



**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CRIMINAL TRIAL NO. 261/2012**

In the matter between:

**REX**

**VS**

**NTANDO BHEKUKUSA DLAMINI**

Neutral citation: *Rex v. Ntando Bhekukusa Dlamini (261/2012) [2014] SZHC 375 (2013) 22<sup>nd</sup> October 2014*

**CORAM**

**M.C.B. MAPHALALA, J**

**Summary**

*Criminal Law – Rape and in the alternative Incest – accused charged with the rape of his biological daughter – essential requirements of the offence of rape considered – accused admits sexual intercourse but pleads that it was consensual – paternity test proves that the accused is the father of the minor child – complainant denies that she consented to sexual intercourse and contends that she was passive and not resisting because she was scared of the accused – held that the Crown has proved the commission of the offence beyond reasonable doubt – accused accordingly convicted of rape.*

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**JUDGMENT  
22<sup>nd</sup> OCTOBER 2014**

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[1] The accused is charged with the crime of rape, and, it being alleged that during 2010 to June 2011 at Mdumezulu area in the Lubombo region, he unlawfully and intentionally had sexual intercourse with Gugu Dlamini, a female minor of fourteen (14) years without her consent. He pleaded not guilty to the charge.

[2] The charge of rape is accompanied by aggravating circumstances as envisaged under section 185*bis* of the Criminal Procedure and Evidence Act No. 67/1938 as amended for the following reasons: firstly, that the accused is in *locus parentis* over the complainant and he is the natural father of the complainant and thus he abused the relationship of trust. Secondly, the accused sexually assaulted the complainant repeatedly over a period of time. Thirdly, prior to the sexual assault the complainant was sexually inactive. Fourthly, there was pregnancy and birth of a child. Lastly, the accused exposed the complainant to the risk of contracting sexually transmitted infections such as HIV/Aids as he did not use a condom. The accused pleaded not guilty to the charge.

[3] In the alternative the accused is charged with the crime of incest, and it is alleged by the Crown that during the years 2010 to June 2011 at Macetjeni area in the Lubombo region the accused intentionally and unlawfully had sexual intercourse with Gugu Dlamini, a female person, whereas the

accused being by blood relationship, her father whom he was consequently legally prohibited from marrying. He pleaded guilty to this charged.

[4] PW1 Gugu Dlamni is the complainant as well as the biological daughter of the accused. She is a seventeen years of age and schooling at Little Frog Primary School in Manzini. Currently she resides at Rhema Christian Centre, a non-Governmental Organization. She testified that at the time of the commission of the offence, she resided at her parental home at Mdumezulu area with her biological father and stepmother. She pointed at the accused sitting at the dock as his biological father.

[5] She told the court that there were two houses at her parental home, one used by her parents and a one-roomed house used by herself. She testified that her father used to come to her house at night when she was asleep; he would get into her bed, undress her and rape her. When she threatened to tell her stepmother, he would intimidate her and further threaten to beat her. The door to her house could not be locked, and, she had on several occasions asked him to repair the door-lock but to no avail. He would come to her house at night because he knew that the door could not be locked. She told the court that she raped her on five different occasions, and, that she never consented to the sexual encounters.

[6] PW1 further told the court that she finally reported the sexual abuse to her paternal grandmother who in turn alerted her stepmother as well as her uncle's wife Lomathemba Mamba. Her paternal grandmother is Hlalaphi Fakudze. By that time she was pregnant, and, her grandmother noticed that she was pregnant. PW1 told her that the accused had impregnated her. She was taken to Thulwani Clinic by her stepmother where it was confirmed that she was pregnant. At the time she was schooling at Mdumezulu Primary school.

[7] She told the Court that she could not report the sexual abuse to her stepmother because of the constant threats made to her by the accused that he would beat her. Her paternal grandmother was staying in another homestead within the same area. She testified that she was also scared to tell her grandmother for fear that she would be angry with her for having sexual intercourse with her biological father. She was a virgin when the accused started sexually assaulting her.

[8] Her grandmother confronted the accused about the sexual abuse at a family meeting. Initially the accused denied the sexual abuse but he later admitted and said it was a mistake. Subsequently and on the same day, the police arrived and interviewed her. The police took her to hospital where she was examined by the doctor. She gave birth to the baby on the 10<sup>th</sup> November

2011 at Mbabane Government hospital. She doesn't know where her biological mother resides. She stays with the minor child at the Rhema Christian Centre, an apartment which was secured with the assistance of the police.

