IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO. 333/06

THE KING

VS

SANDILE SHABANGU

CORAM	**MAMBA I**
FOR THE CROWN	**Q. ZWANE IN**
FOR THE ACCUSED	**PERSON**

JUDGEMENT 7th MAY, 2007

[l]0n the 16th day of April 2007, the accused appeared before me on an indictment alleging that on or about "the month of July 2005 and at or near Mafini Location c/o Malkerns area, in the Manzini region, the said accused did unlawfully and intentionally have unlawful sexual intercourse with one HLOBSILE VILANE, a female minor aged thirteen (13) years without her consent and thereby did commit the crime."

[2]Before the indictment was read to him, he was reminded of his right to be represented by an attorney of his choice if he wished to be represented and could afford such services. He indicated that he would conduct his own defence. When the indictment was read to him he pleaded not guilty. At this stage I took the liberty to explain to him

the possible verdicts that may be returned on the indictment, particularly in view of the indictment before it was amended by the crown, as it seemed to allege that the complainant had in fact consented to the sexual intercourse, but because of her age was in law incapable of granting such consent.

[3]The first witness for the Crown was Hlobsile Vilane (hereinafter referred to as the complainant). She told the court that she was born on the 16th day of December 1991. In July 2005 she was living in Malkerns and looking after her brother's infant. On the night she was raped, the mother of the said infant was away from the house they lived in and she, the complainant, was alone with the infant in the house.

[4]She informed the court that at about 9 of the clock that night, the accused, whom she referred to throughout the trial as VASCO, came to her house, knocked at the door, and identified himself before she could let him into the house. The baby was asleep when this occurred. After a brief conversation between them, the accused offered to give some money to the complainant and invited her to his house, which was in the same location, in order for her to get this money that he was offering to her. She agreed and they both left for the house of the accused, leaving the sleeping baby alone in the house.

[5]I should interpose at this stage and state that the accused was well known to the complainant. The accused was at that time engaged in a love affair with one of the sisters of the complainant. The complainant told the court further that it was not unusual for the accused to give her money.

[6]When the two reached the house of the accused the accused opened the door for the complainant, she entered, the lights were on. The accused directed the complainant to take the money on top of a

refrigerator. The accused suddenly switched off the lights as the complainant tried to take the money on the refrigerator. He got hold of her and forcefully laid her on his bed. He undressed her. She tried to scream or shout for help but the accused threatened her with violence and told her to be quite. Out of fear, she complied. The accused proceeded to rape her after which he dressed her up, gave her E20.00 and freed her to go to her house. She left his house and rejoined the infant at her house.

[7]The mother of the baby came home the next day but the complainant did not report to her that she had been raped by the accused. She explained that she was afraid to do so because she felt she would be chastised or blamed for having left the baby alone at night and joined the accused at his house and thereby put the child at risk. She told the court further that there was no one else in that community to whom she could report what the accused had done to her and it was not until later on that month or early the following month that one of her sisters, SISANA VILANE, came home that she reported to her. Sisana gave evidence as PW3.

[8]PW3 told the court that in about August 2005, she visited the complainant at Malkerns and noticed that she was walking rather awkwardly, She walked unsteadily with her legs wide apart and showed that she was in some discomfort. On being asked by her, the complainant revealed that she had been raped by the accused and that was the source of her discomfort in her groin and private parts.

[9]PW3 told the court further that she decided that the issue should be reported to the police in order to protect the interests of the complainant but that she reasoned that this should be first reported to her sister-in-law, who, at the time, was the person living with the complainant and would, in turn report it to the complainant's elder brother.

[10]Sisana was not sure of the date when this occurred but said that she thought it was in August of that year because at that time she found the complainant readying herself to go to attend the Reed dance, which according to her, is held annually during that month.

[ll]On the 28th day of August 2005, the elder brother of the complainant got to know of the matter and immediately decided that it should be reported to the police and this was done. It is noted here that the said brother got to know of the rape when he over-heard his wife and the complainant talking about it at Mahlanya. They were preparing to inform him about it. Under cross examination by the accused, the complainant said that her wishes and expectations in reporting the matter to her brother was to have the accused called by her brother so that the accused could explain to her in her brother's presence why he had raped her.

[12]The Doctor who examined the complainant on the 28th day of August 2005 found that the complainant's hymen was torn. He came to the conclusion that this was indicative openetration, in one form or another, having occurred.

