IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL TRIAL NO. 230/2006

In the matter of:

REX

VERSUS

VM

CORAM ANNANDALE J MS. N.

FOR THE CROWN : THE LUKHELE IN

ACCUSED PERSON

JUDGMENT 27th JULY 2009

[1] A young girl of only ten years of age arose the suspicions of her relatives when she first disappeared and thereafter, when found and questioned, reported that she had sexual encounters with her father. The police then investigated the matter, including medical examination of the girl. Eventually, her father was arrested and charged as perpetrator.

[2] When arraigned in the High Court on a charge of rape accompanied by aggravating circumstances, he chose to conduct his own defence and tendered a plea of not guilty. During the

course of a protracted and piecemeal trial, the court heard evidence from eleven witnesses. The accused vigorously and adamantly persists with his version of being innocently prosecuted while the crown has it otherwise.

[3] The charge sheet has it that he would have committed the crime of rape by "unlawfully" and wrongfully having had sexual intercourse with a female minor aged 10, whom I shall refer to as "T", who in law was incapable of consenting thereto, "on" or about the year 2005 at or near Sibovu area in the Manzini region.

[4] Aggravating circumstances as per section 185 (bis) of the Criminal Code are alleged to manifest by the fact that the complainant was of tender age; that the accused stood *in loco parentis* over her; that she was sexually abused on a number of occasions and that the accused exposed her to sexually transmitted infections such as HIV/AIDS since he did not use a prophylactic.

[5] The young complainant testified *in camera* upon being admonished to speak the truth. She seemed to me to be quite a bright girl who well understood what was asked of her and her evidence mirrored initial impressions with her cogent replies and leaving the court with a very positive impression.

[6] Miss T. related how her father, pointed out by herself as being the accused before court, shared his house with her, following the death of her mother. She detailed two incidents on two different occasions when at night, her father came over to her bed. Both times he removed her clothes, unzipped his trousers, and put his "thing" inside her. There is no room for speculation that his "thing" which she referred to could be anything other than his penis. She experienced pain in her own private parts. On each of these two occasions her evidence is that penetration occurred, but that during another similar incident, the first and initial occasion, "nothing happened".

[7] She reported this to her grandmother who noted a yellow substance on her underwear before she washed it. Miss T. also noted a similar yellowish smelly substance emerging from her own genitalia after the incidents.

[8] The grandmother then took her to the police and thereafter to hospital, where she was medically examined.

[9] She was extensively cross examined by her father, the accused. He challenged her evidence relating to the time of death of her mother, told her that everything she said was lies and took issue with details of aspects such as the size of her bed. He endeavoured to point at perceived discrepancies, such as her

understanding of the medical examination, namely that nothing was found inside her, and the medical report which relate to infected genitalia and recurrent local trauma to her external genital organs. Her evidence that sexual penetration occurred was disputed.

[10] It was clear to me that the child felt intimidated by her father's persistent questions, also that she became tired and needed some prompting by the court at diverse occasions. Despite this, she formed a favourable and uncompromising impression upon me. Importantly, she did not concede to any suggestion of being untruthful. Nor did she depart from the substance of her evidence. She never caused the court to start wondering if she might have been prompted by someone to falsely accuse her father as the perpetrator. Her vivid recollection of frightful events remains absent from an undertone of well rehearsed imaginary, nor does it smack of any desire to take revenge and adding some or other details.

[11] The lasting impression of the child witness is that she bravely stood up to vigorous testing of the veracity of her evidence and that she succeeded with aplomb, despite her tender age and lack of sophistication. She clearly and plainly gave account of two events, each in which she succumbed to her father's unwanted and painful sexual encounters at night. Previously, he attempted to do so but he did go as far as penetration. At her age, consent

cannot be obtained even if willingly sought to be given, which was not the present position.

[12] Miss T. laid her complaint with her grandmother apparently just after the third incident. It must also be recalled that she said that during the first time, no penetration took place and precisely how long the third event followed the second, remains unknown.

