

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 226/07

In the matter between:

REX

APPLICANT

VERSUS

DUMISANI MATIMBA

RESPONDENT

CORAM

HLOPHE J.

FOR THE CROWN

M. S. LUKHELE

ACCUSED

IN PERSON

JUDGMENT

[1] The accused is charged with rape it being alleged that on or about or during the month of February 2006, and at or near Mafusini area, around Lomahasha in the Lubombo District, he intentionally had unlawful sexual intercourse with one S D, a girl of 4 years of age at the time. It is alleged that at that stage, the accused was already an "adult

male."

[2] It is further alleged in the indictment that the crime concerned was attended or accompanied by aggravating factors as envisaged by

Section 185 bis of the Criminal Procedure and Evidence Act

67/1938 as amended in that:-

(i) The victim was very young at the time of the alleged rape;

(ii) The victim was a virgin whose virginity was allegedly destroyed by the accused;

(iii) The victim was mentally and physically traumatised;

(iv) The accused exposed the victim to sexually transmitted infections such as HIV/AIDS, as he did not use a condom at the time of the alleged rape.

[3] Before the charge was put to him, to which he eventually pleaded

not guilty, and upon having realised that he was unrepresented, I took it upon myself to explain to the accused his rights including how the hearing was to be proceeded with, and how he was to deal with Crown witnesses including what aspects of their evidence he had to deal with in questioning them, and in explaining his position or even putting his case to them.

[4] The Crown led five witnesses in proving its case. These were PW1 the Doctor who examined the complainant Joyce Mareverwa; PW2 the mother of the Complainant, Sisana Matimba; PW3 Mirriam Matimba the grandmother to both complainant and accused; PW4 the complainant, S D; 4577 Detective Constable Sebenzile Maziya, the investigating officer.

I may also highlight that owing to the age of the Complainant, an intermediary Thabisile Matsebula was appointed to assist her and the Court. Her appointment came about after this Court was satisfied of her qualifications and suitability to do so. Otherwise the evidence of the Complainant was delivered via the video installed for such

purposes in the Court specially designed for such matters, namely Court D.

[5] PW1 stated that she was a Paediatrician whose daily duties involved dealing with children who needed medical care and attention. She said she obtained her first Degree in 1986 and has been doing the said job for over 20 years. She further stated that she has been in Swaziland since 2005 and was based at Good Shepherd Hospital in Siteki.

[6] On or about the 24th February 2006, and whilst at work, she was requested by the Lomahasha Police to examine the complainant who had her age recorded as 4 years then. From this examination she was able to prepare a Medical Report, which was handed in by consent and marked exhibit "A".

[7] In carrying out her said examination she found her genital organs to be inflamed and bruised. Her *labia minora* was bruised whilst her

vestibule was inflamed. Her hymen was broken. She observed a whitish-yellowish discharge inside her private part. The examination exercise was painful to the complainant. Her vagina could allow in one finger. Her orifice was bigger than that of a normal child her age.

[8] Following the foregoing observations including the fact that she found her vagina to be distorted and inflamed, she formed an opinion that she had been raped about a week earlier.

[9] The accused chose not to put any questions to this witness; advising that there was no need for him to do so as the Doctor had not implicated him.

[10] PW2, Sisana Matimba stated in her evidence that she was the mother to the complainant and a paternal aunt to the accused who was her brother's son. In February of 2006 she says she was working at Tambankulu Estates where she resided and would occasionally go home. On one of such occasional visits home she learnt that her

daughter, the Complainant, who was then four (4) years of age, was sexually abused. She proved that her said daughter was 4 years through producing a birth card of the said complainant which showed that she was born on the 13th September 2001.

[11] She says that on the day of her arrival at home they had closed at her work even though she could not recall the exact date save that same was after the 14th February 2006. She says that on the evening of the said date she was to sleep with her two children namely S D, the Complainant, and her son, S D who was younger than the complainant. When they went to sleep, the complainant slept on her back facing upwards with open legs and bent knees which she found to be strange. Notwithstanding her attempts at correcting her position the child insisted on it.

