

IN THE HIGH COURT OF ESWATINI

JUDGEMENT

HELD AT MBABANE

Case No. 373/2023

In Matter between:

REX

And

MDUDUZI THOKOZANI SHONGWE

Neutral citation: *Rex v Mduduzi Thokozani Shongwe (373/23)*

SZHC 353 [2025] (06.02.2025)

CORUM: Z Magagula J

Date heard: 26.11.24

Date delivered: 06.02.25

Summary: *Accused charged with contravening Section 3 of the S.O.D.V Act 2018 –
Pleading guilty to charge*

- Found guilty on plea and sentenced to 10 Years imprisonment

JUDGMENT

- [1] The accused person, Mduduzi Thokozani Shongwe was indicted in this court on a charge of rape, it being alleged in the indictment that he did on or about the month of September 2022 and at area near Gucuka area in the area Hhohho Region, the accused person did have unlawful sexual act with one Ayabongwa Nkonyane, a female minor aged 5 years and did thereby contravene Section 3 (1), Section 3 (2), Section 3 (3) (0) and (6) (e) as read together with Section and Section 3 (9) (d) of the Sexual Offences and Domestic Violence Act 15/2018.
- [2] It was further noted that the offence was accompanied by aggravating factors as envisaged by Section 185 *bis* of the Criminal Procedure and Evidence Act 67/1938 as amended in that;

- (i) *The victim is a minor aged 5 years who is in Law, incapable of consenting the Sexual intercourse.*
- (ii) *The accused stood in a loco parentis relationship with the victim as he is her uncle.*
- (iii) *The accused person did not use a condom during the commission of the offence, thus exposing the complainant to the risk of contracting Sexually Transmitted Infections including HIV and AIDS.*

[3] When the matter was mentioned for trial the accused indicated that he would be conducting his own defence. It was my observation that the accused appeared to have difficulty communicating although he seemed to understand the proceedings. I then postponed the matter and instructed that the Registrar should bring this matter to the attention of legal Aid officials.

[4] Following a series of postponements, Senior Attorney, Mr Nhlabatsi appeared on behalf of the accused having been engaged by the Legal Aid officials. I extend the courts appreciation to both the Legal Aid officials. I extend the courts appreciation to both the Legal Aid and to Attorney, Mr Nhlabatsi for their willingness to assist.

[5] When trial commenced, Mr Nhlabatsi indicted that the accused will plead guilty to the offence and he proceeded to do so and a statement of Agreed Facts was duly filed. The statement provided inter alia:

3.1 *The accused Bhekumusa Shongwe aged 7 years old and the victim left home to fetch water from the river. Along the way was, the accused grabbed the victim, laid her down, undressed her (removed) pants and inserted his penis into her Vagina and the Victim cried. Bhekumusa ran away and the accused also left the victim still crying. The Victim was found by Siniketiwe Shongwe and Mthantazo Shongwe who were also on the way to fetch water from the river. The victim confided in them that the accused had inserted his penis into her virginal it was painful.*

....

5.4 *The accused agrees to the following;*

5.1 *That he acted unlawfully when he sexually abused the victim.*

5.2 *That the victim lacks (the capacity) for as sexual consent as she was 5 years old at the time of committing the offence.*

5.3 *That the identity of the accused is not in dispute.*

5.4 *There was no justification for his unlawful*

[6] The statement of Agreed Facts together with the doctors report on form RSP 88 and the victims immunization or child health card were admitted into evidence by consent.

[7] It was also recorded that the accused was remorseful for his conduct.

[8] I am satisfied that the statement of agreed facts has demonstrated sufficient particulars of the event to decide this case. In view of the accused person's plea of guilty, there is no need to lead further evidence in accordance with Section 238 (1) (a) of the Criminal Procedure and Evidence Act 67/1938 as amended.

[9] This Section provides;

238 (1) If a person is arraigned before any court upon any charges has pleaded guilty to such charge, or has pleaded guilty to having committed any offence (of which he may be found guilty on the

indictment or summons) other than the offence which he is charged, and the prosecutor has accepted such plea, the court may, if it is.

(a) The High Court or a Principal Magistrate's Court, and the accused has pleaded guilty to any offence other than murder, sentence him for such offence without hearing evidence.

(b)...

[10] Being satisfied that the contents of the statement of agreed facts and the doctors report prove beyond reasonable doubt that the accused committed the offence charged, I found the accused guilty as charged. This verdict was pronounced in open court on the 26th November 2024.

ON SENTENCE

[12] In Mitigation of sentence the court was entreated to exercise leniency. It was submitted in on behalf of the accused that he was remorseful ; that he was a first offender. The accused was arrested on the 15th April 2022 and has remained in custody ever since. While he was in custody he lost his mother. He was suffering from a mental illness for which he was receiving treatment as out and outpatient. The court was urged to take into account his youthfulness, at the time of the commission of the

offence he was he was only 19 years old. He had pleaded guilty and did not waste the courts time.

[13] Ms B. Fakudze who represented the prosecution in the matter acknowledged the accused's youthfulness, his mental challenges and even the fact that he remorse. She argued, however that the victim was of very tender age and looked up to the accused as an elder relative. She argued further that the court should consider the lasting effects of a sexual assault particularly on very young children.

[14] In passing sentence, I have cautioned myself on the oft quoted dicta of Holmes J A in **S v Rabie 1975 (4) SA 855**, where the learned Judge of Appeal said.

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

[15] I also take into account the wise words of Tebutt J.A in the case of **Ntokozo Dlamini and Another v The King**, Criminal appeal No 10 /2001;

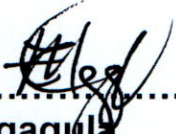
“ The seriousness of their crimes, their moral blameworthiness and their lack of remorse or regret, justify lengthy sentence of imprisonment. Society would require that this court marks its serve

disapproval of this type of behaviour. Its sentence must also sense as a deterrent not only to the Appellants to abstain from similar behaviour in the future but to others who may have like minded schemes in contemplation."

- [16] I have considered the accused's personal circumstances, particularly his mental challenges and the fact that he was very remorseful. It is further not lost to me that you suffered tragedy while awaiting trial in custody when your mother passed on and you were not even in a position to participate in her burial.
- [17] I am, however, also alive to the fact that you committed a very atrocious crime on a helpless victim who looked up to you as an uncle. The seriousness of this offence is exacerbated by the fact that it has become prevalent in this country. There is a sickening increase of elder people molesting innocent children and it is time the courts and indeed all of society stand up against such atrocities.
- [18] Children, especially the girl child should be able to enjoy their innocence until such time that they are able differentiate between wrong and right make their own choices. Having considered all the circumstances in this matter. I am of the view that a sentence of 10 years imprisonment without

the option of a fine will serve sufficient deterrent to other would be perpetrators.

[19] Accordingly, the accused is sentenced to a term of imprisonment of 10 years without the option a fine. The sentence is backdated to the date of arrest.


.....
Z. Magagula
Judge of the High Court

Appearances:

For the Crown – Ms B. Fakudze

For the Accused – Mr S. Nhlabatsi (pro bono)