IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL TRIAL NO.195/04

In the matter between:

REX

VS

SIPHILA NTOKOZO GAMEDZE

CORAM	**ANNANDALE J**
FOR THE CROWN	**MR. S. FAKUDZE**
FOR THE ACCUSED	**MR. O. MAGONGO**

RULING ON APPLICATION FOR ACQUITTAL AND DISCHARGE IN TERMS OF SECTION 174(4) OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT, 1938 (ACT 67 OF 1938)

16TH OCTOBER 2007

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[1] The accused in this protracted trial is charged with the

offence of rape. The Crown alleges that on diverse occasions between July and September 2003, the accused had intentional and unlawful sexual intercourse with a young girl, aged six. It is further alleged that in law she was unable to consent to intercourse and that aggravating circumstances as envisaged under Section 185(bis) of the Criminal Code exist.

[2] The accused initially conducted his own defence and tendered a plea of not guilty. From the outset, it was clear that he was hard of hearing and care was taken to ensure that he followed and understood the proceedings, which resulted in considerable delays.

[3] For the duration of the Crown's case the accused was undefended and he conducted his own defence. On completion of the case for the prosecution, the accused indicated a desire to obtain counsel. Eventually Mr. Magongo appeared on instructions of the accused and the present aspect to deal with is his submission that the accused should be discharged under provisions

174(4) of the Criminal Procedure and Evidence Act 1938 (Act 67 of 1938). The application is opposed.

[4] Section 174(4) reads:

> *"If at the close of the case for the prosecution the court considers that (there is no evidence that the accused committed the offence charged with or any other offence of which he might be convicted thereon, it may acquit and discharge him)".*

[5] Prior to an amendment in 1991 (Act 14 of 1991) it used to read that,

> "… a case is not made out against the accused person sufficiently to require him to make a defence it shall dismiss the case and forthwith acquit him", which was substituted by the words in brackets as indicated in paragraph 4.

[6] The main difference between the two versions is that the court now has a discrection as to whether or not the accused is to be discharged and it also encompasses

the consideration of competent verdicts on the original charge.

[7] The South African version, under a similarly numbered Section 174 of Act 51 of 1977 reads:

> *"If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty".*

[8] In essence, the amended Swazi provision is on all fours with the South African version and therefore, the case of law of both countries are on an equal footing, which allows our courts to find useful guidance in South African precedents.

[9] In Hoffman & Zeffert's classical work on the Law of Evidence Act at pages 505-6 a useful historical background to this provision can be found. This

section emanates from rules evolved to control juries from reaching perverse verdicts by empowering the presiding judge to direct the jury as a matter of law to acquit the accused where there was no evidence on which the reasonable man could convict.

[10] I refer to the statutory provisions further on in this ruling, but before turning to the evidence and the submissions made by Mr. Magongo, it is useful to first look at a few legal issues and principles that impact on the present application. Here, I liberally refer to the Commentary on the South African Criminal Procedure Act by Advocate Ettienne du Toit.

[11] The words ‘no evidence’ in the section 174 have been interpreted to mean no evidence upon which a reasonable man acting carefully may convict (R V SHEIN 1925 AD 6; S V MPHETHA & OTHERS 1983(4) SA 262 (C) at 263-H). The decision to refuse discharge is a matter solely within the discretion of the presiding officer. The court may act *mero mutu* and should do

so where the accused is unrepresented (S V ZIMMERIE EN 'N ANDER 1989(3) SA 184(C)). The section gives the court a discretion in deciding whether to discharge an accused at the conclusion of the State's case. This discretion must be exercised judicially and it is wrong to prescribe to a court how and when it should be exercised in favour of an accused (S V MANEKWANE 1996(2) SACR 264 (O)).

[12] There is disagreement as to whether the credibility of the State witnesses should be taken into account in deciding whether to grant a discharge. In R V DLADLA & OTHERS (2) 1961(3) SA 921 (D) and S V NATIONAL BOARD OF EXECUTORS LTD AND OTHERS 1971(3) SA 817 (D) at 819 it was held that credibility was not a matter that a judge should rely upon when considering a discharge as this was a matter to be considered at the appropriate time. However, credibility was held to be a relevant factor in S V NANDHA GOPAL NAIDOO 1966(1) PH H104 (W) and S V MPHETHA & OTHERS 1983(4) SA 262 (C) at 265 D-G. In *Mpetha*

Williamson J. held that credibility would play only a very limited role and the evidence ignored only if it was of such poor quality that no reasonable person could possibly accept it. I am in respectful agreement with the latter approach.

