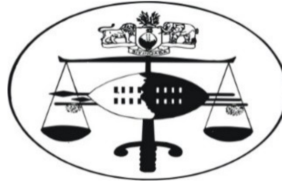

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Appeal Case No. 76/2016

In the matter between:

MATHEWS SIPHO HLANDZE Appellant

And

THE KING Respondent

Neutral Citation: Mathews Sipho Hlandze v The King (76/2016) [2017] SZSC 27 (9th October 2017)

Coram : M.J. DLAMINI JA, R.J. CLOETE JA and J.P. ANNANDALE JA

For the Appellant : In Person

For the Respondent: Ms L. Hlophe

Heard : 04 July 2017

Delivered : 9th October 2017

Summary: *Criminal Appeal against conviction and sentence/Appellant – Failing to convince the Court he was wrongfully convicted – Conviction confirmed – Sentence confirmed save and except that the Appellant was credited with a period of twenty nine (29) months spent in custody pending conviction.*

JUDGMENT

CLOETE - JA

BACKGROUND FACTS

[1] The Appellant was charged in the High Court with the offence of raping a nine (9) year old girl, Mayenziwe Mvubu, during the month of November 2011.

[2] On 06 August 2015 the Appellant was found guilty of the offence of rape with aggravating circumstances and on 23 September 2015 he was sentenced to eighteen (18) years imprisonment.

[3] The Court *a quo* added that **"The period of twelve (12) months spent by the accused in custody will be taken into account when determining the period of imprisonment"**.

[4] Being dissatisfied with the Judgement of the Court *a quo*, the Appellant lodged an appeal against the Judgment on 17 February 2016 (which, incidentally, was out of time but since no objection was raised and in the interest of justice, given that the Appellant was unrepresented in these proceedings, the matter was nevertheless heard) in the following terms:

1. **I hereby humbly appeal for an acquittal on the charge of rape levelled against me by the DPP's office and the Judgment by Justice Bheki Maphalala and sentence of eighteen (18) years be set aside.**

2. **This is due to the fact that I strongly contest the falsehood of the charge of rape on the grounds that I never at any stage have sexual intercourse with the minor and did not ever attempt to do such.**

3. **My conscience is being contaminated by this continued stay in goal, for a wrong I never did. Indeed maybe the child was sexually abused and maybe indeed her genital area was tempered with but I challenge the conviction and charge that I, a law abiding and responsible citizen of this land I am the one**

who did this wrong. If it was done, the state must redo its job and seek the rightful offender instead of just leaning on the possible suspect.

4. The law must be allowed to work beyond reasonable doubt. I did not rape any person at any stage and I pray for the mercies of this Honourable Court to grant me my desired and deserved freedom.

5. In due course I will submit to the Supreme Court my Heads of Argument for my appeal. Please acknowledge receipt of this appeal at your earliest convenience.

[5] The Crown, the Respondent, opposed the appeal and both parties filed Heads of Argument during June 2017.

<u>THE APPELLANT'S CASE</u>

[6] The Appellant advised the Court that his Heads of Argument were drawn up by a fellow prisoner as he is uneducated and as such was unable to draw up the Heads himself but he confirmed that the Heads were read to him and that he signed the document in confirmation of the contents thereof.

[7] His grounds of appeal were as follows:

1. **I still maintain my initial position to the effect that I am honestly innocent of the commission of the rape offence.**

2. **The trial Court erred by accepting PW1's evidence to the effect that the three (3) children namely Vuyo, Sinethemba and Siyabonga, who were said to have witnessed me and the Complainant dressing when they came back from buying me some traditional brew. The trial Court ought not to have accepted her evidence because it was not corroborated by those three (3) children concerning finding me and the Complainant dressing up. She told the trial Court that she had been told by the three (3) children that they found me and the Complainant dressing up. But not even one of those three (3) children was brought to Court to tell the Court they had actually seen us or not. Why were the three (3) children, or at least one of them, not made state witnesses?**

3. **Justice Maphalala erred by saying in his Judgment I had admitted in the family meeting having committed the rape**

offence. See Page 36, Paragraph 6 of his Judgment. Among all the witnesses who testified, not even one had said I had admitted having committed the offence. It is also not true that I had apologised in the family meeting for committing the offence. Such claim is misleading and uncorroborated.

4. The Complainant told the Court that immediately after raping her Vuyo entered the house and found her dressing up, especially putting her panty on. But her evidence was not corroborated by Vuyo. Vuyo ought to have been made a state witness in order to shed light on whatever he had actually witnessed that or not. I still maintain my assertion that the Complainant was used by her mother as a deadly weapon against me as there had been a raging dispute between me and her which stemmed from her refusal to pay me for building her a house. PW1 had denied before Court that there had been a conflict between me and her that effect. See Page 20, Paragraph 5 and 10 of Court record. On the other hand, the Complainant told the trial Court that it is true that there had been a conflict between me and her that stemmed from her refusal to pay me for building her a house. See Page 31 Paragraph 5.

[8] In addition, from the Bar, the Appellant argued that, on questioning by the Court;

1. That he did not send the children to buy alcohol but could not deny that he had not disputed the evidence in that regard;

2. He confirmed that he had attended the family meeting but denied apologising in person and stated that it was in fact his mother who had apologised on his behalf and that she said he could have been drunk at the time. He acknowledged that he did not call his mother to corroborate this very important fact, despite having the right to do so.

3. That he had wanted to call a number of witnesses but when it came to the trial, all of the witnesses refused to give evidence on his behalf.

4. At Page 19 of the record he acknowledged that he had not denied that he had apologised at the family meeting and was referred to his cross-examination of the mother of the Complainant, PW1 as follows;

"ACC: Are you certain I committed the offence?

