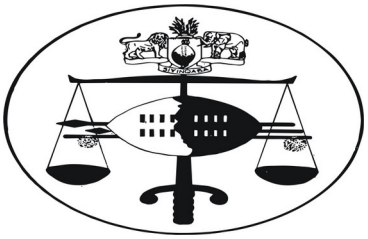

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 223/2007

In the matter between

REX

and

ROBERT VUSIE SACOLO

Neutral Citation: *Rex v Robert Vusie Sacolo* (223/07) [2013] SZHC 72 (28th March 2013)

Coram: **Mamba J**

Heard: **(various dates since 28th September 2010)**

Delivered: **28 March 2013**

[1] Criminal Law – Rape – proof thereon not contested only identity of rapist in issue.

[2] Evidence – Rape committed in broad daylight – rapist unknown to survivor identity of rapist given in very general terms – this is less than reliable.

[3] Evidence – Evidence of confession in the guise of a pointing out – not shown to have been freely and voluntarily made by Accused – inadmissible.

[4] Evidence – Cogency thereof – evidence of identification – honesty of witness alone not enough, but evidence must also be credible and reliable to found a conviction.

[1] This is by far the longest case I have ever tried in my short career on the bench. It started on 28th September, 2010 when the accused was arraigned and the first crown witness, the complainant, gave her testimony.

[2] The crown led eight witnesses in its quest to prove its case. Without exception, all these were subjected to a lengthy and sometimes incoherent and repetitive cross examination by the accused, who conducted his own defence. From the start, it became clear to all who were involved in the trial that maximum tolerance, patience, courtesy, forbearance steadfastness and fortitude had to be in abundance in order that this trial be one that is in accordance with recognised or acceptable precepts of justice and or due process. I trust, and am sure we were not found wanting in this regard. In total, 23 days were spent in court on the case. But finally, it has today, come to an end.

[3] On many occasions the trial could not proceed either because the witnesses were not in attendance or the accused himself was not in a good frame of mind to stand trial. These episodes relating to the accused's state of mind necessitated that he be examined and evaluated by psychologists and psychiatrists in order for the court to make an informed decision on the matter. This court is indebted to these professionals or experts for their assistance herein. Now, the merits of the trial or case.

[4] The accused, who conducted his own defence has pleaded not guilty to an indictment that alleges that on or about 23rd March, 2007 and at or near eKhabonina area in the District of Manzini he raped Nondumiso Shongwe, a female minor who was then 16 years old.

[5] The Crown also alleges that the crime is accompanied by aggravating features or factors as defined in section 185 (bis) of the Criminal Procedure and Evidence Act 67 of 1938 in that:

'(i) The victim was traumatised by the accused's action;

(ii) The victim was threatened by the accused with a weapon to make her comply with his demands;

(iii) The victim was three (3) months pregnant at the time of the sexual encounter; [and]

(iv) The accused exposed the victim to various sexually transmitted infections such as HIV/AIDS, as he did not use a condom at the time of the sexual encounter.'

[6] At the beginning of the trial, I explained to the accused the significance of the allegation that the crime is accompanied by aggravating factors is; namely, that should he be convicted and the court finds that indeed

aggravating factors do exist, the court shall be enjoined to pass a minimum sentence of nine years of imprisonment on him.

[7] I mention from the outset that the case for the crown hinges or rests on the identity of the person who raped the complainant. That the complainant was actually raped, is in my view, beyond question. The medical doctor who examined her on 23rd March 2007 said as much. The doctor came to this conclusion after noting that 'there is evidence of a struggle considering that the cloth or skirt [worn by the complainant] is soiled with thick dirty liquid [and] the right shoe has been damaged.' He also noted the presence of mucord discharge in the complainants's vagina and valva.

[8] The medical doctor who examined the complainant was not called in to give evidence. The court was informed by the crown that the doctor was originally from Zambia and had since left Swaziland at the end of his contract with the Swaziland Government and his whereabouts were unknown to the crown. After taking advice, the accused agreed or consented that this medical report be handed in court without the author thereof being called to give evidence. It was handed in and labelled as exhibit C.

[9] On the fateful day, Nondumiso left home at around 8.40 am and travelled to a shop at Duduza Area to buy fruit juice and sugar for Winile Dlamini. About two hours later, when she was on a footpath in a bush returning home, she was confronted by a short, medium built and dark man. He was clean shaven and wore a cream t-shirt which had some brown decorations on its shoulders. He had a blue pair of trousers on, black and white canvas or tennis shoes, popularly known as takkies in this region. This man was unknown to her.

