**IN THE HIGH COURT OF ESWATINI**

# JUDGMENT

**HELD AT MBABANE** **CRIMINAL CASE NO. 129/2020**

In the matter between:

**FRANK MAPHOLOLO MAGAGULA** Applicant

And

**THE DIRECTOR OF PUBLIC PROSECUTIONS** Respondent

**Neutral Citation:** *Frank Maphololo Magagula v The Director of Public Prosecutions (129/2020) [2020] SZHC 181 (19 August 2022)*

**CORAM:** **N.M. MASEKO J**

**FOR THE APPLICANT:** **ATTORNEY R. MWELASE**

**FOR RESPONDENT:** **CROWN COUNSEL N. MABILA**

**DATE HEARD:** **16/10/2020**

**DELIVERED:** **19/08/2022**

***Preamble:*** *Criminal Law – Rape – Elements of the crime of Rape proven by the Crown reasonable doubt – Complainant is the daughter of the Appellant and she led*

*credible and cogent evidence of the commission of the offence by the Appellant – Appeal dismissed.*

**JUDGMENT**

**MASEKO J**

[1] On the 9th May 2018 the Applicant was arrested and charged with three Counts of Rape, it being alleged in the Charge Sheet filed by the Directorate of Public Prosecutions that he had intentionally and unlawfully had sexual intercourse with his daughter (whose name I shall not mention in this judgment for her protection) during the years 2015, February 2017 and April 2018.

[2] It is common cause that when the charges were read to him at the commencement of the trial on the 20th October 2018, he pleaded not guilty. The Crown has also alleged that the charges faced by the Appellant are visited with aggravating circumstances in terms of Section 186 *bis* of the Criminal Procedure and Evidence Act which prescribe a minimum sentence of 9 years imprisonment without the option of a fine in the event of a conviction.

[3] The aggravating circumstances are the same in all three Counts and are as follows:

1. At the commission of the Rape, the Accused did not use a condom thereby putting the minor child at risk of contracting sexually transmitted diseases and infections such a HIV.

2. The victim had no consent as far as sexual intercourse is concerned.

3. The Accused person inflicted physical and life time mental trauma to the complainant.

4. Accused person is the biological father to complainant.

[4] During the trial, the Crown paraded five (5) witnesses, whilst the Appellant himself testified in his defence under oath, and also paraded the evidence of his mother and his wife.

[5] The Appellant was convicted only on Count Three of Rape when judgment was delivered on the 4th February 2020 and he made submissions in mitigation of sentences on the 24th February 2020 and was thereafter sentenced to fifteen years imprisonment without the option of a fine on the 19th March 2020 and the sentence was backdated to the 9th May 2019 the

date of his arrest. This is the conviction and sentence which the Appellant is appealing against i.e., appeal against both conviction and sentence.

**THE NOTICE OF APPEAL**

[6] The Notice of Appeal contains five (5) grounds of appeal, and it is prudent that I outline them as they appear *ex facie* the Notice of Appeal:

(1) The Court *a quo* erred in law and in fact in convicting the Appellant of the statutory offence of Rape without evidence to prove the commission of such offence beyond reasonable doubt.

(2) The Court *a quo* erred in law and in fact in returning a verdict of guilty on the charge without requiring that the complainant be subjected to medical assessment in view of the Appellant's evidence to the effect that the complainant was showing signs of mental instability.

(3) The Court *a quo* erred in law and in fact in rejecting the evidence of the Appellant to the effect that he never at any stage had sexual intercourse with the complainant but only admonished her for having sexual intercourse with the men of the area.

(4) The Court *a quo* erred in law and in fact in accepting the scientifically and/or medically untested evidence of the complainant against the Appellant to the effect that Appellant had sexual intercourse with her (complainant) without any link of DNA linking the Appellant to the commission of the offence.

(5) The Court *a quo* erred in law and in fact in not holding that a teen child in the shoes of the complainant who is experiencing puberty is more likely to grow hostile against her parents for trying to call her to order and trying to make her do the right thing.

[7] These are the grounds of appeal which form the Appellant's arguments as advanced by his Attorney Mr. R. Mwelase.

