IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO. 3/07

REX **APPLICANT**

VS

JOSEPH PAUL MLOTSHWA **ACCUSED**

CORAM: MAMBA J

FOR APPLICANT: N. LUKHELE

FOR ACCUSED: IN PERSON

JUDGEMENT 20th September, 2007

[1] The accused has been charged with the crime of rape.

[2] He pleaded not guilty to the indictment and the crown led a total of seven (7) witnesses in its attempt to prove its case. The accused was unrepresented and he conducted his own defence.

[3] At the conclusion of the trial ; immediately after submissions were presented by both sides, I gave judgement and held that the crown had failed to establish or prove the guilt of the Accused beyond any reasonable doubt and I acquitted the Accused. In that unwritten judgement I gave my reasons for judgment, but I have considered it necessary briefly to state these in writing, in the hope that they would be of some use or benefit to litigants in the future.

[4] The indictment alleged that the Accused had on 1st December, 2005 raped S M at Khuphuka area in the region of Manzini. It was the crown's allegation

that at the time of the rape the complainant was only 12 years old and was in law incapable of consenting to sexual intercourse.

[5] The Crown clarified its position in- that whilst the indictment alleged that the complainant was, because of her age, incapable of consenting to sexual intercourse, it was not its case that the complainant had in fact consented to the sexual intercourse but because of her age, the law declared her consent ineffectual. It said, as a matter of course or legal requirement, this allegation had to be made in the indictment simply because the complainant was below the age of consent, ie sixteen years, even if she had not *de facto* consented to the act.

[6] Normatively, one would expect that where consent to sexual intercourse has in fact not been given by the rape victim, there would be no need at all to allege that, because of her age, her consent was ineffectual. However, as nothing turns on this point in this case, I need not burden this judgement on the issue.

[7] On the night of the 1st December 2005 at the complainant's home at Khuphuka the complainant (to whom I shall refer as PW7) slept in one rondavel with two of her siblings who were both younger than her, Gogo M M (PW3) and the Accused.

[8] PW3 had arrived at PW7's home on her way home that night drunk and had sought shelter for the night there. The Accused had been hired by PW7's father to do some manual work for him and it would appear that he had been accommodated at the homestead. PW7's parents spent the night in another house within the homestead.

[9] The complainant who gave evidence through an intermediary, testified that she slept with her clothes on, including her panties. After falling asleep she woke up and found that the accused had removed her panties and was

pressing her down and having sexual intercourse with her. He had placed one of his hands over her mouth. She felt pain in her vagina as the accused had sex with her. She cried. Her muffled cries were heard by PW3. Apparently PW3 thought that the person crying was one of the younger children who were sleeping in the hut and she called out to PW7 to attend to the crying child. PW7 did not respond to PW3's concerns. She did not tell PW3 that the person crying was her and not one of her siblings. The hut was dark and neither PW7 nor PW3 saw the person who raped the complainant.

[10] After the rape ordeal, PW7 just lay there, never went out of the rondavel or made any attempt to get help from any one until the next morning.

[11] She said she was in great pain. Her vagina hurt and when she eventually woke up she found her panties on the floor under the bed. The accused was sitting on a stool inside the hut. PW7's parents had already left for work. A neighbour, Lungile, a girl much older than PW7 came and invited PW7 to go with her to gather firewood from the veld. They went and both returned to their respective homes. PW7 did not tell Lungile about her rape ordeal. She, however, stated that from the manner she walked, Lungile must have noticed that she was in great pain and discomfort.

[12] When PW7 returned with the firewood, the accused invited her to go with him to a shop nearby in order for him to buy her a loaf of bread. She obliged and then resolved that she would report her rape to the husband of the shop assistant and she did so at the grocery shop in the absence of the shop assistant. PW7 also told the court that she thought that by giving her the bread, the accused was either bribing her to remain silent about the rape or was enticing her to have sex with him again.

