

IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO. 182/04

In the matter between :

REX

VS

MFANUFIKILE MASANGO

CORAM

MAMBA AJ

FOR THE CROWN

S. FAKUDZE

FOR THE DEFENCE

IN PERSON

JUDGEMENT 08/12/05

The complainant is P D and was born on the 1st July 1997. She is a girl.

In the year 2003 she was attending school at Dvumaneni Primary School at Tikhuba. On Tuesday the 29th July 2003, at about 1.30 pm she was on her way home from school in the company of Nellie Dvuba, her school mate, who was slightly older than her. Whilst on their journey, a boy who was unknown to them came running towards them from behind. Referring to P by her father's name this boy said "come here M's child." The two children started running away from him. He chased after them and caught up with P. He grabbed her by the hand, pulled her away and led her into a bush or thicket nearby. He was armed with a knife and a bush knife. He hit and kicked her as he pulled her into the bush. Nellie continued with her run home.

At a certain spot in the bush the boy ordered the complainant to remove her panties and lie supine on the ground. She submitted to his demands. He in turn lay prostrate on top of her, took out his penis and inserted it - the witness pointed in the region of her groin -after pushing her panties into her mouth. The complainant said what was being done to her was painful. She removed her panties from her mouth and cried aloud. Her assailant threatened her with the knife he had and ordered her to stop crying. Suddenly her assailant stood up and fled the scene leaving her on the ground. This was when PW2 Viliya Khumalo appeared and rescued her. This is the crux of her evidence.

The crown alleged that the complainant was raped and that her rapist or the person who fled the scene when PW2 got there was the accused. In an effort to prove this the crown led the evidence of eight witnesses, and I will deal with their evidence below.

Viliya Khumalo said that on the day in question she was on a field adjacent to the bush referred to above and was cutting thatch grass. She heard cries of a child emanating from the nearby bush. She went to investigate, suspecting that the child crying might have been assaulted and dumped or left in the bush to die. As she approached the spot where the cries came from, about 2 meters away from her the accused stood up from the grass and ran away leaving the complainant on the ground. She called out the accused by name, asking him what he had been doing to the complainant.

Because Viliya Khumalo did not know the complainant or her home she led her out of the bush and into the road. She was carrying her panties. There she handed her over to some school children who included Nhlanhla Matsenjwa, PW5. These boys knew the complainant and her home. They took her home and a report of the rape was made to her aunt. Her aunt, Nelisiwe testified that the complainant's face was swollen or puffed up but did not observe anything else abnormal with her.

The accused was well known to PW2 who was much older than him. They were both from the same area and PW2 had known the accused since his birth. This much was common cause.

Nhlanhla Matsenjwa (PW 5), testified that shortly before he received complainant from PW2 he had seen someone running away from the direction from which PW2 came with the complainant. The person running away was a man wearing a brownish jacket and shorts. He could not identify this person as he was facing away from him and at a distance. PW5 had at that very same time heard PW2 shout or call out the name of the accused and utter a few obscenities.

The next morning PW5 in the company of other school children went to the scene of crime and there found a knife. They took it and gave it to one of their teachers at school. This knife was later collected from the teacher by Gideon Gamedze (PW4), who is a Community Policeman. This knife was later collected from him by the investigating Officer and it was handed in court as an exhibit. It was later identified by DW2 Thuli Buthelezi as hers. She said she had given it to the accused for him to prepare his sticks to help him drive cattle to the dip tank on the following day. She said she had lent him on a Monday and the cattle dipping day was on the next day, the day of the alleged rape. She testified that accused had never returned the knife to her.

The accused denied that he was the assailant. He said that on the day in question he was never near the scene of crime. He was, so he said, at home and his sister-in-law, DW2, would support him in this regard. The sister-in-law, however, did not. I shall return to this presently.

On the 30th July 2003 PW4 convened a meeting between the family of the complainant and the family of the accused. This meeting took place at complainant's home. The accused was, during this gathering, identified by both the complainant and Nellie Dvuba as the complainant's assailant. He denied this but when his brothers who were older than him told him then that his accusers were too young to be fabricating the story against him and that he should admit, he admitted having pulled or led the complainant to the bush. In court, he denied having made such admission.

EVALUATION OF EVIDENCE

The alleged admission in the preceding paragraph was, if indeed ever made, made under circumstances or conditions in which the accused was clearly pressured by his brothers to admit having committed the offence. His accusers pointed him out as the culprit in the presence of each other. They were both aged about 5 years then. Beyond this, there was no evidence led to suggest that this extra-curial admission was freely and voluntarily made by the accused. No reliance therefore could be placed on it.

PW2 identified the accused as the culprit. She knew him very well. She had known him since birth. At the time of the commission of the offence accused was 16 years old, meaning that PW2 had known him for 16 years. She found him *in flagrante delicto*. It was in broad daylight and at close proximity. She had specifically gone to the bush to investigate the source of the noise she had heard and was, alert and or attentive to her surroundings. Though the encounter with the culprit lasted for a short time, it was such a close encounter that there was no room not to recognise and or identify the culprit as the accused, whom as we know, was well known to her. She spontaneously called him by name at the scene of crime - reporting him to nobody in particular as there were the three of them there; that is to say, complainant, accused and PW2. She was coincidentally heard by PW5.

The knife found at the scene of crime by PW5 was traced back to the accused by his own witness Thuli Buthelezi. She said the knife was hers and she had given it to the accused under the circumstances already referred to herein. Accused had not returned the knife to her. She further disputed accused's alibi by saying that the accused had left home on the 28th July 2003 and only returned home at night on the day of the alleged rape without returning the knife to her. In fact the accused was next seen in the homestead on the morning of the 30th July 2003. This knife was identified by the complainant as similar to that used to threaten her during her ordeal.

From the foregoing, it is clear to me beyond reasonable doubt that the accused was the assailant.

The question then is what crime, if any, did the accused commit? The crown has submitted that he is guilty of rape. The indictment reads as follows :-

"In that upon or about the 2nd July 2003, and at or near Tikhuba area, in the Lubombo, district, the said accused, did wrongfully and intentionally have unlawful sexual intercourse with P D, a minor who at the time was aged six (6) years and in law is incapable of consenting to sexual intercourse, and did thereby commit the crime of Rape. "

At the beginning of the trial I enquired from counsel for the crown whether or not it was the contention by the crown that the 6 year old complainant had in fact consented to sexual intercourse, but was, because of her age, in law incapable of giving such consent. The indictment as framed, seemed at least to me, to suggest this. Counsel assured me though that this was not the crown's contention. The crown was alleging, it was submitted, a lack of consent both in law and in fact.

The complainant did not state that her assailant inserted his penis into her vagina. She merely indicated or pointed in the region of her groin. The medical Doctor who examined her on the 30th July 2003 could not detect or find anything suggestive of any penetration or sexual interference with the complainant. PW2 did not see either what the accused was doing to the complainant before he, the accused ran away from the scene of crime. This court is therefore not satisfied beyond any reasonable doubt that there was any actual penetration of complainant by the accused. The accused is thus found not guilty of rape.

There is, however, no doubt whatsoever that the accused chased after the complainant, caught her by the arm. forcefully pulled her into the bush, assaulted her. caused her to remove her panties, (which he then pushed into her mouth), caused her to lie supine on the ground, lay on top of her and put or inserted his penis in her groin. When he did this he intended raping the complainant. He was, however, disturbed in his wicked endeavours by the appearance of PW2 at the scene. He is consequently found guilty of assault with intent to commit rape, as stipulated in section 185 of The Criminal Procedure and Evidence Act 67/1938.

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MAMBA AJ