

THE HIGH COURT OF SWAZILAND

REX

Vs

SAMUEL MAGAGULA

Criminal Case No. 59/99

Coram	S.B. MAPHALALA - J
For the Crown	MR. MAKHANYA
For the Defence	MR. S. KUBHEKA

RULING

(Under Section 174 (4) of the Criminal Procedure and Evidence Act)
(15/02/2005)

[1] At the close of the Crown case *Mr. Kubheka* who appeared for the accused person applied for his discharge in terms of Section 174 (4) of the Criminal Procedure and Evidence Act (as amended) that the Crown has not made a *prima facie* case to put his client to his defence.

[2] The accused is charged with the crime of rape with aggravating circumstances in that upon or about the period of December 1997 and January 1998, the accused did unlawfully and intentionally have sexual unlawful sexual intercourse with S M a female juvenile of 12 years without her consent and thus commit the offence of rape. The Crown contends that the rape is accompanied with aggravated circumstances in that: a) the victim is a juvenile of 12 years old, b) the victim was standing at a *loco parentis* relationship with the accused in that at the time of the offence the accused was 67 years old while the victim was 12 years old; and c) the victim was raped on several occasions by the accused, alternatively the accused is guilty of contravening Section 3 of the Girls and Women's Protection Act 1920.

[3] The accused pleaded not guilty to this offence whereupon the Crown called a total of seven witnesses.

[4] *Mr. Kubheka* in support of the application for a discharge attacked the evidence of the complainant that it was not corroborated as required by the law. In this regard I was referred to a number of decided cases in this court including the cases of *Elphas Siphon Dube vs The King - Appeal Case No. 13/99*; *The King vs < Siphon Dlebe Nyembe - Review Case No. 48/89* and that of *Themba Donald Dlamini vs The King - Appeal Case No. 14/98*.

[5] The second attack is that the Crown case is replete with contradictions in that the evidence of the complainant does not tally with what is contained in the medical report.

[6] *Mr. Makhanya* who appears for the Crown has conceded and rightly so if I may say so, that the Crown has not made a *prima facie* in respect of the main charge i.e. rape with aggravating circumstances. Without further ado, therefore I discharge the accused in respect of the main charge and he is acquitted forthwith.

[7] On the alternative charge however, the Crown persist that it has proved a *prima facie* case against the accused. The court was referred to Section 185 of the Criminal Procedure and Evidence Act of 1938. It was put to *Mr. Makhanya* that the charge as it pertains to the alternative was defective in that it lacks particularity.

[8] Section 185 thereof reads as follows: **Charge of rape.**

185. (1) Any person charged with rape may be found guilty of assault with intent to commit rape; or of indecent assault; or of assault with intent to do grievous bodily harm; of assault; or of the statutory offence of unlawful carnal knowledge of, or committing any immoral or indecent acts with, a girl of or under the specified age; or of the statutory offence of having or attempting to have unlawful carnal connection with a female idiot or imbecile under circumstances which do not amount to rape, or an attempt to commit rape, or of committing or attempting to commit any immoral or indecent act with such female, if such be the facts proved.

(2) Any person charged with assault with intent to commit rape, or with an attempt to commit rape, may be found guilty of indecent assault or assault with intent to do grievous bodily harm, or assault, or of *crimen injuria*, or of any statutory offence referred to in sub-section (1) except an act of unlawful carnal knowledge, if such be the facts proved.

(3) Any person charged with indecent assault may be found guilty of assault or of *crimen injuria* or any statutory offence of committing any immoral or indecent act with a girl of or under the specified age; or of the statutory offence of attempting to have unlawful carnal connection with a female idiot or imbecile under circumstances which do not amount to an attempt to commit rape, or of committing or attempting to commit any immoral or indecent act with such female, if such be the facts proved.

(4) Any person charged with any statutory offence referred to in sub-section (1) may be found guilty of indecent assault, or assault, if such be the facts proved.

(5) Any person charged with sodomy or assault with intent to commit sodomy may be found guilty of indecent assault or common assault, if such be the facts proved.

[9] It was further put to *Mr. Makhanya* that even on an alternative verdict under Section 185 the Crown will still be required to prove the commission of the offence. It was not enough to say because the complainant was alone with the accused at some point then he was guilty under the Act. In the absence of evidence that there was sexual interference it would be unfair to put accused to his defence. In any event, *Mr. Makhanya* when he was pressed further by the court on this point conceded the point though half heartily leaving everything in the so-called "hands of the court".

[10] In the circumstances of the case I agree *in toto* with the submissions made by *Mr. Kubheka* that the Crown has not satisfied the requirements of Section 174 (4) of the Criminal Procedure and Evidence Act (as amended) and I also wish to mention *en passant* that it would be highly dangerous to rely on the evidence of the complainant. Her evidence was discredited by that of her own mother who told the court that complainant had implicated many other people in the commission of this offence. At one point saying that she was raped by a lunatic and at some point that she was raped by one of her schoolmates. Her evidence therefore cannot be relied upon to form the basis of a conviction for this offence.

[11] In the result, for the afore-going reasons I rule that the Crown has not proved a *prima facie* case to put the accused to his defence and he is accordingly discharged forthwith.

S.B. MAPHALALA
JUDGE