[13] Caney J stated in R V C 1955 (4) 40 (NPDJ at G-H:-

"To quality for admission, the "complaint" must have been made voluntarily, not as a result of leading or suggesting questions, nor of intimidation, and it must have been made without undue delay but at the earliest opportunity which, under all the circumstances, could reasonably be expected to the first person to whom the complainant could reasonably be expected to make it".

Gogo M, (PW2) her grandmother, was the person she reported to, and she cannot be said to have delayed unduly long.

[14] In my assessment of the complainant's evidence I consciously bear in mind the useful guidelines of Diemont J in Woji v Santam Insurance Company Ltd. 1981 (1) SA 1020 (A) at 1028 A-E:

"Trustworthiness, as is pointed out by Wigmore in his code of

Evidence para 568 at 128, depends on factors such the child's powers of observations, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he had the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has "the capacity to understand the questions put, and to frame and express intelligent answers"(Wigmore on Evidence Vol.11 para 506 at 596). There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest - is there a consciousness of the duty to speak the truth? Then also

"the nature of the evidence given by the child may be of a simple kind and may relate to a subject-matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility" (per Schreiner JA in R V MANDA (supra))" [1951 (3) SA 158 (A) at 163].

[15] In the present case, the child narrated her own personal first hand experiences. She did so lucidly, signifying intelligence yet

demonstrating naiveness, and displaying an ability to narrate clearly and concisely. She followed questions of varying length and complexity. She appeared to be honest and forthcoming. She has a good recollection of past events.

[16] In England, the Children and Young Persons Act of 1933 requires under section 38 that the evidence of your children must be corroborated. Our law of evidence and our Criminal Code does not confer the same burden upon us. Nevertheless, despite the absence of laws requiring corroboration in cases such as this one, it remains a well established cautionary rule of practice in warning oneself of the dangers inherent in convicting upon uncorroborated evidence of a young child as victim in a case of rape. It is a salutary practice to avoid the risk of erroneous convictions. Corroboration of the evidence of intercourse itself, the lack of consent and the identity of the alleged offender are primary issues of corroboration by which the risk of erroneous factual findings can be reduced.

[17] As stated above, even if the complainant was a willing and eager partner in the escapades, which I do not accept to be the case, she remains a minor child, ten years old at the time, who cannot consent to sexual intercourse in any event, by operation of law. Worse still, if the male perpetrator is her own father. Even if this is negated, which it cannot be, her evidence of experiencing

pain during the event and her diminutive physical size fly in the face of consensual sex. Apart from the perpetrator, there was nobody to hear her pitiful cries that could come to court and testify about it.

[18] The next question is whether there is corroboration of her evidence of sexual intercourse, more specifically of penetration. Hunt, in South African Criminal Law and Procedure states at pages 440-441 of Volume 2 under the heading of Sexual Intercourse:

"There must be penetration, but it suffices if the male organ is in the slightest degree within the female's body and in any case it is unnecessary that semen should be emitted".

This requirement is trite law and has been applied in countless cases over the years.

[19] Doctor Neakit Kamaele is a medical practitioner with additional qualifications in the field of gynaecology and obstetrics. He has practiced since 1977, evidently an expert in his field of specialization. On the 16th March 2006 he examined miss T. and recorded his observations on exhibit "A", being a standard Police Form RSP 88, used by medical practitioners for this purpose. He was also called by the prosecution to give *viva voce* evidence at the trial.

[20] Based on his observations during an examination under general anaesthetic, he concluded that the complainant had been sexually traumatised several times. All of her external genitalia was inflamed and infected. The skin was abraded.

[21] He testified that legal and medical definitions of penetration differ. Medically speaking, there was no "penetration" as the hymen was still intact and the vagina was too small to accommodate the male organ. His evidence is that repeatedly, an object such as a penis or even a finger was used to cause bruises to the *labia majora,* the *vulva* and *fourchette.* But, that whatever the object was, it did not penetrate as deep as the hymen. Medically speaking, there was no penetration.

