IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. CASE NO. 295/10

In the matter between

REX

VS

MZWANDILE MASEKO

Accused

CORAM: Mamba J

FOR CROWN: Mr. M. Nxumalo

FOR ACCUSED: In Person

JUDGMENT

January 2011

[1] The accused was convicted of rape by a senior magistrate sitting in Mbabane who, after considering the circumstances of the case, was of the view that the justice of the case demanded a sentence of more than that which he, the magistrate, could impose: 7 years. Acting on the provisions of section 292 of the Criminal Procedure and Evidence Act 67 of 1938, he committed the accused to this court for sentence. I have gone through the record and heard submissions from counsel for the crown and I am, with due respect, not satisfied that the guilt of the accused was established beyond a reasonable doubt.

[2] On Sunday 4th April, 2010 at around 10 pm, D S, a 40 year old mother of seven was on her way home at Ebuka, when she suddenly noticed a male person running towards her. Before reaching and grabbing her from behind, he uttered an expletive demanding to have sexual intercourse with her.

[3] She called out for help twice and the culprit throttled her, threw her to the ground and raped her. In the process of raping her he covered her face with grass (he probably picked up from that spot. After raping her, his assailant stood up and ran away. She stood up and started crying. Dumisa Ndzinisa, a tenant in one of the flats or detached houses where the complainant stayed, approached her to find out why she was crying. She told him that she had just been raped by the boy who was employed as a cattle herd boy at the Kunene homestead in the same area. Dumisa who gave evidence as Pw2, confirmed this and identified the accused as the said herd boy.

[4] The complainant told the court that her assailant was the accused. She had known him for close to three years and he used to refer to her as Aunt. She did not know his name or surname. The accused, she said, worked as a herdboy at Kunene's homestead. She was able, she said, to identify him by his physical appearance as he lay on top of her during her rape ordeal and also by his voice. She said the street lights which were about 3 to 4 metres away from the spot where she was raped were on and it is these lights that enabled her to identify her attacker.

[5] Pw3, Zeto Nyambose, also gave evidence for the crown. He worked as a gardener in one of the homesteads in the area. He was the complainant's partner and would spend sometime with the complainant at the rented apartment or at his employer's homestead. Whilst on his way home at about 10 pm on this day, he had seen the accused running away in the vicinity but had taken no action on this as he had not been put on alert that the accused had raped his girlfriend or partner. He only got to know about the crime when this was related to him by the complainant whom she found crying at the flat. Pw3 had known the Accused for about a year and had seen him earlier that day in one of the shebeens in the area.

[6] On the third day, that is to say, Tuesday 6th April 2010, the complainant went to Kunene's homestead "to enquire about the person who was a herdboy" and was told that he was no longer there. The evidence does not reveal when he had left or stopped working for Mr Kunene. The complainant then reported the matter to the Community Police and later to the National Police. She was examined by a Doctor at the Mbabane Government Hospital on 7th April, 2010. The medical report in this connection was handed in by consent. The Doctor who examined her observed bruises on her left shoulder and concluded that it was "not easy to tell if there was penetration or not." That concluded the evidence by the Crown.

[7] The accused, who conducted his own defence, steadfastly denied being the culprit or ever having been in the area at the material time. He said he had been in his house asleep at the alleged time. He argued that this was a case of mistaken identity.

[8] As a general rule, evidence of identity is treated with caution by our courts. The origin of this rule, it is said, is that experience has taught or shown the court that identifying witness do often make genuine mistakes regarding the identification of persons, of whom some are even supposedly known to them. Therefore, honesty alone is not enough. In addition, the evidence of the witness, or the witness, himself must be reliable or credible.

[9] In R v MZUBA JAMES MAMBA, 1979-1981 SLR 154 at 155 Nathan CJ quoted with approval from the judgment of Williamson JA in S v Mehlape, 1963 (2) SA 29 (A) at 32-32: "It has been stressed more than once that in a case involving the identification of a particular person in relation to a certain happening, a court should be satisfied not only that the identifying witness is honest, but also that his evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonably required to ensure a correct identification; see for example the remarks of Ramsbottom A.J.P, in R v MOKOENA, 1958 (2) SA 212 (J) at P. 215. The nature of the opportunity of observation which may be required to confer on an identification in any particular case the stamp of reliability, depends upon a great variety of factors or combination of factors; for instance the period of observation, or the proximity of the persons, or the visibility, or the state of the light, or the angle of the observation, or prior opportunity or opportunities of observation or the details of any such prior observation or the absence or the presence of noticeable physical or facial features, marks or peculiarities, or the clothing or other articles such as glasses, crutches or bags, etc connected with the person observed, and so on, may have to be investigated in order to satisfy a court in any particular case that an identification is reliable and trustworthy

as distinct from being merely bona fide and honest. The necessity for the court to be properly satisfied in a criminal case on both these aspects of identification should now, it may be thought, not really require to be stressed; it appears from such a considerable number of prior decisions; see for example the apprehension expressed by Van Den Heever J.A., in Rex v Masemang 1950 (2) SA 488 (AD), after reference to the cases of wrongly convicted persons... . The often patent honesty, sincerity and conviction of an identifying witness remains, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence....
If, in regard to a question of identification, any reasonable possibility of error in identity has not been eliminated by the end of a criminal case, it could quite clearly not be said that the state has proved its case beyond doubt."

