I N T H E COURT OF APPEAL (S W A Z I L A N D)

CRIMINAL APPEAL NO.43/96

In the matter between:

CHICCO NTSHANGASE

vs

REX

CORAM

: STEYN JA

: SCHREINER JA

: LEON JA

FOR THE APPELLANT : IN PERSON

FOR THE CROWN : MR. NGARUA

JUDGMENT

Steyn JA

Appellant was charged in the High Court on two counts of rape. He was convicted in the High Court on both counts. On count one the complainant was a 16 year old girl Phindile Jele and it was alleged that he raped her on the 19th of May 1995. The second count the complainant was a 6 year old Ncamsile Myeni and it was alleged that he raped her on 19th July 1995. There was an alternative to the second count which is not relevant for present purposes. As I have said he was convicted on both counts and he was sentenced to the mandatory minimum sentence of 9 years' imprisonment in respect of both counts, the sentences to run concurrently.

Appellant appeals against his conviction and sentence on both counts. It will be convenient in view of the conclusion which we come to deal with the second count first. In other words I am dealing with the count in which the Appellant was convicted of raping the 6 year old girl Ncamsile Myeni.

In convicting the Appellant the Court relied on the evidence of the complainant who was called as PW4 in Court below. She said that she knows the Appellant who lives in the same neighbourhood as she does. She identified him in Court and she gave evidence that on the day in question she informed her mother of the fact that the Appellant had had sexual intercourse with her. When she was asked to give evidence to what had happened she repeated that and I quote: 'Chicco had sexual intercourse with me.'

It was only with greatly difficulty and understandably so that the Crown was able to elicit details from her as to what had occurred. However it became clear in the course of her evidence that the intercourse that had taken place had occurred after the Appellant had allegedly threatened her to cut her with a bushknife. She then described the events that allegedly took place and again confirmed the fact that she made a complaint to her mother.

She was cross-examined by counsel who represented the

Appellant for much of the hearing in the Court below and it is relevant for the purposes of this judgment to refer in some detail to the evidence which was elicited from this complainant during the course of cross-examination. At page 51 of the record the following is recorded:

(Cross-examination by counsel for the defence)

"DEFENCE: You have told the Court that the accused had sexual intercourse with you and you have used the words 'wangibhebha.' Where do you get that phrase from?

COMPLAINANT: I was told by my mother.

DEFENCE: When did your mother tell you?

COMPLAINANT: The following day.

DEFENCE: Did you mother explain to you why she was telling you?

COMPLAINANT: Yes she did explain to me.

DEFENCE: Why did she say she was telling you?

COMPLAINANT: So that I could talk.

(Then the leading question was put to her)

DEFENCE: So your mother told you that you must say Chicco 'wakubhebha'? (which ellicits the answer)

COMPLAINANT: Yes."

At page 54 of the record she was further cross-examined by counsel of the Appellant. She was asked by counsel, "When you told your mother of what the accused had done to you did you tell the subject to where or she asked you about it?'

And her answer was, 'I was the one that narrated the story to her."

However at page 58 of the record the following evidence is recorded:

"DEFENCE: I put it to you that the accused person never did anything to you that day."

(Obviously there was no response and the Crown prompted her by saying:)

"CROWN: What do you say about that?

COMPLAINANT: Nothing."

The defence proceeded to ask further; 'I put it to you that you were told by your mother to say that Chicco had had sexual intercourse with you when in fact this was not true.' The equivoccal answer given by the witness is; 'That is true.' She was then asked by the defence; 'What is true?' And her answer was that; 'My mother had said Chicco had had sexual intercourse with me.'

On the next page of the record page 59 the following appears in the course of re-examination by the Crown:

"CROWN: When you told your mother what had happened to you what did she say had happened to you?

COMPLAINANT: I told her that Chicco had had sexual intercourse with me. I told her that Chicco had made me do something strange. CROWN: And did she tell you what you must say?

5

COMPLAINANT: She said I must say Chicco had sexual intercourse with me using 'kubhebha.'"

Then finally on page 60 still on re-examination the Crown asks the question:

"CROWN: Ncamsile did you make up a story against Chicco? COMPLAINANT: Yes. CROWN: What did you make?

COMPLAINANT: I thought that I should like that.

CROWN: Is it true?

COMPLAINANT: Yes."

It is clear from this testimony that there is some understandable confusion in the mind of a 6 year old what she experienced herself and what accords with her own original recollection and what she was told by her mother. It is therefore particularly important to have regard to other evidence which would corroborate her testimony. This is the more so in view of the fact that the Appellant has given evidence under oath in which he denied having sexually assaulted the complainant.

There is indeed ample evidence that the complainant was raped. However it is the identity of her assailant that is in issue and its in this respect that one seeks corroboration with the complainant's testimony. Mr. Ngarua. for the Crown was asked by us to refer us to other evidence which would convince the Court that it is safe to convict.

6

In this regard he referred us to several factors the most important of which are the following: Firstly, the fact that the complainant had reported the crime and the identity of her assailant to her mother.

