IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CRIMINAL

CASE NO. 77/03

In the matter between:

REX

VERSUS

SIFISO MDUDUZI NDLANDLA

CORAM SHABANGU AJ

FOR THE CROWN MS. MUMCY DLAMINI

FOR THE DEFENCE IN PERSON

29th July, 2004

The accused a man of about 19 years of age was indicted before this court on a charge of rape, it being alleged that he is guilty of rape,

"In that upon or about 9th October, 2002 at or near Mabovini area the said accused person, a male did intentionally have an unlawful sexual intercourse with Junior Stewart, at the time she was 5 years of age and who in law is incapable of consenting."

The accused pleaded not guilty to the charge. There is no medical report submitted for the purpose of establishing if indeed there was interference with the child's genital area in a sexual manner or otherwise. The evidence that is submitted by the crown in an attempt to link the accused with some crime, including rape, is the testimony of two of the crown witnesses, namely Lomaswazi Mabuza and the child herself. The child called by the crown showed considerable difficulty as a witness and testified that she knew the accused

and that the accused took out his penis and inserted same in her. When asked where the penis was inserted she stated that it was on the front part of her body which she initially labelled as "mgomini". It later turned out that by Mgomini she was not referring to a part of the body but a place which had a number of gum trees close to her home. When the same question was put to her again she answered that the penis was inserted in her anus. It took considerable effort by counsel for the crown to elicit most of the answers relating to the essential elements of the crime, from her. The word she used to describe the part of the body where the penis was allegedly inserted is the word which in English refers to the anus. She was later after sometime asked to tell the court whether the place she described as anus is the one used for urinating or the one used to pass fecal waste to which she responded by saying that it was the 'anus used for urinating.' The witness continued to state that she was wearing a panty before the accused inserted his penis in her. She further stated that the accused used a knife which he allegedly brought from his homestead, to tear the panty she was wearing. The child was also questioned by the Acting Director of Public Prosecutions if the accused did put anything on his penis before inserting it into her vagina to which he replied in the affirmative stating further that the accused had used a condom. She said the condom was white in colour, after a long time and after a lot of probing. She further testified that no one had ever inserted his penis in her vagina before. On whether the accused did anything after inserting his penis, the child after being quite for some time eventually responded and said the accused did nothing after inserting his penis in her vagina. She further stated that after the incident the accused gave her 50 cents and told her to go and buy chips which she did. She later pointed to her brown trouser and identified the trouser as the one she was wearing on the day in question and that the trouser was torn by the accused. The trouser was torn at

the back where both sides of the trouser are sewn together and are joined. On being questioned about the position she was in when the accused allegedly inserted his penis on her she said the accused had told her to sleep facing upwards. During cross-examination the accused who appeared in person denied ever inserting his penis on the vagina or anus of the child, putting to her that if he had inserted his penis in her vagina she would have been injured or bruised because of her age. The child responded to this by saying she did not get injured or get bruises of any kind. On being asked to explain how it was that she

did not suffer any bruises or injuries on her genital area considering that she was too young compared to the accused she gave no response inspite of several attempts to elicit an answer from her. The accused further asked the child to explain if there was any reason for the tearing of the trouser with a knife considering that her version was that when she was asked to lie down facing upwards she allegedly did so.

I am required because of the age of the child to exercise caution in accordance with the cautionary rules when assessing the evidence of the child. "The cautionary rales have been evolved because the collective wisdom and experience of judges has found that certain kinds of evidence cannot be safely relied upon unless accompanied by some satisfactory indication of trustworthiness. Corroboration may be sufficient indication of trustworthiness but there are may others. There is no closed category of pointers to truth; if the court is satisfied upon rational grounds that a witness is reliable, it is not obliged to reject his evidence because those grounds have not yet been mentioned in any decided case" see HOFFMAN & ZEFFERT, THE S.A. LAW OF EVIDENCE 3rd edition page 450. At page 455 HOFFMAN & ZEFFERT supra make the following observation, namely, that

"Experience has shown that it is very dangerous to rely upon the uncorroborated evidence of the complainant unless there is some other factor reducing the risk of a wrong conviction in cases which involve a sexual element - a view that is currently enraging feminists and which has, as a result, led to the rejection of the need for caution by some lawyers, who should know better than to pander to trendy and emotional protests, but which, nevertheless, seems to have been justified from as early as Joseph's troubles with Potiphar's wife. The bringing of the charge may have been motivated by spite, sexual frustration or other unpredictable emotional causes."

However as HOLMES J.A. in S V. ARTMAN 1968 930 SA 339A at 341B a case where the only witness implicating the accused was a girl of 16, remarked that

"While there is always a need for caution in such cases, the ultimate requirement is proof beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace common sense. "

The dicta of DE VILLIERS JP in R V. MOKOENA which has been quoted with approval in a number of latter cases dealing with the subject is significant because of the requirement that before any such evidence is relied upon to support a conviction it must be satisfactory in all material respects and the evidence ought not to be relied upon where

for instance the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had a proper opportunity for observation. See also S V. FFRENCH-BEYTAGH 1972 (3) SA 430 (A) at 445-6.

