

CRIM.CASE NO.49/2000

In the matter between:

REX

VS

NQABA THEMBA DLAMINI

CORAM : **MASUKU J.**

For the Crown : **Mr P. Dlamini**
For the Accused : **In Person**

JUDGEMENT
20/06/02

The accused person stands before me charged with the crime of rape, it being alleged that on the 8th March, 2000 and at or near [M] area, [H] region, he did intentionally have unlawful sexual intercourse with [A], a three (3) year old female, who is in law incapable of consent. It is further alleged that the crime is attended by aggravating factors as listed below: -

- a) the victim was a minor of very tender age
- b) the accused stood in *loco parentis* to the victim
- c) the accused did not employ contraceptive measures during the sexual intercourse with the victim.

The accused was warned of his right to legal representation and he indicated that he understood the same but would conduct his own defence. He pleaded not guilty to the

charge. The Crown paraded five (5) witnesses in proof of the charge. I propose to chronicle the highlights of the Crown's evidence below.

Chronicle of Evidence

PW 1 was [D], a resident of [M] area. He testified that on the 8th March 2000, he was at his home around 16h30 when he suddenly heard a child crying. He decided to go and investigate, whereupon he went to an open grazing area and there found the accused having sexual intercourse with [A], the victim. The accused had put the child on his lap, had taken off her panties, removed his overalls to the knees and had sexual intercourse with the child.

It was PW 1's testimony that he then decided to send his wife to call [A]'s mother. In the meantime, the accused asked for forgiveness. [A]'s mother came, inspected the child and confirmed that somebody had carnally known [A]. PW 1 also sent for members of the vigilantes, who came and took him to their sergeant who later conveyed the accused to [B] Police Post.

PW 1 testified that he knew the accused and he was related to both the accused and [A], the latter being his niece. It was his further testimony that the relationship between the accused, [A]'s mother and himself was cordial before the occurrence of the incident in question.

The cross-examination did not yield much as the accused asked questions which were not material. What did however transpire is that the accused was assaulted by PW 1 before apprehending him. PW 1 also confirmed under cross-examination that prior to this incident, there was no bad blood between him and the accused. The accused put it to PW 1 that PW 1 owed him some money which had been given to PW 1 by [M2], for onward transmission to the accused. When confronted by the accused to hand over that money, PW 1 told the accused that he had used this money and would give it back to him. Each and everyone of these allegations were vehemently denied by PW 1.

He denied the suggestion that he had concocted the rape allegations because he owed the accused. It was further put to PW 1 that he could not possibly have had sexual intercourse with [A] because she is very young and she is his granddaughter. PW 1 maintained that he found the accused having sexual intercourse with [A].

The Court enquired if there was an exchange between PW 1's wife and [A]'s mother and PW 1. PW 1 told the Court that [A]'s mother wondered what the accused was doing to her child as they are related and the accused asked for forgiveness. As a result of this answer, the accused put it to PW 1 that [A]'s mother never stated what PW 1 alleged and that he never apologised. PW 1 insisted that that had been the case. It was further put to PW 1 that the accused apologised, not for having had sexual intercourse with [A] but because he was being assaulted. PW 1 insisted that the accused apologised for having sexual intercourse with [A]. PW 1 was asked if [A]'s mother inspected the child at the scene and this PW 1 confirmed, adding that [A] was inspected by her mother in the accused's

presence. The accused thereupon put to PW 1 that he never saw this inspection take place and that the only inspection was at the vigilante's behest. PW 1 confirmed that the child was inspected at the scene.

PW 2 was [E], [A]'s mother. She testified that [A] is (4) years old (i.e. as at date of trial). She testified that on the date in question, she was from the shop when she received a report that the accused, who she referred to as Buchwabalalana, had had sexual intercourse with [A]. She immediately proceeded to the grazing fields and there inspected [A], whereafter she confirmed that she had been molested. She then asked the accused why he had done such and he told her that he had been tempted by the devil and that he put the child on his lap then got an erection. It was her further evidence that the accused asked for forgiveness and in that regard, offered to pay five herd of cattle as compensation to PW 2 for the wrong he had committed. PW 2 told him that she could not deal with that issue then.