PW1: **You denied but ended up apologising to the family meeting. Further, the Complainant fell sick and she couldn't perform well at school. After learning of the incident, my questions were answered.**

ACC: **Is it myself who apologised?**

PW1: **Correct"**

5. When cross-examined about the allegations he had made relating to abortions, sexual activity seemingly witnessed by one LaDlamini and other matters in the following exchange between himself and the Prosecutor, he alleged that the Court record was incomplete;

"CC: **Why did you not put to Martha that she had committed an abortion?**

ACC: **It was an oversight.**

CC: **Why not put to Martha that you went to drink alcohol with LaDlamini?**

ACC: **I cannot recall.**

CC: **Why didn't you put to Martha that you ploughed her fields and she didn't pay?**

ACC: **It was an oversight on my part because I am uneducated**

CC: **But the Court explained to you of your right to cross-examination?**

ACC: **That is correct.**

CC: **When you had the conversation with Lungelo, was Mayenziwe present?**

ACC: **Yes**

CC: **Why did you not put the conversation to Mayenziwe during cross-examination?**

ACC: **I forgot to put it to her.**

CC: **Which child was beaten during the family meeting?**

ACC: **Rejoice told me it was Mayenziwe Mvubu who was beaten by Martha.**

CC: **Why didn’t you put that to Martha that she beat Mayenziwe?**

ACC: **I forgot.**

CC: **Are you suggesting that Mayenziwe implicated you because her mother beat her?**

ACC: **Vuyo disclosed the issue of sexual intercourse after Martha had beaten her to admit.**

CC: **I put it to you that your evidence is an afterthought because you never put that to Martha and Mayenziwe**

ACC: **That is not true.”**

THE RESPONDENT'S CASE

[9] That the Appellant was properly convicted as the Respondent proved all the essential elements that must be proved in a case of rape as was stated by his Lordship MCB Maphalala CJ in **BENNET TEMBE And REX Criminal Appeal Case 07/2016 (unreported) at Paragraph 10 as follows: "It is well-settled in our law that in rape cases the Crown has to prove beyond reasonable doubt the identity of the accused as the offender, the fact of sexual intercourse as well as the lack of consent."**

[10] That the Complainant had told the Court that it was the Appellant who had sexual intercourse with her and that she had said that no one else had had sexual intercourse with her except the Appellant. The Complainant had given a full description of how the Appellant had inserted his penis into her vagina and had sexual intercourse with her.

[11] The Complainant's evidence with regard to penetration was corroborated by Dr. Asha Gladge Varghese who had examined her and who observed that the hymen was not intact and came to the conclusion that the victim had been sexually abused. In that regard, on questioning by the Court as to why the Doctor had not stated in the report that the Complainant had been raped, Counsel explained that a Doctor was unable to state that the assault was rape which is an offence which needs to be proved by facts, which

facts would not be within the knowledge of a Doctor and hence the statement that there had been sexual abuse.

[12] The trial Court correctly held that the Complainant maintained her evidence relating to the rape even under cross-examination and that there had been penetration and as had been set out in **PHUMLANI MASUKU vs THE KING Criminal Appeal No. 12/2003 (unreported) at Paragraph 13 Dr. S. Twum JA held as follows, "This Court reiterates that the quintessential test for rape is that the accused penetrated the Complainant without her consent. The slightest degree of penetration will sustain a charge."**

[13] It is trite that, as was stated in the **BENNET TEMBE** matter, *supra*, **"In our law a girl under the age of twelve (12) years old cannot consent to sexual intercourse, even if she does consent, sexual intercourse with her constitutes the offence of rape".**

[14] Counsel, on a question from the Court relating to the allegation by the Appellant that the record before the Court was incomplete and having been directed to Page 14 of the record on which the transcriber of the record, one Sibuyane P. Magagula, had stated that **"I hereby certify that insofar as legible, foregoing is a true and correct transcription of the record**

provided of the proceedings recorded by means of the Judge's notebook", pointed out that only at one place in the record, the transcriber clearly was not able to read what was written on the notebook but that nothing turned on that omission and that in all other respects the record was complete, contrary to the allegation of the Appellant.

[15] Counsel further explained that Vuyo was only four (4) years old at the time and not mature enough to give evidence of any consequence and in any event the Appellant did not cross-examine PW1, the mother, relating to the "evidence" relayed by Vuyo to his mother and as such his allegations in that regard carried no weight.

FINDINGS OF THE COURT ON THE MERITS

[16] The Court *a quo* dealt with all the evidential issues at some length and in great detail.

[17] As pointed out in numerous places in the cross-examination of witnesses, the Appellant admitted not putting denials to PW1 and PW2 and as such at this point cannot say that the Court record is incomplete at this point. We are mindful of the fact that the Appellant was unrepresented but he confirmed that the record had been read to him by his fellow prisoner and in addition the explanation of Counsel for the Respondent in para 14 above

makes it clear that there is no merit in the allegation that the record was incomplete.

[18] As regards his main ground of appeal, mainly that the Respondent failed to call Vuyo, as explained by Counsel for the Respondent, Vuyo was four (4) years old at the time and by no stretch of the imagination could it be said that he could give any meaningful evidence. More importantly, the Appellant did not deny the allegations of PW1 regarding Vuyo whilst cross-examining her and as such must be deemed to have admitted the facts.

[19] As regards the family meeting, the Appellant did not put a denial to PW1 that he had apologised as she had alleged. In addition he stated that his mother had apologised on his behalf but did not call his mother to corroborate this very important fact.

[20] In fact he did not call any witnesses to corroborate any of his numerous allegations including LaDlamini who is said could collaborate his various sexual encounters with PW1. He stated that when it came to the trial, none of the witnesses he wished to call agreed to testify on his behalf. In addition, even if he did have such encounters with PW1 it does not detract from the fact that he perpetrated the crime of rape on the Complainant.

[21] PW2, Melusi Mvubu, under cross-examination from the Appellant insisted that the Appellant had apologised at the family meeting in person. To this witness the Appellant stated **"do you recall my mother saying I should apologise because it is possible I committed the offence when I was drunk and she apologised on my behalf"**. The witness was unshaken and clearly gave evidence that it was the Appellant who apologised and not his mother.

[22] As such we agree with the Judgment of the *Court a quo* in all respects and specifically that the crime of rape was proved beyond reasonable doubt and as such the Appellant was correctly convicted.

AS REGARDS SENTENCE

[23] In his Notice of Appeal the Appellant merely sought the setting aside the sentence of eighteen (18) years and did not deal with the severity or otherwise of the sentence in his Heads of Argument. In the latter he merely stated as follows:

"Lastly, I implore the Supreme Court to include the period of nineteen (19) months in determining the period of time I have spent in prison. Justice Maphalala only took into account the twelve (12) months

period I had spent in custody before I was released from custody on bail and did not take into account the nineteen (19) months I spent in custody after the expiry of my bail period before I was sentenced to my current eighteen (18) years sentence"

[24] In the absence of any argument in that regard by the Appellant, this Court can do no better than refer to what was articulated by this Court in the case of **"ELVIS MANDLENKHOSI DLAMINI vs REX Case No. 30/2011 at Page 16, Paragraph [29] as follows: 'It is trite law that the imposition of sentence lies within the discretion of the trial Court, and, that an Appellate Court will only interfere with such a sentence if there has been a material misdirection resulting in a miscarriage of justice. It is the duty of the Appellant to satisfy the Appellant Court that the sentence is so grossly harsh or excessive or that it induces a sense of shock as to warrant interference in the interest of justice. A Court of Appeal will also interfere with a sentence where there is a striking disparity between the sentence which was in fact passed by the trial Court and the sentence which the Court of Appeal would itself have passed; this means the same thing as a sentence which induces a sense of shock. This principle has been followed and applied consistently by this Court over many years and it serves as the**

yardstick for the determination of appeals brought before this Court. See the following cases where this principle has been applied:

