IN THE APPEAL COURT OP SWAZILAND

In the appeal of Appeal No. 13/81

Pheneas Mbuti Masina Appellant

vs

REX Respondent

CORAM: Maisels J. P.

Isaacs J.A.

Mahomed J.A.

FOR APPELLANT: Lukele

FOR RESPONDENT: Flynn

JUDGMENT

(Delivered 25/1/82)

ISAACS J.A.

The Appellant in this matter had been charged with the crime of Rape in that in or about 25th April, 1980 the said accused did intentionally have unlawful sexual intercourse with Dorine Ngwenya who was at that time aged 9 years. There was an alternative charge of contravention of Section 3(1) of The Girls and Womens Protection Act No. 39 of 1920.

The complainant gave evidence to the effect that she had "been staying at the appellant's house. On the day in question her sister Thandie sent her to take a bag to the appellant who was then harvesting in the fields. She said that when she handed the bag to the Appellant he threw it away, got hold of her and dragged her to a tractor-furrow.

She then described how he had removed his clothing and had removed her panties and had threatened her with a knife and proceeded to have intercourse with her. She said it was painful.

Afterwards, she said, he took her home and behind a half-built house he tied her hands, and then went into the house. She said she remained tied up for a long time., She bit the string to get loose. She went into the house and found her sister with the Appellant. Her brother-in-law came, went away with the Appellant and she then reported the matter to her sister.

In cross-examination the Appellant asked her where was her sister when she gave him the bag. She answered her sister was at the house.

She denied that she told the police the Appellant had throttled her but afterwards said she told the police that he had pressed her throat. She said she had made the statement to the police on a Thursday. The alleged rape had taken place on a Friday.

The Complainant's sister Thandi Dlamini (CW 2) gave evidence to the effect said the appellant had come to the premises where she was living and enquired when her husband normally returned from work. The Appellant later went to the field. She gave the Complainant a bag to give to the accused. The Appellant later returned and the Complainant returned later. After the Appellant left the Complainant made a report to her. She examined the Complainant and found blood coming from her private parts. She saw the Appellant the same day later but did not tell him about the report the Complainant made to her. She said she feared "he might stab us".

She was cross-examined by the Appellant. She said he spent the night and left on the following morning. It is not clear from the record whether he spent the night after the alleged incident or before though it appears from the whole of the record to be more likely it was after the incident. It seems she reported to the police the following Monday.

The Appellant gave evidence stating that he suspected that the Complainant made up the story because of a dispute and jealousy. He had been asked by the Mission to help it at a tent hall had been built. At the time where the Mission had asked him to preach, C.W. 2 and her husband had been working previously. He said he knew nothing about the child. He had heard about it first when she made the report to the Mission. He denied the rape.

The learned Chief Justice asked the Complainant to be recalled so that the version of the Appellant could be put to her. She denied it.

The learned Chief Justice convicted the Appellant for rape and sentenced him to imprisonment for 5 years. He said the Complainant gave her evidence very well and that she and her sister were satisfactory witnesses. He disbelieved the Appellant's evidence.

He said inter alia "I have no doubt of the evidence of the Complainant which is corroborated by her report to Thandie which is fully accepted."

A medical report was put in but there was no medical evidence given in Court. According to the report the Complainant was examined on the 1st May, 1980. It is stated inter alia that there was no sign of laceration of the hymen.

After conviction the Appellant gave further evidence in mitigation. He again denied the charge. He said he was a preacher who lived by donations from members of the church. He had two children aged 3 years and 2 years of age.

In sexual cases such as the present it is usually essential to consider whether or not the evidence of the Complainant has been sufficiently corroborated, even where it is found that the Complainant has been a good witness. While corroboration of such evidence is not legally mandatory the trier of fact should clearly have in

mind that charges of this kind are generally difficult to disprove and that they may be falsely laid. (c/p R v. M. 1959 (1) SA 352 (AD), The trier of fact should warn himself of the danger of convicting without corroboration. (c/p R v. V 1949 (3) SA 772 (AD)

This is a cautionary rule similar to that applicable in the case of evidence of accomplices. (R v. W supra). The necessity for this rule is much amplified when the Complainant is a young child

because of the tendency of such children to fanciful illusions. There is always the risk of unconscious patriation (c/p R v. Rautenbach 1949 (1) SA 135 (AD).

The fact that a report was made to her sister is not in my opinion corroboration which tends to prove an accused's guilt. (c/P R v. de Beer 1933 N 50).

Evidence of the state of the Complainant at the time of making the report is an important factor to be taken into consideration, and such report may also be a factor to consider if there is an admission of the intercourse with a defence of consent.

In the present case the only part of the report admissive is the state of the Complainant.

It seems to me that the learned Judge in the present case did not give sufficient consideration to the fact that there was not sufficient corroboration of the Complainant's evidence having regard to the fact that the medical report was neutral, that there was no police evidence as to the state of the place where the alleged offence took place and also the surrounding circumstances. Although the evidence of the Appellant was in fact merely a denial it might reasonably have been true. In my view it would not be safe to convict.

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I would uphold the appeal and set the conviction and sentence aside.

I agree .

MAISELS J.P.

I agree.

MAHOMED J.A.

Maisels J.P.

The appeal is upheld and the conviction and sentence are set aside.