IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT l\1BABANE

Case No. 306/2021

In the matter between:-

NDUMISO KHUMALO — Appellant

and

THE KING — Respondent

Neutral citation: *Ndumiso Khumalo v. The King (306/2021) [2022/ SZHC* 51 (01/04/2022)

Coram: A. **M.** Lukhele **A.J.**

Heard: 15th December 2021

Delivered: I ST April 2022

Summary: *CRIMINAL LAW- appeal on a conviction of rape - Evaluation of evidence led in Court {}; quo -did the Crown prove Appellant guilt beyond a reasonable doubt - Factual findings in the absence of demonstrable material 111idirectio11s and clear(y erroneous findings, an*

appeal Court is bound by the trial Court's factual findings - appeal dismissed- conviction confirmed.

JUDGEMENT

INTRODUCTION

[l] This is an appeal noted by the Appellant against his conviction by the Magistrates Court, Manzini, on a charge of rape of a minor aged eleven years old.

[2] The Appellant had pleaded not guilty to the charge of rape but upon the hearing of the matter he was on the 13 th October, 2021 found guilty and sentenced to a tenn of nine years imprisonment. The present appeal is against conviction only.

GROUNDS OF APPEAL

[3] The Appellant's grounds in respect of the appeal are as follows: -

3.1. "The Court a quo erred both in fact and in law by failing to look into the evidence of the Crown's witnesses holistically, in particular, the evidence of PW 6 in relation to the disappearance of the Complainant's father after the rape incident was reported to the school. The action of the Complainant's father was highly suspicious, raising a doubt to the Crown's case.

3.2. The Court a quo erred both in fact and in law by failing to consider the failure of the Complaii1ant to give evidence in cross examination only when the questions were in relation to her reporting the incident to her father.

3.3. The Court a quo erred by failing to take into account the conflicting evidence of the Crown's witnesses in relation to whether the rape was reported to the father of the Complainant.

3.4. The evidence of PW 2 was that the Complainant had informed her that the rape had been reported with her father yet when the Complainant told the Court that she did not rep01i same, when leading evidence in Chief. Upon cross-examination the Complainant failed to answer this question.

3.5. The Court a quo erred both in fact and in law by finding that in light of the above, the Crown was able to prove its case beyond a reasonable doubt that indeed the Complainant was raped by the Appellant.

3.6. The Comi a quo en-ed both in fact and in law by finding and holding that the Appellant has failed to disclose a defence to the charges against him as the principle is that there is no onus upon an Accused person to prove his innocence and if his version is probably true, he is entitled to an acquittal."

[4] Essentially the Appellant contends that on the evidence led the Crown failed to prove its case beyond a reasonable doubt, that it was the Appellant and not anyone else, who had raped the Complainant.

THE GROUNDS OF APPEAL RELATES TO THE TRIAL COURT'S EVALUATION OF THE EVIDENCE LED BY THE CROWN.

[5] The question before this Court therefore is whether The Magistrates Court. *a quo* was correct in finding that the state had discharged the onus of proof that lay on it in proving its case against the Appellant.

EVIDENCE IN THE COURT A QUO

[6] The record indicate that the number of witnesses were led by the Crown in proof of its case. At the close of the Crown's case the Appellant gave his evidence under oath. The Learned Magistrate convicted the Appellant and has set out his reasons for the conviction and sentence in his judgement fanning part of the record of appeal.

[7] The record reflects that the Complainant, a child of 11 years, testified that the Appellant was a friend of his father and was used to frequenting her home and was well known to him.

[8] During the month of June 2018 the Appellant, had visited the Complainant's father at his home. The home was one building, consisting of two rooms. One room used by Complainant's father to sleep in and the other used as a living room and sleeping

quarters

for the Complainant and his two siblings, Nolwazi aged 13 years and Collen aged 5.

(9] While visiting Complainant home the Appellant and his father stayed watching programmes on a television set which was in the living room. The Complainant naJTated that his father then left for work leaving the Complainant and Nolwazi in the homestead she stated that her mother was not at home as she had left earlier for his stand where she was selling wares. She testified that her brother Collen was not at home as he had earlier asked pennission from his father to go and paly at a nearby homestead with his friends. Her father had allowed him.

[I OJ The Complainant testified that she remained at home washing the dishes. She testified that the Appellant took out some money and called Nolwazi and sent her to the shop to buy fish. The Complainant proceeded to tell the Court a quo that after his father and Nolwazi had left the home, the Appellant called her to the house to his parents' bedroom. She said Appellant ordered her to undress, but she refused. The Appellant then forcefully undressed her the taking out her panty and skirt she had been wearing.

