THE HIGH COURT OF SWAZILAND

REX

Vs

ALBERT KHUMALO

Criminal Case No. 55/2003

Coram	S.B. MAPHALALA - J
For the Crown	MR. FAKUDZE
For the Defence	IN PERSON

JUDGMENT

(21/01/2005)

[1] The accused person is charged with the offence of rape that upon or about 30 August 2001 and at or near Mgidzangcunu compound in the district of Lubombo, the accused wrongfully and intentionally have unlawful sexual intercourse with Z S, a girl aged eight (8) years without her consent and did thereby commit the crime of rape.

[2] The Crown further contends that this rape was accompanied by aggravating circumstances as envisaged under Section 185 *(bis)* of the Criminal Procedure and Evidence (Amendment) Act No. 6 of 1986 in that:

a) **At the time of the commission of this crime, accused stood in *loco parentis* over the complainant;**

b) **At the time of commission of this crime, complainant was a female child aged eight (8) years;**

a) **Complainant was a minor and had no sexual experience;**

c) **Complainant was exposed to the risk of contracting the HIV/Aids virus as no precautionary measures to prevent such were taken by the accused i.e. use of condom.**

[3] On the alternative, the Crown alleges that accused is guilty of contravening Section 3 (1) of the Girls and Women's Protection Act No. 39 of 1920 in that upon or about 30th August 2001, and at or near Mgidzangcunu compound in the district of Lubombo, the accused did intentionally had unlawful carnal connection with Z S, a girl under the age of sixteen (16) years.

[4] The accused person pleaded not guilty to the charges preferred against him and was conducting his own defence.

[5] The Crown is represented by *Mr. Fakudze* who called four (4) witnesses to prove the Crown's case

[6] The essential features of the evidence are that Z S (PW1), the complainant in the matter was a child of eight years when the offence was committed. On the 30th August 2001, the complainant was at home playing a game with car tyres with other children including V N S (PW2) and P Z at about 8.30pm. The accused came along and grabbed the complainant by the hand and dragged her away uttering words to the effect that "come my wife". He took her into his hut. Inside the hut accuse stripped the complainant of her clothing and he also stripped himself naked. He forced the complainant on to the bed in the room and attempted to have sexual intercourse with her. She tried to resist but accused person slapped her with an open hand. She succumbed whereupon accused applied Vaseline on her private parts. Accused proceeded to rape the complainant, despite her pleas for him to stop as it was very painful. The complainant testified that the accused stuffed bones in her mouth apparently in his effort to muffle her screams. He also gave her E3-00 warning the her not to tell anyone about the ordeal, for if she did, he would deal with her. Whilst all this was taking place inside accused's hut PW2 V S who was one of the children mobilised a search party for the complainant. This party was eventually joined by a community police officer Lucky Motsa (PW3) who with a group of other people proceeded to accused's hut. On being confronted like this it is revealed in evidence that accused came out of the hut and ran to the toilet stark naked. The accused was later arrested there and handed to the police who were led by PW4 3187 Detective Constable Mfanasibili Dlamini. The accused person was taken into custody. The complainant was taken to hospital for treatment and examination the following day on the 31st August 2001. She was seen by Doctor Simon Haile Selassin at 11.30am of that day. The doctor compiled a report (Form "A"), as it is the procedure in such cases.

[7] Due to the unavailability of the doctor who has since left Swaziland after the expiry of his contract the Crown applied in terms of Section 222 of the Criminal Procedure and Evidence Act (as amended) to admit the medical report. The accused person did not object to the admission of the medical report. His only concern was that the report does not say that he raped the girl. Indeed, the report does not say that it is the accused who raped the complainant, it only records that the complainant was raped. The doctor states the following as his findings thereof:

> "An eight year old female child presented.....being raped by an adult man - examination revealed no bleeding or discharge.
> Hymen perforated - smear taken and showed spermatozoa with the history she gives and the vaginal smear result - it is my opinion that the girl is raped".

[8] In the circumstances the medical report was entered as exhibit "A" in terms of the proviso to Section 221 of the Act.

[9] He cross-examined the complainant (PW1) and V S (PW2) at some length, but in my view he failed to challenge their evidence as they stood their ground.

[10] The accused elected to make a sworn statement where he gave a rambling and confusing account which was largely not put to any of the Crown witnesses but came as an aftermath. The accused person was not impressive at all when confronted by questions from the Crown. He portrayed the features of a liar, being evasive and shifty.