[13] At the close of the case for the Crown the accused applied for his discharge and acquittal at that stage in terms of the provisions of section 174(4) of the Criminal Procedure And Evidence Act. I refused this application and held that there was evidence implicating him in the commission of the crime. The evidence of the complainant implicated him and although the rape had taken place at night, there was no issue of whom, according to the complainant, her rapist was. There was, ample time and light for her to see and identify him. The accused had made no attempt to conceal his identity, either prior to, during or after the commission of the offence. The complainant had

known the accused very well before this incident and she knew where his house was in the same location she lived.

[14]The rights of the accused on how he could present his case and the implications associated with each of the methods or forms available to him were explained to him by the court and he choose to give an un-sworn statement in his defence and thereafter closed his case.

[15]The accused denied having raped the complainant. He stated that he was not at Malkerns at the relevant time and was working for a construction company away from the Malkerns area. The accused told the court further that the charge against him had been fabricated by the complainant's brother and the complainant because the former and the accused had had a quarrel before this incident and the complainant's brother had threatened some unspecified punishment to the accused. The accused said the brother of the complainant had accused him of being unfaithful to his girlfriend, a sister to the complainant. Accused argued that proof of this fabrication by the complainant's brother was the fact that the complainant had told the court that her initial intention had not been to report the matter to the police but to have the accused called upon by her siblings to explain to her why he had raped her. That, in summary was his case.

[16]The evidence of the complainant is very clear and straight forward. The only criticism that may be leveled against it is that it is lacking with regards to dates; for example, the date of the commission of the crime, the date on which she reported the rape to her sister or the date on which her rape was reported to her brother. That, however, does not, in my view detract from her evidence as to what happened to her and who did this to her.

[17] Her reason for her failure to report the incident to her sister in law, with whom she lived at the time, is understandable and is to be expected of a thirteen year old in her situation. She reasoned that her sister-in-law would disapprove of her having left her baby in the house alone at night to go to the house of the accused. Her fears were, in my view, not unreasonable.

[18]The complainant explained further that she could not report the rape to her brother because she was less familiar with him as she had not lived with him for any significant period of time. She said she was afraid of him. He was after all the father of the baby the complainant had been baby-sitting on the night she was raped.

[19]There is no merit in the allegation by the accused that the complainant conspired with her brother to fabricate the charge against him. There is no support for this in the evidence and the assertion by the complainant that she had wished and expected the accused to be called to explain his conduct to her and her family, militates against such conspiracy involving her.

[20]The doctor who examined the complainant on the 28th day of August 2005 was of the opinion that based on the torn hymen, penetration had taken place about a month prior to his examination of the complainant. This evidence lends support to the evidence of the complainant that she was deflowered during the month of July that year.

[21]I have to treat the evidence of the complainant with the customary or usual caution that is employed in such cases. There are two reasons for this in this case, namely because the complainant is a child and because it involves a sexual offence.

[22]The courts in this jurisdiction have, in exercise of that caution, looked for corroboration of the evidence of the complainant to minimize the risk of convicting on what may be potentially wrong testimony. I have stated above that the complainant was thirteen years old at the time of the commission of the offence. She was fifteen years old when she testified before me. She was not a baby and she gave her evidence in a logical and straight- forward manner.

[23]The cautionary rule of practice employed in connection with complainants in sexual cases was stated by Holmes JA in the case of **S *v* *Snyman.,1968 (2) SA 582 at 585 as follows:***

> "Unlike an accomplice in a criminal trial,a complainant in asexual case is not ex hypothesi a criminal. Nevertheless in respect of both of them there exists an inherent danger in relying on their testimony. First, various motives may induce them to substitute the accused for the culprit. Second, from their participation in events which actually happened, each has a deceptive facility for convincing testimony, the only fiction being the deft substitution of the accused for the real culprit. Hence in sexual cases there has grown up a cautionary rule of practice (similar to that in accomplice cases) which requires -
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> (1) the recognition by the Court of the inherent danger aforesaid; and
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> (2) the existence of some safeguard reducing the risk of wrong conviction, such as corroboration of the complainant in a respect implicating the accused, or the absence of gainsaying evidence from him, or his mendacity as a witness...
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> Satisfaction of (a) and (b) will not per se warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt; and this depends upon an appraisal of the totality of the evidence and the degree of safeguard aforesaid....In this connection...,while there is always need for special caution in

scrutinizing and weighing the evidence of young children, complainants in sexual cases, accomplices and, generally, the evidence of a single witness, the exercise of caution should not be allowed to replace the existence of common sense."

