

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL TRIAL NO 217/07

In the matter between:

MGCINENI MAMBA

VS

REX

CORAM

MONAGENG, J

FOR CROWN

MS N. LUKHELE

ACCUSED

PRESENT IN PERSON

JUDGMENT

09th APRIL 2009

Monageng J

[1]The accused person, Mgcineni Mamba faces a charge of rape. The Crown alleges that on the 13th February 2007 at or near Mpakeni area in the Shiselweni Region, as an adult male, he intentionally had unlawful sexual intercourse with one S M, a female minor who at the time was aged 12 years and in law incapable of consenting to sexual intercourse.

[2] The facts of this case as related by the complainant (PW4) are that on this date, she knew the accused person well since they come from the same area. She further says that on that day she left her home to herd cattle. She met one Thobile Fakudze (PW3) who invited her to go to the fields with her, where they met the accused and one Juluba Dlamini who had roasted mealies. She says that the two young men made them drink marula, an alcoholic beverage.

[3] After the party drank the brew, she says that the accused grabbed her and slept on top of her, inserted his penis into her vagina and moved in an up and down motion and that in the process he was hurting her. She ultimately managed to escape from his grasp and ran away. When she got home, she reported the rape to her grandmother (PW2) who called the police. The child was taken to a hospital.

[4] She further said that when the accused was having sex with her, he told her that he was hurting her, but he ignored her. She says that when he inserted his penis into her vagina, she did not realize it initially because he was on top of her but soon realized what he was doing. When she got home she found her grandmother in the company of other people, and she says that at that time she was crying. She had left her friend,

PW3 and the two boys in the fields when she ran away. They had been next to the Ngwavuma River and she says that since she was bleeding from her vagina, she washed the blood off. After she reported the matter to her grandmother the police were called and she was ultimately taken to hospital.

[5] Fakudze her friend gave evidence as PW3. She says that the day before the 13th February the complainant and herself had asked the accused and Juluba to give them maize and the boys invited them for the maize the following day. The two girls joined the two boys in the fields on the 13th February for the maize as related by PW1 before going to school. The boys had already roasted some maize and they also had a 10 litre bottle of marula brew which they all drank. The boys also offered them cigarettes to smoke.

[6] While they socialized, she says the boys were holding them and calling them light complexioned women. They drank a lot of the brew although the accused drank more and the complainant drank the least. After their drinking spree, the boys told them to leave the field and at the gate there was a lot of grass. The boys told them to lie down and they would lie on top of them and then get up.

[7] Juluba then asked her (PW3) if he could have sex with her and she agreed and they went back into the field where they had sex. She does not know what happened to PW4 and the accused. When Juluba and her finished having sex she heard the complainant crying and walking away from the field. They called out to her but she continued walking.

When she next met her, the complainant she told her that the accused had raped her.

[8] PW5, Mvoyi Enock Dlamini, the chiefs runner, received the report of rape from the complainant's grandmother. A group of people gathered and the elderly women were asked to inspect the complainant's genitalia. She was crying continuously. The complainant told the runner that she had been raped by the accused. The police were later called and the child taken to hospital and the accused was arrested.

[9] PW2, B N M, the complainant's grandmother, said that on the 13th February 2007 the complainant told her that the accused had raped her and that she had managed to run away from him. She knew the accused since they lived in the same vicinity. She is not sure how old the girl was then. She confirmed that the women inspected the complainant's private parts and that she was taken to hospital. She also reported the alleged rape to the police. She also went to the scene of rape.

[10] Constable Ngwenya, PW6, attended the report of rape. He went to the scene of the alleged rape with the complainant's grandmother (PW2) and to the Matsanjeni Hospital for a medical examination. His investigations led him to the accused's home where he was cautioned and arrested.

[11] The medical doctor, Doctor Darlington Chikwanha gave evidence as PW1. He is a qualified medical doctor. He confirmed examining PW4, the complainant, S. M, on the 13th February 2007, who was allegedly a rape victim. When he examined her genitalia he found the following:

(a) Her labia majora and minora were normal.

(b) Her hymen was freshly torn posteriorly and anteriorly, that is at the front and back. There was fresh bruising on the fourchette. The bruising was anteriorly and posteriorly. The vaginal smears did not reveal any semen.

[12] The doctor's physical examination led him to conclude that she had had legal (clinical) penetration beyond the level of the hymen, by a firm object within a period of about 48 hours, prior to the time of examination. On the question of sexual activity, the doctor said that it was not possible to establish because she was injured and everything was clouded by the injuries. He was of the opinion that the injuries could have been caused by a firm and elongated object, but not a pen. He also opined that since this was an alleged rape, she had been penetrated. He tendered his medical report.

