

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL TRIAL NO. 333/07

In the matter between:

D D

VS

REX

CORAM

MONAGENG, J

FOR CROWN

MR. M.S. HLOPHE

ACCUSED

IN PERSON

JUDGMENT 25th FEBRUARY 2009

Monageng J

[1] The accused person D D faces two counts - rape in the first count and incest in the second count. In line with the provisions of Section 185 (bis) of the ***Criminal Procedure and Evidence Act 67*** of 1938, the Crown alleges that the crime of rape was attended by the following aggravated circumstances:

1. The complainant was repeatedly raped over a long period.
2. The complainant is the accused person's biological daughter.
3. The accused exposed the complainant to the risk of contracting sexually transmitted diseases including HIV/Aids, in that no protective device like a condom was used at the commission of the offence.
4. At the commission of the offence the complainant was a minor.

After explaining his right to legal representation the accused indicated that he would conduct his own defence and proceeded to plead not guilty to both counts.

[2] The facts of the case as related by PW1, one Thoko Dzingaphi Shabangu, a 52 year old woman, are that on the 22nd March 2006 in the evening, she was at her house listening to her radio when someone banged the door to her room and ran into the house. The person turned out to be the complainant who is the daughter to the accused, a neighbour. The father of the accused entered the house running and grabbed the child and wanted to take her away from PWI's house. The child, she says looked very scared when she came to her

house and said that her father was chasing her. PW1 on seeing how scared the child was, asked the accused to let her spend the night in her house. He left, and the witness prepared bedding for the child.

[3] She left the complainant with other children to make the bedding. When she ultimately rejoined the girls, Deli, one of the children asked her to hear what the complainant had said. PW1 says that the complainant told her that the reason why she came running into her house was that she was running away from her father, because he was raping her, and that she could not go back home. They decided to go to bed and in the morning, PW1 went to see one Sicengi Dlamini PW2, a community police officer and reported the rape to her. PW2 also called some women who also heard what the complainant was saying.

[4] The complainant, she says, told the group that when the accused father rapes her he holds her mouth to prevent her from screaming. Apparently the rape had been going on for sometime. PW2 left to report the matter to the police and both PW1 and PW2 ultimately took the complainant to the police station. When describing what the father did to her, PW1 said that the complainant told her that the accused was inserting his penis into her vagina and making up and down movements on top of her. Under cross examination PW1 said that she knew that at times the complainant used to sleep behind a house at the Mahlalela homestead nearby and that at times the child spent nights at the river for a week, and also that the accused never cared for her and the child became the burden for PW1 she said the child virtually lived in the wilderness and she now realized that she was running away from what the accused father was doing to her.

[5] PW2 says that on the 23rd March 2006 the accused had earlier told her that the complainant had been missing for a week and when she told him that they should look for her, he said that he did not care about her. She was later approached by PW1 who related the events of the previous night to her. The complainant also told PW2 that she was running away from home because her father was making her lie on her back and inserting his penis into her vagina and that she would cry. Further that he was molesting her every night. She then reported the matter to the police. She also observed that the child was not walking normally. This witness confirmed that the child's mother had long left the matrimonial home.

[6] Under cross examination, PW2 said that when she was with the accused earlier, another villager one Mbuyisa, had told them that he had heard that the complainant had been raped. The accused asked her to go with him to the police station to establish if indeed it was the complainant who had been raped but she refused because she was already aware that he was the alleged rapist. A qualified medical doctor Farai Mbubah of the Raleigh Fitkin Memorial Hospital, PW3 examined the complainant on the 23rd March 2006. He observed that the child had hymenal tears and also said that the external genitalia was painful on examination. Since the vaginal examination was also painful and excruciating, he did not insert his fingers into her vagina hence he noted 0 fingers on the medical form.

[7] The complainant, he said, was mentally stable and physically well and that she said she was not sexually active and was premenstrual. The doctor could not examine her uterus since he could

not insert his fingers into her vagina, due to the pain she was feeling. He did not find semen, but concluded that the hymenal tears were probably due to sexual penetration rather than any other injury, which would have been bleeding, and further that if she had been injured other than by sexual penetration, there would have been other injuries around her genitalia.

[8] This particular case required an intermediary through which the complainant would address the Court and this was arranged. The intermediary, PW4, Mandla Native Shabangu was found to be fully qualified under **Category 2 (1) (b) of Section 223 (bis) (4)** of the **Criminal Procedure and Evidence Act**. PW4, among other qualifications, was trained as an intermediary by WILSA Swaziland and by the Judiciary and the Ministry of Education. He is also trained on children's Rights and on Child protection. He works with children aged 7 years and above. He confirmed not having discussed the case with the complainant before she gave evidence in Court.

