



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No. 144/09

In the matter between:

REX

V

SIPHO SIMELANE

Neutral citation: Rex V Sipho Simelane [144/09] [2017] SZHC 18 (15 February 2017)

Coram: FAKUDZE, J

Heard: 26/07/2016, 14/09/2016, 20/10/2016, 23/10/2016 and
21/11/2016

Delivered: 15 February, 2017

Summary: *Criminal Law – Rape – In rape cases, Crown must prove three elements – identity of accused person as the perpetrator, sexual penetration and lack of consent by the victim – aggravating*

factors alleged – victim a minor of tender age, accused sexually assaulted victim on more than one occasion and accused stand in locus parentis to the victim and thus abused relationship of trust – accused guilty as charged.

JUDGEMENT

- [1] The accused person is charged with the offence of Rape in that between the months of August to October, 2008 the exact dates are to the Prosecutor unknown and at or near Ncandweni area in the Lubombo District the said accused an adult male did intentionally have unlawful sexual intercourse with Nontsikelelo Mavimbela a female minor aged seven (7) years who in law is incapable of consenting to sexual intercourse and did thereby commit the crime of Rape.
- [2] The Crown further contends that the offence is accompanied by aggravating factors as envisaged by Section 185 (*bis*) of the Criminal Evidence Act, 67/1938 as amended in that-
- (a) The victim was minor of a tender age;
 - (b) The accused sexually assaulted the victim on more than one occasion;
 - (c) The accused stood in *locus parentis* to the victim and thus abused the relationship of trust;

(d) The accused did not use a condom thus exposing the victim to the risk of contracting sexually transmitted infections including HIV/AIDS.

[3] I must, at the outset, point out that the last aggravating factor, that is that the accused did not use a condom thus exposing the victim to the risk of contracting sexually transmitted infections, was abandoned by the Crown. The reason was that there was no evidence establishing and substantiating that aggravating factor.

[4] The accused has pleaded not guilty to the charge. Before the charge was put to the accused the court explained his right to legal representation. He indicated that he would appear in person and represent himself. The court also warned him to listen carefully to the evidence of the Principal Witnesses so as to be in a position to cross examine them.

The Crown's case

[5] In its endeavour to establish its case, the Crown led six (6) witnesses.

PW 1 – Nontsikelelo Mavimbela

The first Principal Witness (PW1) is the complainant, Nontsikelelo Mavimbela. This complainant's evidence is that she is seventeen (17) years of age. She no longer remembers how old she was when the offence was committed. In 2008, she and her younger brother Kwanele were staying at

Ncandweni. She used to stay with the accused whom she related to him as her grandfather.

[6] Sometime in 2008, her biological mother was taken to hospital and she remained with her grandmother and the grandfather, the accused. They were all staying in one house. The grandmother and the grandfather were sleeping in their bedroom and she and her brother were sleeping in their bedroom.

[7] On the day of that alleged first rape, her grandfather, the accused person, told her grandmother that the grandfather wanted to sleep in the kitchen. The grandmother prepared the sleeping place for the grandfather. PW 1 and her brother Kwanele went to sleep in their bedroom. Whilst the complainant and her brother were asleep, the accused entered their bedroom. The complainant and her brother were sharing blankets. The accused got into their blankets and called her name. PW 1 kept quiet and never responded. The accused touched her and her brother. That is when her brother asked who was touching them? PW 1 responded by saying that it was the accused. PW 1 was sleeping facing her brother. The accused then turned her so that she could face him. When all that happened they were still in their blankets. She was putting on her panty. The accused undressed her and then inserted his penis into her vagina. PW 1 cried but not so loud because she feared that the accused would beat her. She managed to identify the accused in court.

[8] When asked as to how she saw the accused on the day of the rape, PW 1 responded by saying that there was moonlight. It was bright and since the curtains in their bedroom were transparent, she was able to see the accused. The grandmother then entered the bedroom where PW 1 and her brother were sleeping. The grandmother was carrying a lit cell phone. She asked the accused what he was doing in the children's bedroom. She further told the accused that what he was doing was criminal and might lead to him being arrested. My grandmother said that she wanted to call the police but the accused threatened to throw her cell phone in water.