- **Musa Bhondi Nkambule v Rex Criminal Appeal No. 6/20099;**
- **Nkosinathi Bright Thomo v Rex Criminal Appeal No. 12/2012;**
- **Mbuso Likhwa Dlamini v Rex Criminal Appeal No. 18/2011;**
- **Sifiso Zwane v Rex Criminal Appeal No. 5/2005;**
- **Benjamin Mhlanga v Rex Criminal Appeal No. 12/2007;**
- **Vusi Muzi Lukhele v Rex Criminal Appeal No. 23/2004'"**

[25] As regards the request of the Appellant that his sentence be reduced by the period for which he was in custody pending conviction and sentence, which he is entitled to in terms of the Constitution of Swaziland, with the able assistance of Counsel for the Respondent who had gone to the trouble of communicating with Correctional Services in that regard, the actual period spent in custody by the Appellant was a period of twenty nine (29) months and the order below will rectify the order by the Court *a quo*.

[26] This Court wishes to place on record that it is totally unacceptable that recent statistics show that an astonishing number of rapes took place in the Kingdom in the last two (2) years. The very reason for handing down what appear to be harsh sentences for the crime of rape, is to act as a deterrent to

people contemplating such crimes. It would seem that the message is not reaching enough of the population as these terrible crimes, life changing for the innocent victims, continue unabated and sadly appear to be on the increase. It is the duty of all those in authority at all levels to see to it that the message is relayed to the population at large that this type of behaviour is not acceptable in our culture and will not be tolerated by this Court.

ORDER

[1] The conviction of the Appellant by the Court *a quo* of the offence of rape is hereby confirmed and the appeal of the Appellant is dismissed.

[2] The sentence handed down by the Court *a quo* of eighteen (18) years imprisonment is hereby confirmed subject to the period of twenty nine (29) months spent by the accused in custody being taken into account when determining the period of imprisonment.

R. J. CLOETE
JUSTICE OF APPEAL

I agree

J.P. ANNANDALE

JUSTICE OF APPEAL

M.J. DLAMINI JA,

[1] The appellant was convicted of rape with aggravating circumstances and sentenced to eighteen years imprisonment. He appeals against both conviction and sentence. He has consistently denied the charge. He alleges that the charge against him is a fabrication by complainant's mother (PW1), who is refusing to pay him money for a house he built and a field he ploughed for PW1 and her husband.

[2] In his heads of argument dated 19th June 2017, appellant states:

"2. The trial court erred by accepting PW1's evidence to the effect that the three children, namely, Mvuyo, Sinethemba, and Siyabonga, who were said to have witnessed me and the complainant dressing when they came back from buying me some traditional brew. The court ought not to have accepted her evidence because it was not corroborated by those three children concerning finding me and complainant dressing up. She told the court that she had been told by the three children that they found me and the complainant dressing up. But not even one of those three children was brought to court to tell the court they had seen us or not. Why were the three children or at least one of them, not made state witness?

“3. Justice Maphalala erred by saying in his judgment I had admitted in the family meeting having committed the rape offence. See page 68, paragraph 6, of his judgment. Among all the witnesses who testified, not even one had said I had admitted having committed the offence. It is also not true that I had apologized in the family meeting for committing the offence. Such claim is misleading and uncorroborated.

“4. The complainant told the court that immediately after raping her Mvuyo entered the house and found her dressing up, especially putting her panty on. But her evidence was not corroborated by Mvuyo. Mvuyo ought to have been made a state witness in order to shed light on whatever he(sic) had actually witnessed that or not. I still maintain my assertion that the complainant was used by her mother as a deadly weapon against me as there had been a raging dispute between me and her which stemmed from her refusal to pay me for building her a house. PW1 denied before court that there had been a dispute between me and her … On the other hand the complainant told the trial court that it is true that there had been a conflict between me and her …”

[3] In his notice of appeal dated 3rd November 2015, appellant inter alia wrote: “…. I never at any stage have sexually (sic) intercourse with the minor and did not ever attempt to do such. … Indeed maybe the child was sexually abused and may be indeed her genital area was tempered (sic) with but I challenge the conviction and charge that I, a law-abiding and responsible citizen of this land, am the one who did this wrong … The law must be

allowed to work beyond reasonable doubt. I did not rape any person at any stage …"

[4] In opposing the appeal, the prosecution relies on the following – (a) **Identity of accused**. That accused is well-known to the complainant "and the children referred to him as 'Mkhulu Matewu'"and was related to complainant and her parents; (b) **Fact of sexual intercourse**. As told by complainant: "He climbed on top of the complainant and inserted his penis into her vagina and had sexual intercourse with her". And the prosecutor continues: "The complainant's evidence with regard to penetration was corroborated by Dr. Asha Gladge Varghese (PW3) who examined complainant … Dr. Ernest Peresu (PW7) also treated the complainant for a swelling in the groin which swelling is caused by a sexual illness"; (c) **Apology**. "… according to PW1 the appellant first denied but later apologized during the family meeting. PW1's evidence in this regard is corroborated by the evidence of PW2 who told court that appellant initially denied but later admitted saying he might have been drunk"; and (d) **Absence of consent.** The issue of consent was not raised directly since it was never really an issue. The complainant being nine years of age, if sexual intercourse is proved absence of consent will be implied. Suffice it to refer to Innes CJ in **Socout Ally v R** 1907 TS 336 at 338: *"It seems clear that in charges of rape upon children, the common practice in South African courts both here and at the Cape, has been to adopt the rule laid down by Carpzovius {C.68. XX}, that a child under the age of twelve is conclusively presumed not to be able to consent to the commission of the crime of rape upon her*". The age of twelve has since been raised to sixteen years in the interest of greater protection for children.

[5] With respect to the record of proceedings, there is no mention of "Mkhulu Matewu" in the evidence of complainant. That reference is only mentioned in para [27] of the trial court's judgment, which in part reads: *"There is no dispute on the identity of the accused; he is well-known to the complainant, and the children referred to him as 'Mkhulu Matewu'*, ..." With due respect to the learned trial Judge, there **is** a dispute as to the identity of the accused. The appellant has denied the rape charge and other than the (uncorroborated) evidence of the complainant there is no evidence on record that appellant committed the offence as described. Appellant alleges that he is being wrongly implicated by PW1. In other words, appellant says if complainant was at all raped the rapist is not him. Complainant's evidence is not corroborated and the alleged apology has no leg to stand on.

