



## **IN THE HIGH COURT OF SWAZILAND**

**CRIMINAL CASE NO.72/00**

**In the matter between:**

**REX  
VS  
JOHN BHOJWANA KHANYA**

**CORAM  
FOR THE CROWN  
FOR THE DEFENCE**

**MATSEBULA J  
MR. N. MASEKO  
IN PERSON**

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### **JUDGMENT**

**26<sup>th</sup> September 2001**

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The accused stands charged with the crime of rape. The allegation being that on or about the 21<sup>st</sup> July 1999 at or near [M] in the [H] District, the accused did wrongfully and intentionally had unlawfully sexual intercourse with [T] and thereby did commit the crime of rape.

In view of certain aggravating circumstances the accused has been warned by the Director of Public Prosecutions that he has invoked Section 185(bis) of the CRIMINAL PROCEDURE AND EVIDENCE ACT. What that means is that is that if convicted, the accused should be given a sentence of a minimum which is nine (9)

years. The circumstances which have been mentioned in the indictment are the following:-

- a) that at the time of the commission of this offence, the complainant was a female child of 6 years;
- b) at the commission of this crime the complainant was a virgin;

These were explained to the accused at the commencement of the trial and he said he understood them. The court even took the trouble of reminding the accused that he has a right to legal representation. The charge was then put to the accused, although he said he was pleading guilty, he added certain explanations and because of what he said subsequent to a plea of guilty I suggested to the Crown it would be safer for the court to put a plea of not guilty especially that the accused is not represented. What he said in addition to pleading not guilty was that he was unexpectedly tempted and did not intend to commit the crime. He further added that he had just started committing this crime when suddenly he decided to stop. In view of all this, the court put down a plea of not guilty.

The Crown proceeded to call the evidence of PW1, the Senior Magistrate Mr. Nkonyane. Mr. Nkonyane gave evidence and read certain questions which he put to the accused when he was brought to him for the purpose of making a statement. From the preliminary questions and answers recorded in exhibit "A" the court is satisfied that the statement was meant voluntarily by the accused.

In his statement the accused admits that he did commit this crime. He adds again that the complainant kept on coming to his house and eventually he was overcome by temptation.

The Crown also led the evidence of T the complainant in this case who was assisted by her aunt one Duduzile Nzima. She stated that she was 8 years old and further stated that she was not schooling nor attending any crèche. It was her evidence that she resided at [M] where she resides with her aunt, grandfather and her father.

It was her evidence further that on this day in question, she and other two young girls played at the yard, immediately in front of where the accused stays. She stated further that the accused was known to her. She said she addresses him as "madala". She said accused called them into his house and started kissing the

other two girls but these girls left the house but she was left behind with the accused. She then informed the court that accused put her on the bed and put what he uses for urinating into what she uses for urinating. She said she felt pain even after he had finished she still felt pain. Then the accused informed her that she should tell no one about her ordeal. However, she did say that she told one [NM]. That was her evidence. The accused did not challenge her evidence except to say that she was the cause of this because she had come to his house, he had not forced her into his house. He also asked why she didn't shout and she said she did cry but because [N] was far away and she does not have a sharp voice that could have been heard by [N], it did not help her.

The Crown also led the evidence of [N]. She said at some stage she saw the complainant walking behind the accused's house and the manner of her walk was that her legs were astride. And she then wanted to know why she was walking like that, she then asked her where she had been. The complainant did not immediately come with an explanation to this question but then one of the girls with whom the complainant had been playing informed [N] what had happened.

According to one of the girls the accused had proposed love to them and had also had sexual intercourse with the complainant. Accused wanted to know when he would be given an opportunity to cross-examine the witness and also whether the witness had seen the accused rape the complainant. [N] told accused that she had not seen accused doing that.

The Crown then led the evidence of PW4 the doctor. The doctor is the one who examined the complainant on the 21<sup>st</sup> July 1999. The doctor found that the complainant's hymen was absent and that the examination was painful. He could only put his finger into her reproductive organs of the complainant. He said, in his opinion, the reason it was painful was because she had never had sexual intercourse before. He estimated her age as being 4 years. He formed the opinion that the complainant had in fact been penetrated.

The accused was afforded an opportunity to examine the doctor. All he was concerned with was that he had been told by somebody possibly at the prison that not much damage has been caused to the complainant. However, the doctor was of the view that damage had in fact been caused because of the complainant's age and the fact that the absence of the hymen can never be replaced. The accused's rights were explained to him and he chose not to say anything. He also said he had no witnesses to call.

The Crown on the basis of the evidence I have just analysed,

submitted that they have made a case beyond any reasonable doubt and asked that the accused be convicted as charged. The accused in response thereto stated that he had no intention of committing this crime, it was because the complainant had come to his place and in any event he had started but warned himself to desist from this and stopped.

Considering all the evidence and the fact that there is no defence especially in view of the complainant's age, the court is satisfied that the Crown has proved this case beyond reasonable doubt. And I, accordingly, find the accused guilty as charged.

#### MITIGATION ON SENTENCE

The court has taken into account what you have stated in mitigation especially that you are a first offender. I am not so sure that you are 60 years old but the court in absence of anything will accept that.

In so far as what you have kept on repeating that you did not intend to do this, I am not sure if that would help you. Personally, I think there is an evil spirit that is sweeping across the country because when you look at the complainant, even if she were to undress and walk nude no sane person can ever consider to go to bed with her. To keep on repeating that you did not intend when you put that child into such a trauma she suffered as a result of what you did to her I am not sure I can take that as a mitigating factor. Similarly the fact that you admitted, pleaded guilty and even made a statement to the Magistrate but in view of the age of the complainant, that type of remorse is outweighed by the gravity that you did something to a child who is too young that no sane person can think of doing it.

On the other hand the court has to take into account on behalf of the society that these types of cases as I have indicated are so prevalent that unless sentences are stepped-up the members of the public will start taking the law into their own hands. In your particular case, this child has suffered such a trauma and if she will get to a stage where she gets married this will a lasting and indelible mark on mind - that at the age of 6 an old man like yourself accosted her and sexually assaulted.

We also say that a deterrent sentence should be passed but I prefer a view that the court deals with a person who has committed the crime. If other people hear about this, perhaps it is good that it becomes deterrent to those who might be intending to do it but you will be punished for what you have done.

Considering all these factors, I am of the view that the following sentence would be an appropriate one. Accused would be

sentenced to an imprisonment for 10 years. This sentence would be backdated to the 21<sup>st</sup> July 1999 that is the date of his arrest. Accused's rights to review and appeal explained.

J.M. MATSEBULA

Judge