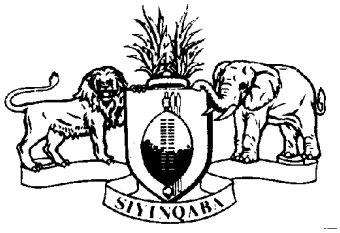

IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO.84/00

In the matter between:

REX
VS
ALFRED MADLEMBE SIHLONGONYANE

CORAM	**ANNANDALE J**
FOR THE CROWN	**MR. P. [D]**
FOR THE DEFENCE	**ACCUSED IN PERSON**

JUDGMENT
(EX-TEMPORE, 18/06/02)

The accused appeared before court indicted with the crime of rape in that on or about the 5th September 1999 at or near [N] area in the [H] District the accused allegedly wrongfully and intentionally had unlawful sexual intercourse with [A] [B], a female child aged about 8 years, and thereby committed the crime of rape. The Crown contends further that, (although it is not quoted in the indictment it would be with reference to Section 185(bis) of Act 67/1938) that there are aggravating circumstances in that the complainant was a child of 8 years of age at the time of the rape.

It is to this indictment that the court recorded a plea of not guilty by the accused. No formal admissions were either sought from or tendered by the accused. The Crown is left with the entire burden of proof, to prove

the commission of the offence and the guilt of the accused person beyond reasonable doubt.

I will briefly summarise the evidence tendered by the Crown and by the accused.

Starting with the evidence of [A] [B], a young girl. When she testified in court yesterday she stated herself to be a girl presently 11 years of age. She stated how the events occurred that gave rise to this prosecution namely that on the date mentioned in the indictment, the 5th September 1999, she was sent to fetch water. There, as she bent down to fill the container she was approached by the accused who, according to her, got hold of her and took her to a conveniently nearby pipe where he semi-undressed her by removing her panties. He held her while he pulled down his trousers, went to lie on his back and placed her above him, whilst holding her with both hands.

This particular evidence of what the accused would have done with his two hands was contested by him in that he said that he was unable to use his left hand for such purposes, while the complainant said that he did use his left hand as well as the right. The court noted today when he was in the witness box that his left hand is deformed. The small finger and the thumb point to the side of the hand whilst the middle finger is deformed as well, the other fingers apparently missing or very tiny. But I could see that even though he suffers this most unfortunate affliction that he still had movement in the fingers and that he moved his hand and arm with apparent ease. I do not accept that he is unable to hold a small girl with both hands.

Further evidence is that once he had placed her on top of him he inserted his private part into hers. She did not state how much time it took but she complained to him that it was hurtful. He told her to shut up and keep quiet, otherwise he would stab her. It was at this point where there was an interruption in the events in that one [C] [D], a cousin of [A] the complainant, arrived at the scene.

Her evidence is that at the time in question she and her sister [E] [D] went walking in the same area when they discovered the empty

container. They split up and looked for [A] who was not there, as she should have been. As [C] came to the pipe she saw what was happening. She says that she saw the accused person lying on his back with the complainant placed on his lap whilst he was holding her with both hands. She did not let things just go by but confronted the accused with what was happening. The accused got up, came to his feet and pulled up his trousers and she specifically noted that his private part was erect at the time.

According to both [C] and [E] [D] it was at that point when [E] also came to the scene and witnessed the accused pulling up his pants, also witnessing that his private part was still erect at that time. They all then set off to the homestead of [A]'s grandmother to take the matter further and met one [F] [B] to whom they reported what they saw. The two ladies and [F] as well as the accused and the young complainant eventually made their reports which led to the detention of the accused person by a community policeman, one Mvubu. The latter then detained the accused person overnight, escorting him to the Pigg's Peak police station the following morning, accompanied by the complainant and [C], her cousin. Mvubu was not called to testify but his actions in the matter were related to the court by both the witnesses as well as the accused, namely that on arrival at the Pigg's Peak police station he was handed over to the police and also what occurred the previous night.

From Piggs Peak police station, accompanied by her cousin [C], the young complainant [A] was taken to the Government Hospital where a medical examination was performed on her by the medical officer in charge, doctor Christopher Aisu. The doctor testified that he is a qualified medical practitioner who obtained his degree in 1991 at Makere University in Uganda and that he has since been employed in hospitals both in Uganda and Swaziland. That leaves him with experience of 11 years at present and at the stage of his examination it was about 8 years. He detailed his evidence by referring to the notes that he made on exhibit "A", namely the medical examination form used by medical officers when examining a patient, a form which was supplied by the police.

His observations are fully recorded and I do not propose to repeat it in detail. To a great extent it is that the girl he examined was [A] [B] who told him that she was about 8 years of age at the time. He recorded his findings and specifically noted that the hymen of the patient was perforated and healed, apparently, as told to him by his patient, due to a previous sexual encounter. During the procedure of the 6th September 1999, one day after the date of the incident, the examination was extremely painful. He noted that her sexual organ was bruised, especially the area around the vestibule still being hypothermic, with the *labia minora* and the *fourchette* also being bruised. As a result of his examination and his professional knowledge and experience, he formed an opinion that there was indeed forceful genital penetration around 24 to 72 hours prior to his examination. There is no reason whatsoever to doubt his findings and conclusion.