[6] The evidence for the prosecution is essentially as follows: On a certain (unknown) day in November 2011, the appellant entered the house where the complainant, nine years of age at this time, and her younger siblings were engaged in their domestic chores. The complainant was cleaning the bedroom. On entering the house appellant sent out the other siblings to a nearby homestead, kaGogo Mnoki's, to buy him some alcohol, leaving behind in the house the complainant. As told by the complainant, soon after the younger children were gone "accused came and grabbed me. I was in the bedroom. He took me to the sitting room and made me lie down. He undressed me and also undressed. He inserted his penis into my vagina and had sexual intercourse with me. He moved away from me;

there was a white substance on my thigh and wiped it with a cloth. The accused said nothing; it was the two of us in the house. After he had finished, he sat on the bench; Vuyo came and found me pulling up my panty. The accused watched television and drank alcohol. Vuyo didn't say anything to me and I never reported the incident to anyone. We had a conflict with Vuyo in December. Vuyo then told my mother [PWI] that accused had sexual intercourse with me. It was Christmas eve; we were preparing for Christmas. I never reported the incident because I was afraid since the accused told me not to tell anyone". Under cross-examination complainant stated that the sexual encounter with appellant was her first such experience.

[7] The first prosecution witness was PWI, the mother of Vuyo and complainant. She told the court that she came to know about the assault on complainant when on Christmas eve, 2011 by chance she overheard Vuyo bragging and daring complainant to beat her at the risk of Vuyo disclosing that complainant and appellant had sexual intercourse. PWI then confronted Vuyo to come out with what happened and complainant followed suit. It would seem there really was no formal or uninvited complaint by complainant. In her evidence in-chief however PWI said before she came to know of what happened, complainant had been sick and was taken to Sithobelweni Health Centre and ka Mfishane Clinic as a result of a fist-sized lump that had developed next to [complainant's] vagina. She was also taken to Good Shepard Hospital and Ubombo Clinic after Christmas 2011 when the lump resisted treatment. PWI also said that

in the meantime complainant *'couldn't walk after the sexual abuse'* nor '*perform well at school'* and '*at night she would suffer from a fever'*.

[8] What is curious in this search for a cure of complainant is that inspite of the above telling signs PWI did not herself suspect or discover that her child was a victim of sexual abuse until told by Vuyo. Curious also is that Sithobelweni and ka Mfishane health centres did not discover that complainant had been violated. How come? Further, the records and dates when PWI and complainant allegedly visited the two clinics were not found by the Police. This raises the question whether complainant was ever taken to these health centres. The issue of the lump "the size of a fist" was apparently not mentioned by PWI to any other member of the family before Christmas 2011. The doctor, PW3, at Good Shepherd Hospital was told that complainant had been sexually assaulted by a known person about a month earlier. What was the doctor then supposed to find out? Hence the only thing the doctor found on examination was that complainant's hymen has been broken (not intact). The doctor concluded that complainant had been 'sexually abused'. But what does 'sexually abused' mean? What we know is that it does not mean or say that complainant was raped by appellant. The doctor, (PW3), in her report wrote: "*I examined the victim to ascertain if she had any HIV/AIDS as well as any sexual infection. I found that she had no HIV/AIDS or Syphilis.*" Thus, if complainant was ever treated, as the doctor says she did, for syphilis or any other sexual infection it must have been only as a precautionary measure – as it is usually done in such cases: nothing to do with the

appellant. If the doctor *confirmed* sexual abuse the sex abuser had yet to be identified as the medical report did none of that.

[9] One notes that the record of proceedings, the transcript, does not show that complainant who was assisted by an intermediary in terms of section 223 *bis* of the Criminal Procedure and Evidence Act, 1938, during her court appearance on 16 October 2014 was duly sworn or warned to speak the truth and nothing but the whole truth. If the record is complete then complainant was never sworn or warned as required by the provisions of the Act, section 217 or 218 or 219. In its judgment the trial court does not refer to an oath or warning having been administered to the complainant except the intermediary. True enough complainant was cross-examined; but if unsworn or unwarned as the case may be what is the value of her evidence. The statements of witnesses to the Police are not contained as part of the record of proceedings. This makes it impossible to cross-check any part of the evidence for consistency.

[10] It will again be noted that there is nothing on the record that says complainant did not report the sexual assault to her mother, PWI, '*for fear that the accused would physically harm her*'. There is also no evidence on record that appellant had '*threatened [complainant] with physical violence if she disclosed the incident to anybody*', as the trial court stated. If the quoted words or words to the same effect were said in evidence, then they have been excluded from the record of proceedings, making the record incomplete, and if so, unreliable. What the record shows is that the

complainant did not report the incident because the appellant told her not to tell anyone. This is a far cry from the allegation of threat of physical harm or violence as the judgment states.

[11] In para [29] of its judgment, the court *a quo* concludes, *"The accused did not dispute the evidence of PW3 that he admitted to committing the offence during the family meeting"*. The reference to 'PW3', I think, should be to 'PW2'. Is this conclusion justified given the evidence on record? The appellant had consistently denied the offence. If he did concede to committing the offence before trial what stopped him from pleading guilty? The proper conclusion from the evidence even at the level of family meeting is that appellant did not admit or apologise to the commission of the offence. If anybody did apologise, it was appellant's mother. But her mandate to do so on behalf of appellant would have to be established. The record does not support any such mandate. Instead appellant insists that he could not have been so drunk that he could not remember committing the offence charged. The appellant is a forty-two year old and the record does not say that he is in any way mentally compromised or challenged to require his mother's assistance.

[12] A glimpse of the cross-examination of PW2 by the appellant might be helpful:

ACC: You said I apologized, did I apologize in the family meeting?

PW2: You apologized.

ACC: How could I apologize when I denied committing the offence?

PW2: You apologized, saying it might have happened when [you were] drunk

ACC: Do you recall my mother saying I should apologize because it is possible I committed the offence when I was drunk, she apologized on my behalf?

PW2: You apologized during the meeting….

ACC: I put it to you that your evidence is not true; I never apologized, even my mother can testify to that.

PW2: She can talk for herself, the accused apologized.

[13] From the foregoing discourse it cannot be concluded by any stretch of the imagination that appellant apologized or admitted to committing the rape. To bolster its case, the prosecution should have applied to have appellant's mother called to testify to assist tip the scales for or against either party. Appellant cannot be blamed for not calling his mother or any other witness. He pleaded no special plea or defence. The prosecution had to prove its case beyond reasonable doubt. PW2 offered no answer to appellant's: *"How could I apologize when I denied committing the offence?* If the conclusion that appellant did not dispute that he admitted was a finding by the trial court then it should have stated that on credibility it accepted the prosecution evidence and rejected that of the appellant. Otherwise appellant clearly and strongly disputed the alleged apology as a matter of fact. Even from a legal stand point the touted apology is not sustainable.

