

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. APPEAL CASE NO. 21/94

In the matter between:

GABRIEL NGRIZA GEORGE

VS

REX

CORAM : A.F.M. THWALA
FOR THE APPELLANT : MR. FINE
FOR THE CROWN : MR. KILUKUMI

JUDGMENT

05/08/94

The appellant was convicted of the crime of rape. The Magistrate sentenced him to four years imprisonment.

The appeal is against conviction. The grounds of appeal are as follows:

- (i) That the court a quo erred in law in finding that the complainant was corroborated in all respects in this matter.
- (ii) That the court a quo erred in law and in fact in rejecting the accused's version, which version might possibly be true.

The Crown led that the evidence of Sibongile Lindiwe Shongwe who is step grandmother of the complainant. She describes how she noticed that the complainant (Busi Msibi), was not walking in the normal way that she usually walked. She asked her what happened. She told her that it happened on a saturday. She then examined her private parts and noticed that there was some rash and a discharge.

The discharge was pus. She then took the child to the police. From the police they went to a garage where the appellant worked. When they came to the garage with the police, the complainant identified the appellant as the person who raped her. The witness then took the complainant to hospital where she was examined by the doctor. This is the brief summary of her step grandmother's evidence.

The Crown then led the evidence of Dr. Petros Igor who examined the complainant. He stated that from his examination he did not see any sign of assault. She was not a virgin because she had no hymen. She had a venereal disease i.e. GRICHOMONIASIS. The period was three to four days. It is an infectious disease. He could not say when intercourse had taken place. The hymen had healed. He could not say whether the complainant was raped or not. The doctor said the person who had intercourse with the complainant must have the infection. He said the test which can reveal the disease is urine test or secretion from the prostate gland if it is chronic.

In the course of the trial, the Magistrate in terms of section 342 of Act 67 of 1938, granted an order that all necessary steps be taken for taking necessary specimen from the accused for the analysis for grichomoniasis. This then became an issue which the Crown was required to establish in support of its case. It became an important corroboration of the evidence of the complainant if established. The Crown also called Nkambule who worked at the garage with the appellant. He saw the complainant standing outside the garage where they work. The accused gave the complainant a lift. He did not know which direction they followed. The time was about 2:00 p.m. He said appellant came back after 15 minutes. Ivan was in the car when appellant gave the complainant a lift. The appellant came back with Ivan. The complainant did not come back with them.

The Crown then called the complainant, an 11 year old girl. She described how she ended arriving at the garage where the appellant works, Her story is not clear how she went to the garage and what for, but it is not disputed that she went there as she is supported by the appellant and Nkululeko. She said it was her first time to see the appellant. It appears according to the record that the complainant was uneasy or afraid when she gave her evidence. She continued to tell the court that appellant, his friend and she took the street towards St. Theresa. His friend alighted from the car next to a flat near St. Theresa. Appellant then drove the vehicle via Fairview to Nazarene. She told the appeallant that she was going to Ngwane Park. The appellant took the Kakhoza direction and then took the Sidvokodvo road. He told the complainant that he was going to Ngwane Park.

She then described how the appellant raped her near the turn off to Ngwane Park after he had parked the car under a tree. He gave her El. He then took her to Ngwane Park. She went home and found her sister and she did not report. She only reported to her step-grandmother when she was questioning her how she was walking. She then described how she identified the appellant.

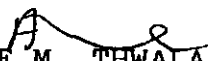
She was then cross-examined by Defence Counsel. She again stated in answer to Defence Counsel that Ivan alighted at St. Theresa and that he did not accompany them for the rest of the journey. The witness started crying and she did not answer Defence Counsel's questions satisfactory. The person who could clarify or corroborate the complainant at this stage was Ivan. Ivan could say whether he accompanied the appellant up to Ngwane Park and came back with him to the garage as testified by Nkululeko Nkambule. Unfortunately the Crown did not call him.

The Magistrate tried to nurse the complainant but she was afraid or shy to answer all questions put by the Defence. Although the Magistrate's judgment is carefully reasoned, it lacks the support of the analyses of the samples which were ordered by the court to be taken from the appellant who submitted himself to be examined. The court was of the opinion that the tests must be carried out to find out if the appellant could infect the complainant if he had the venereal disease.

The appellant could infect the complainant if he had the disease before the alleged rape or be infected if the complainant had it prior to the alleged rape. It was for the Crown to put its case beyond doubt more especially as the complainant is a child to tender age. The name of Ivan was mentioned by the child and Nkululeko who said appellant came back to the garage while the child said she was left near St. Theresa. The Crown had all the time to call Ivan.

I find myself in difficulty to confirm the conviction. The complainant did not answer defence questions satisfactory because she cried most of the time. The Crown did not take the appellant to be tested for the venereal disease which became part of the evidence which was required to corroborate the girl. It also failed to call Ivan to rebut the evidence of the appellant and Nkululeko that appellant returned with him to the garage and that he was with him through out the journey to and fro Ngwane Park.

I reluctantly allow the appeal. Conviction and sentence are set aside.


A.F.M. THWALA

JUDGE