

HIGH COURT OF SWAZILAND

CRIMINAL CASE NO. 173/02

In the matter between:

REX

VS

LAWRENCE P. MANANA

CORAM

MATSEBULA J

FOR CROWN FOR DEFENCE

JUDGMENT 6TH JULY 2004

The accused stands charged with the crime of rape. The allegation being that upon or about the 25th November 2001 and at or near Vusweni in the district of Hhohho the said accused an adult Swazi male did intentionally have unlawful sexual intercourse with Promise Mhlanga adult female of Vusweni without her consent and did thereby commit a crime of rape.

The accused's attention has been drawn to the provisions of Section 185 bis of the CRIMINAL PROCEDURE AND EVIDENCE ACT as amended in that-

(1) complainant was assaulted during the rape;

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(2) complainant was repeatedly raped by the accused. These provisions of this Section has been explained to the accused who told the court that he understood them. The court has also ascertained whether his rights to legal representation were explained to him by the Magistrate Court and the accused confirmed.

What the provisions of Section 185 (bis) provides is that it takes away the court's discretion in so far as there is any sentence below a sentence of nine years. That has been provided by a statute and the court has no discretion in the event that the accused is convicted. By a minimum of nine years does not necessary mean that the court will give a convicted accused person nine years, the court can given anything from nine years up to twenty years, even more.

The charge was put to the accused who told the court that he understood and he pleaded not guilty. The Crown then proceeded to lead the evidence in an endeavour to prove their case against the accused.

The first witness which was called by the Crown was the complainant Promise Mhlanga. She stated, under oath that on the morning of the 25th November 2001 she was asleep with her four months old baby and her brother Nduduzo Ngobeni who was subsequently called as PW2. The complainant actually stated the time at which this crime was committed being 2am. The accused, as the court will deal with this subsequently took issue with how she knew it 2am and also the accused took issue how the brother also knew it was 2am. Indeed when the accused had made his submissions he made the point which is a valid point that the witness Nduduzo Ngobeni would have been 8 years old on the 25th November 2001 not 10 years as he has now turned 10 years and therefore, argues the accused the witness is not likely to have known about the time and accused argues further

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that it then follows that this witness says about this time because he has been schooled either by the sister or by the police.

From the court's experience, when crimes are committed people usually discuss what happened and in their discussion they also estimate time. The time 2am or after 2am which was estimated by PW1 was not to be exact as 2am. Therefore there is the probability that the witness PW2 would have got this specific time because of the discussion which followed as a result of the commission of this crime. But I must hasten to add that that does not by any stretch of imagination mean that the witness has therefore been schooled to come and say what he said in his evidence. The witness was merely saying that because as I have explained there is a possibility that he and the sister and other people estimated the time to have been 2am.

Promise Mhlanga stated that as she had a baby she was not fast asleep. She then heard someone calling her mother's name Sitakele. She then said the caller then forced open the door and entered. The intruder asked what she and the other occupants were doing in the house. She said she had a lantern or a lamp that was burning but not very brightly but once the intruder had forced the door opened she increased the volume of the flame so that she could see who the intruder was. It was her evidence that she asked who the intruder was and the intruder merely grabbed hold of her by the neck and began to strangle her so that she could not raise an alarm. It was her evidence that the intruder carried a bolted stick and produced a 'clasp knife' which according to her was a three star knife' and threatened PW1 and pressed her on the bed and ordered her to undress. PW1 resisted the order by the intruder to take off her pair of panties. The intruder by the use of the knife which he was armed with cut the pair of panties and in the process it was removed from the body of complainant and the intruder proceeded to have sexual intercourse with PW1 against her will and without her consent.

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The intruder also poked her on the right side of her upper thigh with the back of the knife. In the process she suffered contusions. The intruder also scratched her around the neck and base of the neck. The intruder repeatedly raped her three times so she testified. PW1, at some stage moved out of the bedroom of the house in which she and the others were sleeping in order to prepare some food for the baby, the intruder followed her and demanded to have more sexual intercourse. She stated that it was at that stage that she was able to see a stainless kitchen knife she picked up and stabbed the intruder somewhere at the base of the intruder's neck. The two then started struggling for the possession of the knife and in the process the knife's blade broke. The broken knife blade and the handle was subsequently found by the police at PW1's house and has been handed in as an exhibit.

The intruder then ordered PW1 to go back to her sleeping room and instructed her to wash herself and himself because he himself at that stage had blood around the neck where PW1 had injured him. The intruder, according to PW1 warned PW1 not to dare report him or lay criminal charges and said if she did that he would one day come out of prison and will deal with her. PW1 stated that the whole ordeal lasted from the time plus minus 2am till 4.30am when the intruder left.