[13] I pause here to mention that the shop assistant's husband was not called as a witness. The shop assistant, PW2 told a different story from that related by PW7. She testified that when the Accused and PW7 came into her shop,

she realized that there was something untoward about PW7. After questioning her in the absence of the accused, PW7 told her that her body was aching as a result of having been raped the previous night by the accused and that this was not the first time. PW7 further told her that the accused had promised to give her money in return for her silence.

[14] PW2 reported the matter to the Police who came and took PW7 to hospital. Later that evening PW2 reported the matter to PW7's parents on their return from work.

[15] The Medical Doctor who examined the complainant on 02/12/05 observed that the complainant's hymen was freshly torn and this was indicative of recent penetration. That piece of evidence corroborated the evidence of PW7 on the issue of sexual intercourse at the relevant time.

[16] There was a lot of hare chasing during the cross-examination of both the complainant by the accused and the accused by the crown on what actually took place mostly pertaining to the purchase or otherwise of the loaf of bread. The accused said he had no money, and had not offered any bread to PW7 and never went to the shop at all that day.

[17] These matters, whilst relevant, were rather peripheral to the issue of the identity of the rapist. It is to that issue that I now turn.

[18] The Accused denied having raped PW7 or having had sex with her. The hut wherein PW7 was raped was dark. Nothing was said between PW7 and her rapist in the dark. PW7 was adamant that the person who raped her that night was the accused. When asked how she could say that her assailant was the accused she could only say: "I just could tell or see that it was Joe."
Subject to my observations in paragraph 21 herein, I have no doubt whatsoever that PW7 was honest in her evidence. She honestly believed that the person who raped her that night was the accused. He was afterall the only

male adult in that rondavel that night. Other than her honest belief, there is nothing to identify the accused as the person who raped her. The fact that the accused was the only male adult person in the rondavel when PW7 and her companions went to bed, is no conclusive evidence that he raped PW7. For instance, there is no evidence to suggest that an intruder could not have entered the rondavel through the door or window, under cover of darkness, and whilst everyone therein was fast asleep and raped PW7.

[19] Where identification is the issue, the honesty of the witness deposing thereto is important but is not enough or in itself decisive of the issue. The evidence must be reliable and not based on mere perceptions or beliefs; honest as they might be.

[20] This court has, over the years dealt with the issue of identification and emphasized that where there is a reasonable possibility of error in the identification of the accused in a criminal trial, the accused must be given the benefit of that doubt. I refer to the judgment of Nathan CJ (as he then was) in the following two cases, namely; **MAHLAMBI v R, 1977 - 1978 SLR 98 @ 101 AND R v MZUBA JAMES MAMBA, 1979 -1981 SLR 15A.** In the latter case the learned Chief Justice stated at page 155 A-F that:

> "I have grave doubt whether the complainant had adequate opportunity to recognize the accused at the time of the rape. In this connection I quote from the judgement of Williamson JA in S *v Mehlape* 1963 (2) SA 29 (A) at 32 - 33: "It has been stressed more than once that in a case involving the identification of a particular person in relation to a certain happening, a court should be satisfied not only that the identifying witness is honest, but also that his evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonably required to ensure a correct identification; see for example the remarks of Ramsbottom A.J.P., in *R v Mokoena,* 1958 (2) S.A. 212 (T) at p. 215. The nature of the opportunity of observation which may be required to

confer on an identification in any particular case the stamp of reliability, depends upon a great variety of factors or combination of factors; for instance the period of observation, or the proximity of the persons, or the visibility, or the state of the light, or the angle of the observation, or prior opportunity or opportunities of observation or the details of any such prior observation or the absence or the presence of noticeable physical or facial features, marks or peculiarities, or the clothing or other articles such as glasses, crutches or bags, etc, connected with the person observed, and so on, may have to be investigated in order to satisfy a court in any particular case that an identification is reliable and trustworthy as distinct from being merely *bona fide* and honest.

