



THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 66/99

In the matter between

REX

Vs

BHEKI AMSTEL MATSE

Coram
For the Crown
For the Defence

S.B. MAPHALALA – J
MR. Z. MAGAGULA
IN PERSON

JUDGEMENT

(31/10/2001)

The accused person is charged with the crime of rape. It is alleged that upon or about the 27th September 1998, at or near Ngonini area in the Lubombo region, the accused an adult male did intentionally have unlawful sexual intercourse with F, a female aged 29 years at the time and who is mentally handicapped and incapable of giving consent and the accused did thereby commit the crime of rape.

The crown further contended that the rape was attended by aggravating circumstances in that:

- i) The complainant had not had sexual intercourse prior to the rape;
- ii) The accused took advantage of the complainant's known mental

condition.

The accused pleaded not guilty to the indictment and he was conducting his own defence. The crown was represented by Mr. Z. Magagula.

The crown called a number of witnesses to prove its case. The accused person gave sworn evidence in his defence.

The first witness for the crown was PW1 Thulisile Mngometulu who is complainant's mother. She gave evidence on the age of the complainant. She received a complaint from the complainant. On the 28th September 1998, the complainant was taken to the Sithobela Health Centre. To her knowledge the complainant had no relationship with the accused.

The crown then called PW2 Aaron Makhekhe Mamba who is a community policeman. He told the court that on the 27th September 1998, while he was at his grocery shop a report was made that a person was screaming in a forest nearby. He proceeded to the forest to investigate and found two people engaged in sexual intercourse. These people were the complainant and the accused person. The complainant was crying. As he got closer the accused stood up and started running away. A certain Jimmy Matsenjwa who was with him (PW2) ran after the accused and managed to catch him. He was brought back to where the complainant and PW2 were. The complainant made a complaint that the accused had had sexual intercourse with her forcefully.

PW2 then handcuffed the accused and took the accused and the complainant to the complainant's mother where he made a report and later to the Lubuli Police Station where the matter was reported.

The accused cross-examined this witness briefly suggesting that the witness assaulted him. PW2 denied that he assaulted the accused when he was apprehended.

The crown then called its last witness PW3 3439 Detective Constable Saneliso Simelane who investigated this case. He received a report concerning the complainant. The accused was already under the arrest of community police. Acting on the report he took the complainant to Sithobela Health Centre for examination and detained the accused in custody. He later cautioned the accused and

interrogated him about the allegation of rape. The accused denied having committed any offence as he stated that the complainant had consented to his proposal to have sexual intercourse.

This witness was cross-examined briefly where the accused put it to him that he reported to him that PW2 had assaulted him upon arrest. PW3 denied that the accused made this report to him.

The crown then handed the medical report compiled by Dr. Azih of the Sithobela Health Centre. The accused person did not object to this document forming part of the crown's evidence. The crown also handed in a psychiatric report compiled by a certain Dr. Ndlangamandla who examined the complainant to establish her mental status. In the former report the doctor opined that on examining the complainant he found "evidence of penetrative sexual assault". In the latter report upon examining the complainant he made the following conclusions:

"F is a 29 year old female, single with no children, never attended school because of her mental handicapped and still live with her parents.

She cannot give any coherent account of herself or of the events that took place on the day of the said crime. She briefly says she does not remember anything and that she does not know why she is with the police.

Clinically, she is severely mentally retarded, with an IQ at the range of 20 – 30. She cannot differentiate between right and wrong and is not able to follow court procedure.

She is therefore not fit to stand trial or give evidence in court".

The accused person gave sworn testimony in his defence. His evidence is that the complainant was his girlfriend and she consented to the sexual intercourse. Whilst they were engaged in the act complaint complained that she was feeling pain and she started to cry. That is when PW2 and the other people came to the scene. The reason he ran away when PW2 and company came to the scene was because he could not have proceeded to have sex in the presence of his elders. He further told the court that he was assaulted by PW2 with a sjambok.

The accused person was cross-examined at great length by the crown where it was put to him that he took advantage of complainant's mental state to have sexual intercourse with her. The accused answered that was not true.

The court then heard submissions.

I have considered the evidence in its totality and also the submissions made by both sides. It is my considered view that the crown had proved its case beyond any reasonable doubt. The evidence before court is that the accused person was arrested by members of the community police after they called that there was somebody crying in the forest. They proceeded to the forest where they found the accused having sexual intercourse with the complainant. On seeing them the accused person stood up and pulled up his trousers and ran away from the scene. He was apprehended and brought back to the scene. The evidence is that the complainant

was found lying on the ground.

There is no doubt that the person who had sexual intercourse with the complainant was the accused. The complainant was incapable of giving consent as evidenced by exhibit "B", viz the psychiatric report by Dr. Ndlangamandla.

The evidence of the accused that the complainant was his girlfriend cannot hold because during the period of the sexual intercourse the complainant was crying loudly for people to be alerted some considerable distance away. I agree with Mr. Magagula that the loud screams are not consistent with normal sexual intercourse. Clearly, in *casu* there was lack of consent. In this regard reference is made to the case of ***R vs Ryperd Boesman 1942 (1) PH H63 (SWA)*** where Hoexter J (as he then was) held that the test is whether the woman is devoid of reason that she cannot exercise any judgment at all on the question whether she will consent to or dissent from.... intercourse.

For the above reasons I hold that the accused person is guilty of the crime of rape with aggravating circumstances.

S.B. MAPHALALA

JUDGE