IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 12/2016

In the matter between:

ABSALOM VARAM SIKHOSANA **Appellant**

and

REX **Respondent**

Neutral Citation : *Absalom Varam Sikhosana* vs *REX* (12/2016) [2018] *SZSC 34*

(27/09/2018)

Coram: **MCB MAPHALALA CJ, SP DLAMINI JA AND RJ CLOETE JA**

Heard : 07 August 2018

Delivered : 27 September 2018

SUMMARY : *Appeal against conviction of rape of 6 year old granddaughter and sentence – Defence simply denies knowledge of the crime – Alleged fabrication of evidence including medical*

evidence – Could not offer any explanation for alleged conspiracy – Crown proved all three elements of crime – correctly convicted – Sentence within current range – Appeal dismissed – Ordered that name of complainant not to be published.

JUDGMENT

CLOETE - JA

BACKGROUND

[1] Appellant was found guilty of the rape of his six (6) year old granddaughter by the Court *a quo* on 03 August 2016 and on 04 August 2016 was sentenced to fifteen (15) years imprisonment.

[2] On 15 September 2016 the Appellant lodged an appeal with the Registrar of the Supreme Court against only the sentence imposed on him and the letter reads as follows;

"I hereby humbly apply for appeal of my 15 year sentence that was imposed upon me by Justice Nkhululeko Hlophe for the count of rape on the 04th of June 2016. I am not against the conviction but am just

pleading with the Court to reduce my sentence from 15 years imprisonment to at most ten years imprisonment. The 15 year sentence imposed upon me is too harsh for me to bear as it is harsh and I am a very old man at present. I will submit to the High Court my heads of argument for my appeal. Please acknowledge receipts of my appeal at your earliest convenience." (My underlining)

[3] However, on 30 November 2017 the Appellant recanted his letter of 15 September 2016 and now sought to appeal against both his conviction and sentence and the relevant part of the letter addressed to the Registrar reads as follows;

"Therefore I plead with the Supreme Court to allow me to amend it and replace it with this one which is against both my conviction and 15 year sentence. In essence I appeal against both conviction and sentence for the rape offence. It is my strongest conviction that I'm innocent of the charge, conviction and sentence. My main grounds of appealing are that I was erroneously, wrongfully and unfairly convicted and sentenced for this rape offence."

[4] The Crown called the Complainant, PW1 (I do not believe that it is fair or in the interest of this child to have her name published in any records and will

deal with that in my Judgment) who gave evidence through two (2) intermediaries, PW2, Gugu Mtshali, a teacher at the school of the Complainant and a police witness.

[5] The evidence of the Complainant was that she was six (6) years old at the time and a Grade 1 pupil at her school. She testified that around 2009 and 2010 she had been sent to the house of the Appellant to fetch items for her grandmother in the first instance and her Aunt in the second instance from the Appellant at his home and on both occasions she had been sexually assaulted by the Appellant inserting his manhood into her. She reported both of the incidents to her grandmother and her aunt and in both cases neither believed her and indicated that she was fabricating a story. She subsequently confided in PW2, her teacher, who reported the matter to the head teacher and finally the matter was reported to the police.

[6] The Complainant was taken to a Medical Practitioner at the Sithobela Health Centre by the name of Dr Daniel Dangne who examined the Complainant and who completed the standard examination form relating to sexual offenses and the document appears on Pages 13, 14 and 15 of the Record of Appeal. On Page 14 of the Record the Doctor remarked that there had been a sexual assault and on both Pages 14 and 15 of the Record he recorded that there had been a hymenal tear.

[7] The said medical report was, by consent, handed to the Court in terms of Section 221 of The Criminal Procedure and Evidence Act. It is important to note that the submission of the report was with the full consent and knowledge of the Attorney who was representing the Appellant at that time namely Mr. Thulani Maseko. Unfortunately the Doctor left Swaziland before the trial and as such could not and did not give expert evidence but the contents of the report were never questioned by the Appellant or his Attorney.

[8] The Complainant was extensively cross-examined by Attorney Maseko. The Judge in the Court *a quo* observed at Paragraph 9 of his Judgment at Page 68 of the Record **"The Complainant was cross-examined at length during cross-examination by Mr Maseko. She however maintained her story and was not shaken in the process, particularly on her allegations that her grandfather, the Accused, had had sexual intercourse with her on at least two (2) occasions which she graphically mentioned as stated above. Whilst some inconsistencies were exposed between what she had allegedly stated in her statement as recorded by the investigating Officer, and what she had stated in Court, in her evidence in chief, it is apparent that such inconsistencies are not material and they are perhaps normal and expected of a child of six (6) years who is called**

upon to give evidence after years of having had her statement recorded."