[14] It is also important to examine closely the complainant's evidence of what happened when Vuyo and the other siblings had gone to Gogo Mnoki's to buy alcohol for appellant. Complainant's evidence is to be contrasted with that of Vuyo the other possible eye witness. But Vuyo did not testify in

court. PW1 told the court what Vuyo told her. In all fairness Vuyo never witnessed any 'sexual intercourse' between complainant and appellant. This is beside the point whether at four years Vuyo knew anything about sexual intercourse and still not tell anyone about it. Vuyo is said to have said when she entered the house from Gogo Mnoki's "she found the accused having sexual intercourse with [the complainant]", and then "the accused got up and pulled up his underwear"; and, Vuyo said, "this happened on the bench". By 'this' Vuyo probably means the sexual intercourse. This is not what complainant said regarding the state of affairs when Vuyo came in. According to complainant when Vuyo entered appellant was already sitting on the bench, drinking and watching television. At that stage only complainant was pulling up her panties; and the alleged sexual intercourse had taken place somewhere *down* and not on the bench. Question is: Is it Vuyo who is exaggerating or is it PW1 or PW2? If young Vuyo saw any pulling up of underwears, the trial court had nothing before it from which to assess and determine if Vuyo was reasonably intelligent to have correctly inferred from what she saw that sexual intercourse had taken place. It was that critical that Vuyo should have been a witness.

[15] More information about Vuyo would be needed to credit her with the implied intelligence to conclude that the two were having intercourse when she saw them pulling up their underwears. The reason why Vuyo said nothing when she saw her sister pulling up her panties may very well be that Vuyo saw nothing out of place with that since she did not see complainant and appellant having sexual intercourse as PW1 testified.

Vuyo's not telling anyone about the incident would also be consistent with her having seen no sexual intercourse. The story of a quarrel or conflict between Vuyo and complainant on Christmas eve is thus seriously put to question, and so is the entire story of the rape. At 7 years when trial proceeded, Vuyo should have been called to give evidence.

[16] It should be mentioned that Vuyo and complainant only 'reported', for lack of a better term, the sexual assault to PWI after being *confronted*, another lack of a better term, by PWI to come out with the secret they had been keeping to themselves. The children did not volunteer the report. How much persuasion and possible threat of beating PWI used to get the information is unknown. But appellant says that as the complainant was reluctant to speak PWI beat her to say what happened. The trial court casually dealt with this aspect of appellant evidence and rejected it for not having been put to PWI. Yet if indeed PWI had beaten complainant to obtain the report then there would be no case at all as there would be no complaint. What practical form this confrontation took is not explained by the prosecution. Where clearly the complainant had not volunteered the complaint, it is important to know whether any alleged report was not induced by threat. In the absence of sufficient information, is it right to infer that the report was made without intimidation? It was imperative for the trial court to carefully consider the assertion by appellant in this regard. See **S v T** 1963 (1) SA 484 (A) at p. 487D-E where Hoexter JA stated: *"The clear inference from the above cases is that a complaint will not be admissible if it is made as a result of intimidation. In the present case the mother of the complainant actually took a stick and was about to beat the*

complainant when the latter started crying and said she would tell what happened. In my opinion the complaint made by the complainant in the circumstances was wrongly admitted in evidence at the trial". *In casu* the children had not told the rape incident for over a month: what would make them on the alleged occasion willingly tell what happened without much persuasion or even intimidation?

[17] The following issues are noted of the complainant and her evidence with regards the alleged sexual intercourse -

(a) No indication that she struggled in resistance to the rape;

(b) No indication or allegation that she cried, screamed or shouted on being raped;

(c) No indication or statement that she bled or felt any pain or discomfort or distress during the assault;

(d) She was only told by appellant not to tell anyone and she obliged;

(e) Appellant remained silent throughout the assault;

(f) Appellant does not disappear from the scene of crime but sits around, drinks his booze and watches TV;

(g) Vuyo enters the house, sees complainant and appellant 'having sexual intercourse' but she says nothing to complainant, nothing to appellant and does not report to PW1 until she is called upon to do so;

(i) PW1 never suspects sexual abuse for over a month until she overhears the 'quarrel' between Vuyo and complainant whereas complainant, according to PW1, had allegedly evinced signs of possible sexual abuse resulting in visits to the clinics.

It is simply that curious, to say the least.

[18] The medical report is rather shallow and unhelpful. It does not tell how much penetration would tear the hymen and still not cause sufficient pain to have caused complainant to cry or be visibly unhappy or stressed as she pulled up her panties and for Vuyo to see that. How did the penetration, rupturing the hymen, happen as to cause the lymph node on the groin of complainant? Could the lump or lymph node and the tear on the hymen have been caused by any other means than rape? The medical record is not conclusive – mainly, in my opinion, due to the lengthy delay in the reporting of the alleged rape. A tear on the hymen could be caused during play or fall, or even by hand manipulation, or other means and not necessarily only by penile means. PW3's report while finding a torn hymen signifying possible sexual abuse, remarked that "no sexually transmitted infection" was found. PW7 on the other hand concluded that the lump on the groin of complainant was due to a "sexually transmitted infection". Unless reconciled, the medical reports appear contradictory. Did appellant fully understand the meaning of these reports to ask the doctors any meaningful questions? In cases such as the instant, the words of Prof. Keith Simpson are worth recalling: *"Accidental wounds of the genitals*, *unless all the circumstances are known*, *may sometimes resemble those produced by criminal assault*". See Vol. 1 **Taylor's Principles and Practice of Medical Jurisprudence** 12th ed. at p. 259. Simpson also gives some examples and stories about genital injuries occurring without assault such as the case where "The 'rape' injuries were caused by the bicycle". It is important that medical reports be carefully interrogated.

[19] Of the sexual assault, complainant does not give any graphic description of it, and none, including the trial court, appears to have ever been interested to know more, for instance, did appellant in any way appear drunk, did he greet them, exact greeting if at all; what was he wearing. Was it usual that appellant would come in the house, watch television and or drink beer/alcohol? Did Vuyo come back with the alcohol (Vuyo said she did); if so did she hand it herself to the appellant, or which alcohol was appellant drinking as described by complainant? Did Vuyo come in alone or with the other siblings? Was Vuyo (other than complainant) the oldest of the siblings? If Vuyo, at four years, was the older of the siblings, then how far was Gogo Mnoki's place? How did complainant react to the assault; did she in any way put up a struggle – scream, shout or cry for help! Other than sexually, was she in any way hurt; other than the 'white substance' was any blood observed, it being her first. Complainant has said nothing about these things and the prosecution did not assist complainant in the above regard so as to create an internally consistent story as against the bare fact of the sexual intercourse described by complainant.

