IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL CASE NO. 61/04

In the matter between :

REX

VERSUS

ZACHARIAH MKHONTA

CORAM SHABANGU AJ

FOR THE CROWN MR. P. DLAMINI

FOR THE DEFENCE MR. Z. MAGAGULA

JUDGEMENT 16th July, 2004

The accused, one Zacharia Mkhonta, is indicted before this court on two counts. On the first count he is charged with rape and on the second count he is charged with incest. On the rape charge it is alleged that he is guilty of rape;

"In that between November, 2002 and September, 2003, the exact dates not known to the Director of Public Prosecutions, and at or near Matsapha Police Camp in the Manzini Region, the said accused did unlawfully and intentionally have sexual intercourse with one Chazile Mkhonta a female minor aged 7 years who in law is incapable of consenting to sexual intercourse and the accused did thereby commit the crime of rape. "

On count two which relates to incest it is alleged

"The accused is guilty of the crime of incest- in that between November 2002 and September, 2003, the exact dates not known to the Director of Public Prosecutions; and at or near Matsapha Police Camp, in the Manzini Region, the said accused an adult male, did unlawfully and intentionally have sexual intercourse with Chazile Mkhonta, the accused being by blood relation the father of Chazile Mfkhonta whom he is consequently prohibited to marry. "

On the rape count the notice is given that "The Crown shall contend that the crime was attended by aggravating circumstances in that :-

(i) the accused is the biological father of the complainant.
(ii) the accused conducts (sic) were repeated over a long period of time.
(iii) the accused abused a relationship of trust and stood in loco parents' over the child,
(iv) the accused did not use a sexual protective device when he engaged in unlawfully (sic) sexual intercourse with the minor (e.g. he did not use a condom) thereby putting the complainant at risk of contracting venereal diseases including HIV/AIDS, (v) the complainant was a minor of tender age six years old and a virgin at the time of rape, (vi) The accused is a police officer, who is entrusted to safeguard citizens of this country against all forms of abuse, including sexual abuse."

In support of the counts the crown has called the minor child upon whom the rape and incest was allegedly committed. Her evidence in chief was that she began to reside at Matsapha Police Camp with her father in December, 2002. She testified that during the time she resided with his father

between December, 2002 and 17th September, 2003 her father would instruct her to lie facing up, to take off her panty and then insert his penis in her vagina. She said that after inserting his penis the father would make movements and that he would beat her if she cried. She further testified that she told her mother about this when she visited her. During cross-examination by Mr. Magagula it was put to her that the story she had told the court about her father having slept with her in the manner

she described was suggested to her by her mother and she agreed. She anther agreed that she did not tell this to her step mother or anyone of the other people who resided with her in the same house because her father never had sex with her or never slept with her xx alleged by her in her evidence in chief. It is trite that the evidence of certain witnesses notably accomplices, complainants in sexual cases and young children. can not safely be relied upon in the absence of corroboration or some other factor which is an indication xx trustworthiness. A court is therefore required to show caution in assessing the evidence of young children and complainants in sexual cases.

Even though Section 236 of the Criminal Procedure and Evidence Act provides that court may convict an accused of any crime or offence alleged against him in xx indictment, on the single evidence of a competent and credible witness it has been held xx a number of cases that before doing so, a court should bear in mini the cautions-remarks of DE VILLIERS JP in R V. MOKOENA 1932 OPD 79 at SI, namely xxx this provision of the Criminal Procedure and Evidence Act should only be relied upxx where the evidence of the single witness is clear and satisfactory in every mater:_ respect. See also S V. FFRENCH - BEYTAGH 1972 (3) SA 430(A) at 115-6. In R MOKOENA 1932 OPD 79 at 80 DE VILLIERS J.P. observed chat

"The uncorroborated evidence of a single competent and credible witness is xxxx doubt declared to be sufficient for a conviction by S.256 of the Criminal Procedure Act, but in my opinion that section should only be relied on where. the evidence of the single witness is clear and satisfactory in every matexxx respect. Thus the section ought not to be invoked where for instance, in witness has an interest or bias adverse to the accused, where he has made previous inconsistent statement, where he contradicts himself in the witnexxxx box, where he has been found guilty of dishonesty, where he has not had. proper opportunity for observation, etc. "