**THE EVIDENCE BEFORE THE COURT *A QUO***

[8] The Crown led the evidence of PW1 Bongiwe Vilane, a Social Worker based at Mayiwane under Mkhuzweni area. Ms. Vilane testified that she holds a BA Degree in Social Work from the University of Johannesburg and that she has been in the employ of the DPM's Office for two years where her duties among others are to assist individuals and groups on their social

needs, helps children who have been abandoned or abandoned their homes, assist and counsel victims of domestic violence and abuse.

[9] PW1 testified that at the instance of the Buhleni Police, she interviewed the complainant on the 3rd May 2018 and prepared a report on the 8th May 2018. This report was marked **Exhibit "A"** by the Court *a quo*. She testified that during the interview with the complainant, she was crying and traumatized which required her to apply her skills in counselling her and she was able to open up and talk to her.

[10] I must point out that the testimony of PW1 is extensively corroborated by the evidence of PW4, and therefore it is proper for this Court to outline the interview of PW1 and PW4 as testified to by PW1.

[11] PW1 testified that PW4 informed her that she was continually being forced into having sexual intercourse with her father against her will, and that this has been going on since the year 2015. The rape ordeal would always take place when her mother was not around home. PW1 testified that PW4 stated that she could not report that her father was having sexual intercourse with her and threatened her with death.

[12] PW1 testified that due to the gruesome details of the events as narrated by PW4, she felt the need to invoke the provisions of the Children's Protection and Welfare Act No. 6/2012 (The Act) in particular Section 23 which provides for assistance of **'Child in need of care and protection'**. She testified that it was her expert opinion that PW4 was a victim of sexual abuse by her father for a long time. Applying her professional expertise, she opined that the abuse was characterized by powerlessness, stigma, trauma, sexualization and betrayal by her father. She then made a recommendation in her report that the Children's Court acting on the basis of Section 37 (1) (b) of the Act can issue a **'Protection order'** for the child to be kept in a safe environment away from the abusive environment she is currently being subjected to pending further developments in the matter.

[13] PW1 was subjected to a brief cross-examination by Appellant in particular whereby he put it to PW1 that the report which PW4 made to her was a fabrication and thus false. Nothing much came out of this cross-examination other than a bare denial line of question by the Appellant.

[14] The Crown then led the evidence of PW2 Dr. Dziko, a medical practitioner based at Mkhuzweni Health Centre. He testified that he is a medical doctor who qualified in the practice of medicine in 2011 and has been in practice

ever since. He testified that on the 18th April 2018 he examined PW4 at the request of Buhleni Police. He testified that PW4 was 17 years of age and then commenced examining her. He noticed a heavy wound on her left knee which was due to her falling.

[15] PW2 testified that he proceeded to examine her reproductive organ and found that she was normal although there was a bruise and laceration on the hymen and it was also torn. The examination was normal with no pain or other injuries. There was also no discharge of blood or spermatozoa found. PW2 testified that he concluded that she was affected penetration of her reproductive organ. He handed into Court his report which was marked **Exhibit "B"**.

[16] PW2 was subjected to a brief cross-examination by the Appellant and nothing important came up and PW2's evidence remained intact.

[17] PW3 was Chief Jubiphathi Magagula, the elder brother to the Appellant. He testified that he knew the Appellant who is a biological younger brother. He testified that PW4 is a daughter to the Appellant and was currently staying with him at the Royal Kraal because she had run away from the Appellant's home. He testified that in the year 2014, the Appellant, whose

homestead is not far from the Royal Kraal, came with PW4 and reported that the child was troubling him as she would occasionally run away from home. He advised Appellant to let the child stay with him as she would be in the company of his two daughters who are her age-mates, and that he Appellant agreed. He testified that indeed the child started attending school with her sisters, and he at some point in time asked her why she was troubling the Appellant which made him complain, however, she was reluctant to answer his question. He testified further that after talking to her, she then opened up to one of his daughters and confided to her that Appellant was abusing her by beating her and having sexual intercourse with her hence she decided to run away from his homestead, and also that he was accusing her of having sexual relations with other men.

