IN THE COURT OF APPEAL OF SWAZILAND

In the matter between AEP. NO. S.44/83

BOY SAMUEL NXUMALO

and

THE QUEEN

CORAM: MAISELS, P.

VAN WINSEN, J.A.

AARON, J.A.

JUDGMENT

(Delivered 1 on

L. de V. Van Winsen :

Appellant was charged with having raped a girl of 7 years of age, found guilty and sentenced to 8 years imprisonment. He appeals against his conviction and sentence.

The offence is alleged to have been committed on 8 December 1982. When complainant was examined by Dr. Satyanathan on 11 December, he found injuries to her eyes and forehead and conjectival haemorrhage around both eyes. He also found bruising around the vagina from which there was a white discharge. A microscopic examination of vaginal smears showed the presence of venereal infection but no spermatoza. Examination was very painful and indicated to the doctor that there had been partial pernetration in the course of an attempt at forced sexual intercourse with violence.

It was common cause that the facial injuries resulted from blows with a fiat and were unconnected with the sexual assault but had resulted from punishment administered to complainant by her mother after the sexual assault had taken place.

From the evidence of the complainant's mother (AGNES MAGAGULA) it appeared that she had been at a party on 9 December having left the complainant at her home playing with other children. It was only on 11 December that while washing the child she noticed some puss and blood discharge from the child's private parts. At first the child would give no explanation for her condition but on being asked again told her mother that a man with a wart on his nose had raped her. She took her mother to the house of the man she said had raped her. The man was not present but subsequently her daughter pointed out a man and she called him and asked for an explanation ofg his conduct towards her daughter. The man denied knowing the latter. This man was subsequently prosecuted and is the present Appellant. It appeared from the evidence by AGNES that the injuries sustained by complainant originate from a thrashing administered by her mother because her daughter had not told her what had been done to her.

She says that her daughter had told her that the man she pointed out had had intercourse with

her twice on two separate occasions. Apparently the previous rape had taken place on the occasion of another party which had been held a week earlier than the party on 8 December, The witness claims that she had thrashed her daughter after she had described and pointed out the man who raped her.

The complainant, who from her mother's evidence was a child of 7 years of age, was called to give evidence. She gave no answer to the question put to her by the trial judge before she gave her evidence, as to whether she knew what it was to tell the truth. Thereupon a further question was put to her, vz. whether she was going to tell the

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truth in the Court. To this question she replied affirmatively. The record of the. case contains a statement to the effect that the witness was warned to tell the truth. It does not appear that any investigation was conducted by the Court to determine whether she appreciated the difference between the truth and a lie or whether she had any understanding at all as to the meaning of the warning that she must tell the truth in the Court.

On being asked what had happened to her at the house of Appellant she stated that while she was warming herself at a furnace, Appellant grabbed her, took her to his house where ho told her to lie down and he got on top of her putting his private parts inot hers. When she cried he shut her mouth.

In regard to her subsequent actions in connection with the identification of her assailant she said in evidence that "he had a wart here". The transcript of the evidence records that she pointed out where the wart was but the record does not state to what part of her body she had pointed. After the matter had been reported to the police, complainant, accompanied by the police and Appellant, went and : pointed out the house where Appellant lived and in which she alleged she had been raped.

Under cross-examination complainant said she had made two statements to the police, the second of which was made at Big Bend. In that statement she told the police that Appellant had intercourse with her twice -once on a previous occasion to that to which the present charge and again on the day in question.

To complete the evidence, Appellant, after an

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application for his discharge at the end of the Crown case had failed, gave evidence to the effect that he had not known complainant and had never on any occasion had intercourse with her.

The trial Judge (Hassanali, J.) found the evidence of the complainant to be satisfactory, that her identification of the Appellant could be relied upon and that her evidence of having been raped was corroborated both by her mother, ACMES MAGAGULA, and by Dr. Satyanathan.

This case exhibits a number of features which, regarded cumulatively, are disturbing and tend to cast doubt upon the correctness of the decision of the Court a quo. Young children are of course competent witnesses provided they understand the truth and appreciate the necessity to speak the truth while giving evidence. It is for the presiding officer at this trial to satisfy him -delf by enquiry as to whether the child tendered as a witness understands what it means to speak the truth and can distinguish between truth and untruth and can understand the necessity of speaking the truth. Unless a child is found to appreciate this distinction she is not a competent witness.

Prima facie if regard is had to her failure to answer the question as described above, complainant seems not to have understood the meaning of truth. The admonition under such circumstances that she must speak the truth has as little value as her undertaking to do so. See S. v. J. 1973(3) SA 794 (A). The Trial Court, to judge by the record, omitted to conduct any enquiry in regard to her competence to give evidence, A further unsatisfactory feature in this case is the:

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real possibility that pressure was brought to bear upon complainant by her mother to identify someone as the person responsible for raping her. It is eviden that she was at first unwilling to disclose what had happened to her. She said that she was beaten by her mother at the time the latter was telling her to point out the man who had assaulted her. The mother herself says she beat the child after the latter had pointed out the Appellant, a statement which seems to be less probable than her daughter's evidence.

One other matter remains to be referred to. While being cross-examined, complainant's mother stated that her daughter had told her that Appellant had had sexual intercourse with her on two occasions, the first occasion being prior to the assault which is the subject matter of the present charge. A number of questions were asked of this witness in regard to this other occasion. The same matter was raised during the cross-examination of complainant and again in re-examination by Counsel for the Crown. While it is fair to say that no blame attaches to Counsel for the Crown for the introduction of this issue it was one which was prejudicial to Appellant. See the cases quoted by HOFFMAN & ZEFFERT South African Law of Evidence", 3rd Edition at pp 35 et seq, s.v. Evidence of Disposition or Similar Facts.

Had the trial judge been fully alive to the prejudicial nature of this evidence and overtly disabused his mind of the matter, it may well be that it could have been accepted that it had no effect on his judgment. So far from that being the case, however, the trial

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judge remarks in his judgment as follows :

"Though of tender age she (complainant) gave a convincing account as to how she was taken on two occasions by the accused and (sic) raped her. I have no doubt whatsoever that she spoke the truth... "

In my view his reference to and reliance on evidence to the effect that complainant was raped on two occasions constitute a misdirection on his part.

It was in the light of the cumulative effect of all three of these unsatisfactory features that this Court at the conclusion of the argument allowed the appeal and set aside the conviction and sentence.

(SGD)

L. DE V. VAN WINSEN J.A.

I agree.....

(SGD)

I.A. MAISELS P J .P.

I agree.....

(SGD)

S. AARON J.A.