PW 2 further testified that when she inspected the child, she saw semen on the labias and on inspecting the vagina, she found that it was wet. They were then taken to the Police Station from where they were taken to [M] Health Clinic where [A] was admitted. PW 2 further confirmed that she is related to the accused and that he normally visited her home. The accused, according to PW 2 was regarded as a member of her family and would be served food by PW 2's mother. It was her further testimony that her children also accepted the accused as a member of the family.

PW 2 also testified that she found the accused tied with a rope as there were fears that he would escape. He asked PW 2 to assist him and she refused, retorting that she did not know if he had not infected [A] with the Aids virus. When he offered to give her the 5 herd of cattle as aforesaid, she told him that he should have used that herd of cattle as lobola for his wife.

Under cross-examination, which was again discursive in nature, PW 2 told the Court that the accused told the Police that he was removing some insects from his private parts. Most of the cross-examination was targeted to how and by whom the accused was assaulted and what happened at the Police Station. The accused asked who was with her when she apologised and PW 2 stated that she was with [C] and [D]. PW 2 confirmed that the accused apologised for what he had done and she denied that he apologised in order to abate the assaults on him. It was her evidence that she asked PW 2 to apologise on his behalf as the child involved was hers and specifically apologised for the act and then offered five herd of cattle.

PW 3 was [F] who related the events of the day in question as follows: - That he was with Selby and [A] next to a mango tree when the accused told him and Selby to go and round up some cattle. [A] was left with the accused. On their return, PW 1 started quarrelling with the accused. [A] was sitting down crying. [F] confirmed that he knew the accused and that he is a relative. PW 3 told the Court that he did not know why [A] was crying. The accused told the Court that he had no questions to pose to PW 3 as he had told the Court everything.

PW 4 was 3906 W/Constable Funani Promise Dlamini, a Police Officer stationed at Pigg's Peak. She testified that she received a report of a crime at [B] and she proceeded there with 2442 D/Constable Siphanga. They were shown [A] on arrival and she was with PW 2. PW 4 tried to interview [A] as to what had happened, apparently without success. It

was her further evidence that they proceeded to [M] Health Centre, where they were attended by Dr Simon Haile Sellasie, who examined [A]. PW 4 then returned to [B] where she introduced herself to the accused and then took him to Pigg's Peak Police Station where she charged him with rape. There were no questions in cross-examination.

PW 5 was Dr Simon Haile Selassie, a Doctor at [M] Health Centre. He testified that [A] was brought to him by the Police for purposes of examination as there were allegations that she had been raped. His findings were that [A] was about (2) years old; there were no abrasions on her body and her clothes were intact. She was fine physically and mentally for her age. The hymen was absent and only one finger could enter the vagina. He testified that the examination was painful and no spermatozoa was seen. There was no discharge or blood on [A]'s organs of generation. PW 5 concluded that the child had been sexually molested in view of the history recounted to him and his observations. He opined further that there was some penetration as evidenced by the absence of the hymen. It was his evidence that he prepared a report which was handed into Court.

In cross-examination, the accused asked why the medical report reflects the examination as having been carried out on the 9th March, whereas the witnesses mentioned the 8th March. PW 5 stated that the 9th was the day he completed the *pro forma* and that it is possible that he saw [A] on the 8th as stated by the other witnesses. He was asked if he found that [A] had been carnally known and PW 5 confirmed because he found the hymen broken. The accused asked as to what evidence shows or confirms sexual intercourse, to which PW 5 stated that [A] was a child and that it was impossible to have full sexual intercourse with her. It would, he opined, be unlikely for one to find spermatozoa. It was his testimony that penetration is proved if the hymen is absent. He also confirmed that there were no bruises on the organs of generation except the absent hymen. He could not say if the hymen was ruptured the same day, although he could say that it had recently been removed.

Responding to a question by the Court, PW 5 testified that in a child of [A]'s age, he knows of no other cause for the absence of the hymen except penetration, whereas in an older person, the menstrual cycle may interfere in part with the hymen.