[20] In passing, it is most disconcerting that young Vuyo should in the first place have been exposed to the alleged sexual incident, if it ever happened. But more seriously, that Vuyo, at four years, (i) should know about sexual intercourse and be able to infer that complainant and appellant were having sexual intercourse when she found them pulling up their under wears, as told by PW1 (not by the complainant); (ii) should not at once report the incident to PW1 or other responsible adult or her friends

around; (iii) should be smart enough to use it as a form of blackmail against her sister. What kind of upbringing does this conspiracy of silence reflect of the Mvubu children? This also goes for complainant who, being raped, is told not to tell anyone and she meekly complies, even when she falls sick with lymph node abscess? This is unacceptable. But it raises the central question whether the sexual abuse happened as described or is just a fabrication by PWI against appellant for the reasons given by appellant, namely, PWI's failure to pay appellant for the construction of a house and ploughing of a field. PW1 of course denies the issue of payment but not the house or the field referred to by appellant.

[21] It may be convenient to point out here that during the cross-examination of PW1, appellant put questions to PW1 to the effect that he, appellant, had earlier in 2011, built a house for PW1, but PW1 was failing or refusing to pay for the labour. Instead, PW1 had wanted to sleep with appellant in lieu of cash payment. The two did indeed have sexual intercourse at night in appellant's room, so says the appellant. But that did not stop appellant from demanding cash payment. Over time the relationship between the two became very sour. Notwithstanding the strained relations, appellant later ploughed a field for PW1 with a hire-tractor, but still PW1 would not pay for the plowing services: she again denied that payment was required. She also denied the alleged sexual intercourse with appellant. It is in the light of such background that appellant says the charge is a fabrication by PW1, the mother of Vuyo and complainant. In that case, PW1 could have a motive for fabricating the charge and implicating appellant, who, if found guilty would go down for a long period and give peace and space to PW1.

The trial court rejected appellant's allegations as false; but the court did not say anything about PW1's evidence and her general demeanour as a witness or overall credibility.

[22] From appellant's account of the background events leading to November-December 2011, in particular the sexual account, PW1 could also fabricate the charge and implicate the appellant out of embarrassment for having had sexual relations with appellant(1). There is nothing in her evidence which makes appellant's story palpably false. Failure by appellant to properly cross-examine PW1 on these aspects of the case is no proof that appellant's allegations are false or an 'after-thought'. Appellant was unrepresented, not so educated, may easily have been overwhelmed by the trial. Even legally represented accused do falter on the conduct of their defence by failing to bring to attention of counsel relevant information. See **S v Nkala** 1964 (1) SA 493 (AD).

[23] *In casu*, implicitly, appellant may well have been labouring under similar misconceptions as in **Nkala** case in failing to call witnesses in his defence such as his mother or La Dlamini. There was nothing evidently incriminating him in the case. He must have trusted his own defence. The doctor's evidence was at best circumstantial. Vuyo and complainant were children aged four and nine respectively – and Vuyo had not been called to testify. Both children had not divulged the alleged rape for over a month until, according to appellant, the children were beaten by PW1 to tell the story implicating him. The preceding sour relationship between PW1 and

appellant was such that appellant could not believe that the trial court would believe any of her testimony; he probably believed he would be acquitted; and without the court's assistance in informing him of his rights appellant may have failed to appreciate the seriousness of the charge and the likely heavy sentence if convicted.

1.Burchell and Milton **Principles of Criminal Law,** p. 447, foot-note 127 write that women often falsely accuse men of sexual attacks for a variety of reasons, motivated inter alia by *"hatred, a sense of shame after consenting to illicit intercourse, especially when pregnancy results,…"*

Before this court, appellant clarified that the trial court explained that he could call witnesses, but said. "I did not know if I could call my mother…. I erred in not calling my mother. I tried to call my witnesses but the witnesses were scared that they could be viewed badly by the family, as relatives…These were laDlamini (wife to Simelane), Bongi Mamba, Thembi Hlanze…"(2).

[24] Appellant's failure to call witnesses may also be related to his failure to find counsel. The record does not show that the trial carefully inquired why appellant could not secure services of an attorney. The trial court may have perfunctorily dealt with the issue without emphasizing the need to secure these services having regard to the seriousness of the offence involving a minor. Appellant may again have failed to appreciate the significance of having legal representation. Appellant may of course have lacked the necessary funds. But he may also have overlooked the need for counsel

wrongly believing that having counsel might give the impression that he was indeed guilty when in fact he was innocent.

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2. That the trial court explained appellant's rights is not on the transcript even though the judgment reflects it. On the other hand, appellant may confusing the question with what happened at the Police station when he was warned.

[25] The story of how some unsophisticated and superstitious accused person ignore legal representation is told by Kgomo J in ***S v Manale [2000] 4 All SA463 (NC)***. The learned Judge states the following erroneous explanations drawn from experience and the law reports:

> "5.1 Moot-courts are sometimes conducted by the accused's fellow prisoners. They would advise him/her not only on how to conduct his/her defence but also to refrain from engaging the service of a legal representative who, they maintain, may shatter what the moot-court perceived to be an impregnable defence.
>
> "5.2 Superstitious accused persons who have consulted traditional doctors to 'fortify' them and enable them to secure an acquittal are sometimes advised by the traditional doctors that the fortifying traditional medicine ('*muti*' in Zulu or '*pheko'* in Setswana) gets deflated or loses its efficacy upon the intervention of a lawyer.
>
> "5.3 Some accused labour under the erroneous impression that State counsel and lawyers… are part and parcel of the State machinery….

> "5.4 A familiar example of uninformed choice is given by Jordaan AJ in **S v Nkondo** 2000 (1) SACR 358, at 360c concerning
>
> > 'a perception amongst some accused persons that if they make use of the right to an attorney or an advocate it would indicate to the court that they are guilty'".

