

HIGH COURT OF SWAZILAND

CRIMINAL CASE NO. 106/2004

In the matter between:

REX

VS

SATIWE JUDAS KUNENE

CORAM: MATSEBULA J

FOR THE CROWN : MR. S. FAKUDZE

FOR THE DEFENCE:MR B. SIGWANE

JUDGMENT

23rd AUGUST 2005

The accused was initially indicted on the following counts: Count one - rape Second count - incest

Third count - assault with intent to do grievous bodily harm.

At the commencement of the trial, Mr. Sigwane who appeared on behalf of the defence drew the

Court's attention to the unacceptable splitting of charges as far as count one and two are concerned. The court invited Mr. Fakudze to address it and he correctly, in my considered view, conceded that this was infact unacceptable splitting of charges especially if the accused were to be convicted on both count one and two and on sentence it would create havoc on the accused. Thereupon Mr. Fakudze withdrew count two against the accused and proceeded on count one and three. Accused pleaded not guilty to both count one and count three and Mr. Fakudze informed the court that RSP 88, a certain medical examination conducted on the complainant was being handed in by consent as exhibit "A". The import of that means that the contents of exhibit "A" which is the result of the doctor's examination is being accepted as evidence and the court will base its judgment on the contents of that document.

A proceeding involving a minor child was conducted in terms of the provisions relating to assistance in which an intermediary is employed to assist the minor as far as possible. In this case, the intermediary was a Mr. Masuku.

PW1 a minor aged plus minus 14 years old took the witness stand and was duly sworn in. She said, she resided at Ndlalambi with her mother and siblings. She knew the accused as her father and told the court what his names were. It was her evidence that sometime in January 2004 she went to her grandmother's place to report to her that her father had beaten her up. She said, her father, the accused had beaten her up because she had taken accused's money because he in turn, had taken her money which she had obtained from the sale of tomatoes. She testified that accused had tied her hands together and administered the beating and kicked her with a booted foot all over the body. It was not the first time accused had beaten her up, she said. He used to beat her up everyday, sometimes once a week. She also said, the accused would then insert his private part into her private part. She testified that if she remembers well he did this on five occasions. She says that accused would do this during the day when

her mother was at work and her siblings would have gone to fetch water having been sent by the accused. She told the court that accused had these sexual intercourse with her in her mother's sleeping room and on other times he did it on corrugated iron thatched room. In her mother's room, accused had sexual intercourse with her three times and two times at the corrugated room two times. She did not report this to her mother because she was afraid her mother would beat her up. Accused had also threatened her with death and had placed an axe next to her head.

I may add here for the completeness of the evidence that this question of an axe being placed next to her head was neither in the summary of evidence nor deposed to by any other witness called by the Crown. Nor did any of the policeman say that an axe was ever mentioned, whether it was taken by a policeman and brought in as an exhibit before the trial court.

The other exhibits like the woven leather strap was mentioned and also obtained and brought to court but not the axe. She continued with her evidence saying that when accused inserted his private part into her private part, it was hurting but she did not say so to the accused. She decided to go and report to her grandmother at Vusweni. She walked to Evusweni and along the way she met her mother's younger sister, one Nana who asked her who had assaulted her and she informed her. Apparently, Nana then asked her to sleep over at her homestead at one Jike Grocery Shop. From there she proceeded to Evusweni at her grandmother's place. From her grandmother's place she went to the Piggs Peak Police station, she was being accompanied by Nana. At Piggs Peak, she made a full report including the fact that her father, the accused inserting his private part into her private part. She made this report to a policewoman one Nelsiwe Dlamini. Her aunt remained outside as she was making the report to the policewoman. She was then accompanied by the police to the hospital where she was examined by a medical doctor. At the hospital, the aunt was also called in when the doctor examined her and the

complainant repeated the report she had made to the police officer. The doctor completed exhibit "A". According to her, she was detained at the hospital and released the following day. From the hospital, she went back to Ndlalambi and saw her mother who threatened to stone her and compelled her to tell her what her father did to her. It was PW1's evidence that as a result of the assault on her by her father, the accused, she suffered the following injuries: On the shoulder, and on the left breast.

It was PW1's evidence that after this ordeal she attempted to commit suicide by eating a poisonous fruit called "intfuma" and drinking illuminating paraffin. She said she tried to commit suicide before she went to her grandmother's place at Evusweni. She said she tried to commit suicide because accused was abusing her. She said she never consented to sexual intercourse with the accused. And she did not tell her grandmother of the ordeal because she was afraid she would beat her up. She said she told the policewoman because she was a policewoman. She pointed out at a woven strap and said it was the strap accused used to beat her up. The strap was subsequently handed in as exhibit "1".

There were also photos taken of her person and this was done by du Pont and Nelsiwe Dlamini. She said she believed that accused is capable of carrying out his threats. This was the evidence of the complainant PW1. She was extensively cross-examined by Mr. Sigwane on behalf of the accused. From her answers of cross-examination it emerged that on some previous occasions, her grandmother took her to the police station. She said this was when she met du Pont and Dlamini. When she saw them they were not wearing uniforms. Her grandmother told her that at the time, that the grandmother knew these men. She said she had seen these people at the police station before and her father had not started assaulting her sexually. A month elapsed then the assault took place.