The necessity for a court to be properly satisfied in a criminal case on both these aspects of identification should now, it may be thought, not really require to be stressed; it appears from such a considerable number of prior decisions; see for example the apprehension expressed by Van Den Heever J.A., in Rex v Masemang, 1950 (2) S.A. 488 (A.D.) , after reference to the cases of wrongly convicted persons cited in *Wills Principles of Circumstantial Evidence,* 7th ed.p. 193. The often patent honesty, sincerity and conviction of an identifying witness remains, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence... If, in regard to a question of identification, any reasonable possibility of error in identity has not been eliminated by the end of a criminal case, it could quite clearly not be said that the State has proved its case beyond reasonable doubt".

And in **S v SHANDU, 1990 (1) SACR 80 at page 81i - 82e,** where, as in the present case the success of the case for the crown depended entirely on the identification of the culprit by the victim, DIDCOTT J stated that :

"That the identification was honest seems clear. That it was not

perhaps mistaken it had also, however, to be. The danger of mistaken identifications, of those that are honest but wrong even so, is inveterate and notorious. Our Courts, like others, have had frequent occasion to deal with it. S *v Ngcobo 1986* (1) SA 905 (N) was one such occasion, when this Court described an experiment conducted in the United States of America, and reported in an American book on the law of evidence, which bore telling witness to the peril. An article that appeared in (1988) 105 *South African*

Law Journal 108 carped at the judgement, contending that judicial notice should not have been taken of the experiment, that the testimony of an expert in the field where it lay was needed before attention could properly be paid to it. I consider the criticism to have been misconceived. Judicial notice did not purport to be taken of a fact that had to be proved in the case, such serving then as proof of that very fact. It did not purport to be taken of anything at all. The experiment was cited in order to underline, in order to illustrate graphically, a danger with which the Court was already quite familiar, its own experience and its acquaintance with the law reports having taught it so much and taught it full well. And the danger remained an equal one, even if the results of the experiment were less striking than they looked since, in the opinion of some expert on such matters, their production and evaluation had been insufficiently scientific.

The passenger was not only honest in her identification of Shandu, she was confident too, indeed quite certain. But that did not lengthen the odds significantly against the mistake all the same. Van den Heever JA once observed:

The positive assurance with which an honest witness will "sometimes swear to the identity of an accused person is in itself no guarantee of the correctness of that evidence.' The quotation comes from the judgement he wrote in *R v Masemang 1950* (2) SA 488 (A) (at 493). It echoes human experience on a larger scale, of course, mistakes in affairs both public and private being made all the time by people whose conviction is unshakeable that they have

perceived what they really have not. This tendency so exasperated Oliver Cromwell, a stern puritan and no blasphemer, but never a man to mince his

> words, that the stubbornness of the Scots whom he addressed drove him to explain:
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> > 'I beseech you, in the bowels of Christ, to think it possible you may be mistaken.' "

[21] In casu, there is nothing to indicate that the rapist was the accused or why PW7 thinks she was raped by the accused. I may not convict on her mere say-so or belief even if such belief is honest. One further issue that deserves mentioning in this case is the failure by PW7 to shout for help during the rape or immediately thereafter or first thing in the morning before going to gather firewood with Lungile. This aspect of the evidence by the crown is also worrying and disturbing and tends, in my view, to militate against her lack of consent and consequently her credibility in general.

[22] In court she explained that she could not report to PW3 because she was drunk. PW3 had, however, shown concern about what she heard and had immediately told her to attend to the child who was crying. That was the opportunity for her to report to PW3. She told LaMahlalela that accused had promised her money in return for her silence. PW7 told the court that nothing whatsoever had been discussed between her and the accused about the rape.

[23] For the aforegoing, I held that the Crown had failed to prove beyond a reasonable doubt that it was the accused who raped PW7 on the night in question. I therefore acquitted him.

MAMBA J