267/1958

G.P.-S.1568732—1956-7—9,000. S. U.D.J. 445.

# In the Supreme Court of South Africa
# In die Hooggeregshof van Suid-Afrika

( APPELLATE DIVISION).
AFDELING).

267/1958

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

CAPITAL

SAM MAKHAZA
Appellant.

*versus/teen*

THE QUEEN
Respondent.

*Appellant's Attorney* / *Prokureur van Appellant*

*Respondent's Attorney* / *Prokureur van Respondent*

Pro deo

*Appellant's Advocate* / *Advokaat van Appellant* F. P. Ninow

*Respondent's Advocate* / *Advokaat van Respondent* S. F. Evans

(Leave - WLD)

*Set down for hearing on:* / *Op die rol geplaas vir verhoor op:* Wednesday, 10th Dec, 1958.

1.3.5.8.11. (A) 9.50 – 11.40 C.A.V.

JUDGMENT: FRIDAY, 12th DECEMBER, 1958.

Appeal dismissed.

Coram: Schreiner, A/C.J., Steyn, Rogers, Ogilvie Thompson, et Smit (Acting) J.J.A.

Price (Actg.)

L Kriedemeyer.
L REGISTRAR.
12/12/58.

Record

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

SAM MAKHAZA Appellant

and

REGINA Respondent

Coram:Schreiner A.C.J.,Steyn,Ogilvie Thompson JJ.A., Price et Smit A.JJ.A.

Heard: 10th December, 1958. Delivered: 12-12-1958

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JUDGMENT

SCHREINER A.C.J. :- The appellant was convicted by SNYMAN A.J. and assessors, sitting in the Witwatersrand Local Division, of rape and robbery. He was sentenced to death but the trial judge granted him leave to appeal to this Court.

According to the Crown case the complainant in both charges, a girl aged 14, was in July 1958 staying with her aunt, Mrs. Schonken, at Pelzvale, near Randfontein. The complainant's home was with her parents, who lived some distance away. On Tuesday the 22nd July the complainant went out into the velo with her brother aged 13 and her cousin Willem Schonken, aged 14. The ~~birds~~ boys were hoping to shoot birds with an airgun, and they may have reached a dis-

tance/.....

-tance of about three miles from the Schonken's home before turning back. The complainant's brother was picked up by a friend on horseback and taken home, while the complainant and Willem returned on foot. The airgun was taken back on the horse. On their way back at some time in the middle of the day the complainant and Willem met the appellant, a young native aged 19, who was on a red bicycle. According to Willem he and the complainant were then looking for a ring that she had lost. Willem knew the appellant by sight and the three of them walked along together. The appellant was pushing his bicycle and talking with Willem, or, as Willem stated, with "them". The appellant then got on to his bicycle and rode on ahead. Then he stopped and dismounted. They went on towards him. According to the complainant the appellant then threatened to kill Willem. She said that she was then about 10 yards from them. Willem stated in his evidence that the complainant was with him at the time and that the threat was addressed to both of them "as jy nie vir my "die horlosie gee nie."

According to Willem he and the complainant walked on together disregarding the appellant and the appellant then came up to them and demanded the complainant's wristwatch. She refused to hand it over and ran

off/.....

off with Willem. The appellant grasped the complainant by the arm and threw her to the ground. Willem said that he was frightened and ran on to tell their neighbours, about half a mile away. He returned, so he stated, with two sons of the family and they found the complainant who looked pale and said "Help my, help my. Ek wil net my horlosie hê wat by ge-"vat het."

