

THE HIGH COURT OF SWAZILAND

REX

Vs

F W M

Criminal Case No. 136/2002

Coram: S.B. MAPHALALA-J
For the Crown: MR. N. MASEKO
For the Defence: MR. MABUZA

JUDGMENT

(13th April 2006)

[1] The accused is indicted with two counts namely rape and incest, it being alleged that he raped his own daughter N M who at the time was ten (10) years old during the month of September 2001. Accused pleaded not guilty of the main and alternative charge being rape and incest, respectively.

[2] The Crown led the evidence of six (6) Crown witnesses namely, N M, Dotina Mafu, T M, O M, Dr Austin Ezegou and 3315 Constable Mduduzi Vilane. The accused testified in his defence and called no witnesses. The accused is represented by *Mr. Mabuza* and the Crown is represented by the Deputy Director of Public Prosecutions *Mr. N. Maseko*.

[3] The brief chronicle of the evidence is as follows: PW1 the complainant N M described in detail how her father, the accused person raped her on that fateful night where her mother and sister were away. She testified that the house occupied by the family was a two-roomed house. The children that is, complainant and her sister slept in the room that was used as a kitchen whilst the parents slept in the other room. PW1 stated that on this fateful day, her mother and sister were away and she slept on the mat in the parents' bedroom and when the accused came and instructed her to sleep on the bed next to him. Acting upon her father's (accused) instructions she climbed unto the bed, the accused then instructed her to strip off her clothes and was also busy brushing her thighs. She testified that after she had taken off her clothes accused instructed her to apply Vaseline on her private parts. She testified that after applying the Vaseline he instructed her to lie facing upwards and he then inserted his penis into his private parts. She further testified that she informed him that it was painful and that was when he stopped, however, he had ejaculated onto her and he also instructed her to put toilet paper in her private parts. She testified that after the accused had finished raping her, she saw some whitish stuff coming from her vagina. She testified that she did not tell her mother about the incident because her father threatened her with death and also that he would not pay school fees for her and that

he would also chase her away from home.

[4] PW1 testified that as a result of the incident she started having some badly smelling discharge and sometimes blood would also come out, and the pain was still there. She testified further that her mother discovered sometime in November 2001, that she had been sexually abused and arrangements were made to have her taken to hospital for medical check-up. The nurse at Lugogo Clinic was not available and she was eventually taken to Lobamba St Mary's Clinic by her father after he had taken her back home to wash so that the nurses could not smell the foul odour. She testified further that she ended up telling her mother the whole story that is, she was raped by her father.

[5] PW1 was cross-examined at great length by *Mr. Mabila* then accused defence Counsel and I shall revert back to her replies on pertinent issues in due course.

[6] The Crown then called PW2 Dotina Mafu who is a nurse from St Mary's Clinic. She testified that on the 3rd November 2001, she was on duty at the clinic when the complainant was brought to the clinic for medical examination. She paused questions to PW1, PW1 would look at the accused and the accused would then answer for her (PW1). This behaviour then prompted her to ask the accused to exclude them. She was then able to interview PW1. She stated that upon her examination she discovered that PW1 had a sexually transmitted disease. She testified that PW1 had sores on her vagina and there was also a badly smelling discharge. She testified that as a result of the medical examination on PW1 she then made some prescription. She then called the accused back to the examination room where she explained to him in detail the sickness of PW1 and they then left.

[7] PW2 was cross-examined by the defence and nothing turns on that cross-examination.

[8] The third witness for the Crown was PW3 T M, the mother to PW1 and girlfriend to the accused. She corroborated PW1 in her evidence both in-chief and under cross-examination by the Defence. PW3 testified that PW1 only disclosed to her the identity of the person who raped her after they had been to a counselling session from SWAGAA, Mbabane. PW3 further stated that she had instructed the accused to take the child to clinic unwashed so that the discharge and bad smell be detected but he later instructed the child to wash herself so that the nurses would not smell the odour.

[9] The fourth witness for the Crown was PW4 O M who testified that she was present on the 3rd November 2001, when PW1 was discovered by PW3 to be having a smelly discharge and was eventually taken to Lobamba St Mary's Clinic by her father, the accused.

[10] PW5 was Dr Austin Ezegou who had examined PW1 at Mbabane Government **Hospital**. **The essence of PW5's evidence was that rape had occurred to the child** owing to the absence

of the hymen and the presence of bruises of the *labia minora* and the vaginal area.

[11] PW6 3315 Constable Mduduzi Vilane was the investigation officer in this case. He arrested the accused and charged him with the crime of rape.

[12] The accused testified in his defence under oath where he denied the crimes against him.