PW1 and PW2 went to the nearby homestead and reported the ordeal. PW1 stated in her evidence that the intruder left with the bolted stick and his knife and according to her the intruder was also wearing some sandals. She said she had plenty of time to notice the intruder because of the time span from the time the intruder entered up to the time he left. She even noticed that the front teeth of the intruder were somewhat rotten.

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The next door neighbour was one La Matsebula who was subsequently - called as PW3. She made a full report of what happened to La Matsebula which in terms of our law would be admissible even though the accused who is now facing the charge was not present when that report was made. I must hasten to add that that is admissible not as corroborative but to show persistency in the evidence of the complainant. In other words, if she made a report to PW3 Lydia Matsebula about what happened

to her and goes and make a different report to another person then there will be this inconsistency and that will cast some doubt as to whether she infact was telling the truth.

PW1 stated in her evidence that subsequently the matter was reported to the police and PW1 identified the broken knife which she alleged she used against the intruder and this was handed in as exhibit "1". She also identified as 'clasp knife' with three stars which was handed in as exhibit "2" and stated that the intruder was armed with that exhibit "2". She also identified a pair of cut panties, blue in colour, which was handed in and said these pair of panties belonged to her and it was the pair of panties that was cut by the intruder when the intruder forcibly raped her. She also identified before the court a pair of sandals which she stated that the intruder was wearing and this pair of sandals were handed in as exhibit "4". She also identified a bolted stick and stated that it is the stick that was carried by the intruder and this was handed in as exhibit "5".

She then identified the accused and said it was the intruder who came that morning and raped her. She also stated that this was not the first time before court that she identified the accused which would be very easy for her to say it is the accused but she said she had also identified the accused in an identification parade which was subsequently mounted by the police.

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PW1 said that at the identification parade there were ten people in a line when she identified the accused as the person who raped her.

The accused said her evidence should not be believed because he said there were ten people in the identification parade and not the eight which were infact the number of people attending the identification parade. The court does not agree with that line of argument that simple because a witness makes a mistake about the number of people who attended an identification parade, the court should therefore reject her evidence as being untrue. Because the number of people who attended the identification parade is not an issue but whether the witness was able to identify the suspect amongst the number of people whether they will be eight, ten or fifteen. That argument by the accused the court rejects as a reason for rejecting her evidence.

PW1 also identified photos showing her neck injuries. That photo was handed in as exhibit "A1". She identified exhibit "A2" showing the injuries around her neck and "A3" showing injuries on her right thigh. She also identified exhibit "A4" a photo showing PW1 touching the suspect in the parade. That was in short the complainant's evidence, PW1.

The accused was afforded an opportunity to cross-examine her. The accused wanted to know whether the door to their house was not locked so that the intruder was able to enter. PW1 explained that there is a problem with the door sometimes it does not lock properly and accused went further wanting to know whether she PW1 was the person who had closed the door that evening.

The accused also wanted to know who this Sitakele is and the complainant stated that Sitakele was her mother's name. Further, accused wanted to know whether if Sitakele had been present and had

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been sleeping in the same room as her and the children and the complainant said yes because her mother lost her husband in 1998 thereafter they all shared the same room if and when the mother was present. The accused wanted to know further where the mother was on that particular day, the complainant stated that the mother had gone to Barberton in the Republic of South Africa.

Accused then put an extra-ordinary question to complainant to the effect that she the complainant had opened for the intruder. That would have suggested that the intruder was infact the accused otherwise why would he say the complainant opened the door for the intruder if he was not there and knows nothing about that. But the court is not going to base its judgment on that but the court thinks it is strange for a person who was not there would put a question to the complainant to the effect that she the complainant opened the door for the intruder.

Another extra-ordinary question the accused put to the complainant was that she, the complainant knew the accused very well. That question following after the accused had put it to the complainant that she opened the door would also suggest that the accused would come up with another question why he is putting such questions and the court waited with some anticipation that the accused would say, 'you opened the door for me, I went in there with your consent' but that was not to be.

During her evidence the complainant had said that after she had given the description to certain persons, certain people had seen the person going pass there and that is how the accused was pointed out. The accused put a question during cross-examination to the complainant to the effect that who these persons who had seen the person whose description she had given. The complainant said it was Manqoba Simelane. That is as far as the question of Manqoba is given

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because he was not called as a witness and the court is not going to speculate what he would had come to say.

In my considered view, the complainant did not break down during cross-examination. She stood her ground and there can be no reason why her evidence cannot be so far, accepted by this court.