[18] He testified that his daughter then reported to her mother who in turn reported the sad news to him. He then called his daughter and his wife who confirmed the story, and thereafter PW4 was also called to join the meeting and she then related her sexual abuse in the hand of her father to PW3. He testified that he intended to report the matter to the police but before he could do so, the Appellant came and fetched the child from his homestead in his absence and went to the police at Buhleni. He testified that the relationship between him and his brother was very good and there was also good communication between the two as the Appellant is the one

who was staying at their parental home and would report what was happening at their parental home as he is the one who was staying at home. He stated that he last talked to the Appellant when he informed him that he had been arrested after PW4 had preferred charges against him, however, he did not specify the said charges.

[19] PW3 was also subjected to a brief cross-examination and nothing important came out of this line of questioning. I must point out though that the Appellant never put any questions to PW3 that he killed 3 herd of his cattle, and that he (PW3) fabricated evidence with PW4 to falsely incriminate him.

[20] PW4 is the complainant herself and she testified in detail about the sexual abuse ordeal in the hands of the Appellant.

[21] She testified that the Appellant is her biological father and that presently she resides at the Royal Kraal with PW3. She testified that one morning in 2015 as she was staying at Appellant's homestead and she had prepared to go to school and when she found him alone and greeted him and he then instructed her to go to his house and he followed her whereupon entering the house he closed the door and ordered her to undress all her

clothing and lie on the mat facing upwards, and he undressed himself and then continued to have sexual intercourse with her, without a condom. After he had finished, he stood up and warned her not to tell anyone about the sexual encounter and threatened her that if she did tell anyone, he was going to kill her.

[22] PW4 testified that after this sexual encounter with the Appellant she then ran away to stay with PW3 at the Royal Kraal and PW3's daughters were worried about her reserved conduct, however, at first, she didn't reveal the problem but later she opened up and confided in them, and they in turn informed their mother and their mother eventually reported the matter to PW3 who then called her and asked her about her allegations of abuse in the hands of the Appellant which she confirmed. She testified that PW3 made an undertaking to talk to the Appellant, however, after some time before PW3 could talk to the Appellant, the Appellant came to the Royal Kraal and collected PW4 to stay with him at his homestead because his mother (PW4's grandmother) was ill and also said that **"umntfwana uyatitalela ngoba akutalelwana"** meaning that "PW4 must stay with him as his biological parent because every person gives birth to his/her child and no person gives birth to a child on behalf of another".

[23] PW4 testified that upon her return to her father's homestead he again had forced sexual intercourse with her in the morning of the following day in the same manner as before. When he had finished, he again threatened her with death. Thereafter she went to wash herself and prepared to go to school.

[24] PW4 testified that after school on that day she didn't go back to the Appellant's homestead but instead went to the Royal Kraal. On the following morning the Appellant again came to the Royal Kraal and asked why she didn't come back home and that they should go home. PW4 testified that the wife to PW3 advised her to go with Appellant and that if he repeated his sexual abuse, she (PW4) must come back and report this abuse.

[25] PW4 testified that when they reached home, he took a bath and then took her to Buhleni Police Station to report that she was troubling him by not sleeping at home. The Officer called her to talk to her alone and by that time she was crying. She explained to the Officer that her father was persistently abusing her sexually without wearing a condom. She testified further that the Officer asked her if she had reported the rape to anyone, and PW4 responded that she didn't tell anyone because Applicant always

threatened her with death if she were to tell anyone. However, she informed the Officer she eventually reported the abuse to PW3.

[26] PW4 testified that she informed the police that she discussed the sexual abuse with her two half-siblings which had been continually committed by the Appellant. Since she was nine (9) years old. She testified that the Police Officer then asked Appellant to be with her for a while and thereafter the Officer took her to Mkhuzweni Health Centre for medical examination, whereupon she informed the Doctor that she was being sexually abused by her biological father.

[27] PW4 was subjected to a careful, skillful, searching and lengthy cross-examination by the Appellant.

**HIGHLIGHTS OF THE CROSS-EXAMINATION OF PW4 BY THE APPELLANT**

[28] - PW4 maintained her evidence-in-chief that the Appellant always threatened her with death not to tell anyone, and that she never told anyone at home but would run away to PW3's Royal Kraal where she eventually reported the rape.

- that when she was not sleeping at the homestead of the Appellant, she was always at the Royal Kraal as she was forced to do so because of his sexual abuse.
- that she was nine (9) years old when he started raping her.
- that she was not raped by anyone else but by the Appellant and that she had severe pains in her vagina.