[22] However, it is clear from his evidence that the genitalia suffered the consequences of repeated external abuse, being bruised in the process and resulting in a discharge. In my view, this equates to at least a minimum degree of partial penetration, but I am a judge and not a doctor, let alone a specialist gynaecologist.

[23] When pertinently asked by the court if there was even partial penetration, the medical specialist answered clearly and unambiguously that "no penetration" occurred.

[24] This much is also apparent from his evidence under cross-examination in conjunction with his evidence in chief. Whichever view the court takes of the matter, it would require a substitution of the neutral evidence of a medical expert by the opinion of the court, even though based on the observations of the expert, to make a factual finding of penetration.

[25] The evidence of an established expert does not have to be blindly accepted by jurists and is not universally binding upon the judiciary. It still remains the duty of the presiding Judge to make factual findings. In the matter at hand, it is my considered view that it would be wrong to make a factual finding of penetration, even to a slight degree, in the face of uncontroverted evidence by an expert in the field of gynaecology.

[26] It is also a well established principle in our adversarial criminal justice system that if reasonable doubt exists in any particular aspect, the benefit thereof must by necessity befall the accused person and not the prosecuting authority. Presently, it cannot be found that beyond reasonable doubt, penetration had been proven by the crown.

[27] It is the consequence of this that it therefore cannot be said that the complainant's evidence regarding penetration has been corroborated. On the contrary, the factual finding that by necessity

must follow is that her evidence, on the aspect of penetration, cannot be accepted. Instead, as a result of the medical expert's evidence, the factual finding is that no penetration occurred since the crown has not been able to prove a vital element of the crime of rape, and the accused can therefore not be convicted of rape.

[28] Instead, an attempt to rape the complainant occurred and indeed on more than one occasion.

[29] The next issue which requires to be determined is the identity of the perpetrator. Again, the evidence of the complainant was sought to be corroborated by the crown in the calling of further witnesses at the trial. The crown called a further six witness in order to satisfy the evidentiary burden.

[30] The first of these was her maternal grandmother, P M (PW2). She said that in February 2006 she noticed yellowish stains in the underwear of the complainant when washing it. She also noticed that she dragged a foot when walking. That evening, she spoke with the child and asked about sleeping arrangements. When she heard that they sometimes shared the same bed she further asked the child about being abused. The child then started to cry but she did not say that any report of abuse was made to her.

[31] The following day, Miss T. did not return home after school.

That evening, she reported the disappearance to the local community police. The next day, a police officer came and took her to Sibovu Police Station, near the child's parental home, after she was found. She reported the observations which she made concerning the child's condition and the police arranged that she be taken for a medical examination at the hospital.

[32] The gist of her evidence is that she observed the suspicious looking yellow substance on the underwear of the complainant, and that after she spoke with the girl in the evening when she started to cry, she disappeared from school the next day, to be found a day later by the police, whereafter she was medically examined. Also, that the girl reported having slept in the same bed as her father and that her father kept her at his own home, on and off, after her mother's death. Importantly, at the time of the incidents, she stayed with her father, the two alone. The girl did not tell her of any sexual abuse by the accused but she concluded so from her observations.

[33] The paternal grandmother of the complainant was also called to testify. Her uncontested evidence was that in the years 2005 to 2006 the complainant lived alone with her father. This was after he took her to his own home from her mother's home, expressing his dissatisfaction with his child staying elsewhere than with himself. A police officer alerted her to rumours of her grandchild being

abused, something she had no knowledge about.

[34] The police officer she spoke of, detective constable Mdluli, was also called as witness. On the 16th March 2006, the complainant was brought to him by her grandmother, Gogo M (PW2). On receipt of a report that sexual abuse might have occurred, the girl was questioned but she was reluctant to tell the police what had happened, a common occurrence in his experience. They then took her for a medical examination at the hospital.