[13] Where the uncontradicted evidence of the State is circumstantial and more than on reasonable inference may be drawn a discharge should be refused if guilt could also reasonably inferred. It is only rarely that the court would refuse a discharge where there is no evidence on which a reasonable man may convict. In S V SHUPING & OTHERS 1983(2) SA 119 (B) Hiemstra CJ laid down the following test: the first consideration is whether there is evidence on which a reasonable man may convict; if the answer is negative it must be asked whether there is a reasonable possibility that the defence evidence may supplement the State case; if the answer is positive a discharge should be refused.

[14] As indicated below, I respectfully differ with this

approach. In S V PHURAVHALTHA & OTHERS 1992(2) SACR 544 (V) it was held that where no state case is made out it cannot be supplemented or strengthened during the defence case. Therein, Ettienne du Toit AJ said that where there was a reasonable possibility of the supplementation of the state case by the defence case, this should not necessarily lead to an application for discharge being refused. It is merely one of the relevant factors to be considered and may be overridden by such factors as the interests of the accused.

[15] A judge is under a duty to direct an acquittal if he considers that there is no evidence that the accused committed the offence. It is equally important to note that if there is evidence on which a reasonable man may convict the judge has no power to grant a discharge (R V THIELKE 1918 AD 373).

[16] In S V MGAYI (unreported Ciskei High Court handed down on 10th June 1999) White J stated the following:

"In my opinion the cornerstone of an open and democratic society is a system of justice which is fair both to the accused, the prosecution, and the administration of justice as a whole. It seems to me that the Constitution envisages such a system of justice and that it can never be said that the interests of justice are the interests of the accused only. There is therefore, in view of the anomalies and injustices which could arise, ample justification for affording the courts discretion in terms of section 174. Furthermore, if that discretion results in a limitation of the accused's rights in terms of section 33 of the Constitution, there are ample and justifiable reasons therefore. It does not, however, appear to this Court that the said discretion makes any inroads into the rights of the accused. If he is placed on his defence neither he nor any of the other accused are compelled to testify against him. He retains all the rights referred to in the abovementioend

> *extract from the Mathebula case, and he is still assured of a fair trial.*
>
> *This court therefore finds that the provisions of the Constitution have not affected the discretion afforded courts by section 174 of the Criminal Code, and that the discretion is extant."*

[17] In our law, the provisions of section 174(4) of the Criminal Code is also consonant with the provisions of section 21 of our Constitution, which pertains to the right to a fair hearing. Section 21(9) specifically provides that no accused shall be compelled to give evidence at the trial. Thus, if an application for discharge under section 174(4) is refused, it does not imply that the accused is then in any way obliged to testify. It remains entirely within his own discretion whether he chooses to do so or simply close his case without adducing any evidence at all.

The presumption of innocence, the rights to taciturnity and to refrain from testifying has been moved into the

limelight through various decisions that have relevance to our legal system.

[18] In R V OAKES (1986) 26 DLR (4TH) 200, it was decided in Canada that at least three different components to this exist: firstly, the guilt of an accused person must be proved beyond a reasonable doubt, as has always been the position in our law. Secondly, the onus or burden of proof remains squarely on the Crown and thirdly, the aspect which brings on a further dimension to some extent but which has also been part and parcel of our law for a long time is that criminal prosecutions must be carried out in accordance with not only lawful procedures but also in accordance with the principles of fairness.

[19] These sentiments are vividly recorded in numerous international instruments and is in line with human rights litigation. It is nothing new, really, but it is a manifestation of guidelines that have all along sought to be followed and applied in our domestic criminal

justice system.

