THE HIGH COURT OF SWAZILAND

Criminal Case No.330/02

In the matter between:

REX

VS

JUSTICE MAGAGULA

CORAM **: MASUKU J.**

For the Crown **: Ms. N. Lukhele**
For the Accused **: In Person**

JUDGEMENT 25th
August, 2004

On the \T July, 2001, a five year old girl Njabulo Yende was sexually abused at or near Mankayane area. An adult male was seen leading her to a nearby forest by another young girl.

The Crown alleges that the accused is the assailant. He stands before me charged with the charge of rape. In the alternative he is charged with the contravention of the provisions of Section 3 (1) of the Girls and Women's Protection Act No.39 of 1920.

The Crown, in line with the provisions of Section 185 *(bis)* of Criminal Procedure and Evidence Act, 67 of 1938, further alleged that the crime was attended by the following aggravated circumstances:

(1) the victim was a minor aged five (5) years and incapable of consent;

(2) the victim was deceived or enticed into agreeing to walk *(sic)* of the accused;

(3) the victim was traumatised by the act;

(4) the victim had no knowledge or experience of sexual intercourse as she was a virgin,

(5) the accused exposed the victim to the risk of HIV/AIDS infection as he did not use a condom.

After explaining his right to legal representation, the accused indicated that he would conduct his own defence and proceeded to plead not guilty to both the main and the alternative charge.

The parameters of the enquiry into which the Court shall be engaged may be briefly summarised by reference to the judgement of Rooney J. in **THE KING VS VADELMAR DENGO REVIEW CASE NO.843/88** (unreported), where the learned Judge, in dealing with the need for corroboration in such matters, stated the following at pages 4 to 5: -

> *"... The need to be aware of the special dangers of convicting an accused on the uncorroborated testimony of a complainant in such cases must never be overlooked.*
>
> *Corroboration may be defined as some independent evidence, implicating the accused, which tends to confirm the complainant's testimony...Corroboration in sexual cases must be directed to (a) the fact of sexual intercourse or indecent assault (b) the lack of consent on the part of the complainant and (c) the identity of the accused. Any failure by the trial court to observe these rules of evidence may lead to a failure ofjustice. "*

The summation by Rooney J. above points to the issues that must be satisfied by the Crown before a verdict of guilty may be returned against an accused person. The elements that must be clearly proved are the following: -

(6) the fact of sexual intercourse or indecent assault, as the case may be;

(a) the identity of the accused

These are the issues that I will examine in the matter, considering the evidence tendered in respect of each element. I will start with (a) above.

(a) The fact of sexual intercourse

In this case, the Crown called Dr Wajilovia Chilambo (PW 1), who testified that he examined the complainant on the 18th July, 2002 at Mankayane Hospital. His evidence, which was straightforward and largely incontestable, is that after inspecting the child, he found that no penetration had occurred and that ejaculation was outside the vagina because of the following: -

(i) the hymen was intact
(ii) the enteritis and perineum were intact; and
(iii) there was a discharge around the vaginal enteritis.

He opined that the child may have been sexually abused because: -

(i) she did not trust any man as exemplified during the examination
(ii) she was afraid of being examined by a male.

Regarding the question of penetration, PW 1 testified that if there had been penetration, the perineum and the hymen would not have been intact and moreover, there would have been visible wounds or cuts. PW 1 however could not rule out the slightest degree of penetration, suggesting that if the tip of the penis had entered, that would have been penetration although there would have been no injuries. It all depends, he concluded, on the force and degree of the penetration. He handed in a medical report, which was admitted by consent, indicating the findings adverted to above. It was marked Exhibit "A". He was not cross-examined by the accused, whose rights to cross-examine the Crown witnesses were fully explained.

Whatever penetration may be in the medical field, it however settled that for legal purposes, the slightest degree of penetration suffices. The learned author Hunt, "South African Criminal Law and Procedure", Volume II, 2nd Edition, Juta 1982, states the following at page 440: -

"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."

This view was endorsed by Dumbutshena C.J. in the Zimbabwean case of **S VS MHLANGA 1987ZLR PART I page 70 at 72,** where the following is recorded: -

"For purposes of establishing the offence of rape, it suffices for the penetration to be slight."

In view of the foregoing, one may conclude that penetration did occur. This is in line with the evidence of the complainant PW 2, who in spite of her young and tender age, in my view gave a credible, believable and truthful account, which was not polluted or adulterated by a fertile imagination or schooling. On this score, I can safely conclude that the fact of intercourse, notwithstanding that the hymen remained intact, was proved by the Crown beyond a reasonable doubt.