Secondly, that it was common cause that the Appellant had been with the complainant on" the day in question. Thirdly, that the Appellant had been proven to be an unreliable and untruthful witness. In this respect counsel for the Crown specifically emphasized the fact that it had been established that the motive that he advanced why he was falsely implicated by the complainant was proved to be false.

We have given careful consideration to these factors. A reading of the Appellant's evidence demonstrates that he was certainly not an impressive witness and that the evidence he has given in the Court below in respect of this count appears to be highly questionable.. His evidence was of such a nature that there every reason to doubt his veracity and it certainly renders his conduct and behaviour on the day highly suspicious. The admission he made of being in the company of the complainant on the day in question is certainly confirmatory of her version. However, it is not on its own or together with the unsatisfactory evidence of the Appellant of sufficient weight to convince us that a Court properly instructed would find that the Appellant's guilt was established beyond a reasonable doubt.

7

Finally concerning the question as to what the corroborative force is of the contents of the report allegedly made by the complainant to her mother our view is that the significance of the report must be greatly reduced by the unsatisfactory evidence of the complainant which I have cited above. Her responses to the suggestions put are of particular importance. It is clear that at least some of her evidence would indicate that she was prompted by her mother to identify the Appellant as the person who has sexually assaulted her.

The risks of a wrong conviction in this case have been considerably enchanced by the fact that the court a quo failed to advert to the unsatisfactory aspects of the complainant's evidence referred to above. Had the Court dealt with this evidence and found on good grounds that despite the concessions made by her the complainant's evidence could be relied on, particularly when she identifies the Appellant as her assailant, this Court may as well have been persuaded to sustain the conviction.
As counsel for the Crown contended we are well aware that the fact that the Court does not specifically advert to evidence does not mean that the Court below did not in fact consider it when coming to a conclusion. However, the startling nature of the concessions made by the complainant are such that it is remarkable that the Court did not

8

advert to it when accepting the evidence of a 6 year old girl. This is particularly so when the Court is obliged to rely as heavily as it must do in this case exclusively on her testimony. For these reasons we have come to ' a conclusion that it is unsafe to sustain the conviction of the Appellant on this charge.

The conviction and sentence on count two must accordingly be set aside.

I come now to deal with the conviction on count one. The evidence on which the court aquo relied in respect of count one with a great deal more cogent than in the case of count two. Here to there can be no doubt that the complainant had indeed been subjected to a sexual assault. The medical evidence confirmed that 'forceful penetration of the vagina had taken place.'

The evidence of the complainant on count one was summarised by the Court in its judgment on page 4 of the judgment in the following terms and I quote:

"The Court then led the evidence of Phindile Jele on count one. She told the Court that she had been temporary working at Sarah Magagula's homestead. (next sentence omitted not relevant) The complainant stated that she was looking after the children of PW7. She also testified that the accused was also at the relevant time present at Sarah Magagula's homestead and he had requested the complainant to go to the accused's homestead to fetch chicken meat. She said she and the accused had gone to the accused's homestead and found that the homestead or the huts of the homestead had been locked and that the accused had

9

forced one of the doors of the hut and they opened and they had then entered. She stated that once in the hut the accused had requested from the complainant sexual favours which request was refused."

The learned Judge aquo then goes on to record the following: "It was the complainant's evidence that the accused had thereupon produced what appeared to her to be a firearm and had threatened to shoot her if she refused to have sexual intercourse with him. The accused had then proceeded to rape the complainant and this he did twice.

The learned Judge also records the question of the report which the complainant allegedly made and he analyses the evidence of the accused and the testimony of the defence witnesses called on his behalf including the Appellant's mother. Some of these witnesses including his mother clearly contradicted the defence that they had been present at the time when the alleged rape took place.

We have carefully considered the evidence and have had regard to the reasoning of the court a quo.

Certainly I could find no misdirection in the careful analysis which the Court made of the evidence of the complainant and of the Appellant and defence witnesses.

As in the case of count two this cannot be the case of mistaken identity. The Appellant was well known to the complainant. The Appellant was accordingly obliged to allege that he had been deliberately and maliciously falsely

implicated by the complainant and her family. The reason the Appellant advanced for him doing so was proved to be false. The evidence of the complainant was carefully analysed and considered with caution by the Judge aquo.

It is our view that there is no reason for disturbing these findings. The appeal against the conviction of the Appellant on count one on the charge of rape with aggravating circumstances must accordingly be dismissed. Aggravating circumstances having been proved to be present the mandatory minimum sentence of 9 years was obligatory. In the result the appeal on the charge of rape in respect of the rape of Phindile Jele referred to as count one is dismissed and the conviction and sentence are confirmed. Secondly the appeal on the charge of rape of Ncamsile Myeni referred to as count two is upheld and the conviction and sentence set aside.

STEYN J A

I agree:

SCHREINER J A

I agree:

LEON J A

Delivered on 4th April 1997