At night the child insisted on going to urinate on a number of occasions but when taken there she would urinate in small pints at a time and complained of pain on her private parts. She says that she tried on several occasions to find out from the child what happened without

much success as she would not disclose anything to her.

[12] On the next day she decided to bath the Complainant after doing her washing. When she tried to bath her on her private parts the complainant cried and said it was painful. When she asked her what had happened, she broke the news that she had been injured by the accused when he had sexual intercourse with her. She then went to tell her mother on her return home from the river where the bathing took place.

[13] She said she then called the accused to talk to him whilst she was with her youngest child S D. She says she enquired from the accused why he had sexually abused or slept with her child. She says the first time he denied having done so; the second time he insisted in his denial enquiring if she thought he could do such a thing. She says that when she asked him the third time he said "Aunt I am sorry; I will not do it again," effectively admitting that he had had sexual intercourse with the minor child.

[14] She says she asked him if he knew that he could spend many

years in prison for such an act to which he reiterated his being sorry and that he would never do it again. She said this he said to the three of them as described above.

[15] She then telephoned her elder brother Jabulani Matimba and informed him about the matter. The latter advised her to lay charges against the offender in keeping with the law which she subsequently did.

[16] She took the child to the Good Shepherd Hospital where she was asked to report to the Police first. After her reporting to the Police, they were taken to Good Shepherd Hospital where the child was examined by a Doctor they found there. She was asked why she had delayed reporting the matter. She said she was not able to ascertain when the abuse had occurred but had learnt that same had occurred on the day her mother had left the children with the accused to look after them when it was raining.

[17] She says prior to this discovery she had a good relationship with the accused, which however soured after the said discovery.

[18] She claimed not to know what eventually happened to the accused given that she was not staying at her home.

[19] Under cross examination from the accused, this witness maintained the foregoing position, including maintaining that the accused had asked for forgiveness for his having sexually abused her daughter. It is important to note that the accused had not specifically denied this damning evidence against him nor did he challenge it, notwithstanding his having been advised by the Court earlier on what aspects of the case he was expected to deny or explain or challenge including how to do it.

I was impressed with the evidence of this witness and her demeanour as she appeared to be sincere in her evidence and I found her to be credible.

[20] The third Crown witness was Mirriam Matimba, PW3, who stated under oath that she was the grandmother to both Complainant and the accused. She said that she stayed with three people namely Dumsani Matimba accused, S D Complainant and S D the youngest child and brother to Complainant. She said that as she works at a nearby pre-school, she used to go there with the two minor children, S and S everyday.

[21] On a certain day in February 2006, she left the children in the care of Dumsani (the accused) as it was raining. Nothing was reported to her on her return but she was to later learn from PW2 Sisana Matimba, that the complainant, who at that time was four (4) years of age, had been sexually abused allegedly by the accused.

[22] She claimed to have at some stage examined the child and discovered that she indeed had been raped because her vaginal orifice was much bigger than that of a child of that age which she said was known to her. She had also noted that the child's private parts were

extra ordinarily wet (bekancinca).

[23] She said she had confronted the accused and enquired a number of times why he had sexually abused her grand daughter including warning him of the prospect of a lengthy jail term for his conduct though the accused had denied having raped the child.

[24] She said she had no doubt that the accused was the one who had raped the Complainant because he was very disrespectful to her and was generally troublesome.

I comment that this would be a very strange way of attributing guilt to the accused, particularly when considering the charge the accused was facing which requires application of the cautionary rule. I have no doubt that had this been the only instance to connect the accused with the offence, or even rely upon as corroboration, the accused would have had the benefit of the doubt accruing to his favour.

