

THE HIGH COURT OF SWAZILAND

REX

Vs

ERIC MAKWAKWA

Criminal Case No. 117/2003

Coram

For the Crown

For the Defence

S.B. MAPHALALA - J

MRS M. DLAMINI (Acting Director of Public Prosecutions)

IN PERSON

JUDGMENT (11/03/2005)

[1] The accused person is charged with the rape of a 4year old girl in that upon or about the 13th January 2003, at or near Mpolonjeni area, Lubombo region the accused being an adult male did intentionally have unlawful sexual intercourse with the child, who in law is incapable of consenting to sexual intercourse.

[2] The Crown further alleges that the rape is attended by aggravating circumstances, namely (a) accused being an adult male of about 65 years old stood in a *loco parentis* relationship with complainant. That is, complainant looked upon accused to protect her; (b) accused raped complainant while she was discharging duties at the instruction of accused and hence abused society's mores that children should obey adults; (c) complainant was of a very tender age at that time; and (d) accused failed to use protective measures before raping complainant hence putting complainant to a risk of contracting venereal diseases including HIV/Aids.

[3] The accused person was conducting his own defence and the Crown is represented by the Acting Director of Public Prosecutions, *Mrs M. Dlamini*.

[4] The accused pleaded not guilty to the charge whereupon the Crown led the evidence of (5) five witnesses to prove its case.

[5] In view of the tender age of the complainant being 6 years her evidence was entered in terms of Section 223 *bis* sub-section 3 (c) of the Criminal Procedure and* Evidence Act (as amended). The Section reads *in extenso* as follows:

"Evidence through intermediaries

223.bis (1) In this Section, whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if such person testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give the evidence through that intermediary.

(2) In these proceedings:

a) no examination, cross examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary; and

b) the said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give the evidence at any place:

a) which is informally arranged to set that witness at ease;

b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his testimony.

(4) In this section:

a) **the Minister may by notice in the Gazette determine the or the category or class of persons who are competent to be appointed as intermediaries; and ..."**

[6] The evidence adduced by the Crown is to the effect that on or about the 13th January 2001, the complainant PW1 L V was sent by the accused to bring him some Vaseline. PW1 obliged. Accused was inside his house at that time. PW1 entered accused's house and as soon as PW1 entered, accused closed the door and removed complainant's clothes. He raped her. PW2 H V one the child in the homestead was curious and she decided to go into accused's house. She found accused on top of PW1. Accused told her not to tell her parents and promised her money. PW2 reported to her mother what had occurred. She also told PW3 Nolwazi Gamedze who had come to visit them. The matter was then reported to the police. PW1 was taken for a medical examination. She was examined by a medical doctor who also gave evidence that upon examining the complainant he found the presence of gonorrhoea from her vagina and he concluded that there was sexual contact.

[7] The accused person cross-examined each and every witness for the Crown but his questions did not dislodge their evidence that it was the accused who raped the complainant on the day in question. The accused did not challenge the damning evidence against him but merely put it generally that these witnesses were fabrication a story against him.

[8] At the close of the Crown's case accused rights were duly explained to him where he elected to make an un-sworn statement from the dock. In his statement for what it is worth, he gave a rambling explanation that at his age he cannot rape a child so small. He also wanted to call a certain witness by the name of Thulie who is PW1 's aunt to ask her why she brought him to Swaziland only to implicate him in the commission of such dastard deed. Indeed, the court adjourned to allow the calling of this witness for the defence.

[9] On the return date the court was informed that defence witness cannot be located. The accused then closed his case.

[10] The court then heard submissions.

[11] The evidence of the Crown is based on what was said by the three small girls viz, PW1 (the complainant), PW2 H and PW3 Nolwazi. In weighing their evidence I have sought refuge to what was said by Tebbutt JA in the Appeal Court Case of *Roy Ndabazabantu Mabuza - Appeal Case No. 35/2002 (unreported)* as follows:

"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) S.A. 158 (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 *Wojj v Santam Insurance Company Ltd 1981 (1) S.A. 1020 (A) al 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 506 at 596). There are other factors 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)*)".

[12] In the present case after assessing their evidence I am satisfied that these three girls were "intelligent enough to observe" what happened in accused's room on the 13th January 2003. Their evidence was truthful and have proved beyond a reasonable doubt that the accused person committed the rape. The medical report entered by the doctor on the same date has proved beyond question that there was sexual contact which resulted with complainant contracting gonorrhoea. The accused has failed to give evidence to contradict the Crown's case.

[13] On the totality of what I have said above I have no hesitation at all in coming to the conclusion that the accused committed this offence and that the Crown has proved its case beyond reasonable doubt. The Crown has also proved all the alleged, aggravating circumstances viz (a), (b), (c) and (d) thereof.

[14] In the result, the accused is found guilty of the rape of L V, a female minor aged 4 years old at the time.

S.B. MAPHALALA
JUDGE