It cannot be said that the evidence of the young child is satisfactory in every material respect. From the testimony of the mother of the minor child it appears that there is a previous inconsistent statement made by the child to her mother and such statement is not consistent with her evidence in court. The child having said in court that when the accused inserted his penis in her vagina she was lying in a position facing up, whereas the mother says the child told her that the accused had made

her kneel, took out his penis and inserted it into her vagina from the back. That is a material contradiction. Furthermore the child says she was not injured or bruised in any manner, yet the mother towards the end of her evidence in chief stated that the child's genital area was "bruised and a little red." The evidence of the crown's second witness Lomaswazi Mabuza is to the effect that having woken up early on the day in question to cut grass and when she returned from this mission she saw a wheelbarrow with two bags of dry maize along the main road. Lomaswazi Mabuza states that on looking around she noticed the accused whom she says was making movements which she associated with sexual acts against the ground or sand. She says she advanced closer to where the accused was and because she could not see any other person with whom the accused was allegedly performing these sexual acts, enquired from the accused who she suspected of being mentally disturbed, as to what he was doing. This witness says the accused responded to this question by simple lifting up his head and looking towards the direction of the witness and saying "MMH...", after which he continued with what he was doing.

The further testimony of this witness is that after this response from the accused she also decided to ignore what was happening and proceeded to drop her grass at her homestead. However she says she came back and noticed that the accused had already taken hold of the wheelbarrow he was pushing and that she saw a child who according to her appeared

to come from the spot where she had seen the accused making those movements which she associated with sex. She also says strangely that she saw the child emerge from under the accused when she came back to the road after dropping the grass at her homestead. She says she did not see a condom even though she came close. It is also strange that she did not see the child from under the accused at the time she allegedly advanced close to where she alleges the accused was making sexual movements against the child. According to her evidence she came close enough to be within hearing distance with the accused, but strangely she did not see any other person who was participating in the sexual movements of the accused. I am not persuaded that if the child was the other person in the alleged sexual movements the accused was allegedly performing, this witness would not have seen her. She was emphatic on a number of times during her evidence that the accused was "having sex with the sand or ground." This is a very strange statement and observation. Further, in the absence of the doctors medical report it is reasonably possible. On the evidence it is not shown that there was even interference of any kind with the childs' genital organs or area. According to the evidence of the mother and the child, she was indeed examined by a doctor at the Mankayane Government Hospital and the results of this examination would have been independent and professional evidence establishing whether there was interference with the childs' genital organs in any manner. Furthermore, even though the mother says that on her own examination of the child she noticed what she described as dried semen on the buttocks and thighs of the child she does not say that there was any semen on the childs' genital area. The medical doctor's examination would have dealt with all these matters. During cross-examination of the mother and during submissions the accused raised a concern that the mother's allegation that what she saw was dried semen is discounted to a large extent by the fact that the accused allegedly used a condom. In the circumstances the decision taken by the Acting Director of Public Prosecutions not to press for the conviction of the accused on the rape charge is not necessarily incorrect. The Acting Director of Public Prosecution conceded during submissions that the crown evidence does not establish rape and abandoned the idea of pressing for a conviction on the charge of rape. Because of all the aforementioned factors I cannot find the accused guilty of rape. The Acting Director of Public Prosecutions, however, even though she

decided not to seek a conviction on the rape charge argued that the accused should at least be found guilty on a lesser competent verdict of indecent assault. She could not say what form did the indecent assault allegedly took. Section 185 (1) of the Criminal Procedure and Evidence Act, 67 of 1938 provides that "Any person charged with rape may be found guilty of indecent assault..." Where the evidence offered by the prosecution, while falling short of the crime charged, succeeds in establishing some of the component facts of the crime charged which amount in law to an offence less serious in degree, then, under the specific provisions of section 181 to 195 under Part XII C of the Criminal

Procedure and Evidence Act, 67/1938 a verdict of guilty of the offence of less degree may be returned. Whatever the law may be in relation to indecent assault the major difficulty in the way of the crown's case on this aspect of the matter is that the difficulties relating to the crown's evidence on whether there was indeed a rape are to a large extent also applicable to the question whether there is anything which connects the accused to any form of sexual contact or indecent contact to the child. In this context I am not satisfied that there is evidence sufficiently connecting the accused with any wrong doing of either a sexual nature or indecent nature. It certainly cannot be said there it is not a reasonable possible that such sexual acts or indecent acts did not occur.

In the circumstances the accused is found not guilty and is acquitted and discharged.

ALEX S. SHABAKGU

ACTING JUDGE