According to the complainant Willem ran off crying out when the appellant threatened her. She said that she waited for him to return but he did not do so and the appellant came running towards her. He seized her by the right arm and threw her down on the grass and climbed on to her sitting with his legs across her. He kissed her and then asked for her wristwatch which she refused to hand over. He pulled it off her arm and put it in his jacket pocket. Meanwhile she struggled to free herself but could not do so. He then moved down towards her feet pulling her bloomers off. She tried to stop him but he pulled them down to her feet. He then undid the fly of his trousers and with his feet kicked her bloomers off her left foot. He was wearing long trousers which were torn, so she said, on the inside. Then he took out his penis and told her to look away, which she did. He then lay on her and had connection with her, hurting her. He then got up

and/.....

and ran straight to his bicycle and rode away.

She said she had shouted for help but there were no houses in the vicinity. After the assault she lay still for a short time, then put on her bloomers and ran to her aunt's house. On the way she met her aunt in a car; the latter had received a message from a neighbour and had come to look for her. She told her aunt, to whom she seemed in a highly hysterical state, that a native had taken her watch. The aunt testified that the complainant told her herself that he had also kissed her but she did not say that she told her aunt. She did not say anything about the sexual assault because she was shy and afraid. Her aunt testified that at a later stage she saw ~~something~~ what looked like blood on the complainant's ~~dress~~ shirt, but the latter said it was not blood but mud. To her aunt's ~~questionings~~ she consistently replied that nothing beyond the loss of her watch had happened to her. When they reached the house she went to her room and saw that her private parts were bleeding. She had not yet begun menstruating. She wiped herself off with paper handkerchiefs and put them, together with her bloomers, into her suitcase. The bloomers had blood on them. That evening, the Tuesday, her mother arrived, having been sent for. To her also the complainant

seemed/.....

seemed to be in a terribly nervous condition. The complainant told her mother nothing about the assault, but only spoke of the theft of her watch. Her mother took her home and, suspecting that something more had happened than that her watch had been taken, tried to find out by questioning her. She tried also to get an opportunity of examining her clothes but the complainant followed her about as if to prevent this and it was not until Friday the 25th, when the complainant went into town, that the mother was able to go through the complainant's belongings in her room. Under the mattress of her bed the mother found the blood-stained bloomers and paper handkerchiefs. She confronted the complainant with these on her return from town and she then told the story of being raped by a native.

There was police evidence to the effect that the complainant was brought to the Randfontein Police station on the night of the alleged assault i.e. on the 22nd. At that time the only charge to which the complainant had spoken was robbery of her wristwatch and that was all that she put before the police. The police however thought from her nervous state that she might have been assaulted.

It was not until the night of Friday, the 25th,

after/.....

after she had told her mother that she had been raped, that she was examined by the district surgeon, who gave evidence that her hymen had recently been ruptured in four places which could have happened during the previous three or four days. These tears obviously established penetration. There were no signs of her having had connection previously. The tears could have been caused by voluntary connection as well as by rape.

The appellant was arrested on the 26th July and on the same day the district surgeon examined him and found that he was suffering from syphilis at a stage at which there was a very strong possibility of his infecting anyone with whom he had connection. No signs of the disease were found on the complainant but steps were taken to treat her against the possibility that they might develop later. No signs of spermatazoa were found on the complainant's clothes when they were examined a week after the incident.

The appellant made a statement on the day of his arrest and gave evidence in his defence at the trial. In the statement he said, "Op die voetpaadjie "het ek die klein miesies ontmoet en ek het haar horlosie "gevat. Na ek die horlosie gevat het het ek geloop. Toe sy "haar horlosie vra het ek met my fiets weggery. Sy het toe "ook geloop, miskien na haar huis toe.....Ek wil verder sê

"dat/.....

"dat my privaatdeel seer is deur vuilsiekte. As sy sê ek het "haar verkrag, dit is onwaar. Dit is nou omtrent 'n maand dat "ek siek is. My hele penis is vol sere. Nou hoor ek ek het "haar verkrag and dit is nie so nie." The district surgeon stated in evidence that in his condition at the time the appellant was capable of having connection though in some such cases it might be very painful. The sexual urge would however, be normal.