[25] Under cross examination, the accused denied having attended

any meetings called by this witness (PW3) where he was asked about raping the Complainant. Further, when asked if Sisana (PW2) was present in those meetings she answered that she was not.

This witness was not impressive at all and I found her to be evasive and unreliable in her testimony and perhaps understandably when one considers her position towards all the role players in this matter as the head of the family.

[26] The fourth Crown witness was the Complainant whose evidence had to be given under a conducive environment owing to her age. This was done when the appropriate Court Room, Court D, was secured, in which a video was used to view her whilst she remained in a specially designed office under the assistance of the intermediary referred to above, Thabisile Matsebula.

[27] I must clarify at this stage that the intermediary was introduced in Court as such and she took the oath. She spelt out her qualifications in that regard including her experience which in all satisfied me of her

suitability to assist the Court as such. Importantly she understood that in executing her duties she had to be honest and trustworthy.

[28] At the commencement of her evidence and even before she could have an affirmation administered, the Complainant answered a number of questions directed at her, which sought to establish if she could comprehend the proceedings including her duties as a witness and whether or not she understood the significance of not telling the truth including the danger of not telling it as well as distinguishing between telling lies and the truth.

[29] With the way she answered such questions, including her demeanour which was lively; I was convinced that she understood the significance of telling the truth including her ability to distinguish between the two.

[30] In commencing her evidence after affirmation, the witness stated that she was in Court to talk about Dumisani's matter, which was that he "raped" her. She said he did that when on a certain day, he uplifted

her; put her onto a bed at a room or hut called e-telephone where he inserted his urinating organ into her urinating one. She said Dumsani told her not to tell anyone about that. After inserting his urinating organ she said, he started making movements or motions sideways (stirring). She said he was on top of her having caused her to lie on the bed facing up including removing her panty. She referred to this occurrence as "rape." She says he had been wearing a BVD under wear and a skipper but had undressed when he "raped" her.

[31] She said when the said "rape" occurred, it was painful and that she cried. Although the incident, according to her, occurred when she was five, she was, three years later, able to narrate convincingly how the whole incident occurred, including being able to recall the events. Given the amount of time it took for the matter to be heard in Court vis-a-vis the incident itself, certain minor or immaterial discrepancies could not in my view be avoided. Indeed I can say I noted such discrepancies which as stated were immaterial.

She said that other than Dumsani, no one else "raped" her. She says

she told her mother about the incident when she bathed her, whom she told was causing her pain including telling her because of Dumsani. She says her mother eventually went to the hospital and subsequently to the Police. The Police, she said, took her to Hospital. She said in hospital she was attended to by a female Doctor.

[32] She said when Dumsani inserted his urinating organ into hers; he had not covered it with anything or had put nothing on it. I must point out that she had already said the accused had not put on a condom, but when asked if she knew what a condom looked like, she picked up the doll next to her and said a condom looked like that.

It was then that the question was rephrased to whether or not he had covered his urinating organ with anything to which she answered in the negative.

[33] Under cross examination, the accused called the Complainant by her nickname "Tamati" and asked if she could tell whom she was

talking to, obviously by asking her that he wanted to know if she could tell, owing to the fact that where she was, the child could not see the people in Court except hearing them. The Complainant clarified that she could tell that she was talking to Dumsani. She was asked if what she had said is what happened to her or what she had been told to say to which she insisted that what she said was what had happened to her.

[34] She said she could not remember when the said incident allegedly occurred. It was again put to the witness if anyone had not told her what to say in court to which she answered that she was speaking about what had happened to her.

The question was thereafter put differently to say:-

"Can you deny if I say someone told you what to say?" to which she answered: - "There is somebody."

[35] It is important that I record at this stage firstly that the question put to her did not divulge who allegedly told the witness what to say in Court (as suggested by the question that such person was known to accused) nor did it disclose the exact particulars of what the witness had allegedly been told to say given the various allegations she had already made in Court. Furthermore it was not being clarified what the basis of the question that the witness had been told what to say were as it suggested the accused knew of the witness being told as a matter of fact. To this extent there can be no doubt that such a question was unfair.