[13] In arguments it is the Crown's contention that the testimony of PW1 is trustworthy and credible and it is after this court has satisfied itself that the witness is credible that the need for corroboration arises. That PW1's testimony is credible. She was able to narrate concisely and accurately all the events of the rape from beginning to end. Further, that in the instant case there is corroboration of the evidence of PW1. Exhibit "B" the medical report clearly show that the hymen is absent and the *labia minora* and the vaginal region has bruises. PW5 Dr. Austin testified that this state of affairs was as a result of sexual assault. PW1 clearly and undoubtedly identified the accused as her assailant. In the circumstances it was contended for the Crown that it has discharged the *onus* of proof beyond reasonable doubt and therefore accused is guilty in respect of crimes contained in the indictment.

[14] The defence on the other hand advanced argument *per contra* to the general proposition that the Crown has failed to prove the necessary corroboration for a conviction. In this regard the court was referred to the legal authorities of *Hunt, South African Criminal Law and Procedure (common law crimes) Vol. II, Juta and Co., 196 at page 462, Rex vs W 1948 (3) S.A. 772 at 781, Ncanana 1948 (4) S.A. 399 A at 405, R vs Satiwa Judas Kunene - Criminal Case N.O. 106/2004 at 10; 11, King vs Valderna Dengo Review Case No. 843/88 at page 4 and the case of Sabelo Dlamini and others vs R - Case No. 103/99. On the evidence adduced before court it was contended for the accused that the complainant (PW1) had a problem explaining why it took her weeks to report the rape to her mother. PW1 testified that the accused instructed her to bath before they proceeded to hospital. However, accused illustrated the mechanical problems his car had which would have made it impossible for him to switch the engine off and re-start it by himself if he had gone home to bath the child. He even let the engine idle whilst at the hospital, to show the extent of the problem and had failed to take the mother to a funeral earlier.*

[15] It was also contended for the accused person that PW1 was diagnosed with a sexually transmitted disease and accused was tested but his result were never adduced to show that he has the sexually transmitted disease and accused testified that he has never had a sexually transmitted disease, which evidence was never rebutted.

[16] These are the facts and arguments in this case. I have heard all the evidence of the Crown from the witnesses and I have also heard the accused in his defence. It is a trite principle of our law which is found in the landmark judgment of Lord Denning in the case of *Miller vs Minister of Pensions [1947] ALL ER 3 72* at page as follows:

"...the court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true".

[17] Further in another exposition of the criminal standard by Lord Denning the following was propounded:

"... it need not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect community if it admitted fanciful possibilities to defect the possibility in his favour, can be dismissed with the sentence "of course its possible but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice".

[18] In the landmark judgment of the Appellate Division in South Africa in the case of *R vs Difford* 1937 A.D. 370 at 373 the following trenchant remarks were made:

"No *onus* rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal".

[19] In another Appellate Division case of *R v M* 1964 A.D. 1023 at 1027 the following was said:

"The court does not have to believe the defence story, still less does it have to believe it in all its details, it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true".

[20] Leon J in the case of *S vs Singh* 1975 (1) S.A. 227 N held that in criminal cases, where there is a conflict between the evidence of the Crown witnesses and that of the accused, **"it would be quite impermissible to approach the case on the basis that because the court is satisfied as to the reliability of the Crown witnesses, it therefore must reject the accused's evidence"**.

[21] In *S vs Munyai* 1986 (4) S.A. 712 at 715 G, it was stated **"there is no room for balancing the two versions, i.e. the state case as against the accused's case and to the act on preponderances [of probability]"**; At page 715 F the following was propounded **"even if the state case stood as a completely acceptable and unshaken edifice, the court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false"**.

[22] Slomawitz AJ in the ease of *S vs Kubeka* 1982 (I) S.A. 534 Wat 537 put it this way:

"Whether I subjectively disbelieve the accused is, however, not the test. I need not even reject the state case in order to acquit him. It is not enough that he contradicts other acceptable evidence. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the state".

[23] The above-cited legal principles govern the treatment I give to both the evidence of the Crown and that of the accused person. It would appear to me that on the evidence before me that there exist a reasonable doubt that he committed this offence. Firstly, PW1 testified that the accused instructed her to bath before they proceed to hospital. However, accused person illustrated the mechanical problems his car had which would have made it impossible for him to switch the engine off and restart it by himself if he had gone home to bath the child. He even let the engine idle whilst at hospital, to show the extent of the problem and had failed to take the mother to a funeral earlier. Secondly, there is evidence that PW1 was diagnosed with an STD and accused was tested but his results were never adduced to show that he has the STD and accused testified that he has never had an STD, which evidence was never rebutted. Thirdly, it is my considered view that in the circumstances of the case the conduct of the accused is inconsistent with a guilty person. PW2 testified in court that the accused was co-operative during the examination. Accused has a very close relationship with the complainant. Accused said he suspects the people fencing the homestead and that evidence remains uncontroverted. It appears to me that in this case there are more questions than answers. As a result thereto I give the accused person the benefit of the doubt and he is accordingly found not guilty in respect of the charges in the indictment. He is accordingly acquitted forthwith.

S.B. MAPHALALA

JUDGE