



## **IN THE HIGH COURT OF SWAZILAND**

**CRIMINAL CASE NO. 74/98**

**HELD AT MBABANE**

**IN THE MATTER BETWEEN:**

**REX**

**VS**

**SANDILE STANLEY MAVIMBELA**

**CORAM: MATSEBULA J**

**FOR THE CROWN: MS. LANGWENYA**

**FOR THE ACCUSED: MR. S. KUBHEKA**

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**JUDGEMENT DATE**

**23/02/99**

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The accused stands charged with the crime of rape it being alleged that on or about the 1<sup>st</sup> January 1998 and at or near Embikwakhe in the Manzini District he did wrongfully and intentionally had sexual intercourse with [A] without her consent and thereby committed the crime of rape.

Accused's intention was drawn to the provision of Section 185(bis) of the **CRIMINAL PROCEDURE AND EVIDENCE ACT 1938** in that the commission of the crime was accompanied by aggravating circumstances because of the following reasons:

- (a) at the time of the commission of the crime the complainant was aged 9.;
- (b) she was a virgin.

On the 30<sup>th</sup> November 1998 when the charge was put to the accused, he pleaded not guilty. Mr. Kubheka represented him throughout the trial.

On the 23<sup>rd</sup> September 1998 the accused appeared before the learned Chief Justice. According to the endorsement on the file, he was referred to the Psychiatrist Centre for investigation into his mental capacity at the time of the alleged rape to ascertain whether he was capable of standing trial and pleading to the matter and to investigate any factors relating to his mental capacity which may affect his criminal liability.

On the 28<sup>th</sup> September 1998 Dr. R. Ndlangamandla a consultant psychiatrist in the National Psychiatric Centre produced a report on the accused's mental state. Dr. Ndlangamandla who was called by Mr. Kubheka as a defence witness prepared the report. The contents of the report in general terms are that the accused's mental state:

“is fully conscious, fully orientated and in all spheres shows good contact and gives a coherent account of himself. His memory is intact and shows no psychotic features. His mood and affect are normal and he has no anxiety features. He shows good judgement and has no cognitive impairments.”

These qualities are contained in paragraph 5 of the report. Paragraph 6 of the report reads and I quote:

“The assessment therefore shows that Mr. Mavimbela is mentally fit. He recovered fully from his psychotic episode in 1991. His claim of alcohol intoxication cannot be based as grounds for not being held responsible for his activities.”

The last paragraph of the report, reads and I quote:

“Mr. Mavimbela is therefore capable of standing this trial and pleading to the charge laid against him.”

I will revert to the report later in my judgement. For now I have to deal the facts proved at the trial and these are:

PW1 Dr. Jackson handed in exhibit "A." According to exhibit "A," the fourchette and perineum were lacerated and the vagina had faeces and the patient had a slight bleeding from the lacerations. Her hymen had fresh tears.

It is therefore common cause that the complainant was raped. PW2 Dumisa [B] testified that he received a report and went to a spot near a bush. He entered the bush and found the accused on top of the complainant busy having sexual intercourse. He said the complainant was screaming but helpless. PW2 confronted the accused about his conduct. Accused told PW2 that he had called the child and wanted to send her to the shop. At cross-examination by the defence PW2 said accused did not show signs of being too drunk. PW2 knew the accused very well. He said he knew him from childhood. PW2's evidence was not challenged.

PW3 [B] the mother of the complainant testified about her age and her subsequent behaviour after the rape. She stated that after the rape, the complainant does not want to see male persons. Under cross-examination she said that after the incident the complainant came back home and was not prepared to go on schooling.

PW4 [A] also testified that on the day in question, she was in the company of the other girls proceeding to the shop when they came upon the accused. She said she knew the accused. Accused called her and she told him there were sent by her parents and the accused barred her way and told her that he wanted to send her to a certain homestead. He got hold of her and pulled her to the bush and ordered her to take-off her panties and to lie down. She obliged and the accused lay on top of her and proceeded to rape her. This was done without her consent, so she says. The defence did not challenge her evidence except challenging that she suffered injuries around her neck at the hands of the accused.