[24]Indeed, common sense dictates that there is no empirical evidence to suggest that complainants in sexual offences, who are in most cases women, would deliberately lie and cry rape.

[25]In rejecting this cautionary rule I can do no better than echo, with due respect, what was said by Olivier JA **in S v Jackson 1998 (1) SACR 470 (A) at 474G -477D** that:

"The notion that women are habitually inclined to lie about being raped is of ancient origin. In our country, as in others, judges have attempted to justify the cautionary rule by relying on 'collective wisdom andexperience'...This was also the justification, before the reform of the law, in the UK...This justification lacks any factual or reality- based foundation, and can be exposed as a myth simply by asking: whose wisdom? Whose experience? What proof is there of the assumptions underlying the rule?

Few things may be more difficult and humiliating for a woman than to cry rape: she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; her community may turn their back on her; she has to undergo the most harrowing cross-examination in court, where the intimate details of the crime are *traversed ad nauseam;* she (but not the accused) may be required to reveal her previous sexual history; she may disqualify herself in the marriage market, and many husbands turn their backs on a 'soiled' wife.

It is also sometimes said that the rule does not affect the State's burden of proof. This is not correct. In **R v W 1949(3) SA 772 (A)** Watermeyer CJ at 783 said that had the case been one of theft, the evidence would have satisfied the test of proof beyond reasonable doubt; but because the case was one of sexual assault, the same evidence would not suffice.

And at 476E the learned judge said that:

"In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt - no more no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.

In formulating this approach to the cautionary rule under discussion I respectfully endorse the guidance provided by the Court of Appeal in **R v MAKANJUALO, R v EASTON [1995] 3 ALL ER 730 CA),** a decision given after the legislative abrogation of the cautionary rule in England. Although the guidelines in that judgement were developed with a jury system in mind, the same approach, *mutatis mutandis*, is applicable to our law. At **732f-733a Lord Taylor CJ** stated:

"Given that the requirement of a corroboration direction is abrogated in the terms of s32(l), we have been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge ought in summing up to a jury to urge caution in regard to a particular witness and the terms in which that should be done. The circumstances and evidence in

criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving "discretionary" warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's as well as its content." Lord Taylor CJ then formulated eight guidelines, the third of which is particularly important for our purposes. It reads as follows (see at 733c-d):

> '(3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual

offence nor will it necessarily be so because a witness is alleged to be an accomplice. *There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential* basis does *not include mere suggestions by cross-examining counsel.*'

[26]I respectfully accept and endorse this approach and hold that the cautionary rule, as hitherto applied in our courts, is outmoded, arbitrary, discriminatory of women and empirically false and should no longer be part of our law.

[27] **Jackson's** case (supra) was followed and applied in **S v M1999 (2) SACR 548** (A).

[28]There is of course, no evidence corroborating that of the complainant that the person who raped her is the accused. The evidence of the complainant is, however, clear and she was a credible and truthful witness. There is in my judgement, nothing in all the evidence before me suggesting that she may be falsely implicating the accused in this case. Her innocent assertion in court that she did not run to the police to report the rape because she was afraid her sister-in-law would reproach her for having abandoned her child at night is acceptable and so is her testimony that after reporting the rape to her brother, she expected the accused to be called upon by her brother for the accused to explain to her why he had raped her.

[29]The accused gave un-sworn evidence denying the charge. He did not lead any further evidence and of course he was not obliged to do so. There is very little, if any, weight I can attach to such untested and self-serving piece of testimony by the accused in the face of the truthful and clear-cut evidence by the complainant. His evidence is thus rejected as false.

[30]In sentencing the accused the court took into account the following as aggravating factors:

(a) The complainant was attacked or lured away from the sanctuary of her bedroom.

(3) The accused was a lover of the complainant's sister and was to that extent related to her.

(4) The accused took advantage of the complainant's prior knowledge that the accused would now and then make money gifts to her.

(5) The complainant was a virgin at the time.

(6) The accused did not use any protective device when raping the complainant and thus exposed her to the many sexually transmitted infections, some of them deadly, which are prevalent these days.

(f) The complainant was actually physically hurt in her genitalia and moved about with difficulty as a result.

(g) The accused exhibited no contrition for his misdeeds.

[31]Rape, whoever the perpetrator or the victim may be is utterly reprehensible and repellent and whilst long -term custodial sentences may not always be the answer to such acts, offenders should at least be left in no doubt whatsoever that the courts would not impose light sentences on them upon conviction.