

imprisonment. Leave to appeal was granted by the Court a quo. The appeal is against conviction only.

The complainant (PW1), an elderly woman of 64 years, told the trial Court that she was approached by the appellant, a young man of 26 years, when she went to fetch her ladder at her neighbour's house. She knew the appellant by sight. The appellant told her that a wall which she had constructed had collapsed at the house where he was staying and she went along with him to inspect the wall. When they arrived at his house he grabbed her, pushed her into the house and locked the door. He informed her that he proposed having sexual intercourse with her. When she refused he proceeded to assault her. She tried to shout but he choked her. According to her evidence the appellant then had sexual intercourse with her without her consent. She told the trial Court that the appellant "removed my panties and he inserted his penis into my vagina". On her evidence there had undoubtedly been penetration. I specifically mention this aspect in view of the appellant's submission regarding penetration which will be considered later.

As the complainant left the appellant's yard she met an acquaintance, one Nchadi Baalosi (PW2), and immediately told her that the appellant had had sexual intercourse with her without her consent. The witness PW2 confirmed that the complainant informed her that the appellant had raped her. This witness further told the trial Court that the complainant's face was swollen and

that she was crying. The witness PW2 reported the matter to the police who arrested the appellant that same afternoon in the house where the complainant had allegedly been raped.

According to the evidence of witness PW2 and Detective Sergeant Malumbela (PW3) the complainant mentioned to them at the police station that she had been wearing a woollen hat earlier that day and that it must have remained behind at the appellant's house. They returned to the appellant's house where the police found a maroon woollen hat which the complainant is said to have identified as her hat. The public prosecutor however failed to lead the complainant's evidence with regard to this hat and also forgot to produce the hat through the complainant at the trial. The mere presence of the hat at the appellant's house does, however, create certain problems for the appellant, as will appear later.

The complainant was examined on the same day by a medical doctor at the hospital. He found that she had multiple contusions on her face and lower lip. The doctor's report was handed in as an exhibit at the trial with the appellant's consent. The doctor's "opinion", as set forth in the report, is as follows:

"Clinically she was physically assaulted and sustained multiple extra genital soft tissue injuries. There were no genital injuries and the vaginal smear revealed no presence of spermatozoa."

The result of an Aids test was negative.

The appellant, who was not legally represented at the trial, testified under oath. He maintained that he did not know the complainant at all and asserted that he had seen her for the first time in court some seven months after the alleged rape. He also denied that he had seen the woollen hat before. His evidence is that he was alone at home from about 9 o'clock in the morning on the day of the alleged rape and that he had been sleeping all day until woken up by the police during the afternoon. He denied having raped the complainant.

The magistrate rejected the appellant's evidence as false. Counsel for the appellant submitted that the magistrate erred in dismissing the appellant's version without giving proper reasons for doing so. I do not agree with this submission. The magistrate came to the conclusion that the appellant's explanations were simply bald denials, clearly implying that such denials were manifestly false in the light of all the evidence. I shall give two examples of such false denials. In the first instance the appellant denied that he has seen the complainant or the witness PW2 on the day of the alleged rape. The appellant's evidence is that he met the complainant for the first time in Court some seven months after the alleged rape. However, the evidence is clear that when the police went back to the appellant's house on the day of the alleged rape to look for a woollen hat both the appellant and the complainant were present when the hat was found in the house. The evidence further shows that the witness PW2 was also present on that occasion. Although the appellant admitted that he knew the witness PW2 he denied having seen her on that day.

The second example of a bald denial by the appellant relates to the maroon woolen hat that was found in his house. The hat which was handed in as exhibit A at the trial was identified by the witness PW2 and by the witness PW3 as the hat which was recovered in the appellant's house and in his presence on the day of the alleged rape. The appellant must have realised that he would have great difficulty in explaining the presence of the hat in his house and therefore simply resorted to the device of denying that it had been found in his house or that he had ever seen it before it was produced in Court during the trial. In my judgment the appellant was clearly a lying witness and the magistrate was fully justified in rejecting his evidence.

The complainant on the other hand was found to be a truthful and reliable witness in all respects. Counsel for the appellant did not attack this credibility finding but argued that the State has failed to prove its case inasmuch as the complainant's evidence regarding penetration was not corroborated. Counsel rightly pointed out that the doctor who examined her on the day of the alleged rape found no genital injuries and reported that the vaginal smear revealed no presence of spermatozoa. While that finding may not assist the State case it certainly does not lead to the conclusion that penetration did not take place.

I am satisfied that the complainant did not make a mistake as to whether penetration had taken place. She is an elderly woman who would know whether there was penetration and her evidence is clear that penetration had in fact taken place. She is also consistent in this regard because that is what she told the

witness PW2 shortly after the event, i.e. that the appellant had sexual intercourse with her without her consent. I therefore conclude that there is sufficient evidence of penetration.


The witness PW2 noticed that the complainant's face was swollen when they met at the gate of the appellant's yard immediately after the alleged rape. Later that same day the doctor found that the complainant had a swollen face, multiple contusions on the face and lower lip and a red left eye. The presence of these injuries is consistent with the complainant's version and lends support to her evidence that the alleged rape was "attended by violence resulting in injury" (as is required by Section 142 (2) of the Penal Code mentioned earlier).

I would therefore dismiss the appeal.

DELIVERED AT LOBATSE THIS 2nd DAY OF JULY 2001.


 F.H. GROSSKOPF
 JUDGE OF APPEAL

I AGREE:


 P.H. TEBBUTT
 ACTING PRESIDENT

I AGREE:


 SIR JOHN BLOFELD
 JUDGE OF APPEAL