The Crown then led the evidence of Nduduzo Ngubeni whose evidence was pretty much the same as that of PW1. To this end, the court would say there is corroboration of the complainant's evidence by Nduduzo Ngubeni, which is an essential element in crimes of rape and other similar crimes.

The accused was given an opportunity to cross-examine PW2 and he brought in the question of how PW2 was able to say that the time was 2am. And how he was able to say the intruder's front teeth were rotten. There again the court takes the point that has been raised by accused but again I will explain that in matters of this nature after an incident people usually discuss therefore there is a likelihood that PW2 gave the evidence regarding the time and the broken teeth because there was a discussion after the crime had been committed.

The Crown called as PW3 Lydia Matsebula who gave detailed report concerning the report that was made by PW1 to her. I have already indicated that the contents of that report are not tendered to be corroboration of the complainant's evidence but as showing consistency of her evidence. What is corroborative of PW3's evidence corroborating the evidence of PW1 is the fact that the witness PW1 and others arrived at her house (PW3) at 5am, which more or else tells you the time that PW1 said the accused was at her house until 4.30am.

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The Crown then led the evidence of Sergeant Howard Hlophe. The witness was asked to mount the identification parade. He completed the identification parade form, which he read, confirmed and handed it in as exhibit "A7". He stated that he mounted this parade and the person in question who was to attend the parade as a suspect was Lawrence Kubuta Manana. The charge laid against him was rape. He said this identification parade was held at the Pigg's Peak Correctional Services' premises at 10:25hrs. It was his evidence that the witness who was detailed to take witnesses to the parade was 2421 Constable E. Mkhathshwa and the police responsible for taking away the witness from the parade was 3878 woman Constable S. Bembe. Because the siSwati language was being used he said there was no need for an interpreter. He said he informed the suspect the allegation against him and the purpose of the parade and gave him an opportunity to call a legal representative if he wishes. The suspect indicated that he had no legal representative.

There was also another officer who was in charge of taking photos who was 3024 Detective Sergeant S.M. Dlamini. It was further his evidence that in the parade there were eight persons. He said they were more or less of the same built, height, age and appearance, occupation, more or less similarly dress to the suspect's dress. In this particular case he said they were dressed in football gear. It was his evidence further that he told the suspect that he could take any position that he wishes to take and

after each and every witness has been called he can then change. He then asked the suspect, the accused whether he was satisfied that the answer was that accused was satisfied. It was his evidence that the suspect was in position three initially from the left and the first witness was Nduduzo Ngubeni. The language he used in asking these witnesses to do certain things was siSwati. He said this witness was asked to point out the person in the parade by touching them of the shoulders, if such a suspect was on the parade. He said the result was the witness

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pointing at the suspect on position three on the left, which was the - accused. He said the suspect was given an opportunity to change positions, if he wished. The suspect chose not to change his position and the next witness was Promise Mhlanga. The language he used in instructing the witness what to do was siSwati again. The witness was asked to point out the person on the parade by touching him on the shoulder if he was on the parade. The witness told the court that it was explained to the witnesses to point out the suspect who was in connection with the alleged rape committed on them. He said the result was that she pointed out at the suspect on position 4 from the left. As there was no need to call other witnesses that was the end of the parade.

It was PW4's evidence that the people who attended the parade were the following:

Sipho Mabuza who is 26 years who came from Mbabane;

Sifiso Mabuza who is 26 years who came from Mahlangatsha;

Sibusiso Dikiza also 26 years from Mvembili;

Alfred Mkhumane was 27 years from Mbabane;

Wildow Mashaba who was 26 years from Msunduzi, Mbabane;

Sabelo Zwane who was 26 years from Mbabane;

Nkosingiphile Dlamini who was 27 years from Mvembili.

The accused was given an opportunity to cross-examine the witness.

He was concerned with the height of the person who was standing next to him. He said that person was shorter than him. The witness insisted that the person was more or else the same height as the accused.

The court is satisfied that there were no irregular proceedings as regard to the mounting of the identification parade as reflected in exhibit "A7". There is no reason why this court should not accept his evidence.

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The Crown also led the evidence of PW5 2421 Constable P. - Mkhathwa and the court has already dealt with the part that the witness played in the identification parade. She confirmed that she did her duties to the best of her ability to ensure that the parade was carried out in accordance with the rules and that the witnesses were not allowed to contact one another either before or after the identification parade.

The Crown then led the evidence of PW6 3878 Constable Dlamini who also took part in the supervision of the identification parade. He also gave evidence that nothing abnormal happened during the mounting of the identification parade.