[26] ***In casu,*** the record of proceedings reflects that at the close of the crown case the appellant, (DW1), began his defence, on 8 April 2015, and the record only states *"Oath taken*". There is nothing to show that DW1 was informed of his rights as an accused person in a serious rape trial. Previously on 15 October 2014, when PW1 began her evidence in-chief, all that the record shows is: *"15/10/2014. Postponement application being refused on the basis that the matter was before court on the 4th March 2014 and it was postponed to enable accused to secure services of an attorney. Accused had 7 months to engage an attorney and it was more than enough time*". There is no indication as to what exactly was said to appellant in March 2014 when the matter was postponed for appellant to obtain legal representation. In para [12] of his judgment the learned trial judge writes. *"On the 26th March 2012 PW4….arrested the accused at Murray Camp at Sidvokodvo. The accused was told of his rights to legal representation as well as his rights to silence. He was cautioned that he was not obliged to say anything to the police and that whatever he said would be recorded and used as evidence in court. He opted to say something…."* But with due respect the pre-trial police warning in terms of the so-called Judges' Rules is not a substitute for a formal court warning, informing accused of his right not only to say anything in court but also the significance of being legally represented. Indeed by the beginning of his evidence accused may long

have forgotten the police warning. The requirements of ss 21(2) and 21(9) of the Constitution are imperative.

[27] In **S v Manale**, supra, Kgomo J, at pp 466-7, has this to say: *"3. A principle has evolved over the years to the effect that where a case is sufficiently complicated and could turn out to be materially prejudicial to an accused he/she ought to be apprised of the gravity of the charge and possible dire consequences of a conviction. The arraignment of the accused on five episodes of rape on the same woman during the same night at gunpoint falls unquestionably within the purview of this principle.... In S v Mbambo 1999(2) SACR 421 (W) at 426b-d Goldstein J stated: 'It is quite clear that where an accused faces a charge involving life imprisonment, as the present accused did, that sentence is one which "could be materially prejudicial" to him and therefore that he "should be informed of the seriousness of the charge and of the possible consequences of a conviction". Furthermore, a charge of rape involving a child of nine and medical evidence as this one did is in my view sufficiently complicated and serious to warrant the accused being encouraged to exercise his right to legal representation. Thus applying the dicta, the accused ought to have been informed at least of the fact that he was faced with the possibility of a minimum sentence of life imprisonment and further that he ought to have been encouraged to obtain legal representation" (see further S v Radebe; S v Mbonani 19989(1) SA 191 (T), at 195B-196I; S v Mabaso and another 1990 (3) SA 185 (A) at 203 B-G)"*

[28] From the outset of the trial unrepresented accused should be told to listen carefully to prosecution witnesses so as to ask them pertinent questions and carefully determine the witnesses, if any, they may wish to call in their defence. The necessity for witnesses should be repeated as may be deemed necessary before accused close their defence. Accused should be encouraged to call identified witnesses. This of course does not mean that accused have a case to prove during trial. But accused should not out of apparent ignorance or misinformation or superstition fail to take advantage of their rights at trial. Unrepresented accused should not be expected to conduct their defence as trained lawyers. They should not be entirely blamed for not asking certain pertinent questions during cross-examination. Fair hearing requires that bit. Failure to observe these precepts may lead to a failure of justice. To this end, Kriegler J. in **Key v. Attorney General, Cape Provincial Division and another**, 1996 (4) SA 187 at 196, observed:

> "In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties, and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, ...fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to

> take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded".

[29] The story of how PW1 came to know about the alleged rape was never tested for admissibility by the trial court. This aspect of the evidence is about the *complaint* which is usually required in sexual cases. Was any 'complaint' of rape made and, if so, by who? Did the trial court believe the story that PW1 overheard or eavesdropped on her children? Neither child 'reported' of the sexual incident involving the complainant. PW1 came to know about a month or so after the rape supposedly occurred. PW1 told the court that Vuyo told her about how she, Vuyo, found complainant and appellant having sexual intercourse on a bench. The trial court should have seen Vuyo and made its own impressions of her general demeanor and intelligence as a witness. From complainant's account Vuyo did not see any of the alleged sexual intercourse when she came in. PW1's account must be somewhat embellished. The discrepancy is not insignificant. Only appropriate leading and cross –examining of the witnesses would bring out the truth and clear any grey areas. Vuyo did not testify; complainant does not seem to have been duly guided and assisted in her evidence in-chief, resulting in her evidence leaving a lot to be desired. Even if Vuyo had testified, it is hard to see how she would have corroborated the complainant in any material respect.

[30] Vuyo is the 'whistleblower', however reluctant. Without Vuyo on the witness stand, the lead evidence is missing. Critically, complainant is not corroborated as a cautionary measure. Smit JA in **Maseko v R** 1977-1978

SLR 8 at 9A says – speaking with reference to witness Mfaniseli, about ten or eleven years old. *"In cross – examination he appears to have been unshaken. Nevertheless he is a young person and the courts are aware of the danger of accepting the evidence of young children without there being corroboration of their story. Not that there must always be corroboration"*. In **R v Ginindza** 1987 – 1995(1) SLR 165 (HC) at 169d-e, Dunn J stated as follows: *"....It has been stated in numerous cases that there is no rule of law requiring corroboration of a complainant in cases such as [at] the present but that 'there is a well-known cautionary rule of practice in regard to complainants in sexual cases in terms of which a trial court must warn itself of the dangers inherent in their evidence and accordingly should look for corroboration of all the essential elements of the offence'. See* ***Vilakati Dicko v R*** *Appeal Case 56/1984 (unreported)"*.

[31] In para [28] the trial court said that Vuyo corroborated the complainant. But Vuyo did not turn up in court: so she could not, in absentia or from the public gallery, corroborate the complainant. And to be sure, PW1 cannot corroborate an absent witness. In **Tshwene and Another v. The State** [1987] BLR 92, the High Court of Botswana held *"(2) Corroborative evidence must confirm in some material particular: (a) that intercourse had taken place, (b) that such intercourse had taken place without the woman's consent, and (c) that the accused was the man who committed the crime"*. Even at the family meeting, for whatever it was worth, PW1 says complainant never had the opportunity to speak, as it were, point out at the appellant in the face as the sex abuser. Instead, we are told, Vuyo "only explained all what happened". In the absence of corroboration, how

reliable is complainant as a witness. The medical report or doctor's evidence is far from being of any material assistance. The report does not say who 'sexually abused' complainant. In the **Tshwene** case Hallchurch J did not find any fault in what the Magistrate had held, that is: *"(c) The medical report disclosed that the prosecution's first witness had had sexual intercourse recently as semen was present in her vagina. However, such a revelation is* ***not*** *corroboration. In* ***James v. R*** *(1971) 55 Cr.App.R. at p. 303 Viscount Dilhorne said: 'Independent evidence that intercourse had taken place is* ***not*** *evidence confirming in some material particular either that the crime of rape had been committed or, if it had been, that it had been committed by the accused. It does not show that the intercourse took place without consent or that the accused was a party to it'"*. (p 96)

[32] The Concise Oxford Dictionary defines 'apology' as – 1 ***"A regretful acknowledgment of an offence*** ..." Does the alleged apology by appellant at the family meeting provide an admission of the offence by appellant to bolster the prosecution case? The appellant denies ever apologizing. The apology is supported by PW1 and PW2. The understanding is that in apologizing the appellant was in effect admitting to have committed the offence charged. It becomes necessary then to enquire whether there was an apology, and if so, whether it meets the requirements of an admission for admissibility in our law. The family meeting was an extra-curial informal arrangement - a family affair. In general, as to the alleged apology, one would wish to know (i) what words were spoken by who leading to appellant tendering an apology; (ii) what words or conduct was used by appellant to express the apology; (iii) was appellant in any way induced by

threat or promise to offer the apology; (iv) in other words, was the apology voluntarily made or was it squeezed out of appellant 'kicking and screaming' is it were. See Lord Morris in **DPP v Ping Lin** [1975] 3 All ER 175 (HL) at 177.