[9] My grandmother then instructed me and my brother to go and call Tema's mother who was our neighbour. Her surname is Ndwandwe. At that time my grandfather and my grandmother were in the house. When we came back, we found our grandmother and grandfather quarrelling and Tema's mother asked what was happening. My grandmother responded by saying that she had found the accused in the children's bedroom notwithstanding that she had prepared a sleeping place for him in the kitchen. My grandmother showed Tema's mother the place in the kitchen which had been prepared for the accused to sleep.

[10] Tema's mother told my grandmother that it was wrong for my grandmother to allow the accused to sleep in the kitchen. She should have prepared their bedroom as a sleeping place, even if it is on the floor. Tema's mother then went to her home and after that, my grandmother warned us not to about the incident because it was a family matter. PW 1 stated that she kept quiet for

about a month and some few days. Thereafter, her grandmother was admitted in hospital. The accused came back again. He was sleeping in his bedroom and me and my brother were sleeping in our bedroom.

[11] Before my grandmother went to hospital, she had requested her sister (whose boyfriend's homestead was in our area) to take care of us. Her name is Tholekile, PW 4. On this day when the accused came back again, my mother's sister had gone to her boyfriend's homestead. Late in the night the accused came to our room. He called my name but I kept quiet. He joined us where me and my brother were sleeping. My brother asked who that was and I told him that it was my grandfather. My grandfather removed my underwear and inserted his penis into my vagina. When asked by the Crown how this witness saw the accused, she said that there was moonlight even on this night. After the act, the accused went back to his bedroom until morning.

[12] In the morning, my mother's sister came home and I told her what happened, including that the accused had inserted his penis into my vagina. My mother's sister then took me to another grandfather's homestead who is called Pelepele Dlamini. My mother's sister told them all that I had said. They took me to a community motivator and along the way they called the police. The police took me to a hospital whose particulars are unknown to me, where a doctor examined me. When PW 1 was asked if her sister's mother was aware of the first incident she said that she was not aware. PW 1 only mentioned it when narrating to her about the second incident. PW 1

stated that she did not consent to sexual intercourse on both occasions and when was asked if a condom was used during the intercourse, she said that she knows nothing about it. Before these incidents PW 1 stated that the accused had stayed with them for over a year. Their relationship had always been harmonious before the alleged rape.

- [13] The accused was given an opportunity by the court to cross examine PW 1. This was after the court had explained to him his right to cross examine a witness. The accused wanted to find out if the alleged rapes took place, how is it that PW 1 managed to wake up and go to school? PW 1 stated that she did manage to go to school. PW 1 maintained her story even under cross examination. At the end of the cross examination the Crown was given an opportunity to re-examine P.W. 1 and she was then discharged.

PW 2 – Kwanele Mavimbela

- [14] PW 2 stated that he was fifteen (15) years old, only managed to go as far as Grade 1 and that he knew PW 1 by virtue of her being her sister. PW 2 reiterated what PW 1 had said on the day the accused allegedly first raped PW 1. Their grandmother had prepared a sleeping place for the accused in the kitchen and the accused entered their bedroom and into their blankets. He managed to see the accused because there was moonlight. It came through the window. When PW 2 asked Nontsikelelo as to who was entering the bedroom and the blankets, PW 1 responded by saying that it was the accused.

- [15] PW 2 confirms that the grandmother entered the bedroom carrying a lit cell phone. She told the accused that what he was doing to the children could lead him being arrested. When the grandmother made an attempt to call the police, a fight between my grandmother and grandfather ensued. My grandmother sent PW 1 and PW 2 to go and call Tema's mother and Tema's father. Tema's mother was shown the place that had been prepared for the accused to sleep.
- [16] On the second occasion, PW 2 explained that after about one month after the first incident, their grandmother was admitted to hospital because she was ill. The accused entered our bedroom, and got into our blankets. I asked PW 1 who this was and she responded by saying that it was the accused. I then slept. When we woke up the following morning, PW 1 went to report what had happened to my mother's sister. When asked where the mother's sister was at night, PW 2 responded by saying that she had gone to Andiswa's father and had slept there. When asked where his grandmother was now, he responded by saying that she passed away. When further asked where the grandfather was within the vicinity of the court, PW 2 pointed at the accused.
- [17] After presenting his evidence, the accused was allowed to cross examine PW 2 and PW 2 maintain his story even under cross examination.

