

IN THE MATTER BETWEEN:

REX
VS
ALBERT MATSE

CORAM	:	MATSEBULA J
FOR THE CROWN	:	MS. LANGWENYA
FOR THE DEFENCE	:	MR. M. MNISI

JUDGEMENT

19/05/99

RULING

Ruling on application at close of Crown's case in terms of Section 174(4) of the **CRIMINAL PROCEDURE AND EVIDENCE ACT 1967/38 AS AMENDED.**

At the close of the Crown case Mr. Mnisi moved an application for the discharge of the accused on the grounds that the Crown failed to make out a *prima facie* case against the accused. Ms. Langwenya for the Crown opposed this application.

The evidence of the complainant was to the effect that after accompanying her sister when she returned she came upon the accused. Accused called her twice and she did not respond. He then approached her and grabbed her by her left arm and proposed love to her. She turned down the proposal she said. Accused then told her that he wanted to sleep with her and she started to cry she said. Accused suddenly grabbed her by force and forced her to have sexual intercourse with her. She said she was crying all along and suddenly two cyclists came by and she appealed to them for assistance and told them what had happened to her. The cyclists asked if she was not the man's lover and she told them she was not and told them she did not even know him.

The two cyclists tried to assist and come to her rescue but met with vicious opposition from the accused who struck PW2 Dumsani Gwebu on his chest and grabbed his bicycle and threw it into the grass.

PW2 Dumsani Gwebu also corroborated PW1's evidence. He said complainant had asked them to come to her rescue and when they did accused became violent and accosted them. He grabbed his bicycle and threw it on the grass and struck him on his chest. PW2 said he realised that he might suffer grievously at the hands of the accused and decided to leave.

PW3 Constable Mbingo testified that they had left a word at accused's work place to report at the police station, accused subsequently reported.

PW4 Julius Mngomezulu told the court that PW1's parents came to complain to him about what complainant had told them. What she had told them is consistent with what she told PW2.

I do not propose to go into details in dealing with Mr. Mnisi's submissions suffice that I hold that the Crown has established a *prima facie* case. I further hold that a reasonable man acting carefully might convict on the evidence led so far. (See **R VS SIKHUMBA 1955(3) SA125**). I emphasize that a reasonable man "might" and not "should" convict. In the result the application for a discharge is hereby dismissed and accused is called to his defence.

JUDGEMENT

The court will refer to the ruling I made at the end of the Crown case when an application in terms of Section 174(4) of the **CRIMINAL PROCEDURE AND EVIDENCE ACT (as amended)** and that should be read as if it forms part of the judgement which I am about to give.

In that ruling I found that a *prima facie* case had been made and refused the application for the acquittal of the accused at the end of the Crown case. I referred to **REX VS SIKHUMBA 1955(3) SA125** and emphasized that a reasonable man might and not should convict and then dismiss the application for an acquittal at the end of the Crown case. I have listened to the accused's version of what happened. He has given a whole new defence which was never put to the witnesses which in my judgement is so incredible that no reasonable man can accept such a defence. The version that he has given was also given to his defence counsel according to him but strangely this was never put to any of the witnesses. The court has no hesitation to reject the new version that the accused has resorted to and find that this a fabrication on the part of the accused.

Referring to the medical examination, a certificate which was handed in by the doctor, the doctor stated in his opinion that in view of the fact that the complainant had had sexual intercourse about two weeks ago apparently from some other male person, the doctor was not in a position to say that the accused had raped her or not. The doctor's opinion was that she might have been raped. The doctor also referred to, among other things, the laceration of the vestibule of the complainant. I would not

go into the question of the hymen because any other male person who had sexual intercourse with the complainant previously could have torn this.

The evidence of Gwebu was not seriously challenged on the contrary it was admitted by the counsel who represented the accused that in fact these two person on bicycles had arrived there but Mr. Mnisi said because of the fact that they had taken liquor they could not have been telling the truth. But it was never denied that they had arrived there and that the complainant had reported to them what had happened to her.

The evidence of the people who were at the complainant's house told the court that she was in a state, which shows that she had been sexually assaulted, has not challenged. Nor was it disputed or challenged about what they said the accused had become violent and threatened to assault those witnesses who were present.

In the circumstances, the court is satisfied that the Crown has proved its case beyond reasonable and it would be safe to convict taking all the precautions taken in matters of rape. The Court is satisfied that this case has been proved beyond reasonable doubt and find the accused guilty as charged.

SENTENCE

The court will take into account that he is a first offender. That according to him he has a wife and two minor children and that he was employed at the time of his arrest. However, the Court must also take into account that this type of crime, that is rape, is on the increase and people keep on committing notwithstanding that the sentences are very severe.

The Court does not sentence or deal with sentences on the basis of what the public say but the cannot close its eyes to the concern raised by the public. The Court must send a very clear message to the accused and also to other would-be rapists that if they engage in these types of crimes and are convicted could be dealt with very severely. Especially at this day and age when there is HIV/AIDS virus which is so endemic the court will have to take that into account that it basically mean a victim is sentenced to death if it is found that the person who raped her had the virus. Because rapist is not using all the preventive measures, they do not have time to use any of the preventive measures to make sure the disease does not spread. Therefore, this is against the complainant's consent; she is also exposed to contract this deadly virus.

Considering all these factors, the Court finds that the factors, which favour the accused, are less than the factors that favour the community's concern about this escalating crime. In the circumstances the accused will be sentenced to an

imprisonment for eight (8) years without an option of a fine. The sentence is backdated to the 3rd December 1996 when he was arrested even though at some stage he was let out but the Court will consider that in his favour.

J.M. MATSEBULA

JUDGE