Assessment of Crown's Evidence

In my view, the Crown's witnesses were clear, credible and consistent in their evidence. They tendered their evidence calmly and responded to questions in a forthright manner.

Their evidence was given matter of factly and those that were cross-examined stood up well thereto. I cannot criticise their evidence. This applies equally to PW 3, who in spite of his age tendered good evidence and I was convinced that he was telling the truth. PW 1 however omitted to tell the Court that he assaulted the accused when he found him with [A] at the scene.

In view of my conclusions above, I found that there was a *prima facie* case against the accused to which he had to answer. He chose to adduce sworn testimony as follows: - That on the date in question, he went to the mountains to dig up some herbal roots. On his return, he went to [D]'s home (i.e. PW 1) and told him that he had come to fetch his money

as he intended departing for some other place. PW 1 told him that his wife was not there but that as soon as she arrived, he would deliver the money.

He thereafter went to his brother's house where he prepared the herbal roots and his brother's wife [L] came and she offered to get some money she was owed by [M3] and that she would be free to get the money once the children had returned from school to relieve her as she had to look after the cattle. The accused offered to look after the cattle which he did. He was with four children, including PW 3 and [A]. He drove the cattle towards a deserted homestead and sat there. According to him, he was with the boys at this stage, the girls appearing later. The latter asked him to pick up some guava fruits and he shot the tree causing some guavas to fall down in the process. He then went to the cattle with PW 3 and decided to sit on a pile of soil next to a mango tree, smoking his cigarette. The other children came to where he was and played. The accused then instructed PW 3 to go and restrain a beast which was heading to some cultivated fields.

Suddenly, somebody hit him on the ear with a knobkerrie and he fell down. The person continued to assault him on the shoulders and on his back. The accused stood up and wrestled with his assailant, who turned out to be PW 1. A [D] man approached and separated them. It was the accused's story that PW 1 accused him of being naughty as he found the accused having sexual intercourse with [A], which the accused denied. This lie, the accused attributed to the fact that PW 1 owed him some money. PW 1 was breathing threats of taking the accused to the RSP, failing which he would kill the accused.

Some vigilantes then came and [F] explained what had happened and which PW 1 denied, insisting that the accused had had sexual intercourse with [A]. The accused testified further that he was eventually taken to the home of the sergeant of the vigilantes, who in turn referred the matter to the RSP. The accused stated in great detail the events, which occurred at the Police Station at E[B] and Pigg's Peak. In my view, they do not go to heart of the charges and it is unnecessary to advert thereto.

I then directed the accused to certain allegations against him *viz* that he admitted having committed the offence and that he offered to pay compensation. This he said was untrue and that the Crown's witnesses ganged up on him. Prompted further by the Court, the accused denied that PW 3 examined the child and there observed signs consistent with [A] having been engaged in some sexual activity. He maintained that he never touched [A]. He further denied, when prompted by the Court that he had told PW 2 that he had been tempted by the devil.

In cross-examination, the accused admitted that he was related to all the first three Crown witnesses and that PW 3 and [A] respected him as an elderly person, referring to him as their grandparent. When taxed as to why PW 2 would concoct false allegations against him as there was no bad blood between them, all that the accused said was that she had been told everything to say by PW 1. When asked about his removing ticks the accused said he removed the ticks from under his armpit not from his pubic hair. It was further put to him that he never challenged PW 2's damning evidence against him, especially that he had apologised; he had offered to give some cattle as *solatium* and that he had said he had been tempted of the devil. This the accused said he had challenged.

There are several issues which render the accused's story improbable and not worthy of belief or acceptance. Certain important allegations were not put to the Crown's witnesses

and only emerged when accused adduced his evidence in chief. One example is the story that he was leaving and needed money from PW 1, which the accused needed for the trip. He alleged that he went to PW 1's home to ask for the money on that day. This was never put to PW 1. Furthermore, the accused never put to PW 1 that they had quarrelled over money. In this wise, these pieces of evidence fall to be declared an afterthought. **S v P 1974 (1) SA 572 AND R v DOMINIC MNGOMEZULU CASE NO.94/90** (unreported).