[11] I have listened to the submissions made by the Crown as well as those made by the accused person and I have also weighed the evidence *in toto.* It is abundantly clear that the Crown *in casu* has proved its case beyond a reasonable doubt. The evidence of the Crown witness who gave evidence in this case was cogent and truthful and linked the accused with the commission of the offence beyond a reasonable doubt.

[12] The evidence of PW1 the complainant was truthful and I find that it is admissible and it passes the test as outlined by the author ***Swift*** in his book ***Law of Criminal Procedure (2nd Edition)*** at page ***442*** where he said; and I quote:

To be admissible the complaint must-

a) Have been made without undue delay and at the earliest opportunity which under all the circumstances could reasonably have been expected ***(R vs Gannon, 1906 TS 114).*** The mere fact that the complainant, a young girl, had made her complaint late did not require the court to draw an adverse inference against her, provided that the court had appreciated the risks in relying on the evidence of a young complainant ***(R vs M., 1959 (1) S.A. 352 AD).*** What could be reasonably expected will, as indicated, depend on all the circumstances, as to which see ***R vs T, 1937 TPD 389*** - victim aged five, six weeks reasonable; ***R v Sideropoulos, 1910 CPD 15; R. v Gow, 1940 (2) PH H148 (C); R v Ellis, 1936 SWA 10; R v duPlessis, 1922 TPD 153*** - nine days unreasonable; R v Msome, 1931 S.A.L.J. 351 more than four months unreasonable; ***R v du Plessis, 1922 TPD 153*** one month unreasonable, child of sixteen; ***Westermeyer v R, 1911 NPD 197*** -two days after, unreasonable in case of married woman; and see ***R v Tangeni, 1937 TPD 389; R v Meyer 1925 TPD 390*** - three months unreasonable; ***R v Mapoyana (1899), 20 NLR 139*** - two days after, admissible; ***R v Busse, 1932 SWA 16; R v C, 1955 (4) SA 40 (N)*** - girl aged five, complaint five days after admitted.

b) Be made to a person to whom the victim would naturally appeal for help, advice or consolation ***(R v Jenkison, 21 SC 233),*** and this rule is applicable in the case of an indecent assault on a young boy ***(R v S 1948 (4) SA 419 (G)).***

a) Not have been solicited by questions of a leading and inducing or intimidating character ***{Gannon's*** case, ***supra; S v T 1963 (1) SA 484 (AD); R v Asamu, 1938 SR 81*** -inadmissible where made after two days of persistent questioning; ***R v Osborne, [1905] 1 KB 551; R v Lillyman, [1896] 2 QB 167)*** but some reasonable persuasion to overcome the initial and natural timidity to make the complaint will not make it inadmissible ***(R v Norcott, (1916) 116 LT 576*** - threat to take away girl's bicycle); ***R v C 1955 (4) SA 40 (N)).***

b) Be made by a person competent to give evidence ***(R v Malete, 1907 TH 235)*** but the mere fact that the complainant is under the age of consent does not exclude the complaint ***(R v C, (supra)).***

[13] The evidence of PW1 fall under the first category (a) outlined by ***Swift*** *(supra)* that the report that she was raped by the accused person was made without undue delay and at the earliest opportunity which under all the circumstances could reasonably have been expected. In fact, in the present case the sequence of events from time accused grabbed complainant amongst the children to the time accused was arrested in the toilet naked had not been broken. The production of the medical report proved the fact of the rape beyond any doubt. The evidence, in my view, is overwhelming that it is the accused person who raped the

complainant on the 30th August 2001, at 8.30pm. The Crown evidence has been corroborated on all material respects. The contradiction which the accused seeks to capitalise on that one witness said he was arrested in the toilet and the other PW2 that he was arrested on his way to the toilet does not affect the materiality of their evidence. These witnesses might have viewed the events in two different vintage points and at different times. The fact of the matter is that the accused was arrested in vicinity of his home at Mgidzangcunu, naked.

[14] All in all therefore, I find that the accused raped the complainant as alleged by the Crown and that aggravating factors (b), (c) and (d) have been proved by the evidence led by the Crown.

[15] In the result, I find accused person guilty of the rape of Z S, a girl aged eight (8) years old at the time.

