IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE No. 147/06

In the matter between

DAVID SITHOLE

VS

REX

CORAM: S.M. MONAGENG J

FOR CROWN: MR. S. MASEKO

FOR ACCUSED: MR. L. GAMA

ACCUSED: PRESENT

JUDGMENT
22 AUGUST 2008

[1] The accused David Sithole faces a criminal offence of rape. In the alternative he is charged with contravening Section 3 (1) of the Girls and Women's Protection Act 39/1920.

[2] The Crown alleges that on the 21st July 2006 he intentionally had sexual intercourse with one C D, a female minor aged 12 years, without her consent. In the alternative, the Crown alleges that he had unlawful carnal connection with her, while she was aged twelve years, thus contravening the girls and women Protection Act 39/1920.

[3] This is a case where the complainant was 12 years old at the time of the alleged rape. She was duly cautioned by the Court and I was satisfied that she understands and appreciates the nature of the proceedings and also the significance of the oath she took. This was necessary because when she gave evidence she was only 14 years old.

[4] The brief facts of the case as narrated by the complainant girl (PW1), are that on many occasions she studied with the accused's children at his homestead. He would walk her from her own homestead to his and take her back afterwards. The two were neighbours.

[5] On this particular day, she went on, after the studies, the accused called her and informed her that her aunt wanted her at home. Instead of walking her home, he asked her to go with him to a house within the compound, since he wanted to put the lights on. When they got to the house, he unlocked the door and told her to go in, which she did. He got in after her and closed and locked the door behind him. She asked him why he was doing that, especially that her aunt wanted her, but the accused pointed to another door and told her to go through it and to keep quiet. He also went through the same door, into the same room, took a brown blanket and spread it on a bed.

[6] The blanket apparently belonged to the Princess Inkhosikati, the owner of the compound. He then ordered her

to undress and sleep on the bed. On asking him why she should, he said he wanted to inject her and that if she told her aunt about what was happening, he would kill her. He undressed her panry which got torn in the process, and then took off his pants, and he told her that he was going to use a condom and went on to of her and had sexual intercourse with her without her consent. When he finished, he ordered her to get dressed and again warned her not to tell her aunt. He then walked her home and informed her aunt that they were back. Her aunt opened for her, while the accused went back to his own home. She went to bed and did not report the matter to her aunt.

[7] Three days later, she met the accused who gave her R2.00 and later on that day, when she came back from school, her aunt asked her what the accused had done to her and further that the accused's wife had already told her what had happened, but she says out of fear of the accused, who had threatened her, she told her aunt that he had done nothing to her. On the fourth day, her uncle Ntokozo Vilakazi (PW4) also asked her what the accused had done to her, and she related the events as she related them in Court. She says that she opened up to him because he promised not to tell her aunt. When she came back from school that day, a decision had been taken for her to report the matter to the iNkhosikati, which she did with PW2.

[8] After that the iNkhosikati gave them money to go and consult a certain doctor Futhi, after which they went to report the matter to the police and handed over the medical

form to them. She says that she was a virgin when the accused slept with her and that he did not use a condom. It transpired during cross examination of PW1 that the iNkhosikati homestead is guarded by soldiers around the clock, and when asked why she did not report the rape to the soldiers on duty, the complainant said that she was not used to them and further that the accused had threatened to kill her if she told her aunt. On why she ultimately told Vilakati (PW4), she said that he had assured her the he would not tell her aunt. Her panty, which she says got torn during the alleged rape, she says was burnt by her and her aunt, before the aunt knew about the allegation of rape.

[9] PW2 related the story as told to her by the complainant. It is noted that she had forgotten some of the details in this matter. It appears that the accused's wife informed her and PWl's aunt that the accused had raped PW1, or had a sexual connection with her. It also appears that this is what led to PW1 being questioned by PW2. Vilakati (PW4) also gave evidence to the effect that PWl's aunt asked him to question PW1 on the allegation made by the accused's wife, to the effect that PW1 was in a love relationship with the accused. PW1 then, after the assurance that the would not tell her aunt, told PW4 that the accused had slept with her and walked her to her homestead and left her at the gate. PW 4 passed this information to PWl's aunt the following day.

