IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Criminal Case No. 317/2002

In the matter between:

REX

Vs

MUSA HLATSHWAKO

Coram Annandale, ACJ

For the Crown Mr. P. Dlamini

For the Defence In Person

JUDGMENT

The tragedy of a young and innocent little girl whose frail body is abused by a depraved and vile man can never be allowed in any decent and moral society. All concerted efforts to eradicate the scourge of the

2

vilification and sexual abuse of all women, but especially so in the case of young girls in Swaziland, has proven to be futile to a great extent, especially so in the case of the complainant in this matter.

The accused person, who through lack of financial means had to conduct his own defence, pleaded not guilty to two counts of rape. For the reasons below, it is helpful to quote the charges verbatim.

"COUNT ONE

The accused is guilty of the crime of RAPE.

IN THAT upon or about 24th July, 2001 at or near Mbabane area, in the district of Shiselweni, the said accused did wrongfully and intentionally have unlawful sexual intercourse with Pinkie Gabsile HIatslmako, without her consent, and did thereby commit the crime of Rape.

COUNT 2

The accused is guilty of the crime of RAPE.

3

IN THAT upon or about 27th February, 2002 and at or near Mbabala area, in the district of Shiselweni, the said accused did wrongfully and intentionally have unlawful sexual intercourse with Pinkie Gabsile Hlatshwako, without her consent, and did thereby commit the crime of RAPE."

From the onset, it is necessary to stress, yet again, the Importance of a correct formulation of an indictment. For justice to be done, and to be seen to be done, and also for reason of affording an

accused person a fair trial, it is necessary to restate that the crown (the prosecution) bears an onus to prove the guilt of an accused person beyond a reasonable doubt, not beyond any doubt and also not to raise a reasonable suspicion or a balance of probabilities. The accused person has an absolute and inalienable right to be properly informed of the details of the charge, which it proved, will substantiate his guilt. It is therefore imperative that the formulation of the charge be precise, accurate and correct.

The Criminal Procedure and Evidence Act, 1938 (Act 67/1938) sets out the essentials of an indictment in that it "...shall set forth the offence with which the accused is charged, in a manner, and with sufficient particulars as to the alleged time and place of committing such offence and the person ...against whom ... such offence is alleged to have committed, as

4

ale reasonably sufficient to inform such accused of the nature of the charge." (Section 122)

Where theft is charged, the dates between which a deficiency occurred may be alleged, in other prosecutions some leeway is also afforded. Various presumptions are also catered for. Section 148 comes to the rescue of otherwise insufficient or defective indictments, for instance, it provides for an extention of time three months before and after an alleged date to be deemed sufficient enough, under certain circumstances, to inform the accused of the date of the alleged offence.

Essentially though, the accused person has to be succinctly and properly informed of the case he is to meet, which is to be proven by the prosecution.

Over and above '"docket' disclosure, the established procedure in Swaziland is that the indictment is accompanied by a summary of" evidence that the crown intends to prove at the trial. The source of the summary is the police investigation docket or file, containing the statements made by witnesses during the investigation phase and it is thus so that the summary of

5

the evidence of a particular witness is precisely that, I will revert to the summary of the complainants evidence further down. The essence is that the indictment is 'amplified' to the same extent of further particulars sought and advanced, which provide the details of the case an accused person is to meet at the trial.

In the course of this trial, the evidence of five witnesses for the crown was heard and documentary evidence was also admitted. The accused testified in his own defence.

The complainant (PW2) testified that the accused is her "brother", meaning that his father is a brother of her father. On the 27th February 2002, he had intercourse with her 'at the back of the kraal'. This was not the first time, as he had also done so the previous year while they were 'at the river.' It needs to be recorded that the date of the incident referred to here was in the form of an affirmative answer to a leading question by the crown's counsel - "Do you recall the events of the 27th February 2002?" Later in the trial it transpired that the complainant was very vague and uncertain insofar as her ability to recall specific dates are concerned. At best, she was able to distinguish between the years 2000 and 2001, but not the months of a year,

6

nor specific days of any particular month. It is however not the question of
precise or imprecise dating which leads to the end result.
Thereafter, she testified that in 2001, they had intercourse 'in front of the kraal'. She then said that in 2002 they had intercourse 'at the garden', where they had gone to pick tomatoes. In all, during the years 2001 and 2002 the accused is said to have had intercourse with her some four times, two of which she reported to her mother, which led to two medical examinations of herself, at Nhlangano in 2001 and Hlatikulu in 2002.

