

IN THE HIGH COURT OF SWAZILAND

CRIMINAL TRIAL NO.126/95

In the matter between:

REX

VS

FELIX JABULANE ZWANE

FOR THE CORAM : J.M. MATSEBULA A.J.

FOR THE CROWN : MR. KILUKUMI

FOR THE DEFENCE : IN PERSON

JUDGMENT

29/02/96

The accused stands charged with crime of rape, and before the indictment was put to the accused, the Crown applied for an amendment in respect to the note which was attached to the indictment. This was in terms of Section 185 CRIMINAL PROCEDURE AND EVIDENCE ACT OF 6/1938. Drawing the attention of the court and indeed, that of the accused as well, that the; complainant in this matter was of tender age and the amendment was to the effect that the following should be added to the note.

After the sentence tender age, the Crown had asked that the following be added that is, "and the accused was in possession of a knife with which he threatened to stab the complainant." This was brought to the attention of the accused and he indicated that he did not have any objection to the amendment and the amendment was then effected.

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In the alternative, the accused is said to have contravened Section 3(1) of the GIRLS' AND WOMEN'S PROTECTION ACT, in that on the 19th February 1995 at Mapondweni area in the District of Shiselweni, he did unlawfully have canal connection with Andile Nxumalo, a girl under the age of 16 and did thereby commit the crime under the statutory crime of the GIRLS' AND WOMEN'S PROTECTION ACT.

When the charge was put to the accused, he pleaded not guilty. The court asked him whether he was happy to conduct his own defence and he said he was, as he said he did not have money to hire the services of defence counsel. The Crown then proceeded after the plea of not guilty which had been entered, to call PW1 Dr. F. Fakudze who gave evidence and referred to Exhibit 'A' which was subsequently handed in after the doctor had given evidence.

The Exhibit 'A' is a certain form RSP 88 which was completed by the doctor after examining the complainant in this case. The doctor stated that he had examined the complainant on the 28th February 1995 at 11.30am and he had estimated the age of the complainant to be 13 years old. He had found that there were certain contusions on the complainant's fingers of the left hand. He had also examined the complainant's private parts and found that the labia majcra had bruises and abrasions and also; her labia minora had bruises and abrasions. There were also bruises on the

vestibule and her hymen was absent and he was able to insert two fingers in her vagina. He also testified that there were some whitish discharge coming from the complainant's vagina and he stated that the examination was painful.

He had taken some vaginal smears and sent these to the laboratory. He said he is in the habit of going to the laboratory himself to see how the smears look like and he had gone there and saw the smears himself under a microscope. He had seen the spermatoczoa which came out of the complainant's private parts and these were still active. He formed the opinion that there had been recent sexual intercourse with the complainant and she had been penetrated.

The doctor's evidence was not contested.

Then the Crown also called the evidence of the complainant Andile Pertunia Nxuroalo who was PW2.

She stated that she was 13 years old and was in Standard Five and she attended school at Ekuthuleni School. The court was satisfied that even though she was of tender age she understood the proceedings to be able to take an oath, and she took an oath.

She told the court that she knew she had come here to give evidence and that she knew the accused before this incident..

And she stated that on the 19th February 1995 she was in the company of a friend of hers Gugu and they met the accused, because it was late the accused had undertaken to accompany them to their respective homes. They moved along the way, the accused had then asked them about the death of a certain child who the accused was supposed to be the father, born by Nondumisc. He had ultimately suggested that they were responsible for bringing about the death of this child.

They moved along and. at a certain spot voices were heard and the accused then suggested that these were ghosts and that they should not move along that footpath but should move along a mountain towards their respective homes. They had first resisted but the accused was threatening and because they were also afraid of the ghosts they ultimately allowed the accused and they moved along the footpath which was going to be along the mountain. They stopped at some stage and the accused had said they should go to his home. They had refused to go to his home. The accused had then used a knife to cut out a switch from a tree and threaten to hit them with the switch. He also threaten to stab them with the knife. They then continued to move along with the accused and some stage, so the complainant testified, the accused had confronted Gugu PW3 and insisted she should submit to having sexual intercourse with him. She resisted and the accused stabbed at her aiming at her

head, she warded off and the knife blow felt on her hand and she sustained an open injury. She then agreed that they will move along to the accused homestead. The accused had then said to Gugu that she had accepted his love and he had wanted to have sexual intercourse with her. She denied this and the accused threaten to hit her and the accused insisted that Gugu kiss him and she obliged.

