IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE
CRIM. APPEAL NO. 91/06

In the matter between:

MGCIBELO ALPHEOUS TFUMBATSA

VS APPELLANT

REX

RESPONDENT

CORAM

FOR APPELLANT FOR
RESPONDENT
ANNANDALE J MAMBAJ MR
SHABANGU MS. L. HLOPHE

JUDGEMENT

MAMBA J,

[1] The complainant M M was, according to her mother, born on the 27th May 1988. She alleged that she was raped by the Appellant in his house at Lomshiyo, in the Hhohho region on the 4th January, 2003. This would mean that she was about fifteen (15) years at the time she was raped.

[2] Because of the view I take of the matter, it is not necessary for me to state in any great detail the evidence that was led leading to the conviction of the Appellant on the alternative charge of having sexual intercourse with a woman who is below the age of sixteen years in contravention of section 3(1) of the Girls and Women's Protection Act 39 of 1920. Suffice to say that at the close of the crown case, the Appellant applied to be discharged on both the main charge of rape and the alternative charge aforesaid. He was successful on the main charge only; the court a guo holding that there was evidence implicating him on the alternative charge and went on to convict him of that charge.

[3] In arriving at that conclusion, the learned trial Magistrate in a careful, clear and fair analysis or assessment of the evidence stated that he was not satisfied that the complainant had not

consented to the sexual intercourse. The substance or gist of the evidence by the Crown is sufficiently captured in the ruling of the court a quo in its ruling at the close of the crown case at page 23-24 of the record, which I quote hereunder as follows:

> "The evidence of the complainant is that on the 4th January, 2003, she was sent by her mother to the local shop to buy a loaf of bread. The way to the shop passes by Accused's gate, she [found] the accused standing by the gate and he called her. He invited [her] to his house where [he] was to give her money to buy him something from the shop. He then raped her in the house. After the alleged rape she went to the shop to buy the loaf of bread. She did not report the rape to anyone because the accused had threatened to kill her should she report the rape. It emerged during cross-examination that accused had also raped her on the 6th December 2002 and she did not report that rape because accused had threatened to kill her. After about 2 days she started to notice some discharge from her private parts. After 2 weeks she walked with her legs apart. It was then that her mother noticed her abnormal walk. She asked her what was wrong.
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> According to her, her mother kept on asking her until she told her that the accused had raped her.
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> ...From the evidence as a whole, the court notes that complainant is said to be 14 years old and she attends school. When she gave evidence, she struck the court to be a person of average intelligence. It cannot be said that she did not understand the seriousness of the alleged rape and the threat of death. If she had been raped on the 6th December, 2002 she would have reported the rape to any person whom she is expected to confide in. This included her mother, brothers and sisters, friends even to her neighbours. If she had been threatened with death, one would have expected her to run away from the accused when she was invited to the house [on the 4th January 2003]. Had the [complainant] been raped on the 4th January, 2003, one would have expected

her to report the rape at the local shop where she had been sent to buy bread. In fact, the complainant had ample opportunity to report the alleged rape to any person. On the evidence, the court is in doubt that the crown has made a prima facie [case] on the main charge. He is therefore acquitted and discharged on the main charge and the court rules that he has a case to answer on the alternative charge."

And in convicting the Appellant, the learned trial Magistrate held that: "Looking at the evidence the court detect no reason why the complainant would lie against the Accused. It was not suggested to the complainant that she was schooled by her mother to frame the charge against the Accused. The story of the existence of the bad blood between the complainant's family and that of the Accused has been made up [by the Accused and his witnesses]. No member of the Chief's Council was called to confirm that they once deliberated on a matter involving Accused and the complainant's family. It cannot be said that the complainant reported the matter after being asked leading questions. She reported after being asked what was wrong with the way she walked. Even if Accused's step-daughter was at home on the day in question she could not see what happened in Accused's house. Accused's house is said to be a two-roomed house separate from the other houses. The court finds that the Accused did have sexual intercourse with the complainant on the 4th January, 2003. He is therefore found guilty [on the alternative charge]."

[4] With due respect to the learned trial Magistrate, I do not share his reasoning and conclusion that because there was no bad blood between the two families herein, ipso facto, the complainant was being truthful that she had had sexual intercourse with the Appellant on the day in question. Again, while it cannot be said that the complainant told her mother that

she had been raped after the latter had put leading questions to her, this conclusion should not, of itself have led to the further conclusion that this piece of evidence (by her mother) was admissible and consistent with the honesty and truthfulness of its maker, the complainant. It should be remembered, as the Appellant argued before us, that she informed her mother that she had been raped by the Appellant after repeated questioning by her. At first she was not willing to say to her what was wrong with her. Her mother had to dig this information from her. The veracity and or cogency of such information or evidence - solicited or obtained under such circumstances - is in my humble judgement, not beyond suspect or reproach. This is more so in view of the fact that its author is a fourteen year old girl. The situation is worsened by the further consideration that the court had ruled that it would be unsafe to rely on her evidence that she had been raped by the Appellant on two occasions and had not reported these incidents out of fear. The court came to the conclusion that if she had been raped and threatened at all, there was ample time, space and persons to whom she could have reported before being questioned by her mother. The court a quo was further of the view that if she had indeed been raped and thereafter threatened with death on the first occasion, she would not have gone into the Appellant's house on the 6th January, 2003.

