

THE HIGH COURT OF SWAZILAND

REX

Vs

COLANI KWE SHABANGU

Criminal Case No. 93/2004

Coram

S.B. MAPHALALA - J

For the Crown

MR. P. DLAMINI

For the Defence

MR. Z. MAGAGULA

JUDGMENT

(20th April 2006)

[1] The accused person stands indicted for the offence of rape in that upon or about 14th February 2002, at or near Nkambeni area, in the region of Hhohho, the accused person did unlawfully and intentionally have sexual intercourse with T M, a female minor aged 7 years who in law is incapable of consenting to sexual intercourse and the accused did thereby commit the crime of rape. The Crown contended that the crime was attended by aggravating circumstances which are particularised in the indictment. The accused person pleaded not guilty and is represented by *Mr. Z. Magagula*. The Crown is represented by *Mr. P. Dlamini*.

[2] The Crown led a number of witnesses to prove its case. There was a trial within a trial on the admissibility or otherwise of a confession made by the accused in terms of Section 226 of the Criminal Procedure and Evidence Act No. 67 of 1938 (as amended) where the court ruled in favour of the Crown that the said statement was admissible in terms of the Act. The ruling of the 25th November 2004 forms part of this judgment. The accused also gave evidence under oath in his defence and he also called the evidence of his mother to support his case.

[3] The first witness for the Crown was the Judicial Officer PW1 Florence Nkambule who gave evidence on the admissibility of the accused's statement in terms of Section 226 of the Criminal Procedure and Evidence Act. The second witness in relation to this aspect of the matter was PW2 4029 Cyril Mamba who is the Investigating Officer in this case. The third witness also in this enquiry was the Interpreter for PW1 Mr. Mbutfo Mbingo entered as PW3. The fourth witness for the Crown was PW4 N S who gave evidence on the main trial.

[4] She is the mother of the complainant in this case. She told the court that the complainant was 10 years old when she gave evidence on the 3rd October 2005. She related that on the 14th February 2002, on a Thursday in the afternoon she was waiting for her children including the complainant from school. The complainant came from school and she was crying. She thought that she was crying because she had lost her books as she normally hit her for that. She looked at her and she saw that there was blood on her legs. She asked her what was the matter but complainant cried. She then called her father and grandmother. She then carried her on her back to hospital at Sidvokodvo Clinic. She was attended by the nurses at Sidvokodvo Clinic and later conveyed to the RFM Hospital in Manzini. She deposed that she asked the complainant as to who had done this to her and she said it was Kwe referring to the accused person. She related to her how this came about. This witness further testified that at some point the charges were withdrawn against the accused and she later reinstated them.

[5] This witness was cross-examined at great length by *Mr. Magagula* for the accused and I will come back to her replies which were pertinent to this case in due course.

[6] The sixth witness for the Crown was 4029 Constable Cyril Mamba who was again re-introduced to' depose on the merits of the case. He testified that he was the Investigating Officer in this case. He related how he arrested the accused person and later investigated the case against the accused. This witness was also subjected to a lengthy cross-examination on the circumstances leading to the accused person released to his parents and his re-arrest.

[7] The seventh witness for the Crown was the complainant herself PW6 N M. She testified that on the 14th February 2002, she was from school and before reaching home she met the

accused person whom she knew very well as he is a neighbour. She was with another child from school on Gina, who is her cousin. They then went to drink water in a nearby river. Gina then left her and went home ahead of her. She followed him. The accused person then came along. He grabbed her by her hand and led her to a nearby forest. The accused person then closed her mouth and laid her down. He placed some papers on her mouth. He then tried to insert his penis but at first could not. He then used a knife. He then inserted his penis on her vagina. She told the court he injured her. He then told her not to mention this at home but to say that she was injured when she was picking wild fruits. The accused made up and down movements on her for a long time and she cried trying to raise an alarm. After the incident she tore papers from her exercise book to wipe the blood which was coming out of her vagina. She then went home. Her mother saw that she was bleeding and she asked her what was the cause. She told her that she was injured by a log because accused had told her that he will kill her if she told what had actually happened. As they were proceeding to hospital with her mother they met accused mother who asked how she was injured. At first she told her that she was injured by the wild fruit tree but later on told her that she was injured by the accused. She was first taken to Sidvokodvo and later to Manzini R.F.M hospital.

[8] The complainant was cross-examined at some length by *Mr. Magagula* for the accused where it was put to her that she was not telling the truth that the accused cut her with a knife and thereafter inserted his penis in her vagina. She was however, adamant that the accused did all these things.

[9] In his defence the accused person also gave a lengthy account of his side of events. His version of events is that on the day in question he left his home with his mother and others from his homestead to look for a family beast which had gone astray at the Mjoli forest. This exercise took them the whole day where they did not find the beast when they rejoined at home in the early evening of that day. He testified that during this search he was carrying a thick stick. He said he was not carrying a knife and that he did not normally carry a knife. He deposed that he never met the complainant that day. His mother came home at about 5.30pm and told them that she had met complainant and her mother and that she was taken to hospital after being injured by a log whilst they were picking up wild fruits from school. The accused testified that he did not see the complainant that day. The accused described at some length how he was arrested by the police in connection with this offence. He was arrested by the police on Friday and released on Sunday. He further described the events where complainant's uncle one Bhekindlela Maphanga and the chiefs runner were involved in this case.