[10] The man ordered Nondumiso to lie down, but she refused. He then produced a knife and threatened to harm her with it if she did not comply with his demands. She submitted to his orders. The man then ordered her to remove her panties to which she also complied. He then raped her. He did not use a condom or any protective device in the process. After raping her, he gave her a whitish cloth and ordered her to use it to clean or wipe her organs of generation. Again, out of fear, she complied. The encounter between them before the actual rape, lasted about five minutes, she said.

[11] After raping her, the man then demanded money from her. She told him she had no money and he then kicked her on her left leg and in the process her shoe on the right foot got torn. The man then searched her person but did not find any money on her. He then ordered her to go away and not

look back. He also told her not to tell anyone what he had done to her, failing which he would hunt her down and kill her. She ran home with her shoes in her hands, crying.

[12] On reaching home, she reported her ordeal to Winile Dlamini (PW2) who then called the police. She also reported the matter to Wandile Vilakati (PW3).

[13] Pw2 told the court that she interviewed Pw1 on her return from the shop. She confirmed that Pw1 was crying and had her skirt wet or soiled as a result of the fruit juice being spilt on it. She also confirmed that one of her shoes was torn.

[14] I note her that although Pw1 said she had reported her rape ordeal to Pw3 and had also given him the description of her assailant and the location where she had been raped, Pw3 who must have been about 15 years at the time, testified that he had received the bad news from Mbali and not Pw1.

[15] Pw3 testified that upon receiving the said report from Mbali, he went to the mountain where the rape had reportedly taken place, in search of the culprit. He testified further that he came across a man who was a stranger in the area. This man fitted the description given to him by Mbali. The

description of the cloths worn by this man is the same as that given by Pw1. Both Pw1 and Pw3 said the man had a long sword-like weapon tucked in between his trousers and body on his waist. Again, I observe that Pw3 said the stranger wore a woollen hat and this made it difficult for him to observe him properly. Nonetheless, Pw3 said he could be in a position to identify him if he came across him. He did not say how though. About two weeks later, he had positively identified him as the accused in an identification parade held at Mankayane Police Station. The said parade was held on 9th April, 2007, about 17 days after the commission of the offence. I shall deal with the identification parade later in the judgment.

[16] The accused has not denied that he was in the relevant area at the material time. He confirmed that he saw Pw3 there, together with Jabulani Hlophe. Jabulani Hlophe was not called as a witness, but according to Pw3 it was Jabulani who told Pw3 that the stranger had informed him (Hlophe) that he was Robert Sacolo from Ebhadzeni Area and was looking for someone in the Khabonina area.

[17] I have no doubt that the accused was arrested based on the information about his identity given to Pw3 by Jabulani Hlophe. This information was obviously passed on to the police by Pw3. This court has not been told of any other leads, information or evidence that led to the arrest of the accused

herein. The description that the rapist was medium-built, short and dark in complexion is so general to the point of being nondescript. This is the same with the clothing worn by the rapist.

[18] I hasten to note further that, in court, both Pw1 and Pw3 conceded that the accused cannot be described as dark in complexion. They both said his complexion has since changed. Pw1 suggested that his change of complexion may be due to his long period of incarceration, which has made him to be less exposed to sunlight and thus the lightening in his complexion. This is all surmise or conjecture of course.

[19] The accused, it is common ground, was arrested at his home (Bhadzeni 2) on 6th April 2007. Pw8, 2807 Constable Leon Mdluli, said when the police found the accused at his home, he was in the company of some of his family members in the kitchen. Pw8 testified that he was in the company of three of his colleagues and after they had introduced themselves to the accused, they told him of their mission, namely; that they were investigating a case of rape and that he, the accused, was a suspect in the matter. Pw8 testified further that the accused was advised that he was not obliged to say or point out anything to them but if he decided to say something, this would be taken down in writing and could be used in evidence against him in his trial, or that if he showed or pointed out

something to them this would also be taken and could be used as evidence against him in his trial. And lastly, the accused was advised of his legal rights to be represented by an attorney of his choice should he so desire.

[20] After this caution or warning, the accused is said to have then "freely and voluntarily given" Pw8 a metre long silver metal rod or sword whose handle or shaft was wrapped in blue and whitish plastic or rubber bands. I pause here to note that this is the same weapon or item that was described by Pw1 and Pw3 as having been in the possession of the rapist on 23rd March 2007.