HOFFMAN & ZEFFERT, SOUTH AFRICAN LAW OF EVIDENCE. 3rd Editior

at 454 make the observation with regard to the evidence of accomplice a witnesses, whxxx observation is equally applicable to evidence of young children and complainants-sexual cases that;

"Before relying upon the evidence of an accomplice the court should find some circumstance which can properly be regarded as reducing the danger that it might convict the wrong person. Corroboration is the best known and perhaps the most satisfactory of such safeguards. But the list is an open one, each case depending upon its own peculiar circumstances. "

If the court seeks to find such safeguard in corroboration it must be corroboration implicating the accused, (see HOFFMAN & ZEFFERT 3RD edition supra page 454. see also S V. MAHLABATHI 1968 (2) SA 48 (A) at 51). In the present case as already observed the evidence of the complainant who is a young child cannot be said to be satisfactory in all material respects in the manner described above. She contradicted herself in the witness box in a manner which indicated that she could easily accept any suggestion being put to her on who might have had sexual intercourse with her. if anyone. To illustrate this during her evidence in chief she said it was her biological father who had had sexual intercourse with her at the time she resided with him in Matsapha. During cross-examination she agreed with the defence counsel that her father never had sexual intercourse with her and that it was her mother who had suggested to her that her father slept with her. Later, on re-examination by Crown Counsel she again changed her story and agreed with Mr. P. Dlamini who appeared for the crown that her father did have sexual intercourse with her. In the circumstances I cannot say that her evidence, which is the only evidence which would have implicated the accused in the offences with which he is

charged, is satisfactory in every material respect. Her evidence in light of the above is not trustworthy and cannot be relied upon to support a conviction. Furthermore the accused has denied having had sexual intercourse with his daughter and the essential question being whether on all the evidence there is a reasonable possibility of the defence story being substantially true, it seems to me that indeed there is a reasonable possibility of the defence story being substantially true. R V. M. 1946 AD 1023 at 1026-7; R V. DIFFORD 1937 AD 370. In this regard one would have regard to the fact that when the child was discovered to have the wound which she explained to her mother as having been caused by her father in October, 2003 the child had not stayed with the father for at least a month. It was also part of the crown case on the evidence that the alleged sexual contact between the accused and the child cook place whilst the accused's wife who passed away in August, 2003 was still alive. This would mean that

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the alleged sexual contact between the accused and the child which would therefore be responsible for the condition of the child's genital organs occurred earlier than August. 2003 some two months prior to the date when the mother allegedly was told by the child how the wound had come about, on 14th October, 2003 or towads the end of October. 2003, For about two weeks after 17th September, 2003 the child had been admitted to hospital after having been involved in a motor vehicle accident. During the period she was in hospital she was being bathed or washed by an older sister to her mother who apparently ought to have noticed the condition of the child's genital organs which condition gave rise to the present charges. In other words, in the ordinary nature of things the inflamation and tenderness on the labia minora, the ulcerative lesion on the lower end of the vagina would have been seen by the mother's sister during the time the child was in hospital if there had been interference by the father prior to the accident. This condition which was not noticed at the hospital when the child was admitted in connection with the accident is likely to have been brought about when the was already at her mother's parental homestead at Mayiwane. If the condition came about from anytime between October and November, 2003 then the accused who did not live with the child at the time cannot be responsible. The mother only reported to the Police and had the child examined on 17th November, 2003 after at least three months from the time when the accused could possibly have committed the crime. Between October and November, 2003 the child was left with another man of twenty four years said to be her uncle. The child said that the father raped her twice during the time she stayed with him in Matsapha and that she would rape her in the dining room of a three bedroomed house occupied by two families with at least five other adults. Having regard to these factors there is a reasonable possibility that the defence story, namely that the condition of the child's genitals cannot be linked to the accused who only stayed with the child in Matsapha at least two months prior to the discovery whereas the child at the time of the discovery of the condition of her genital area was staying at Mayiwane in Hhohho at the parental homestead of her mother.

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In the circumstances I am not satisfied that the crown has proven beyond a reasonable doubt that the accused raped her six year old daughter or committed incest with her. I find the accused not guilty and acquit him.

ALEX S. SHABANGU

ACTING JUDGE

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