[10] The accused person was cross-examined at great length by the Crown.

[11] The accused then called her mother DW2 Alice Magagula who gave a lengthy account of her version of events. She deposed at great length on the search for the beast she and the accused person conducted in the forests that day. She further testified on her meeting with complainant and her mother on their way to hospital late in the afternoon. She deposed that at first complainant had said that she was injured when she fell on a log when she tried to pick up wild fruits. She later got to know that complainant was raped by her son, the accused person. She also testified at great length on the role taken by Bhekindlela, the chiefs runner and other members of the family in this whole saga. According to her the said Bhekindlela demanded payment of two beasts from her for what the accused had done to the complainant. She did not pay these two beasts. The accused was then re-arrested.

[11] In argument before me it was contended for the Crown that the accused person be found guilty as charged on the basis of the testimony given by the complainant PW6. It was contended in this regard that her evidence was not shaken despite her tender age. That her evidence is corroborated by the evidence of the medical report which stated that "**the child was cut with a sharp object, at the perineum and raped thereafter**" and also the evidence of the confession made by the accused in terms of Section 226 of the Criminal Procedure and Evidence Act, as (amended).

[12] *Mr. Magagula* for the accused advanced arguments *au contraire* to the general effect that the Crown has not led proof against the accused person beyond a reasonable doubt. Firstly, it was contended for the accused that the Crown has not called Bhekindlela Maphanga who played a very important role in the case for the Crown. Secondly, that the complainant was confronted by her mother to change her story when at first she had said she was injured when she fell on a log whilst picking up wild fruits. Later she changed and said she was raped by the accused person. Thirdly, that when she came home she was not crying and this according to *Mr. Magagula* has created a big *lacuna* in the Crown's case. Fourthly, that no attempt was made to produce the knife which is allegedly in the possession of the accused person. Fifthly, the court was referred to the case of *Rex vs Zacharia Mkhonta -Criminal Case No. 61/2004* by Shabangu AJ on rape cases. Sixthly, it was contended for the accused person that the confession admitted in the Crown's evidence is not "an end that ends all" in that it does not form part of the Crown's case.

[13] Starting with the last point that the confession does not form part of the Crown's case. After hearing submissions in this matter and before issuing this judgment I called for the evidence of the Judicial Officer who prepared annexure "A" in terms of Section 199 of the Criminal Procedure and Evidence Act, (as amended). The said Section provides for the subpoenaing of witnesses or examination of persons in attendance by the court where it states

in Subsection (1) that the court may at any stage subpoena any person in attendance though not subpoenaed as a witness, or may recall and re-examine. Further in subsection (2) the court shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential to the just decision of the case. In view of this subsection, it is my considered view that the objection raised on behalf of the accused person is ill-founded.

[14] In the present case, it is abundantly clear that complainant was raped as the medical report entered as exhibit "B" states that **"the child was cut with a sharp object at the perineum and raped thereafter"**. The only question now before the court is who raped the complainant. The complainant and her mother have related that it was the accused person. The accused person and his mother have stated that it was not the accused as the accused was not in that vicinity where complainant was raped as he had gone looking for a stray beast. On the other hand the confession made by the accused person entered as exhibit "A" states as follows: **"I woke up on Thursday the 14th February 2002, and took cattle out of the Kraal, I went to graze them at Bhabha area. Around 1.00pm I went home with the cattle whilst driving the cattle I met a young girl and I then slept with her. She got injured in the process. I had sexual intercourse with her (ngamfeba wase uyalimala) and she was injured"**. The court has found that this statement was made in accordance with the provisions of the Criminal Procedure and Evidence Act, as amended, thus freely and voluntarily.

[15] The evidence of the complainant alone was damning to the accused as she was not wavered at all in cross-examination despite her tender age. The evidence of the complainant is corroborated by the evidence of the medical report stated above in paragraph [14] of this judgement. In view the evidence of all the Crown witnesses I have no hesitation at all that the accused committed this offence as alleged in the indictment and I have also come to the considered opinion that the crime was attended by aggravating circumstances in that i) the complainant was a minor of tender aged 7 years old and a virgin at the time of the rape, ii) the accused did not use a sexually protective device when he engaged an unlawfully sexual intercourse with the minor (e.g. he did not use a condom) therefore putting the complainant at risk of contracting venereal diseases including HIV/Aids and iii) he cut the complainant with a sharp object at the perineum before raping her.

[16] In the result, for the afore-going reasons I find accused person guilty of the rape of T M, a female minor aged 7 years and also that aggravating circumstances outlined in (i), (ii) and (iii) above in paragraph [15] (*supra*) have been proved in the present case.

S.B. MAPHALALA

JUDGE