In his evidence at the trial the appellant said that he was riding his red bicycle when he came across the complainant and Willem. He stopped and they stood still. He saw that the complainant had a watch on her arm. He told her to give it to him, which she did. He mounted his bicycle and she called out, "Waar neem jy my horlosie "heen ?" He made no reply but rode off. Later he heard that she accused him of having raped her but that was not true.

He was cross-examined upon the statement made to the magistrate in which he was recorded as having said that he had taken the watch. The interpreter of the statement to the magistrate had given evidence that the appellant had certainly used the Setshuana word for "take" and not the wholly different word that would mean that he had had it"given"to him, but the appellant denied this and said

that/.....

that he had told the magistrate that the complainant had given him the watch. He said that Willem was frightened of him and went away while he spoke to the complainant but that she was not frightened. After she had handed over the watch she joined Willem and they walked off together. In answer to one of the assessors the appellant said that he made a face at the complainant in order to frighten her and that this did frighten her at the time when she handed over the watch.

The evidence of the complainant that she eventually told her mother on the 25th that she had been raped was given in chief. No objection was raised to the admission of the evidence and counsel for the appellant cross-examined her at length to show that, though she had been closely questioned first by her aunt and then by her mother, she had not only refrained from telling them of the alleged rape but had denied that anything had happened beyond the taking of her watch. She was asked why she had explained an apparent blood mark as mud and had concealed her blood-stained bloomers and the paper handkerchief. Counsel for the appellant naturally took the line that this was not a case of an early complaint but that on the contrary the complainant's conduct was inconsistent with her having been raped. In such a situation

it/.....

it seems clear that while the defence is entitled to press to the full the length of the delay in reporting and the positive attempts to put off or mislead inquiries, the Crown should be entitled to show that the delay and deception came to an end and did not persist up to the trial. The law to be applied is the law of England (sections 241 and 292 of Act 56 of 1955). The history of the admission in England of complaints in sexual cases is given in Wigmore, 3rd Edition paragraph 1760. Eventually it was established that complaints are admissible for two purposes - to show consistency and to negative consent. It is with the former alone that we have to deal here. In paragraphs 1135 and 1136 Wigmore explains that where nothing appears at the trial as to the making of a complaint the assumption could be made that there was none. It is to forestall this assumption that the evidence can be led by the Crown. The learned author proceeds - "This apparently irregular process of negativing evidence "not yet formally introduced by the opponent is regular "enough in reality, because the impression on the tribunal "would otherwise be there as if the opponent had really of- "fered evidence of the women's silence. Thus the essence of "the process consists in the showing that the woman did not-

"in/.....

"in fact behave with a silence inconsistent with her present
"story.....In the same way.....if the silence is conceded
" by the prosecution, the silence may nevertheless be explain-
"ed away as due to fear, shame, or the like, so that it loses
"its significance as a suspicious inconsistency..... Under
"the early rule of hue-and-cry, it was necessary that there
"should have been fresh complaint; and this notion has been
"perpetuated in the statement, usual in enunciating the
"modern rule, that the complaint must have been recent, in
"order that the fact of it may be admitted. A few courts
"have applied this notion practically in this"( ? sc.their)
"rul'ngs, by excluding complaints made after a certain length
"of time. But, if it be considered that the purpose of the
"evidence is merely to negative the supposed silence of the
"woman, it is perceived that the fact of complaint at any
"time should be received. After long delay, to be sure, the
"fact is of trifling weight, but it negatives silence, never-
"theless, and the accompanying circumstances must determine
"how far the delay has been successfully explained away.....
"When the complaint is admitted on this theory certain limi-
"tations upon its use follow logically and necessarily.....
"Thus the gist of the evidential circumstances is merely not-

"silence/.....

"-silence i.e. the fact of a complaint, but the fact only." In the present case it was only the fact of the complaint of rape made to her mother on the 25th July that was given in evidence. There was no evidence of any details she might have furnished.

