

THE HIGH COURT OF SWAZILAND

Rex

VS

Sandile Victor Gcokoma

Cri. Case No. 181/98

CORAM : SAPIRE, CJ

FOR THE CROWN : MS NDEM

FOR THE ACCUSED : IN PERSON

JUDGMENT (21/09/99)

The accused, Sandile Victor Gcokoma, stands indicted on three counts. The first count alleges that on or about 12th February, 1998 and at or near Mahwalala in the Hhohho region he, an adult male did intentionally have unlawful sexual intercourse with Sindie Thwala a female aged 18 years without her consent and did thereby commit the crime of rape.

The crown contends that the rape was attended by aggravating circumstances these being that the accused used a knife to threaten the complainant to force her to submit, Secondly the complainant was five months pregnant. The third aggravating factor is that the accused repeatedly raped the complainant on more than three occasions.

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The second count is one of robbery in that on or about 16 February 1998 and at or near Benguni Grocery at Mahwalala Zone 5 in the Hhohho Region, the accused did unlawfully and with the intention of inducing submission by Linda Angela Malambe to the taking by the said accused of E500.00, threaten Linda Angela Malambe that unless she consented to the taking by the accused of the E500.00 or refrained from offering any resistance to him in the taking of the E500.00, he would then and there stab her, and the accused did then and thereupon take and steal from Linda Angela Malambe E500.00 which was the property of Linda Angela Malambe or in her lawful possession and did rob her of the same.

The third count is that the accused is guilty of the crime of escaping from lawful custody in Contravention of Section 43 of the Criminal Procedure and Evidence Act 67/1938 being alleged that on or about 20th February, 1998 and at or near Mbabane Magistrate Court in the Hhohho Region, the said accused having been arrested and charged with the offence of Rape and Robbery and while under the lawful custody of the Mbabane Police did unlawfully and intentionally escape from their custody.

The accused person was informed of his right to be represented by counsel but said he would conduct his own defence

After the accused had pleaded not guilty to all the charges the prosecution led evidence in support of the allegations.

On the first account of rape, the complainant Sindie Thwala testified. She recounted how on the date in question, 12 February 1998 she was visiting Mahwalala to see her boyfriend. As she was walking to his home she went behind a bush in order to relieve herself. While so engaged, a man unknown to her wearing a dark blue Nike hat came and enquired why she was urinating besides the road. Concerned for her safety she stood up and ran away raising an alarm. The man charged after her, caught her and produced the knife and ordered her to keep quiet. This she did, as she says because she

was frightened of what the accused might do with the knife. She dragged her to some grass some distance away and he ordered her to remove her undergarment. Still fearing for her life she did as she was told. She says the man had intercourse against her will and without her consent. She has been sexually active and knows what intercourse is. She could state positively that she had been penetrated on this and on the other occasions of which she spoke.

After he had satisfied himself she got up and wanted to retrieve her panty, but he told her to throw it away. She followed his instruction. A little further he again had intercourse with her against her will on the grass. He then ordered her to accompany him to a house and he again had intercourse with her. She recounted that there were no less than 5 occasions during the period that the complainant was under his control that he had intercourse with her against her will.

He released her at 5.30 the following morning at the same time telling her not to report the matter. He indicated that he would hunt her down if he did so. She also recounted, and this is of some importance, how during the night another occupant of the same room in which the accused and the complainant were, returned home. He sought entrance into the room but the accused was at first reluctant admit him. And explained that he had a woman with him. Eventually the other person was able to persuade the accused to allow Mm in to the room and the accused relented, but insisted that no light be put on. This is what the complainant recounted.

She also said that after she eventually left the room when she was released by the accused she went straight to the police.

On the next morning on the 13th of February in the company of the police she went to the very house, the scene of the crime. She told the court that she was pregnant at the time.

When she returned to the house in the company of the police the accused was no longer there. Later in the month she identified the Nike hat and her panty, which were in the possession of the Police. The complainant identified the accused who had by then been arrested as the person who raped her. The accused rightly pointed out that the conditions were dark and the opportunity for identification was not very good. If it were not for other corroborative factors, in the absence of an identification parade her identification of the accused at this late stage and in the circumstances described would not be strong enough on which to base a conviction.

A crown witness, Mzwandile Bhembe testified. He cousin of the accused and he has often stayed with (he accused at what the witness called his parental home. From the evidence he has given it is quite clear that this particular place is a Bhembe homestead. He told the court how on the night of the 12 February 1998, that is the night of the rape, he returned to the room which he shared with the accused at about 10.45 at night. He knocked at the door and tried to seek admission but the accused was at first reluctant to let him in and said he had a girlfriend with him. Eventually however after he had called the accused and tapped on the window the accused allowed him to come in but he said no light should be put on. He noticed at the early hours of the morning the accused and the woman leaving the house.

Later in the morning a woman came to the house in the company of the police. He was unable to identify the woman because of the complete darkness at the time.

The accused giving evidence denied all this.

He claimed that he was at home at the time and had no woman with him that night at all. The accused's account is clearly false. He is contradicted not only the complainant but by Ms own roommate. The complainant could not have known of this incident if she were mistaken in her identity of the accused. She could not possibly have known about the return of Bhembe had she not in fact been in that room.