PW 3 - Sonto Nxumalo

[18] This witness gave evidence that in 2008 she was staying at Ncandweni. She knows the mother of PW 1 and PW 2 who is now deceased. PW 1 and PW 2 were her neighbours. PW 3 further stated that in 2008 she was staying at Ncandweni because that was her children's home. When asked how long she had been a neighbour to PW 1 and PW 2, she responded that from their birth. PW 3 was asked to estimate the age of PW 1 and she said that she was the same age as her daughter, Temalangi. Temalangi was born in August 2001 and PW 1's mother gave birth to her in September, 2001. When asked if PW 3 knew PW 2, she responded by saying that PW 2 is of the same age as her son. Her son and PW 2 were both born in March 2003.

[19] PW 3 explained that she knew the accused by virtue of the fact that he was in love with Sibongile Dlamini who was PW 1 and PW 2's grandmother and is now deceased. In 2008, the accused was staying in Sibongile's homestead together with PW 1 and PW 2. In the month of August, 2008, at night, PW 1 and PW 2 came to PW 3's homestead having been sent by Sibongile, their grandmother. Tema's father accompanied PW 3. When they arrived at Sibongile's homestead, they found the accused and Sibongile outside the house. The two were exchanging words. PW 3 asked what was happening and Sibongile told her that the confrontation was caused by what the accused was doing to PW 1 and PW 2 which act was unbecoming. Sibongile told her that she had prepared a sleeping place for the accused in the kitchen because he was refusing to bath before going to bed. At night, Sibongile woke up to see if the accused was in the kitchen only to find that he was in between the children's blankets. Sibongile used a lit cell phone to see where the accused

was. When PW 3 asked the accused if what Sibongile was saying was true, the accused denied knowledge of same. The accused was furious to the extent that he threatened to burn the kitchen.

[20] PW 3 then requested Sibongile to show her the place she had prepared for the accused to sleep. Sibongile showed her. She rebuked Sibongile for preparing the kitchen for the accused to sleep because it was close to the children's bedroom and it was also dark. PW 3 further told Sibongile that she could not help much in reporting the incident because she was not there when it all happened. PW 3 and Tema's father went back home. On the following day, she established from Sibongile what steps Sibongile had taken to report the matter to the police. Sibongile responded by saying that she was going to think about the way forward. This witness also identified the accused in the courtroom. It was only in 2009 when she was called to the police station where she was asked regarding the 2008 incident.

[21] On cross examination, the accused sought to establish that the cause for the quarrel was that a man had tried to call Sibongile and he picked up the phone. When the accused responded, the man on the other side kept quiet. PW 3 responded that this was the version the accused told them on that night they were called to Sibongile's homestead. Sibongile's story was what she had just told the court. During cross examination, PW 3 maintained her version of what she knew about PW 1's matter. There was no re-examination.

PW 4 – Tholekile Dlamini

[22] This witness stated that she was staying at Sibongile Dlamini's place in 2008. The accused, PW 1 and PW 2 were also staying there. The relationship between the accused, Sibongile and this witness was cordial. She had been staying at her sister's place for about two years. She then identified the accused in court. When asked to explain what happened around October, 2008 in relation to the matter before court she stated that she left Sibongile's homestead to visit her boyfriend with whom they had a child. PW 1, PW 2 and a certain Velile Tsabedze remained at home. The accused was also there. Sibongile was away because she had been admitted in hospital.

[23] When PW 4 came back the following day at about 6.00 A.M, she found the children still sleeping. The accused had gone. When they woke up, PW 1 in the company of PW 2 told her how the accused crept into their blankets, removed her underwear and inserted his penis into her vagina. PW 1 cried and the accused told her not to cry. PW 1 told PW 4 that PW 2 asked who else had joined them where they were sleeping. PW 1 responded by saying that it was the accused. After the rape, the accused told PW 1 not to tell anyone about what happened. Should PW 1 tell anyone the accused would beat and kill her.

[24] PW 1 further told PW 4 that it was not the first time the accused had raped her. She related to PW 4 the first incident that took place before her

grandmother was admitted in hospital. After PW 1 had told PW 4 what happened to PW 1, PW 4 went on to tell Pelepele Dlamini who is her uncle. PW 4 confronted the accused about what PW 1 had told her and the accused denied it. PW 1 was not there when PW 4 first confronted the accused. Later that day, PW 4 confronted the accused in the presence of PW 1 and the accused denied the allegations. He went on to threaten PW 1. PW 1 was in the presence of PW 2. Police were then called by PW 4. On cross examination, the accused put it to PW 4 that all that she was saying was a fabrication. The whole story was trumped up against him by PW 4 and her sister/aunt Sibongile Dlamini. There was no re-examination by the Crown.

