IN THE COURT OF APPEAL OF SWAZILAND

Crim.Appeal Case No.13/02

In the matter between:

ZWAKELE MAVUSO Appellant

VS

REX Respondent

CORAM: BROWDE J.A.

STEYN J.A.

ZIETSMAN J.A.

JUDGMENT

Zietsman J.A.

The appellant brought an application to the High Court in which he sought an order that he be released from custody.

The facts of the matter are that the appellant was arrested by members of the Royal Swaziland Police on 9th October 2001 on a charge of rape. An indictment dated 7th March 2002 alleges that the appellant, together with three other named accused, raped one Gugu Precious Ndlangamandla on 6th October 2001. The appellant was born on 12 May 1988. He was thus 13 years old at the time of the alleged rape.



The application in the High Court was heard by the Chief Justice. He came to the conclusion that because rape is a non-bailable offence in terms of section 3 (1) of Order No. 14 of 1993 (as amended) he could not came to the appellant's assistance by ordering his release on bail. He however recommended that the appellant be moved to the juvenile prison at Malkerns and detained there.

The appellant appeals against the order made by the Chief Justice.

In his Notice of Appeal the appellant alleges inter alia, that the Chief Justice, who heard the application, had no authority to do so as his services had been terminated. This point was however abandoned by the appellant and requires no further consideration.

The gist of the appellant's argument on the merits is that there is an irrebuttable presumption in law that a boy under the age of 14 years cannot commit rape. The appellant was 13 years old at the time of the alleged rape and can therefore not be convicted of the offence of rape. The argument is that the charge against the appellant is not a sustainable or valid charge and that he should therefore be released from custody.

That there is an irrebuttable presumption that a boy under the age of 14 years is incapable of

having sexual intercourse with a woman is not disputed by the respondent. This is clearly the law in both England and South Africa. With regard to the English law see e.g. Halsbury's Laws of England, 4th Edition, Vol.II (1) p.38 para 34. In paragraph 516 at page 388 it is specifically stated that evidence may not be adduced to show that such a boy is capable of rape. For the position in South Africa see e.g. the cases of R v. Magope 1931 O.P.D. 57, R v M & Others 1949 (4) S.A. 831 (AD) and S v. S 1977 (3) S.A. 305 (0).

As stated above, the Crown in the present case does not dispute the fact that the same irrebuttable presumption applies in this country.

The cases to which I have referred emphasize the fact that it is the direct commission of the offence of rape that a boy under the age of 14 years is presumed to be incapable of committing. There is however authority for the proposition that if a boy under the age of 14 years assists an older boy or man to rape a woman he can be convicted of rape as an aider and abettor of the commission of the offence just as a woman who assists a man to



rape another woman can herself be convicted of rape. See e.g. the case of R v M and another 1950 (4) S.A. 101 (T). See also R v. Jackelson 1920 A.D. 486. In the passage in Halsbury referred to above what is stated is that a boy under 14 cannot be convicted as a principal of rape. He may however be convicted as a secondary party. The South African case of S v. S (supra) is to similar effect. What is stated in that case is that such a boy cannot be convicted as a principal offender of rape.

Miss Lukhele for the Crown submitted that on the charge as drawn the appellant could be convicted of rape as being an aider and abettor of the rape committed by his co-accused, and that it cannot therefore be said that the charge of rape brought against him is not a valid charge. To test this argument it became necessary for us to have regard to the actual wording of the indictment. After listing the four accused persons the indictment reads as follows:

"The Director of Public Prosecutions presents and informs the Honourable Court that the above mentioned persons (hereinafter referred to as the accused) are guilty of the crime of RAPE.

IN THAT on or about 6th October 2001, and at or near Mnyamatsini area in the Hhohho Region, the said accused, either one or all of them, acting in the furtherance of common purpose, did wrongfully, unlawfully have unlawful sexual intercourse with one GUGU PRECIOUS NDLANGAMANDLA without her consent. Thus did thereby commit the crime of RAPE.

The Crown will further prove that the Rape was accompanied by aggravating Factors in that

1. The complainant was gang raped;

2. The complainant was raped repeatedly by all the accused persons;

3. The complainant was due for work and needed transport; and

4. The accused persons did not use condoms during the unlawful sexual intercourse and thereby unduly exposing the complainant to the risk of contacting HIV/AIDS."

