

IN THE COURT OF APPEAL OF SWAZILAND

Crim. Appeal Case No.7/2004

In the matter between: REX

VS

:KENNETH MASEKO

CORAM : LEON J.P.

: BECK J.A. : ZIETSMAN J.A.

For the Respondent : Mrs Mawala

For the Appellant : In person

JUDGMENT

:Beck J.A.

The appellant was convicted in the High Court of rape. He was sentenced to 15 years imprisonment. The sentence was backdated so as to run from the date on which he was arrested and kept in custody until the time of his trial and conviction.

The complainant was an 11 year old orphan. At the time of the offence she was, and had been for some years, living under the roof of her aunt, Lomhlangano Kunene, the wife of Majalimane Kunene to whom the appellant is related.

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The complainant, who knew the appellant, testified that he raped her twice. She told her aunt and uncle that the appellant had raped her, but they reacted by saying that he would not have done such a thing and they did not take her to the Police or to a Doctor,

A few days later the complainant developed painful and itchy sores in her vagina and she complained about them, but once again her aunt and uncle did not take her to a Doctor. Instead, her uncle Majalimane gave her a medicine of sorts to drink, but it tasted awful and she did not drink it.

Not long thereafter a cousin of the complainant, Nozipho Hlophe, came to visit the Kunenes and she shared a bedroom with the complainant. Nozipho testified that the complainant would wake up at night and scratch at her vagina. Upon asking the complainant what was the matter the complainant told Nozipho that she had been raped by the appellant and that vaginal sores had developed thereafter, but that her uncle and aunt had not believed her and would not take her to a Doctor.

A little while after this Nozipho saw her elder sister, Zanele Dlamini, and told her what the complainant had said to her. Zanele thereupon fetched the complainant and took her away from the Kunene's home and the matter was reported to the Police who caused the complainant to be medically examined by Doctor Chibangu.

The Doctor testified that the complainant's hymen was torn and that there were ulcerated sores in her vagina. He was of the opinion that those findings in a child of 11 indicated that she had been sexually abused.

Zanele Dlamini died before the trial began and was therefore not available to testify. The only other witness called by the Crown was the complainant's aunt, Lomhlangano Kunene. She confirmed that the complainant had tearfully complained to her that she had been raped by the appellant, but went on to say that the complainant then added that she had been urged by Zanele to falsely accuse the appellant of rape because Zanele wanted

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to get the appellant into trouble. This additional assertion caused Crown counsel to ask for leave to treat Lomhlangano as a hostile witness, but the learned trial Judge was of the view that counsel had not followed the necessary procedure for such leave to be granted. Accordingly Lomhlangano was not cross-examined with regard to this piece of evidence which appears to be difficult to reconcile with her evidence that the complainant was in tears when she told her aunt that she had been raped by the appellant.

The appellant's testimony was a denial that he had raped the complainant. He called his relative Majalimane Kunene, and a fellow worker, Mduduzi Nkonyane, as witnesses. They both asserted that they had each gone, on separate occasions, to the school that the complainant attends, and had there been told by her that she had been asked by Zanele to falsely say that the appellant had raped her.

None of this was ever put to the complainant by the accused, although he cross-examined her in some detail. But since he represented himself it would be preferable not to rely upon this omission as a significant reason for discrediting the defence that the charge against the appellant is a trumped up one, maliciously instigated by the late Zanele Dlamini.

The learned trial judge had no hesitation in rejecting this defence as false and in my view he was correct in so doing. I have already referred to the incongruity of Lomhlangano's assertion that the complainant came to her in tears to say that the appellant had raped her, only to add in the next breath that this was a lie inspired by Zanele. Majalimani's behavior throughout displayed a fixed determination not to entertain the complainant's accusation against Majalimani's relative, the appellant. He even went so far as to say that his wife Lomhlangano had lied to the court when she said that the complainant had come to her in tears to say that she had been raped by the appellant. As for the fellow-worker of the appellant's, Mduduzi Nkonyane, his alleged concern on the one hand to search for and find the complainant after hearing that the appellant had been arrested for raping her, and his omission thereafter to report to the Police what he alleges she said to him after he

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found her, seems incomprehensible, and he was unable to explain his alleged behaviour to the trial court.

Moreover, the motive attributed by the appellant to the late Zanele for wishing to subject him to so serious a charge is far-fetched. The appellant made the unsupported allegation that he and Zanele had been lovers for only a week when he discovered that she was being intimate with another man, and, so he says, he terminated their very short relationship. He contends that this is what lay behind the alleged plot by Zanele to get back at him by persuading an 11 year old relative to tell such a serious lie.

Quite apart from these considerations however, the fact of the matter is that the medical evidence indicates that the complainant was indeed the victim of sexual abuse, and she told Lomhlangano and Nozipho that it was the appellant who had raped her long before Zanele had heard anything about the complainant having been raped.

For these reasons I am of the view that the appellant was correctly convicted. In addressing us the appellant said there was no medical evidence to identify him as the rapist. That is of

course true, but it is of no consequence because the behaviour of Lomhlangano and Majalimane Kunene prevented the complainant from being timeously medically examined. The appellant also contended that the complainant's evidence that he was armed with a knife, and that she cried out, was unreliable because no neighbours responded to her cries, and because she only spoke about a knife for the first time in cross-examination. These criticisms are of little value however. The evidence does not disclose how audible her cries may have been to neighbours, and the question of a knife having been in his possession was the result of a question that the appellant himself raised in cross-examining her. She had never suggested that she was forced to submit to him for fear of being stabbed, nor did she say so after he elicited from her the fact that he had a knife in his possession.

As for the backdated sentence of 15 years imprisonment I find no reason to justify altering it. The complainant, as I have said, was a child victim of his lust, physically

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unable to defend herself against him, and she sustained a sexually transmitted infection as a result of his behaviour. The offence is of an inherently very serious nature and it is an extremely prevalent offence. There is no misdirection to be found in the learned trial judge's approach to sentence, and the sentence he passed I do not find to be startlingly inappropriate at all.

Accordingly the appeal against conviction and against sentence is dismissed.

C.E.L. BECK J.A.

I agree

R.N. LEON J.P.

I agree

N.W. ZIETSMAN J.A.

Delivered on the 23....day of November, 2004