IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 143/02

REX

VS

THULANI FELIX MBHAMALI

CORAM FOR K.P. NKAMBULE -J MS

CROWN FOR WAMALA MS VILAKAZI

ACCUSED

JUDGEMENT 2/12/04

The accused person is charged with the rape of a 15 year-old girl.

The crown alleges that upon or about 20th September, 2000 and at or near Logoba area in the Manzini region, the Accused did wrongfully and intentionally have unlawful sexual intercourse with Thulie Lukhele without her consent, and did thereby commit the crime of rape.

The crown further alleges that this rape is accompanied by aggravating circumstances as envisaged under Section 185 (bis) of the Criminal Procedure and Evidence Act, 1938 as amended in that:

a) at the time of the commission of the crime complainant was a female minor of fifteen (15) years.

Alternatively that the Accused is guilty of contravening Section 3 (1) of the Girls and Women's Protection Act No. 39/1920. In that upon or about the 20th September, 2000 and at or near Logoba area in the district of Manzini, the Accused did intentionally have carnal connection with Thulie Lukhele, a female aged (15) fifteen years.

The Accused has pleaded not guilty to both the main charge of rape and the alternative charge.

The first witness for the crown called was PW1 Thulie Lukhele, the complainant. This witness told the court that she stays at Nsangwini in the Mankayane sub region. She testified that on the 20th September 2(000 she went to Logoba where she was sent by her grand mother. She was sent to the home of her aunt Delisile Lukhele. Whilst there she asked from her aunt Delisile to visit one of her aunts Gabsile Lukhele at Mhlaleni. On her way to Mhlaleni she met two boys. One of the boys proposed love to her and then took her hat. The boy who was not proposing love to her was wearing a uniform from one of the security companies. The other boy was wearing private clothing.

PW1 followed the two boys begging for her hat until they reached the water tanks at Logoba. They then grabbed her and took her to a house nearby. The Accused before court remained with her in the house, and the other boy left. Accused then grabbed the complainant and

undressed her. According to complainant she fought with the Accused but she was overpowered. The Accused ended up on top of the complainant and he produced his penis and inserted it into PWl's vagina. After he was through he got off. After some time he repeated the exercise once more.

According to complainant he was freed by the Accused in the following morning. She proceeded towards Gabsile Lukhele's homestead. On arrival there she found that her aunt Delisile had been there to look for her. She then proceeded to Logoba and on arrival she related the story to her aunt Delisile.

The matter was reported to the police. The police took her to the R.F.M. Hospital in Manzini where she was examined by a medical practitioner.

The second crown witness, Nondumiso Norah Nkambule told the court that she stays at Logoba with Delisile Lukhele who is her cousin. She testified that on the day in question PW1 came to Logoba from Nsangwini at Mankayane to pay them a visit. She came at 9.00 a.m. and at about 3,.00 p.m. she left to visit her aunt Gabsile at Mhlaleni. She was supposed to return on the same day. She never returned. According to PW2 they woke up in the morning and went to Mhlaleni at Gabsile's homestead and they never found the complainant. As they were still worried as to the whereabouts of the complainant they saw her coming. They asked her where she had been. She then told them that she was abducted by two boys who first proposed love to her and later on grabbed her hat. She followed them demanding her hat.

According to PW2, complainant told them that the two boys then took her into Accused house. The other boy went away and she was left with the Accused. While they were alone in the room the Accused undressed

her and proceeded to have sexual intercourse with her. According to PW2 the complainant was crying when she reported the incident. They then took her to Matsapa Police Station to report a rape complaint.

PW3 Delsile Lukhele told the court that she knows the complainant and that she was born in 1987. The witness stated that the complainant is her niece and that her (complainant's) mother died in 1993. She said the complainant was born after a child who died in 1986.

The crown then called PW4, the investigating officer 3956 Constable L. Mngometulu. The officer told the court how the matter was reported to him whilst he was on duty, and how he carried out his investigations which led to the arrest of the Accused.

At the end of the crown case the Accused was brought to his defence. His account of events is that on the day in question, the 30th September, 2000 he was at home. At 10.00 a.m. he went to visit his friend at Mahlabathini. On arrival there he found that his friend was on the way to visit him (Accused).

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On their way to Accused house and before reaching Logoba Butchery they met Thulie. He proposed love to her and she agreed 20 minutes later. Accused then asked her where she was going. She said she was going to Mhlaleni. When they arrived at Logoba Butcheiy the Accused asked complainant to accompany him to his room so that he could give her money to board a bus. On arrival at his room he gave her the money.

According to Accused they stayed in his room in the company of his friend for two hours. His friend then requested him to accompany him to

his place of employment. They spent some time at his friend's place of employment.

On his return he found complainant in his room. When she asked her why she was still there, she said she could not go because it was raining. They stayed in the room until it was dark. At 7.00 p.m. complainant asked the Accused to accompany her to her aunt's house in Mhlaleni. Accused refused to accompany her. The reason for refusal was that he was afraid because there were thugs in die area and they would harm them. They agreed that he would accompany her in the morning.