Secondly, there are very crucial pieces of evidence that the accused failed to challenge and which pointed directly at him. He failed to challenge PW 1's evidence when he testified that he found the accused red-handed as it were, having sexual intercourse with [A]. He also failed to challenge PW 2 when she testified that he apologised and explained that he had been tempted by the devil. He also failed to challenge her evidence that he offered to pay some five herds of cattle as *solatium*.

As stated earlier, the Crown's evidence, which was not seriously challenged is clear. PW 1 heard a child crying and went to investigate, whereupon he found the accused in a compromising position. Although PW 1 did not say this directly, it is clear that he lost control at the ghastly sight and assaulted the accused person, who he stated had his jeans and overalls on his knees with [A] on his lap. [A] was examined by PW 2 and signs were observed consistent with recent sexual activity. Moreover, save for the accused's bare denial when prompted by the Court in chief, there is nothing to gainsay the evidence of both PW 1 and PW 2.

It is also well to point out that in the circumstances of this case, there was no motive for the Crown witnesses, particularly PW 2 to fabricate the evidence against the accused. The story about PW 1 owing the accused was convincingly denied by PW1. Even if PW 1 owed the accused the money as alleged, that would not have been reason enough for him to concoct this story. How could PW 1 have manufactured the signs indicating that [A] had been raped? Furthermore, PW 1 and PW 2 testified that the accused apologised and there is no reason suggested why he did so if he had not committed the offence in question. The story that PW 1 merely pounced upon him like a bolt of lightning for no apparent reason is fanciful to the extreme and must be rejected as false.

The evidence of the Doctor confirms the observations by PW 2 that [A] had been sexually molested. The accused was caught red-handed as it were, he apologised and promised to make reparation for his misdeeds. I am alive to the principle that the accused bears no onus to prove his innocence but the evidence here is direct and points to the accused. He failed to challenge it and proved to be very poor as a witness. His evidence seemed to conveniently veer away from the crucial allegations, choosing instead to dwell on peripheral matters like the arrest.

In **S v VAN DER MEYDEN 1991 (I) SA 447 at 449** Nugent J. summed up the position regarding establishing the accused's guilt at the end of the case in following language;

"The onus of proof in a criminal case is discharged by the State if the evidence

*established the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see for example, **R v DIFFORD 1937 AD at 373 and 383**). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility and an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In which ever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, and so too does not look at exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.”*

I whole heartedly embrace these remarks and find that the Crown proved the case beyond a reasonable doubt and that there is no reasonable possibility that the accused’s story may be true. He gave an improbable story which is undoubtedly false and more importantly, did not challenge the gravamen of the evidence against him.

The only question I am to now determine is whether the accused is guilty of rape or indecent assault. From the evidence of PW 5, whom I regard as an expert, it is clear that some degree of penetration did occur and which, according to him explained the missing hymen from [A]. According to PW 5, no other cause is known that could have removed [A]’s hymen, save the accused’s onslaught on the unsuspecting child.

According to **Hunt Vol.II, “South African Law and Criminal Procedure”, 2nd edition, Juta, 1986, at page 441 – 442;**

“There must be penetration, but it suffices if the male organ is in the slightest degree within the female’s body. It is not necessary in the case of a virgin that the hymen should be ruptured, and in any case, it is unnecessary that semen should be emitted.”

In casu, the hymen was ruptured, indicating, as PW 5 put it, that there was some degree of penetration. This was clearly a painful and traumatic experience for this child and this is evidenced by the manner in which she cried, thus attracting PW 1’s attention. In a recent judgement in **MICHAEL MALAZA VS REX APPEAL CASE NO.16/2002**, the Court of Appeal upheld the return of a verdict of guilty on charge of rape, where the complainant was five (5) years old and the accused forty (40). There are similarities in the two cases, particularly regarding the question of penetration.

I accordingly find the accused guilty of rape as charged. I do also find that the aggravating factors listed in the charge sheet have been proved from the evidence led.

T.S. MASUKU
JUDGE