

IN THE HIGH COURT OF SWAZILAND**HELD AT MBABANE****CRIMINAL TRIAL NO 318/07**

In the matter between:

SIPHO MAGAGULA

VS

REX

CORAM

MONAGENG, J

FOR CROWN

MS HLOPHE

ACCUSED

PRESENT IN PERSON

JUDGMENT
09th APRIL 2009**Monageng J**

[1]The accused, Sipho Magagula faces two counts of rape, it being alleged in Count 1 that on the 19th March 2006 at or near Likhula area in the Lubombo Region, he unlawfully and intentionally had sexual intercourse with N M, a female minor who at the time was nine years old, and in law incapable of consenting to sexual intercourse. In the Count 2 the said Sipho Magagula is alleged to have unlawfully and intentionally had sexual

intercourse with one L M, a female minor, who at the time was 9 years old, and in law incapable of consenting to sexual intercourse.

[2] The Crown further alleges that the rape in both counts was accompanied by aggravating factors as envisaged by section 185 (bis) of the Criminal Procedure and Evidence Act No. 67/1938 as amended in that:

1. The complainants in both counts were of a young and tender age.
2. Both complainants were sexually inactive and inexperienced.
3. Both complainants suffered injuries to their private parts (vagina) during the unlawful acts.
4. The complainants were raped by the accused in the sanctity of their home.
5. The accused was in an authoritative position over the complainants.
6. The accused was brought in to reside in the family home through courtesy and he abused the trust of both the complainant's families.
7. The accused did not take any preventive measures against sexually transmitted infections including the HIV.
8. The accused behaved in a promiscuous way by having multiple sexual partners hence endangering the lives of the complainants and his own.

9. The accused accosted the complainants who were going up and about their activities innocently and the accused turned out to be the wolf.
10. The accused in accomplishing his rape mission used threats to both complainants and admonished them not to report the ordeal.

[3] With respect to Count 1, the complainant PW3, says that while at PW1's home playing on the 19th March 2006, the accused grabbed her and took her to a room in the homestead, made her lie down, went on top of her and inserted his penis into her vagina. He threatened to kill her if she told anybody about what he had done to her. In the meantime he was moving up and down on her and she felt pain in her vagina. PW1 (L) says she found the accused on top of PW3. After he finished what he was doing, the complainant reported the rape to PW1 and a certain Nothando and later to Bongekile (PW5) and to a certain Make Lapatekwane (PW6).

[4] The Police ultimately took the girl to the Good Shepherded Hospital where she was examined by a doctor and given medication. The complainant said that this was not the first time the accused had raped her. She also said that a certain Thando and Mphile had also had sexual intercourse with her before, although it was confirmed that this happened a long time before this incident, hence they were not charged. Bongekile (PW5) heard about the rape from Nothando and she told Make Lapatekwane (PW6) who interviewed the children and later inspected their private parts and formed the impression that they had been tampered with sexually.

[5] The children were PW1 and PW3. This led to the two being taken to hospital. Lindelwa (PW1) confirmed that on the 19th March 2006, while she was cooking, she saw the accused take N (PW3) into a room. She followed the two and saw the accused instruct PW3 to remove her panty and lie down. He then inserted his penis into her vagina and made movements on top of her. After the sexual act the accused told the two of them not to tell anybody. While the accused was raping PW3, PW1 says he was not aware that she was watching.

[6] PW6, Yvonne Mumsie Tfungi also known as Make Lapatekwane is a social worker within the community where the two complainants live. She is also a counselor and community police woman. On the 27th March 2006, she says that PW5 came to her home with PW3 (N). PW3 told her that the accused had raped her. She was crying. Apparently PW3 and PW5 are orphaned and PW6 has assumed responsibility over the children as a concerned neighbour. On hearing about the rape she reported the matter to the accused's grandmother. When confronted, the accused became uncooperative, so the matter was reported to the police and ultimately the girls taken to hospital. She confirmed having inspected the children's private parts and finding signs of sexual interference.

[7] PW7 Sergeant Wilson Vilane received the report of the two rapes on the 27th March 2006 and duly arrested the accused. He handed him over to PW8, Constable Detective Tengetile Vilakati, the Domestic Violence and Sexual Offences expert at Siteki Police Station PW8 says that she questioned the two girls. This was on the morning of the 28th March 2006. As a result of her questioning the two girls she referred them to a medical doctor at the Good Shepherd Hospital.

[8] PW1, L M, gave evidence to the effect that in March 2006 she was at her homestead with the accused when he called her into her grandmother's house. When they got into the house he forcefully removed her panty and took off his underpants and trousers. He made her lie on the floor, went on top of her and inserted his penis into her vagina and made up and down movements. When he finished they dressed up and went outside where they met Tholaphi Sifundza (PW2).