The only difficulty that I find in applying the cogent reasoning of Wigmore is that it is not clear that the English law puts the matter quite in the same way. In the latest English case which I have consulted (Rex v. Cummings, 1948(1)A.E.R.551) which is cited in Halsbury, 3rd Edition, Vol. 10 page 469, the rule is still stated in the form given in Lillyman's case that the complaint is admissible "provided it was made as speedily after "the acts complained of as could reasonably be expected." The Court of Criminal Appeal indicated that within wide limits the matter was one to be decided by the trial judge. But that consideration would hardly assist in the decision of the present case.

It seems to me that the proper way to look at the problem before us is that this was not an attempt by the Crown to prove an early complaint. Had the Crown not led the evidence of the complainant on the

point/.....

point it is clear that the appellant's counsel would have broached the matter himself since it was the lateness of the complaint and the attempts of the complainant to avoid having to make it that were the main basis of the defence. It is true that the mere failure of an accused person to object to inadmissible evidence is not necessarily fatal to the point being raised on appeal, yet it is "a matter very "seriously to be taken into account" when the court is considering the question whether an irregularity is of such a nature as to be capable of adversely affecting a trial court's decision (Rex v. Noorbhai, 1945 A.D.58 at page 73; cf. Rex v. Losch, 1949(1) S.A.548). If in the circumstances of this case the Crown had not led evidence-in-chief that the complaint was made on the 25th, and assuming that the defence had not cross-examined so as to bring it out, and assuming further that the Crown refrained from attempting to prove it in re-examination, the position of the appellant would have been no better than it is on the present state of the record. For the complaint, coming as late as it did, had no material tendency towards proving the complainant's consistency in the face of her attitude during the previous few days. In his judgment SKEEN A.J. said -

"The conclusion to which we have come is that despite the

"late/.....

"late report which we have considered solely in so far as it "favours the accused, and having warned ourselves that it "cannot be regarded as corroborating the complainant's evi- "dence, is that we believe the evidence of the complainant ~~having regard to the circumstances of this case~~ "and that we drew no adverse conclusion from the fact and cir- "cumstances of the late report." It seems to me that the trial court approached the matter from the right angle and having regard to the circumstances of this case that the appellant's counsel was also right in not contending at any stage that there was any irregularity in the Crown's leading the complainant on the fact that she told her mother on the 25th that she had been raped. In any event, even if the leading of the evidence could be said to have constituted an irregularity it would have been covered by the proviso to section 369 of Act 56 of 1955, since clearly no failure of justice resulted therefrom.

In his judgment [illegible] J.P. after summarising the evidence said that if the complainant had made a report immediately after the incident the case would have presented very little difficulty. He then said that the court had gone very carefully into the question whether the absence of an early report by the complainant was not perhaps due to the fact that she had not been raped, as she stated, but had had intercourse by consent with some

person/.....

person other than the appellant. In particular the learned judge said that the court had examined the possibility that she had had connection with Willem, with whom she had been alone in the veld for something like half-an-hour. The court found that Willem gave his evidence very well and was truthful; his denial that he had had connection with the complainant was accepted. And the court was satisfied that the complainant's delay in reporting the matter was due to her being shy and sensitive, and also possibly to her mother's being over-emotional and on that account a person to whom her daughter might find it difficult to unburden herself. So regarding the matter the court did not find that the complainant's delay in reporting provided a sufficient reason for doubting her truthfulness. As in the case of Willem the court found that she gave her evidence well and was truthful.

The appellant's evidence was dealt with somewhat cursorily and at a late stage in the judgment, after the court's acceptance of the Crown evidence had been expressed. This was a defect in form, but it was not more than that. The court's decision had of course been reached before the learned judge began to state the reasons whereby the decision had been reached.

Considering/.....

