

IN THE COURT OF APPEAL SWAZILAND

CRIMINAL APPEAL NO.40/96

In the matter between:

MFANUFIKILE GININDZA

VS

REX

CORAM

: LEON JA

: SCHREINER JA

: STEYN JA

FOR THE CROWN : MISS S. NDERI

FOR THE APPELLANT : IN PERSON

JUDGMENT

Judge Leon:

We have had the advantage of argument by the appellant in person in this case. He has contended that he is innocent because the case was framed against him. In my view there is no such substance whatever in that point.

With regard to the offence of rape on which the appellant was charged the Crown has correctly conceded that he ought to have been convicted of attempted rape not rape. Not only did the grandmother against whom the offence was committed say that there could not have been penetration because her vagina had atrophied but the doctor himself when he was pertinently asked the question as to whether there was

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penetration he gave the following reply; "I cannot definitely say there was penetration." In those circumstances there is no justification whatsoever for a conviction of rape in this case but it must be attempted rape.

The facts briefly stated are as follows:

The complainant is the grandmother of the appellant. On the day in question, on her evidence, he dragged her outside, she cried and shouted for help. He dragged her into a hut where he slept on top of her saying that he would kill her. She added as I have indicated earlier that her genital parts were no longer functioning as they had dried up.

The appellant also had a knife. A neighbour witnessed this and summoned help. The complainant also complained to the appellant's mother when she had returned after herding cattle. The name of the neighbour is Amos Nkambule. He was PW3. He heard a cry for help and went into the house. He found the appellant seated on a bed, naked with a blanket covering the lower part of the body. The complainant also complained and made a report to a police constable. The complainant also

complained to another neighbour PW5 that the appellant had committed this offence. That witness found this old lady the grandmother who was 85 years of age crawling on her knees.

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The appellant testified under oath in which he said what he has told us today namely that the whole story had been concocted against him. He called as a defence witness his mother. So far from helping the appellant, she confirmed the complainant's evidence that she found the complainant crying alleging that the appellant had had sexual intercourse with her. The appellant then accused his own witness of lying.

He also called his second witness DW2. She testified that the appellant had worked for her in 1992 which took the case no further. The appellant's defence therefore was attempting to set up an alibi which was not supported by his defence witnesses and the Crown case against him was overwhelming. The defence witness DW1 his mother's evidence was destructive of his own.

In my view the learned Judge correctly accepted the Crown's evidence and rejected the appellant's evidence. However, the case as I have already mentioned is one of attempted rape not rape which means the sentence falls to be reduced. The question now is what is the proper sentence.

The initial sentence imposed by the learned Judge was nine years which was the statutory minimum. Although this case is now one of attempted rape it is in my view a serious case. The fact that the complainant was the grandmother of

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the appellant is important. Moreover the circumstances which I outlined earlier of what happened to the complainant fortifies this view. On a conspectus? of all the evidence I am of the opinion and it is now a matter where this court is at large to impose what it regards as a proper sentence. I am of the opinion that a sentence of six years which I might add was suggested by the counsel for the Crown will meet the justice of this case. I would therefore allow the appeal against the conviction to the extent by altering the conviction of rape to attempted rape. I also propose that the sentence be changed from one of nine years' imprisonment to six years' imprisonment and that the sentence must be backdated to 8th February 1995.

R.N. LEON JA

I agree :

W. H. R. SCHREINER JA

I agree :

J.H. STEYN JA

Delivered on the 3rd of April 1997