PW 5 – DR. T.J. Mangunda

[25] This witness stated that he was stationed at Mbabane Government Hospital. He had been summoned by the Crown to assist in the explanation of the medical report because the doctor who compiled it had passed on. The medical report established in page 2 (opinion's section) the absence of the hymen. This was suggestive of *assertive coitus*. When asked to explain the term "coitus" he said it is an English term suggestive of sexual intercourse. The medical report was handed in as Annexure 1. There was no cross examination and no re-examination of this witness.

PW 6 – Constable Zodwa Dlamini

[26] This witness stated that she was based at Lubulini Police Station in the year 2008. She was under the Domestic Violence Sexual Offences and Child Abuse Unit. This witness further stated that on the 20th October, 2008 she

received a cell call from Tholekile Dlamini informing her that a child had been sexually abused at Sinyamantulwa. Tholekile told me that I will find her at Maja Primary School which is the school the child goes to. The witness proceeded to that place and found Tholekile together with PW 1 and PW 2. She interviewed them and then recorded statements.

[27] PW 6 then took PW 1 to Sithobela Clinic where she was examined by a doctor. On her way back to school, PW 6 heard on the police communication system that some police were patrolling in the area where the accused was. She then instructed that the accused be taken to the police station at Lubulini. On arrival there, she took the accused to her office, introduced herself to him, and cautioned him according to the Judges' Rules that he was not obliged to say anything and whatever he says would be used as evidence against him. He was also not obliged to point out anything and if he does that would be used as evidence against him. Since the accused was in a violent mood, he was then detained. On the following day he was charged and later taken to Siteki Magistrate's Court for his first appearance.

[28] When asked what PW 1 told her, PW 6 said that she had been sexually abused by the accused. It was not the first that the abuse had happened. PW 1 related to her about what happened during the first rape and the second rape. PW 6 identified the accused in court. When the accused was given an opportunity to cross examine PW 6, he put it to her that she knows nothing about the two incidents and that the whole story was a fabrication. There was no re-examination and the Crown closed its case.

[29] Before the accused gave the side of his story the court explained to him the right of the accused to call his witnesses (if any), to keep silent, make an unsworn statement or make a sworn statement. He was informed of the implication of each option. The accused opted to give evidence on oath. He also informed the court that he had no witnesses to call to his defence.

The accused's case

[30] The accused stated that he never committed the alleged offence. He is being implicated because he refused to take care of Sibongile Dlamini's children whilst Sibongile was not well. She could not fetch firewood and water. When asked who those who were implicating him were, he responded by saying that the employees of the department of social welfare were responsible. The accused further stated that the hatred was perpetuated by the fact he continued refusing to take care of the grandchildren after the death of Sibongile.

[31] The accused later changed his mind and took care of them by paying for their tuition fee. The children were doing well until there was interference from Tholekile Dlamini, PW 4. One day the accused's partner Sibongile Dlamini was sick and the accused took her to hospital. Sibongile was admitted, but later in the day, the accused received a phone call that Sibongile had been discharged. Around 6 pm, the accused went to the bus station to welcome his partner who had been discharged. On their way home, they saw fire at their homestead. One of the houses was burning. PW 1 and PW2 had hidden in one of the rooms. Tholekile was not there; the children told him that Tholekile was at Xaba's homestead. The accused

then opened a window and extinguished the fire. Him, his partner and the children went to sleep. Tholekile came back the following morning at 6 AM.

[32] The accused was preparing to take goats to the dipping tank when all of a sudden he heard Sibongile and Tholekile exchanging words. This had to do with the burnt house. I then intervened and told them to stop what they were doing. The accused then went to the dipping tank and thereafter went to grind maize. At evening, the police came to collect him to the police station. On arrival there, he was told that he had raped a minor.

[33] The accused further stated that the fracas between his partner and Tholekile caused Tholekile to start spreading rumours that he had raped the complainant. The accused was then charged and was kept at Big Bend prison for two (2) years. He thereafter instructed an attorney who applied for bail on his behalf. When he went back to her partner's place, he found that Sibongile was now living with another partner. He therefore left and went to stay at his parental home. On cross examination, it was put to the accused that the issue of the burnt house was never put to any witness. It was therefore an afterthought. When asked if Tholekile was there when the first rape occurred the accused responded by saying that she was there. She had gone to visit her boyfriend on that night. It was then put to the accused that he was lying because none of the witnesses made mention of the presence of Tholekile.