SENTENCE

[16] The accused has been convicted of the rape of a girl of eight (8) years. It was proved that the said rape was attended by aggravating circumstances as envisaged under Section 185 *bis* of the Criminal Procedure and Evidence Act (as amended), 1938. It has been proved that at the time of commission of this crime, complainant was a female child aged eight (8) years. Secondly, that complainant was a minor and had no sexual experience. Thirdly, that complainant was exposed to the risk of contracting the HIV/Aids virus as no precautionary measures to prevent such were taken by the accused i.e. use of condom.

[17] At this stage of the proceedings, the court has to pass an appropriate sentence. Three competing interests arise for the proper balance by the court. These are referred to in legal parlance as the **triad.** The nature of the crime, the interest of society and the interest of the accused. According to Holmes JA in the case of ***S vs Rabie 1975 (4) S.A. 855 (A)*** at ***862 G*****.**

> "Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances".
>
> "Despite their antiquity these wise remarks contain much that is relevant to contemporary circumstances (they were referred to, with approval, in ***S* vs *Zinn 1969 (2) S.A. 537 (A)*** at ***541)*** **"a judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and the pressures of society which contributes to criminality ..."**

[18] The above is the legal approach I ought to adopt *in casu.*

[19] The accused person himself made submissions in mitigation of sentence where he told the court that he is a first offender and this fact has been confirmed by the Crown. He has nine (9) children in Maputo and he lost his wife in the floods in Mozambique. He came to Swaziland to look for a job. He is 47 years old. He asked for leniency. He is a builder.

[20] The accused person in the present case perpetrated an aggravated rape of an eight (8) year old girl. In a recent Court of Appeal judgment in the case of ***Rex vs Christopher Boy Masuku - Criminal Appeal No. 16/2004*** Tebbutt JA delivering the judgment of the court on a similar case as the present stated as follows:

> "In cases of a similar kind, i.e. where children of tender years have been raped, the sentences imposed by the High Court have in cases before us varied between 10 years and 14 years imprisonment, the latter sentence being imposed in cases where an accused conduct has been particularly reprehensible - such as an abuse of a trust relationship. The present case certainly falls within this category to repugnant offence. Such a sentence i.e 14 years would therefore also give effect to the principle that offenders found guilty of an offence and whose moral guilt is similar should be treated similarly. Profound disparities can offend against the underlying principle of fairness. We feel that a sentence of 14 years on the Appellant, who is a first offender, would have been sufficient to meet the criteria I have set out above. It would also be in conformity with sentences in similar cases. We can therefore interfere with the trial court's sentence of 18 years and reduce it to one of 14 years imprisonment backdated Ist January 2000, as we now hereby do".

[21] In another recent Court of Appeal judgment in ***Rex vs Jeremiah Shongwe -Appeal Case No. 6/2003*** the same Judge stated the following at page ***3*** of the unreported judgment; and I quote:

> "In sentencing the Appellant the trial Judge rightly mentioned the increase of this type of offence, *viz* the rape of young girls by adult men and said that the message should go out that the courts will be very severe on this type of behaviour. I agree entirely. His lying attempts to deny his participation shows that he had no remorse for what he did. The nature of the offence justified the sentence of 10 years imposed on him. Indeed he is lucky it was not more severe".

[22] Steyn JA also in a recent ***Court of Appeal Case No. 6/2004*** that of ***Rex vs Mfanzile Mkhwanazi*** said the following at page 6 of the unreported judgment:

> "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 an d 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. 16/2004*** delivered contemporaneously with this judgment".

[23] I agree *in toto* with the sentiments expressed by their Lordships in the cases cited above and I hold that the *ratio decidendi* propounded in those cases is applicable On the facts of the present case. I refer also to the Court of Appeal cases of ***Thumbela P. Mhlanga - Appeal Case*** *No.* ***26/2003; Rex vs Kenneth Maseko - Appeal Case No. 7/2004; Nicholas Magagula vs Rex - Appeal Case No. 13/2004*** and that of ***Lawrence Phuphutha Manana - Criminal Appeal Case No. 733/2004*** on the range of sentences to be imposed i>n cases of rape.

[24] It appears to me that *in casu* the interest of the accused will have to be subservient to the interest of the society. Young children are entitled to their play and it is not for scavengers like you to pounce on. They need to be protected. The only protection against your sort is to impose severe sentences to discourage others who might be lurking in the dark aspiring to satisfy their lust on young girls.

[25] In the circumstances of this case, it is my considered view that a sentence of 15 years would be appropriate and will send the right message to would-be offenders.

[26] In the result, the accused person is sentenced to 15 years imprisonment without the option of a fine backdated to the 30th August 2001.

S.B. MPHALALA

JUDGE