Then the Crown led the evidence of PW7 3024 Detective Sergeant Constable Dlamini. He was the

photographer and he identified the photos before court. The court accepts his evidence and also the photos that were handed in as exhibit showing different positions of the persons in the identification parade as well as the injuries sustained by the complainant.

The Crown then led the evidence of PW8 3802 Detective Constable Mbongeni Mlangeni. He is the investigating officer. He received a report and started investigating the case. He also confirmed that the complainant had sustained injuries on her right thigh and around the neck. He also identified the pair of panties which according to him were torn and the "three star" knife. And he deposed to having been given a description and as a result he went to a certain homestead. He also deposed that the person had some rotten front teeth and he deposed having been told about a stainless knife used by the complainant on the assailant which he stated he found at the complainant's homestead. He subsequently traced the accused that was pointed out by the complainant in a queue where he was queuing to receive meat. He said the accused was in a queue and there was a

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crowd of people there, there was a party. He said he then confronted - the accused and introduced himself and warned the accused in terms of the Judges' Rules. He said the accused after warned of the Judges' Rules he led him to a flat and there the accused handed to him a pair of brown broken sandals, a three star clasps knife, and a bolted stick. He then informed the accused that he was under arrest being suspected to have been the person who has committed the crime of rape. He took accused to detain him at the police station. He said he received from the complainant, the pair of blue panties that were torn and the stainless knife which was broken.

He said he again cautioned the accused in terms of the Judges' Rules and the accused asked that he be taken to Pigg's Peak hospital for treatment for injuries he sustained. Apparently the accused did say how he sustained these injuries but because this would amount to a confession the court would not allow the witness to divulge what the witness said to him. However, the witness took the accused to the hospital and took him to a doctor who completed RSP8. He then formally handed in all the exhibits, which he said they were exhibits in the caves.

The accused was then given an opportunity to cross-examine the witness. Accused wanted to know what time the witness took the complainant to the doctor. And the witness' answer was that immediately after receiving the report.

The Crown then led the evidence of PW9 Dr. Robutt. He said he was a medical practitioner and in November he was employed at the Ministry of Health and stationed at Pigg's Peak. He gave his qualifications which consist of Bachelor of Medicine and Bachelor of Surgery obtained at Makerere University and he had been practising since 1987. He said on the 25th November 2001 he examined PW1

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and completed RSP88 which he read, confirmed and handed in as exhibit "A9".

The doctor found all the injuries sustained by the complainant that is around the neck and the right thigh and under opinion the doctor said of the complainant that there is substantial evidence of sexual intercourse by violence.

The doctor also said he examined a person of Lawrence Manana on the same date. He said he had some injury puncture wounds to the left side of the neck. He said these were compatible with stab wounds by a sharp objects. The medical examination form was handed in as exhibit "A10". The accused was then afforded an opportunity to cross-examine the doctor, he wanted to know how many stab wounds did the doctor found around his neck. The doctor said he found one stab wound at the base of the neck. The accused wanted to know whether that was a stab wound or a scratch mark. The doctor said it was not a scratch wound but a puncture which would have been caused by a sharp object. The accused put it to the doctor that he had not been stabbed but scratched. The doctor was adamant that he found a puncture which had been caused by a sharp object. The Crown rested its

case.

The accused's rights were explained to him fully and he chose to make a sworn statement. He then stated that on the 25th November 2001 he was at home and there was a night vigil. He said the night vigil started on Saturday the 24th November 2001. During the evening he had a quarrel with one Manqoba Simelane and others. The quarrel was about that Manqoba Simelane and the others were making noise and when he tried to tell them to stop the noise Manqoba scratched him around the neck. He said after this incident they left and he does not know where they went. He said thereafter a certain Constable Bheki Dlamini came out and asked him where accused room was. He

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said he asked him in the presence of Vuseni H. Manana. He said he - and Vuseni went and showed the officer where his sleeping room was. He said the police then asked him where are clothes he had been wearing the previous day. He said he handed to him a black pair of trousers and a jacket. He said the policeman accused him of wearing these clothes when he went to rape the complainant. He then informed him that he was under arrest. The accused was then taken to the police station.

He said he informed the police that a boy had injured him and they then took him to hospital for treatment. He said the following day he was in the identification parade. He was identified by PW1 and PW2. He said he knew PW1 before this incident. He said this is how he was arrested.