[10] PW5, the doctor who examined the complainant on the 28th July 2006, confirmed that when she came to the clinic and when he examined her, she had a smelly discharge

from her vagina, and that she alleged that she has been raped two weeks before then that is on the 14 July 2006. Her hymen was perforated and there was cervical motion tenderness, which meant that there was an infection on the cervix, since on touching it she felt pain. The doctor concluded that this was a sexually transmitted disease (STD), which she would have acquired through sexual intercourse and he treated her for the STD.

[11] PW3, one Detective Constable Ernest Fakudze, who worked under the Domestic Violence Against Child Protection and Sexual Offences Unit received the report of rape from PW1 and PW2. He says that the accused, who was known to PW1, was said to be David Sithole. He recorded statements from the two women and gave them a medical form to take to a doctor, Futhi Vilakati, who examined her on the 9th August 2006. He then followed the suspect who was absent from his home, but who later came to the police station on hearing that PW3 had come looking for him. He arrested him.

[12] At the close of the Crown's case, I ruled that the accused had a case to answer and he elected to give sworn evidence and also called one witness in his defence. The accused confirmed that he resided at the Royal Residence at that time, where he worked as a grounds man. He knew PW1 since they were neighbours and that she used to visit his household to study, do homework or play with his children. He further confirmed that whenever she left, it was too late, he would walk her home, which was 20 paces away from his, and on arrival he would inform her grandmother that he had brought her back home.

[13] In his defence, he denied raping her on the 14th July or 21st July 2006 and actually denied ever having any sexual connection with the girl since he regarded her as a child. With regard to the key to house where the rape allegedly took place, he informed the Court that in fact, he did not handle any other keys except the keys to his own house.

[14] Further, that all the other keys were kept by one Patricia Motsa in the main house. Motsa, he says, was the custodian of the Royal Residence keys. As a result of this, he says that it is not possible that he could have opened the house, since he did not have the key, and also that even the switches to the lights in the residents were installed on poles outside the houses, so that no unauthorised person could access the inside of the houses to put the lights on. This procedure he ways was effected from the year 2005.

[15] Before then, for one to switch the lights on, he said one would put one's hand in through the burglar bars. In totality, the accused flatly denied having sex with PW1, let alone without her consent as alleged by the State. He called his young son PW2 as his witness. The witness basically came to confirm that the keys to the Royal Residence were always kept by Patricia Motsa. He also confirmed that the houses in the Royal Residence were lit through a switch which was installed on a pole outside the houses, so that his father could not have gone into the house to switch the lights on.

[16] Regarding the keys, the witness stated that it was impossible for anyone to steal or take them from Patricia

Motsa, who always has them in her possession. His evidence was exculpatory of the accused.

The Crown had to prove that:

a) sexual intercourse took place

b) between the accused and the complainant, a 12 year old girl.

c) without the complainant's consent.

[17] It appears to me, from the doctor's evidence, that in deed sexual intercourse did take place. What had to be proved by the Crown was whether it was with the accused person. This is a case where it is the complainant's word against that of the accused. Their accounts differ dramatically. However, the onus is on the Crown to prove the guilt of the accused beyond any reasonable doubt, and the onus does not shift to the accused except in very specific and exceptional cases. I wish to observe that apart from the PW1, all the other witnesses were told about the rape or sexual contact by either PW1 or the accused's wife.

[18] Moreover, this was after probing, and in PW4's case this was after he promised PW1 that he would not tell her aunt. I have tried to establish if any of these witnesses, PW2, PW3 and PW4 could be said to corroborate PW1, and the conclusion I reach is that under the circumstances they cannot. There is nothing in their evidence that is independent enough to satisfy the strict test of corroboration as required by the law see **George, Gabriel v Rex** Swazi Law Reports 1987 -1995

Vol. 4 at page 44.