Considering the evidence on the record before us it seems to me that there is considerable force in the view expressed by SIEVIER A.J. that the complainant's account of what she says happened when she was with the appellant, bears strong internal evidence of its truth. It is extremely unlikely that it could have been invented by her. In general her account receives support from the evidence of Willem. There are, it is true, several discrepancies between her version and that of Willem, but they seem to me to be the sort of minor conflicts that the evidence of two young children acting in excited and frightening circumstances, would be likely to reveal. It is to my mind incredible that if they had had intercourse with each other they would thereafter have acted as they did. Probably they would have returned home together without telling anyone. If they had decided to concoct a story, to explain perhaps the presence of blood on her private parts, they would almost certainly have gone home and told it together, and Willem would no doubt have claimed to have seen much more than he said he did.

Other points were made on behalf of the Crown which tend towards the acceptability of the evidence of the complainant and Willem. Their taking the police to the scene of the alleged offence where flat-

tened/.....

tened grass was found near a road - an unlikely place for voluntary connection when, as the photograph shows, there was tree cover available not far away, the complainant's retention of the bloomers and the paper handkerchiefs, instead of washing the former and destroying the latter, the substantial lapse of time between Willem's departure and her meeting with her aunt - these and other factors are collectively of some importance in relation to the probabilities. The fact that no spermatazoa were found on her clothes is of little importance, since it is beyond doubt that there was penetration.

Obviously, for the purposes of this appeal, the main factor is the direct evidence of the complainant and its acceptance by the trial court. That evidence was certainly open to the major criticism arising out of the delay in complaining and the positive deception practised by the complainant. The trial court, however, took the right factors into account in considering the issues. It appreciated the risks involved in relying on a young girl complainant in a rape charge and it realised that those risks were heightened by her subsequent behaviour. Having regard to the trial court's findings and to the probabilities appearing from the record it is impossible ~~xxxxx~~ for this Court to say that the verdict was wrong.

The appeal is dismissed.

Steyn J.A. Ogilvie Thompson J.A. } Concur.
Price, A.J.A. Smit, A.J.A.

11/12/58

pad sou teekom nie.

REGTER : Ja, maar was dit jou doel om haar bang te maak ?---Ja dit was.

Het jy 'n lat daardie dag gedra ?---Ek het geen lat gehad nie

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(Counsel address the Court in Argument).

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J U D G M E N T.

SNYMAN, J. :

The accused, SAM MAKHAZA, is charged on two counts. The first is that he is guilty of the crime of rape andthe second is that he is guilty of the crime of robbery. The two charges against him arise out of the same set of incidents, and I propose to deal with the facts of the two crimes together.

It appears that on the 22nd of July this year the complainant, Hendrina Magdalena Erasmus, who was visiting her aunt, a Mrs. Schonken, went out into the veld with her brother, a boy aged thirteen years, her cousin Willem Schonken, aged fourteen, the son of Mrs. Schonken. The complainant herself was aged fourteen. They went into the veld for the purpose of doing some bird shooting as they were on holiday. It was in the daytime. They had gone a considerable distance into the veld. The complainant estimates it at three miles. It may

not/...

not, however, be a correct estimate of the distance. It is sufficient for me to say that they were away in the veld and away from any habitation. After they had been out for some time the brother was taken home on horseback by a friend who arrived there, and the complainant and Willem proceeded to walk home. When they had walked about half way home they were met up by the accused. The accused started speaking to her cousin and claimed that he knew him. Some conversation took place between the cousin and the accused. Both the cousin and the complainant were somewhat nervous and afraid of the accused.

After a while the accused left them. He was on a bicycle. Having gone some distance however he got off his bicycle and came back to them. The complainant says he then called her cousin away. Willem says that they were together when the accused came back and spoke to them. Nothing turns on this this discrepancy. The evidence of the complainant and Willem then is that the accused started to threaten to kill them and demanded the complainant's wrist watch, which she refused to give him.

