

IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO.6/96

In the matter between:

REX

VS

CHICCO NTSHANGASE

CORAM

: MATSEBULA J

FOR THE CROWN : MR. NGARUA

FOR THE DEFENCE : IN PERSON

JUDGMENT

27/08/96

The accused Chicco Ntshangase an adult male was indicted on two counts of rape. On count one it being alleged that he did on the 9th May 1995 at Mlindazwe area District of Shiselweni have unlawfully sexual intercourse with one Precious Phindile Jele a female aged 16 without her consent and thereby committed the crime of rape.

On the second count the allegation being that he did intentionally have unlawful sexual intercourse with Ncamsile Myeni a female aged 6 years without her consent and did thereby commit the crime of rape.

There is an alternative to count two. The accused being charged with contravention of Section 3(1) of the GIRLS AND WOMEN PROTECTION ACT 39(1920) the so-called statutory rape.

2

Before pleading to the charges set out above accused was warned In terms of Section 1(85) of CRIMINAL PROCEDURE AND EVIDENCE ACT 67(1939) of the aggravating circumstances of charges preferred against him on count one, in that it was alleged he used a firearm to threaten her and assaulted the complainant in order to subdue her in the commission of the crime. Similarly on count two he was also warned there the aggravating circumstances being the age of the complainant she being only 6 years old. Accused pleaded not guilty on both counts and to the alternative count to court two and was represented by Mr. Mamba.

The complainants on count one and two were examined by Dr. T.Z. Gambo who gave evidence and handed in exhibits 'A' and 'B' certain RSP 88 in respect of the individual complainants. In respect of count one where the complainant Precious Phindile Jele features the doctor found the following:

- a) Signs of assault on complainant in the form of bruises on both cheeks;
- b) Abrasions left lower eyelid and cheek.

The doctor stated in his evidence that he had found no spermatozoa in the complainant's vagina. He was however of the opinion that forceful penetration of the vagina had taken place.

3

It might be appropriate at this stage to state that the doctor's opinion findings are not in themselves conclusive proof that complainant had in fact been raped.

The court always considers doctor's findings in conjunction with other factors in the evidence as a whole. Nor is the absence of the spermatozoa in the vagina an indication that rape had not taken place because penetration can take place without the presence of the spermatozoa. The above findings by the doctor was handed in as exhibit 'B'.

In exhibit 'A' in respect of the complainant on count two, the doctor has the following findings:-

- a) Count two relates the complainant Ncamsile Myeni who is aged 6;
- b) The doctor had found that the apparent age of the complainant was 6 years and he had found in respect of the sex life - the doctor had recorded that she was a child and opposite menstruation the doctor recorded 'yet';
- c) Her labia minora had a bruise which was healing and her vestibula had a bruise which was in the process of healing and the doctor found that her hymen had been torn.

The doctor's opinion from the history of the assault and his examination was that the complainant had been raped. It may

4

be appropriate to mention that the complainant was examined by the doctor some six days after the alleged assault had taken place.

I may just add for the purpose of this judgment. Findings in respect of exhibit 'A' and 'B' that is the certificate by the doctor were not challenged to a point that they would leave the trial court in any doubt. The court was satisfied that the evidence relating to exhibit 'A' and 'B' were conclusive that the complainants had in fact been raped.

The Crown then led the evidence of Phindile Jele on count one. She told the court that she had been temporarily working at Sarah Magagula's homestead. Sarah Magagula being one of the Crown witnesses who was called to give evidence. She was called as PW7 for the Crown.

The complainant stated that she was looking after the children of PW7. She testified that in doing her work she was assisted by the accused's girlfriend one Ncengekile Sihlongonyane PW3 who was called by the accused as his witness. She also testified that the accused was also at this relevant time present at Sarah Magagula's homestead and that he had requested the complainant on count one to go to his, the accused's homestead to fetch chicken meat. She stated that she and the accused had gone to the accused's homestead and found that the homestead or the huts of the

5

homestead had been locked. And that the accused had forced one of the doors of the hut open and they had then entered. She stated that once in the hut the accused had then requested from the complainant sexual favours which request was turned down by the complainant.

It was the complainant's evidence that the accused had thereupon produced what appeared to her to

be a firearm and threatened to shoot her if she refused to have sexual intercourse with him. Accused had then proceeded to rape the complainant and this he did twice said the complainant. After this the accused had grabbed hold of the chicken and proceeded back to PW7's homestead where the accused's girlfriend had been left.

Complainant testified that she had then prepared the chicken and cooked it. She said in the evening she informed the children that she feared the accused would rape her again and decided to go away.