MAHLAMBI v R, 1977-1978 SLR 98 and R v MSOLWA DLAMINI, 1970 - 1976 SLR 16 are to similar effect. In the latter case the court quoted with approval the view that "People often resemble each other and strangers are sometimes mistaken for old acquaintances."

[10] In R v SHANDU, 1990 SACR 80 at page 81 i - 82e, where, as in the present case the success of the case for the crown depended entirely on the identification of the culprit by the victim, DIDCOTT J stated that:

> "That the identification was honest seems clear. That it was not perhaps mistaken it had also, however, to be. The danger of mistaken identifications, of those that are honest but wrong even so, is

> inveterate and notorious. Our Courts, like others, have had frequent occasion to deal with it. S *v Ngcobo 1986* (1) SA 905 (N) was one such occasion, when this Court described an experiment conducted in the United States of America, and reported in an American book on the law of evidence, which bore telling witness to the peril. An article that appeared in (1988) 105 *South African Law Journal* 108 carped at the judgement, contending that judicial notice should not have been taken of the experiment, that the testimony of an expert in the field where it lay was needed before attention could properly be paid to it. I consider the criticism to have been misconceived. Judicial notice did not purport to be taken of a fact that had to be proved in the case, such serving then as proof of that very fact. It did not purport to be taken of anything at all. The experiment was cited in order to underline, in order to illustrate graphically, a danger with which the Court was already quite familiar, its own experience and its acquaintance with the law reports having taught it so much and taught it full well. And the danger remained an equal one, even if the results of the experiment were less striking than they looked since, in the opinion of some expert on such matters, their production and evaluation had been insufficiently scientific.

The passenger was not only honest in her identification of Shandu, she was confident too, indeed quite certain. But that did not lengthen the odds significantly against the mistake all the same. Van den Heever JA once observed:

'The positive assurance with which an honest witness will "sometimes swear to the identity of an accused person is in itself no guarantee of the correctness of that evidence.'

> The quotation comes from the judgement he wrote in *R v Masemang 1950* (2) SA 488 (A) (at 493). It echoes human experience on a larger scale, of course, mistakes in affairs both public and private being made all the time by people whose conviction is unshakeable that they have perceived what they really have not. This tendency so exasperated Oliver Cromwell, a stern puritan and no blasphemer, but never a man to mince his words, that the stubbornness of the Scots whom he addressed drove him to exclaim:
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> 'I beseech you, in the bowels of Christ, to think it possible you may be mistaken.'"

[11] Now, the evidence in the present case is that the Accused was known to the complainant. She had known him for about three years, she said. There were street lights on about 3 to 4 metres from the spot where the rape took place. The rape survivor was able to identify or recognise her assailable before he could cover her face with grass. She could also identify him by his voice, she said.

[12] From the above facts, this court has not been told how long the encounter between the survivor and her assailant took before the complainant had her face covered with grass. The crown has not led evidence showing the extent and nature of the complainant's prior

knowledge of the accused. How close or well did she know him in order for her to make an accurate identification? This is wanting in the evidence. These issues were not explored or probed by the crown despite the denial by the accused that he is the culprit. One has to bear in mind further that the encounter between these persons was violent, chaotic and probably fleeting. This criticism on the evidence of Pw1 applies in equal measure to that of her boyfriend who testified that he saw the accused running "very fast" in the neighbourhood around the material time. I also observe that the evidence of the said boyfriend as to what was reported to him by Pw1 is not supported by her. She did not tell the court that the accused had been seen running away from the vicinity of the scene of crime by her boyfriend. Lastly, on the question of her voice identification, Pw1 is not a voice identification expert. In addition, there is no evidence on how she was acquainted with his voice. Her assailant is reported to have uttered five words only: "Bring your vagina to me." I am not sure that such short words by themselves, blurted out during a violent physical confrontation between Pw1 and her attacker would accurately reveal the identity of the speaker. In a case where the accused is said to be known to the identifying witness, as in the present, "what is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made." (REX v D LAD LA & OTHERS, 1962 (1) SA 307 (A) at P.310c quoted with approval in Msolwa's case (supra)).

[13] For these reasons, the accused is found not guilty and he is acquitted and discharged.

MAMBA J