

SWAZILAND HIGH COURT

HELD AT MBABANE

CRIMINAL TRIAL NO. 104/2002

In the matter between

REX

vs

THULANI SABELO MNISI

Coram

Annanclale. ACJ

For Crown

Ms N. Lukhele

For the accused

Mr B. Sigwane

JUDGMENT

24th March, 2005

[1] The accused person herein was prosecuted on a charge of rape, alleging him to have had unlawful and intentional sexual intercourse with Jabulile Sithole on the 15th July 2000 at the Mandela area. The indictment further contends that aggravating circumstances exist, due to the alleged use of a knife to subdue the victim, a wife of the accused's father.

[2] The accused pleaded not guilty and no explanation of the plea was tendered. No evidential facts were admitted with the result that the burden of proof beyond reasonable doubt in respect of all factual and legal issues remain squarely with the crown.

[3] The complainant, Jabulile Sithole (PW1), is a woman of about 35 years of age who resided at the Malanzela area, together with her husband at the time of the alleged crime. Due to a polygamous marriage, the mother of the accused is a further wife of the husband, as is the complainant.

[4] Her evidence is that on the night in issue she was inside her sleeping hut when the accused also entered it at around 22h00. She testified that she was asleep when he entered. He then produced a knife which he held at her neck and then undressed himself after which he also removed her clothing. Due to shock she did not resist him when he proceeded to have full penetrative sexual intercourse with her.

[5] Once finished, he fell asleep and she managed to take hold of his knife, dressed herself and ran out of her hut to the hut of Mfanawenkosi Mnisi (PW4). There she took refuge underneath a bed but her crying aroused the occupants. She got out from underneath the bed and sat next to the door until dawn when she sent Mnisi to call her mother-in-law, now deceased, to whom she made a first report of the incident and who then advised her to report it to her husband (PW2), which she then did. On his instructions, she then went to the police at Mliba to lay her complaint and they took her to hospital.

[6] In court, she described the knife as having an orange coloured string tied to it and identified an Okapi knife with a 10 cm blade, shown to her by the crown, as the one used by the accused.

[7] Mr. Sigwane cross examined her at length and in detail.

[8] What was put to her is essentially that the accused denies having had intercourse with her. She would have falsely implicated him because he confronted her about false rumours she would

have spread about the paternity of his wife's baby which was born around that time, insinuating that the real father is not the accused himself but in fact her husband, the father of the accused.

[9] A second leg of his defence is that the accused could not have had the knife she said lie used to threaten her with, as that knife was with someone else, after using it to cut meat that the accused brought to the homestead earlier in the day of the alleged incident.

[10] This was sought to be fortified by stating the presence of one Magwinya Ginindza (DW2) who would have been in the presence of both the accused and complainant on the fateful day, him being served homebrewed liquor by the complainant, which she denies.

[11] Moreso, if indeed she recovered the knife from the accused after he fell asleep, she would have either used it to retaliate or at least would show it to those in the hut where she took refuge, to substantiate her claim of being raped. Furthermore, instead of persuading those people to wait and do nothing, she immediately would have raised a hue and cry, inciting them to pounce on her assailant there and then, while he was said to be still asleep in her own hut.

[12] She denied all these aspects, explaining that the people in the hut would not go to fight their brother, the accused, and that it did not cross her mind to take revenge when she got hold of the knife. She insists that the accused did take the knife with him after the meat was cut, not that he left it in the cooking hut or with someone else. She flatly denies having seen DW2 during the day, certainly not serving him with liquor as she never brewed such concoction. The rumour about paternity of the baby is also denied to have come from her, save for her observation that he resembled her own husband.

[13] I will revert to her evidence further down"

[14] The complainant's husband, Bangwako Mnisi (PW2) and father of the accused, testified that she angrily reported to him that his son had raped her, producing the knife exhibited in court. On his advice she reported the matter to the police.

[15] From the cross examination it further transpired that there is no love lost between PW2 and the accused, his son. The latter is said to have assaulted his father and that he was chased away from the homestead. He denies that he fathered an incestuous child with his son's wife. He further stated that it was open for the accused, who knew about the accusation of rape, to have come to him and deny it, but that he did not do so.

- [16] Mfan'zile Shabangu (PW3) gave evidence as to the events that transpired in the hut in which the complainant sought refuge. That night he, Magwinya Ginindza (DW2), Mfanawenkhozi Mnisi (PW4) and another were asleep in their hut when the complainant breathlessly rushed in and minded them to be quiet. He did not testify, as did the complainant, that she first hid under a bed before crawling out, to sit in a corner until daylight. He says that she did not tell them what befell her or caused her to be there, contrary to her own evidence in cross examination that she did report to them that "...their brother raped me...".

[17] He, like the complainant, says that she sent him to call her mother-in-law. When she asked him why he came to call her he could not tell her as he did not know why. Later in the day when she came over, the complainant related to them all that the reason why she came to their hut at night was because the accused had raped her.