[35] Some two weeks later he again interviewed the girl and she then made a report to him, which he reduced into writing as her statement. He then opened an investigation on a charge of rape. He found the accused person in his home area, cautioned him appropriately and informed him that he is being investigated on a charge of rape, where after he placed him under arrest. The following day, at the police station, after again being cautioned, the accused "said something" and he was consequently formally charged with the crime of rape.

[36] The accused took intensive issue with the date when his daughter would have been taken for medical examination as well as the date of his arrest. Whichever version is to be accepted, regarding the dates, it does not detract from the uncontroversial

fact that indeed a report was made to the police officer about suspected sexual abuse, that he caused her to be medically examined at a hospital, which resulted in the medical examination report referred to above, and that the officer arrested the accused as the suspect in this case.

[37] The challenged evidence does not detract from these established facts and it does not create any uncertainty about it either. Whether the police officer heard his first report a day sooner or not and whether the accused was arrested a day later or not are peripheral issues which do not detract anything from the established facts. Insofar as the established facts are concerned, there is no credibility issue which adversely impacts on the evidence of Mdluli.

[38] The Crown also called Absolom Khumalo, a neighbour of the two grandmothers and chairman of the community police in the area. Gogo M (PW2) reported to him on the 14th Mach 2006 that her grandchild did not return home from school. The following day, he found her at the homestead of the accused, a man he had known for 10 years and with whom he gets along well. She was having a bath and preparing for school. He informed the accused of the report made to him about the child being missing, whereafter he took the accused with him and handed him over to the police. Thereafter, he related the events to PW2.

[39] The accused put it to him that PW2 placed the same events in the month of February, not March 2006, a disparity which seems correct when regard is given to the doctor's evidence as well as that of the police officer. They also have it that it was in March. However, if PW2 was mistaken about the month of the year, it is not of such material importance as to cast doubt about the credibility of PW2, P M's evidence as to whether the child indeed disappeared the day after her grandmother spoke with her about the stains on her underwear.

[40] A further challenge by the accused focused on where he was arrested. He denied that Khurnalo found him and his child at his homestead or that he was taken to the police post at Sibovu. Instead, he put it to Ndlovu that the police arrested him at "RDA". In fact, the police officer testified that the accused was arrested in the area of his homestead, at Mahlangatsha. Khurnalo replied that he does not know what happened to the accused after he was taken to Sibovu police post, that he cannot take issue with wherever the accused was actually arrested but he maintains having found the girl in her father's homestead the day after she was reported as missing.

[41] When the probative value of the evidence of Mr. Khumalo is

considered in full context, even if the various discrepancies and differences of opinion were not existent, it still does not advance matters to any significant extent. The identity of the accused as being the father of the complainant remains common cause, as is the fact that she shared a house with him at the relevant time. Whether he was actually and formally arrested at point X or point Y does not detract from the fact that he was arrested, charged, and prosecuted as accused in the trial.

[42] The fourth relative of the accused to testify at the trial was his sister in law, N M (PW7). The essence of her evidence is that police officer Mdluli (PW5) would have enquired from her if she knew anything about the matter, to which she replied in the negative. Some days thereafter, Mdluli arrived at her home, accompanied by the complainant and the accused. He wanted her to take the girl to "the elders" and said that he takes the accused with him "because of abuse of the complainant". She then asked the complainant, in the presence of the police officer, as to the truth of the complaint. The response she got was in the affirmative. She then took the child to her grandparents. No elaboration of the alleged abuse was given.

[43] The extracurial statement made by the complainant to her aunt in the presence of the police officer is not admissible as evidence as to the guilt of the accused. It does not advance the

case for the crown.

[44] All factual relevant admissible evidence from PW7 is that she is the aunt of the complainant and a sister in law of the accused. During March or February 2006 she heard about the complaint against the accused, which she found surprising. Also, that she heard of the complaint from the police at a time when her father was being taken somewhere by the police.