[19] With regard to the evidence of the doctor, again, the present case is almost on all fours with the **Gabriel** case supra. In the present case, the doctor found that PW1 had a sexually transmitted disease, a suspect was known to the police, but the investigator became indifferent to this finding, and did not have the suspect accused tested to establish if he could have infected the complainant. Quite obviously a positive result would have gone a long way in corroborating the complainant. Another observation I need to make is that PW1, PW2 and PW3 said that PW1 was examined by doctor Futhi and yet Doctor Jonathan Dlamini says it is him who did. No explanation was given by the doctor for this disparity and I wonder what the truth is.

[20] The issue of dates on which the alleged rape took place is also crucial in this case, regardless of Section 148 of the Criminal Procedure and Evidence Act that was brought to my attention.
The Section read thus:
"*No indictment or summons in respect of any offence shall be held insufficient —*

(a) for want of the averment of any matter which it is unnecessary to prove;

(b) because any person mentioned therein is designated by a name of office or other descriptive appellation instead of by his proper name;

(c) because of an omission to state the time at which such offence was committed, if time is not of the essence of such

offence;

(d) because the offence is stated to have been committed on a day subsequent to the lodging of the indictment or the service of the summons or on an impossible day or on a day that never happened;

(e) for want of or imperfection in, the addition of any accused or any other person; or,

if) for want of the statement of the value or price of any matter or thing or the amount of damage, injury or spoil if such value or price or amount of damage, injury or spoil is not of the essence of the offence:

Provided that if any particular day or period is alleged in any indictment or summons as the day or period during which any act or offence was committed, proof that such act or offence was committed on any other day or time not more than three months before or after the day or period laid therein shall be taken to support such allegation if time is not of the essence of the offence:

Provided further that in the case described in the last preceding proviso, proof may be given that the act or offence in question was committed on a day or time more than three months before or after the day or period stated in such indictment or summons, unless it is made to appear to the court before which the trial is being held that the accused is likely to be prejudiced thereby in his defence upon the merits: and

Provided also that if the court considers that the accused is likely to be thereby prejudiced in his defence upon the merits it shall reject such proof and the accused shall be in the same plight and condition as if he had not pleaded".

The complainant was taken to the doctor about seven days after she says she was raped, and yet she told the doctor that she had been raped two weeks before then.

[21] I am awake to the fact that she was a child and could have been confused, and traumatised, but it should be remembered that this is a stage where the Crown should prove the guilt of the accused beyond all reasonable doubt, and the date or the correct date becomes one of the most crucial components of this enquiry. This is more so that there is no other evidence that the Crown relies on, except the complainant's word. These differences in dates obviously bring further difficulties to the Crown's case.

[22] The issue of the keys is also another dimension. The Crown should have known that this would be contentious and should have called the so called custodian of the Royal Residence keys. Motsa, the custodian, was not called, and as a result I have only the accused's account. Moreover, the accused called a witness who confirmed his version. This also brings further difficulties to the Crown's case. As correctly submitted by the accused's attorney, the accused need only give a reasonably plausible explanation and in this particular part of the case, I find that the accused's evidence has been

amply corroborated by his son, and that it has actually not been challenged by the Crown, which leaves me with no other alternative but to believe that the accused could not have had the key to the house, where the alleged rape took place.

[23] There was a suggestion from the Crown that PW2 harboured a grudge against the accused since he had blocked her chances of getting employment at the Royal Residence, hence her falsely implicating him in this criminal office. The accused promptly said that he was only a groundsman, who was not involved in recruitment of staff, so that PW2 would not have had any reason to begrudge him.

[24] Another unfortunate part of this case is the destruction of the complainant's panty by her and her aunt. This has meant that there is no exhibit and no corroboration of her allegation of non-consensual sex.

[25]I am faced with these conflicting statements and have to decide which is more plausible. As I stated above, it is for the Crown to prove its case against the accused, beyond reasonable doubt. In the circumstances, I reach the inevitable conclusion that this has not been done and on the available evidence, it would be unsafe to convict the accused person.

[26] I therefore find him not guilty and accordingly acquit him.

S.M. MONAGENG

JUDGE