THE HIGH COURT OF SWAZILAND

HELD AT

MBABANE

In the matter

between SABELO

NATHI MALAZA

Vs

THE

KING

Cora

m

CASE NO. 26/2008

Appellant

Respondent

Ban
da,
CJ
Ma
buz
a, J

For the Appellant

For the Respondent

Present in Person

Q. Zwane

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BANDA, CJ

[1] The appellant was convicted of rape by the Magistrate's court sitting at Manzini. It was alleged that on or about the 29th September 2007, at or near Mbhuleni area the appellant wrongfully, unlawfully and intentionally had sexual intercourse with C M, a female juvenile of 15 years of age without her consent. On conviction, the appellant was sentenced to a term of imprisonment of seven (7) years without an option of a fine.

[2] The appellant has now appealed to this court against both the conviction and sentence.

[3] In the Notice of Appeal the appellant contended that there was no report by a doctor to prove the commission of the offence. He attacked the evidence of the police officer (PW3) who searched his house and that the officer did not produce items which were used in the commission of the offence. The

appellant further attacked the credibility of the evidence of B W (PW4) and that of the complainant and described it as lies.

[4] In his heads of argument dated 3rd February 2009 and in his oral submissions made in this Court, the appellant had argued that the blood samples which were taken from the complainant were not produced in court to prove that he had committed the offence. He wondered why the doctor was not brought to court to give his evidence or to present his report. He also described the evidence of the police officer (PW3) and that of B W (PW4) as lies. The appellant criticised the trial court for allowing the complainant's mother to give her evidence at her home. In his heads of argument dated 10th February the appellant expressed his disappointment with the state of the court record and stated that he wished it had been "radio-taped". He contended that there were no proved facts from which the trial court could have inferred his guilt.

[3] The evidence of the complainant was very clear and direct. She said that on 29th September 2007, she had gone to the home of the appellant at Mbhuleni to visit her sister who happened to rent a house at the homestead of the appellant. She arrived at her sister's house at about 6.00 in the evening. She informed the court that at about 10.00 p.m. her sister took her to another house where she would spend the night. It was the house where her brother PW4 also slept. It was her evidence that while she was asleep she heard a knock at the door and that when she opened it she saw that it was the appellant who had knocked at the door. She said that the appellant told her that her brother, one Z K, was looking for her at the gate. There was electric light outside and she was able to see the appellant clearly. The complainant said that she proceeded to the gate to meet her brother-in-law only to find that he was not there. She said that the appellant had accompanied her to the gate. When they reached the gate the appellant closed the complainant's mouth and dragged her to a graveyard which was 100 meters away. The complainant said

that the appellant threatened to shoot her if she shouted and that while in the graveyard the appellant proceeded to rape her throughout the night. He produced an okapi knife. She stated that each time the appellant raped her he would wipe her with a jacket. The complainant was released in the early hours of the morning at about 4.00 a.m. and she immediately went and reported to her mother (PW2).

[4] The evidence of PW2 was to the effect that she was surprised to see the complainant coming to her in the early hours of the morning crying. She said the time was about 4.30 a.m. The witness said she was shocked and surprised to see the complainant crying. She said that she had originally thought that the complainant had miscarried as she was pregnant. When she was told the cause for the complainant's distressed condition she advised her to report the matter to the police. The matter was accordingly reported to the police on the same day.

[5] The next witness for the prosecution was PW4, B W. This witness is a brother to the complainant. He

confirmed that the complainant visited her sister and that he spent the night in the same house as the complainant. He said that he fell fast asleep and that on the following morning he could not see the complainant and did not know where she had gone. He said that the police came in the morning and they asked where "Sabelo Malaza" was. The witness said that Sabelo himself led the police to a different house where the police started making enquiries. The witness further stated that the appellant had told the witness that he feared he would be arrested by the police as he had done something bad and he expressed sorrow to the witness and asked for forgiveness. The witness said that the appellant was not able to tell him what wrong he had done that would have led to his arrest. The witness said that he later learnt that his sister, the complainant, had been raped.

[5] The next witness was the police officer (PW3) who arrested the appellant. He stated that after being misdirected to a wrong house by the appellant the witness later arrested the appellant in

a different house where he was found hiding under a bed and had covered himself with a mattress.

[6] The complainant is a young girl of 15 years. It is always advisable to remember that the evidence of young children should always be accepted with caution. It has been held, however, that courts should not act upon any rigid rule that corroboration must always be present before a child's evidence is accepted: See the case of **R v THANDA** 1951(3) SA158 at 153 and our local case of **ROY NDABAZABANTU MABUZA V REX** Appeal Case No. 35/2002 where the principles set out in the case of **MOJI VS SANTAM INSURANCE COMPANY LIMITED** 1981(1) SA 1020(A) at 1028 A - E were applied.

> *"Trustworthiness, as is pointed out by Wigmore in his Code of Evidence paragraph 568 at 128, depends on factors 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 observation 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 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,"*

The complainant in this case was 15 years of age and was pregnant. She was sufficiently mature and intelligent to know and remember what happened to her. The appellant was not a stranger to her and there was sufficient light to enable the complainant to identify the person who sexually assaulted her. There was no possibility of mistaken identity. The complainant immediately reported the incident to her mother which negatives consent and proves her consistency. The court *a quo* found the complainant to be an impressive and credible witness. I am satisfied and find that there was sufficient evidence to support the conviction.

[7] The appellant was somehow obsessed with the fact that the complainant's mother gave her evidence at her

home. The trial Magistrate found that she was critically ill and that she could not to travel to court. I find that there was nothing procedurally irregular in the trial court sitting at PW2's house and take her evidence. Similarly I find that there is no merit in any of the points the appellant has raised in his appeal.

[8] The sentence is always a matter in the discretion of the trial court. An appellate court will only interfere with the sentence if it is wrong in principle or if there was a misdirection or if the sentence is one which comes with any sense of shock. Seven (7) years imprisonment was not wrong in principle nor was it manifestly harsh. In the result I find that there is no merit in this appeal and it is dismissed in its entirety.

R.A BANDA, CJ

I Agree

Q.M. MABUZA, J