[21] The crown sought to have this weapon and the evidence of Pw8 relating thereto admitted in evidence. Counsel argued that it was evidence of a pointing out and that because the accused had been duly warned or cautioned before he produced the weapon or gave it to the police, this evidence was admissible in terms of S227 (2) of our Criminal Procedure and Evidence Act 67 of 1938.

[22] I have difficulties with these submissions by the crown. First, whether or not the pointing out was freely and voluntarily made, is a matter for the court to determine, not the witness. The witness has to give the facts or evidence and the surrounding circumstances under which it was made and

leave the court to draw its own conclusions therefrom. Secondly, it is unrealistic to presuppose that after the caution the accused simply handed over the weapon to the police without him saying anything. This sounds too artificial and unrealistic. Thirdly, taken on its face value, in handing over the weapon to the police, the accused in effect said "I committed the rape and here is the weapon I used to coerce the complainant into it." In that case the handing over or pointing out of the weapon was a confession in the guise of a pointing out, made by the accused to a person in authority. As a confession, the crown is obliged to prove or establish beyond any reasonable doubt that it was freely and voluntarily made by the accused as per s226(1) of the Criminal Procedure and Evidence Act 67 of 1938. That is the crux or nub of the decision in *July Petros Mhlongo and Others v R*, *Crim Appeal 185/92* and to some extent *Alfred Shekwa and Another v R*, *Crim Appeal 21 of 1994* (delivered on 26th May 1995) both cases unreported.

[23] In *July Petros Mhlongo (supra)* the above point was stated by the court as follows (at page 16 of the judgment):

> 'In my judgment the evidence of the pointings out in the context of the circumstances in which they were made was evidence of confessions in the guise of pointing out and were not proved to have been made freely and voluntarily. On the contrary they were

> probably effected under duress. They ought therefore, to have been disregarded by the court a quo.'

That decision of course followed and applied *S v Sheehama, 1991 (2) SA 860* where the court stated that:

> 'A pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out unaccompanied by any exculpatory explanation by the accused, it amounts to a statement by the accused that he has knowledge of relevant facts which prima facie operates to his disadvantage and it can thus in an appropriate case constitute an extra-judicial admission. As such, the common law, as confirmed by the provisions of section 219A of the Criminal Procedure Act 51 of 1977, requires that it be made freely and voluntarily.'

vide also the decision by this court in R v NDUMISO MUZI MAZIYA, Case Number 137/2008, (judgment delivered on 14th March 2013)

[24] For the above reasons, I held that the pointing out of the metal rod or sword by the accused to the police was a confession in the guise of a pointing out and it had to be shown by the crown that it had been freely and voluntarily made by the accused. The crown had not succeeded in discharging this onus and therefore this evidence was ruled inadmissible and had to be rejected.

[25] In an attempt to bolster its weak evidence of identification, the crown led the evidence of an identification parade that was held at the Mankayane

Police Station Conference Room on 9th April, 2007. I now examine this evidence below.

[26] Both Pw1 and Pw3 positively identified the accused during the parade. The accused denied that he was the culprit and offered a reason why he was in the area. Pw1 identified him as the rapist whilst Pw3 identified him as simply the stranger that he had met in the grazing lands on the day Pw1 was raped. As stated above, the accused admitted having met or seen Pw3 in the veldt that day. Therefore his presence in the area on that day is not in issue. But, was he the man who raped the complainant? And again, as stated earlier in this judgment, the crown's case hinges on the evidence of identification of the culprit by Pw1.

[27] The court has to approach evidence of identity cautiously. The dangers that are inherent in evidence of identification were discussed in *Ntshalintshali v R, 1982-1986 SLR (1) 238 at 240F-241*. There the court said;

> 'The question we have had to consider is whether the identification of the appellant as the assailant was sufficiently reliable to justify the conviction of the appellant. The question of identity is always approached by the courts with caution, for it is well-known that cases of mistaken identity do sometimes occur. In **Rex v Masemang** 1950 (2) SA 488 (A) at 493, there is a quotation from Will's **Principles of Circumstantial Evidence** (7 ed, 193) in which the learned author mentions the case of an eminent barrister who swore positively to the identity of two men whom he charged with robbing him in open daylight, but who proved conclusively that they were elsewhere at the time of the robbery. In

the present case, there are a number of features which under line the need for caution: the two witnesses who identified the appellant were both very young, twelve and thirteen years of age respectively when they gave their evidence at the trial. Neither of them had known the assailant prior to the day of the rape. The complainant was too upset on the day of the assault to be able to give the police a description of her assailant. Although she did give them a description later, we do not know what period of time elapsed before she did so. There is the danger that during the period she would have been questioned by members of her family, that Mbuso would also have been questioned, and that the complainant and Mbuso would have been together at some time before the parade at which the distinguishing features of the assailant and his clothing were discussed. The court cannot therefore be satisfied that these two witnesses had independent recollections of the appearance or the clothing of the assailant. Apart from the identification of the appellant by these two young witnesses at the identification parade, there was no independent evidence to link the appellant with the offence, or even to place him on the day in question in the vicinity of the scene of the crime.

