

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 305/84

In the matter of:

REGINA

VS.

ELIJAH MFANIMPELA MAGAGULA

CORAM:

HASSANALI, J.

FOR CROWN:

MR M SIBANDZE

FOR DEFENCE:

IN PERSON

JUDGMENT

(Delivered 12 March, '85)

HASSANALI, J.

The Accused is charged with the rape of one Dumile Ngcamphalala on 18/8/84. He pleaded not guilty and was undefended.

At the conclusion of the Crown case, I posed the question to the Counsel for the Crown as to whether the Crown had made out a sufficient case for the accused to answer. After hearing his submissions, I postponed the matter to a later date for an order.

Dr Khayyam of the Mbabane Hospital who examined Dumile Wgcamphalala, the complainant on 18/8/84 said that her clothes were dirty and mixed with grass. Her labia majora, labia minora and vestibule were congested.

2

Vaginal smear revealed spermatozoa. He was of the opinion that the complainant was sexually assaulted.

The complainant told the Court that on Saturday 18th August 1984 at about 9p.m. when she and Vusie Sibisi were walking towards the corporation, they were accosted by two persons who were unknown to them. One of them who was dark in complexion had an axe in his hand. They demanded money from Sibisi. The dark boy then snatched Sibisi's camera from her. Sibisi in fear ran to the nearest homestead. The two boys then grabbed and pulled her demanding money. They took her into the tall grass and the boy Vincent ordered her to lie down while the dark complexioned one held the axe in his hand. At this stage Sibisi reappeared and threw stones at them but he was chased away. The boys then took her to another spot where Vincent forcibly put her down, removed her panty and had sex with her. The other boy took over from him. He too had sex with her and then disappeared. She also said that Vincent was caught by the police when he was having sex with her for the 2nd time. She said that there were lights 60/70 feet away from the scene of crime.

Vusi Sibisi substantially corroborated the complainant in her evidence. He testified that on 18/8/84 at about 10p.m. he was walking towards the Corporation with the complainant. All of a sudden 2 boys whom he was seeing for the first time appeared and started to fight with him. One of them had an axe. He ran to the nearest homestead and requested help which he did not get. He went back to the scene and threw stones at them but was chased away.

He then rushed to the Mobeni Flats and from there he phoned the police. The police arrived immediately and arrested the boy (Vincent) who was having sex with the complainant.

D/Constable Ngamandala said that he arrested the accused on 20/8/84. When charges of rape and robbery were put to him, he denied them. He further said that the accused's friend mentioned to him that the accused had taken the axe to his house. He was then asked the following questions.

Q. When Vincent painted out the accused as the man who had been with him, what was accused's reaction?

A. He denied it first. We then asked him to open his house. We questioned him about the axe and he gave the axe to us.

He further said that when the complainant and her witness were shown the axe and asked to identify it as the weapon the accused had with him that night, they were unable to do so.

On the evidence I am satisfied that the complainant was sexually assaulted. The main point in issue is whether the identity of the accused has been established beyond reasonable doubt.

The rape was committed late at night at about 10p.m. According to the evidence the assault took place in the tall grass. There were lights about 60/70 feet away but there is no evidence to show that the lights were sufficient for the accused to be recognised. In my view this

could have been impossible because of the grass. The complainant and her witness stated that they had not seen the accused before. She only mentioned that the accused was a dark complexioned person. Her evidence as regards identity of the accused was vague and insufficient and therefore no reliance can be placed on this.

It has been stressed more than once 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 or her evidence is reliable in the sense that he or she 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. 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 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 merely bona fide honest.

Van Dan Heever J.A. in *Rex v. Maaemang* 1950 (2) 488 after reference to the cases of wrongly convicted persons cited in *Wills Principles of Circumstantial Evidence* 7th Edition P. 193. 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.

Dowling J in *R vs. Shekelele & Another* 1953(1) 5 A 636 at 638 said "questions of identification are always difficult. That is why such extreme care is always exercised in the holding of identification parades to

prevent the slightest hint reaching the witness of the identity of the suspect. An acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identifications. People always resemble each other. Strangers are sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence. Witnesses should be asked by what features, marks or indications they identify the person whom they claim to recognise. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplored, untested and uninvestigated, leaves the door wide open for the possibility of mistake."

6

In this case there is no evidence by the complainant or her witness to satisfy Court that the assailant had been identified. The only evidence that links the accused to this crime is that of the police officer Ndlangamandla. According to him, one Vincent had told him that he was with the accused that night and the accused had an axe with him. Although an axe was recovered from the accused, neither the complainant nor her witness was able to identify the axe. The only point on which I desire to guard myself is the admissibility of the statement made by Vincent to the police officer. In my view for the proper identification of the accused, Vincent should have been called to give evidence in the witness box and not evidence of what he said elsewhere.

The crown evidence leaves much to be desired. I think that the case against the accused should have been more thoroughly and carefully presented. As this was not done and as it now stands, there is nothing against the accused.

Therefore having considered all the factors in this case, I have come to the conclusion that the Crown has failed to establish beyond reasonable doubts that this accused committed rape on the complainant.

In view of this I discharge and acquit the accused.

J.A. HASSANALI

JUDGE