

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE.

CRI. CASE NO. S./352/83

In the matter of

THE QUEEN

Vs.

ISAAC NDEBELE MAVUSO

CORAM:

DUNN, A.J.

FOR CROWN:

MR. DONKOH

FOR DEFENCE:

MR. PUPUMA

JUDGMENT

(Delivered 4 April, 1984)

DUNN, A.J.

The Accused is charged with the rape of Thembi Kunene at Duduslni area, on the 28th September, 1983. He is charged in the alternative with contravening Section 3(1) of the Girls' and Women's Protection Act No. 39 of 1920 in that the complainant was at the time, below the age of 16 years.

The accused pleaded not guilty to both the main and alternative charges.

The Crown led the evidence of 6 witnesses at the conclusion of which Mr. Pupuma applied for the discharge of the accused on the grounds that the crown had failed to show that the accused was the complainant's assailant.

The effect of Section 174(4) of the Criminal Procedure and Evidence Act No. 37/1968 in terms of which Mr. Pupuma's

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application is made was considered by Nathan, C.J. in the often cited case of R v. Mtetwa and others 1970 - 1976 SLR page 364. It is clear from the decision in that case that the section postulates an actual appraisal of the Crown's evidence at the close of the crown's case and further, that the quality of the Crown's evidence also falls to be considered.

The complainant told the court that she saw the accused for the first time at a shop at Singeni in the afternoon of the day in question. She stated that the accused was with one Hosha Kunene whom she knew and who lived in her area. Later that afternoon she went to collect donkeys from the grazing area. She stated that it was getting dark. The accused approached her. He grabbed her and pulled her to the side of the road where he removed her panty and had sexual intercourse with her. She stated that the accused left after the sexual intercourse which took a very short while. She went and reported to her aunt whose homestead was nearby. She described her assailant to her aunt as being tall and fair in complexion and that he was wearing a red pair of trousers, a waistcoat and a white pair of sandshoes. She stated that her aunt replied that it must be the Mavuso boy who was staying at Hosha Kunene's home. The complainant stated that her aunt took her home and made a report to her father.

It became clear under careful cross-examination by Mr, Pupuma that the complainant had no reason for

stating that the person that raped her was the same person she had seen at the shop at Singeni. She replied that she had taken particular notice of the accused at the shop because she was seeing him for the first time in her area. The complainant then stated

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for the first time, that she used to see the accused with other boys in her area before the day in question. She stated that she had in fact seen the accused and Hosha riding bicycles the day before she was raped.

The complainant's aunt Miriam Hadzebe denied that she had said that the person described by the complainant was a Mavuso. She stated that she did not know the person described by the complainant. She stated that it was dark when the complainant made the report to her.

The complainant's father Silwane Kunene told the court that he received a report of the rape from the complainant's aunt. She described the complainant's assailant and told him that the assailant was usually seen in the area and that he was from the Transvaal. He stated that it was the complainant's aunt that informed the Police that the complainant's assailant was a Mavuso. This evidence of course differs from that given by the complainant's aunt.

The Investigating Officer told the court that following the report of rape he proceeded to a Kunene homestead which was in the complainant's area. He had been given a description of the complainant's assailant. He found the accused at Kunene's homestead. The investigating officer told the court that the accused seemed to fit the description he had been given and he decided, as a result, to return to the Police station to re-read the complainant's statement and the description she had given of her assailant. On re-reading the description he suspected that the accused was the assailant. He returned on the following day to Kunene's homestead, to find that the accused had since

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returned to his home at Mashobeni. The accused was subsequently arrested at his home and taken to the Gege Police Post together with a white and red lumber jacket, a pair of trousers and white sand shoes which items the investigating officer told the court were similar to items described by the complainant as having been worn by her assailant.

Hosho Kunene told the court that he had been with the accused at the store at Singeni on the day in question. The accused was his brother-in-law. He stated that he saw the complainant at the shop. Hosho stated that he left the accused at the shop and went to a football match. He found the accused at home when he returned from the match in the evening.

The conflict in the evidence of the complainant and her aunt concerning the mention of the accused's surname and the fact that he was staying at Hosho's home throw serious doubt on the complainant's ability to identify her assailant. If she is to be believed that she had in fact seen the accused with Hosho before the day in question it is difficult to understand why she did not in fact immediately point out to her aunt and her father that her assailant was the young man she had on several occasions, seen with Hosha.

The doubt I have expressed must in my view have also been entertained by the investigating officer who upon arresting the accused decided that an identification parade be mounted for the complainant to point out her assailant.

The investigating officer stated that on the day the parade was to be held inmates of the police cells (5 in all including the accused) were moved into the charge office in order that the cells be cleaned. The complainant and her

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father were outside the police station. He stated that the complainant's father had come with the complainant to find out how far the investigation of the case had progressed and not at the request of the Police. This is highly improbable. The complainant's father told the court that the Police called him and the complainant to the Police station and it is difficult to appreciate how the parade could have been held without the complainant having been called. In any event, the Investigating officer stated that whilst he was looking for the forms which are to be completed when an identification parade is held a driver constable who was aware of the investigations in this case went, without instructions from anybody, and called the complainant into the charge office and asked her to point out her assailant. She pointed to the accused. When the investigating officer realised that the driver constable had in his own words "messed up the identification parade" he sent the complainant out of the office, reshuffled the sitting positions of the inmates and called the complainant in again. The complainant again pointed out the accused.

The investigating officer agreed that the accused was the only fair complexioned person in the parade and that the accused had been ordered to wear the clothes which were taken from his home and which were similar to those described by the complainant. Nobody else in the parade wore clothes of a similar description. There is in fact no evidence of what the other persons on the parade wore.

The investigating officer agreed that the procedure adopted at the police station was grossly unfair to the accused. He added that he in fact did not consider what had taken place to

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have been an identification parade at all.

The cardinal principle in the conduct of identification parades is fairness to the accused. See *R v. Kola* 1949(1) P.H. H.100(AD); *R. v. Masemang* 1950(2) S.A. 488 (A.D.). I am not satisfied that the manner in which the accused was identified by the complainant guaranteed the accused the standard of fairness to be observed. I cannot attach any weight to the identification of the accused by the complainant at the Police Station.

Mr. Donkoh has submitted that the Crown's case does not rest on the identification of the accused at the Police Station and has referred to the evidence of the complainant to the effect that she had seen the accused with Hosha on the day before the rape and further that she had also seen the accused with other boys at the shop before the rape. It will be remembered that the complainant gave this evidence under cross-examination after having first replied that she was certain that she saw the accused for the first time in the afternoon of the day she was raped. I have also made reference to the manner in which the complainant made the report to her aunt with no reasonable explanation for not immediately linking her assailant in her report with the accused whom she said she had seen in Hosha's company.

The evidence which Mr. Donkoh has referred to is in my view inextricably bound up with the conflict in the evidence of the complainant, the complainant's aunt and the complainant's father on the question of the contents of the report made by the complainant to her aunt. It is this very question

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which resulted in the need for an identification parade. The evidence of the complainant regarding the opportunities she stated she had of observing the accused is totally unreliable for me to conclude that the accused is the person that raped the complainant

Applying the test in *Mtewa's* case and bearing in mind that the issue at this stage is the identity of the accused, I find that the crown has not led sufficient evidence to place the accused on his defence. He is found not guilty. He is discharged at the close of the Crown's case.

B. DUNN

ACTING JUDGE