IN **THE HIGH COURT** OF SWAZILAND

CRIM. APPEAL CASE NO. 15/04

RICHARD SIBUSISO NGWENYA

VERSUS **REX**

CORAM J.P. ANANDALE - ACJ
K.P. NKAMBULE-J

FOR APPELLANT MR. B HEM BE

FOR RESPONDENT MS LUKHELE

JUDGEMENT

27th January 2005

The appellant to whom I shall continue to refer to as the accused was charged before the senior magistrate, Manzini in the following terms:

The accused is charged with the offence of rape.

> In that upon or about the 23lcl March 2003 and at or near Makholweni area in the District of Manzini the said accused did wrongfully and unlawfully and intentionally have sexual intercourse with N M, girl of 23 years of age without her consent

The accused pleaded not guilty to the charge.

At the conclusion of the trial the accused was convicted of the offence *Bind* sentenced to seven years imprisonment which v/as backdated to the date of his arrest. The present appeal is against the conviction only. Though broken down into four heads, the theme of accused heads of arguments is that the court *a quo* misdirected itself in convicting the accused without any evidence corroborating complainant's evidence.

On the element of sexual intercourse Mr. Bhembe who argued the appeal before us stated that PW4 who examined the complainant stated that she could not confirm that complainant was actually raped as she was sexually active. Under cross-examination the doctor told the court that sexual intercourse did take place on the day in question. The doctor's observation that complainant was sexually active is beside the point. What is important is the finding that sexual intercourse did take place. The complainant says it was without her consent.

Mr. Bhembe relied on the point that the doctor could not confirm that the complainant was raped and that the discharge from complainant was not taken to the laboratory for examination and as such there was no proof of the existence of spermatozoa.

The law in this regard is found in P.M.A. Hunt,, South African Law and Procedure, (Vol. II) (2nd ed) at pages 440 to 441 on what constitutes sexual intercourse, where the learned author states as follows:

> "*There must be penetration, but it suffices if the male organ is in the slightest degree within the female body. It is not necessary in the*

case of a virgin that the hymen should be ruptured, and in any case it is unnecessary that semen should be emitted."

On the element of corroborative evidence Mr. Bhembe states that the evidence of PW2 and PW3 only relates to what complainant said and he submits that this is not corroborating evidence.

The evidence which directly implicated the accused person with the commission of the offence is the evidence of complainant, PW2 and PW3. PW1 told the court that while they were on their way home from buying ice from one of the neighbours' homesteads they were approached by the accused who accused them of causing him to be assaulted 03' certain boys. He was carrying a golf stick which he used in assaulting them. '

According to PW1 accused ordered her and PW2 to remove their clothes. He then ordered them to move into the field nearby. He then ordered them to engage in sexual intercourse with each other. They told him that they did not know how to do that. According to PW1 the accused threatened to assault them with the golf stick. Accused then ordered PW2 to sleep on the ground and face upwards and PW1 to lie on top of her. They obliged. Thereafter he ordered them to stand up and put on their clothing. Accused then ordered them to go to the river so that they could have sexual intercourse in the water. They pleaded with him not to take them to the river. He then changed his mind and said he was taking them to his house.

On arrival at his house he produced a key whilst he was about to open PW1 ran away. He chased and caught up with her. He dragged her back to the yard. On arrival PW2 had ran away.
Accused then dragged PW1 towards the river where he had sexual intercourse with her. When he was through he begged her not to report to her parents what had happened. He then asked the complainant to spend the night at his house. Complainant refused saying she was going to a funeral. He then accompanied her to her parental home. When they were close to her home the accused stopped and let her procede alone.

PW2 related to the court how they were accosted by the accused and how the accused made them to engage in the act of sexual intercourse with each other until the point where PW1 ran away exactly in the same manner as testified by the complainant.

PW3 told the court that as he returned from hiring a motor vehicle to take PW1 to hospital he found accused in the homestead standing near the window. Accused called him and asked where he was coming from.

Regarding corroboration I find the judgement of **Rooney J. in** THE KING VS VALDEMA DENGO REVIEW CASE NO. 843/88 (unreported) apposite. The learned judge stated the following at page 4.

> "*Corroboration may be defined as some independent evidence, which tends to confirm the complainants' testimony.*"

From the foregoing there is no doubt that the accused assaulted PW1 and PW2. There is no doubt further that he took both PW1 and PW2 to his place of residence where PW2 managed to run away. The question which has not been answered is why was the accused so keen for the girls to go to his place of residence.

During the cross-examination of the accused by the crown the accused said the reason why he assaulted PW1 and PW2' was that they once

assaulted his girl friend in 2002. The accused failed to put this to PW1 and PW2 during cross-examination. This was observed by the senior magistrate in his rather lengthy judgement. The senior magistrate rightly pointed out that this was mentioned by the accused for the first time when he was under cross-examination and as such an after thought and a lie. The magistrate rightly rejected this evidence. In this regard the dictum by **Hannah C.J** in the case of **Rex Vs Dominic Mngomezulu and 10 others** Case No. 96/94 is apposite. The Chief Justice in that case held that failure by the defence to put the story of the accused could well lead the court to draw an inference that whatever he says for the first time in his evidence-in-chief must be clearly regarded as an after thought. In this case the learned senior magistrate observed that the accused advanced this defence in cross-examination and this evidence differed with his evidence in chief.

From the observation of the senior magistrate and on what this court makes of the record it is clear that there is a clear inconsistency in the evidence of the accused. This also presented the court *a quo* with a problem of which version of evidence to believe. The truth is that this material contradiction goes to the credibility of the accused as a witness. Therefore his evidence is not to be believed.

Another contradiction which was rightly pointed out by the senior magistrate in his judgement is that when he was questioned about his whereabouts at the time of the commission of the offence he said that he was at home sleeping. It was, however, found out that he was not telling the truth because PW1 had said he accompanied her up to the house and then stopped. This was confirmed by PW3 who told the court that when he came back from hiring transport to convey PW1 to hospital he found accused standing close to a window at their house.

On the other hand the evidence of PW1, PW2 and PW3 was not shaken under cross-examination. The court a quo correctly found that they were credible and trustworthy witnesses.

For the foregoing reasons and conclusions I can find no fault with the senior magistrate's assessment of the evidence and his reasons for rejecting the accused's evidence. The appeal against the conviction is dismissed.

K.P NKAMBULE
JUDGE

I agree, and it is so ordered.

J.P. ANNANDALE
ACTING CHIEF JUSTICE