Two further witnesses were called by the Crown, namely [F] [B] and the investigating officer but nothing much turned on their evidence, save to confirm what was already said about themselves.

With this evidence presented by the Crown, the accused was placed on his defence. His version during his own evidence on oath is that on the day in issue he was indeed at the pipe where he was said to be by the Crown witnesses but that he did not do any of the things ascribed to him. His version is that he was resting, having a short nap after a hard day, following his return from some other place. He said that he was very tired. He held out that the complainant, [A] [B], approached him and asked for his help with carrying of the water. It was at that stage that [C] and [E] arrived and made all sorts of false accusations against him. His version is that the reason for the false complaints made against him is that [C] used to be his one-time secret lover and that at some stage during their affair she was impregnated by a close friend of the accused. It caused her great stress that he was not happy with it and decided to get back at him by “schooling” the complainant to give false evidence and lay a false charge against him. That is briefly the evidence of the accused before court for consideration.

When I turn to an evaluation of the evidence one must be extremely cautious in a case like this not to fall into the trap of comparing the version of the Crown with that of the defence and finding the one more probable than the other or the weight of the one exceeding the other and thereby arrive at a conclusion. That would a serious miscarriage of justice.

What the court is required to do is to establish from the evidence before it if the Crown has discharged its burden or onus of proof beyond reasonable doubt, that the offence was committed and that it was done by the accused person. Hand in hand with this is the requirement that an accused person must get the benefit if there is any doubt. If he gives a reasonable possible explanation that could exculpate him, even if the court does not believe his version to be true, he is entitled to an acquittal.

When assessing the evidence in a case like the present where the complaint is of a sexual nature, special care must be taken. Due to practical experience over many years of jurisprudence, the courts have said over and over again that when assessing such evidence one must be very careful to avoid a misdirection or to make a wrong factual finding. Part of this caution was raised by the accused who says that there is a false complaint against him due to an ex-lover who had a secret affair with his friend and now wants to get back at him. This raises a suspicion that if perhaps it is so, she could have a motive to falsely implicate him. But that is not all. The complainant here is a young child whose evidence must also be treated with extreme caution. In other words, the court today must be doubly cautious and careful not to come to a wrong conclusion. Merely concerning the evidence of the complainant, a number of *caveats* or aspects that must make one very cautious comes to mind.

There are at least five such aspects that came to mind where the evidence creates a difficulty namely, was the complainant taken to the hospital the same day of the incident or the next day? Also, who was the first person on the scene during the incident? Further, was it her first sexual encounter or not? Did [F] come to her rescue or not or did someone else? Was there penetration or not?

Because penetration is one of the essential elements of the crime of rape, it is one of the aspects that has to be found before a conviction of rape can follow. It is aspects like this, that made me say from the onset of the judgment that the delay between the time of the alleged offence in September 1999 and the trial almost three years later is not conducive to the good administration of justice.

It is normal and usual for anybody to forget fine details over time especially such a long time and more especially in the case of a very young child. So there will be contradictions in the evidence of [A], at least in some of the above aspects. I am very very hesitant to rely on her evidence alone as to what would have happened and as to what has not happened, because of the wide possible margin of error.

As I have said before, it also requires a great measure of caution when considering the evidence of [C] in light of the evidence by the accused concerning their previous relationship. Could it be, I must ask myself, that she is a hurt ex-lover who now has an opportunity to get back at the accused. These aspects requires one to exercise caution not to draw a wrong conclusion by erroneously or unthinkingly or wrongly accepting evidence by either the complainant or [C]. The court must look for other factors outside their own evidence as safeguard against such incorrect findings of fact. By doing so, I do not hold that the evidence of [A] and [C] is unreliable and untrustworthy simply because of the factors I have mentioned, but as I have said the court could possibly make incorrect findings if their evidence is just blindly accepted.

One such possible safeguarding factor might be the fact that when given the opportunity to cross-examine [E] [D], the sister of [C], the accused did not take to issue the question of the secret relationship with [C] and himself, and also whether that could be a reason for her to lie. But there again, the court must not place too much emphasis on that particular aspect as the accused is unrepresented, he is not a skilled cross-examiner and his mere failure to take that issue to task with [E] is in itself is not that much of a factor. Still, he did not take her to task on this aspect of his defence.

What I do find much more important is the evidence of [E] which corroborates that of [C] [D], namely that they both said they saw the accused pull up his pants with his private organ still in a state of erection. As opposed to the *caveat* that the accused placed on the evidence of [C] the same does not apply to [E]. He conceded during cross-examination by the Crown's counsel that she has no reason whatsoever to fabricate any evidence against him, unlike the other witness. That evidence where they both corroborate each other is totally irreconciliable with the version of the accused. There would have been no reason whatsoever for him to pull up his pants with his private part in the state they said it was if he was merely lying down and having a nap, as he wants the court to find.