[18] He further confirmed that he did not see any knife with the complainant when she came to them in the night. He could not recall if the knife of the accused was taken back by him after cutting the meat or whether he left it behind. He would not confirm that DW2 (Magwinya) was served home brewed lemon beer by the complainant, but said that the accused and DW2 drank elsewhere.

[19] Another of the people in the hut to which the complainant went during the night, Mfanawenkhosi Mnisi (PW4), testified about the incident. This witness is related to her as well as the accused, she being the junior wife of his father and the accused being his elder brother.

[20] He also said that she entered during the night and that she would not tell them why she came to their hut. In the morning she did so, telling them that their brother, the accused, had raped her and that he had a knife. He did not see a knife with her.

[21] Since his attorney had withdrawn at the time PW4 started his evidence and the accused chose to conduct his further defence in person, the aim and purpose of cross examination was fully explained to him.

[22] When he asked whether PW4 believed the report of the rape he replied that he did not, mainly because she previously threatened himself with the making of a false report to the police, also that she lied about him to someone else which resulted in an attack on himself. He further conceded to a possibility, suggested to him by the accused, that the complainant might possibly have sought shelter in their hut due to inclement weather as her own hut did not have a proper door.

[23] The investigating officer Detective Constable Mabuza (PW5) received the complaint on the 17th July, following the alleged incident during the night of the 15th. She gave him the Okapi knife which was exhibited in court. He arrested the accused and caused PW1 to be examined by a doctor.

In cross examination the accused put to the police officer a worrying aspect that is all too frequently mentioned in just about every second case, namely that he was assaulted by the police. Though obviously denied, the reaction to it was that there was no reason to do so as the knife was already with the police and that he could therefore not be induced to point out any exhibits. This reply implies that if there is such a reason, it would then be in order to use force to compel a pointing out of an exhibit.

Because the contents of the statement the accused made to the police was not sought to be proven by the prosecution I need not decide on this alleged assault as it does not affect the outcome of the trial and nothing turns on this in so far as the merits of the trial goes.

Finally, the prosecution proved the medical examination report. No external injuries were found. The doctor noted the presence of spermatozoa in her private parts and opined recent sexual activity. No bruises or injuries of her private parts were noted. One does have to bear in mind that the examination occurred not far from about 36 hours after the alleged event.

In his own evidence the accused held out that the reason for his arrest was the incestuous allegation that his father caused the pregnancy of his (the accused's) wife and that he warned the complainant to tell his father about the matter. He was not on good terms with either his father or the complainant and that as his father did not bring them together to clear the air, he suspected both to collude against him.

[28] In his evidence in chief he did not address the evidence against him by denying the allegation that he raped PW1 at knife point.

[29] When cross examined, a further aspect of "bad blood" between him and PW1 surfaced, for the first time. He has it that she persuaded his wife to go for an abortion in 1999, which eventually did not take place. The baby was born a few days prior to the alleged incident between him and PW1.

[30] He was taken to task by the crown for a variation in his evidence, namely stating and then denying that he told PW1 that she would get hurt if she did not tell his father not to discuss the incest issue.

Otherwise his evidence remained steadfast. ~

[31] The accused called Magwinya Ginihdza (DW2) to testify about the events of the matter.

That day DW2 drank some liquor which he had brought with him to the homestead. The accused

would have told him that he left his knife in the kitchen after they used it to cut some meat.

Thereafter he went to sleep and during the night PW1 entered. Before going to bed, he says that he saw the accused going to the nearby hut of PW1, which is within close hearing distance from the cooking hut/kitchen but that he did not hear anything.

[32] In cross examination he changed to state that he did not say that the accused told him that he left his knife in the cooking hut. The discrepancy was not followed through by the crown. He also

contradicts the evidence of PW1 by stating that she did in fact serve homebrew on the day of the incident.

[33] The accused also called his wife, Nhlanhla Ginindza (DW3) who confirms other evidence about the meat which the accused brought to the homestead where the alleged incident took place. Contrary to the evidence of PW1, she related the accusation of an incestuous child she allegedly would have had with the father of the accused.

[34] Concerning the matter at hand, she testified that on his return from the homestead where the incident would have occurred, the accused sent her to go to the same place he just came from, to fetch some meat. It was then that PW1 confronted her and told her that she was raped by the accused during the night, and doing so in a manner that implicated her (DW3) as being aware of the matter.

[35] Her evidence is not to the effect that it provides an alibi for the accused or provides him with any sort of defence.

[36] In cross examination she did convey a feeling of hate against PW1 for laying a false charge against the accused. She considers the complainant to be a liar. This seems to follow on either incorrect interpretation in court or some other incongruous factor, because her main suspicion seems to be that the complaint had to be false because it was reported to her before the event. Her evidence in chief is that she went to the complainant's homestead "between 7 and 8 in the

evening", prior to the time of midnight, some hours later, being the time of the incident as it was related to her by the complainant. Her evidence in cross examination is along the same line.

[37] However no issue was made in court about the interpretation of this most important evidence, reporting a rape before it actually occurred. I have to accept the interpretation to be correct but remain with the problem of evidence that if accepted, casts severe doubt about either the veracity of DW3 or that of PW1.