[33] The trial court seems to have uncritically accepted the story that appellant apologized, without properly testing it for admissibility. Even though it has not been raised expressly in this court, in my view the admissibility of the apology cannot be overlooked having regard to the fact that the conviction is challenged by an unrepresented appellant. Be that as it may, if the apology is tendered as an admission signifying a confession to the offence, the apology must be rejected out of hand for failure to comply with the common law and or the provisions of section 226 and the first proviso thereto. The section is headed: ***"Admissibility of confessions by accused if freely and voluntarily made without undue influence and, if judicial, after due caution"***. The alleged apology is not clearly established even as a matter of fact. If appellant had admitted the offence even before trial began, why did appellant plead '*not guilty*'? In my view the alleged admission must be rejected as not established. In **R v Mkhaliphi and Others** 1977 – 1978 SLR 191 (HC), the headnote reads: *"The onus is on the Crown to prove the matters set out in the first proviso to s. 226(1) of the Criminal Procedure and Evidence Act 67 of 1938, namely that the confession was freely and voluntarily made by the accused in his sound and sober senses and without being unduly influenced thereto*".

[34] In para [29] of its judgment the trial court observed: *"The accused did not dispute the evidence of [PW2] that he admitted to committing the offence during the family meeting*". If the alleged apology was in law an admission or confession then in terms of the accepted procedure the trial court should have conducted a 'trial-within-a trial', the so called ***voir-dire.*** Nothing of the sort is reflected on the record. PW1 insisted that "the accused apologized…" and PW2 stated: "The accused initially denied but later admitted, saying he might have been drunk." In that case, was the admission not unaffected? *Hoffmann and Zeffertt* write: *"At common law no statement by an accused person can be given in evidence against him unless the prosecution prove beyond reasonable doubt that it was freely and voluntarily made. This requirement applies to all extra judicial statements by the accused*, *whether they were intended to be incriminating or exculpatory…*" (p. 200). ***Cross on Evidence*** states: *"A confession of a crime is only admissible against the party making it if it was voluntary i.e. provided it was not made in consequence of an improper inducement or threat of a temporal nature held out or made by a person in authority, or by oppression*" and that "*a plea of guilt is a species of confession…*" (Cross p. 482), and "*The legal burden of proving that a confession was voluntary rests on the prosecution*" (Ibid p. 485). And Hoffmann and Zeffertt further state: "A person in authority is 'any one whom the prisoner might reasonably suppose to be capable of influencing the course of the prosecution'". No attempt at all was made by the prosecution to prove the apology as a confession. And if need be, in my view, the family meeting could be considered as some kind of 'person in authority'. The family meeting could as a matter of fact have decided not to pursue the matter any further or not to report it to the police. It is also

said that "a suggestion of the possibility of a pardon….will vitiate a confession…" (Cross, p 487). And that (s 226) *"requires proof that the admission was voluntarily made and that the confession was freely and voluntarily made by the accused in his sound and sober senses, without his having been unduly influenced to make it*". Hoffmann and Zeffertt, p.222. The fact that the family meeting could not possibly warn or inform appellant of his rights as a suspect, in particular that he was not obliged to answer any question, also militates against admissibility of the apology generated by that meeting.

[35] On the indictment, the appellant could not reasonably seek to establish an alibi because the indictment simply states the offence occurred "upon or about the month of November 2011." The charge sheet cast the net too widely to properly inform the appellant of the case against him. As it is, complainant could be substituting appellant for the real culprit. It should be remembered that appellant denies the charge and says that PW1 is the architect of this rape case implicating him. If appellant were to be properly informed of the case against him and be allowed to prepare his defence in the spirit of fair hearing he would be told when in November the offence happened. As it is the indictment denies appellant one of his formidable defences, an *alibi*. There is nothing on the record which ties the offence to the month of November 2011. PW1 does not indicate when she first took complainant to Sithobelweni and ka Mfishane clinics or when she first noticed complainant being "unable to walk"!! Such information would have reduced the area of uncertainty as to the date of the offence. For all we can ask: Why is it said that the offence happened in November 2011,

and not in October or September 2011? Other than the mere say-so of the indictment, there is nothing on the record which connects the offence to November 2011. By denying the charge, appellant does not necessarily concede to have been present at the house at the time the crime is alleged to have taken place. In the result appellant's counter that the case against him is a fabrication by PW1 should not be summarily rejected. The totality of the evidence raises the question whether the rape occurred at all or as described by the prosecution. Children should be protected against sex perverts, but the standard of proof should not be lowered from shoulder-high to knee-level, as it were, in rape cases involving children. The presumption of innocence until proven guilty rule requires that all accused persons should be treated similarly until conviction. The impression of guilty until proven otherwise should not be created even in child victims of alleged rape.

[36] In summary, Vuyo did not testify in court in order to corroborate complainant as to the fact of sexual intercourse between complainant and the accused. There is no evidence on the record that complainant was duly sworn or warned before testifying in court contrary to the provisions of section 217 or 218 or 219 of the Criminal Procedure and Evidence Act, 1938. The medical report does not identify appellant as the sexual abuser. Complainant did not report the rape until she was questioned or invited by PW1; it was not shown that complainant was not intimidated to tell PW1 of the alleged rape. The evidence of PW1 and PW2 is not worth much in the absence of a complaint in the face of the denial by accused. Any alleged corroboration between PW1 and PW2 on the apology fails with the failure

to prove that the apology passes muster. The alleged apology cannot stand judicial scrutiny. The evidence does not establish the identity of accused.

[37] In the result, I cannot say that the prosecution proved its case beyond reasonable doubt. I am unable to support the conviction and sentence of the appellant. The appeal succeeds. The appellant is discharged.

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M. J. DLAMINI JA