A further safeguarding factor is the evidence of both [A] and [C] [D] as to in what state and what position the two of them were found by the lady, namely with [A] sitting with her bare buttocks on his bare lap while he was lying on his back, with the accused holding her with both hands. The accused when confronted by [C], then only pushed the girl off him and started dressing himself. That is also a factor that the court finds difficulty with, to believe the version of the accused, namely that [C] would have "schooled" [A] and coming up with the version that they did. But even if I were mistaken by taking these factors to militate very strongly against the version of the accused, one cannot overlook the independent professional evidence of the medical examiner. Nowhere during this trial has it been suggested or can it be contemplated or should it be deduced by the court that between the time of the incident at the pipe and the medical examination, that there was any other source of sexual interference with [A].

When she was examined shortly after the alleged incident the doctor unequivocally, definitively and reliably, in my view, based on his observations, found that there was indeed interference of the genital area of the complainant just shortly before the examination. Such interference he said, could only have been caused by penetration of her genitalia. Try as he might, the accused cannot explain that away. He can say [C] lied and "schooled" [A] because of their secret affair that went sour. He can

say they are all ganged against him to falsely implicate him about the scene but still, even though I do not find so, it does not at all dispose of the evidence of the doctor.

Even the slightest degree of penetration is sufficient for the act to have been done on a charge of rape, penetration of the female genitalia by the male sexual organ.

In the course of the trial, the accused tried to convince the court that there could not have been penetration because of the variance in physical sizes of the relative sexual organs of himself and the complainant. That argument also does not hold water. The evidence, especially that of [C], is that to all probable extent there was *coitus interruptus,* namely the accused had just started penetrating her when he was caught. It also ties with the absence of spermatozoa during the examination. The court does find as a fact that indeed there was penetration, as is also evidenced by the medical examination. The accused conceded when I asked him, that he was then and is now aware such an act between an adult and a child, even if the child would have tried to consent, would be wrongful.

On the final evaluation of the evidence as a whole, the court rejects the evidence of the accused in so far as it contradicts the evidence adduced by the Crown. The court finds that on the date in question, the 5th September 1999, at the [N] area the accused wrongfully and intentionally had sexual intercourse with [A] [B], a female child who was at that stage about 8 years old and thereby the accused did commit the crime of rape. I order a conviction accordingly.

REASONS FOR SENTENCE

The court considers your personal circumstances as you have given it. You chose to give sworn evidence in mitigation and did not call any witnesses in support. There is no reason to doubt the correctness of what you said. I am not going to repeat it all. You are a man who is illiterate. Apparently, from your appearance, you seem to be about 40 years of age. You are unmarried but have a child of about 20 years and there is your

home to take care of. You did part time odd jobs, not earning very much. Your sister who was in England is said to have been murdered and she had a child staying at your homestead, who also passed away during your incarceration.

You say that you have remorse, but that is clearly not the case, in view of what you said, that you are “supposed to be remorseful because you are convicted, but you think the conviction to be incorrect”. Something certainly in your favour is that you have no previous convictions of this sort of nature that has been proven against you, or any other for that matter.

Apart from your personal circumstances, the court must also consider the seriousness of the crime and the interests of the community. A very very young girl, 8 years at the time, was raped. I do not propose or purport to be a preacher but if one looks at the scriptures it has been said that anyone who does harm to the little children, for such a person it is better that a grinding stone to be tied around his neck and that he be thrown into the sea.

During the course of the trial, the absence of the press was notable, this is not a matter that received much media attention. To a great extent, that is to protect the identity of the girl.

Another aspect is that when word of this sentence goes out to the public, and if the court were to impose a sentence according to your liking, then it would be a recipe for disaster if the court were to visit such offences with meagre light-weight sentences.

This little girl was sexually abused by an old man like yourself. In the process she was infected with a disease. Fortunately for you, the court is not aware whether she is now HIV positive or not or if the disease has now been cured. The court must also try and dissuade other people from doing such things, as you have done, not only to all women but especially to the little children.

I will ameliorate your sentence to the greatest possible extent by backdating it, for the sentence to be deemed to have commenced on the 5th September 1999 namely, the date when you were taken into custody

by the community police and later on by the Royal Swazi police. You stayed incarcerated until today, the 18th June 2002.

You have indicated during your evidence in mitigation that you are dissatisfied with the outcome of this trial. If you wish to pursue that, whether against the conviction or whether against the sentence that will now be imposed or both, you will have to file your notice of Appeal with the Registrar of the High Court within 21 days from today. You may then pursue your appeal with the Court of Appeal.

When I consider your personal circumstances, the seriousness of the offence, and the interests of the community, I also take into account the provisions of the Criminal Procedure and Evidence Act, Section 185(1) which makes rape with aggravating circumstances subject to a minimum sentence of 9 (nine) years. The court is of the opinion that the correct sentence that is to be imposed on you is a sentence of 12 (twelve) years imprisonment which is backdated to the 5th September 1999. It is so ordered.

JACOBUS P. ANNANDALE
Judge