(b) Absence of Consent

As indicated, the complainant, PW 2 was only (5) at the time the incident occuned. Her mother, Reginah Deli Khumalo, (PW 5), testified that the complainant was bom on the 1st February, 1997. She is the mother and her evidence regarding the date of birth of PW 2 and her age at the time of the assault was not challenged.

In terms of the law, a child of PW 2's age is regarded as incapable of granting consent to sexual intercourse. A cursory glance at main charge will show that the Crown did expressly allege that PW 2 was incapable of granting consent as aforesaid. In this case, this is a given considering that the girl was clearly a small child, attending kindergarten at the time and who could not under no circumstances be reasonably regarded as having both the *intellectus* and *judicium* to consent. Her actual and physical age could, viewing it from even the time she adduced her evidence, lead to the only inevitable conclusion that she was clearly far below the age of consent.

I say this cognisant though that there was no argument that she-was capable of or indeed consented to sexual intercourse. In any event, the tenor of her evidence clearly shows that she did not consent, inspite of the presumption. According to her evidence, she was pulled into the forest by her assailant and the cried when he took off her underwear. I would therefor come to no other conclusion than that the Crown in this case also succeeded in showing that PW 2 could not, given the legal presumption, consent to the sexual intercourse and in fact did not, given the entire matrix of her evidence. I am satisfied that this element has also been proved ineluctably.

(c) **The identity of the accused person**

This is the element that presents a formidable challenge in this case. In exemplifying this, I will have regard to the relevant evidence tendered by the Crown in this regard.

It is fitting to point out at this stage that PW 2, testified that the event took place around 13h00 and in broad daylight. She told the Court, notwithstanding her tender age, where the incident occurred. Her evidence in chief was to the effect that even though she saw her assailant, she could not recognise or identify him. This, in my view, added immensely to her credit worthiness because if she had been schooled, pointing at the accused in his place of obvious isolation would have been the simplest of all tasks.

The evidence upon which the identity and the arrest of the accused is premised is that of PW 3 Delisile Nomvula Goodness Jele, a girl of thirteen (13). She attended school at Mount Hermon Primary School and was at school on the 17th July, 2001.

She testified that around the lunch hour i.e. 13h00 to 14h00, she was on her way to dispose of some papers in the rubbish pit and she saw the accused with PW 2. She knew PW 2 from Emangwaneni area where she had been staying previously. The accused was going through the school with PW 2 and they were heading for the forests nearby.

She asked PW 2 where she was going but instead of PW 2 responding, it was the accused that responded, saying that he was taking her to the salon where her (PW 2's) mother was working. The answer aroused suspicion with PW 3 because PW 2 and the man had already passed the salon. It was her evidence that she then took note of the clothes that the man had adorned.

It was her further evidence that her attempt to notify PW 2's sister of what she had seen was foiled by a teacher, who unaware of what she intended to do, stopped her dead in her tracks. After the end of the school day, she testified that she went to inform PW 2's mother and PW 2's sister of what she had observed. PW 3 told PW 5 in detail what she had seen and the latter requested PW 3 to advise her if she again happened to see the man she had seen with PW 2.

Indeed on the following day, she saw the accused at the shop. He was carrying a 2kg packet of biscuits. It was her evidence that she looked at him carefully and confirmed that it was him that she had seen the previous day and she rushed to the salon to inform PW 5 and asked her to call the Police. The accused stopped on the steps to Umfolozi store which is where the Police found and arrested him, clearly based on the information furnished by PW 3.

It was her evidence that he was no longer wearing the clothes he wore on the previous day and that she did not know the accused, having seen him for the first time on the 17th when he was walking with PW 2. It was her further evidence that she got to know his name from the subpoena served on her when called to testify. PW 2 also testified that she noticed him by his height, the beard around his cheeks and his manner of walking. Having given this brief description, PW 2 looked around the Court at the invitation of the Crown and pointed at the accused in the dock as being the same man she saw both on the 17th and 18th July, 2001.

In cross-examination, the accused put to PW 3 that he was not at the school on that day because he normally works at that time. PW 3 insisted that she had seen him and that he had admitted to the Police that he had the clothes she described him as wearing the previous day i.e. the 17th July. The accused put to PW 3 that if the Police indeed believed that he had committed the offence they would have gone to seize the clothes he was allegedly wearing on the day of the rape. Evidently these clothes were not seized.