[20] I have a difficulty to appreciate the prevailing legal position (as per Shuping *supra*) that an incomplete case presented by the prosecution should result in a refusal to discharge an accused at the end of the Crown's case, if there remains the possibility that the accused, if called upon to present his defence and he then testifies, could supplement the defective case of the prosecution. In practice, it could well result that by giving evidence instead of just closing his case without presenting evidence to be considered, the accused person could effectively present the proverbial noose from which he could be hanged, or otherwise put, to assist the prosecution in securing his own conviction. This is abhorrent to a presumption of innocence and the right to a fair trial.

[21] Respectfully, I prefer the approach adopted (again) by the Canadian Judiciary in DUBOIS *(infra)*, where the court spelled it out that the guilt of an accused must

fully and properly be proved by the prosecution, without the assistance of the accused person. The bottom line then becomes, as it should be, that when there is no evidence on which the reasonable man, or the reasonable court of justice for that matter, may convict, the accused must be discharged or found to be not guilty of the crime with which he is charged.

[22] In his Commentary on the Criminal Procedure Act of South Africa, Advocate Ettienne du Toit refers to the Canadian case of Dubois (at 22-32F) as follows:

> *"In the Canadian case of DUBOIS V R (1985) 23 DLR (4th) 503 Lamer J speaking for the majority indicated that Section 11(d) of the Charter of Rights and Freedoms (Schedule B of the Constitution Act 1982), which provides that any person charged with an offence has the right 'to be presumed innocent until proven guilty to law in a fair and public hearing by an independent and impartial tribunal,' requires the prosecution to*

make out a case against the accused before he or she needs to respond. This may be done by testifying or calling other evidence. Lamer J indicated that the principle of a 'case to meet' is the real underlying protection which the non-compellability rule seeks to promote. The protection is not that the accused need not testify but that the prosecution must prove its case before there can be any expectation that he or she will respond".

[23] He then goes on, with reliance on S V GQOZO AND ANOTHER TWO, 1994(1) BCLR 10 (Ck), where Heath J (as he then was before tackling the vexed issue of corruption), set out some useful guidelines when a case has to be decided as in the present circumstances. The following six factors are held out for consideration, with which I respectfully agree.

They are:

"1. An innocent person must as far as possible

never be convicted of a crime.

2. *The conviction of a guilty person must be obtained with the best possible endeavours. The prosecution representing the community must fulfill their duties within the framework of the law and the available facts.*

3. *The right to remain silent and the satisfaction of the onus which is on the State must be satisfied as far as possible.*

4. *The rights of the accused are very important.*

5. *The right of the community to see that justice is done is equally important.*

6. *To achieve these goals instruments should be used in such a way that justice is done to everybody".*

[24] Finally, the court remains with a responsibility to fairly adjudicate each individual case on its own merits and it has to remain alive to the realities of criminal

prosecutions that are conducted under less than ideal circumstances but nevertheless it must balance various interests and legal issues at the same time. Another enlightened South African jurist, Justice Johann Kriegler of the Constitutional Court had the following to say about the concept of the fairness of trials in KEY V ATTORNEY-GENERAL CAPE PROVINCIAL DIVISION AND ANOTHER 1996(2) SACR 113 (CC) at 120h-121h:

> *"In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or*

prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in FERREIRA V LEVIN, fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence albeit obtained unconstitutionally, nevertheless be admitted".

[25] In his submission on behalf of the accused person when applying for a discharge at the end of the case for the prosecution, Mr. Magongo, obviously placed at a disadvantage by not being present during the proceedings up to that stage and having to rely on a cold clinical transcription of proceedings, supplemented

by his instructions, vigorously attacked the manner in which the trial had been conducted.

[26] Mr. Magongo submitted that the court was at fault for allowing diverse evidence to be taken into account and essentially attacked the whole conduct of the trail as if he argued against a skewed conviction before an appeal court. This court was, if not berated, castigated for averred asking of leading questions to the child complainant, and allowing her answers as evidence. The second main prong of attack focused on the trial within a trial, without a reasoned ruling having been handed down at the time. This court held that the statement made a judicial officer was admissible as evidence but that reasons for that decision would follow in due course.

