IN THE HIGH COURT OF SWAZILAND

In the matter of Case No. S. 143/1981

REX

vs

Prince Maquba

CORAM: NATHAN, C.J.

FOR CROWN: MASINA

FOR DEFENCE: EARNSHAW

JUDGMENT

(Delivered 27th November, 1981)

NATHAN C.J.,

The Accused is charged with the rape of Phumaphi Khumalo on 7th April, 1981.

The complainant told the Court in her evidence in chief that on the morning of the day in question she was taking food to her mother who works in some gardens opposite the Happy Valley Hotel. She crossed the Bridge over the Usuthwana river on the Mantenga road and met the Accused, who was with a companion. He asked her name. She apparently knew him already. She is betrothed to Prince Mzingaphandle, a half brother of the Accused, to whom she has borne a child, and she was wearing ematinta. The Accused asked for whom she was wearing these; and she told him. The Accused told her he would like to take her over -'gena' her - while his brother was still alive. The complainant says she did not know what this meant. The Accused, like Prince Mzingaphandle is a son of His Majesty, older than Prince Mzingaphandle and is also a Member of Parliament. The suggestion that he is said to have made to the Complainant is surprising;

but J do not regard it as in any way impossible.

The complainant says she took the food to her mother and on her return found the Accused still standing near some gum trees. He followed her, saying she should not leave him behind. Later he asked her whether the ematinta she was wearing were not a sign that she should be respectful. She then stopped walking. According to her, he pulled her off the road into the bush and threw her onto the ground. She said she was menstruating and was wearing two pairs of panties. He pulled down the top pair which got torn and inserted his penis. He was wearing a mania; she did not notice if he had a jobo or anything like that. She said he penetrated her, and that she shouted but he shut her mouth with his hands. Before he discharged he withdrew his penis and he discharged onto her thighs. They were then disturbed by a rustling, possibly of a goat; the Accused got off her and she ran away. She said that as she ran the Accused wiped his penis, which would have had blood on it from her menstruation, with a pink wad of toilet paper. She said she later found this with the police under the tree where he had raped her.

This wad was produced. It bears two marks which suggest it may have been rubbed, but there is no sign of any blood on it, nor of any trace of sperm. The wad was apparently not sent by the police for any scientific investigation. Nor, although I am informed that the complainant underwent a medical examination, was any medical evidence called. Nor was either pair of the complainant's panties produced. All this is indicative of very slack investigation on the part of the police; and I think some

criticism of Crown is also called for;

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because it is the duty of the Crown to call for further investigation and evidence if it finds that the evidence with which it has been presented is inadequate.

The Complainant said she did not wipe herself till she got home. She was frightened that the Accused might catch up with her again. This evidence may be true; but it is not very convincing. I would have thought the natural thing to do -at least when she realised she was not being chased - would have been to wipe all the semen that the Accused had discharged onto her thighs. It is, of course, possible that she wanted to show the discharge to some person at home and she says that at at her home she showed it to one Dzandzane, before washing. But she does not give this as a reason for not wiping herself.

Dzandzane was the first person to whom she reported. She had, as appears in cross-examination, an earlier opportunity of reporting as she met one LaShongwe along the way. But she did not report to LaShongwe. The reason she gave was that LaShongwe was not of her family. This may be an adequate explanation, but I have some doubt in regard to it. She also said she did not think it necessary to tell LaShongwe, I think the natural thing to have done would have been to report to her.

I should mention that neither LaShongwe nor Dzandzane was called as a witness by the Crown.

The Complainant later reported to her mother who did give evidence. But the report to the mother appears to have been of the sketchiest - the complainant merely told her she had been grabbed by the Accused, which the mother took to mean had been raped, but there was no mention of the Accused's penis or of his having wiped it, or of the discharge on to the complainant's legs, or even where the assault took place.

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What is even more significant is that the mother did not make any enquiries or do anything or tell the Complainant to tell the police the whole story. Under questioning by one of my learned Assessors the mother said she had asked the complainant for details of what had happened, but the latter did not respond.