The accused put to PW 3 that she was mistaken that she saw him on the 17th but had only seen somebody who looked like him. This PW 3 denied, reasoning that she could separate the accused even from his twin brother and had noticed his beard, complexion and the manner in which he walked. PW 3 failed to explain clearly why she did not report to the teachers that she had seen PW 2 with a strange man. Her answer was that she did not think of doing that being a child and instead decided to tell PW 2's sister.

When asked what clothes the man she saw was wearing, PW 3 testified that he was wearing a black trouser, black shoes, a black shirt with white stripes and a brown jacket and was not carrying anything. In response, the accused put to PW 3 that he did not have a shirt answering to her description but PW 3 insisted he had it and had admitted to the Police that he did.

PW 6, 2807 Constable L. Mdluli, testified that acting on information he had obtained, that the accused was suspect in a rape case, he proceeded to arrest him at Mfolozi Grocery and that PW 3 is the one who pointed the accused to him as the suspect.

I find it unnecessary, in view of the question I have to answer i.e. of the accused's identity, to consider the evidence of the other witnesses, who include PW 5 Reginah Deli Khumalo and PW 4 Elizabeth Fikile Malinga. Their evidence does not have a material bearing on this question.

I now turn to the evidence of the accused person. His evidence was terse. He testified that he does not belong to that area and knows nothing about the charges preferred against him. It was his evidence that he resides at Velezizweni area, a fact which proved according to him, that he did not commit the offence in question. He testified further that the person who can bear him out is Elegant Khumalo, who would testify that he works at her homestead at Velezizweni and not at Mankayane and that he is a sickly person who suffers from eleptic seizures. That was the extent of his evidence in chief.

In cross-examination, the following issues emerged:- That he was employed at the home of the said Eligant Khumalo as a night watchman guarding a shop. It was his evidence that he worked the night shift from 19h00 to 05h00. When asked to explain why PW 3 testified that she saw him at Mankayane during the day, the accused testified that on the day she saw him, he was on his way to his parental home at Hlatikulu. He later stated that he was arrested when he was going home.

He explained that on the day of his arrest, he had knocked off that morning and requested to go home as he was required to take some people there. It was his evidence that when he was arrested, these people had gone as the bus had left. They returned to their respective homes,

aceording to his evidence. The people he was to take home were Nozipho and her aunt. He testified further that when seen on the 17th he was going with his girlfriend to his home.

In answer to the further elaborate cross-examination by Ms Lukhele, the accused stated that the day before his arrest, he was at the home of his employer sitting until mid-day. Around lunchtime, he testified that he was at the shop and then went to the Khumalo homestead. When put to him that he was unclear about the events of the 17th because he was untruthful and fabricating a story to exculpate himself, the accused insisted that he was telling the tmth but that his main undoing was that he was not eloquent. He stated that he is the one who was unable to state the matter clearly when put to him that the evidence of going to Hlatikulu was a lie.

Later he did acknowledge that there was a contradiction in his evidence and that on that account he did understand that the Court could disbelieve him. He attributed the contradiction to his inability to speak well. In concluding the answers to the cross-examination, the accused stated that PW 3 had concocted the story against him because she hated him. He testified that people do hate you for no apparent reason and that is what PW 3 had done. He went on to state that PW 3's was a case of mistaken identity as it is possible that she saw a man who looked liked him.

The accused then called DW 1 Eligent Zanele Khumalo (Nee Dlamini) as his sole witness. Hers was to confirm his alibi regarding his whereabouts on the 17th. The accused asked if she remembered him being sent to Macondza and then returning to report to her that some people had accused him of raping a child.

In response, DW 1 stated that that the accused's account was not correct. Her evidence was that sometime in January 2001, she sent the accused to Mankayane to pay her children's school fees at the bank. The accused came back very late. She noticed some blood spots on his shirt and on enquiry about the delay in his return, together with the bloodstains, the accused told her that he had been assaulted by some boys accusing him for standing with a certain child. She emphatically pointed out that he did not say that it had been alleged that he had raped the child.

Eligent further confirmed the accused's story that on the 18th, he asked for permission to go to his parental home. According to her, the accused's girlfriend, who had fallen pregnant, wanted

to -go with her relatives to the accused's home and she granted- the accused permission. Inexplicably, the accused left with his in-laws in the morning but they returned later reporting that they had lost contact with him and that was the day when he was arrested.