[27] I do not propose to now give reasons for allowing the statement as part of the evidence – it will follow in the final judgment. Furthermore, the arguments of the newly instructed attorney was based on averred

principles of *stare decisis*, which unreported judgments would have been availed to this court. Despite at least three different reminders by myself to Mr. Magongo to file the promised judgments, supplemented by various other reminders by my court clerk or interpreter, none such judgments have been filed. The consequences are that I am not readily in a position to assess the impact of those authorities and moreso, it resulted in this matter being "placed on the shelf", so to speak, in anticipation of the expected case law, with a resultant delay in handing down this ruling. In addition, the draft of this judgment had to be retyped at least five times following a *"virus"* that reportedly infected my secretary's computer. Inevitably, portions had to be reconstructed and corrections made from scratch. The first hand written draft was complete more than a court session ago.

[28] These problems are not uncommon in this jurisdiction, but it also does not offer an excuse for the very long delay in informing the accused before court that he is

not about to be acquitted on the charge that he faces. The lack of diligence by his attorney in not promptly producing unreported case law that he relies upon to justify an acquittal should not have resulted in a protracted delay in the ruling by the court, nor the additional delay caused by computer problems.

[29] The issues at hand are not clouded in such mystery that it should result in holding the accused in continued anticipation of being found not guilty because there is, to his understanding, a supposed "vacuum" in the presented evidence that has to result in his acquittal. On the contrary, there is sufficient evidence that could very well result in a reasonable court to find that in fact, he could well be convicted. He has the opportunity to persuade the court, on a far lesser onus than what rests on the Crown that he has been unjustifiably accused of a serious crime. His lawyer argues that the evidence thus far adduced should not be accepted and that he must be set free. This is not the correct position. By so saying, I do not at all imply that any

accused person has any onus or burden of proof on him to prove his innocence. It is the Crown that bears the full onus of proving guilt beyond reasonable doubt.

[30] In the course of the trial thus far, there is evidence, which if ultimately accepted, points to nothing else but that the accused before this court did what he is alleged to have done.

[31] I do not place an over reliance on the statement that he made to the Magistrate. That in itself is unconfirmed evidence of the issue at stake, but which has already been allowed to be part of the entire body of evidence which will have to be considered in due course.

[32] Apart from the statement to the judicial officer, this court has heard details of the alleged crime as was conveyed *viva voce* by the various witnesses.

[33] The complainant testified as to how it came about that she was carnally known by the accused. Despite her timidity and youthful age she managed to recount the

horrid details of her ordeal. Both her parents and her stepmother also gave their versions of what they were told, what they saw and what they experienced, in addition to the evidence of the investigating officer.

[34] The accumulative and *prima facie* weight of their evidence points nowhere else than to the accused before court as being the one who trapped the complainant, and had his way with her. The body of the evidence is neither fanciful or full of conjecture and speculation, deprived of possible acceptance by the court as argued on behalf of the accused.

[35] There might very well be some validity in the criticisms raised by Mr. Magongo in so far as the manner in which evidence came about or against the role taken by the court itself. There also could be validity in the critique against the acceptance of the statement made by the accused, which was admitted as evidence, but at the end of the day, at this stage of the trial, these are not the foremost considerations.

[36] What I am now to consider is whether there is sufficient evidence on strength of which there is a reasonable possibility that the accused may be convicted of either rape or of a competent verdict on that charge.

[37] In my considered view, such possibility cannot be excluded.

[38] The invocation of section 174(4) of our Criminal Code is not an opportunity to have a comprehensive assessment and summary of evidence made, to the extent that it prejudges the merits of the case and provides an opportunity for defence counsel to re-adjust its sails according to the prevailing winds. Frequently, and indeed in the present matter, it is tantamount to not only an abuse of the legal process, but it also adversely impacts on the rights of an accused person to have his trial resolved in a timeous and expeditious manner.

[39] Had his counsel thought that indeed there is no acceptable and admissible evidence on which the

accused reasonably could forsee a conviction and simply closed his case without adducing any evidence for the defence at all, of if he called the accused to testify in his defence, thereafter arguing for a verdict of not guilty, this trial would have been concluded long ago. Further, if the court was to indeed have erroneously entered a conviction, he could well have repeated exactly the same argument during the course of an appeal as was done in the application for discharge.