[9] The accused did not object to the use of the intermediary. The complainant was duly warned and cautioned to tell the truth. She demonstrated and confirmed that she knew the difference between telling the truth and telling lies. She confirmed being the biological child of the accused and also that she is 14 years old and that her mother does not stay at their homestead. When the mother left the homestead, she remained with her father and her younger brother and that they were sharing a room. She was 12 years old then. She confirmed that on a number of occasions, her father would go on top of her, insert his penis into her vagina and make up and down

movements. This was painful, and when she cried he would slap her and hold her mouth.

[10] She ultimately started spending nights behind the house and in the forest to run away from the accused father. She further said that she did not consent to the sexual acts. On the last occasion, the 22nd March 2006, when she ran into PW1's house, she reported the rape to her. The following day PW1 and PW2 took her to the police. This was on the 23rd March 2006 and ultimately she was examined by a doctor. During the rapes, she said her younger brother Sicelo would be fast asleep and snoring. She further said that her father would at times come home drunk, pick her up from the floor and place her on his bed and rape her, and that he was a drunkard then. She further said that she heard that when he was arrested he was found under a guava tree.

[11] The girl's age was confirmed by PW6, her mother's sister in law. The witness says that she was present when the complainant was born on the 19th December 1995. After the alleged rape, the children were moved to her home, where they presently reside. She also confirmed that the complainant confirmed the rape that took place on the 22nd March 2006 and on other occasions to her.

[12] Detective Zwane, PW7 received the report of the rape. He was attached to the Domestic Violence, Child Protection and Sexual Offences Unit at the Sidvokodvo area, where the parties resided. When the child was brought to him, he says she was crying and told him that her father had raped her on several occasions. As she related the story, he says, she would be so emotional that she would stop talking. He says that the complainant was wearing torn clothes and looked like

she had not taken a bath in a long time. He took her to the RFM Hospital where she was examined by PW3. He later charged her father with rape and incest on the 25th March 2006 and handed over the complainant and Sicelo to PW6.

[13] This witness confirmed what the complainant related when she gave evidence in this Court. At the close of the State's case I ruled that the accused had a case to answer. I gave him his options under the law and he elected to give sworn evidence and did not call any witnesses to his defence. He confirmed that he is the biological father of the complainant and that she is 14 years old this year. He further confirmed that her mother left him with the children and never came back to the matrimonial home.

[14] He categorically denied raping the complainant and said that the complainant disappeared from home in February 2006 and that in March 2006 he went to the police station to look for her and that was when he was arrested because she had reported that he had raped her. He says that he told the police that he had come looking for the child since a certain Mbuyisa had told him that the police were holding a child at the police station, and he discovered that the child was the complainant. He further said that PW2 had told him that a certain man called Magagula had been arrested and released for rape and he asked PW2 to accompany him to the police station, but she refused.

[15] He further says that when he was arrested he told a police officer that he had had trouble with the complainant's behaviour, to

the extent that he was planning on taking her to a mental home, since he suspected that she had a mental disorder. He denied everything that the witnesses said in Court. He says that the child implicated him because she stayed with PW1 and PW2, overnight, the very people who had caused his arrest, especially since they had the opportunity to convince her to lie before they took her to the police station. He did not question the girl on the allegation she made to the effect that he used to come home drunk and he says that he forgot to. He does not remember PW1 saying that the complainant reported the rape to her. He denies being arrested in March 2006 and says that it was in February 2006, although he did not dispute it when the officers said it in Court. He also forgot to question the police officer on his evidence to the effect that the complainant had told him that the accused had raped her many times.

[16] Regarding Magagula, when he said he had been told by PW2, that he had been arrested and released for rape, he says he also forgot to question PW2 about him in Court. In answer to enquiries on his failure to question witnesses on some things they said in Court, the accused said that he suspected that the answers would be long and therefore irritate the Court. On his suspicion that the complainant probably had a mental disorder, when asked why he thought so, he said that although he holds no qualification on this, he has seen people with a mental disorder and observed their behaviour and that the complainant displayed such behaviour. Although he says that he made his suspicions regarding the complainant's mental disorder known to a police officer he could not identify the said officer. Although he confirms that the complainant did not spend the night of the 22nd

March 2006 at home, he does not know why she fabricated the story of rape.

[17] At this stage, I wish to draw the attention of the prosecution to the fact that the Court cannot convict the accused of Rape and Incest, because this would be duplicitous and therefore unlawful. The two offences should not have been charged together. They cannot even be charged in the alternative. In the event of a rape conviction, incest may be used as an aggravating factor.

[18] The Court in its consideration of the charge of rape must establish if the complainant's allegation 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 at page 2:

"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 sexual intercourse or indecent assault as the case may be.