In the morning the Accused accompanied complainant to the station as he was going to work. On Friday the 22nd September 2000 police came in Accused' house in the company of complainant and arrested the Accused.

In argument Miss Wamala for the crown argued that the crown has proved its case beyond reasonable doubt in that there is no dispute that sexual intercourse did take place and according to the crown evidence this was not by consent of the complainant.

On the alternative charge Miss Wamala stated that though there was no documentary proof regarding the age of the complainant, PW3 Delisile Lukhele who is PWl's aunt told the court that the complainant was born in 1987. The event which took place before the complainant was born was the death of a child who was born in 1986.

Ms. Zondi for the defence advanced argument that the crown has failed to discharge the onus resting on it and that is proof beyond reasonable doubt. She stated that if complainant did not consent to sexual intercourse she might have raised an alarm. She stated that when we

went for inspection in loco we observed that the Accused house was centrally situated among other houses in the homestead and as such if complainant had raised an alarm members of the homestead would have heard and come to her rescue.

The second point raised on behalf of the Accused was that though the Accused alleges that she was raped, the medical report stated that there were no spermatozoa found in the vaginal smears taken to the laboratory for examination.

On the alternative charge the defence submitted that there was no documentary proof regarding the age of the complainant.

It is common cause that the Accused had sex with the complainant. The question is whether complainant consented to sexual intercourse with the Accused.

The Accused told the court that he proposed love to complainant, who agreed twenty minutes later. He then suggested that they go to his house so that he could give her some money to board a bus to Mhlaleni. According to Accused complainant agreed. What is not clear in the evidence of the Accused is why he then decided to accompany his friend and leave the complainant in his house alone. The earlier agreement was that he would give her the money to board a bus to Mhlaleni. He actually derailed her from his way to Mhlaleni in order to help her find easier means of transport. Why then did he leave her in the room instead of accompanying her to the station and helping her to board the bus as arranged.

From the foregoing one would say that the intention of the Accused was to keep the complainant in his room until it was dark so that he could spend the night with her.

According to complainant as soon as they came at Accused house his friend left. The Accused asked complainant to join him in bed. As complainant refused Accused grabbed her and started undressing her. They had sexual intercourse. What raises eyebrows in the account of events is that when we went for inspection in loco we observed that Accused room was centrally situated among other rooms in the homestead. We also noticed that there are a lot of people staying within the homestead. If somebody was assaulted in the manner complainant stated she could have easily raised an alarm. She told the court that she tried to struggle with the Accused but that she was overpowered. She does not tell us why she did not raise an alarm.

As stated above the room in which the alleged rape took place is strategically situated in the homestead. It beats all understanding why the complainant did not raise an alarm. The only explanation would be that she did not raise an alarm because she consented to sexual intercourse.

Regarding the alternative charge Accused told the court that he enquired from complainant as to her age. Complainant told Accused that she was sixteen years of age. PW3 told the court that the complainant was born in 1987. She did not produce complainant's birth certificate. She however, stated that complainant comes after a child who died who was born in 1986. She however, did not produce the death certificate of the said child.

The charge sheet states that at the commission of the offence complainant was 15 years of age. If she was born in 1987 she cannot have been 15 years old in the year 2000 when she was allegedly raped. She could have been 13 years of age.

From the foregoing it is clear that the complainant's age has not been proved. It is further clear that the Accused was deceived as to the age of complainant. In this regard the law is quite clear that there is this absolute prohibition of intercourse with a girl of 16. This is in terms of Section 3 (1) of the Girls and Women Protection Act 39/1920. The onus is upon the Accused to show that he was deceived either by the looks of the complainant or by complainant herself telling lies as to her age. See RVT 1960 (4) SA 685 at 686 (page 8 para 2) in **Rex** Vs **Mfanasi Dlamini** 1979/81 SLR 211 Nathan CJ was of the view that mens *rea* is not an element of an offence under Secion 3 (1) of the Act. In my view I respectfully differ with Nathan CJ's Judgement on this point. I do not believe that the legislature of the time intended that strict liability should apply to offences under the Act (See **The King** Vs Valdema **Dengo** review case No. 843/88 per Rooney J. at page 2)

> "*... In Swaziland it is the maturity and not the age of a girl which ought to he the deciding factor. It is an offence for a man over the age of sixteen to have intercourse with a girl under that age who is not a prostitute (See proviso to Sub-section (3), however, I am satisfied that the maxim actus non facit reuni nisi mens sit rea should be applied to all offences under Section 3 of the Girls and Women's Protection Act*".

In the circumstances of this case and for the reasons I have given above I Find that the crown has failed to prove its case beyond a reasonable

doubt as to the guilt of the Accused on the charge of rape; and also the alternative charge that of contravening Section 3 (1) of Act 39/1920. He is accordingly acquitted and discharged.

K.P. NKAMBULE

JUDGE