



**IN THE HIGH COURT OF SWAZILAND**  
**JUDGMENT**

Case No. 74/2011

In the matter between:

**THE KING**

**VS**

**MDUDUZI MAGAGULA**

**Neutral citation:** *The King v Mduduzi Magagula* [74/2011] SZHC 105 [2017] (8 June 2017)

**Coram** : **T. L. Dlamini J**

**Date heard** : **16 November 2016, 15 March 2017 and 31 May 2017**

**Date of delivery** : **8 June 2017**

**Summary:** *Criminal Law and Procedure – Accused charged with Rape accompanied by aggravating factors – Accused pleaded not guilty to the charge – Complainant unable to testify on the commencement day of the trial – Trial postponed to commence on another date whereupon complainant could not be located – Trial was again postponed but complainant could still not be located – Even the search for complainant’s mother was unsuccessful – Crown applied for withdrawal of charge.*

**Held:** *That in terms of section 162(4) (c) of the Constitution the DPP has the power to discontinue, at any stage before judgment is delivered, any criminal proceedings.*

**Held further:** *That in terms of section 6 of the Criminal Procedure and Evidence Act of 1968 as amended, the Accused is entitled to an acquittal because he pleaded to the charge – Accused is acquitted.*

## **JUDGMENT**

[1] The accused person, **Mduduzi Magagula**, stood before me charged with aggravated Rape. According to the Indictment, the accused had sexual intercourse with **Buhlebetfu Dlamini**, a female minor who was aged nine (9) years and therefore incapable of consenting to sexual intercourse in law. The crime was accompanied by aggravating factors in that the victim was a

minor of tender age; the accused ejaculated in the mouth of the complainant, and that the accused did not use a condom, hence exposed the complainant to contracting sexually transmitted infections including HIV/AIDS.

- [2] On the 16<sup>th</sup> November 2016 I asked the accused if he was advised of his rights to legal representation and he answered in the affirmative. He informed the court that due to financial constraints, he will conduct his own defence and was ready to proceed.
- [3] The charge was read and put to the accused in the language of his choice, *siSwati*. I asked him if he understands the charge and he answered in the affirmative. He entered a plea of not guilty.
- [4] The complainant was called into the witness box and she duly took the oath to be truthful. She however looked uncomfortable. She started looking uncomfortable from the moment the accused person entered the court room and the accused dock.
- [5] When counsel for the Crown began to lead the complainant in-chief, the complainant broke down in tears and cried. The court was then informed by counsel for the Crown that she learnt this morning that the complainant was also writing her end of year examinations in school. She might therefore be disturbed and traumatized, hence unable to be led in evidence. For these

reasons the court held that the trial should not continue. I ordered Counsel for the Crown to ensure that the complainant is given proper counselling by the responsible government department or unit before she comes back to court to testify. Counsel undertook to do so.

[6] The trial was to proceed on 15<sup>th</sup> March 2017 but could not. Counsel for the Crown informed the court that she was informed by the investigating officer that the complainant has relocated to South Africa and could not be located for service upon her of the notice of trial. She then applied for a postponement. The matter was therefore postponed to 31<sup>st</sup> May and 1<sup>st</sup> June 2017.

[7] On the 31<sup>st</sup> May 2017 Counsel for the Crown informed the court that the complainant has still not been located. She further informed the court that even the mother of the complainant could not be located as her cellphone number was unavailable when called. She submitted that the Crown is of the view that the mother also relocated to South Africa. She then applied for the charge to be withdrawn subject to reinstatement once the complainant is located.

[8] Section 162 (4) (c) of the Constitution Act No. 001 of 2005 gives the Director of Public Prosecutions the power to discontinue criminal proceedings at any stage before judgment is delivered. The section provides as follows:

“162. (1) .....

(2) .....

(3) .....

(4) ***The Director shall have power in any case in which the Director considers it proper to do so, to –***

(a) .....

(b) .....

(c) ***discontinue, at any stage before judgment is delivered, any criminal proceedings instituted or undertaken by the Director or any other person or authority;”***

[9] The Criminal Procedure and Evidence Act No. 67 of 1938 as amended, section 6 thereof, provides in similar terms. It provides as follows:

***“6. The Attorney-General may, at any time before conviction, stop any prosecution commenced by him or by any other person; but in the event of the accused having already pleaded to any charge, he shall be entitled to a verdict of acquittal in respect of such charge.”***

[10] On the basis of the above mentioned provisions I issued an order and declared the charge withdrawn but subject to reinstatement once the

complainant is located. I also discharged the bail conditions and ordered that the accused be refunded the money that he paid as bail.

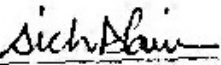
[11] Whilst in Chambers after the charge had been withdrawn in open court, I prepared to return the file to the office of the Registrar. I first went through the entries I made on the file and I noted that on the 16<sup>th</sup> November 2016 the accused pleaded to the charge and tendered a plea of not guilty. He therefore is entitled to be acquitted of the charge. I then called Counsel for the Crown to my Chambers and informed her about the accused person's right to acquittal and she concurred. I then ordered her to find the accused and come back with him to court for an appropriate order to be entered. It is for that reason that the accused is before court today.

[12] **Hull CJ**, as he then was, in the case of **Director of Public Prosecutions v The Senior Magistrate, Nhlanguano and Another, 1987 – 1995 SLR 17 at 23**, states the following in connection with section 6 of the Criminal Procedure and Evidence Act:

*“...Thus where the accused has pleaded, and thereafter the director sees fit to stop the case against him under section 6 of the Criminal Procedure and Evidence Act, 1938, the accused is entitled under that section to be acquitted.”*

[13] For the foregoing, and in substitution of the order I made on 31<sup>st</sup> May 2017, I order as follows:

1. The accused is acquitted of the charge.
2. The bail conditions imposed upon him are hereby discharged.
3. The accused is to be refunded all monies that he paid as bail.

  
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T. L. DLAMINI  
JUDGE OF THE HIGH COURT

For the Crown : Ms F. Gamedze

For the Accused : In person