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

[19] In this case, the identity of the accused is not indispute. The accused shared a room with the complainant and her younger brother. He was her biological father who was well known to her. They met on a daily basis when she did chores in the house. And she says that he had been raping her almost daily. I have no doubt in my mind that this is a case where positive identity is a given and it was also not challenged by the defence. Moreover PW2 also confirmed that the accused came running after the child on the night of the 22nd March 2006. She saw him and they talked, and the complainant shortly thereafter said that he had just raped her.

[20] (b) **SEXUAL INTERCOURSE.**

In this case, the Crown had to prove the fact of sexual intercourse that was alleged by the complainant. PW3, the medical doctor who examined the complainant confirmed that there were hymenal tears consistent with penetration and that the vaginal examination was painful and excruciating, so that he could not insert his fingers into her vagina during the examination. Although the laboratory test did not detect any sperms in the specimen that was lifted from her vagina, there was ample evidence of penetration, the doctor said.

[21] This evidence of the doctor goes a long way in confirming what the complainant said to PW1, PW2 and all other witnesses and what she said in Court. There is no doubt that sexual intercourse, with

penetration, did take place and this is amply corroborated by the doctor's findings. This is not a case of slight penetration but of penetration.

[22] (c) **CONSENT**

The issue of consent or absence thereof is looked at from two dimensions in this case. When the accused managed to run away from her home to PW1's house, with the father hot on her heels, she informed PW1 and her grandchildren that she had just been raped by her father. When the father came into PW1's house it took a while for PW1 to convince the accused to leave the complainant at her house. PW1 says the complainant was crying and frightened when she banged on her door and ran into her house uninvited.

[23] Someone consenting to a sexual act would not behave the way she did. Moreover, it is on record that the child had been spending some nights behind the Mahlalela house or in the forest. It emerged after this last attack, when she finally reported the matter to PW1, that in fact she was escaping the unwanted and forced sexual intercourse by her father, when she slept in the forest and behind the house. Another dimension in this case is that when she was being sexually molested by her father, she was under the age of 12 years. She was born on the 19th December 1995. This was confirmed by the accused himself, by the complainant and by Make Lukhele, PW4 who saw her mother pregnant and who was with her through the pregnancy until the complainant was born in their home.

[24] It is now settled that a girl under the age of 12 years is incapable of consenting to sexual intercourse, this is on the grounds of public policy. See South African ***Criminal Law and Procedure Vol. 11 P.M.A. Hunt*** - page 443. In this particular case, there was no argument that she did in fact give her consent, since the accused denies having sexual intercourse with her. She says she did not give her consent and given the surrounding circumstances as she described them, and as PW1 described them, it is clear that she did not and I am satisfied that this element has been proved.

[25] Having established the above, I must say that in rape cases, the Court should caution itself against reaching a wrong verdict on the basis of untested evidence. It is a fact that at times, for reasons known only to themselves, accusers point to the wrong person as their rapist. I am particularly cautious in this particular case, since the complainant is a minor. I should, however, mention that she gave evidence in a forthright manner, un-intimidated by the fact that she was addressing her father.

[26] I observed her demeanour on the television screen and she was quite impressive as a witness. She answered questions put to her by the accused in a forthright manner and I am convinced that she is a witness of truth. She was amply corroborated by PW1 and PW2, the first people she reported the rape to. These are neighbours who were not shown to harbour any ill feelings against the accused, and much as he sought to blame them for what he says is a fabrication against him by the complainant, I find them to be credible witnesses, who had no reason to fabricate evidence against the accused person. They did not contradict each other, neither did they contradict the complainant.

[27] The accused curiously suggested that he had always suspected that the complainant has a mental problem. I think this was his way of saying that as a result of that she fabricated this story. Unfortunately I cannot rely on bare allegations that one not backed by any facts. I also do not believe that he told any police officer of his suspicions and in any case, the child's reaction from the night she escaped from him to the day she gave evidence in Court points to a very normal, albeit traumatized girl. This allegation by her father is a mere afterthought that is designed to hoodwink me. Moreover the doctor found her to be mentally stable.

[28] When he realized that the net was drawing closer, the accused developed a pattern of actions to try and distance himself from the criminal offence. For instance, he does not deny that on the night of the 22nd March 2006, he followed or rather ran after the complainant to PW1's house and actually talked to PW1, and yet on the other hand, he says that the child had been missing for a week when he went looking for it at the police station. He says that PW2 refused to accompany him to the police station after they were told that Magugula had been arrested and released for a rape. PW2 says indeed she refused to because by that time, she knew that the accused had allegedly raped the girl himself.

[29] Again it is clear that this was a trail being established to try and run away from the inevitable result, flowing from the events of the night of the 22nd March 2006, when he was clearly seen by PW1 who talked to him and convinced him to let the child spend the night at her place. Again this is an afterthought on his part.

