IN THE HIGH COURT OF SWAZILAND

APPEAL CASE NO.6/2004

In the matter between:

REX

VS

MFANZILE MKHWANAZI

CORAM

BROWDE JA

STEYN JA

TEBBUTT JA

FOR THE CROWN

FOR THE APPELLANT IN PERSON

JUDGEMENT

Steyn JA

The appellant was tried in the High Court on two counts of rape. He pleaded not guilty to both counts. At the conclusion of the evidence he was convicted on both counts. He was sentenced to a term of imprisonment of 12 years on each count, the sentences to run concurrently.

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The appellant who appeared before us in person challenged both the validity of his convictions and the propriety of the sentences imposed. In order to address these issues I summarize the evidence as follows;

In respect of count 1 it is alleged that during the months of August and September 1999 the appellant raped the complainant one Lovergirl Simelane a minor girl, 14 years of age. It was also the Crown's contention that the rape was attended by certain aggravating factors i.e.

(a) The appellant raped the complainant on several occasions during the period in question.
(b) The appellant in so doing breached a trust relationship in as much as he had accepted responsibility for looking after her (the complainant).
(c) She was a girl of tender years and virgin when he raped her.
(d) The appellant used no protection when having sexual intercourse with her.

On count 2 the Crown alleged that he had during the months of June and July 2000 raped one Hloniphile Simelane all year old minor who in law is incapable of consenting to sexual intercourse and therefore had committed the crime of rape. Similar aggravating features as in respect of count 1, were also alleged by the Crown.

It was common cause that the appellant was an uncle of both of the. complainants. His sister who is the mother of the two complainants had entrusted her two daughters to the care of their uncle while she visited her husband at his place of work in Big Bend from time to time.

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The complainant on count 2 was called to give evidence as PW1 and testified as to the appellant's

conduct both in respect of the allegations contained in count 2 as well as of his sexual exploits with "Lovergirl* the complainant on count 1. She described how sexual intercourse took place with both of them from time to time during 1999 and 2000 whilst their mother was away and that this occurred on many occasions.

The complainant on count 1, (Lovergirl) gave evidence as PW3 and her testimony corroborated that deposed, to by PW1. The sexual abuse occurred on several occasions with both of the complainants and always when their mother was absent.

Whilst PW1 had not undergone a medical examination, PW3 did. She was found to have been sexually assaulted over a considerable period of time. The examining doctor also diagnosed her as being HIV positive and that she had sustained a sexually transmitted disease (STD). He found her father who was prior to his death a co-accused with the appellant, to be similarly infected with a STD and that he tested positive for HIV. No active STDs were seen on the examination of the appellant and he was not found to test positive for HIV.

The probabilities point strongly to the fact that PW3's father had had sexually relations with his daughter. This is so because although she denied this in evidence, PW3 had disclosed the fact that her father had sex with her at Big Bend, to Dr. Nunn who had examined her. It was this false denial as well as the fact that he did not manifest any STD or HIV infection which was used by the appellant as the lynchpin of his appeal on count 1.

Whereas the false denial by the witness of her father's conduct must impact negatively on her credibility, the fact of the appellant's sexual

health is explicable by virtue of the fact that he had sex with Lovergirl before her father and not thereafter.

The accused also relied on the fact that no medical evidence was addressed to corroborate the testimony of PW1 and that PW3's evidence was also not corroborated by these two witnesses. However, these two witnesses corroborated one another in material respects. Two other witnesses also gave confirmatory evidence. These were the aunt of PW1 (PW2) who testified that PW1 came crying to her whilst being chased by the accused. On being questioned, PW1 told her that appellant "was used to raping her". The aunt (PW2) advised her to tell her parents and her mother.

The appellant was summonsed and was present when the witnesses repeated the charge of rape by the appellant to both the mother and the aunt. According to the witness the appellant did not deny the charge but "just looked down".

The investigating officer PW5 also gave evidence implicating the appellant in regard to the alleged rape of PW3. She says the appellant did not give them any problems in response to the charge but said that he was "tempted" and that he was a Christian.

In a carefully reasoned judgment Maphalala J analyzed the evidence and in doing so pointed to the fact that in cases involving an alleged rape where young girls are concerned the court should exercise awareness of the special dangers inherent in cases of this kind. He found that both girls impressed him as intelligent and confident and that although no medical evidence was tendered in respect of count 2, the direct and the circumstantial evidence taken cumulatively confirmed that PW1 had been raped by the appellant. The trial Judge then refers to a judgment of

this Court by Tebbutt JA (ROY NDABAZABANTU MABUZA APPEAL

CASE NO.35/2002 (unreported)} concerning the evidence of young children. At page 4 of the judgment of this Court said the following;

"It is clear, however, that the evidence of young children should be accepted with caution. The

imaginativeness and suggestibility of children are only two of a number of elements that require that this should be so. However, courts should not act upon any rigid rule that corroboration must always be present before a child's evidence is accepted (see R V MANDA 1951(3) SA 159 (A) at 163). The question which the court should ask itself is whether the evidence of the young witness is trustworthy. An admirable guide to this is provided by the judgment of Diemont JA in WOJI V SANTAM INSURANCE COMPANY LTD 1981(1) SA 1020 (A) at 1028 A-E:

"Trustworthiness, as is pointed out by Wigmore in his Code of Evidence para 568 at 128, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he had the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has "the capacity to understand the, questions put, and to frame and express intelligent answers" (Wigmore on Evidence Vol.II para 5506 at 596). There are other facts as well which the Court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest - is there a consciousness of the duty to speak the truth? Then also –

"the nature of the evidence given by the child may be of a simple kind and may relate to a subject-matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility" (per Schreiner JA in R V MANDA (supra))".

Having done so the court a quo concludes as follows:-

"I find that in casu the evidence of both PW1 and PW3 to have been truthful and these two girls were "intelligent enough to observe" what happened to them at the hands of the accused person".

The appellant pointed to some inconsistencies between the evidence of PW1 and PW3. We have had regard to these. All of them appear to be of a minor nature and are certainly not serious enough to warrant a rejection of their testimony or bring it into serious question.

The sentence of 12 years appears to us to fairly reflect the abhorrence with which the courts of this Kingdom view the crime of rape of young girls and is in no sense out of line with that imposed by other courts whose judgments came before us during this session. See in this regard the comments of this Court in the case of S V MASUKU APPEAL CASE NO. 16/04 delivered contemporaneously with this judgment.

For these reasons the appeal is dismissed and the convictions and sentences are confirmed.

J(H).STEYN

Judge of Appeal

I agree J. BROWDE

Judge of Appeal

I agree P.H. TEBBUTT

Judge of Appeal
DELIVERED IN OPEN COURT ON THIS 15TH DAY OF NOVEMBER 2004