[13] Considering the totality of the evidence gathered, the accused was charged with rape. I must observe that this is a very queer case, where the accused did not cross examine witnesses despite my urging him many times to do so.

[14] At the close of the Crown's case I ruled that on the available evidence the accused had a case to answer. He was duly given his options at that stage of the proceedings, but he elected not to give evidence. I again ensured that the understood his options under the law and he said that he did, but that he was not giving any evidence in his defence, nor did he want to call any witnesses. He also decided not to make any final submissions. In the result, I am left with the version of the Crown only.

[15] In the case of **Rex v Justice Magagula** Case No 330/02 Justice Masuku quoting Justice Rooney in the **King v Vadelman Dengo** - review case No. 843/88 (unreported), the Court directed that in considering a charge of rape, the Court must establish if the complainant has been corroborated -

"The need to be aware of the special dangers of convicting an accused on the uncorroborated testimony of a complainant in such cases must never be overlooked. Corroboration may be defined as some independent evidence, implicating the accused, which tends to confirm the complainant's testimony

— Corroboration in sexual cases must be directed to:

1. The fact of sexual intercourse or indecent assault.
2. The lack of consent on the part of the complainant and
3. The identity of the accused.

Any failure by the trial Court to observe these rules of evidence may lead to failure of justice. The elements of the offence that must be proved are:

- (a) The identity of the accused.
- (b) The fact of sexual intercourse or indecent assault as the case may be.
- (c) The lack of consent on the part of the victim".

[16] (a) THE IDENTITY OF THE ACCUSED

In this case the identity of the accused is not in dispute. The two, that is the accused and the complainant, knew each other. They lived in the same locality. Their friend PW3, who was with them at the fields knew the accused well and was able to confirm that he was the last person she saw

with the complainant, before she started crying and leaving the field. He has not denied the evidence that ties him to the girl.

[17] (b) THE FACT OF SEXUAL INTERCOURSE

The medical report is quite explicit. The girl's genitalia was injured, her hymen was torn anteriorly and posteriorly. The doctor confirmed that she was medically and legally penetrated. This confirms what she said in Court - that the accused inserted his penis into her vagina. The accused has not denied this and I find that indeed there was sexual penetration. No semen was found, but it will be recalled that she says that since she was bleeding from her vagina, she washed her vagina in the river before she was examined by the doctor. And in any case, absence of semen does not disprove penetration.

[18] (c) THE LACK OF CONSENT ON THE PART OF THE
COMPLAINANT

Her friend PW3 says that after she had sex with Juluba, the two having parted with the complainant and the accused, the complainant emerged from the fields and was crying. She left without talking to her. Her grandmother (PW2) says that when she reported the rape she was crying. She is not sure when she was born, but the doctor said she was 12 years old when she was allegedly raped. When she gave evidence she said she was 14 years old. This is two years after she was raped.

[19] Whatever her age, the medical examination shows that even her breasts were undeveloped. She was not yet menstruating. Legally at age 12 years, she cannot give consent to sexual intercourse. Given the

totality of the evidence, I am convinced that she did not consent to the sexual intercourse. In the absence of anything to the contrary from the accused man, there is nothing that points to consensual sexual intercourse.

[20] I find that all the elements of rape have been proved. The complainant's evidence has been corroborated and it is my considered view that the Crown has proved its case against the accused man beyond reasonable doubt. As I indicated earlier, the accused offered no explanation at all although he is not forced to. He did not cross examine witnesses. Although by so doing, he exercised his right under the law, it is also trite that where there is overwhelming evidence against an accused person, usually he can make an effort to rebut it. In this case, I have had to rely solely on the evidence of the Crown, which I daresay has proved the charge of rape.

[21] In the result, I find that the Crown has proved the offence of rape against the accused person beyond reasonable doubt. I find him guilty as charged and accordingly convict him of rape.

[22] STATE COUNSEL

The accused is a first offender

[23] MITIGATION BY ACCUSED

I plead for leniency.

[24] STATE COUNSEL

I have no submissions.

[25] SENTENCE

The accused is a first offender who was relatively young when he committed this offence, he was clearly drunk at the time he committed this rape, although this is not justification for this offence. The complainant was also drunk although her state of mind should not make her easy prey to young men who take advantage of a young girl.

[26] I do, however, take the accused's mitigation into account. He is sentenced to 5 years imprisonment. The sentence shall be backdated to the 13th February 2007 when he was first arrested. Right of appeal within 14 days to the Supreme Court explained.

S.M MONAGENG JUDGE