[45] The final witness paraded by the crown was constable Mdluli of the Royal Swaziland Police (PW8). He was on duty at the Sibovu Police Post near Mankayane, on the 15th March 2006. Mr. Khurnalo (PW6) came in and handed the accused over to him as being a suspect in a rape case. He placed the accused under arrest and the investigating officer, Constable Mdluli (PW5), further handed him over to the Domestic Violence Unit of the Police. The following day, Mdluli requested him to take the complainant to Mankayane Government Hospital, which he did.

[46] Later, on the 4th April 2006, he, Mdluli and other officers went to Sibovu area where the accused was found, cautioned and arrested.

[47] Again, the only issues which the accused contested are peripheral details such as whether the complainant was taken to

the hospital on the 15th or 16th day of the month and whether the summary of evidence correctly reflected these dates.

[48] None of this took the matter any further than to re-establish that the accused and PW2 were together on the same day at Sibovu Police Station, that the complainant was taken to hospital for examination and that the accused was arrested as the suspect in this matter.

[49] After the Crown closed the case for the prosecution, the accused testified in his own defence and he also called two witnesses. As expected, he testified that he knows nothing about this case.

[50] He portrayed himself as a caring father who lovingly followed the growth of his child and who worked hard in the mines to take care of her, give her a good life and to avoid her from suffering. She moved to and fro between the different homes of her parents. When the need arose, he took her for medical care.

[51] He said that he received the child from her mother at Nhlangano to take her to stay with her grandparents, then correcting himself to say that the mother in fact took her there. This was in 2006, as he prepared to return to his work in the mines. Then, in his following breath, he said that on a certain Sunday after

church, officer Mdluli arrived at his home with the complainant. He told the officer that he did not know how the child got to his home and that she should be taken back to a different area, other than his own. When the policeman left with the child, he would have told the accused to report at the police station on Tuesday.

[52] Instead, he went somewhere else and later that afternoon the police officer again came to him. This time, he was detained overnight and interrogated the following day. He says that he then denied any knowledge of the matter said to involve sexual abuse of his child, as he now does at his trial. He maintains that "nothing happened to her".

[53] After an inordinately long delay of over a year, the accused was eventually cross-examined, and at length. He proved to be a master in sidetracking pertinent issues which is only surpassed by his blame shifting. He constantly avoided direct and simple questions by instead embarking on elaborate and irrelevant detours in his replies. He gave most feeble excuses for failing to put relevant and pertinent aspects of his defence to witnesses called by the crown and which only surfaced during his evidence under his cross-examination.

[54] For instance, his latest version is one of his mother in law being hateful of him and in her vengeance, having persuaded his

child to falsely accuse him of a most heinous crime and despicable deeds. He even went as far as actually and literally shedding tears at that stage, while in the witness stand. However, he remained unable to explain away the conclusive medical evidence, save to state that his daughter told him that "nothing happened" and that the doctor "found nothing". Equally so, he was unable to deal with unchallenged evidence of both police officers, with regard to where they found him and seeing his daughter in his house the day after her grandmother reported her as missing.

[55] He attempted to convey an elaborate but unfounded plot against him, which would also have required the police officer, community police officer and other witnesses, all acting in concert, to falsely accuse him. He could however not manage to give even a speculative reason for this complot against him. In the case of his daughter and her grandmother, he feebly said that they have it against him that he gave too much money to his beloved child, against the wishes of his mother in law.

[56] In all, he made a most unsatisfactory showing as witness. I would almost venture to say that it may be risky to ask him the time of day. His inconsistencies, unfounded allegations and slippery tongue all combine to make it a most difficult task to determine his exact defence and his versions of the reasons why he has been falsely blamed.

