IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE APPEAL CASE NO. 25/2002

In the matter between

THEMBA DLAMINI Appellant

And

REX Respondent

Coram LEON, JP

STEYN, JA

TEBBUTT, JA

For Appellant In Person

For Crown Miss N. Lukhele

JUDGMENT

LEON, JP

Despite his plea of not guilty the appellant was convicted of raping Fakazile Mdluli referred to in the indictment as a three year old female. He was sentenced to 15 years' imprisonment. In the indictment aggravating circumstances were alleged, namely:

1. The victim was a minor of a very tender age at the time of rape.

2. Accused stood at loco parentis with the victim.

3. Accused did not use a contraceptive measure when having sexual intercourse with victim.

The Court a quo found that aggravating circumstances had been present.

After judgment had been given in this matter and the record was being prepared it was discovered that two tapes on which the evidence was recorded had been lost. Those tapes contained the evidence of Doctor Simon Haile Selassie and that of the appellant. The High Court record which was prepared was thus incomplete in that the evidence of Dr. Haile Selassie and that of the appellant did not appear therein.

At the hearing of the appeal counsel for the Crown made an application, supported by affidavit, that:

"Notes extracted from the judge's notes be included in the court record, so as to complete the High Court record on the proceedings in case 49/2000; the King vs Nqaba Themba Dlamini."

Although this court has in the past on occasion set aside convictions and sentences in appeals before it where the record of the case, and particularly the evidence, has been irretrievably lost or is substantially defective and it is impossible to reconstruct it, the courts are generally reluctant to do so. A court, on appeal or review, will only do so if it is satisfied that it is impossible to reconstruct it from the best secondary evidence available. The matter has also engaged the attention of the South African courts where it has been said that there is a distinction between a trial and the administrative tasks connected therewith e.g. the recording of the evidence. ...Evidence heard by the trial court forms part of the case upon which the court on appeal or review must adjudicate whether or not it is still on record. If the record is deficient or defective

the way out is to reconstruct the record as best as possible from secondary evidence that is available as to the contents of the original record. (See REX V WOLMARANS AND ANOTHER 1942 TPD 279 at 283; S V CATSOULIS 1974 (4) SA 3(T)). Such secondary evidence can come from the presiding judicial officer, the legal representatives, witnesses or even other persons present in court (see REX V WOLMARANS supra loc. cit; S V NTANTISO & OTHERS 1997(2) SACR 302 (ECD).

The primary source for such reconstruction is, however, the notes of the presiding magistrate or judge (see S V BIYANA 1997(1) SACR 332 at 333). When once the record has been reconstructed the Crown and the appellant or the accused in a review should be afforded the opportunity to say if they each agree with the reconstructed record (compare S V BIYANA supra; S V JOUBERT 1997(2) SACR 302). That is what has happened in this case. The presiding judge, Masuku J, who kept a very full note of the evidence, had his notes transcribed. He then invited the appellant and the representative of the Crown to a meeting where he furnished them with such transcript and asked them if they agreed that it were an accurate reflection of the missing evidence. Apart from some minor typographical errors, the Crown's representative agreed that it was. The appellant said that he, however, could not remember if that was what he and the other witness had said. When the matter came before this court, a similar question was put to the appellant who then produced his own notes which he said he had dictated to his brother, who had written them down for him. They were in Siswati which were translated into English for the court by the official court interpreter.

Those notes do not deal at all with the correctness of the transcript furnished by the trial judge. They are heads of argument relating only to

the conviction and sentence. When the court asked the appellant whether he wished to raise the question of the reliability of the learned judge's transcript he indicated that he did not wish to go beyond his heads of argument.

In those circumstances, and in the absence of a challenge by the appellant to the transcript, the court granted the application by counsel for the Crown.

The facts, briefly stated, are as follows:-

On the day of the commission of the offence, 8 March 2000, Solomon Hlatshwako (PW1) heard a child crying. He went to the spot from where the crying had come and found the appellant, who had stripped off his trousers and undergarments, having sexual intercourse with the complainant who was on his lap. He sent a child to fetch the complainant's mother and then asked the

appellant why he was having intercourse with the child. The appellant's response was to ask for forgiveness.

The complainant's mother arrived. She examined the child. Thereafter the appellant was handed over to the vigilantes and later to the police. The complainant was PW1 's niece while the appellant was his cousin.

PW1 was extensively cross-examined by the appellant mainly on peripheral, unrelated matters. It was also suggested to PW1 that he had concocted a story against the appellant because he owed him money. This was strongly denied by the witness.

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Although the complainant's mother Zakhele Hlatshwako (PW2) did not witness the rape herself, her evidence affords strong corroboration of the evidence of PW1. On the day in question she was coming from a shop when she received a report that the complainant had been raped. She hurried to the scene. Inspecting the child, she found that she had been sexually molested. She then asked the appellant, known as Buchwabalalana, what he had done to her child. The appellant replied that he had placed the child on his lap and this caused an erection. He had been tempted by the devil. He pleaded for forgiveness offering PW2 five head of cattle. She was advised by the elders and the vigilantes to take the child to the hospital and she secured the assistance of the police in order to do so. At the hospital the child was examined.

Earlier, when she had examined the child, she found the presence of semen and the child was wet inside her body.

PW2 described the relationship between the appellant and herself. The appellant's mother was her grandmother. The appellant was always treated as a member of the family; the children also treated him as such and her mother always gave food to the appellant. Despite a lengthy and largely irrelevant cross-examination the appellant did not challenge PW2's evidence that he had apologised and had been tempted by the devil. In her evidence PW2 stated that the child was four years of age.