[9] Under cross-examination PW1 reiterated her evidence that the sexual intercourse between the accused and herself was not consensual, and, that each time the accused forced himself upon her, she would resist but her father would threaten to beat her. She disclosed that she was thirteen years of age when her father sexually assaulted her and that she fell pregnant when she was fourteen years of age.

[10] PW2 Hlalaphi Dlamini (nee Fakudze) is the paternal grandmother of the complainant. She is the biological mother of the accused. She testified that on the 11<sup>th</sup> June 2011, the complainant's stepmother asked her to examine the complainant as she suspected that she was pregnant. During the inspection the complainant cried, and this caused PW2 to cry as well when it became apparent that she was pregnant. On the next day the complainant returned to PW2's homestead in the company of Lomathemba Mamba, her uncle's wife. The complainant consequently disclosed to PW2 that she had been impregnated by the accused. When PW2 confronted the

accused about this issue, he said it was a mistake. The defence did not cross-examine PW2.

[11] PW3 Lomathemba Mamba is the wife to the complainant's uncle. She told the court that on the 11<sup>th</sup> June 2011, she was approached by the complainant's stepmother who told her that she suspected that the complainant was pregnant. PW3 took the complainant with her to her grandmother. The complainant disclosed to her grandmother that she had been impregnated by the accused. In the process both the complainant as well as her grandmother started crying. She maintained her evidence under cross-examination.

[12] The Forensic Report prepared by Lorraine Harris, a warrant officer in the South African Police Service and attached to the Biology Section of the Forensic Science Laboratory was admitted in evidence by consent. She is a qualified Forensic Analyst and Reporting Officer with a Bsc Honours degree majoring in Genetics. She obtained her qualifications from the University of Pretoria in South Africa. She examined DNA samples taken from the accused, the complainant and her child Philile Dlamini for a paternity test. The results were conclusively positive that the probability of paternity is 99.99%, and, that the accused was the biologically father of the minor child Philile Dlamini. The Forensic Analyst after giving evidence

submitted her findings which were in the form of an affidavit. The report was admitted in evidence and marked Exhibit 1.

[13] The Medical Report presented in Court by Dr. Asha Varghese was admitted by consent and marked Exhibit 2. The complainant had been examined by a doctor at Good Shepherd hospital on the 23<sup>rd</sup> June 2011 at the instance of the police. The doctor had been advised by the police that his was a case of an alleged sexual abuse by her father over a long period of time dating from 2010 resulting in a pregnancy. The doctor found that the complainant was twenty-two weeks pregnant (5 ½ months), and, no sexually transmitted infections were noted.

[14] PW4 Detective Sergeant Phindile Mkhabela is the police investigator in the case. She is attached to the Domestic Violence and Child Protection and Sexual Offences Unit. She testified that she was on duty when she received an anonymous call asking her to investigate a rape case at Mdumezulu at the homestead of the accused, and, that the complainant was Gugu Dlamini, a biological daughter to the accused. She found the complainant alone at her parental homestead. She took her for a drive in order to protect her. She interviewed her and recorded her statement. She was pregnant and had been schooling at Mdumezulu Primary School. From

the investigations, she found that the complainant had been impregnated by her biological father, the accused.

[15] On the following day she returned to the complainant's parental homestead in the company of another police officer by the name of Detective Constable George Dlamini. She found the complainant with her stepmother. After introducing themselves to the stepmother and explained the purpose of their visit, they took the complainant to hospital; thereafter, they took her to Rhema Christian Centre where she is currently residing. This was done for the complainant's protection and safety. The police took statements from the complainant's stepmother as well as her grandmother.

[16] PW4 further told the Court that during police investigations, they found that the accused had sexually abused the complainant on several occasions in her house during the night. When the complainant was taken to hospital the doctor had confirmed that she was already pregnant. After the baby had been born, blood samples were taken for a paternity test from the accused, the complainant as well as the baby; and, the results showed that the accused was the father of the child. The accused was subsequently arrested on the 5<sup>th</sup> August 2012, and, he was formally charged with rape and in the alternative incest. Subsequent to the arrest, the accused was taken for a



confession before a judicial officer at his instance. PW4 maintained her evidence under cross-examination.

[17] The statement made by the accused to a Judicial Officer was admitted in evidence and marked exhibit 3. The accused was brought to Magistrate Philisiwe Dlamini at the Simunye Magistrate's Court by Constable Thamsanqa Ndlovu; thereafter, the police officer left the Magistrate's office and waited at a distance. Only the magistrate, the Court Interpreter Khetsiwe Gama as well as the accused were left in the office. The magistrate cautioned the accused that he was not obliged to say anything unless he wishes to do so but that whatever he said would be recorded in writing and might be used in evidence at his trial. The accused was further advised to speak freely and with complete frankness.

