THE HIGH COURT OF SWAZILAND

REX

Vs

MSUNDUZA KHUMALO

TIMOTHY KHUMALO

Criminal Case No. 26/2002

Coram	S.B. MAPHALALA – J
For the Crown	MS M. LANGWENYA
For Accused No. 1	IN PERSON
For Accused No. 2	MR. Z. JELE

RULING IN TERMS OF SECTION 174 (4) OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT (AS AMENDED)

(29/08/2002)

The two accused persons stand charged as follows:

"Count 1

Accused no. 1 is guilty of the crime of rape. In that upon or about the period, January 2000 at or near [E] area, [H] region the said accused person did intentionally have unlawful sexual intercourse with [A], a female minor child aged about 7 years old, who in law is incapable of consenting to sexual intercourse.

Count 2

Accused no. 2 is guilty of the crime of rape. In that upon or about the period of January 2000, at or near [E] area, [H] region the said accused person did intentionally have unlawful sexual intercourse with [A], a female minor child aged about 7 years old, who in law is incapable of consenting to sexual intercourse".

The Crown contends that the rape in both counts is attended by aggravating factors in that:

1. The complainant is a minor;
2. The complainant was an orphan and accused no. 1 was responsible for her welfare;
3. Both accused persons are elderly men who stood n *loco parentis* relationship with the complainant;
4. When accused no. 1 had sexual intercourse with complainant, complainant was a virgin; and
5. Both accused persons did not use a condom or take any precautionary measures when having unlawful sexual intercourse thus exposing the complainant to venereal diseases and HIV/Aids.

Both accused persons pleaded not guilty to the charges. Accused no. 1 is conducting his own defence and accused no. 2 is represented by Mr. Jele. The Crown is represented by Miss Langwenya.

The Crown called five witnesses to prove its case. After the Crown closed its case, Mr. Jele, who appeared for accused no. 2 moved an application in terms of the provisions of Section 174 (4) of the Criminal Procedure and Evidence Act, 1938, as amended, for accused no. 2 to be acquitted and discharged. This application was vigorously opposed by the Crown.

Section 174 (4) of the Criminal Procedure and Evidence Act, 1938, as amended, reads as follows:

> "If at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him"

Dunn J (as he then was) in the case of ***King vs Duncan Magagula and 10 others, Criminal Case No. 431/96 (unreported)*** correctly observed that the Section captioned

above is of similar effect with the South African Criminal Procedure Act 51 of 1977. The learned Judge laid out, the test to be applied in such applications as being whether there is evidence on which a reasonable man, acting carefully might or may convict. (see ***Commentary on the Criminal Procedure Act, Du Toit et al*** at page ***174*** and the cases cited therein).

The test is should a reasonable man convict (see ***Gascoyne vs Paul and Hunter 1917 T.P.D. 170; Supreme Service Station (1968) (Pty) Ltd vs Fox and Goodridge (Pty) Ltd 1971 (4) S.A***. and ***S vs Moringer and others 1993 (2) S.A. 268).***

From the test laid out above, it is clear that the decision to refuse a discharge is a matter solely within the discretion of the trial court. This is borne out by the legislature's choice of language, namely, the use of the word *"may"*. The exercise of this discretion may not be challenged on appeal. For this I cite the Court of Appeal case of ***George Lukhele and five others vs Rex – Appeal Case No. 12/95***; at page ***8*** where their Lordships said the following, and I quote:

> "It is now well established that no appeal lies against the refusal of the trial court to discharge an accused at the conclusion of the prosecution case"

However, the discretion must be properly exercised, depending on the particular facts of the matter before court.

Having ascertained the test to be applied, as herein above set out, the question that arises is whether the five (5) witnesses evidence presented to the court in *casu* prove a *prima facie* within purview of the Section.

Mr. Jele attacked the Crowns evidence on a number of fronts, finally contending that the evidence so far presented fall short of the requirements of Section 174 (4) of the Act. Mr. Jele's first salvo is that the police officer who gave evidence as PW5 Bhembe was shoddy in his investigations of this matter. He pointed out that the officer had no knowledge as to when the alleged offence was committed and could not assist the court as to the month or date on which the rape occurred. Mr Jele further attacked the evidence of this officer in that he did not take the complainant to

the place where the rape is alleged to have taken place. This being the toilet in respect of accused no. 2.

Secondly, Mr. Jele contended that the court should be wary in accepting the evidence of the complainant in that she failed to report the rape to the people who were close to her but reported to a total stranger (PW2 [PW2]) six months after the occurrence of the rape. The complainant failed to tell her aunt who was in *locus parentis*. She failed to tell the [E]'s family who were also close to her.

Thirdly, Mr. Jele contended that there are material contradictions in the evidence of the crown witnesses rendering their evidence remarkable. He went on to show these to the court.

Fourthly, Mr. Jele argued that the officer failed in his investigations to reconcile the sequence of events as presented by these diverse versions of the crown witnesses.

Fifthly, Mr. Jele described the evidence of PW2 [PW2] as remarkable in that he told the court that when the complainant came to him to pour out her heart and to tell him what has befallen her, she was being pursued by her aunt yet [D] who also gave evidence denied this aspect of [PW2]'s evidence. Also the complainant herself denied that her aunt was at the gate at the material time.