[29] PW5 is 6904 Detective Constable Dumsile Msibi who was on duty on 18/04/2018 when the Appellant came to the Buhleni Police Station with PW4 to report that PW4 was troublesome and would always abscond home and sleep out since 2015.

[30] PW5 testified that when the Appellant narrated his complaints about PW4, she started crying and they ordered her to excuse them whilst they were recording her father's statement. After they were through with his statement, they then called PW4 and interviewed her alone without the Appellant.

[31] During the interview with PW4 she narrated that the Appellant had been sexually abusing her since 2015, and went on to describe how the sexual

abuse was perpetrated and how she would then escape to stay at the Royal Kraal.

[32] PW5 eventually conveyed PW4 to Mkhuzweni Health Centre where she was examined by PW3 and he thereafter filed the medical form RSP 88, which was handed into Court as an Exhibit in this case and Appellant was eventually arrested on the 9th May 2018.

[33] PW5 was subjected to a lengthy cross-examination by the Appellant, however, nothing material to his defence came out of this cross-examination.

[34] PW5 confirmed under cross-examination that the evidence which led her to arrest and charge Appellant for the offences he was charged with are the statement of PW4, the Doctor's Report, and the evidence of the other witnesses. Appellant also put to PW5 that PW4 concocted or fabricated the rape ordeal because she had actually lost his wife's cellular phone worth E500, however, PW5 brushed that allegation aside and responded that the Appellant never reported this issue of the cellphone when she recorded his statement.

[35] The Crown then closed its case and the Appellant opened the defence by taking the witness stand and made a sworn oral testimony in his defence.

[36] The Appellant who testified as DW1 narrated that his evidence commences in 2014 when PW4 would accompany PW3's children when they went about selling spinach. The children were all of the same age. He testified that PW3's daughters then asked him that PW4 visits them and thereafter there would be traditional dances and they complimented her traditional dancing skills and then referred to her as **"ligabazi"** i.e., a gifted and talented traditional dancer.

[37] The Appellant testified that he agreed to the request by PW3's daughters and that was when PW4 started to visit her half siblings at the Royal Kraal where they also enjoyed television as at the time, he did not have electricity. He testified that that was the beginning of PW4's troublesome behaviour of always running away to stay at the Royal Kraal. He narrated before Court that she stayed there for four (4) years from 2013 to 2017 and had to return to his homestead to assist him look after his mother who was sickly.

[38] He testified that during that time he borrowed his wife's cellular phone and handed to PW4 so that she could set on the alarm which would wake her up to prepare for school, however, PW4 lost the cellphone and that caused tension between them. He testified that he then instructed her to bring the cellphone after school and take it to her stepmother and she didn't return home. That was on the 17th April 2018. He testified that he tried hard to trace her whereabouts without success and eventually on the 18th April 2018 he found her at Nkosingiphile Magagula his half-brother's homestead, and then she reluctantly accompanied him home and that's when he realised that he had to take her to the Buhleni Police Station and report her misbehavior pattern.

[39] He testified that when they arrived at the Police Station, he reported that PW4 had behaved badly after a misunderstanding over a cellphone which belonged to her stepmother and which cellphone was used by her and had gone missing. He testified that after he had finished narrating his complaint against PW4 he was then excused believing that PW4 was being counselled, however, after a lengthy wait an Officer came out and requested him to get food for PW4 and after he had given the Officer the food, he was then informed that the Police Officers will take PW4 to hospital to be examined if she had already started to have sexual intercourse.

[40] He testified that upon returning from the hospital the Police handed over the child to him and they proceeded home. He testified that he stayed with PW4 for about three weeks and on or about the 18th April 2018 the Investigating Officer eventually arrested him and charged him with the offences he is currently facing.

[41] The Appellant was subjected to a lengthy and searching cross-examination by Crown Prosecutor Mr. M. Dlamini. Under extreme cross-examination by Mr. Dlamini, the Appellant was unable to explain why he reported PW4 only in 2018 when according to him she had been troublesome since 2012. It was put to him that PW4 ran away to live with PW3 and family at the Royal Kraal because he was sexually abusing her and threatened her not to tell anyone. The Appellant maintained his innocence that he never raped PW4 and that her evidence was false.