Eligent further confirmed the accused's evidence that on the 17th he did not go to Mankayane but was at her home. It was her evidence that around 13h00, (when the rape would have occurred), the accused was at her home with his girlfriend and he went to get his food from her house on that day. The long and short of her evidence was that although she could not account for his every movement on that day, as she was not in the same house with him throughout the day, she could however vouch that he never left the homestead and that the journey to Mankayane is very long and that if he had gone there on the 17th, he would have returned very late. She also told the Court that he had to wash his clothes in readiness for the journey and was therefor at home.

She also told the Court that the accused is a person who normally took prescribed tablets and that she took it as her responsibility to ensure that he did. She testified that if he did not for any reason take them, he would **be** in a foul mood and would do unusual things like taking things out of the room, cleaning and taking them back, something that would raise suspicion about his state of mind.

Assessment of the evidence

The Crown's evidence was clear and straightforward and credible. I cannot say that there was any witness who wilfully set out to mislead the Court. I was particularly impressed by PW 2 and the other witnesses. PW 3 however failed to explain as to why she did not tell her teachers that the person she said was the accused was walking away with PW 2. This can be attributed to her age though.

The accused on the other hand, admittedly gave evidence that was littered with inconsistencies. The record is replete with these. I must say that as he put it, he had difficulty expressing himself well, and a factor he attributed to the inconsistencies in his evidence. He did not appear to me to have all the facts on his hands and to present them to the Court in an orderly fashion, chronicling them according to their occurrence in the process.

It may be argued, and quite understandably by the Crown that the accused gave evidence riddled with inconsistencies and the he prevaricated and even lied in certain respects. His medical and mental condition is in my view responsible in part for this.

Should I be wrong in that regard, it would not be out of place to quote from the remarks of Leon LA. in **JAMLUDI MKHWANAZI VS** REX **CRIM. APPEAL NO.4/97,** where the following appears:-

> *"Lies by an accused person are but makeweights and should not be allowed to loom too large and replace essential evidence. At the end of the day, the question in a criminal case is not whether the evidence as a whole is consistent with the guilt of an accused person but whether it is inconsistent with his possible innocence."*

I have formed the opinion that notwithstanding the inconsistencies or even lies in his evidence, if lies they are the accused's evidence, coupled with DW l's evidence and the unsatisfactory aspects at PW 3's evidence to which I will refer below, that on the whole, the evidence *in casu* is consistent with the accused's possible innocence.

The accused has in this case raised defence of an alibi. His evidence is that he was at home on the 17th and could not have been at Mankayane and could not therefor have raped the complainant. In this regard, the accused's story is conoborated by Eligent, who struck me as an impressive witness. The Crown assisted in locating her and she clearly had no time or opportunity to discuss the evidence she would be called upon to give. In point of fact, the accused did not know what to say to her in examining her in chief and she clearly was unaware of what evidence the accused had led in Court which touched and concerned her. The Court had to intervene and assist the accused and DW 1 in eliciting the relevant evidence.

It is worth pointing out that she in fact corrected the accused in regard to the sequence of events e.g. the allegation of rape raised by him and the assault. She clarified regarding the length of time between the two events. Her evidence, confirming that the accused was not in Mankayane must for that reason stand.

Regarding the defence of an alibi, it is worth remembering the trenchant remarks of Holmes **A.J.A.** in **R VS HLONGWANE 1959 (3) SA AD 337** at **340 - 341,** where the following is recorded:-

> *"The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true, he must be acquitted. "*

In **R VS BIYA 1952 (4) SA 514 AD** at **521,** Greenberg **J.A.** stated the following: -

> *"....if on all the evidence there is a reasonable possibility that this alibi evidence is true, it means that there is the same possibility that he has not committed the crime."*

The matrix of the evidence before me, in view of the above formulation, suggests that the accused's alibi might be reasonably true, and in fact appears to be true.

It must also be pointed out that in the light of the evidence of the accused and that of Eligent, it is quite probable, indeed likely that PW 3's identification of the accused was clearly mistaken. I say so for the following reasons.

Firstly, PW 3 did not know the accused and saw him as she said, for the first time on the 17th according to her evidence. He clearly did not reside in that area. Whilst the *bona fides* of her belief that it was the accused that she saw cannot be denied, she appears to have been *bona fide* wrong. PW 3 struck me as an impulsive character, who could miss nothing and have an answer ready for every question. It would, in my view, be precipitous to solely rely on the evidence of such a character, who is in any event of such a tender and clearly impressionable age, particularly given Eligent's impressive evidence.