[34] In re-examination, the accused stated that the fabrication about the rape was tormenting him. The defence's case was closed and a date was set for the parties to make submissions.

Parties' submissions

[35] The Crown submitted that the evidence established that the rape took place on two different occasions. In a charge of rape the Crown has to prove three things: (a) The identity of the offender; (b) sexual intercourse; and (c) the absence of consent. On the identity of the accused, the Crown has established through the evidence of PW 1 and PW2 that the accused was the person who entered the bedroom on both occasions of the rape. The moonlight which shone through the tattered curtained window helped them see the accused. After all he was their grandfather. If there is any doubt on the identity of the accused on the first occasion, there was evidence by PW 3 about how he found accused and the late Sibongile Dlamini (the grandmother) exchanging words about something that had happened at Sibongile's homestead. Sibongile told PW 3 how she had found the accused in the children's room sleeping between their blankets. The deceased had used a cell phone light to see that.

- [36] On the second incident the evidence of both PW 1 and PW 2 point at the accused as the perpetrator of the crime. The accused used the same strategy on this occasion as well. The accused was alone at the homestead with the children since Sibongile was in hospital. On the following morning, the complainant reported the incident to her aunt, PW 4, who had just returned from visiting her boyfriend. PW 4's evidence corroborates the evidence of the complainant on her being informed by the complainant and the story being confirmed by PW 2 upon her enquiring.
- [37] On the issue that PW 1 and PW 2's evidence should be accepted with caution because they are young, the Crown submitted that trustworthiness is the determining factor. **Eric Makwakwa V Rex, Criminal Appeal No. 2/2006** is authority for this proposition. Both PW 1 and PW2 appeared intelligent and maintained their evidence on cross examination.
- [38] On the issue of sexual intercourse the Crown submitted that the complainant narrated how the rape was carried out. The medical evidence revealed that the hymen was torn but does not reveal evidence of recent intercourse due to the absence of injuries in the genital area. PW 6, the investigator, pointed out that the rape took place on Friday night and PW 6 took her to hospital on the following Monday. The matter was reported to the police after an interval of about two days. Even if there were no injuries in the genital area the medical report concluded that the lost hymen was "suggestive of assertive coitus." The Crown referred the court to the Supreme Court case of **Mfanasibili Gule V Rex, Criminal Appeal No. 03/11** which establishes that rape may be carried out without injury whatsoever to the victim.

[39] On the issue of lack consent, the Crown submitted that PW1 was estimated by PW 3 to be seven (7) years at the time of the commission of the crime. She was therefore incapable of consenting to sexual intercourse. The complainant's age was not disputed.

[40] The accused stated in his submissions that the rape allegations are a fabrication. PW 4 Tholekile Dlamini was responsible because she had a quarrel with Sibongile Dlamini over the setting alight of one of the houses by PW4 whilst PW 1 and PW 2 were inside the house. The accused stated the fabrication was also as a result of the fact that he had refused to take care of PW 1 and PW 2 when Sibongile was in hospital. The accused stated that PW 1 and PW 2 had been schooled by the police to lie about him.

APPLICABLE LAW AND THE COURT'S FINDINGS

[41] There are three requirement that must be satisfied before a conviction on a charge of rape is secured. These are that (a) the accused must be identified; (b) there must be sexual intercourse; and (c) there must be lack of consent by the complainant. See **Mbuso Blue Khumalo V Rex Appeal Case No. 12/2012** at pages 11 to 12.

[42] It is common cause that the accused was a live in lover with Sibongile Dlamini who was the complainant's grandmother. The accused has not

denied the fact that on the two occasions when the alleged rape took place, he was staying at Sibongile's homestead. There seems to be no dispute on the identity of the accused and that the complainant was about seven (7) years old when the incidents happened. She could not therefore consent to sexual intercourse. The only two matters that remain for determination is whether the accused did sexually penetrate the complainant and the credibility of the evidence by PW1 and PW2 based on the fact that they are minors.