Along the way the accused became more violent and they had started running away and Gugu had ran into some donga and had warned the complainant not to come to where she was and Andile PW2

had ran to some homestead nearby but the accused had subsequently traced Andile PW2 and pulled her out of the homestead towards the mealie fields and there forcefully had sexual intercourse with her. He had pulled out a knife and said it was difficult for his penis to penetrate PW2 and he was going to use the knife to open PW2's private parts wider so that his penis should penetrate. He had also pulled the pair of panties of Andile PW2 before he had sexual intercourse with her.

After he had had sexual intercourse Andile managed to run away leaving behind her panties in the mealie fields and she subsequently got some people who took her to her house. It was her evidence that she had not consented to the sexual intercourse by the accused.

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PW2 is the complainant Andile Nxumalo and PW3 is Gugu.

PW2 was eventually taken to hospital where she was examined by the doctor and ultimately she was taken back to where the incident had taken place and the exhibits were found there, PW3 was also called and she corroborated PW2's evidence in all material respects and the court is satisfied that there is corroboration to substantiate the necessary corroboration in cases of sexual crimes.

PW4 Thembeni Nxumalo was also called and she stated that she was the complainant's mother. She deposed to the fact that the complainant was born on the 24th July 1982. She said she remembers this date because it was the year in which King Sobhuza died. Her evidence was also corroborative of what Gugu had said. She had taken Andile to the hospital and she had also examined the complainant and found that sexual intercourse had in fact taken place.

PW5 also gave evidence and said that she had been taken by the complainant and in the company of another officer they went to the scene and they recovered the items which were identified by the complainant as hers which she had been wearing at the time of the assault on her.

Then the Crown also called the evidence of Samuel Zwane who

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is the chief's runner of the area and a relative of the accused. He testified that he had received a report on the 28th February 1995 and had contacted the accused. He had first confronted the accused and asked him about the allegation of rape. The accused had denied any knowledge about this. He had then asked the accused to go along with him to the Chief's place. Before they got to the Chief's place, he had again asked the accused who then said yes, he had soiled the complainant and the witness said the accused by saying he had soiled the complainant meant he had had intercourse with the complainant on her thighs. That was the evidence by the Crown.

The accused was then warned in terms of 174(4) of the CRIMINAL PROCEDURE AND EVIDENCE ACT and his rights explained, he was told that a prima facie case had been made. He understood this and he elected to give evidence on oath. He gave evidence and denied what had been said by the Crown witnesses. And said they were doing all this because they knew he was before court for the first time and he was not aware of the procedures. He then stated that the complainant was his lover and that she had accepted his love some time before this incident. And that on this particular day she had consented to the sexual intercourse.

He stated under cross examination that he did not dispute the evidence of the Crown witnesses because he was not used

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to the procedures. He then stated that he had no witnesses to call.

The Crown has addressed the court and they are of the view that they have proved this case beyond reasonable doubt and they are asking that the court should convict the accused on the main charge that is of rape because the only reasonable inference that can be drawn is that the complainant never consented. The accused was also invited to address the court and he stated that he did not rape the complainant, nor did he assault her nor did he assault Gugu. He said he had sexual intercourse with the complainant with her consent. He also said it was not true that the items, the exhibits handed to court were found at the place of the scene of the crime because the sergeant had not taken him along to go and retrieve the goods. And he stated that these goods, the items were handed forward to the sergeant by the mother at their respective homesteads and not found at the scene of the crime.

The court is aware and is conscious of the fact that the onus in criminal cases always rests on the Crown to prove a case against an accused person beyond reasonable doubt. And that there is no onus that rests on the accused to prove his innocence. In this respect the court refers to REX VS DIFFORD 1937 AD 370 at 373. This is the broad principle in all criminal cases but there is a requirement especially

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in sexual related cases. There should be corroboration of the complainant's evidence in instances where the Crown must prove that sexual intercourse had taken place, there must be corroboration that there was no consent, there must also be corroboration that the accused is the person who committed the rape.

Considering the evidence as a whole, the court finds that there has been corroboration in all these instances where corroboration is necessary and the court is satisfied that the Crown has proved its case beyond reasonable doubt and find the accused guilty as charged on the main count.

J.M. MATSEBULA

ACTING JUDGE