Against this background, it was important to ensure that the identification parade should be conducted with all possible safeguards to eliminate the possibility of error, if it was to have the necessary probative value. As Schreiner JA pointed out in **Rex v Kola** 1949 (1) PH H 100 (A), an identification parade may become a grave source of danger if it creates a false impression as to a witness's ability to identify an assailant: "Unsatisfactory as it may be to rely upon evidence of identification given by a witness not well acquainted with the accused if that witness has not been tested by means of a parade, it is worse to rely upon a witness whose evidence carries with it the hallmark of such a test if in fact the hallmark is spurious."

In the present case, the fact that the appellant was the only person on the parade who was wearing a dark cardigan with white stripes immediately reduces the probative value of the pointing out, for the fact that the appellant was wearing this cardigan seems to have been relied upon by the complainant. It appears to have been a clue which guided constable Mkweli to the appellant. Furthermore,

> although he disclaimed it, Mbuso must to some extent have been influenced by the jersey which the appellant was wearing, for in his evidence in court he referred to the jersey in describing the assailant. As far as the checked shirt was concerned, again there was only the other person on the parade wearing a checked shirt similar to the appellant's. In this respect, the facts of the present case are very much like those in **Rex v Masemang** 1950(2) SA 488 (A), where an appeal against a conviction of assault with intent to commit a rape was allowed. Although the identification in **Masemang**'s case was by a single witness, whereas here we have two witnesses, this difference does not in my view render the pointing out in this case for reliable, bearing in mind the strong probability that before the parade the description of the assailant and his clothing was discussed in the presence of both witnesses (cf **R v Nara Sammy** 1956 (4) SA 629(T) at 631A-B)."

See also the judgment of this court, delivered two years ago, in **Rex v Mzwandile Maseko** Crim. Case No. 295/10 wherein the following passage appears:

> '[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 81i – 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:
> 'I beseech you, in the bowels of Christ, to think it possible you may be mistaken.' "

[28] In the present case, the accused was unknown to Pw1 before the rape incident. Pw1 was obviously traumatised by the rape ordeal. She was afraid, upset and scared. She came home crying and was immediately taken to the police who eventually took her to hospital for medical attention. Her only description of the rapist was that he was dark, medium built and clean shaven. There was no particular or specific bodily mark or feature by which she was able to identify her assailant. None of the cloths referred to by her or Pw3 could be traced and linked with the accused herein. From the date of the rape, about two weeks lapsed before the identification parade was done and it is not inconceivable that both Pw1 and Pw2 could have compared their notes or recollection or description of the stranger that was seen by Pw3 in the grazing land. As stated above, the only plausible reason why the police arrested the accused was because he had told Jabulani Hlophe that he was Robert Sacolo from Bhadzeni 2.

[29] The accused has given a reason why he was in the area on the relevant day. There is nothing inherently improbable or unreasonable or sinister about his version. His presence in the area does not perforce point to him as the rapist. Further, it cannot be said that he was the only stranger there at the relevant time. In any event, I consider it highly unlikely that if the accused had indeed committed the offence, he would have given his true particulars to Jabulani Hlophe immediately thereafter.

[30] Whilst Pw3 admitted or conceded that the hat worn by the stranger in the veldt prevented him from properly identifying him, there is no explanation offered how he was then able to positively identify him during the identification parade two weeks later. But, as already stated, the accused admits that he was seen by Pw3 in the area that day. The identity of the culprit (offender) rests on the evidence of Pw1. I have no reason to doubt her bona fides or honesty, but this is not enough. Her evidence must also be credible and reliable. As already stated, her evidence of the description of her assailant is in general terms. I am not certain that the crown has proven, beyond any reasonable doubt that it is the accused herein who raped Pw1.

[31] For the foregoing, the accused is given the benefit of the doubt and he is hereby found not guilty and he is acquitted and discharged of this crime.

MAMBA J

For the Crown	:	Mr M. Nxumalo
For the Defence	:	(Accused) In person