This evidence I consider to be adequate corroboration in so far as it is needed which supports the complainant's account and is destructive of what the accused has had to say. The consistency of her account is further vouched for by the fact she made the complaint to the police at about 8.00a.m. in the morning. Although the accused criticised this evidence by saying that she should properly have come to lay a complaint in the first instance with her boyfriend this seems to me to be of little merit in this argument-There was also the evidence of Eric Mkhonta, a policeman. He said that he arrested the accused at Mpolonjeni area on the 18 February 1998. He says that he cautioned the accused that led him to a forest at Mahwalala, where he handed him a cream-white panty, which he retained as an exhibit. This item was later identified by the complainant as hers was. The accused also led him to the house in question where he handed him a number of objects including a Nike hat, which has been referred to. He confirms that on the following day the complainant on the invitation of the police came to the station where she identified the under garment as hers.

Because of certain evidence which has been given suggesting that the accused may at some stage have been mishandled by the application of what is known as the "spray-gun" I have little regard for the police evidence. I say this despite the fact that the spray-gun incident seems to have taken place after the pointing out and the accused does not claim to have pointed out anything under the duress of some sort of physical torture but says he pointed out nothing at all. In view of the complainant's evidence and the strong corroboration, which I have referred, it is quite unnecessary to have any further evidence. The complainant explained that she is well aware of what constitutes an act of sexual intercourse and knows that she has been penetrated during the night in question There can be no doubt that the accused had intercourse with the complainant against her will under the threat of a knife on at least five occasions on the evening in question.

I accordingly find him guilty of rape on count 1.

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Count two is a robbery charge. Here the complainant is Linda Angela Malambe. She was in charge of a shop in the same area Mahwalala Zone 5 on the 16 February 1998. She claims to know the accused person as a frequent customer in the shop. She described how on this particular day the accused threatened her with a broken bottle and under such threats took E500.00 which was behind the counter. The complainant said she reported the matter to the police and immediately informed them of the identity of the accused mentioning him by name.

She was contradicted by one of the police officers who said at the time of the initial report she said that she did not know the name but could identify him. This statement by the policeman conflicts with his record made at the time and also conflicts with the evidence of his colleague with whom he was engaged in the investigation of this offence.

There can be no doubt that the complainant was robbed and I am satisfied having all the evidence at this point that she knew the man who robbed her and that she reported this to the Police. I say this because the police went and looked for this person and looked for him by name. They could not have done that without the complainant having informed them of his name. The explanation given by the policeman in question who claims the complainant did not immediately identify the accused is quite illogical. He suggests that other people, bystanders informed the complainant as to who her assailant was. But there were no bystanders who saw the occurrence who were able to identify the assailant. The name must therefore have come from the complainant herself.

On count 3 the accused is charged with escaping from lawful custody. Constable Penga Jele supported the charge with his evidence. This witness was on 20 February, 1998 on his way to Mbabane Magistrate Court in the company of another Constable when he heard shouts of "Juba", "Juba" which translated from Siswati means "catch him", "catch him". He rushed in the direction of the court and he saw a young man running towards the Swaziland Royal Insurance Building main gate. He took Ms whistle, blew it, and security officers blocked the fugitive's path. He was forced to turn back to

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the Cinelux where this particular witness subdued him with the assistance of some fellow officers. He

was then taken back into custody and there is evidence from the court records that the accused person had been brought before the court that very day for remand. On counts 2 and 3 the accused testified denying all knowledge of the event. As Miss Nderi for the crown said this is in lieu of anything better he could say. He claimed to have been at home on the night of the rape and on the night of the robbery without apparent appreciation that two different days were being talked about. His attitude seems to be based on the fact that because of some inefficiency in prosecution the Magistrate was at one stage constrained to release him from custody.

The accused in the first instance after pleading to the counts raised the question of autrefois acquit. He did not lead any evidence to support this plea. The records of the Magistrate's Court, for which I called, make it quite clear that the accused never pleaded to these particular counts, or any other.

In the circumstances he must, on counts 2 and 3, as on count 1 be found guilty. The outcome is therefore that on all 3 counts he is found guilty as charged.

As far as the question of aggravating circumstances are concerned I find that,

- (a) the use of the knife,
- (b) the fact that the complainant was 5 months pregnant as she said,
- (c) repeated sexual intercourse with her against her will during the night

Were all aggravating factors.

You now have the opportunity to address me and tell me whatever you want to say in regard to your sentence which I must impose upon you. You may

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give evidence if you so wish or you may confine yourself to a statement from where you are.

During this trial you have not displayed any remorse for what you have done. You have told lies with contemptuous regard for the truth. You have accused everybody that has given evidence here being a liar. That people unconnected with each other all have been conspired to convict you of these serious offences.

It is then clear to me that you have no insight at all into the seriousness of your misbehaviour. You acted with contemptuous disregard for the young women concerned and particularly the one you raped repeatedly. Remorse on your part is entirely absent.

Your request for a suspended sentence in these circumstances cannot be acceded to. In respect of the rape the statutes provide for a minimum sentence.

In the circumstances the sentences, which I impose on you, are as follows:

In respect of the rape, you will be imprisoned for 12 years. In respect of the robbery you will be imprisoned for 3 years. In respect of the escape you will be imprisoned for 1 year.

The sentences will run consecutively.

S W SAPIRE, CJ