[9] PW1 told PW2 that the accused had just raped her. She also later told Nothando who told Bongekile (PW5). The events, led to PW5 informing among others, PW6 and this led to the involvement of the police. PW2, Tholwaphi, gave evidence to the effect that on that day she had actually seen the accused raping PW1, L . They were in the accused's room. The two were not aware that she was watching them. She says that she did not say anything and also confirmed that the elders were not at the homestead. She was ultimately part of the people who gave their version to the elders.

[10] The two girls were referred to PW4, Doctor Duvai Mukuvisi a qualified medical doctor who is based at the Good Shepherd Hospital in Siteki by PW8, the police officer. He deals with cases that are referred to him by the police. The doctor confirmed that on the 28th March 2006 one N Matsenjwa (PW3) was brought to him for his opinion, on the allegation that she had been raped. He concluded, after a thorough examination, that there were areas of obvious damage to the vestibule (erythematous that is bruised) and that the injuries were consistent with recent penetrative sexual abuse. Although the hymen was intact, he says, this does not mean that sexual intercourse or abuse did not take place. The

labia majora was bruised and had rugae and the labia minora was also bruised.

[12] The doctor also examined L (PW1) who was alleged to have been raped. He found that her hymen was bruised anteriorly but that it was intact. The vestibule was bruised and the labia majora had rugae. The doctor concluded that there was physical evidence of recent penetrative sex.

[13] At the close of the Crown's case, I put the accused on his defence and he elected to give a sworn statement. He did not call any witnesses to his defence. I should mention that the accused was adamant that he was arrested on the 28th March 2006. This cannot be, because the evidence of PW7 and PW8 and that of the doctor (PW4) contradicts his. For purposes of these proceedings, I believe that he was arrested on the 27th March 2006. He says that he was confronted by his grandfather and others about the alleged rapes and he told the people that it was not true that he had raped the girls.

[14] He further says that PW1 told the group that one Thando used to have sexual intercourse with her and PW3 in the fields. Further that PW3 told the group that Thando and one Mphile used to have sex with her at their home. The two, he says, confirmed the allegations, but said that this happened a long time ago. One Gumedze was called to the meeting and the accused says he was drunk when he arrived. He asked the two girls to say who had had sexual intercourse with them and they fingered Thando, Mphile and him, the accused. One Sfiso also wanted to know the truth and this is the man who called the police, despite the accused denying the accusations. Mphile and Thando confirmed having had sexual

intercourse with the two girls but said that it was a long time ago. He says that he does not have a good relationship with Make Tfusi (PW6) and Bongekile (PW5) and that this is why they would accuse him falsely.

[15] Regarding PW1, the accused says that she was told to implicate him by PW6. PW2 and PW1 he says were also told to implicate him by PW 8. PW3 and PW1 also lied, he says, when they said he had sex with PW3. He conceded that he did not cross examine some of the vital witnesses but says that this was because he was amazed and afraid.

[16] It is trite that in considering a charge of rape, the Court must establish if the complainant has been corroborated -see J. Rooney in the **King v Vadelman Dengo** -review case No. 843/88 (unreported), referred to by Masuku J in **Rex v Justice Magagula** case No. 330/02 page 2 where the Honourable Judge said:

"The need to be aware of the special dangers of convicting an accused on the uncorroborated testimony of a complainant in such cases must never be overlooked. Corroboration may be defined as some independent evidence, implicating the accused, which tends to confirm the complainant's testimony Corroboration in sexual cases must be directed to:

1. The fact of sexual intercourse or indecent assault.
2. The lack of consent on the part of the complainant and
3. The identity of the accused.

Any failure by the trial Court to observe these rules of evidence may lead to failure of justice. The elements of the offence that must be proved are:

- (a) The identity of the accused.

(b) The fact of the sexual intercourse or indecent assault as the case may be.

(c) The lack of consent on the part of the victim".

[17] (a) THE IDENTITY OF THE ACCUSED

In this case, the identity of the accused man is not in dispute. These are people who were growing up together virtually in the same vicinity. The two girls knew the accused well and he also knew them well. The alleged rapes took place in broad daylight so that I am convinced that this cannot be a case of mistaken identity.

[18] (b) THE FACT OF SEXUAL INTERCOURSE

The two girls were examined by the same doctor, PW4 who observed rugae or bruises on the labia majora and bruised vestibule in respect of PW1. He also observed anterior bruises on their hymen and concluded that there was physical evidence of recent penetrative sex. PW6 who examined the two girls also alluded to evidence of sexual activity or interference. Furthermore, PW2 gave evidence to the effect tht she had actually seen the accused forcing PW1, L to undress, going on top of her and having sexual intercourse with her. PW1 also said that she saw the accused taking PW3 into the house. She followed them and saw the accused having sexual intercourse with her. The doctor's evidence corroborates what the above witnesses have said in their evidence.

