

IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

Criminal Appeal Case No. 55/2003

In the matter between

ALBERT KHUMALO Appellant

and

THE KING Respondent

Coram LEON, JP

TEBBUTT, JA

BECK, JA

For the Appellant: In Person

For the Crown: Mr. S. Fakudze

JUDGMENT

LEON, JP

Despite his plea of not guilty, the appellant was convicted of rape with aggravating circumstances and sentenced to 15 years imprisonment. That sentence was backdated to the 30ⁿ August 2001. The appellant, who appeared before us at the hearing of the appeal, has appealed both against the conviction as well as the sentence. The complainant Z S S testified as PW1. Her father had passed away, her mother had run away, and she lived under the roof of another woman. She testified at the trial when she was eleven years of age but it is common cause that at the time of the alleged commission of the offence she was eight years old. She said that on the day in question she was playing with other children at about 8.30 p.m. The appellant grabbed hold of her, pulled her into his house, undressed himself and herself, he then took some cow bones and stuffed them into her mouth and then smeared oil on her private parts having inserted two fingers to perform that task. He took his penis out and inserted it in her vagina. She complained that he was injuring her and that she would report him. This

caused him to slap her. She complained again that he was hurting her and he then gave her three Emalangeni asking her to wait as he was about to ejaculate. He warned her not to report the matter otherwise he would deal with her. One of the children with whom she was playing was Vusi S. Sibandze who testified as PW2 and to whose evidence I shall refer in little more detailed presently. He also supported her evidence that she had been seized and taken to the appellant's house. He reported this to the family and the community police. A member of the community police who was present was a man by the name of Lucky Motsa. He testified as PW3. These people and others ran to the appellant's house but he ran out of his house stark naked. He was apprehended just outside the toilet and the appellant in his argument urged that there is some discrepancy as to where he was arrested. The police had been summoned and the appellant was

arrested at the spot where he had been apprehended by Constable PW4, He was still stark naked when he was arrested and handcuffed. At the time of the arrest of the appellant complainant testified that she reported what had happened to the family and friends including her "mother" who later fainted on the spot and was not called as a witness. The complainant was examined by a doctor Simon Haile Selasi and he made a report. He had left Swaziland at the time of the trial but the appellant agreed that his report should be handed in. It reads as follows:

"An 8 year old female child was handed in as having been raped by an adult male. Examination revealed no bleeding or discharge Hymen perforated and smear taken showed spermatozoa. With the history she gave and the vaginal smear result it is my opinion that the girl has been raped. "

The appellant suggested to us that there was some conflict in the Doctor's report. I am unable to find such conflict. PW2 supported the complainant's evidence that she had been raped by the appellant. The

appellant said to the complainant "come here my wife". He said that the appellant took the complainant to his house and they went to the complainant's house calling out the name of the complainant but the appellant answered that she was not there but at another house with Bheki. They repaired to the latter's house but the complainant was not there and they then went back to the house of the appellant. They heard the complainant cry out that it was painful. This caused PW2 and others to raise the alarm. They then saw the appellant run out of the house stark naked towards the toilet. One of those people to whom PW2 made a report was a man to whom I have earlier referred as Lucky Nicholas Motsa. In consequence of that report he and others went to the appellant's house where he observed the appellant running out of the house stark naked. He went to the toilet where he grabbed hold of him. He took the appellant back to the crowd which had gathered including the complainant's "mother" who asked the appellant "what are you doing to me Khumalo". The appellant responded by pleading for forgiveness whereupon the mother fainted. The complainant reported in the presence of the appellant that she had been raped and had been given E3.00 and they saw the three Emalangeneni in the possession of the complainant. The police arrived and arrested the appellant. I pause to observe that the only matter raised by the appellant in cross examination of this witness was precisely where he had been apprehended. There was no cross examination on the appellant's plea for forgiveness, nor on the complainant's evidence relating to the three Emalangeneni. With regard to the other Crown witnesses I agree with the trial Judge that they were not discredited in cross examination but stood their ground.

In his evidence the appellant maintained that he was arrested at his house while asleep and he was naked at that time. He was arrested for no reason whatsoever. In short the whole crown case amounted to a tissue of lies. The appellant made a very poor impression upon the trial Judge and I am not surprised. There is another highly unsatisfactory aspect of the appellant's evidence. It was never suggested by him in cross-examination that he was arrested while sleeping in bed. But that was

fundamental to his case. He also claims to have been arrested on the 29th of August and not the 30th but that was never put by him on cross examination. Indeed he did not deny in cross examination that he grabbed the complainant and took her to his house.

The appellant contends that he was a victim of a conspiracy led by the parents of the complainant who were old enemies of his. They had tried to have him arrested on several occasions and the complainant had been schooled to lie against him. None of this was ever hinted at by him in cross examination. Even if there has been evidence that the parents of the complainant were illdisposed towards him that does not provide any reason why the other crown witnesses should lie. On the complainant's evidence supported by the medical evidence it was clear that she was raped. The abduction of the complainant with a sexual motive is supported by PW2. The evidence of the appellant is not only in the highest degree improbable but it is inconsistent with the Crown case. I agree with the trial Judge that the case against the appellant is overwhelming.

I turn now to consider the sentence. The Court found the crime was attended by the following aggravating circumstances. The complainant was a female child of 8 years of age. She was a minor with no sexual experience, and she was exposed to the risk of contracting HIV/AIDS, in that no preventative measures were taken.

The appellant is a first offender, a point made by him, and he has 9 children having lost his wife in the floods in Mozambique. He is 47 years of age. In the course of his judgment, the learned Judge refers to the general principles dealing with the question of sentence. He also refers to some judgments given by

my brother Tebbutt, also by my brother Steyn who have said that the usual range of sentences in cases of this kind are between 10 and 14 years and in this case as I have said the learned Judge gave a sentence of 15 years. In his judgment the Judge said this:-

"It appears to me that in casu the interests of the accused will have to be subservient to the interests of the society. Young children are entitled to their play and it is not for scavengers like you to pounce on. They need to be protected. The only protection against your sort is to impose severe sentences to discourage others who might be lurking in the dark aspiring to satisfy their lust on young girls. "

There is no misdirection on the part of the trial Court. I am sensible of the judgments of this Court which have referred to the general range of sentences in cases of this kind. However, this is a particularly revolting case made worse I believe by the fact that the appellant stuffed cow bones into the mouth of the complainant in order to prevent her from crying out. And even though he knew that he was causing pain, continued raping her in order to gratify his lust. It is a matter of great regret to record that there has been a steady increase in cases of this kind of rape on young children. It is true of course that a sentence of 15 years is a severe sentence. And it is also true that the sentence is one year more than the usual range of sentences that have been referred to in the cases in this Court. As I observed earlier there has been no misdirection on the part of the trial Judge. Having regard both to the nature and circumstances of this particular case as well as the most regrettable increase in crimes of this kind in this kingdom, I find myself quite unable to say that there is any striking discrepancy between the sentence which the Court imposed and that which this Court would have imposed. In my judgment this is a case where seventy was called for and there is no proper basis upon which this Court would be justified in interfering with the sentence.

In the result the appeal must be dismissed and the conviction and sentence must be confirmed.

DELIVERED IN OPEN COURT ON THE 14th DAY OF JUNE 2005

C.E.L. BECK,JA

I AGREE

R.L. LEON,JA

I AGREE

P.H. TEBBUTT, JA