



IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO.114/07

In the matter between:

REX

VS

ALBERT SUKULWENKHOSI NKAMBULE

CORAM

:

BANDA CJ

FOR THE CROWN

:

M. Simelane

**FOR THE DEFENCE
PERSON**

:

ACCUSED IN

JUDGMENT

- [1] The accused is charged with the offence of rape. It was alleged that upon or about the 20th May 2006 and at or near Shisizwe area, in Shiselweni District, the said accused did intentionally have unlawful sexual intercourse with Nompumelelo Mvubu, a Swazi female juvenile of seven (7) years old. When the charge was read to him, the accused pleaded not guilty and informed the court that he would conduct his own defence.
- [2] The complainant was a girl of ten (10) years of age at the time this trial took place. She was seven years old when the offence was allegedly committed. Mr. Simelane for the Crown applied that, in view of the tender age of the complainant, her evidence should be heard in camera. I granted that application. After examining the young girl on *voir dire* I was satisfied that she appreciated the nature of the oath she was about to take and on that basis I allowed her to be sworn.
- [3] The complainant stated that she went to Juliana Primary School and that she stayed at Shisizwe area and that she remembers the events of that day, the 20th May

3 2006. She stated that she lived with her grandparents together with her sister and an aunt, Phindile Mngometulu. She remembered the accused calling her and asking her if she wanted some oranges; that he invited her to go to his parental homestead where he had a house; that he told her to go further down where he allegedly showed her what he said was his garden. She stated that the accused then asked her to sit down and immediately ordered her to lie down and that he then lay on top of her and proceeded to rape her. She said that after he had finished raping her he told her to go to her home and that she should fetch some oranges from his home; that the accused's grandmother accosted her and asked her who gave her permission to pick the oranges. The complainant stated that she told the accused's grandmother that it was the accused who had told her to pick the oranges and that after that meeting she went home. She stated that when she got home she was asked where she had been and that she told them that she had been called by the accused. She then told Phindile Mngometulu, PW2, something and immediately Mngometulu went to see the accused's grandmother. The complainant stated that she had told Mngometulu that the accused had raped her. The complainant further stated that she had never, before this date, had

4 sexual intercourse; that the accused did not wear a condom when he raped her.

[4] The second witness for the prosecution Phindile Mngometulu. She stated that she knew the complainant who was her niece. She also knew the accused as neighbour. She remembered the events of 20th May 2006. She stated that during that day the complainant went missing and that they had gone looking for her. This witness stated that after sometime and at about 3pm the complainant came back home while she was carrying oranges. The witness stated that she asked the complainant where she had been and was told that she was coming from the accused and that she had gone to fetch some oranges. But the witness stated that she noticed that the complainant was crying and on further inquiry the complainant told the witness that the accused had taken her to a forest.

[5] The witness (PW2) informed the court that she decided to inspect the private parts of the complainant and that she observed that there was sperms in the complainant's private parts. The complainant told the witness that she had sexual intercourse with the accused. The witness then decided to take the

5 complainant to the accused's grandmother. Elinah Nkambule (PW4), in this case, is the grandmother of the accused. She confirmed the story of the complainant of having gone to fetch oranges from the witness' homestead and also confirmed that she had confronted the complainant on who gave her the permission to pick the oranges. This witness also confirmed the story of PW2 to the effect that the complainant was taken to her by PW2. PW5 was the police witness who investigated the allegation and stated that the accused was taken to a Magistrate court at Nhlangano where the accused made a statement to a judicial officer. That statement has been produced in this court as exhibit 2. The complainant was taken to Matsanjeni Health Centre and a medical report was obtained and has been produced in this trial as exhibit 1.

[6] The statement the accused made to a judicial officer is an admission of the offence. The medical report indicates that the complainant had been sexually assaulted as the hymen was absent from her private parts. It should be noted that the complainant was taken to the hospital soon after the alleged sexual assault.

[7] The accused elected to give sworn statement. He

6 denied sexually assaulting the complainant. He stated that he, at the material time, had spent the whole day watching and playing soccer and that he was nowhere near the complainant. In effect the accused states that the whole story is a complete fabrication against him.

[8] The complainant, as already indicated earlier in this judgment, is a young girl of ten (10) years of age. The evidence of young children should always be accepted with caution. But it has been held that courts should not act upon any rigid rule that corroboration must always be present before a child's evidence is accepted; vide the case of R V THANDA 1951(3) SA 158 A at 153 and our local case of ROY NDABAZABANTU MABUZA V R APPEAL CASE NO.35/02 where the guide set out in the case of MOJI V SANTAM INSURANCE COMPANY LTD 1981(1) SA 1020 (A) at 1028 A-E was applied:

“Trustworthiness, as is pointed out by Wigmore in his Code of Evidence paragraph 568 at 128, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observatim will depend on whether he appears “intelligent enough to observe”. Whether he had the capacity of recollection will depend again on whether he has sufficient years of discretion “to remember what occurs” while the

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capacity of narration or communication raises the question whether the child has “the capacity to understand the questions put, and to frame and express intelligent answers” (Wigmore on Evidence Vol.II paragraph 506) at 596).

[9] In the present case I find that the complainant, young though she was, had the capacity to remember the events and was intelligent enough to remember what occurred. She was able to remember and identify the accused as the person who sexually assaulted her. There was no possibility of mistaken identity as they both live in the same neighbourhood. Indeed there is evidence of PW2 that the complainant reported to her what had happened to her and that on inspecting the complainant’s private parts, the witness observed what she thought were sperms. This evidence is admissible, in my view, as this witness, being a married woman with one child, had sufficient experience of matters of life to know what are sperms. This discovery was made soon after the alleged sexual assault had taken place. There is also the evidence of this witness to the effect that the complainant’s skirt was wet at the back. The grandmother of the accused also noticed that the skirt of the complainant was wet at the back.

[10] I am satisfied and find that the complainant’s story is a

8 credible one and I can find no reason why the complainant would fabricate the sexual allegation against the accused. The accused conceded that there are other boys in the neighbourhood and he never suggested any ground why the complainant would make false accusation against him and not any other boy. I find that the prosecution has proved the charge against the accused beyond reasonable doubt. I find the accused guilty as charged and is convicted accordingly.

Accused: I have something to say in mitigation. I would ask that the court should discharge and caution me because the evidence given in court shows that nobody saw the offence being committed. PW2 saw that the complainant was not injured contrary to what the medical report states. The complainant's grandmother did not see the complainant's skirt wet. I am about to turn 18 years. I was attending school at St. Juliana Primary School. I was doing grade 7. I stay with my grandmother and I have no parents. I was attending school through Government Scheme. I help my grandmother in the household chores. I

receive food donation which I give to my grandmother. I was arrested on 20th May 2006 and have been in custody since then.

Sentence: This was a serious offence of rape. The complainant was only seven (7) years old. While I have to take into account the interests of the accused I must also consider the gravity of the offence and the interests of the community which demand that those who commit offences must be punished. The accused is a young man who is about to turn 18 years. He lives with his grandmother. I am satisfied that this is not a suitable case for caution and discharge. A custodial sentence is warranted. Cases of sexual assaults on girls of tender age are becoming prevalent and it is the duty of the courts to ensure that meaningful sentences are imposed. In the circumstances the accused will serve a sentence of 5 years with effect from 20th May 2006.

Pronounced in open court sitting at Mbabane on this 8th day of April 2008.

R.A. BANDA
CHIEF JUSTICE