[42] I will record the following two questions and answers to demonstrate the importance of this crucial testimony. It is the last two questions by Crown Prosecutor Mr. Dlamini's cross-examination of the Appellant and is found at page 33 of the typed Record of Proceedings: it is as follows:

> ***"Q. I put it to you that you did rape PW4 on several occasions forcing her to flee your home to your brother's Umphakatsi?***

***A. That is false.***

***Q: I put it to you that PW4 did not fabricate evidence against you as she told the truth and had no reason to tell falsely against you?***

***A: That is false because Nosipho at the Royal Kraal she is called Inkhosatana by her regiment and that pleases her but is true that she fabricated evidence against me after collaborating with my brother the Chief Jubiphathi ----. I borrowed him three (3) herd of cattle which he has failed to repay me as he has refused, and so he wants me to go to jail. My brother taught PW4 lies so to make sure that I be found guilty so that he does not pay me my three (3) herd of cattle."***

[43] As I indicated above, this evidence is crucial and I shall deal with it later in the judgment.

[44] DW2 is Lomini Martha Magagula, the mother of the Appellant. Her evidence did not advance the Appellant's defence in any manner whatsoever.

[45] DW3 is Zandile Dlamini, the wife to the Appellant and her evidence as well did not advance the defence or case of the Appellant. At that stage the Appellant closed his case.

**SUBMISSIONS BY ATTORNEY MR. R. MWELASE**

[46] In his submissions Mr. Mwelase submitted that the offence that the Appellant was convicted of was alleged by the Crown to have been committed during April 2018 and that there is no evidence *in casu* which links the Appellant with the commission of the offence.

[47] Mr. Mwelase submitted further that the medical evidence submitted by the Crown does not link or identify the Appellant as the perpetrator of this offence with which the Appellant has been convicted, further that PW4 is said to be of unstable mind. He submitted further that there is no DNA evidence that links the Appellant with the crime. Mr. Mwelase submitted further that it was the Appellant who took PW4 to the Buhleni Police Station to report her misbehavior and that this act itself is not consistent with a guilty person. He submitted further that PW4 was engaged in love affairs with boys in the area and that she could therefore have sexual intercourse with them. He submitted that the Crown has failed to prove its case against the Appellant beyond a reasonable doubt, and that the conviction and sentence be set aside.

**SUBMISSION BY CROWN COUNSEL N. MABILA**

[48] Ms. Mabila submitted that the DNA could not be performed because the child washed herself even on the last sexual encounter which occurred around 2018. She submitted that the allegation by Mr. Mwelase for the Appellant that PW4 was engaged in love affairs with boys in the area and had sexual intercourse with them was being raised for the first time on appeal and thus constitute an afterthought. She submitted that the last incident of February 2018 was never disputed by the Appellant and even during cross-examination of PW4 the Appellant never challenged on it in his defence.

[49] Ms. Mabila submitted further that PW4 was referred for psychiatric evaluation because of trauma resulting from her abuse at the hands of the Appellant. Ms. Mabila submitted that the conviction and sentence are proper in this matter and that the Appeal on both conviction and sentence should be set aside.

**ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE**

[50] The crime of Rape is defined as the unlawful and intentional sexual intercourse with a female without her consent. This was the definition of the offence of Rape during the period of the allegations of the issues *in casu*. This definition has since changed with the advent of the Sexual Offences and Domestic Violence Act.

[51] The definition which applies *in casu* is the common law definition of Rape which even lists the essential elements.

[52] It is true that the Appellant was acquitted of Counts 1 and 3 and convicted and sentenced on Count 3. It was submitted on behalf of the Appellant that the Crown had framed Count 3 as an offence which is said to have happened in April 2018 and not February 2018. I must say at a glance this is a valid and genuine argument, however, such an argument would be more helpful to the defence of the Appellant if the complainant PW4 was not his biological daughter and that the incidence referred to was a once of occurrence. The difficulty for the Appellant *in casu* is that PW4 is his biological daughter and in her evidence, in particular under the rigorous cross-examination of the Appellant, she was very clear and unhesitant and unwavering that Appellant subjected her to sexual abuse on numerous occasions since she was nine (9) years old. She never once hesitated that the person who raped her was the Appellant.

