IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

CRIMINAL APPEAL NO. 15/97

In the matter between:

THE KING RESPONDENT

vs

THEMBA JEREMIAH MAGONGO APPELLANT

CORAM

: SCHREINER JA

: LEON JA

: STEYN JA

FOR APPLICANT : IN PERSON

FOR RESPONDENT : MISS NDERI

JUDGEMENT

Schreiner JA

The State in this matter has, in our view, correctly conceded that the case for the Crown was not sufficiently strong to constitute proof beyond a reasonable doubt. The appellant was found guilty of the rape of an eleven year old mentally handicapped child on or about the 1st February, 1996. There was an alternative count under the Girls and Women's Protection Act, 1920. I will not set out the terms of the relevant provisions of that Act because it is clear that, if the appellant is acquitted on the charge of rape, he also should be acquitted on the charge under the Act.

The complainant in the present case was a child under the age of twelve (12) when she was assaulted, and spermatozoa was found in her vagina on the day of the alleged assault. This, in the absence of a very unusual circumstances, establishes penetration and ejaculation by a male sexual organ on or about the 1st February, 1996.

The child appears to have been very retarded as a result of an illness which she had when she was six years old. As was pointed out by the Crown there was no medical evidence which describes in detail the nature of her mental illness. She was usually only capable of using the word 'mama' or 'mammy' and, when she uttered these words it meant that she was hungry. When asked whether other than calling to her mother in this way, she was able to communicate with her, the latter replied, 'there is no other way'. The word 'communicate' in this context must be confined to communicating by words or signs. The mere fact that a witness is totally dumb or nearly so does not mean that she is not a competent witness. Section 214 of the Criminal Procedure and Evidence Act provides that:

'No person appearing or proved to be afflicted with idiocy, lunacy or insanity or labouring under any imbecility of mind arising from intoxication or otherwise whereby he is deprived of the proper use of reason shall be competent to give evidence while under the influence of such malady or disability'.

Section 213 vests in the Court jurisdiction to decide upon all matters concerning the competency or compellability of any witness to give evidence. In the present case the learned Acting Chief Justice was of the view that the complainant was not competent by virtue of her idiocy or lunacy. He must therefore have found that the problem was not purely one of communication which could be solved by the use of an appropriate interpreter but that the complainant suffered from one of the deficiencies mentioned in Section 214.

The child was not called as a witness and, her mother was called to depose to her actions and to interpret those actions to the Court. She was able to do this, it would appear by reason of the fact that she was the mother of the complainant and through this special relationship, she was able to put a meaning to the signs and actions of her child. A complaint made by the victim to another immediately after a sexual assault may be admissible as evidence in certain circumstances. This is dealt with in Hoffmann and Zeffett fourth edition page 118 as follows:

'The purpose of admitting such a complaint is to show consistency of conduct. That it is of no value whatsoever unless the complainant herself gives evidence'.

At page 120, it is said:

'If the complainant gives no evidence at all, neither the terms of the complaint, nor the fact that it was made can be ordinarily admitted. If the complainant has given no evidence the complaint cannot be used to show consistency. Normally, it will have no other relevancy unless it can be used to prove the truth of its contents. This would infringe the common law rule against hearsay'.

Joyce Matsenjwa, the mother of the complainant appears to have been sworn in as an ordinary witness and not as an interpreter. To the extent that her statements to the Court purported to be an interpretation of the sign language of her daughter it probably falls to be ignored. Authority for this is to be found in S v Naidoo 1962 (2) SA 65 (A). Because the mother was not interpreting evidence given in Court but rather the actions and words used by the mentally retarded daughter it should be ignored because it was hearsay.

I do not propose to into details of the evidence which the mother gave concerning the facts leading up to the pointing out of the Appellant by the daughter nor do I intend to describe in detail her evidence concerning the alleged pointing out or statements which were not made by the daughter as to who was responsible for the assault upon her. It suffices to say that the actions of the child are perfectly consistent with an intention by the child, if she could form any such intention, was to say that she had been assaulted by a man or a person and not by the Appellant in particular.

If the court ignores the evidence of the mother there is nothing which indicates that the Appellant was the person responsible for what was admittedly a sexual attack. I am therefore of the view that the trial Court erred in finding that the Crown had established that the appellant was responsible for the assault. It follows that the appeal must be upheld and the conviction and sentence set aside.

W. H. R. SCHREINER JA

I agree :

J.H STEYN JA

I agree :

R.N. LEON JA

Delivered on this........day of September 1997.