The accused himself has admitted that he stared at them and made threatening facial grimaces at them, but he denies that he did anything more than that or that he used threatening language. He says his grimaces alone enabled him to get the watch from the complainant. The complainant says that the accused's threats to kill Willem resulted in Willem's running away. Willem says he ran away to get help. The complainant was left behind with the accused. She also tried to get away,

but was caught up by the accused and, according to her evidence, he grabbed her by the arm and threw her to the ground.

Willem says that as he ran away he saw this happening. When some distance away he again looked back but was then not able to see them. The evidence is that the grass was at least two feet high in this area, and it seems likely that at that stage the complainant must have been on the ground. It is probably for that reason that Willem could not see her.

Willem ran on to call for help. In the meantime the accused, having thrown the complainant to the ground, straddled himself across her and proceeded to take the watch off her arm. He put the watch into his pocket and then pulled down the complainant's bloomers towards her feet, forced her legs open, lay on top of her, then kicked the bloomers off one leg, and proceeded to rape her. Her evidence is that she saw him take out his private part; she felt him put it into her private part and she felt and saw him moving up and down on top of her. In addition she says he told her to turn away her face. This is a very graphic description of what happened. I shall deal with the importance of it at a later stage.

The medical evidence is that penetration took place and that it was probably the first time that the complainant had sexual intercourse. The hymen was torn in four places. This together with the complainant's evidence proves that the accused had accomplished his purpose. Whether there was a discharge of semen we do not know.

/The.....

The accused himself in his statement which he made to the magistrate at Randfontain has said that he suffers from a venereal disease and that his penis is full of sores. Apparently he thereby wished to convey that because of the painfulness he could or would not perform the sex act. In any event in his statement to the magistrate he denied having committed theoffence. It may be that before he accomplished his purpose the pain caused him to stop. However, in law that does not matter. The fact is that he penetrated this girl and whether semen was emitted or not does not matter. Intercourse had taken place. It was against the will of the complainant and therefore it was rape.

The complainant has told us that after he had raped her he got off her, ran to his bicycle, got on it and rode away. She lay there for a short while, jumped up, re-arranged her clothes, put her bloomers on and ran along the road home. She says she screamed for help but there was nobody in the neighbourhood. She was met on the road by her aunt who had been called by Willem. Her aunt was brought to the place in a motor car of a friend. When her aunt met her the complainant was crying and in a highly emotional and hysterical state. She was taken home and on being questioned by her aunt as to what had happened, she did not say that she had been raped by the accused. She merely said that he had taken her watch. Her aunt saw some blood on her dress and asked her about it. The aunt suspected that something more than robbery had taken place. The girl, however, explained to her aunt that it was merely mud on her dress.

The aunt sent a message to the complainant's parents, and when her mother arrived that evening the complainant was still seriously distressed. When asked by her mother what had happened the complainant again refrained from telling that she had been raped. The complainant was taken to the police to make a statement there, and the police constable who took the statement, Detective Constable Botha, tells us that he suspected that there was something more wrong with her than just the effect of the robbery. He found her in a highly distressed state. He says she was crying, excited and hysterical. As a result of his observations he wrote a letter to her mother, the contents of which we do not know, but it was associated with his observations. She was taken home by her mother who again questioned her, but she still did not say that she had been raped.

The crime took place on the 22nd of July. On the 25th of July, the complainant went visiting, still not having told what had happened. Her mother then made a search in her room and under a mattress found the bloomers of the complainant with blood on it and also some handkerchiefs and tissues with blood marks. When the girl returned from her visit her mother again broached the subject by showing these articles and asking her whether she had started menstruating. I might here mention that the complainant told us in evidence that she was at that stage not yet menstruating. When confronted with the bloomers, the handkerchiefs and the tissues the complainant told her mother what had happened, but the mother still had to drag from her the

information by questions. The complainant told her mother that she had washed the dress and petticoat which she was wearing at the time of the offence but that she had kept the other articles because she thought she might have to produce them later on to prove what had happened.