[53] PW4 narrated the events clearly and convincingly on how she was subjected to sexual abuse by the Appellant together with the threats that were then pronounced by the Appellant after each and every sexual encounter. PW4 testified that she was traumatized by this unfortunate

ordeal being perpetrated by her biological father on her and would always escape from her home to the homestead of PW3. It was the children of PW3 who noticed the strange behavior of PW4 and started asking her questions until she eventually opened up and confided to them, and eventually PW3 was also told by PW4 of her traumatic experience at the hands of her father.

[54] There is no reason why PW4 would falsely incriminate her biological father with such serious allegations if it was not the Appellant. There is no plausible reason whatsoever that has been advanced by the Appellant why she was falsely implicating him in the commission of such offence. During his defence case, under the rigorous cross-examination of the prosecutor, he replied to the question that PW4 had not fabricated false evidence against him by stating that, PW4 in collaboration with PW3, his brother Chief Jubiphathi fabricated this evidence against him because PW3 borrowed his three (3) herd of cattle back in 1985 and was now refusing to give him back his cattle hence PW3 fabricated lies so that he (Appellant) is sent to jail.

[55] I must say this was the most bizarre evidence from the Appellant. Not only is it an unfortunate afterthought on his part because such a version was never put to PW3 and PW4 when they testified, and even when the

Appellant himself testified in chief in his defence, he never made this allegation.

[56] When PW3 testified, the Appellant ought to have put questions to him on the issue of the three (3) herd of cattle, but he never did. The cross-examination was fair and he never levelled any accusations at PW3 about the three herd of cattle. It is common cause that cattle are amongst the most precious possessions in siSwati culture, and are a sign of prosperity in siSwati culture. I have no doubt in my mind therefore that this was an afterthought on the part of the Appellant.

[57] Unfortunately for the Appellant it has been raised so belatedly and so brazenly to the extent that it even creates more circumstantial corroboration of PW4's version that she is not falsely fabricating evidence against her father. Why would she fabricate such credible and cogent evidence remains difficult for the Appellant to answer, the answer is simple, it is because he does not have the answer to contradict the plausible, cogent and credible testimony of the Complainant PW4.

[58] The Complainant PW4 was subjected to a lengthy traumatic sexual abuse and had to live with the pain and shame of being violated by her father.

The trauma had to take its toll on her in one way or the other. There is no doubt that she was under a heavy mental strain because she was being continually sexually abused by her father and who then threatened her with death in the event, she told anyone. She has never hesitated for once in identifying the Appellant as the person who was perpetrating the offence on her. She cannot be faulted for not disclosing immediately after the first incident, but she must be commended for being brave and disclosing the identity of the Appellant, difficult as it was, to the Police when the Appellant took her to the Police Station.

[59] The medical doctor's Report proves that there was penetration of PW4's reproductive organ, and PW4 identify the Appellant as the perpetrator. The issue of consent is not much of a problem because PW4 was in law "incapable of consenting to sexual intercourse" because she was seventeen (17) years old when the last sexual assault was perpetrated on her by the Appellant. Further no female child can ever consent to sexual intercourse with her father because that is a criminal offence on Incest. Authority is legend that the Crown must prove three main elements in rape cases beyond reasonable doubt and these have been proven *in casu*. These are:-

(i) the identity of the accused,

(ii) the fact of sexual intercourse, and

(iii) lack of consent.

[60] The evidence of PW4 is clear that the sexual assault was perpetrated against her will by her biological father, the Appellant and was accompanied with threats of death at all material times.