She says that one Mthokozisi (PW4) witnessed the events. She also stated that she did not record a statement with the police, quite emphatically so.

Under cross examination, the accused contested her evidence, putting it to her that her evidence is what her mother told her to say, with her mother having an axe to grind with him and trying to avoid having him as an extra mouth to feed during a shortage of food.

7

During the hearing of this evidence, and noting that a summary of her evidence has been filed together with the indictment, the source of which ordinarily being a statement made to the police, I asked some questions to this witness. She was adamant that she had made no statement to the police. When asked where the information would have been obtained to draft the summary of her own evidence, which' also contains the dates and places of the incidents alleged in the indictment and the places where it would have occurred, she said that it is her mother who said so, as was alleged by the (undefended) accused in cross examination.

Further, when asked how many times she has had intercourse, contrary to her evidence-in-chief where she had it as four times, she now increased it to ten times.

When further asked by the accused why it did not appear in the police statement, which would be used to formulate charges against him, that he was not also alleged to have had intercourse with her at the kraal, the over and the garden, she responded by saying it is because she did not tell her mother about it. This is in stark contrast to her earlier version that indeed she told her mother about it.

8

The so called eye witness, Mthokozisi (PW4) who was called to verify what he would have seen happening. At the time he testified, he was a young boy of thirteen, who experienced quite some difficulty in conveying to the court whether he understood the difference between true and false evidence. He was asked about the date(s) his evidence would relate to and he vaguely placed it somewhere in the year 2001.

His evidence is that he saw the accused 'sleeping' with the complainant, lying on top of her. This he says he saw from a vantage point of climbing on top of the poles at the kraal, with the other two (as indicated) some 30 paces away. They were in a bare area of the garden.

According to the complainant, the intercourse in 2001 occurred at the kraal and the incident in the garden during the following year, 2002, Although both the complainant and this child were quite vague about times of events they testified about, they each place the event in the garden in different years.

9

The mother of the complainant, Zanele Mavimbela (PW5) was also called by the crown to testify. She said that on the 24th July 2001 she noticed that her daughter walked with a limp. On enquiring, she was told that it was due to pain under her heel but that on checking it, she found nothing wrong.

Sometime 'later' or after 'a long time' or 'subsequently', she again noticed that her daughter had a difficulty to walk and this time seriously questioned her. To her horror, she was then told that the accused had raped her child.

Eventually, after relating it to an elder aunt who undertook to speak about it to the accused and again due to a difficulty of the complainant to properly walk, she took her to a hospital, was referred to the police when making her story known and subsequently the complainant was medically examined at the Nhlangano clinic. The accused was then arrested but released a month later to write his December exams.

The medical practitioner who conducted this examination could not be located to give viva voce evidence, but with the informed consent of the

10

accused, the doctor's report was admitted as evidence, exhibit "B". According to the report of the 3rd August 2001, the complainant (7 years of age at the time) had a perforated hymen and a perforation of her fourchette. The doctor recorded an opinion of "evidence of sexual activity".

The ordeals of the complainant apparently continued, as she again reported to her that she was raped by the accused. This time, she was told where it would have occurred, namely in the bush where they had gone to cut logs. Yet again, on the 27th February 2002, she became suspicious when on her return from Mbabane, she found the accused and her child exiting the grandmother's hut. On questioning her child, she was told that the accused had raped her on top of the grandmother's bed, whereas the accused said that they did nothing.

Despite this, she did not make a report to the police or to take the child to a doctor, but instead took the child to stay at her parental homestead. She eventually reported the matter to the complainant's father who in turn alerted the police, resulting in a medical examination on the 4th March 2002.

11

Dr. Torya who examined the complainant testified in court about Ms observations and finding. The crux of his evidence is that he could not come to any firm finding to conclude recent rape or sexual intercourse. He noted that her hymen was torn but that it would have much been longer than six days prior to the examination and that it could have been caused by other causes than sexual activity.