The Crown cross-examined the accused and the main crux of the examination was that there were certain questions which he did not put to the witness. For the first time the accused informed the court that he did not put the questions because at one stage he was a mental patient and he is in the habit of not remembering certain things and he sometimes gets confused. That, beside being for the first time that he mentioned it, but hardly compatible with the other questions that he put to the different witnesses including a question which he put to the doctor about whether the smell the doctor got from the complainant's private parts was not because the complainant had a baby of four months. When the doctor explained that such a smell would be different from a smell of the woman who has been raped the accused persisted that there is no different in such a smell. That to me, does not seem like a question that can be put by a person who has mental instability. There were quite a number of very incisive cross-examination questions which the accused put to the witness. Therefore, the court does not accept that the accused has mental instability.

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The court asked accused if he had a witness to call. He said he wanted to call Vuseni Hlophe. Vuseni Hlophe came and gave a totally different story from what the accused told the court about what happened when the police came while he was with him. According to the witness the police asked the accused where his sleeping room was and then asked for certain exhibits, the accused thereupon lifted up a sleeping mat and produced the exhibits. It appears to me that the story given by the accused is a bold denial and a totally different story from the one given by the witnesses. On the other hand the witnesses corroborated each other which is not the case with the accused and his witness.

The Crown has submitted that they have now made a proven case beyond reasonable doubt that the accused should be convicted of rape as charged.

The accused has attacked the question of the witness PW1 for having said there were eight people instead of ten and on that score he asked that the witness' evidence be rejected. He also said the witness Lydia Matsebula was supposed to have said in the summary of evidence that this happened on the 28th November but when she gave evidence she said on the 25th. Accused said that has to show that the story against him has been made up and that these witnesses had been schooled to testify against him.

The accused also took issue of PW2's evidence about the time being 2am and said PW2 is now 10 years old he must have been 8 years at that time. And it is highly unlikely that a child of 8 years would have been able to know the time as being 2am unless he had been told by the sister to say so. J have

dealt with that in my judgment earlier.

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In the result, the court does not accept the accused's explanation and - defence and finds that the Crown has proved its case beyond reasonable doubt and accused is found guilty as charged.

JUDGMENT ON SENTENCE

If you did not know, you must know that these cases are not child's play. We do not know whether you are HIV or full-blown AIDS. We do not know what is going to happen to the poor complainant who gave you no right to invade her privacy. I would not be surprised if you are infact HIV because it takes time to show. I think it is high time, that these judgments should be referred to the Parliament that people who have raped a woman should also be examined to find out if they are not HIV positive before the trial starts. If they, knowingly rape a woman that should be tantamount to attempted murder.

The complainant is an innocent woman, minding her own business. In the dead of the night he comes, invades her privacy, forces her and stabs her and do all sort of things on her. Now you want the court to take into account that you are first offender and you have children whose mother is dead, you say are receiving medication - which the court is going to take into account but how much would that help you as far as sentence is concerned, I do not know because the severity of what you have done on the complainant is nothing compared to the consequences the complainant is going to suffer as a result of this. And if these courts are still going to give people like you lenient sentences it won't be long before people take arms against the courts and want to punish people who go about invading female's rights. God help us all that we do not get to that stage because there will be so much chaos if the members of the public take the law into their hands. While I am going to take into account that your mitigating factors I am also bound to take into account the right of these females who, as Mr. Maseko has rightly pointed out that these cases are prevalent, it does not seem to make any difference whether we pass

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severe sentences, deterrent sentences but it does not seem to have an - effect.

I have said time and again that murder cases are sometimes better because you would get people who have a quarrel and at the heat of the moment, one takes up a dangerous weapon and someone is fatally injured and he dies. You invaded this woman in the privacy of her own house where she is supposed to be protected. She is not like a woman walking about in the dead of the night and you would say you were tempted. I am not saying that should happen but here it's worse where a person is in her shelter, protected, you come in the dead of the night you invade her privacy. It appears to me you have not shown any remorse during the trial and you are the type of person who would go on doing this if the court would show you mercy. You would get out and think it is worth the game and go on doing it. I hope the children which you say you have, will be looked after by your uncle the Manana or any other relative but hard luck. The type of the parent, like you who go about raping people in the sanctity of their houses have to be kept behind bars for a very long time. In so far as the other ground of your requests that the court takes into account that you are a mental patient and you are still receiving treatment, report to the Correctional Services they will make sure that you continue receiving this treatment if it is true that you are receiving the treatment.

As I have indicated, the court has no option but to consider the provisions of Section 185 (bis) as the CRIMINAL PROCEDURE AND EVIDENCE ACT that does not mean you will get the nine years' sentence - you can get anything from nine years up. You will be sentenced to an imprisonment for 15 (fifteen years) without an option of a fine. Your sentence is backdated to the 26th November 2001 the date on which you were taken into custody.

18 Rights to appeal and review explained.

J. M. MATSEBULA