IN THE APPEAL COURT OF SWAZILAND

CRI. APPEAL NO. 7/99

In the matter between;

SANDILE STANLEY MAVIMBELA

VS

THE KING

CORAM LEON, J P

STEYN, J A

TEBBUTT, J A

FOR APPELLANT IN PERSON

FOR CROWN

JUDGMENT

(26/11/99)

LEON, J P

Despite his plea of not guilty the appellant was found guilty of rape. In the indictment it was alleged that the rape was accompanied by aggravating circumstances as envisaged under Section 185 bis of the Criminal Procedure and Evidence Act 1938. At the time of committing that crime the complainant was a female child of 9 years and at time of the commission of the crime she was a virgin. The court a quo found that aggravating circumstances were present and sentenced the

appellant to 9 years imprisonment. The appeal is brought both against the conviction and sentence. According to the file which was in possession of the trial judge when the appellant first appeared on this charge before the Chief Justice, he was referred to the Psychiatric Centre for investigation into his mental capacity at the time of the alleged offence in order to ascertain whether he was capable of standing trial and pleading to the charge and to investigate any matters relating to his mental capacity which may affect his criminal liability, A few days later on the 28th September, 1998 Dr. Ndlangamandla, a consultant Psychiatrist at the National Psychiatric Centre produced a report on the appellant's mental state. He was later called as a defence witness to whose evidence I shall later refer. That report stated of the appellant:-

" he is fully conscious, fully orientated, and in all spheres he is able to give a coherent account of himself. His memory is intact and shows no psychiatric features. His moves and effect are normal and he has no anxiety features. He shows good judgment and has no cognitive impairments. "

In the next paragraph of the report he stated that:-

"The assessment therefore shows that Mr, Mavimbela is mentally fit. His claim of alcohol intoxication cannot be based on grounds for not being held responsible for his activities. "

The report concludes that the appellant is therefore capable of standing this trial and pleading to the charge laid against him.

There is abundant evidence that the complainant was raped. Dr. Bitarabeho, who works at the RFM hospital in Manzini examined the complainant on the day of the alleged offence. He found her to be a nine year old child with a withdrawn mental state. There were no injuries in the labia majora or the labia minora but the entrance to the vagina was bruised. The Hymen had fresh tears and the fourchette and the perineum had lacerations which were bleeding slightly. He found faeces in the private parts The fresh tears in the hymen could have been caused by a penis. He concluded that the complainant had been raped. In cross-examination it was suggested that the doctor's report was more consistent with sodomy than rape but the doctor disagreed.

The complainant (PW4) testified that on the day of the alleged offence she had been sent to the shop. She saw the appellant following her. He asked her and her companions to come to him after they had been to the shop. When the complainant returned from the shop the appellant came up to her saying he wanted to take her to a certain homestead instead of which he took her into the bush where he asked her to lie down and he inserted his penis into "what I use for urinating," It was painful and it was against her will. She cried out but he throttled her. There was no cross-examination at all on the rape but only on the throttling which she did not report to the doctor.

The uncle of the complainant, one Dumisa Zwane testified for the crown as PW2. He also knew the appellant. The complainant lived with him. At about 2p.m. on the 1st January 1998 he sent three children including the complainant to the shop. One of them returned making a report to him. In consequence of that report he went

to a bush where he found the appellant having intercourse with the complainant. He was on top of her. She was crying but helpless. The complainant was bleeding from the vagina and could not walk. He was unable to notice whether the appellant was drunk or not. However he questioned the appellant about his conduct who told him that he had called the child and wanted to send her to the shop. The witness admitted that he knew that the appellant drank alcohol and that he had once had an episode of mental retardness. But he did not agree that the appellant was drunk at the time of the incident.

The mother of the complainant, Phindile Zwane, gave evidence as PW3. She handed in the birth certificate of the complainant reflecting that she was bom on the 3rd may 1988.