(11] After undressing her the Appellant then threw her on his parents' bed, took out his trousers while ordering her to lie facing upwards he then inserted his penis on her vagina, penetrated and raped her.

[12] The Complainant testified that while Appellant penetrated her it was painful. She cried and she bled from her vagina. She stated that the Appellant ejaculated on her. After finishing to rape her Appellant wiped himself with a cloth, dressed up and left the homestead leaving the Complainant at her home.

[13] The Complainant stated that immediately after the sexual intercourse she washed herself Nolwazi, her sister, had not returned from the shops when she washed. She stated that Nolwazi returned after she had washed. She did not tell Nolwazi as she was afraid. She also did not tell her father or mother when they came back in the evemng.

[14] The Complainant stated that she only reported the ordeal to the Deputy Headteacher of her school, Mrs. Mavuso, after a couple of days of her having been raped.

[15] Bertina Mantombi Mavuso, is a witness who was called by the Crown. This witness testified that she was a teacher at Balegane Nazarene Primary School lifted. Complainant's uniform and inspected. She and Mrs. Pata noticed that the child was burned on her thighs.

[16] The witness testified that she took the Complainant out of the class where she asked her about the burns. She said it was not clear that the Complainant had been burned sometime ago. The witness stated

that she. asked the Complainant if her parents took her to hospital and Complainant responded by saying no one took her as she did not tell anyone about the bums.

[17) This witness testified that the Complainant narrated to her how she had been sexually violated by her father's friend at his home while the friend was visiting her homestead.

[18) This witness testified that the Complainant mention that the person who raped her was a friend to his father, a certain Khurnalo. She testified that she was a teacher of the Complainant where she was doing Grade 3.

[19) She testified that on the 18 th July, 2018 on a Wednesday she was at school on that day the Complainant arrived late at about 9:00 a.m. she asked her why she was late on that day and why she had been absent from class on the previous day. This witness testified that the Complainant stated that she had been sick. The witness stated that she asked her about her ailment, whereupon she pointed at her private parts and stating that her private parts were sore.

[20] This witness testified that as they were talking with the Complainant a ce1iain Mrs. Pato a fellow teacher joined them in her class. She then invited Mrs. Pato to listen to what the Complainant was saying PW 2 testified that Mrs. Pato she stated that she asked the Complainant if she had reported the rape ordeal to. her parents and

she said she had informed her father. Upon enquiry as to what steps had been taken by the father to about the friend, she said her father called her friend by phone but his friend never came.

[21] This witness further told the Collli that Complainant did mention that her siblings were not at home when she was raped and she said one had beei1 sent to the shops. Her mother was also at work on the day of the rape.

[22] This witness concluded by saying she reported the incident to the Deputy Headmaster of the school. The Deputy Headmaster then took the child to Balegane Clinic where the child was examined.

[23] This witness was called by the Crown as PW 2. Dr. Banza is a medical doctor then based at the Dvokolwako Health Centre. He is the Doctor who on the 1 9th July 2018 conduced a medical examination 011 Bongiwe Malindzisa, the Complainant.

[24] He stated that the Complainant was stable with 110 injuries, but noticed the absence of a hymen. On examination he observed that one finger could be inserted on the vagina. Such examination was painful. The Doctor observed that there was no bleeding or discharges.

[25] The Doctor concluded that the had been penetration of the vagina "with a hared object which caused the tearing of the vagina." The Doctor testified that she examined the child of the presence of sexually transmitted diseases and she gave her some medication under cross examination Doctor Banza testified that she did not observe any sores on the thighs and Complainant did not experience any difficult in wallcing.

LEGAL PRINCIPLES

[26] It is trite that the onus rests on the Crown to prove the guilt of the Accused beyond reasonable doubt. If the version of the Accused is reasonably true, he must be acquitted.

[27] In considering the judgement of the Court *a quo* this Court has been mindful that a Court of Appeal is not at liberty to depart from the trial Courts findings of fact and credibility, unless they are vitiated by iffegularity, or unless an examination of the record reveals that that those findings were patently wrong.

[28] In **S v. Monyone and others 2008 (l) SACR 543 (SACR) at Paragraph 15** the Learned Ponnin JA stated the above principle as follows: -

"The Court's powers to interfere on appeal with the findings of fact of a trial Court are limited .....

[29] In the absence of demonstrable and material misdirection by the trial Comi, its findings of fact are presumed to be correct and will only be disregarded if the, recorded evidence show them to be clearly wrong **(S v Hadebe and others 1997 (2) SACR 641 (SCA0 at 645 E- F).**

[30] At issue in this appeal is whether the Crown proved its case against the Appellant beyond a reasonable doubt and if the Appellant was on the evidence rightly convicted.