She said she left and went to Makhathini's homestead where her boyfriend was staying and reported the rape to her boyfriend. She stated that the following day she reported the rape to her mother PW6 Vesta Jele. When PW7 Sarah Magagula returned from South Africa she also reported to her the rape.

She was then advised by Sarah Magagula to report the matter to the police. After reporting the matter to the police she

6

was eventually examined by the doctor who produced exhibit 'B' to which the court has already referred.

The report the complainant made to her mother PW6 Vesta Jele and Sarah Magagula is to the same effect. The court is aware that this type of report does not corroborate the fact that sexual intercourse had taken place but it is only admitted as evidence to show consistency. In this regard the court refers to the case of VILAKATI VS REX COURT OF APPEAL 1992/96 SWAZILAND LAW REPORT @359.

The court is also aware that no onus rests on accused person to prove his innocence. If he gives an explanation which could reasonably possibly be true he is entitled to his acquittal. In this regard the court refers to REX VS DIFFORD 1937AD @373.

Accused made a statement to the police whose contents he confirmed before this court and handed in as exhibit 'C'. Exhibit 'C' is clearly at variance with the accused's evidence in court. Also the evidence of DW2, DW3 and DW4 the witnesses who were called by the accused is at variance with one another. DW2 was Elliot Nyanzima. The accused's witness Elliot Nyanzima not only refuted the accused's version totally but he denied ever arriving at Sarah's place. He stated that on the contrary he had been asked by the police to search for the accused. He said he was engaged in this matter after the police had asked that he

7

help them to search for the accused.

DW2 the accused's witness would not be allowed to cross-examine him after he had given evidence.

No good reason was advanced by the accused why his witness would suddenly turn against him and give evidence against him.

The court can at this juncture refer to the fact that it was at this juncture that the accused counsel Mr. Mamba withdrew from representing him.

The accused asked that his girlfriend Ncengekile Sihlongonyane be called as a witness. She was called in as DW3. The evidence of DW3 the accused's girlfriend contradicted that of DW2 in toto and although some aspects of the accused's version of his evidence in chief were corroborated by DW3, under cross-examination she failed to explain certain aspects of what the accused had told the court.

The accused also called his mother one Lizzy Ntshangase who to a great extent also refuted the evidence given by DW3 Ncengekile Sihlongonyane. At the request of the accused his witness the girlfriend Ncengekile Sihlongonyane was recalled to give evidence on count two. She threw in a lot of confusion because persons who had been mentioned by the accused who would have been present when certain occurrences

8

took place she denied that those persons were present even though those were identifiable persons she knew.

The accused in his evidence had mentioned that a certain Sonnyboy was present and his certain uncle Dlamini was also present but the witness said they had not been present when certain occurrences took place. Evidence of DW2,3 and 4 at the end of the day were found to be reeling with contradictions.

I have dealt at length with the evidence of these witnesses because the court must of necessity weigh the accused's story against that of the Crown witnesses, even though there is no onus on the accused to give any explanation but it is important that the court takes the accused's version into account when considering whether or not the Crown has proved its case beyond reasonable doubt.

Considering all these factors the court finds that there has been corroboration:-

- a) of sexual intercourse having taken place in terms of exhibit 'A' and 'B' that is the doctor's certificate;
- b) that there was no consent either by the complainant on count one or count two to the said sexual intercourse;
- c) that the identity of the accused is not disputed

9

by the accused because they knew him.

The accused himself had admitted that he had met these complainants but what he denies is that he had raped them. I am referring to this because in terms of REX VS VALDERMO REVIEW CASE 843/1988, the identity of a person must be proved by the Crown beyond a reasonable doubt before he can be said to have been the person who raped the complainants.

The court in analysing the accused's evidence finds that the accused had lied when he said that one Happy Mthembu had been present at the crucial time when the complainant Ncamsile Myeni was allegedly raped.

The accused had also testified that his girlfriend Ncengekile Sihlongonyane and his mother had also been present at the relevant time and they would have seen if he had raped the complainant. This obviously is not true. This the court finds to be very serious discrepancies. These serious discrepancies in a case for the defence are discrepancies which the court takes into account in deciding whether or not the accused's story could reasonably possibly be true.

The accused in his submissions stated that the witnesses who had turned against him and given contradictory explanations are doing so because of some quarrel relating to the lobola

10

for his girlfriend Ncengekile. This of course was denied by both his girlfriend Ncengekile and the accused's mother who should have known about this dispute which has led the witnesses to turn against him.

Considering all the factors and the evidence involved in this case this court is satisfied that the Crown has proved this case beyond reasonable doubt and find that the accused is guilty of one and two counts as charged.

J.M MATSEBULA

JUDGE