[19] The accused seems to be the view that since the hymens were not torn, he cannot be said to have had sex with the two girls. It is trite

that penetration, however slight, once proved is sexual intercourse with penetration. This is the case in these two allegations. I have no doubt in my mind that the two girls were penetrated and that sexual intercourse did take place.

[20] (c) CONSENT

When the two girls were allegedly molested they were 9 years old. It is settled law that a girl under the age of 12 years is incapable of consenting to sexual intercourse - this is on grounds of public policy - see South African Criminal Law and Procedure Vol. 11 P.M.A. Hunt at page 443. The two girls said that they did not give their consent, that they were threatened by the accused not to tell anybody and when they were questioned by PW6 they were crying. The witnesses who saw the accused have sexual intercourse with the two girls also corroborate the complainants. In PW1's case the accused grabbed her and took her into the house. In PW3's case he was seen by PW1 forcibly undressing her panty and having sex with her.

[21] I have no doubt in my mind that given the surrounding circumstances of these cases, the children were forcibly molested. From the accused's cross examination and his evidence, he seems to be of the view that there was nothing wrong with him having sexual intercourse with the two girls, since Thando and Mphile had said that they also had had sexual intercourse with them in the past. There is cogent evidence, even from the girls, that this was a long time ago and a one off event.

He is aggrieved that the two boys were not charged with him, but I should say that the fact that Thando and Mphile slept with them cannot be justification for him to rape the girls.

[22] In any case that was then. He is the culprit who perhaps was unfortunate to be reported to the police. Be that as it may, he stands accused, there is evidence that he did have sexual intercourse with the two girls and that they did not and could not have given their consent. It is trite law that in rape cases involving minors, the Court must caution itself against convicting wrongly. These two complainants are minors who should be proved to understand the oath and to understand the difference between telling the truth and lies. It is a fact, that at times for reasons best known to themselves, complainants in rape cases points to the wrong person as their rapist.

[23] This is particularly true with minors. But I am convinced that the two girls understand the difference between telling the truth and lies. They gave evidence in a forthright manner and were not shaken by cross examination. They were not intimidated by Court proceedings nor by the accused. I found no reason to doubt that they gave evidence voluntarily. I have no doubt that they were not influenced by anybody. I find the accused's statement that they were influenced to fabricate evidence against him an afterthought which cannot be entertained by this Court.

[24] The accused questioned the date of his arrest and said that PW7 and PW8 told lies as mentioned earlier. This cannot be true. PW8 said that she found the accused in the police cells on the 28th March when she came to work in the morning. PW7 says he arrested him the previous day. PW8 says that after questioning him she charged him and took the girls to

hospital. The girls were indeed examined by a doctor on the 28th March 2006 in the morning. I am therefore convinced that he was arrested on the 27th March, so that there is no contradiction. All other witnesses have confirmed that he was arrested on the 27th March 2006.

[25] The accused sought to punch holes in the prosecution evidence. For instance he says that Tholwaphi said that Bongekile was informed of the rape at home while Bongekile herself says that she was told about the rape on the road. I attach no importance to this, since it does not go to the root of the case. Whether the report was made on the road or at home does not change the fact that it was made, and that it led to investigations as articulated above. In reality nothing turns on this.

[26] Given the above and the totality of this case, I find that the Crown has proved its case against the accused person beyond reasonable doubt. The Crown has proved sexual penetration, without the complainant's consent. The allegation of sexual penetration was fully corroborated and I reach the inevitable conclusion that the accused is guilty as charged of rape in both Counts 1 and 2. He is accordingly convicted.

[27] MITIGATION

I ask for leniency. I intend going back to the community and helping my parents. I am sickly. I plead with the Court to consider my circumstances and give me a chance to lead a normal life.

[28] STATE COUNSEL

No submissions.

[29] SENTENCE

The accused is a relatively young man and a first offender. He was caught up in what he believed was a free for all where children one of them orphaned, were taken advantage of. The reality in this case is that these two girls were 9 years old and therefore children. The Crown *USLS* articulated other aggravating factors. In a conviction under these circumstances the minimum sentence is 9 years imprisonment.

[30] In recognition of his personal antecedents, for instance his age, and the fact that he is a first offender, I have decided to give him the minimum sentence allowed by the law. He is sentenced to 9 years imprisonment in each Count. Sentences shall run concurrently. The sentences are backdated to the 27th March 2006 when he was first arrested.

Right of appeal against conviction and sentence within 14 days explained.