When cross examined, the complainant's mother was confronted by the accused, accusing her of bearing a grudge against him. He repeated that she disliked him as he was an extra mouth to feed during a shortage of food and that she wanted him out of the way. She denied it. She confirmed that her accusations of him were based on what she was told by her young daughter in 2001 and 2002, now eleven years of age, further that her suspicions were aroused by her uncomfortable gait and finding the two of them exit a hut together. She did not notice anything untoward when washing the child's clothes.

Notably, her evidence about receiving a report of rape from her daughter at the time they exited the grandmother's hut was not also mentioned by the child in her own evidence, nor that she was raped on top of

12

the grandmother's bed, as was vividly summarised by the crown prior to the trial.

Also notably absent is any mention of the equally vivid description in the summary of evidence which gave rise to the first count of events in July 2001 when the accused was said to have raped her inside his own abode.

The final prosecution witness (PW3) is the investigating officer who gave his account of receiving complaints, eventually arresting the accused and arranging for medical examinations. On cross examination, having solicited evidence about an alleged confession, the now familiar allegations of torture were made, as is frequently heard in so many trials. I need not delve in any detail on this as no admissible evidence about any 'confession' or admission was adduced by the police officer, for serious consideration by the court, save the bald allegations.

In his own evidence, the accused gave an exculpatory version of events, amounting to a denial of the crown's case. He gave his version of events, placing himself away from the incidents as related by the

witnesses for the prosecution. He also said that the distance between the kraal and vegetable patch is too far for Mthokozisi (PW4) to have been able to see

13

what. he narrated, a matter not canvassed with that witness. He was not enticed to come forth with, any admissions during cross examination by the crown's counsel and restated his defence as being loathed by the complainant's mother for the aforementioned reasons.

On a final analysis of the evidence, it needs re-mentioning that there is no onus on any accused to prove his innocence but that it is the prosecution who has to prove his guilt. In order to do so, reliable evidence has to be placed before court, which in turn must prove and substantiate the allegations in the charge.

In the present matter, I have no choice but to draw an adverse inference from the very substantial deviation between the summary of the complainants evidence, sourced from her statement to the investigating police officer, and her own evidence in court. The different stories simply do not match. To make it worse, she denies that she ever recorded a statement with the police, whereas the police officer testified that she did. She stated that the source of information is her mother.

14

In her statement to the police, which I have to accept that she indeed made, contrary to what she says, it is stated that the two charges emanate from events that occurred in the hut of the accused and the hut of her grandmother. This is totally at odds with her evidence that each and every event, whether four or ten times, occurred in the open.

I accept that the complainant is now a young girl of eleven, seven or eight years of age at the time of the alleged incidents. This does not dispense with the requirement that evidence must be reliable at minimum, to sustain any conviction. This is especially so in trials where the complaint is of sexual nature, moreso when the evidence of a child is considered.

The medical evidence does not serve to be a safeguard of any sort. Both examinations justify findings that sexual activity cannot be ruled out, but even if taken as proof of sexual intercourse, neither report supports an adverse inference of any sort against the accused. If it was so that the girl was raped a few days prior to the second examination, there was no evidence of forceful penetration resulting in bruises or visible injury at the time she was examined. The first medical examination is so inconclusive as to be peripheral at best.

15

The contradictions in the evidence of the complainant and other witnesses, as indicated above, does not auger well for a conviction with any measure of certainty, let alone beyond reasonable doubt. The law is clear and certain that the large measure of doubt by necessity has to accrue to the accused.

As mentioned at the onset of this judgment, the tragedy of an abused child cannot be condoned. If this unsuccessful prosecution has to leave at least one positive legacy, it would be to alert the authorities of the inadequate awareness of children and their parents as to how such complaints are to be made and dealt with. Timeous examination by sensitive doctors can vastly improve the lot of molested girls. So can sensitised and specialised police officers who become aware of complaints of sexual abuse. The prosecution service could well learn from neighbouring jurisdictions where specialised and dedicated sexual offence prosecutors thoroughly interview and assess witnesses prior to prosecutions, sifting the cases and ultimately obtain very high percentages of convictions.

16

In the event, it is ordered that the accused be acquitted on both counts of rape.

ANNANDALE, ACJ