[36] It suffices at this stage to reveal that the accused closed his cross examination of the Complainant as soon as the answer quoted above (that there was somebody; was given) which was even not consistent with a natural answer to the question asked.

[37] Under re-examination the Complainant was asked a direct question if what she said about Dumsani inserting his urinating organ

into hers had been told to her by anyone. Her answer was that no one had told her to say that. A follow up question was to enquire if what she said happened to her, did happen to her; to which she emphasised that what she said happened to her did. She went on to say it was during the day when the accused lifted her up and placed her on the bed at e-telephone and went on to "rape" her according to her, by inserting his urinating organ into hers. She clarified she already knew Dumsani by then.

[39] In my view this witness's evidence was impressive. Her age and the passage of time between the occurrence of the incident Complained of and the hearing of the matter in Court could not deter her. She answered the questions put to her in a forthright and frank manner. Whatever discrepancies there were in her evidence, none of them can realistically be said to be material.

[40] The next Crown witness was PW5, the investigating officer, who introduced herself as 4577 Detective Constable Sebenzile Maziya.

[41] She said that she was the investigating officer in the matter and is currently based at Siphofaneni Police Station although in February 2006, she was based at Lomahasha Police Station. She said during that month and year she met Sisana Matimba who was in the company of a minor child, who she was caused to meet and assist as a domestic officer. Sisana Matimba was complaining that her daughter had been forced into sexual intercourse.

[42] She made an arrangement to see a gynaecologist at Good Shepherd Hospital who she could not find on that day and therefore postponed the exercise to the next day. The next day she said she proceeded to Good Shepherd in the company of her colleague Sabelo Dlamini, where the complainant was examined by the Doctor and given some medication. The Doctor recorded her findings or observations in the Police Form called RSP 88. It can be clarified that Exhibit A, the Medical Report does bear the inscription RSP 88 on its top right hand corner.

[43] She said she carried on her investigations and on the 14th May 2007, whilst investigating a robbery case she got a tip off that the accused was in the area and proceeded with her colleagues to arrest him.

[44] When asked why it took her over a year to arrest an accused person who had been reported to her more than a year ago, she respond by saying that she had attempted on several occasions to effect the arrest but could not do so and went to indicate that there were attendant difficulties with doing so as she got to know that it was a family matter without elaborating what she meant.

[45] Under cross examination it was put to this witness by the accused that it was not true that it took her a year to investigate him because no one had ever investigated or enquired about anything from him.

[46] After this witness the Crown decided to close its case which led to the Defence having to commence its own; after I was convinced that a

prima facie case had been made against him. . This stage of the matter was explained to the accused particularly that he could choose whether to give evidence or not to do so in his defence. That if he chose not to do so, he could close his case; but that if he chose to give evidence he could do so under oath or could just talk from where he was without taking an oath. That if he chose not to give evidence under oath, he would not be cross examined but such evidence is accorded lesser weight unlike that where he would have given evidence under oath. If he however gives evidence under oath, he would be subjected to cross examination and such evidence is accorded more weight.

[47] The accused chose to give evidence under oath. In his evidence he stated that on the 23rd February 2006 he had woken up as early as 0430 hours that morning and gone with the boys from the neighbouring Matsaba homestead to obtain firewood which they used to sell. When he returned home, the others, namely Mirriam Matimba, Siphokazi Dlamini and Simakahle Dlamini, had not yet returned which they did a little while later. After them he said there was to arrive

Sisana Matimba, the complainant's mother.

[48] He says he followed the same routine as above stated the next day except that on his return he found "PW2" and the Complainant not present at home. He says he did not enquire from them as to where they had gone to except that in February of the next year 2007, he was arrested.