Secondly, PW 3 testified that the accused admitted that he was wearing the clothes that she had described to the Police. The Police Officers did not confirm this. More importantly, no effort was made by the Police, in ensuring that the correct suspect had been apprehended, to go to the accused's house to find out if he did own the clothes similar to those described by PW 3. In fact, no such clothes were brought to Court as exhibits. This is so because the accused in

particular denied owning a black shirt with white stripes. The other clothes described by PW 3 are clothes the colours of which many, if not the majority of men have and wear.

Thirdly, PW **3** told the Court that she identified the accused by the way he walks. She did not describe how he walks and there was indeed no evidence that he walks in the manner in which she would have described had she done so.

In S VS SINGH **1975 (1)** SA **227** (N), Leon J. stated the applicable principle as follows at the conclusion of **a** criminal trial :-

> *"// would be impossible to approach the case on the basis that because the Court is satisfied as to the reliability of Crown witnesses, it therefore must reject the accused's evidence. There is no room for balancing the two versions i.e. the state case against the accused's case and to act on preponderance ofprobability. "*

In S VS KUBEKA **1982 (1)** SA **534 (W) at 537** D-H, Slomowitz J. stated the following:-

> *" Whether I subjectively disbelieve the accused, is however not the test. I need not even reject the state case in order to acquit him. It is not enough that he contradicts other acceptable evidence. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such in the onus of the State. "*

I am of the view, in the light of the foregoing that the Crown has failed to prove beyond a reasonable doubt that the accused raped the complainant in this case. There is a reasonable possibility, regard had to the circumstances of this case that the accused's explanation is true and in this case, this is more than a reasonable possibility. See R VS DIFFORD **1937** AD **370** (A.D.) **at 373** (per Watermeyer A.J.A.). He is therefor acquitted and discharged of the crime wherewith he was charged.

He has in my view succeeded to comply with the standard set out by Malan J.A. in R VS MLAiMBO **1957 (4)** SA **725** AD **at 738** B in the following terms:-

> *"..An accused's claim to the benefit of the doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation*

created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, proved facts of the case."

In acquitting the accused the Court must not be understood to say that PW 2 was not molested. Far from it. The evidence that she was molested is overwhelming. The crux of the matter, on which the Crown failed is the identity of the perpetrator. It is important to remember that it is better to acquit one hundred guilty people than to convict one innocent man. The remarks of Leon J.A. in **THE KING VS ABRAHAM NGWENYA AND ANOTHER CRIM. APPEAL 33/96** that; "Caution must be exercised because rape cases are easy to lay and difficult to disprove", must in such cases not be allowed to fall to the ground!

The Court would like to express its appreciation to Dr Chilambo, who compiled a very comprehensive medical report, which even in his absence would have greatly assisted the Court. Doctors would do well to emulate his example and err on the side of offering more information and the bases of their conclusions than being miserly in that regard.

The only black *nota* against him is that his report was not typed as is the standard and acceptable procedure.

In conclusion, the accused in this case is but one example, of many, of the suspects who have been dealt a severe blow by the abrogation of the presumption of innocence by passing the now defunct Non-Bailable Offences Order of 1993. He has been in custody since the 18th July, 2001 and his acquittal three (3) years later leaves him understandably hurting and broken. His employment may well be lost forever, his family disintegrated, possibly forever. In the circumstances, he is even unlikely to be compensated after his acquittal. Is there real justice for such individuals in this country?

From my observation of the accused's deportment, his is a simple, illiterate and unsophisticated man. He has his roots in this country and does not appear to have ever left this country's borders. If there was a prime candidate for admission to bail, it was him. The decision to remove the discretion to grant bail from the Courts is not only a vote of no confidence in the Judiciary, and a negation of the hallowed principle of the presumption of innocence which is celebrated in all civilised countries of the world, but it is the unjust infliction of an injury on citizens of this country that no medical or mental health practitioner

can heal. It leaves these people devoid of justice, bereft and remediless. Efforts to redress these wrongs would restore justice to our people. It is for that reason that the efforts to restore the Courts' constitutional discretion is most welcome and will render such ugly spectacles the fossils of an old dispensation which will hopefully never haunt us again.

T.S. MASUKU