I have set out the relevant facts basing myself up to this point only on the complainant's evidence in chief and the mother's evidence, both of which furnish material for criticism. I now deal with the complainant's evidence under cross-examination, which in my view considerably detracts from the strength of the Crown case.

It emerged that when the complainant gave her mother the food t she did not tell her of the encounter with the Accused. She said this was because visitors are not permitted to converse with employees at the gardens while they are working. This may be acceptable; it may also - although less probably -explain why the complainant did not go and report to her mother immediately after the rape. But if the complainant was in fact raped one would have expected her immediately to report to her mother who was only a couple of hundred yards away.

It appeared that the Accused had initially been with another man; but the latter had disappeared before the rape. Apparently the Complainant was dragged for something like 120 yards. But there was no evidence in support of this. The Complainant denied that she had told the Police that the Accused had run and chased her; but this does appear in one of the police statements that she made.

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The Complainant was very uncertain as to whether she had reported first to her mother or to Prince Mzingaphandle, and said she could not remember. Apparently Prince Mzingaphandle suggested that they

should make a report to the Police; but the Complainant could not remember whether they did this the same evening or the next day. It seems that it was during the day. When asked what time she reported she said she could not remember and thought the matter had been settled. Questioned as to what she meant by that, she said it had taken so long, in fact many months, and she thought the matter had been withdrawn. This is really not an answer to what she meant by saying the matter had been settled.

She said she could not remember what time she went to the police, nor the name of the police officer she first saw. But it emerged that she had first interviewed Inspector Vilakazi who referred her to female Constable Makhanya so that she should not feel embarrassed in making a statement. Notwithstanding this she said she did not tell Constable Makhanya that the Accused had inserted his penis in her private parts. The Complainant was very unconvincing in regard to what she had told Inspector Vilakazi. She said she had been afraid to talk, and she also had not told him that the Accused had inserted his penis. When asked how she could have had intercourse without the Accused inserting his penis she said she was still afraid to talk. Eventually, a couple of days later she appears to have made a somewhat fuller report to Inspector Bhembe.

It was put to Phumaphi in cross-examination that the Accused would deny that he had spoken to her of beads (ematinta) or made any reference to having intercourse with her, as he knew she was the girl-friend of another Prince.

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Phumaphi said this was not correct.

As will be appreciated from the aforegoing the Complainant did not make a very favourable inpression on me. She was to some extent rehabilitated by Prince Mzingaphandle, also known as Prince Sky, who gave good evidence, largely in line with that of the Complainant in regard to the complaint she had made to him and the contents thereof. He corroborated what she had said about the Accused having talked of a levirate or ngena relationship, and of his having later asked why she was not showing respect to an older person who wanted to talk to her. He also substantially repeated her story of the actual rape, although he said both pairs of panties were removed. He also said the Accused had referred to some new homestead that was being built, but he said he had forgotten the details of this.

It was put to this witness that there was ill-feeling between him and the Accused arising out of the latter's refusal to give him leopard skins for use on ceremonial occasions. But the witness denied this. Also in regard to trouble between the Accused and another brother, Prince Mabisela.

It appears that before the Complainant went to the Police Prince Mzingaphandle and Mabisela went to discuss the matter with an Induna, who had given them permission to make a report. This would fit in with my theory in regard to the case, which I will mention later. The only aspect in which Prince Mzingaphandle was not wholly satisfactory was in regard to the manner in which the Complainant's complaint had been received by the Police.

But in regard to his evidence in general it must be borne in mind that ;he can only testify in regard to what the Complainant told him. The crucial question for decision is whether what she told him is acceptable.

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Although I had considerable misgivings as to whether her evidence is acceptable I ruled, on an application, for d discharge of the Accused at the conclusion of the Crown case, that it could not be said that no sufficient case had been made to put the Accused on his defence, and I refused the application for discharge.

The Accused did not himself give evidence in his defence, but called his companion Mandlendo Maseko to do so. An Accused person is of course not obliged to give evidence if he considers that he cannot properly be convicted on the evidence as it stands; but his failure to do so may, according to the

circumstances, be a factor to be taken into account in assessing his culpability. It should, however, be remembered that even if it be found that his failure to give evidence is justified and that he should be acquitted, he nevertheless runs the risk that he may be the subject of adverse comment by reason of his failure to give evidence, exculpating himself. Especially is this so where he has indicated in cross-examination that he will give evidence along certain lines.