[57] In saying so, I remain mindful that there is no onus upon an accused person to prove his innocence. Even if his evidence is not believed by the trial court but could just reasonably possibly be true, when exculpatory, it stands to be counted in his favour. Also, "... *(i)t must never be forgotten that in a criminal case, the question is not whether the evidence is consistent with the guilt of an accused person but whether it is inconsistent with his possible innocence",* (per Leon J P in Sipho Bongani Mavimbela and others, unreported Criminal Appeal Case No. 17 of 2002 at page 8). He referred for this dictum to R v Nel 1937 CPD 327 at 330, per Davis J (as he then was).

[58] In the present matter, the evidence of the accused himself can hardly be categorized as consistent with his possible innocence and when compared with the evidence of the crown, it pales even more. The prosecution's evidence is not only consistent with his guilt but certainly not inconsistent with his possible innocence.

[59] The backbone of his defence, as I understand to be, is that the girl did not stay with him at the relevant time, also that nothing happened to her. The Crown's version is overwhelmingly evident that the girl indeed shared his house at the time. She was taken for a medical examination soon after the events. She was seen in his house in the morning before going to school by a community

policeman who was tasked to locate her. The girl's own evidence about sharing a house with her father, supported by the evidence of other witnesses, is a fact found to be proven. The contradictory evidence of the accused in this regard is rejected insofar as it is inconsistent with the evidence of the crown. His own evidence on this surfaced as an afterthought when it became convenient and necessary to counter it.

[60] His evidence of a concerted effort to have witnesses "schooled" to falsely testify against him is also rejected. Again, it came as an afterthought long after the witnesses have testified. He did not challenge their evidence along the lines of being orchestrated, concocted and with them being "schooled".

[61] One telling defect in his defensive armour was pinpointed by the crown's counsel when she asked him as to why he was not interested in at least making enquiries about the perpetrator, if not himself, when it carne to his knowledge that his daughter was "raped". Any father who cares about his young daughter to the extent that the accused portrays would most certainty have wanted to know the identity of the alleged perpetrator.

Figuratively speaking, he would have shifted mountains to find out who molested his child. The accused did not do so, even to the slightest degree. Instead, he seems rather relieved by his child's words that the "doctor found nothing". This disinterest, shying

away from such a serious issue, flies in the face of his self portrayal as a loving and caring father who puts the welfare of his child above his own.

[62] Over and above his own evidence on this last mentioned aspect, he also called a witness to confirm his "caring and protective attitude" towards his child, the complainant. Andreas Zwane is a nurse at the Mahlangatsha Clinic. Initially he was reluctant to disclose particulars of patients, understandably so due to his training on confidentiality. When he was put at ease with regard to this particular matter, he testified that the accused brought his child, the complainant, to the clinic in August 2005. He treated her for a rash all over her body. He had nothing to do with the present complaint and he did not examine her private parts. The present medical examination was done on the 16 September 2006, about one year after Zwane treated the child.

[63] The accused called a second witness, M D. She said that in the year 2005 the complainant came to her and that the accused then took her to Nhlangano by bus so that she could stay with her mother as he was to go and work at the mines. She could not remember when in 2005 this happened, save to state that it was early in summer.

[64] In cross examination, she added that she is an unmarried

"wife" of the accused since 1987 but that she has her own home. Even so, the accused is locally known to be the head of her homestead. The accused and his child stayed at her home "for quite long", a very loose concept of time. In any event, she stayed long enough to take a bath and be given a new panty, as well as to eat. She has no knowledge of the alleged incident and does not know if the child was actually taken to her biological mother in Nhlangano or if she stayed with her grandmother.

[65] Having already found that the evidence does not support a factual finding that, the act committed was that of rape but an attempt to do so, further that it was done wrongfully, without consent, the main issue yet to be decided is the identity of the : wrongdoer.

[66] On this aspect, there is the direct evidence of the complainant herself. From the relationship between the two, being that of father and child, there is no scope for a case of mistaken identity. Oftentimes, if is quite possible that one person may be seen by another for a short period of time, or even an instant, and under circumstances which are less than conducive for positive identification. It could be low intensity of light, distance, trauma or various other factors, but still, they are afterwards adamant that they do recognize the person and positively identify him. Safeguarding factors could include identification parades and such

but still, mistakes can be made even in good faith.