[43] On the issue of sexual penetration, evidence was led to establish that on the first occasion, Sibongile had prepared a sleeping place for the accused in the kitchen. The accused does not dispute this. The prepared place was also shown to PW 3, Tema's mother, who was a neighbour to Sibongile and the accused. Evidence was also led to show that Sibongile used the cell light to trace the accused who happened to be in the children's bedroom and was found between the blankets. The accused does not dispute the issue of the tracing. He does not dispute that he was found in the children's room, but only states that the reason why Tema's mother was called was because he had a fight with Sibongile over a cell phone that rang that night which the accused suspected that it was from a boyfriend.

[44] PW1 and PW 2 explained how the accused entered into their bedroom and that they saw him because there was moonlight. PW1 states that there was sexual penetration and she did not scream because the accused threatened her. The first incident was not reported to the police.

[45] On the second incident PW1 was left at the homestead with her younger brother PW 2. Sibongile was in hospital and their aunt, PW 4, left them at the homestead and visited her boyfriend's place. Even on this day there was moonlight; that is how they managed to see him. The accused joined them in the blankets and PW1 states that the accused sexually assaulted her again. On the following morning the complainant reported the incident to PW 4 and further mentioned that the incident was not taking place for the first time. PW 1 told PW 4 what happened last time and that that incident was not reported to the police. PW 2 confirmed the complainant's version.

[46] Two or three days after the second incident, the complainant was taken to hospital by the police. The doctor's report, which was interpreted by another doctor because the one who did the examination had passed on, established that there was the absence of the hymen. The cause of the absence "is suggestive of assertive coitus." The term "coitus" is defined by the Learned Author, Saunders, **Medical Dictionary**, 27th Edition, as "sexual connection per vaginam between male and female." "Assertive coitus" has to do with forced sexual connection per vaginam between male and female. "Assertive coitus" can be interpreted to mean forced penetration. In the case of **Mbuso Blue Khumalo** (Supra) it was stated at paragraph 31 that -

"There must be penetration, but it suffices if the male organ is in slightest degree within the female's body. It is not necessary that the hymen be ruptured,

*and in any
be*

*case it is unnecessary that the semen should
emitted.....”*

[47] In the case at hand, the medical report shows that the hymen was ruptured as a result of forced penetration. Even though the accused refuted the sexual intercourse because there were no bruises in the complainant’s vagina to prove recent intercourse, the absence of bruises does not suggest that there was no penetration. Courts have even stated that –

“Even where there is no corroboration properly so called of the actual penetration, there may be direct and circumstantial evidence which cumulatively points in that direction and in that direction only.” See **The King v Abraham Ngwenya and Another Criminal Appeal Case No. 33/96** at page 5.

In the present case, the evidence by PW1 on penetration has been corroborated by medical evidence. There is also evidence that there was immediate reporting of the rape to someone else by PW1. In the first instance, Sibongile found the accused in the children’s blankets and in the second instance, PW1 reported the incident to PW4 the following morning. This court is inclined to therefore believe that PW1’s story is credible. See **Rex v Albert Sukulwenkhosi Nkambule, Criminal Case NO 114/7** at page 7.

[48] On the issue of PW 1 and PW 2 being minors and that their evidence should be accepted with caution, this court is guided by the principle laid down by the Supreme Court in the case of **Eric Makwakwa v Rex Criminal Appeal No. 2/2006**, where the court stated that -

“It is clear however, that the evidence of young children should be accepted with caution. The imaginativeness and suggestibility of children are only of a number of elements that require that this should be so. However, courts should not act upon any rigid rule that corroboration must always be present before a child’s evidence is accepted. The question which the court should ask itself is whether the evidence of the young person is trustworthy.”

In applying the principle in **Makwakwa’s case (Supra)**, both PW 1 and PW 2 appeared to me intelligent and trust worthy. Their power of observation, the power of recollection and the power to narrate the two alleged events of rape cannot be faulted. It is true that it has taken too long for the matter to come to court but PW 1 and PW 2 were in a position to relate the events. Their evidence was further corroborated by the evidence of PW 3 and PW 4. Even during cross examination, their version remained solid and unshaken.

[49] The accused’s response to the *prima facie* case against him is that the Crown’s version is a fabrication. He first stated in his evidence in chief that the alleged rape was first fabricated by employees of the department of

Social Welfare. Later, he changed it to say that PW 4 was responsible, reason being that PW 4 had had a fight with Sibongile his live in lover. The fight was caused by the fact that PW 4 had burnt one of Sibongile's houses. The accused further stated that the medical report would bear him out to prove that no rape ever took place. This Court is convinced that evidence has been led by the Crown to prove the identity of the accused, that there was sexual penetration and that the complainant was incapable of consenting by virtue of the fact that she was about 7 (seven) years old when the first and second rape took place.