[49] On that day of February 2007, he says, PW5, Detective Constable Sebenzile Maziya came by and told her whilst at the Matsaba homestead that he was under arrest for the rape of the complainant.

[50] He then stated that Sisana had not told the Court the truth in her evidence. He said although it was true that she and Sisana had met, she had told lies about the particulars of such a meeting. She said at the said meeting only him, Sisana and Simakahle were present. He says he was then asked by Sisana, why he had raped her daughter (the Complainant), which he says he denied ever doing

notwithstanding such question having been directed at him a number of times.

[51] I pause at this stage to comment that Sisana had stated in her testimony that she had had a meeting with the accused in the presence of the minor child who she was holding. She said she had thrice asked him, why he had sexually abused her daughter to which he had denied two times but owned up the third time and asked for forgiveness, explaining he would never do it again. As indicated the accused did not challenge that nor did he deny it. The accused had also not put to the witness as his version what he now contends, despite that his rights had been explained to him.

[52] He went on to state that Mirriam Matimba, had told the court lies as she had allegedly never asked him at any stage about raping the Complainant. He said if any need to call him had arisen, it would have been by the whole Matimba family, and not just her.

[53] On the evidence of the Complainant, he said she had lied before

Court in her evidence and had in any event admitted that she had been told to say what she did in Court.

[53] I again pause to clarify that by this admission he is referring to the general response by the witness referred to above, notwithstanding that the Complainant had prior thereto, and whilst answering specific questions, maintained that, what she was saying was what she either knew or what had been done to her. My analysis on this aspect has already been set out above and need not be repeated.

[54] By way of definition, rape is the unlawful, intentional sexual intercourse with a woman without her consent. See in this regard **Jonathan Burchelli and John Milton's Principles of Criminal Law, Third Edition 2005 at page 162 as well as at page 699.**

[55] There can be no doubt from the circumstances of this matter particularly the Doctor's uncontroverted evidence, that there was sexual intercourse with a woman (girl of 4 years) in this matter. There

also can be no doubt that the said sexual intercourse was without consent when considering the evidence of the complainant who in any event is below 12 years of age, and therefore cannot legally consent to sexual intercourse. According to **John Burchell's** work referred to above, and at page 163 thereof sexual intercourse in such circumstances is always rape.

[56] The issue in this matter appears in the final analysis to be the identity of the offender or put differently whether the Crown has proved beyond a reasonable doubt that the accused is the offender.

[57] The position is now settled that in considering a charge of rape, the Court must establish if the Complainant has been corroborated. Clearly this position is further complicated by the fact that the Complainant is a minor who was four (4) years at the time, hence the need to approach her evidence with caution.

[58] In the case of **Mgcineni Mamba vs Rex Criminal Trial No. 217/07** at page 7, paragraph 15 thereof, this Court per Monageng J,

referred to the words of **Rooney J in the King vs Valdeman Dengo Review Case No. 843/08** as quoted by Masuku J, in **Rex v Justice Magagula Case No. 330/02**, which are put as follows:-

"The need to be aware of the special dangers of convicting an accused person 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 matters must be directed to:-

- 1.The fact of the 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 the 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**

The lack of consent on the part of the Victim."

[60] In **Fana Msibi vs Rex Criminal Appeal Case No. 7/2008**
(unreported) at page 2 paragraph 3, Banda JP, as he then was stated
the following vis-a-vis the caution with which the evidence of a minor
child should be approached:-

**"The Complainant was a girl of seven 7 years when the
trial began as well as when she gave evidence. The
evidence of young children should always be accepted
with caution. It has been held, however, that Courts
should not act upon any rigid rule that corroboration
must always be present before a child's evidence is
accepted. Vide the Case of Rex v Manda 1951 (3) SA**

158 and our local case of Roy Ndabazabantu Mabuza vs Rex Criminal Appeal Case No. 35 of 2002."