Miss Lukhele submitted that the words "acting in the furtherance of common purpose" in the indictment were sufficient to cover a possible finding that the appellant aided and

abetted his fellow accused to commit the rape, and that if this were to be proved he could himself be found guilty of rape.

There are no allegations of aiding and abetting in the indictment, and it is a matter of some concern that the Court should be asked by the Crown to read such words into the indictment in order to justify the continued incarceration of a 13 year old boy as an awaiting trial prisoner.

During the course of Miss Lukhele's argument we questioned her submission that the indictment could be interpreted to mean that the appellant aided and abetted his co-accused to rape the complainant. It was put to her that the mere allegation that the four accused acted in furtherance of a common purpose did not necessarily mean that the appellant actively assisted the other accused when they raped the complainant. What made such an interpretation of the indictment even less acceptable was the listing in the indictment of the alleged aggravating factors. Point No. 2 reads; "The complainant was raped repeatedly by all the accused persons". This suggests that it was the Crown's case against the appellant that he was a principal offender of the crime of rape. If this is what the Crown eventually succeeds in proving against the appellant he will not be found guilty of rape but only of indecent assault. See in this connection the case of R v M & Others (supra). Indecent assault is of course not a non-bailable offence.

When these possible difficulties concerning the interpretation of the indictment were put to Miss Lukhele she asked for time to reconsider the matter. When the case was again called she produced a new indictment and applied for it to be substituted for the original indictment. The substitution was not opposed, and was granted. In the new indictment the words "aided and abetted' are used, and we were once again surprised and concerned at the lengths the Crown was prepared to go to in its attempts to deny bail to this 13 year old boy (he has now, since the alleged rape, turned 14).

The amended indictment however does not solve the Crown's problems. This indictment, which is now the only indictment against the four accused reads as follows:

"The Director of Public Prosecutions presents and informs the Honourable Court that the above mentioned persons (hereinafter referred to as the accused) are guilty



of the following crimes:-

COUNT 1

The accused 1,2 and 4 are guilty of the crime of RAPE.

IN THAT on or about 6th October 2001, and at or near Mnyamatsini area in the Hhohho Region, the said accused, acting jointly and in the furtherance of the common purpose with accused No.3's assistance, did wrongfully and intentionally have unlawful sexual intercourse with one GUGU PRECIOUS NDLANGAMANDLA without her consent.

The Crown will further prove that the Rape was accompanied by aggravating factors in that

1. The complainant was gang raped;

2. The complainant was raped repeatedly by accused Nos. 1,2, and 4 whilst accused No.3 aided

and abetted in the unlawful enterprise

3. The complainant was due for work and needed transport; and

4. The accused persons did not use condoms during the unlawful sexual intercourse and thereby unduly exposing the complainant to the risk of contacting HIV/AIDS."

It can be seen that although allegations of assistance and of aiding and abetting on the part of the accused No.3 (the present appellant) are made, he is not charged with anything. It is only accused 1,2 and 4 who are charged with having raped the complainant. Miss Lukhele could provide no answer when this difficulty was pointed out to her.

In view of the fact that there is now no charge levelled against the appellant it is clear that he must be released.

As stated above, we are concerned at the attitude adopted by the Crown in this matter. The substituted indictment appears to be in conflict with the allegations made in the original indictment. The Crown must know what its case against the appellant is and the attempted alteration to the original indictment in order to overcome the possible difficulties pointed out to Miss Lukhele creates the impression of a manipulation on the part of the Crown in an attempt to defeat the appellant's claim for his release from custody. The wording of the original indictment suggest that the correct verdict against the appellant, if the Crown's



allegations against him are proved, will be one of indecent assault. If this had been the charge brought against him a court would have been able to consider whether he should be released from custody pending his trial. The Crown has however consistently refused to alter the charge against him to one of indecent assault and the result now is that he has in fact no charge to face. He must accordingly be released from custody.

The order we make is the following;

The appeal is allowed and it is ordered that the appellant be released from custody.

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