[50] Considering all what has been said above, I am convinced that the Crown has established its case beyond reasonable doubt. I therefore find the accused guilty as charged.

A handwritten signature in black ink, appearing to read 'FAKUDZE J.', written over a horizontal line.

FAKUDZE J.

JUDGE OF THE HIGH COURT

FOR CROWN: E. MATSEBULA

FOR ACCUSED: IN PERSON



IN THE HIGH COURT OF SWAZILAND

SENTENCE

Case No. 144/09

In the matter between:

REX

V

SIPHO SIMELANE

Neutral citation: *Rex V Siphon Simelane* [144/09] [2017] SZHC 23 (16 February, 2017)

Coram: FAKUDZE, J

Heard: 15th February, 2017

Delivered: 16th February, 2017

SENTENCE

[1] The accused has been convicted of the crime of Rape. This rape is accompanied by aggravating circumstances in that the victim was a minor of about seven (7) years when the rape occurred; the accused sexually assaulted the victim on more than one occasion and that the accused stood in *locus parentis* to the victim and thus abused the relationship. These aggravating circumstances have been proven by the Crown.

[2] It is trite that courts have been implored to approach the matter of sentencing with great care. This is because there are conflicting interests that are in

issue; the interests of the individual, the interests of society and the crime itself. In the case of **Rex V Samkeliso Madati Tsela Criminal Case No. 166/2008**, His Lordship Hlophe J observed at page 3 as follows:

“When it comes to sentencing, courts world over, have repeatedly confirmed that same is a difficult task in every criminal trial. In approaching this subject, I tried to observe the triad principle consisting of balancing up the three components being those of the community, those of the accused as well as the offence itself. By so doing, I tried to avoid approaching the issue of the accused person’s sentence in the spirit of anger just as I tried to avoid falling into what judgments of this court refer to as misplaced pity.”

- [3] As concerns the interests of the accused, I took into account the following:
- (a) The accused is not well physically; he is suffering from high blood pressure and asthma;
 - (b) He was born in 1958 and at the time of the commission of the offence, he was fifty (50) years old. He is now fifty nine (59) years old. He is not therefore a young man;
 - (c) He is the bread winner in the family; and
 - (d) He has been faithfully attending all the court proceedings; he has never been contemptuous of the court.

[4] As regards the interests of society and the offence itself, I took into account that:

(a) The accused has been found guilty of a serious offence;

(b) The rape of children in the country is now prevalent as rightly observed by the Supreme Court in the Case of **Melusi Maseko V Rex Criminal Appeal No. 43/2011**;

(c) The case against the accused is not only serious, but also been aggravated by the fact that a young child was sexually abused;

(d) The victim placed her trust in the accused and this trust was abused by him; and

(e) The accused is an old man; he should be exemplary in the way he conducts himself.

[5] Sentence is pre-eminently a matter within the discretion of a trial court. See **Melusi Maseko V Rex (Supra)**. In **S V Rabie 1975 (4) SA 855 (A)** it was stated that:

“Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.”

[6] In determining the appropriate sentence, I have taken into account the following factors:

(a) The submissions by the accused in mitigation and the Crown's response to those submissions;

(b) The attempt to conduct the exercise of balancing the interests of the accused as against those of the society. I have also taken into account the seriousness of the offence;

(c) The sentencing trend that has been adopted by this court and higher courts on matters similar to the one before this court. See **Mgubane Magagula V Rex Criminal Appeal No. 32/2010**;

(d) The period the accused spent in custody prior to being released on bail. An enquiry into this aspect by this court has revealed that the accused was arrested on the 23rd October, 2008 and released on bail on the 25th June, 2009.

[7] In totality of the aforementioned factors, the accused is therefore sentenced to imprisonment for a period of fifteen (15) years. The period the accused spent in custody prior to being released on bail is to be taken into account in computing the period of imprisonment.

A handwritten signature in black ink, consisting of a large, stylized initial 'F' followed by a cursive name, positioned above a horizontal line.

FAKUDZE J.

JUDGE OF THE HIGH COURT