

IN THE HIGH COURT OF SWAZILAND

CASE NO. 41/03

REX

Vs

NDLELENI NHLANHLA MAPHANGA

CORAM

K.P. NKAMBULE –J

FOR CROWN

P. DLAMINI

FOR ACCUSED

IN PERSON

JUDGEMENT 12/8/04

The accused is charged with the offence of rape. It is alleged that on or about the 9th July 2002 and at or near Zombodze area in the Shiselweni region the said accused did wrongfully, unlawfully and intentionally have sexual intercourse with one Nombulelo Thandeka Maphanga, a Swazi female minor of six years, without her consent.

Alternatively the accused is charged with the offence of indecent assault in that upon or about the 9th July 2002 and at or near Zombodze area in the Shiselweni region, the said accused did wrongfully, unlawfully and intentionally placed his penis on Nombulelo Thandeka Maphanga's vagina.

The crown called a total of five witnesses. PW1, Xolile Myeni told the court that both accused and complainant axe her neighbours. According to this witness on the 9th July 2002 she asked complainant to give her some avocado pears from a nearby Maphanga homestead. Complainant then asked if she can tell her a story. Complainant then related how the accused called her for food and thereafter grabbed her, stripped her of her panty and proceeded to have sexual intercourse with her.

According to PW1 she asked complainant whether she told her mother of what had befallen her. She said she did not tell her mother as the accused had threatened her that should she tell her mother he would kill her.

On arrival from work PW1 then asked complainant to relate the story to her mother, which she did.

PW2, Jenneth Nxumalo told the court that complainant is her daughter and that she was born in 1996. According to this witness on the 9th July 2002 she left her homestead to attend to her neighbours who were bereaved. She left her children at the homestead of the accused as they are related.

Accused also went to the bereaved homestead to assist in erecting a tent. PW2 spent the night in the homestead. After the funeral on the following day PW2 returned to her homestead and, because she was tired after spending the night without sleeping she went straight to bed.

On Monday morning she woke up and went to work. When she went to work she used to leave the children at PW1's homestead.

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After six days from the day of the funeral she went from work to collect her children from PW1's homestead. PW1 then enquired from complainant whether she had told PW2 about the matter. Complainant then related to PW2 that accused had raped her.

According to PW2 complainant told her that the accused after having given her some food enquired from her if she needed a Christmas present. Complainant's response was that she did not need any

present. Accused then grabbed the complainant and put her on the bed. She said the accused then inserted his penis in her vagina.

Complainant's mother, PW2 asked where her panty was when this happened. Complainant answered and said the accused did not remove the panty, but simply put his penis by pushing the panty away.

It should be remembered that PW1 told the court that complainant told her that the accused removed the panty before they had intercourse. One of the versions must be untrue.

According to this witness (PW2) she took the complainant home and observed her private parts. PW2 stated that complainant's vagina had some whitish stuff. She then washed the child. On the following day the child was taken to Hlatikulu Government Hospital where she was examined by a medical doctor.

PW3, the complainant Nombulelo Thandeka Maphanga born in 1996 gave an unsworn statement due to the fact that she does not understand what it means to tell the truth. She could not understand the nature and religious sanction of an oath. It is dangerous to rely on the evidence of this witness - more particularly because it was not corroborated by the evidence of PW5, the doctor. Such evidence needs strong corroboration.

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The findings of the medical doctor who came and gave evidence is that the hymen was intact. Further that there was no evidence of penetration. He further stated that all the areas around the child's private parts were normal. She had no discharge; and that she could not even insert a finger in complainant's vagina as the examination seemed to be painful.

It would be unsafe as well to convict the accused of the alternative charge of indecent assault. As already mentioned that the evidence of the complainant cannot be relied upon, then the accused cannot be found guilty of indecent assault.

For the foregoing and conclusions the accused is found not guilty. He is accordingly acquitted and discharged.

K.P. NKAMBULE

JUDGE

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