[61] In the case of **Mbuso Blue Khumalo v Rex (12/12) [2012] SZSC (31 May 2012)** M.C.B. Maphalala JA (as he then was) stated the following at paragraphs 28 and 31 pages 11-12: -

> ***[28] In rape cases the prosecution bears the onus of proving beyond reasonable doubt three essential requirements of the offence, namely, the identity of the accused, the fact of sexual intercourse as well as the lack of consent. See cases of 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."***
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> ***[31] P.M.HUNT in his book entitled, SOUTH AFRICAN CRIMINAL LAW AND PROCEDURES, 2nd Edition, Juta Publishers, 1982 at page 440,the learned author states the following with regard to the act of sexual intercourse: -***
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> > ***"There must be penetration, but it suffices if the male organ is in the slightest degree within the female's body. It is not necessary that the hymen should be ruptured, and in any case it is unnecessary that the semen should be emitted. But if there is no penetration, there is no rape even though semen is emitted and pregnancy results."***

[62] *In casu* the evidence of PW4 regarding the element of penetration is corroborated by the evidence of the medical doctor PW2. The argument advanced on behalf of the Appellant that PW4 was in love relationships with the boys of the area and that she had sexual intercourse with them is another significant afterthought on the part of the Appellant because this allegation is only being made for the first time on appeal. The Appellant who brilliantly conducted his defence by asking relevant and intelligent questions in cross-examination could never have missed the opportunity to put such a crucial question(s) to all the Crown witnesses for them to comment. Definitely such a question would have been put to PW4 during the lengthy and searching cross-examination by the Appellant, however, PW4's testimony remained focused and credible and she maintained that the Appellant is the one who raped her and had done so since she was aged nine (9). This evidence falls in the same category as the allegation of 3 herd of cattle against PW3 which was not dealt with in cross-examination.

[63] Authority is legend that the defence of an accused person must be put to all or relevant Crown witnesses so that they may comment on it, and also the Court is put in the picture of how his defence will be conducted. In the case of **Nkosinathi Sibandze v Rex (31/2014) [2014] SZSC 19 (9th**

**December 2015)** M.C.B. Maphalala CJ stated as follows at para 15 pg 9 of the judgment: -

> ***"It is a trite principle of our law that the defence case should be put to the prosecution witnesses otherwise the defence evidence would be considered as an afterthought if disclosed for the first time during the accused's evidence in chief. See Rex v Mbedzi Criminal Case No. 236/2009 at para 223 (HC); Sonnyboy Sibusiso Vilakati v Rex Criminal Appeal Case No. 35/2011 at pp 4 and 5 as well as Elvis Mandlenkhosi Dlamini v Rex Criminal Appeal Case No. 30/2011 at para 22 and 23."***
>
> ***"In the case of Elvis Mandlenkhosi Dlamini v Rex Criminal Appeal Case No. 30/2011 at paras 22 and 23; I had occasion to state the law as follows: -***
>
> > ***"It is a trite principle of our law that the defence case should be put to the prosecution witnesses otherwise the defence would be considered as an afterthought if disclosed for the first time during the accused's evidence in-chief."***

[64] The testimony of PW4 has been consistent ever since she confided to PW3's daughters, to PW3 himself, to PW5 and in Court both in examination-in-chief and under the tactical and searching cross-examination by the Appellant. She never not even once exhibited any hesitation. As regards dates she was not ashamed or shaken to admit that she did not remember them and she could not be faulted for that, but what she confidently stated in Court was that it was the Appellant who sexually assaulted her. The issue whether the last encounter was in February 2018 or April 2018 as

appears on the Charge Sheet i.e., Count Three, is insignificant as far as I am concerned and is overshadowed by the circumstances, I narrated earlier in the judgment that PW4 was testifying about her father and not a stranger, her father who is well known to her and who has sexually abused her for a long time.

[65] The issue of wrong dates or erroneous dates does not negate the credible and cogent testimony of PW4. What is important is that the essential requirements as outlined in the case of **Mbuso Blue Khumalo** *(supra)* have been proven by the Crown beyond reasonable doubt.

[66] It must always be borne in mind that the prosecution is entitled to prosecute any person who is alleged to have committed an offence, and where it has assessed and concluded that such evidence is sufficient to prosecute, to continue and prosecute such person and state in the Charge Sheet that **the exact date (s) of the commission of the offence is/are unknown to the prosecutor**. It doesn't mean that if a wrong date is stated then that error exculpates the accused from the offence, rather it is the evidence and circumstances of that particular case which determines a verdict of guilty or not guilty. If the Crown has proven the essential elements like it has done *in casu*, there must be a verdict of guilty. The

Court *a quo*, correctly in my view convicted the Appellant of Count 3 of the Charge Sheet.