PW1 said, in answer to a question asked by Mr. Sigwane - I went with my aunt after Christmas in January 2004. When I went with my grandmother, it was before November 2003. When my father worked at Mhlume he would reside at home on weekends and would be away during the week. In the year 2001/2 accused still worked at Mhlume. He would leave on Sunday and come back on Saturday and my mother would be present on weekends. Towards the end of 2003, accused became ill and stayed at home and seriously ill and eventually was bed-ridden. PW1 said he and her father's sisters who came from South Africa threatened her mother because they were of a view that her mother was not caring for their sick brother, the r.ocv.?ed. Her mother became very "upset and reoorted this to the grandmother of PW1 who threatened to get even with the accused.

It was PW1's further answers that her grandmother had already told her that she knew of some people at the police station when this incident took place. Accused recovered and found a job as a forester. It was at this juncture that her mother was no longer working. PW1 and her mother remained at home until accused joined them in the evening. She and her mother would go about selling tomatoes and sometimes PW1 would not come back home and spend a night at her grandfather's place at Mayiwane. One obviously does not know what she would do when she was away from home.

On one occasion, PW1 and her sister misappropriated money realised from the sale of the tomatoes and they decided not to go back home. From these questions and answers it would show that PW1 was wayward child. On these occasions when she did not sleep at home, no one knows what she did where she slept. The above instances are some of the many that PW1 went missing without her parents knowing where she was. Obviously she would not come back and say to her parents I slept at such a place and such and such thing befell me.

She also said, in answer to a question by Mr. Sigwane that she and her aunt Nana discussed this matter and her aunt told her what to say that is that her father had abused her. That is hardly surprising that a young child like the complainant is, if told the story she may even believe that actually happened whereas it never happened. Such a story would create an impression on the child that this actually happened whereas it did not.

Then the Crown led the evidence of PW2 Betty Dlamini, PW1's paternal grandmother. She resides at Evusweni. On the 27th January 2004, PW1 came to her homestead to report that the accused had beaten her up. PW2 noticed that PW1 had weals/stripes on her body. According to PW2, PW1 had numerous weals/stripes marks and scars around her wrists which indicated that she had been tied up by robes.

I may point out at this juncture that this evidence does not corroborate with the evidence in exhibit "A". PW2 said some of the injuries were old and others were healing and some were still oozing blood. That again raises a lot of questions, who had caused the injuries that were oozing blood and who had caused those that were old and who had caused those that were healing? Assuming the court were to find that accused caused those injuries, then he would only be responsible for the injuries which were still oozing blood because those were fresh. What about those that had healed and where still healing?

The reason advanced by PW1 why she had been beaten up by the accused was that she had helped herself to some porridge belonging to the accused without his consent.

According to PW2, PW1 and Nana came at plus minus 4pm. The police PW1 and Nana after some days in the following months. PW2 denied having gone to Pigg's Peak in the company of PW1 before

the 27th January.

Under cross-examination, PW2 stated that if PW1 told the court that she knew du Pont and Dlamini before the incident of rape and assault on her she would not be telling the truth. PW2 also denied that he had taken PW1 and saw du Pont and Dlamini on an earlier date.

PW3 Nana also met PW1 on the 27th January 2004 and saw that PW1 had weals on her body. PW1 told her that accused had beaten her up but declined to tell her the reason why her father beat her up.

Under cross-examination, PW3 told the court that PW1 did not tell her that her father beat her up for the theft of money. PW3 told the court that she and PW1 had not discussed this matter although PW1 had said earlier on that they discussed this matter.

The Crown led the evidence of Raymond Ndwandwe who arrested the accused as a result the accused made a report to him. He warned the accused according to the Judges Rule. The leather strap was handed in as exhibit "1". He then handed further investigation in this case to PW2 Nelsiwe Dlamini a policewoman.

Sergeant Dlamini was PW5. He took photos which were handed in, of the complainant. He also said he noticed that the complainant had injuries and they were in the process of healing. He agreed that on PW1's head there was a part which had no hair at all. There is no evidence of what had caused the removal of that portion of the hair.

PW6 Detective Nelsiwe Dlamini deals with violence and has been doing so for three years. It was her evidence that on the 23rd January 2004, PW3 Nana brought PW1 at the police station and requested PW6 to accompany them back to the homestead to investigate how PW1 had sustained the injuries she had on her body. PW6 took PW1 into a secluded room and tried to ascertain how she had sustained the injuries on her body. She was stripped naked as PW1 investigated and inspected the injuries. PW6 noticed the following injuries:

1. All over body
2. back of her body where there was a big scar.

When asked who had assaulted her, PW1 told PW6 that her father, the accused, did. When asked why she was assaulted by her father, PW1 told her because she had eaten her father's porridge without his consent and also for having stolen E25 from him.