[5] Another aspect of the case which I think deserves noting is that the medical doctor who examined her on the 16th January, 2003 concluded that her genitalia exhibited evidence of repeated sexual intercourse. She admitted to 2 incidents (both with the Appellant) and disavowed any other. The doctor did not give an indication of the approximate occasion of the last sexual intercourse he was testifying about or the approximate number of what he referred to as repeated sexual intercourse. I would, however, be surprised if just two occasions would qualify for such description.

[6] Again if the complainant could and did lie about her lack of consent to the sexual intercourse, as the learned Magistrate thought, she could equally lie about the identity of the person who had sexual intercourse with her.

[7] In the light of the above deficiencies or features of the evidence of the complainant, corroboration of her evidence was, in my view, necessary before the court could hold that the crown had proven its case beyond any reasonable doubt. I emphasise that caution in the form of corroboration was required not because this is a sexual assault case or that the complainant is a woman but because the quality, nature or features of the evidence is such that it be corroborated in its material respects.

In the case of **SIBONISO NKOSINATHI MAGAGULA v REX Crim. Appeal 73/06** (Judgement delivered by this court on the 21st June 2007) I had occasion to say that:

> "The court must look for corroboration only where the quality or nature of the evidence is such that it might be false; or there is a reasonable suspicion present in the evidence, that the complainant might be lying against the appellant. Such features or factors may include the past and present relationship between the parties.

...[Corroboration] ... is required because of the particular features and the nature and quality of (the) evidence of the complainant and PW3." These remarks are apposite in this case too. See also **S v JACKSON 1998 (1) SACR 470 (SCA), S v M 1999 (2) SACR 548 (SCA) and S v M 2000 (1) SACR 484 (W).**

[8] The facts of this Appeal are substantially the same as those in the case of **MKHWANAZI v R 1979 - 1981 SLR 83.** In narrating and analyzing the evidence, Cohen J at 84 stated as follows:

> "The crown case depended almost entirely on the evidence of the complainant; it was not in my view corroborated in any material respect. She stated that on 28 January, the Appellant came to her home in the afternoon and asked her to come along with him to the Mlumati River. It is nowhere indicated how far the river is from her home but she stated that he pulled her by the arm to the river. At his behest when they reached the river she

> removed a baby she was carrying on her back. He ordered her to lie down and remove her panty which she did under threat of being stabbed by him. She believed he was going to stab her because, so she testified, she had heard that he was accustomed to stabbing people. He ordered her to lie on her back and then he had sexual intercourse with her. As this according to her was not the first time he had sexual intercourse with her, it does struck one as rather strange that his courtship of her should have been of such an aggressive character and that there should have been no preliminary love-making effort on his part before he indulged in violence. After the act and once more in obedience to the Accused's command she returned home, but as on the former occasion when the accused is supposed to have had sexual intercourse with her she did not report the matter until questioned by her mother.

...she stated that she did not report the first "rape" because he had threatened to stab her, but despite that threat on the second occasion she did make a report. It might be pointed out that the magistrate apparently disbelieved that there was a rape (a charge of rape was the main charge), because he only found him guilty of the alternative charge ... By implication therefore the magistrate did not believe her evidence of the threat of being stabbed, because if he had he would have convicted him of rape.

...the mother stated that after returning from a visit to a certain kraal she beat the complainant because the latter had not fetched the goats. This beating was administered after she had completely undressed her daughter. She then noticed that "she was wet on her private parts as if she had had sex with someone." Apparently after being questioned the complainant told her she had had sex with the accused and that was why she did not fetch the goats. Further questioning revealed that she had also had sex with him on the previous day, that the Accused had produced a knife and threatened to stab her.

...Before dealing with the corroboration relied on by the crown it is necessary to emphasise that by virtue of the complainant's age the importance of a critical examination of her evidence was in any event necessary. Moreover the complainant proved herself to be a lying witness in many respects and that accordingly the need for supporting evidence was all the more essential. ...

And Nathan CJ (as he then was) concurring said :

...The simple point upon which I consider that the appeal must succeed is that if the complainant was lying in charging the Appellant with rape, as the magistrate in effect found, she may equally have been lying in naming him as the person with whom she had intercourse."

The Appeal was upheld as the nature of the evidence and circumstances of the case called for caution and in the absence of corroboration of the evidence of the complainant, it would have been unsafe to rely on it to convict the Appellant. The result should be the same in this Appeal.

[9] For the foregoing reasons, I would accordingly allow the Appeal and make the following order:

1. The conviction and the sentence imposed on the Appellant are hereby set aside and he is found not guilty of the offence of contravening section 3(1) of the Girl's and Women's Protection Act 39 of 1920.

2. The sum of E3000.00 paid by the Appellant as a fine herein is to be refunded to him.

MAMBA J

I Agree

ANNANDALE J