[18] The accused told the magistrate that he had come to make a confession after being advised by the police, and, that the police did not make any promise or threats to induce him to make the confession. He further told the court that the police did not assault him during his detention.

[19] In his confession the accused admitted that he had sexual intercourse with the complainant on two occasions when his wife was not at home. Subsequently, he received a phone from his wife telling him that she

suspected that the complainant was pregnant. The suspicion was later confirmed by a doctor after the police had taken her to hospital. The complainant disclosed in a family meeting attended by the accused's mother that she was impregnated by the accused; and, the accused had admitted this and said it was a mistake. However, he never made the admission to his wife. In addition, he admitted impregnating the complainant when he was called at Siteki Police Station. Blood samples were taken from the accused, the complainant as well as the child at Good Shepherd hospital for a paternity test. He was arrested on the 5<sup>th</sup> August 2012, after the paternity test had shown him to be the father of the child.

[20] The confession made by the accused is admissible as evidence in terms of section 226 (1) and section 238 (2) of the Criminal Procedure and Evidence Act 67/1938 as amended which provide the following:

**“226. (1) Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible in evidence against such person:**

**Provided that such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto. . . .”**

Section 238 (2) provides as follows:

**“(2) Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons by reason of any confession of such offence proved to have been made by him, although such confession is not confirmed by any other evidence:**

**Provided that such offence has, by competent evidence, other than such confession, been proved to have been actually committed.”**

[21] When the Crown had closed its case, the accused led evidence in his defence. He told the Court that his first sexual encounter with the complainant took place in her one-roomed hut when they were both watching porn movies. Her stepmother was not at home and it was only the two of them at home. He further disclosed that his wife had no children of her own. He admitted having sexual intercourse with the complainant for the second time in the absence of his wife. According to his evidence, he would romance the complainant whilst they were watching porn movies; and, he would end up having sexual intercourse with her. He claims that

the sexual intercourse was consensual; however, there is no evidence to substantiate such allegation. He admitted committing the offence when confronted by his mother.

[22] Under cross-examination the accused failed to produce evidence that the complainant had consented to sexual intercourse. He didn't deny that the complainant had been a virgin before he sexually assaulted her. He didn't dispute the evidence of the complainant, her grandmother as well as that of PW3 Lomathemba Mamba that when the complainant disclosed that she was impregnated by her father, she had cried bitterly; and, this caused her grandmother to cry as well. Such a conduct is inconsistent with consenting to sexual intercourse with the accused.

[23] It is a trite principle of our law that in rape cases the prosecution bears the onus of proving beyond reasonable doubt three essential requirements of the offence, being the identity of the accused, the fact of sexual intercourse as well as lack of consent.

See *Mbuso Blue Khumalo v. Rex* Criminal Appeal No. 12/12 at para 28

*Mandlenkhosi Daniel Ndwandwe v. Rex* Criminal Appeal No. 39.2011 at para 8.

*Mandla Shongwe v. Rex* Criminal Appeal No. 21/2011 at para 16

[24] The complainant testified that she could not report the sexual abuse because she was afraid of the accused, and, this evidence was not disputed by the defence. In the case of *Mbuso Blue Khumalo v. Rex* (supra) at para 35 and 36, I had this to say with regard to the requirement of consent in rape cases:

**“35. In the case of *R. v. Swiggelaar* 1950 (1) PH H61 (A) at 110 –  
111 the court said:**

**If a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realizes is useless.**

**36. The Swiggelaar’s case above reflects our law because the essence of the crime of rape is that the complainant has not consented to the sexual intercourse that took place. The absence of physical resistance by the complainant does not amount to consent; the reality is that the submission may have been induced by threats of violence, fear or duress or incapacity to consent. The woman’s consent must be real and given prior to the sexual intercourse.”**

[25] There is no dispute to the identity of the accused on the basis that the accused is the biological father of the complainant and they know each

other. Similarly, there is no dispute with regard to the fact of sexual intercourse on the basis that the accused admits having sexual intercourse with the complainant. In addition the medical report states clearly that the complainant became pregnant pursuant to the sexual intercourse. The paternity test further provides evidence that the accused is a biological father of the complainant's child.

[26] Having found that the complainant did not consent to sexual intercourse with the accused, and that he is guilty of the offence of rape, it becomes unnecessary to consider the alternative count of incest.

[27] Accordingly, the accused is convicted of rape with aggravating circumstances.

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**M.C.B. MAPHALALA**  
**JUDGE OF THE HIGH COURT**

For Crown

Principal Crown Counsel  
Lomvula Hlophe

For Defence

Attorney Kush Vilakati