The evidence of a young boy, Sowetho Hlatshwako, does not take the case much further. On the day in question he had been told by the appellant to round up the cattle which he and one Selby did. He left the appellant next to a mango tree. (It was at a mango tree that the alleged offence was committed.) The complainant was with the appellant at the

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mango tree. He later saw PW1 quarrelling with the appellant and saw the complainant crying at the mango tree.

Woman Constable Funani Primrose Dlamini was PW4. She is a member of the Royal Swaziland Police stationed at Pigg's Peak police station in the Criminal Investigation Department. In consequence of a report she went to Ebuhleni Police Post where she found the complainant and her mother PW2. She took them to Mkhuzweni Health Centre on 8 March 2000 and on that day the complainant was examined by Dr. Simon Haile Selassie (PW5). She later returned to Pigg's Peak Police Station where she charged the appellant with rape.

Dr. Haile Selassie testified that he examined the complainant whose age he estimated was "plus minus 2 years ". The hymen was absent and only one finger could enter the vagina. The examination was painful. No spermatozoa were observed. He concluded that the child had been sexually molested and that the absence of the hymen showed that there had been some

penetration.

The appellant gave evidence under oath. He denied having sexually molested the complainant at all. He denied having apologised either to PW1 or PW2. He claimed that PW1 had made up the story against him because he owed him money. He admitted being on good terms with PW2 but suggested that she had been put up to lie by PW1.

The court a quo was impressed with the quality of the evidence of the Crown witnesses. Their evidence was found to be clear, credible and consistent. They responded to questions in a forthright manner and the learned judge was unable to criticise their evidence.

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In the course of his evidence, the appellant admitted that he was related to PW1, PW2 and PW3, the latter two referring to him as their grandparent.

The learned trial judge found that the appellant's story was not only improbable but unworthy of belief. He relied, inter alia, on the fact that important aspects of the appellant's evidence were never put to the Crown witnesses. The court a quo regarded much of the appellant's evidence as an afterthought. Moreover the most critical and relevant parts of the Crown case were not challenged by him in cross examination, namely, PW1's evidence that he caught the appellant red-handed and PW2's evidence that the appellant apologised saying that he had been tempted by the devil.

In his letter of appeal to this court which is dated the 9th July 2002 the appellant attacked the reliability of the main Crown witnesses and urged that the trial court had erred in accepting their evidence. He suggested that the trial court had approached the evidence unfairly. He also suggested that the doctor's evidence did not establish rape.

In his argument before us the appellant contended that he was convicted on the wrong charge because the doctor's evidence proved no more than an indecent assault. He also contended that the sentence was too severe and was not correct because he did not commit the offence.

In my opinion no adequate grounds have been shown for concluding that the trial court erred in its assessment of the evidence. Indeed as appears

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from what is said earlier herein, the court a quo was clearly correct in such assessment.

There remains the question as to whether the doctor's evidence established rape or only indecent assault. In his evidence, Dr. Selassie stated that when he examined the complainant he found that she had been sexually molested and that there was some penetration because the hymen was not present. The examination was painful and admitted one finger.

In response to a question by the court, Dr. Haile Selassie stated that in a child of the complainant's age he knew of no other cause for the absence of the hymen except penetration whereas in an older person the menstrual cycle may interfere in part with the hymen. In Hunt South African Criminal Law and Procedure (Volume 2) the following is stated at page 440 - 441 under the heading Sexual Intercourse:

"There must be penetration, but it suffices if the male organ is in the slightest degree within the female's body and in any case it is unnecessary that semen should be emitted. "

In his judgment the learned trial judge relied upon that passage which is also in accordance with the view which has been taken by this court.

The court a quo was, in my view correct in holding that rape was proved, and the appellant's argument to the contrary cannot prevail.

I turn now to the question as to whether the sentence of 15 years imprisonment should be interfered with.

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The learned trial judge has given a most detailed and careful judgment in which, inter alia he has set out the principles which should guide a court in deciding what is a proper sentence. He also took into account all the relevant circumstances which operated in favour of the appellant but he considered the crime so heinous given the very tender age of the child and the fact that the appellant stood in loco parentis to the complainant as well as other relevant circumstances that a severe sentence was called for. One of the important matters relied upon by the trial judge in his impressive judgment is the fact that crimes of this nature are on the increase.

Aggravating circumstances having been established the court a quo was bound to impose a minimum sentence of 9 years' imprisonment.

The sentence of 15 years' imprisonment is undoubtedly a severe sentence but severity was called for. Offences of this nature are indeed on the increase. In the present session, this court (court A) heard eleven criminal appeals five of which involved rapes of young children. I am informed by Browde, JA that in this session in court "B" out of 10 criminal appeals three were rape cases, two of which involved young children.

In the course of his judgment Masuku, J said this:

"Offences of this nature are gaining ground and are on the increase in this nation. Parents and society at large must see a demonstration of the court's protection of young children. This can be translated by imposing a lengthy custodial sentence that will serve as a deterrent to you and other like-minded perverts that

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courts will not tolerate the abuse suffered by children at the hands of child molesters like you. This is a practice that must be nipped in the bud and you will provide a good example. "

I quite agree. The trial court did not misdirect itself in any way and the sentence was an appropriate one. There is no basis upon which this court can interfere with the sentence.

The appeal against the conviction and sentence must be dismissed and the conviction and sentence confirmed.

LEON, JP

I agree

STEYN, JA

I agree

TEBBUTT, JA

GIVEN AT MBABANE this 15th day of November 2002