PW6 said the complainant told her that her father had abused her. She said it was difficult to find out exactly why and what she meant by being abused and she was not ready to divulge the information to her. She then noticed that the complainant was afraid, she then assured her that she was a police officer and she should be free to tell her what had happened. She also noticed that the complainant was hungry and she gave her food to eat and persuaded her to tell her what her father had done to her. She eventually came forth with the information that her father had inserted his private part into her private part. When asked how often this happened, she said five times. Three times in her mother's house and two times in a corrugated thatched hut. Then PW6 completed RSP 88 and took PW1 to the hospital to be examined by a doctor.

On the 29th January 2004 PW6 contacted accused in custody at the Correctional Services building and informed the accused of the alleged allegation by complainant. He warned the accused in terms of the Judges' Rule and accused made a report to her.

PW6 was examined by defence counsel. In answer to a question about the exact date on which this alleged rape took place, she said PW1 emphasized the occasions January 2004 but could not remember the exact dates. According to her, the complainant said accused raped her everyday when the mother was away. PW6 said the complainant told her that she was afraid to tell her mother and her grandmother that accused had raped her.

The Crown led the evidence of Lomakhisimusi Thwala PW7, PW1's mother. It was her evidence that during the year 2000 and 2004 there were occasions that accused remained at home with the children when she was away. It was further her evidence that she would on occasions send PW1 and the other children to go and buy her bananas and that PW1 and the other child would not come back home with the bananas and she would find out that they had misappropriated the money and went and stayed at Pigg's Peak. She said there were number of such occasions when PW1 would disappear from home.

PW7 told the court that she would notice that PW1 was not happy to remain at home when she, PW7 left. On occasions, she would ask PW1 to accompany her to the fruit and vegetable field. She said on one occasion, involving this case, PW1 would resort at throwing stones at her in order to discipline her or force her to tell her something of which she thought she was not prepared to tell the truth.

PW7 is aware that her husband, accused would also chastise PW1 by beating her with a harnessing

leather strap. In my judgement, the way of chastisement meted out by accused were certainly better than the way of chastisement meted out by the mother i.e. by throwing stones at the child.

PW7 was also cross-examined extensively by defence counsel. In answer to his questions, she stated that she threatened to throw stones at PW1 after plus minus less than a year that accused had been arrested. PW7 admitted that in the year 2003 accused was still at Mhlume Company and during this period he would not remain at home with the children but will come home on weekends. During the above period she did seasonal work at the fruit and vegetable gardens. It was only January 2004 that she started working on a regular basis. She said she decided to throw stones at PW1 when she suspected that PW1 was not telling her the truth.

The Crown rested its case.

I wish to point out that the standards of expected by the court in terms of Section 174(4) and the standard applied by the court at the end of the Crown case differ widely. At the close of the Crown case, the standard is that the Crown must have proved its case beyond reasonable doubt. In order to find this out, the court must take all the facts into account and assess the evidence in its totality.

The general principle is that in rape and related cases the court should constantly remind itself that the facile acceptance of credibility of certain witnesses may prove dangerous. In those circumstances, the court consciously remind itself that it should be careful in considering evidence which practice has taught should be viewed with suspicion. Towards this end, a court should seek some or other safeguards reducing the risk of a wrong finding based on a suspect evidence.

This caution must not be allowed to displace the exercise of common sense. See in respect SNYMAN 1968(2) SA 582 AD 585. Reference is made to the caution that the court should take into account that principle in the above-cited case.

One of the safeguards applicable is to find corroboration, see in respect of NCANANE 1948(4) SA 399A @405. In the present case, corroboration must not only be based on the fact that crime charge was in fact committed, but further, that it was the accused who committed it.

As to the commission of the crime, the court should view the evidence of PW1 the minor of tender age whose evidence's credibility is wanting in a number of respects with caution to name but a few of her evidence -

(a) her own mother PW7 told the court that she resorted to the use of such violence against her own child in order to extract certain information from her i.e. by throwing stones at her.

(b) PW1 would be sent on an errand and would not return home, PW7 would not know where she would be sleeping and who would be sleeping with her;

The date of this alleged criminal assault on her do not support those in the indictment. I had some difficulty in accepting that the method by the accused of using a woven leather strap only would not even amount to an assault but in view of the even crude method used by the mother it appears to me that was an accepted norm at the accused's household.

Considering the above, and other incidences, the court was of the view that PW1 was a witness whose evidence is highly suspect. PW1 was not readily forthcoming with the information of the alleged rape on her. PW6 the policewoman had to feed her in order to persuade her to tell her what her father did to her. It is trite that the Crown must prove its case beyond reasonable doubt. In the present case, the Crown has not done so. For instance in count one, the Crown could have extracted some specimen from the private parts of the complainant and compared it with the sperms of the accused. This was not done. I have already referred to the assault and it appears to me the family used this crude method used by the accused as chastisement is even better than the method used by the mother who one would have thought the mother would be more lenient on the complainant than the father. This was clearly a wayward child who was completely unruly. During her evidence she referred to her father as "lomuntfu" instead of "my father".

In all the circumstances of this case, considering all the facts of this matter, the court finds that the Crown has not proved its case beyond any reasonable doubt and it follows that the accused is therefore found not guilty on count one and three and is accordingly acquitted and discharged.

J. M. MATSEBULA
JUDGE