[31] lt is trite that the onus is on the Crown to prove beyond reasonable doubt the crime of rape. In **Mbuso Blue Khumalo v. R 12/12 [2012] SZSC 21** MCB Maphalala JA (as he then was) stated that:

"285 In a rape case the prosecution bears the onus of proving beyond reasonable doubt three essential requirements of the offence, namely the identity of the Accused, the fact of the sexual intercourse as well as the lack of consent. See the cases of Mandlenkosi Daniel Ndwandwe vs. R Criminal Appeal No. 39/2011 at Para 8; Mandia Shongwe v R Criminal Appeal No. 21/2011 at Para 16."

[32] Applying the above test to the facts of this appeal the identity of the Accused person was not in issue in this case. The Appellant person

was well known to the Complainant as he was a family friend. This fact was not disputed in the Court *a quo* by the Accused in his evidence and/or in cross-examination.

[33] The issue of sexual intercourse was also proved beyond a reasonable doubt by Dr. Banza. The evidence of the Medical Doctor accords with the probabilities of a penetration of the complainant and c01Toborates evidence of rape.

[34] On the issue of the lack of consent, the Crown proved that at the time of the commission of the offence the Complainant was about seven years. She was therefore incapable of consenting to sexual intercourse. The Complainant's age was not disputed. Lack of consent was proved beyond a reasonable doubt.

[35] It is a trite principle of our law that the defence case should be put to the prosecution witnesses otherwise the defence evidence would be considered as an afterthought if disclosed for the first time during the Accused's evidence in-chief. See **Rex v. Mbedzi Criminal Case No. 236/2009 at para 223 (HC); Sonnyboy Sibusiso Vilakati**

v. Rex Criminal Appeal Case no. 35/2011 at pp 5 and 5 as well as Elvis Mandlenkosi Dlamini v. Rex Criminal Appeal Case No. 30/2011 at para 22 and 23.

[36] In the case of **Elvis Mandlen kosi Dlamini v. Rex Criminal Appeal Case No. 30/2011 at para 22 and 23;** [had occasion to state the law as follows:

"22. ft is a trite principle of our law that the defence case should be put lo the prosecution wirnesses otherwise the defence evidence would be considered as an afterthought if disclosedfor the first time during the Accused's evidence in-chief,'"

[37] The irnpottance of putting the defence case to the prosecution witnesses is to enable the Court to see and hear the reaction of the witnesses to the defence advanced by the Accused. The Crown witnesses should be cross-examined on the specific defence and respond fully to all questions put forward by the defence counsel. This assists the Comt in weighing up the evidence presented and reach its decision. Failure to put the defence case to prosecution witnesses is fatal to the defence case. Such evidence is considered an afte1thought, and, it is inadmissible.

See S. v. P 1974 (1 SA 581 RAD) at 582 and Mandlenkosi Ndwandwe v. Rex (supra) at para 15.

[38] [n this appeal, Ms. Ndlangamandla submitted that the Appellant was entitled to be acquitted as his version of events was reasonably possibly true.

(39] Having analysed the evidence of the Appellant ahd the evidence of' the Crown, the Court found that the Appellant's version is not reasonably, possibly trne and convicted him as charged.

[40] The record reflects that in his evidence the Appellant evidence hardly addressed the allegations against him. He sought to shift the blame to Complainant's father and subsequently to one Magagula.

COURT'S FINDINGS

[41] Having carefully considered the evidence in the record, judgement and submissions in this Cou1i I am not convinced that the Court *ff. quo* erred in finding that the Appellant's version is not reasonably true. The Appellant failed to put his version to the witnesses. His evidence, when compared to the evidence of the witnesses who testified was so improbable that the Court *a quo* was justified in rejecting his version. There is no reason for disturbing any of the factual findings made by the Court *a quo*. The case against the Appellant was proved beyond a reasonable doubt. In my view, the Appellant was correctly convicted as charged. I am convinced that his conviction should be confirmed and the grounds of appeal stands to be dismissed.

ORDER

[42] In the premises, the following order is made: -

l. The appeal against the conviction is dismissed.

2. The Appellant's conviction by the Magistrate Court, Manzini, is hereby confirmed.

. LUKHELE AJ

A.M. LUKHELE AJ
HIGH COURT OF ESWATINI

FOR: Appellant

Ms. N. Ndlangamandla
(Attorney for the Appellant)

FOR: Respondent

Mr. Musa Masango

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