Lastly, Mr. Jele urged the court to look closely at the evidence of the doctor who examined the complainant seven months after the alleged rape who told the court that the child was in pain when he examined her.

Miss Langwenya argued *au contraire*. Her first point in opposition was that Mr. Jele was applying an inappropriate test, that of *"sufficiency"* as opposed to the test enunciated in ***Duncan Magagula (supra)***. The Crown's view is that the Crown has advanced a *prima facie* case at this stage to put the accused persons to their defence.

She urged the court to look at the Crown's evidence in totality and should not confine itself to the evidence of PW5 (the police officer). The court should not at this stage be concerned by fundamentals, as it was argued by Mr. Jele on behalf of accused no.

2. There is consistency in the evidence of the crown witnesses as to the event, this being the rape on the complainant. That accused no. 2 is implicated by the evidence of the crown witnesses especially the evidence of the complainant which is to a large extent corroborated by that of [PW2] and [D].

These are the issues to be determined by the court at this stage. In my view, having ascertained the test to be applied as I have outlined above, the question that arises is whether or not the credibility of crown witnesses should be taken into account in deciding, whether or not to grant a discharge, at this stage of the proceedings in view of the fact that Mr. Jele in the main attacked the credibility of the Crown witnesses in this case.

In ***S v Mpetha and others 1983 (4) S.A. 262*** at ***265 D – G,*** Williamson J stated the position of the law as follows, and I quote:

> "Under the present Criminal Procedure Act, the sole concern is likewise the assessment of the evidence. In my view, the cases of ***Bouwer and Naidoo*** correctly hold that credibility is a factor that can be considered at this stage. However, it must be remembered that it is only a very limited role that can be played by credibility at this stage. If a witness gives evidence which is relevant to the charges being considered by the Court, then that evidence can only be ignored if it is of such poor quality that no reasonable person could possibly accept it. This would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed. Before credibility can play a role at all, it is a very high degree of untrustworthiness that has to be shown. It must not be overlooked that the triers of fact are entitled while rejecting one position of the sworn testimony of a witness, to accept another portion. (See ***R v Khumalo 1916 AD 480 at 484***. Any lesser test than the very high one which, in my judgement, is demanded would run counter to both the principle and the requirements of S. 174".

In the Kingdom of Lesotho, this very question was considered by Cotran CJ in the case of ***Rex vs Teboho Tamati Romakatsane 1978 (1) CCR 70 at 73 – 4***. The learned Chief Justice enunciated the law as follows, and I quote:

> "In Lesotho, however, our system is such that the judge (though he sits with assessors is not bound to accept their opinion) is the final arbiter on law and fact so that he is justified, if he feels that the credibility of the crown witness has been irretrievably shattered, to say to

> himself that he is bound to acquit no matter what the accused might say in his defence short of admitting the offence".

In the case of ***Rex vs Duncan Magagula and 10 others*** *op cit* Dunn J (as he then was) was of the view that this court should follow a similar approach as in Lesotho, a proper regard being had to the similar position in which trial judges are placed in both Kingdoms. Similarly, I concur with that view.

I shall now proceed to analyse the evidence adduced on behalf of the crown in order to ascertain whether there is evidence that the accused persons committed the offences preferred against them or any other offence of which they might be convicted. I propose to also include accused no. 1 who is un-represented.

My *prima facie* view is that the Crown has fulfilled the requirements of Section 174 (4) of the Act. When the evidence is taken in its totality a case has been made at this stage to put both accused persons to their defence. The attack by defence counsel that PW5's evidence is lacking in so far as he failed to take the complainant to the toilet where the rape is alleged to have occurred is fragmented by the fact that the rape had occurred six months prior and he would obviously not have found anything suggesting that a rape had occurred there.

I find that there is consistency in the evidence of the complainant when taken together with that of [PW2] (PW3) and [D]. The evidence of the complainant was in the main consistent when she gave her evidence-in-chief and even when she was subjected to intense cross-examination by defence counsel. She further explained why she did not report the matter to her guardian in that she was afraid. I agree with Miss Langwenya's submission that [PW2] was not a total stranger as he frequented the [E] homestead and can hardly be described as a total stranger. I find that at this stage the evidence as advanced by all the Crown witnesses is relevant to the charges being considered in *casu*, and I cannot say that their evidence is of such poor quality that no reasonable person could possibly accept it. Further, accept the position adopted in ***S v Mpetha and others (supra)*** at ***262*** *in fin* ***265 D – G*** the triers of fact are entitled while rejecting one position of sworn testimony of a witness, to accept another portion (see ***R vs Khumalo (supra)*** at ***284***.)

All in all, I agree with the submissions by Miss Langwenya for the Crown that the Crown has made a *prima facie* case to put both accused persons to their defence following test propounded in the case of ***Duncan Magagula and 10 others*** *op cit*

In the result, I rule that both accused persons have a case to answer and they are thus put to their defence.

S.B. MAPHALALA

JUDGE