[67] Presently, the relationship between the two persons is altogether different. Miss T. testified that she slept in the same house as her father. He left his bed and came over to her. She heard his voice and saw his clothes. Afterwards, he went back to his bed. Nobody else was inside the house. In my view, this sufficiently eliminates the possibility of mistaken identity of the perpetrator.

[68] The issue now becomes one of credibility. Having heard and seen the complainant and having carefully considered her evidence, there is no doubt in my mind that she spoke the truth. I believe her. Also, anxious consideration was given to the possibility, as contended by the accused, that she might have been "schooled" or groomed to concoct her evidence and falsely testify against her father.

[69] That notion has already been rejected. However much favouritism one could attach to the evidence and accusations of the accused, it is so unlikely and close to impossible that even if one does not need to believe it, it even remotely could not reasonably possibly be true. When all of the evidence is holistically viewed, in my judgment, it leaves no room at all for the possibility that the witnesses could have joined forces to all point fingers at

the accused.

[70] The evidence of the accused himself does not create a suspicion of a potential wrong finding insofar as identity is concerned. On the contrary, his feigned disinterest in the complaint by his daughter, coupled with his aloofness as to who might have done it to her, rather has the opposite effect. A father whose young child has been sexually molested would leave no stone unturned to find out who did it. He would also not be complacent about a medical examination conducted on the child to the extent that the accused displayed.

[71] The only inference that could reasonably be drawn from the direct evidence of the complainant and the circumstantial evidence which fortifies it, is that beyond reasonable doubt, the identity of the wrongdoer is that of the accused before court, the father of the complainant.

[72] In *Ndlovu v The State 2000 (2) BLR at 161, Korsah JA* stated that:

"Proof of guilt beyond a reasonable doubt does not necessitate proof of guilt beyond all doubt. Where the facts are staring you in the face, to indulge in extravagant excuses for their occurrences is to take an excursion in futile mental exercise".

This salient *dictum* was cited with approval by Browde JA in unreported Swaziland case No. *6/06-Celani Maponi Ngubane* and Two *Others versus Rex at page 25.* It serves to underscore the view that I take in the present matter.

[73] All of the evidence heard in the course of this trial, with the exception of the feeble disavowals by the accused himself, clearly point to the inescapable conclusion that the father of little Miss T. succumbed to the temptation of trying to have sexual intercourse with his child. He did so on three occasions, the last being in March 2006. This is less than three months after the year 2005 ended. On the last two occasions, it was by the thinnest of technical margins that he is found to have failed to be proven to have penetrated her.

[74] The indictment asserts that the diverse occasions on which he did this were during the year 2005. Where time is not an essential element of the crime or of the defence, a leeway of three months either side of a specifically alleged date suffices for conviction insofar as the date is concerned. Presently, there does not manifest prejudice to the defence of the accused person insofar as the alleged time of the offence is concerned. Had his defence been that of an alibi, placing him elsewhere at a specific time, it might have been different, if not a defect that could have been cured by an amendment of the indictment. That imperfections in the drafting

of indictments indeed do occur is obvious when the alleged age of the complainant is looked at. I reads that she was a minor of"... three (sic) (10) years ..." an obvious typing error which was corrected at the plea stage. Likewise, it seems to me that the year should have been stated to be 2006 instead of 2005. However, I do not the extent that it results in an acquittal. If that had to be so, it would result in a travesty of blind justice.

[75] It is for the aforementioned reasons that the inevitable outcome of this trial must be that the accused stands to be convicted of attempted rape, with aggravating circumstances, and it is so ordered.

[76] Following the handing down of this written judgment, proceedings on sentence will continue ex *tempore* in open court.

JP ANNANDALE
JUDGE OF THE HIGH COURT