The other observation I wish to make is that the accused deliberately distorted evidence that is on record in his written submissions.

[30] In the second paragraph, he ascribes words that were not used by the complainant to her. He says:

"the complainant told the Honourable Court that after raping her she screamed for help, then Sicenge Dlamini and Thoko Shabangu came to her rescue. She claimed that I took to my heels for cover under a guava tree. She claimed that they then went to the police station to report the matter and they came back with the police and found me still under the tree, that is how she claimed I was arrested and the police officer brought a different version".

[31] This is a complete distortion of the facts, and it will get the accused nowhere. I should say it is also designed to confuse this Court. The complainant clearly never said such. Regarding the guava tree she said she was told that he was arrested under a guava tree, which turns out to be false. In my view nothing much turns on this, because it does not go to the root of the allegation of rape. The girl related what she was told about his alleged arrest under the guava tree, not what she saw.

[32] Basically, his final submissions are full of falsities and I believe that this is his way of finding an excuse, however flimsy to shift the blame from himself. He also says that I should not believe the evidence that he raped his daughter in the presence of her brother. But, this is an even younger person to the complainant, who is said to have slept and snored throughout the complainant's ordeal. It is not surprising that the accused would be raping the complainant in his

presence since he slept through the ordeal and the accused was aware of this. In any case, the complainant says that when she screamed he covered her mouth. In the result I find no basis for me to be convinced otherwise.

[33] The accused, I should say, was quite an effective cross examiner despite the fact that he was unrepresented. It is also settled that where an accused is unrepresented, the Court has an added responsibility to guide him. This does not only mean protecting him in Court procedures and processes. It means, for instance, as in this particular case, guiding him on how to cross examine, on what questions are allowed etc.

[34] This is what I did when the accused was cross examining the first witness and I ultimately intervened, not to frighten him but to guide him. After that he effectively, albeit it selectively, cross examined all other witnesses. It is now surprising that when he is confronted with his failure to cross examine witnesses on some aspects of his evidence, he turns around and says that he suspected that I would not be happy. In some instances he says that he suspected that the witness would give a lengthy answer and so irritate me.

[35] Regarding his failure to question the complainant he says that he feared asking her some questions because she is young. I should observe that again, the accused was up to his tricks when he selectively asked questions. I come to the conclusion that he did not cross examine on some crucial issues because he knew the answers the witnesses would give, which answers are inculpatory. This is

another trick he uses for his failure to cross examine witnesses and I daresay that it will not work.

[36] In totality, I find that the State has proved its case against the accused person beyond reasonable doubt. This is in respect of rape. The State has proved sexual penetration without the complainant's consent, by a fully identified accused, her father. I further find that her allegation of sexual penetration has been fully corroborated by the evidence of the doctor. PW1 and PW2 also corroborated the complainant in some material respects. Whichever way I look at this case, the inevitable conclusion I reach is that the accused is guilty of rape as charged and I accordingly convict him.

[37] **MITIGATION**

I have epilepsy - I have other children outside. Nobody is taking care of them right now. I plead for leniency in the sentence. The purpose of sentencing is rehabilitation not destruction and I plead with the Court to pass a rehabilitative sentence.

[38] **SENTENCE**

The accused man is a first offender. It is on record that he is on medication for fits. This is a 42 year old man who cannot be said not to have known what he was doing when he so cruelly violated his own blood child. What aggravates this rape is that it was not a one off transgression, but a continuous violation of a girl who had not even reached puberty, a child whose mother deserted her and her younger brother. The accused had an obligation to protect this child, to give her

love, to see her develop into an adult who would also have her own family in future.

[39] Instead, he made sure that the girl's mother ran away from the matrimonial home and from her responsibility to love, cherish and protect her child, and it is not far fetched to say that he did this in order to have the unimpeded opportunity to turn her into an adult overnight, so cruelly. The worst experience for this child is losing her innocence to her biological father, through an inhuman act known as incest. Their relationship of father and daughter renders this rape seriously aggravated. The accused can never have reason to have acted in this manner to not only his daughter, but a minor daughter.

[40] In Court he showed no remorse at all and instead added salt to injury by unashamedly suggesting that his victim / survivor had a mental problem, thus giving me the impression that he violated her because she had a mental problem and probably that she would never tell. I have taken all his mitigation into account. The fact that he has epilepsy cannot be used to ask for leniency. The doctor Mangezi said he was of sound mind. In any case there are medical facilities in prison where he is.

[41] The accused is sentenced as follows:

1. 13 years imprisonment.
2. The sentence shall be backdated to the 25th March 2006 when he was first detained.
3. Right of appeal explained.

S.M. MONAGENG

JUDGE