The complainant's reason for not making a report to her aunt, the police or her mother, is that she was too shy to do so because she did not know how to tell them, but she did say under cross-examination that it was her intention to tell her mother the next day, that is on the 26th of July.

The complainant, as I have already said, is corroborated by Willem Schonken as to what happened when he ran away, and if she had made a report immediately after the assault on her, this case would have presented very little difficulty to us, but we must consider the effect of this late report by the complainant. Mr. Ninow for the defence has rightly made the submission that it may be because there was in fact not a rape but voluntary sexual intercourse on that same day with someone else, and that it is for that reason that she at first only mentioned the robbery and said nothing about the rape. That is a submission which the Court had to consider very carefully. It was necessary for us to, and we have warned ourselves, that in dealing with the evidence of a young girl one must be particularly careful. We must consider whether the complainant may not be drawing on her imagination and furthermore that there is not a reasonable possibility that some sexual act did take place between her and someone else - to put it quite

/bluntly.....

bluntly, between her and Willem Schonken, the fourteen year old boy with whom she was alone that morning. It is clear that a boy of fourteen is capable of performing the sex act although the impression this boy made on us is that he is a physically rather under-developed boy for his age.

The complainant and Willem were in the veld alone for something like half an hour. We must, therefore, ask ourselves whether it is not reasonably possible that the girl's conduct in not reporting the rape upon her until three days after it happened, was due, not to shyness or embarrassment, but to the fact that no such offence had been committed, but that she had had sexual intercourse with Willem Schonken.

The position in this respect is that we accept the evidence of Willem and of the complainant that the accused grabbed the complainant by her arm and threw her to the ground. Thereafter Willem could not tell us what happened, but the mere fact that he could not see her after being some distance away from them is demonstrative of the fact that she must have been lying on the ground, and, if that is so, that is strong corroboration of her evidence that she was being held to the ground by the accused. Now it would be a strange thing that having the girl prostrate on the ground, having robbed her of her watch, and having her at his mercy, the accused would then get off her and walk away. The graphic description given by the complainant becomes a feature of importance in this respect. We do not believe that the young inexperienced child had the knowledge of sexual matters necessary to give

such a description unless she actually experienced it.

In regard to her failure to report sooner than she did we have seen the complainant in Court; she is a nice, decent looking child, but very emotional. She was in a highly emotional state when giving her evidence. We know that her aunt found her in such a state after the event. That may have been simply on account of the robbery, but that evening when Constable Botha interviewed her she was still in that state. It seems to us that that is not conduct consistent with only robbery. We believe she was seriously upset at what had happened to her and that it may well be that she was too shy to make a report. She appeared to us to be a shy sensitive child. She nevertheless impressed us with the way she gave her evidence here and our impression was that she was telling the truth.

We have seen the complainant's mother in the witness box. She says she was on very good terms with her daughter, the complainant, and we accept that. But the mother is a most emotional type of person. In fact she displayed much greater emotion than the complainant in the witness box. It is significant also that after I had given permission for a relative to sit with the complainant in the witness box to succour her, it was an aunt who did so although the mother was present. The mother's emotional state did not allow of her assuming the role. Now one can readily appreciate the likely behaviour of such a mother when she suspects that her daughter has been raped. In spite of her solicitude for her child her emotional approach to the subject was bound to have made matters difficult for the child to

Court. His evidence before us ultimately was that he had threatened the children by making grimacing faces at them and that the girl had then taken her watch off her arm and given it to him. He admitted that both children were afraid of him, and it is clear on his own evidence that he is guilty of theft. We reject his evidence as totally untrue, and we accept the evidence of the complainant and Willem. We are completely satisfied in our minds that he took the watch from the complainant's arm by violence and thereafter proceeded to rape her.

The conclusion to which we have come is that the accused is guilty on both counts as charged.

(Mr. Ninow addresses the Court in mitigation of sentence).

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