IN THE COURT OF APPEAL OF SWAZILAND

Appeal Case No.16/2002

In the matter between:

MICHAEL MALAZA Appellant

VS

REX Respondent

CORAM : BROWDE J.A.

STEYN J.A.

ZIETSMAN J.A.

JUDGMENT

ZIETSMAN J.A.

The appellant was found guilty by the senior magistrate at Mbabane of raping Bonsiwe Mdluli, a five year old girl. Aggravating circumstances were found to be present and he was sentenced to 12 years imprisonment. His appeal to the High Court against his conviction was dismissed. In regard to the sentence the judges of the High Court held that the magistrate had exceeded his jurisdiction and the sentence was reduced to 7 years imprisonment, being the maximum sentence which could have been imposed by the magistrate.

The appeal by the appellant to this Court is against both his conviction and his sentence.

The appellant, who gave his age as being 40 years, was known to the complainant and to the complainant's mother. He is apparently not related to the complainant but in her evidence she referred to him as her "grandfather".

The Crown witness Rose Sibongile Sacolo stated in evidence that on 8th April 1998 she was at the market where she met her husband and the appellant. It was cold and she asked one of them to fetch her some warm clothing from her home. The appellant agreed to do so. He left her just after 11a.m. but did not return. When Rose's son, Nunu Sacolo, arrived from the preparatory school which he attended she asked him to go and look for the appellant.

The complainant stated in evidence that on the day in question she was at Nunu's parental home where she stayed. The appellant arrived there and told her to enter the house. He . followed her and made her lie on her back on a bed. He then lay on top of her and inserted his penis into her vagina. At this stage Nunu Sacolo arrived at the house. The door was locked but he managed to open it and he entered the house. The appellant then stopped what he was doing, and soon after that he left the house. She stated that this was not the first time that the appellant had done this to her.

Nunu Sacolo, a boy of six, also gave evidence. He stated that the complainant resided at his

parental home, and when he arrived at the house he saw the appellant, wearing only a T-shirt, lying on top of the complainant in the house. Nunu incidentally also referred to the appellant as his "grandfather".

It appears from the record that Nunu told the complainant's mother what he had seen and she reported the matter to the police. The complainant was then taken to hospital where she was examined by Dr Maureen Magagula. Dr Magagula stated that the complainant had no external genital injuries but she found a discharge that was dry on her vagina. She also found that the complainant had contracted a sexually transmitted infection. Her hymen had been ruptured but no bleeding was detected and no spermatazoa was found. Dr Magagula's conclusion was that penetration could have occurred without ejaculation.

The complainant's mother, Mary Mashiya, carried out a prior examination of the complainant and she stated in her evidence that the complainant's vagina was "open" and "completely damaged".

The appellant gave evidence and he called two other witnesses in his defence. His two witnesses were called simply to say that the complainant's mother had the habit of regularly locking her children in the house.

The appellant in his evidence admitted that he had been asked by Rose Sacolo to fetch a jersey for her. He stated that when he arrived at the house he found the door locked and the complainant inside the house. He stated that he did not enter the house and he denied assaulting the complainant in any way.

In contrast to the evidence he gave, the appellant in cross-examining the complainant put it to her that he was not at the house at all at the time when she was allegedly raped.

The magistrate accepted the evidence given by the Crown witnesses and rejected the evidence given by the appellant. The appellant, who argued his own case on appeal, failed to persuade us that the magistrate erred in this respect. In his argument before us he submitted that the case was not properly conducted in the magistrates court and that he did not commit the offence. He also alleged that the witness Nunu had been recalled to the witness stand and had changed his evidence. This is not borne out by the record, and the record does not in anyway support any of the submissions made by the appellant.

In the appeal to the High Court counsel for the Crown apparently doubted whether actual penetration had been proved beyond a reasonable doubt and submitted that the magistrate should have found the appellant guilty of indecent assault and not of rape. The judges of the High Court did not accept this submission. They came to the conclusion that the medical evidence and the direct evidence given by the complainant and by her mother constituted proof of actual penetration beyond a reasonable doubt. In this Court this conclusion by the High Court was, in out opinion correctly, supported by the Crown.

The Crown evidence depends to a large extent upon the evidence given by two very young children, namely the complainant who is 5 years old and Nunu who is 6 years old. Their evidence is however corroborated by the medical evidence and the evidence given by the complainant's mother, and it is our finding that the case against the appellant was proved beyond all reasonable doubt.

On the question of sentence the appellant complained of the fact that the sentence, as it was

altered by the High Court, was not backdated to the date of his arrest. It was ordered to run from the date upon which he was sentenced in the magistrates court. In reducing the sentence from 12 years imprisonment to 7 years imprisonment the High Court pointed to the fact that although aggravating circumstances are alleged in the charge sheet no such circumstances are detailed in the description of the alleged offence. The High Court, with obvious reluctance, felt compelled to reduce the sentence to 7 years imprisonment which was considered to be an unduly light sentence for the offence committed. It is our conclusion that the sentence is indeed a light sentence and that a further reduction of the sentence, by backdating it to the date of the appellant's arrest, is not justified.

In the result the appeal is dismissed and the conviction and sentence (as altered by the High Court) are confirmed.

N.W. ZIETSMAN J.A.

I agree

J.BROWDE J.A.

I agree

J.H. STEYN J.A.

Delivered in this 7th day of June 2002