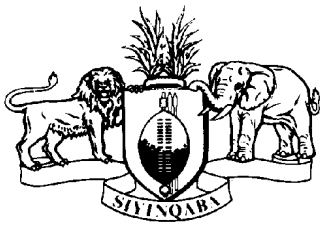

IN THE HIGH COURT OF SWAZILAND

***CRIM. CASE NO.* 142/98**

REX

VS

MUSA CHICKEN DLAMINI

CORAM	**:**	**MATSEBULA J**
FOR THE CROWN	**:**	**MISS SUSAN NDERI**
FOR THE ACCUSED	**:**	**IN PERSON**

JUDGMENT

20/05/99

The accused is charged with a crime of rape. It is alleged that on or about the 5th February 1998 and at or near [M] in the [M] District he did wrongfully and intentionally had unlawful intercourse with [D] and did thereby commit the crime of rape. Before the charge was put to the accused at the commencement of the trial, I took the trouble of explaining to him his legal rights as well as the competent verdict under rape. He indicated that he understood the explanation and he had no money to engage a defence counsel. The charge was put to him and he pleaded not guilty to the charge.

The Crown led the evidence of Dr. Paluku an obstratician, consultant at the RFM Hospital. He stated in his evidence that he had been a consultant at the hospital since 1977. He stated that on 5th February 1999 at 4.30pm the complainant was brought to him for examination following an alleged committal of rape on her. It was his evidence that he established her age being 38 years and that she was sexually active. He said as a

person who had been sexually active, the complainant had been penetrated before and that his examination could not therefore confirm or otherwise that she had been raped. The doctor then read and confirmed the contents of the medical examination handed in as exhibit "A."

The court put questions to the doctor to which he responded that he could not remember what the complainant said about her ordeal. He said however she was emotionally upset. The accused did not put any questions to the doctor.

The complainant was called as PW2. She told the court that she resided at [M] at the [M] and that she was not married but had children. She knew the accused in that the accused referred to her as "sister" because accused's mother had the same surname as hers. She stated that there was no other relationship between her and the accused. She had known the accused for four years but she has never socialised with him. He used to visit her homestead when the husband was still living with her.

The court may hasten to add that, Swazis very often refer to a man with whom they have children as their husbands therefore, her earlier statement that he had children but not married cannot be taken as being contradictory.

PW2 further told the court that the accused would visit her and her husband to ask for food. She said her husband whose name is [A] presently reside at [C]. She would visit him at [C]. It was her evidence that on the 5th February 1998 she had retired to bed and had secured the door from inside by means of a nail, which serve as a bolter. She said she was asleep in her room when she was suddenly awoken by someone having sexual intercourse with her. She asked who it was and a voice retorted, "it is I, sister". She said she pushed the person away and the person protested that he had not yet finished. She then lit a match and saw the accused busy putting his shoes on. She picked up a shoe and struck him with it. She told the court that the accused bolted out and went towards a homestead that is in the neighbourhood. PW2 reported the matter to her neighbour however, the neighbour was still asleep and PW2 decided not to wake them up but instead resolved to go there and report in the morning. This she did, first to the wife of Solomon Masimula who in turn called her husband and she made the report to them. Both Solomon Masimula and wife were called as witnesses for the Crown. Solomon Masimula gave evidence as PW3 and Freda, his wife as PW4 respectively.

The evidence of PW3 and PW4 cannot be treated as being corroborative to PW2's evidence in so far as the report she made to them about the rape. Their evidence about what PW2 said in accused's absence is meant to show consistency in the story of rape reported to them by the complainant. Their evidence also led to rebutt any suggestion of recent fabrication. See in this respect paragraph 457 **STATE VS BIRD (4) SA857.** However, PW3 and PW4 told the court that when accused was confronted by PW3 he first denied the truthfulness of PW2's report about the rape but when asked further he subsequently admitted having had sexual intercourse with PW2 and immediately asked PW2 to forgive him. This request by accused was turned down by PW2.

This piece of evidence by PW3 and PW4 is corroborative of PW2's evidence in that the accused had infact had sexual intercourse with her because that is what the accused told these witnesses.

The accused's cross-examination of the witnesses, PW2, PW3 and PW4 was aimed at merely denying everything they said. The Crown also led the evidence of PW5 3364 Detective Constable Augustine Dlamini. It was his evidence that he was an investigating officer. He had cautioned the accused in terms of the Judges Rules and the accused had elected to make a statement. The Constable reduced the statement down to writing and the accused admitted the statement as being correct.