She sent the children including the complainant to the shop before 4p.m. on the day in question but the complainant did not return. In consequence of a report she went towards the shop preceded by her brother. When she arrived they had already caught the appellant next to the bush. The complainant was crying and kept quiet for a long time. She examined the complainant finding swellings on the side of her vagina and "a cut in the front". She knew the appellant drank alcohol.

Since the event the complainant was afraid of males and she also refused to go to school.
The appellant testified. He was at home on New Year's day 1998 but did not remember what he was doing there. On the night before he was at Mhlume arriving home at 7.30a.m. He asked his grandmother for money and went to drink liquor at some drinking spots. He had several beers. He next found himself at the Police Station. He had been at the Psychiatric Centre in 1991 where he received treatment.

The appellant claimed to have no recollection of raping the complainant and remembers nothing from the time he was drinking beers after having received money from his grandmother. He admitted that he had had no treatment for some time since he left the centre.

On the previous day the appellant said that he had been drinking for some time and he fell asleep. He was still drunk the following morning

The Psychiatrist who had furnished the report was called as DW2. He said that in 1991 the appellant had a history of psychiatric disorder due to cannabis abuse. However when he examined the appellant before the trial he presented as a normal person. He said the alcohol could trigger any underlying mental disorder. However if the disorder was caused by cannabis that would imply that there was no underlying cause of the disorder. And when he saw the appellant in September 1998 his mental status was intact He did not show any disturbance.

DW2 then made some further general observations which are not entirely clear to me. However he admitted that if the appellant asked the children to come to him because he wanted to send them somewhere that suggested that it was very unlikely that he was mentally disturbed at the time. He added that the grabbing hold of the complainant by the appellant was very purposeful behaviour and did not suggest that

the person was disturbed. His evidence so far from helping the appellant did in fact weaken his position.

The appellant's grandmother, with whom he lived, is Florence Hlophe. She testified as DW3. The appellant had lived with her since his mother died from mental illness.

She confirmed that the appellant had been treated at the Centre in 1991 where he spent about two to three months. After he returned from hospital he would, after he had taken liquor, destroy or break her plates. Sometimes he would beat children and then go away randomly. He was prone to this bizarre behaviour after drinking liquor. She did not take him back to the hospital after 1991 because, although she had discovered that he was abnormal, as a Swazi she took him to traditional healers.

She did not see the appellant on the night before the incident. She gave him money in the morning when she said he was drunk. That was the defence case.

When this appeal was called the appellant appeared in person and advanced arguments both in respect of the conviction as well as the sentence. In regard to the conviction he urged, relying upon the evidence of the Psychiatrist and his grandmother, that he was mentally disturbed at the time of the commission of this offence. In regard to the sentence he said that he was a first offender, one who would not normally commit an offence of this kind and urged that his sentence should be reduced.

In R vs H 1962(1) SA 197 (A) at p207 the Appellate Division left open the question as to whether the defence such as amnesia is akin to insanity and whether in such a case the onus rests upon the accused person who raises it.

I shall assume, without deciding that the onus was on the crown not on the appellant but even upon that assumption I am satisfied that the appellant was correctly convicted. He was undoubtedly drunk but he was not so drunk that he was unable to rape the complainant. On the contrary, it is plain that he did indeed rape her. With regard to the question of amnesia the medical evidence to which I have referred points strongly in the direction that the appellant was not suffering from amnesia but he knew what he was about. That appears from his

conduct. His purposeful action in trying to persuade the complainant to go to a homestead and then deliberately drag her into the bush shows that he was aware of what he was doing and wanted to rape the complainant which is precisely what he did. I am satisfied that he was not suffering from amnesia at the time when this offence was committed and that he knew what he was doing. I am satisfied on the crown case particularly the medical evidence and all the facts that the appellant knew what he was about. He knew what he was doing and he was properly convicted. With regard to the question of sentence the learned judge was perfectly correct in finding as he did that aggravating circumstances were present. That attracts the minimum sentence of 9 years imprisonment which is the sentence which the appellant received.

It follows that the appeal must be dismissed and the conviction and sentence must be confirmed.

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LEON, J P

I AGREE STEYN, J A

AND SO DO I TEBBUTT, J A