[61] The need for the exercise of caution when dealing with the evidence of minor children stems from the observations made overtime that there are inherent dangers in such evidence, namely the imaginativeness and suggestibility of children. I have taken into account these issues in the matter as recorded in law. **In Etiene Du Toit's Commentary On The Criminal Procedure Act and whilst dealing with Section 208 of the South African Act at page 24 - 6 of service 15, of 1995,** the following was stated.

"A trier of fact should guard, and a Trial Court is required to indicate in the reasons furnished for its decision that it has fully appreciated these dangers and duly taken account of such safeguards as there may be in the circumstances of the case."

[63] My primary concern in this regard has been to ascertain the trustworthiness of the evidence of the Complainant and I have been guided in this regard by what was stated in **Wcji vs Santam Insurance Company Limited 1981 (1) SA 1020 (A)**, which I reiterate as follows:-

"Trust worthiness, as is pointed out by Wigmore at 128, depends on factors such as the child's power of observation, his power of recollection and his power of narration on the specific matter to be testified upon. In each instance the 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 question put, and to frame and express intelligent answers."

[63] I was convinced that the Complainant was intelligent enough to observe things as can be seen from her answers to the questions posed to her on her surroundings including being able to identify the accused by his voice; and that she had good recollection from her mentioning the issues confirmed by the evidence of the other witnesses as well as her ability to narrate events as deciphered from how she answered questions directed at her including her ability to maintain her previous position under cross examination.

[64] There can be little doubt that there was proof beyond a reasonable doubt that sexual intercourse had taken place. The Complainant did not only vividly describe this fact but the Doctor who examined her established this fact beyond any reasonable doubt as can be seen from Exhibit "A", the Medical Report.

[65] The lack of consent by the Complainant is also not only established by the Complainant when she said she was lifted up by the

accused against her will and caused to lie on the bed facing up by him when he inserted his urinating organ into hers but is also established by the fact that owing to her age she could not consent in law as was emphasised by **Steyn JA in Mandla N. Matsebula vs Rex Appeal Case No. 6/2002**, (unreported) when he stated on the opening paragraph that

"The Appellant was charged and convicted in the High Court on a charge of rape. The Complainant was a young girl, 9 years of age, and as such was incapable of consenting to sexual intercourse.

See also the authorities cited above on the same point at paragraph 55 of this judgment.

[66] On the central question, whether the Crown did prove beyond a reasonable doubt that the accused was the person who raped the Complainant, I have no hesitation; this has been done by the Crown. The Complainant, without any hesitation, told the court how the

accused who was known to her, (and I would add so known to her that she could even tell from his voice without seeing him in Court, notwithstanding having not seen him for over two years whilst in custody awaiting trial) uplifted her and caused her to lie facing upwards on the bed at e-telephone room, and inserted his urinating organ into hers and started movements or motions (wanyikitisa) whilst lying on her.

[67] I have no doubt that on the trustworthiness of this witness I was entitled in law to come to the conclusion I have as expressed hereinabove after exercising the necessary caution. I have however been bolstered in this position by the evidence of PW2 the mother of the Complainant and natural aunt of the accused when she said that the accused admitted to her having sexually abused or raped the complainant, and undertook never to do it again after asking for forgiveness including his having expressed his being sorry. This was never challenged by the accused.

[68] I will state that despite that the demeanour of PW2 was consistent

with that of a truthful witness, when considering the forthrightness with which she gave her evidence, my stance on her credibility was confirmed by the fact that the accused was her biological nephew with whom it was common cause they had good relations prior to the discovery of the incident. There clearly would have been no reason for the said PW2 to maliciously implicate the accused as having admitted raping Complainant to her. It shall be noted accused himself could not suggest any such reason.

[69] As stated above, I have come to the conclusion that the Crown has proved the case against the accused beyond a reasonable doubt and I find him guilty as charged.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 17th
DAY OF FEBRUARY 2010.**

N.J. HLOPHE

JUDGE