Mandlendo Maseko gave evidence to the effect that he was with the Accused at all material times during the complainant's outward and return journeys to and from her mother. His account of what had taken place differed in several respects from what had been put in cross-examination to the Complainant. According to him the Complainant started the conversation by greeting the Prince and himself and she said she would be going to a shop (not to her mother) and coming back. He says he heard no mention of any other Prince or of ngena, although he was close by. For was there any mention of ematinta. When asked whether

the Complainant was wearing these Maseko said "I remember slightly that it is possible she was wearing then." On its being pointed out to him. how very unsatisfactory this type of evidence is, Maseko agreed that she was wearing ematinta.

Maseko said that at the Mantenga road the Accused and the Complainant, for some unexplained reason, walked on one side of the road and Maseko on the other side. lour girls eating mangoes then arrived from Mantenga. Maseko joked with one of the girls. The Complainant then joined these four girls and walked with them towards the bridge. Maseko said he last saw the Complainant at the Bridge, at which stage he could not be sure whether she had joined the other girls or was ahead of them. He never lost sight of the Complainant. He said he then rejoined the Accused and they walked home towards Lobamba.

None of what I have set out was put to the Complainant in cross-examination.

I formed an unfavourable impression of Maseko and have no doubt that he was endeavouring to cover up for the Accused. But even if I reject his evidence, and take into account the Accused's failure to give evidence, it does not follow that the Complainant's account of a rape upon her must be accepted as proved beyond a reasonable doubt. In dealing with the Complainant's evidence I mentioned a number of aspects which give rise to a reasonable doubt.

In my opinion it is probable that although there was no rape in the sense testified to by the Complainant, the Accused and the Complainant did have intercourse, her consent thereto having been induced by the misrepresentation that he was an older prince who was entitled to demand intercourse with her.

It is what one might describe as a siSwati type of droit de seigneur. This would explain the Complainant's failure to report to LaShongwe, her mother's half-heartedness about the affair, the unsatisfactory nature of the Complainant's reports to the police, Prince Mzingaphandle's getting permission from the Induna before the Complainant made a report to the police, and what appear to be the misgivings and reluctance of the police in investigating and preferring a charge of rape against the Accused.

If this is what happened the Accused's conduct was grossly improper and reprehensible. But for two reasons I cannot find him guilty of rape on this basis. The first reason is that a criminal case must be judged on the evidence and not on mere speculation as to what probably happened. The Court must always consider whether a conviction is justified on the evidence or whether it is, on the other hand, against the evidence and the weight of evidence. In the present case although the theory I have put forward appears to me to be a reasonable one, it is not supported by the evidence and the Accused is at least entitled to the benefit of the doubt.

The second difficulty in the way of finding the Accused guilty is that even if the facts be as I have

postulated them, this does not constitute rape in law. It is of the essence of rape that intercourse should have taken place without the consent of the woman concerned; and fraud may vitiate consent. But it has been held that it is not every fraud that will have this effect: it must be a fraud inducing either an error personae - for example X inducing Y to believe that he is her husband - or an error in negotio - for example X inducing Y to believe that

the act of intercourse is an act of a different nature such as an operation. But where she realises that the intercourse is indeed intercourse and she is deceived only in regard to the effects it will have or the attributes of the person having the intercourse with her; her consent is not vitiated. The matter is well discussed in Hunt's S.A. Criminal Law and Procedure, pages 407-4-08 where it is pointed out that consent would not be vitiated if X induced it by fraudulently misrepresenting the state of his age, pedigree, health, bank balance, or willingness to pay for Y's services. It appears to me that any misrepresentation by the Accused in regard to his right to ngena the Complainant would fall into this category, and would not vitiate the consent. See also R v Clarence, 1888, Q. B. D. 23; R v K, 1966 (1) S.A. 366 (R. A. D.).

In the circumstances the Accused must be found Not Guilty. My Assessors agree with this decision.

C. J. M. NATHAN

CHIEF JUSTICE.