[40] Excluding for present purpose the evidence of the statement made to the Magistrate, which corroborates the gist of the Crown's case against the accused, the evidence is that the accused had multiple sexual encounters with an underage girl. She described these acts in lucid detail and her evidence is corroborated by her parents and aunt/godmother.

[41] The medical examiner's report, which now is also placed in dispute by the accused's attorney, does not in

itself provide sufficient proof of rape, certainty not by any specific person, but it is wholly consistent with sexual activity by a very young girl, six years of age, who fortunately did not also lose her virginity in the process of gaining an infection of her genitalia. This is also consistent with the complainant's evidence that despite making all the moves that are associated with sexual intercourse there was in fact no deep penetration of her tiny private part by the perpetrator. It is in line with all of the available evidence presented by the Crown.

[42] *Prima facie,* the evidence points towards the accused person as being the perpetrator. He is the one who continuously features as the one who did this to the complainant.

[43] In my considered view, it cannot be said, even by a long stretch of the imagination, that there is no evidence on which a conviction might well result on a charge of rape or of for instance, indecent assault or some other

competent verdict. Moreover, there is not an incomplete case that was presented by the Crown and which could require any measure of supplementation by the accused.

[44] The case law that Mr. Magongo referred to, most of which I have now obtained, is not adverse to the finding that is made. The case of ROY NDZABANDZABA MABUZA V REX, APPEAL CASE NO.35/02 deals with the evidentiary value of child witnesses and the reliance to be placed on it. It is clearly distinguishable from the present set of evidence where no credibility finding has yet been made on the evidence of the complainant. It is premature to now attack her credibility, especially in the face of the remainder of the body of evidence, in an effort to obtain an acquittal at the end of the Crown's case.

[45] Likewise, APPEAL CASE NO.25/2002, the matter of THEMBA DLAMINI V REX, also does not lend support for an acquittal at this stage. Whether or not there is

sufficient evidence of penetration to justify a conviction of rape, or whether there is only evidence of indecent assault, still remains to be decided. Section 174(4) does not have the connotation, as argued, that if the Crown did not prove all the elements of the alleged crime, that an acquittal should inevitably follow. The question of possible competent verdicts cannot be negated. At this stage of the proceedings, no finding as to the level of penetration or absence thereof is crucial to an acquittal. Suffice to say that there is no reason to find that no semblance of sexual activity took place. On the contrary, it points towards the other direction. The more important issue that is yet to be decided is who is the male that has forced himself upon the young girl. Was the accused or could it have been someone else? The present body of evidence clearly points towards the accused and not some other person.

[46] In CRIMINAL CASE NO.19/99, REX V HEZEKIAL GCUMU SIMELANE, my former brother Justice Masuku gave a detailed account of the evidence, from which he drew

the conclusion that no reasonable court could convict the accused on the basis of evidence adduced by the Crown in that matter.

[47] From his judgment, it is quite clear that the facts were evaluated to be on quite a different basis as the present matter. Therein, there were far too many contradictions, improbabilities and adverse issues of credibility to sustain a possible conviction in the face of an absence of a defence version. There, respectfully, the accused was correctly acquitted and liberated. Such is not the present position where there is a fully different set of evidence and issues before this court.

[48] The evidence heard thus far is not fully detailed in this ruling for the reason that it is yet to follow in the final judgment, with or without the evidence of the accused and possibly his witness or witnesses. At present, there is sufficient evidence to refuse an acquittal and discharge of the accused.

[49] I have deliberately refrained from making any remarks

about the manner in which the accused has presented himself thus far, specifically referring to his hearing impediment. I am sorry that Mr. Magongo could not have rendered his assistance from the outset. It would have been most helpful if that could have been the case.

[50] This court would ordinarily not be adverse to a reasonable request by Mr. Magongo to overcome his prior absence and have witnesses recalled, but no such request has been made. The accused was accommodated to a great extent to make good for any hearing defect and his rights and the procedural aspects were explained to him in elaborate detail.

[51] For the reasons stated above, the application by the defence to have the accused acquitted in terms of Section 174(4) of the Act at the conclusion of the Crown case stands to be dismissed.

[52] The ball is now in the court of the accused, assisted by his legal counsel, as to the way forward with this trial,

which has already been delayed unduly long.

J.P. ANNANDALE

Judge