At the trial the statement was properly identified and handed in. The signature of the accused was on the statement. It was handed in as exhibit "B." In exhibit "B" accused admits having sexual intercourse with the complainant and that she is his girlfriend. He states further that during the bout of sexual intercourse the complainant had pushed him off. Accused stated in his statement that the reason for complainant to lay the charge is because he no longer gives her money. In my judgement the statement is admissible and certain sentences corroborates the complainant's version. The complainant had said that she had pushed the accused off and he protested that he had not finished. That is what the accused says in his statement.

The accused also gave evidence and for the first time raised a defence of an alibi. He stated that he could not have raped the complainant at the time alleged. He said he was employed by a Mr. Du Pont as a watchman and it is impossible for him to leave the premises during the night. Although this defence was raised at a very late stage the accused not being represented, the court indicated to the Crown that they should try to secure the presence of Mr. Du Pont which they succeeded.

Mr. Du Pont was called to the witness stand and he gave evidence. He told the court that on the day in question, during the evening he had checked the accused making a surprise visit and found the accused was not present. Mr. Du Pont said he was in the habit of making surprise visits to check on the accused and the accused would tell him, at the time he was not there, that he had gone to Murray Camp to visit his friends and get some food. I have not the slightest hesitation to reject the accused's alibi. I find further that the Crown's evidence has been corroborated and it is safe for this court to accept it.

In the course of the trial, I enquired from the Crown about the position of the possibility of a conviction whether in that event the provisions of Section 185(bis) can be involved seeing that the Crown had not alleged the provisions of Section 185(bis) in the charge sheet. Section 185(bis) of the **CRIMINAL LAW AND PROCEDURE EVIDENCE ACT 67/1938** provides and I quote:

> "A person convicted of rape shall, if the Court finds aggravating circumstances to have been present, be liable to a minimum sentence of nine (9) years without an option of fine and no sentence or part thereof shall be suspended."

Even though on numerous occasions the courts especially the High Court has insisted that the Crown should always specifically put the provisions of Section 185(bis)(1) but this being a statute there is nothing to indicate that if that has not been done then the provisions will not apply. Miss Nderi explained to the court that it is sometimes difficult for the prosecution to know beforehand that aggravating circumstances may be present. She said it is only in cases where it is alleged from a statement of a complainant that a knife had been used or that a child of a very tender age has been raped; that the Crown would be in a position to specify that the provisions of Section 185(bis) would be involved. She stated that in the present case, the only indication was that the complainant had stated in her evidence (or in a statement) that the person who raped her got into her house by committing some burglary by removing the bolt which was in a form of a nail and entering, therefore it could be safely said that she was at her house which can be regarded as sanctity when the rapist came in. But in-so-far-as the question of puberty lice which only made the appearance after the rape the complainant could not have mentioned that in her statement and when she did also in her evidence, it is obviously an aggravating factor. It is clear to me that a person who would infect another by this type of sexual transmitted disease is a person of loose morals and can easily infect the said victim with HIV/AIDS virus.

In the circumstances, I find that the presence of these puberty lice is also a factor to be taken as aggravating circumstances. It was also stated by the Crown that the complainant had been invaded in her privacy when she was in her house, it can be taken as sanctity to herself and that the rape took place while she was asleep. She only woke up when the accused was busy having sexual intercourse with her. I therefore find that the provisions of Section 185(bis) are involved and find the accused guilty of the crime as charged.

SENTENCE

The court will take into account as far as possible what he has said about his children being all by themselves at Mpaka. And that the area has been hit by drought and that he needs money to feed them. But the court will also take into account his attitude that he felt no remorse whatsoever. On behalf of the community the court should also take into account the community's interests. The rape cases are in such an increase these days and these days being the days of HIV/AIDS which is so endemic. Committing rape on these

women is tantamount to sentencing the victim to death. The only signal that this court should sent to would-be rapists is that they should know that if they are caught and they are convicted they would get a very severe sentence for raping a woman. It is a pity that in the process some dependants like the children and other dependants are also affected. But the sentences are aimed at the perpetrator who is the rapist and it must be such that other rapists or other people who intend committing the same crimes must also get the language very clear.

In the circumstances I sentence the accused as follows:

He will be sentenced to the minimum sentence as provided for in Section 185(bis) which is nine (9) years' imprisonment. The sentence will be backdated to the 5th February 1998 the date of his arrest.

J.M. MATSEBULA
JUDGE