THE SUPREME COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Criminal Appeal No. 18/2008

In the matter between

JONAH TEMBE Appellant

Vs

REX Respondent

Coram: BANDA, CJ

FOXCROFT, JA

EBRAHIM, J A

For the Appellant: In Person

For the Respondent: Ms Qondile Zwane

BANDA, CJ

JUDGMENT

[1] The appellant was convicted of the offence of rape by the Senior Magistrate's Court sitting at Mbabane. It was alleged that the offence was accompanied by aggravating circumstances as envisaged by the provision of Section 185 bis of the Criminal Procedure and Evidence Act. It was further alleged that the complainant was a young girl of tender age of nine years (9) and that the appellant did not use any contraceptive measure when he committed the offence. After conviction the case was remitted to the High Court for sentencing. After hearing the appellant in mitigation the High Court sentenced him to a term of imprisonment of 12 years and it was ordered to run from the date of his arrest.

[2] The appellant has appealed to this court against both the conviction and the sentence. He contends in his Notice of Appeal that he was wrongly and unfairly convicted and in his oral submission before this court he contends that although the complainant had alleged that he had threatened her with a knife, no such knife was produced as an exhibit at his trial. He also contended that he did not follow the proceedings at his trial because he did not speak or understand Siswati language and that he was not given a Portuguese interpreter.

[3] The appellant argued his appeal in this court in Siswati and he did not appear to have any difficulty in conveying his views. Indeed Ms Zwane, who also appeared at the appellant's trial, confirmed that the appellant conducted his defence, at the trial, in Siswati. I am satisfied and find that there is no substance in his complaint that he was not afforded a fair hearing at his trial.

[4] The complainant in this appeal is a young girl who was nine (9) years old at the time the offence was committed. The trial

was, quite properly, conducted in camera. The evidence of the girl was clear and specific. She stated that while she was watching television the appellant entered the room where she was and grabbed her by the neck, produced a knife and proceeded to sexually attack her. She stated that after the attack the appellant ran away through the same door he had entered. She immediately noticed that she was bleeding from her private parts. She crawled to the room where her grandmother was sleeping and reported what had just happened to her. The grandmother advised her to wipe off the blood and warned her not to report the matter to anybody. The complainant spent the rest of the night in her grandmother's bedroom.

[5] On the following day her grandmother borrowed a wheelchair which the complainant used to go to school because, apparently, she was having difficulty to walk properly after the sexual assault. When she arrived at school, one of her teachers noticed that she was not walking properly and she immediately told the teacher the cause of her difficulty. The teacher inspected the complainant and discovered that she had injuries in her private parts. The complainant later reported the matter to her aunt who inspected her private parts and found that the underpant was bloodstained. The complainant was later examined by a doctor who found that she had some ulcers in her private parts and that her hymen had been torn. The doctor also found that some yellowish discharge was coming from the complainant's private parts.

[6] There can be no doubt, in my judgment, that there was sufficient evidence to support the conviction against the appellant. His protestations of innocence have no basis

whatsoever. The sexual attack took place when the lights were on and there can be no question of mistaken identity. The appellant was somebody who was familiar to the complainant as the person who was working as herdboy to her grandmother.

[7] The complainant as already observed was a young girl of nine (9) years at the time of the offence. The evidence of young girls should always be accepted with caution. But it has always been held that courts should not act upon any rigid rule that corroboration must always be present before a child's evidence is accepted; See the case of R V THANDA 1951(3) SA 158 and also the local case of ROY NDABAZABANTU MABUZA V REX Appeal case No. 35/2002 where the guidance set out in the case of MOJI VS SANTAM INSURANCE COMPANY LTD 1981(1) SA 1020, at 1028 was applied. The court there stated as follows:-

> "*Trustworthiness, as is pointed out by Wigmore in his Code of Evidence Paragraph 568 at 128, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe." Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration and communication raises the question whether the child "has the capacity to understand the questions put, and to frame and express intelligent answers." There are other factors*

> *as well which the court will take into account in assessing the child's trustworthiness in the witness box. Does he appear to be honest - is there a consciousness of the duty to speak the truth*". *Then also* "*the nature of the evidence given by the child may be of a simple kind and may relate to a subject matter clearly within a field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility.*"

The complainant was examined before she gave evidence on the duty of telling the truth. The complainant was very consistent in her behaviour after the sexual attack. She immediately reported the attack to her grandmother and on the following day she reported the matter to her teacher and ultimately to her aunt.

[8] I am satisfied and find that the learned trial Magistrate properly directed himself of the danger of receiving evidence of young children. He was therefore entitled, after such direction, to receive the evidence of the young complainant. In the circumstances I find that there was sufficient evidence against the appellant to support his conviction and there is no merit in the appeal against conviction.

[9] The appellant was sentenced to a term of imprisonment of twelve (12) years. A sentence is always a matter within the discretion of the trial court. This court can only interfere with the sentence if it is wrong in principle or if it is manifestly excessive or if it comes with any sense of shock. The complainant is a young girl of nine years and she suffered serious injuries to her

private parts. The sentence imposed in this appeal was not wrong in principle, is not manifestly excessive nor does it come to me with any sense of shock. There is also no merit in the appeal against sentence. Accordingly I would dismiss the appellant's appeal in its entirety.

R.A. BANDA
CHIEF JUSTICE

I agree

J.G. FOXCROFT
JUDGE OF APPEAL

I agree

A.M. EBRAHIM
JUDGE OF APPEAL

Delivered in open court at Mbabane on 19th...day of November, 2008