

In the matter between

REX

[1] The accused was charged with the offence of rape. It was alleged that on or about the 16<sup>th</sup> November, 2005 at or near Qomintaba area in the Lubombo Region, the

Vs

SIFISO FISTOS MATSE

CORAM

BANDA, CJ

For the Crown For the Defendant

#### JUDGMENT

accused person did intentionally have unlawful sexual intercourse with one NOKUBONGA NGCAMPHALALA. The accused pleaded not guilty to the charge.

[2] The complainant is a young girl who was six years of age at the time the alleged offence took place. She was about 8 years of age at the time the trial took place. After examining her on voir dire I came to the conclusion that the girl

understood the nature and obligation of the oath and on that basis I allowed her to give sworn evidence. She gave her evidence in a mature and emphatic manner. She told the court that the complainant came to her homestead on the material date when he asked her to accompany him to go to Maziya homestead where he would buy her sweets. On the way the complainant says the accused diverted to a different route from that which leads to Maziya homestead and that when she asked him where he was taking her he said he wanted to have a rest. After a short distance she says the accused lifted her up and made her to lie down facing upwards; that he undressed her skirt and underpant and proceeded to rape her. The complainant stated that the accused had threatened her not to shout and that he had placed a knife near as he raped her. After the sexual attack, the accused threatened the complainant not to tell anybody and that he would kill her if she did.

On her return home she first met Tholile Khanyi, a girl of twelve years at the time she gave evidence. She must have been ten years when the offence was committed. I found that, she too, understood the nature and obligation of an oath. I allowed her to give her evidence on oath. Tholile, who gave evidence as prosecution witness number three, stated that she asked the complainant where she has been and that when she noticed that the complainant was reluctant to talk she invited her into a hut

where she noticed that the complainant's back was full of thorns. Tholile stated that as a result of what the complainant told her, she went and reported to their grandmother Jenitha Ngcamphalala, PW6 in this case. Tholile informed the court that she had seen the accused at the house earlier in the day when there was a feast and that she saw the accused eat porridge without permission and she also saw the accused take an avocado pear belonging to PW6. Tholile also told the court that she had seen the accused take the complainant saying that he would buy sweets for her. The next witness for the prosecution was Philisiwe Simelane, a married woman of forty four yearsold. She stays in the same area as the complainant and she is a member of the Community Police in the area. She knows the complainant and the latter's grandmother Jenitha

Ngcamphalala PW6. Simelane stated that she received a report that the complainant had been raped and that when she met the complainant she noticed that the complainant had dirt at her back. She invited PW 6 to go with her into a hut to inspect the complainant. While in the hut the complainant told them what had happened to her. Philisiwe and Jenitha both told the court that the complainant had injuries in her private parts and that they also saw what they both found to be sperms in her private parts. Both these ladies are women of mature age and experience and I accept that what they found was sperms. The injuries which the two ladies found in the private parts of the complainant are supported by the findings of the medical doctor who gave evidence in the trial. The doctor testified that, on examination

of the complainant, he found that her hymen had been partially destroyed which was consistent with the allegation of sexual assault. The medical examination was conducted only a day after the offence was committed. The evidence of the police officer while formal is significant in one important respect. The officer stated that, on his visit to the scene of the crime, he found peels of an avocado pear. The evidence of Tholile was that she saw the accused take an avocado pear from the house and without permission, when she saw him take away the complainant.

[4] The accused gave sworn statement and he denied any knowledge of the offence. He suggested that the allegation against him was a complete fabrication engineered by the complainant's grandmother (PW6) because of the failed marriage between his uncle and the grandmother's daughter. While the accused has denied any knowledge of the offence he has conceded, however, that on the particular day he had gone to the complainant's homestead. He states that there was a feast there and that he had helped to slaughter the beast and was given a piece of meat for his help. He roasted the meat and ate it before he left.

[5] It is the duty of the prosecution to prove the case against the accused person beyond reasonable doubt. There is no duty on the accused to prove his innocence.

[6] I have carefully reviewed both the evidence of the prosecution

and that given by the accused person. The complainant and Tholile (PW3) are young children and I direct myself to the dangers of such evidence. It must be accepted with caution. There is, of course, no rigid rule that requires that corroboration must always be present before the child's evidence is accepted. It was stated in the case of R V ROY NDABAZABANTU MABUZA, Criminal Appeal 35/2002 that the test to apply is as follows:-

*"The question which the court should ask itself is whether the evidence of the young witness is trustworthy".*

[7] I watched the complainant give her evidence in a mature and emphatic manner. I accept her evidence as trustworthy. She insisted throughout that the accused had sexually assaulted her and each time the accused would ask her she would answer "You did it". "You know what you did to me". So too the evidence of Tholile (PW3). I accept her evidence as trustworthy. I accept her evidence when she states that she saw the accused take the complainant and I also accept her evidence when she states that she saw the accused take an avocado pear from the homestead. The peels of the pear were found at the scene of the offence.

[8] There was more than sufficient evidence against the accused and I find that the prosecution have proved the case against

him beyond reasonable doubt. The accused person's protestations of innocence are rejected. The accused is found guilty as charged and is convicted.

Pronounced in open court at Mbabane on this 14<sup>th</sup> day of August 2007.



R.A. BANDA

CHIEF JUSTICE

Simelane: The accused is a first offender.

Accused: I would ask court to consider on my behalf that the indictment and evidence given is contradictory. I am a first offender and this is the first time I have to come to court. I have my grandfather and grandmother. There is no one to take care of them. It has always been my wish not to be in court and I am sorry that I am in court for a case of this nature. I am still young and I would like to have a good future. That is all.

Simelane: I leave everything to the discretion of the court.

Sentence: I have considered what you have said in

mitigation; that you are a first offender, but the offence you committed is a serious one. The complainant was only six years old and you lured her away from the village on the pretext that you were going to buy sweets for her. A custodial sentence is warranted and I sentence you to a term of imprisonment of nine (9) years to take effect from 20<sup>th</sup> November 2005. Accused has a right of appeal to the Supreme Court.

Pronounced in open court at Mbabane on the 14<sup>th</sup> day of August 2007.

CHIEF JUSTICE