[38] The remainder of her evidence in cross examination does not point towards other contradictions or fabrications. She says that when the complainant made the report to her they were in the cooking hut while the men (who said that the complainant came to their hut during the night) were already in their hut.

[39] Inis witness has it that the issue of a premature report was known to the accused as well as the men whose sleeping hut was used by the complainant after the alleged incident. None of them brought it to the attention of the court during their evidence. More importantly, it was not put to the complainant in cross examination that she would have reported being raped before it would have happened. At the time the complainant was cross examined, the accused was still represented. I cannot accept that such a crucial aspect, if so known to Mr. Sigwane, an experienced trial lawyer, would, not have been used as the backbone of an attack on her credibility. It is only at the very end of the defence case that it suddenly emerged from the evidence of his wife. I have a great difficulty to accept this most extraordinary evidence as being true, the reporting of a crime prior to the event.

[40] To determine the verdict in a criminal trial on the basis of individual aspects of evidence, be it brought by the crown or the accused, is not only suspect and dangerous but it also removes the fairness of a trial. If taken bit by bit, piecemeal, it would be easy but unjust to hold that the evidence of the wife of the accused regarding the reporting of a crime before the event impacts on the credibility issue to the extent that not only should her whole evidence be disbelieved, but also that it should in turn be found that the accused caused false evidence to be placed before court and that his whole version should accordingly be rejected. The crux is to evaluate the evidence in its totality and decide whether the prosecution proved the guilt of an accused person

beyond reasonable doubt. Hand in hand is the well established principle that a reasonably possibly true explanation of his innocence does not even have to be believed and accepted as true by the court in order to be upheld.

[41] In the present matter there are a number of issues that raises a concern. One of these is whether the conduct of the complainant is consistent with that of a woman who has just been raped. Nothing turns on her explanation about not taking the knife she said she just got hold of and stabbing the accused, whom she said to be asleep. It was suggested to her that it would have been the natural thing to do. She differed. In itself, it cannot be held against her if she did not retaliate when she could.

[42] It is her conduct thereafter that has more meaning. Her evidence as well as that of the men who were in the hut to which she went is that when she got there, in relative safety, away from the alleged assailant, she was asked what she did there. She did not and would not tell the men about her predicament. This flies in the face of a rape victim's behaviour once safety after the event is reached. She did not have any problem to report the matter in the presence of at least one of them the following day. She was repeatedly reminded that if indeed she was raped and escaped thereafter, taking with her the knife of the assailant, she would have been able to convincingly report the incident to the men in the hut. They in turn would have been able to there and then get hold of the rapist, whom she left asleep in her own hut. Her taciturnity, the non utilising of her opportunity to report that she had just been raped, at knife point and having the knife with her as she said, using such an opportune time to have the sleeping culprit face the music, makes' one wonder why she did not report the matter when she could have done so.

[43] A further aspect of the complainant's evidence that does not tally with reality is her statement that she went to the police station "the following day". She said that she waited until daylight, the morning after her night in the hut with the four men, then sent PW3 to call her mother-in-law. On her arrival she made her first report about being raped and was advised to tell her husband as well. She did so, the same day, and he sent her to the police, who took her to hospital. Her evidence is that she was raped at around 22h00 in the night of the 15th July. The following day, when she made her reports and was taken for a medical examination, on her own

version, would have been the 16th July. The medical examination, *ex facie* exhibit "B", was conducted a day later, the 17 July at 17h50.

[44] Another aspect is her evidence that the first time she saw the accused after the event was after a week had lapsed, the next time in court. Yet, in cross examination she admitted going to Zakhele Remand Centre where the accused was detained, and that she saw him there, in between the occasions she first said.

[45] The medical evidence is not inconsistent with the evidence of the complainant but it also is not inconsistent with the evidence of the accused who denies having had sexual intercourse with her. The report of the doctor is that spermatozoa was found in her private parts. No analysis was done to compare the DNA of the sperm with that of the accused person. There is no evidence or an explanation before court as to why it was not done in the course of the investigation.

There is no link that positively ties the accused to the complainant insofar as the medical report is concerned. The doctor's opinion is that "the patient had been involved in recent penetrative sexual activity." How recent is recent? On her own version, she had forceful sexual intercourse with the accused 43 hours before being examined. There is no evidence that she did not have sexual intercourse with anyone else prior to the examination, also not that she did not have intercourse before the incident with the accused. The medical evidence cannot substantiate a finding beyond reasonable doubt, to the exclusion of other possible conclusions as well, that it only could have been the accused who had carnal knowledge of her. Furthermore, she had no injuries or bruises at all at the time she was examined.

When the totality of the body of evidence that was heard at the trial is placed on the scales, it cannot substantiate a factual finding, beyond reasonable doubt, that the accused indeed raped the complainant in the manner she described. There are too many inconsistencies in the evidence to justify a conviction.

It is therefore ordered that the accused be found not guilty of the crime he was charged with. He is acquitted and discharged.