[67] The difference between February 2018 and April 2018 is very minimal in the circumstances of this case where the Appellant and PW4 were staying together and even if PW4 was at PW3's homestead he would fetch her whenever he wanted to sexually assault her, and after that she would again escape to PW3's Royal Kraal.

[68] In the circumstances it would be unfair to criticize the Crown and say it didn't lead evidence on Count 3 and that the evidence led wholistically in the case does not link the Appellant with the commission of the offence. It is my considered view that the learned Principal Magistrate in the Court *a quo* fully considered all the evidence and evidentiary material *in casu* and at the end of his careful analysis of all the circumstances correctly in my view returned a verdict of guilty.

[69] Magistrate Joe Gumedze states as follows: at page 101 of his original handwritten Record of Proceedings: -

> ***"On the totality of the evidence adduced, the duty of the Court is to assess the evidence wholistically in order to determine if the Crown succeeded to prove the guilt of the accused beyond reasonable doubt.***

***In my analysis of the evidence of Nosipho I emphatically found her to be an honest and creditworthy witness and believed her evidence. There was no evidence of likelihood of her engineering evidence to falsely implicate her father. The reason advanced by the accused that Nosipho ran away because of the lost cellphone is of no substance because Nosipho did admit having lost or misplaced the cellphone and that the accused made no threats to assault her ----"***

[70] His Worship in the Court *a quo* analyzed all the evidence and circumstances and came to the conclusion that the Crown has proven its case against the Appellant beyond reasonable doubt because there is ample evidence of lack of consent, identity of the culprit and that indeed sexual intercourse did occur.

[71] The Court *a quo*, correctly in my view, also found that the rape of PW4 by the Appellant started way back when she was below the protected ages i.e., 6 years then and which protected age is now 18 years or below, where any consent even if existing is unlawful.

[72] I am also of the considered view that the Court *a quo*, also correctly in my view, imposed a sentence that is commensurate with the offence with which the Appellant was convicted. This is an offence which is accompanied with aggravating circumstances in terms of Section 185 *bis*

of The Criminal Procedure and Evidence Act 67/1938 As Amended, which provides that a minimum Sentence of 9 years imprisonment without the option of a fine where an accused has been convicted of Rape with aggravating circumstances. His Worship Gumedze stated that the Appellant is the biological father of PW4 and ought to have given her fatherly love instead of sexually abusing her.

[73] I am in agreement with the observation of the learned Principal Magistrate because the Appellant has a duty as a parent of being *"in loco parentis"* to PW4, which however was not the case.

[74] An Appellate Court can only interfere with a sentence of the trial Court where the sentence is so severe such that it induces a sense of shock, or where there is a striking disparity between the sentence passed by the Court *a quo* and that which the Court of Appeal would have passed, or where there is a material misdirection resulting in a miscarriage of justice or irregularity. None of these factors exist *in casu*. This is because the Court *a quo* correctly applied the **triad**. His Worship took into account the age of the Appellant, his personal circumstances, the seriousness of the offence and the interest of society. His Worship correctly considered that the interests of society outweighed the personal circumstances of the Appellant and imposed the sentence of Fifteen (15) years imprisonment.

His Worship was of the view that PW4 has undergone severe psychological trauma at the hands of the Appellant who should have been protector, and further that the stigma implanted in the victim could never be deleted or forgotten by the said victim. These are some of the but may factors which the Court *a quo* considered and eventually imposed a sentence of 15 years imprisonment without the option of a fine which was backdated accordingly to the date of his arrest.

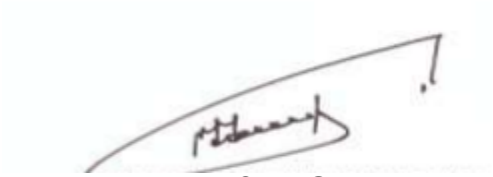
[75] In the circumstances, I will not interfere with the conviction and sentence as imposed by His Worship J. Gumedze.

[76] Consequently, I hand down the following judgment: -

1. The Appeal against Conviction and Sentence is hereby dismissed.

2. The sentence of Fifteen (15) years imprisonment without the option of a fine, imposed on Appellant by The Principal Magistrate His Worship Joe Gumedze on 19th March 2020 is hereby confirmed.

So, ordered.



**N.M. MASEKO**

**JUDGE**