The accused himself gave evidence in his defence. He says that he is unable to remember anything of the day in question. He says he doesn't remember because he was either so drunk as to being delirious or his drunkenness of too much intake of intoxication liquor had triggered a psychotic episode to which Dr. Ndlangamandla referred to in his report and was treated of in 1991. Dr. Ndlangamandla stated in his report that accused had completely healed after the

treatment. According to the doctor's report accused suffered these psychotic episodes in 1990 as a result of smoking marijuana. When Dr. Ndlangamandla made the psychotic assessment of the accused in the months of September 1998 accused had not been abusing marijuana. He had stopped doing this after the recovery of the episode in 1991.

That being the case the court will have to determine as at the commission of the crime accused's psychotic condition had being triggered so as to render a voluntary nature of the *actus reus* involuntary so that the accused was comparable to a person of a sick mind so as to be unable to form any intention to commit the alleged offence. If the court were to find that that was the case then for all intensive purposes he cannot be held liable for his actions. See in this regard **STATE VS TRIGGARD 1973(3) SA @557d-g** and also **PAUL VS REX 1906 @506**.

According to PW4 the complainant, the accused was seen on the road to the shop. He followed the complainant and her companion. He called the complainant and the complainant told him that they were on their way to the shop. He then barred her way, got hold of her, and told her he wanted to send her to a certain homestead. He pulled her into the bush and ordered her to take off her panties and to lie down then he lay on top of her and proceeded to have sexual intercourse with her.

For the purposes of this judgement I would say that the accused had consumed a considerable amount of intoxication of liquor but on the evidence of the accused certainly he knew the nature of his actions and was wise enough to lure the complainant to come to him and tell her he wanted to send her to a certain homestead. The accused was aware that a young girl of the complainant's age would oblige if he told her that he wanted to send her to a certain homestead. When he said he wanted to send her to a homestead he knew he didn't want to do that but to rape her.

On a balance of probabilities the accused would not have had the psychotic episode of 1991 from which he had recovered completely triggered for as long as it was necessary for him to commit the rape and normalise immediately thereafter without even undergoing any treatment. I therefore reject the defence in any loss of sanity resulting in temporary insanity or a blackout or amnesia and find him guilty as charged.

## JUDGEMENT ON SENTENCE

This is a very serious case infact there are certain pressure groups who are against the courts for being lenient with people convicted of crimes of rape and other crimes involving abusing young girls and women. Infact it would now seem as though a person who commits a crime of murder is punished less severely than one who commits rape and the provisions of Section 185(bis) are brought into operation because very few cases had been dealt with where an accused person charged with and convicted of murder is given up nine or fifteen years whereas in terms of the provisions of this Section you can get anything from nine years upwards. Although I have not written down the sentence I was of the good mind that you should be sentenced from twelve to fifteen years nothing less but I have been persuaded by your counsel and the grounds he has advanced are very persuasive in the sense that your case should be treated completely different from other cases wherein other people have also raped young girls of the same age as complainant. He has advanced reasons that by the evidence that has been led so far you have a history of a person who had at one stage had been admitted at a psychiatric centre where your mind was said to be abnormal you should be treated not like any other person.

Further evidence was led that your condition was caused by your over indulgence of marijuana which for all intensive purposes for this sentence will be equivalent to the abuse of intoxicating liquor.

Mr. Mavimbela as against that, you understand as I have pointed out that there are certain pressure groups especially if you happen to have been convicted of having abused a young girl who is not in a position to consent to your advances. These pressure groups feel that you should be made to suffer even asking that a death sentence should be imposed to such offenders. Some have even suggested that such people should have their private parts disembodied as a result of this behaviour. But there is a legal principle which we apply in these courts and that is each case must be treated on its own merit we don't do it as a rule but we look at the merits of each case.

What is aggravating in your case is, the mother or the guardian of this child has given evidence that the child since the incident has grown to hate any male person and she runs away from male

people so you can see the damage that has been caused is almost irreparable. Also, the child has not shown any interest in continuing with her school. She comes back from school under the illusions that there are certain people who may wish to attack her. These are very serious measures and the court may not, with ease, ignore them and look at your particular circumstances.

Considering all the facts and the special circumstances of this case the court will imprison you to an imprisonment for nine years backdated to 1<sup>st</sup> January 1998.

J.M. MATSEBULA

JUDGE