[9] PW2, Gugu Mtshali gave evidence that she was a teacher at the school which the Complainant attended and that the Complainant had confided in her relating to the sexual assaults by her grandfather which PW2 reported to the head teacher which resulted in Police intervention and the medical examination. She was cross-examined extensively and whilst there were some omissions relating to what she had said in her Police statement and what she had stated in Court, the view of the Judge in the Court *a quo* was that these issues were immaterial and did not damage the case of the Complainant at all.

[10] At the close of the Crown's case the Appellant gave evidence. The words of the Judge in the Court *a quo* at Paragraph 20 on Page 75 of the Record **"When he took to the witness's dock after his rights and procedure going forward including its consequences had been explained to the accused; he denied knowledge of the Complainant on the one breath and later stated that whereas he knew her as his granddaughter, she had been sent by Mganda and her school teacher Gugu Mtshali to implicate him. He however did not bring any evidence in support of**

these assertions. These assertions, it is a fact, were not put to the Crown witnesses including the basis for their having been made."

[11] The Appellant subsequently called his son Fana Sikhosana, DW2 who simply denied any knowledge of the charges and who tried to convince the Court that his father was never at home during the day but it soon transpired that he himself was not at home for long periods during the day and as such he was unable to vouch for the fact that his father could not have committed the offences during the daytime. The Appellant also called one Elliot Mamba, DW3, who simply knew nothing about anything relating to the matter.

[12] The Court *a quo* found that the Crown had proven all the three (3) required elements of the crime of rape being the identity of the perpetrator, the fact that intercourse had taken place and of course the Complainant was unable to consent, being *doli incapax* at the age of six (6) at the time and accordingly found the Appellant guilty of rape and sentenced him to imprisonment for a period of fifteen (15) years.

ARGUMENT OF APPELLANT

[13] Just as he had done in the Court *a quo* the Appellant simply continued to allege that he knew nothing about the matter and was completely innocent,

that the Complainant had never come to his house and that he left early for work every day and arrived home late and that as such the Complainant had simply fabricated the whole story against him.

[14] The Court asked the Appellant on three (3) occasions what the possible reason was why his six (6) year old granddaughter would fabricate evidence of such a serious nature against him. He avoided the question on two (2) occasions but when pressed for an answer on the third occasion he simply said he did not know.

[15] When confronted with the fact that his Attorney had consented to the admission of the medical report, the Appellant simply alleged that the Doctor had lied and had fabricated the evidence of the sexual assault.

ARGUMENT OF THE CROWN

[16] The Crown Counsel argued that the Appellant had been correctly convicted as all of the elements of the crime of rape had been proven by the Crown. There was no doubt about the identity of the accused person and this was due to the evidence given by the Complainant that the Appellant was well-known to her and that their home was adjacent. Secondly, the medical report, unchallenged, found that there was a hymenal tear and coupled with the evidence of the Complainant that the Appellant had inserted his

manhood into her vagina, proved that there had been sexual intercourse. It was not necessary to expand on the issue of consent as the Complainant was six (6) years old at the time.

[17] As regard the sentence it was stated that the sentence was well within the range of matters of this nature and as such should not be interfered with and accordingly the appeal should be dismissed.

FINDINGS

[18] As found by the Court *a quo* and as argued by the Crown, I believe that the Crown had proven all the essential elements of the offence of rape. The following cases are instructive in this regard: **"Mbuso Blue Khumalo v Rex, Supreme Court Case No. 12/2012, Mandla Shongwe vs Mandlenkosi Daniel Ndwandwe v Rex, Supreme Court Case No. 39/2011"**.

[19] As regards the identity of the accused, I am satisfied that the evidence of the Complainant and PW2 satisfied this element.

[20] As regards the issue of intercourse, the medical report showed a torn hymen and the opinion of the Doctor was that it was caused by a sexual assault. Whilst the report found that some of the vaginal parts were normal, he was

specific about the hymen tear. 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"**. See also **Mbuso Bene Khumalo v Rex** and **Nkosinathi Sibandze vs Rex, Supreme Court Case No. 31/2014**.

[21] The Appellant failed to put his case to the Crown witnesses as set out in the Judgment of the Court *a quo* at Paragraph 21 on Page 76 of the Record. There are several decisions which have found that such omission amounts to an afterthought and falls to be rejected on that ground alone. See **Elvis Mandlenkosi Dlamini vs Rex Criminal Appeal Case No. 30/2001** and **Rex vs Mbendzi Criminal Appeal Case No. 236/2009**. The evidence of the accused accordingly suffered that fate.

[22] The Appellant could not explain to the Court *a quo* why the Complainant would fabricate a case against him and similarly failed to do so before this Court when specifically asked to give any reason. Accordingly this disingenuous defence has no merit of any nature and cannot be sustained.

[23] When faced with the issue of the medical report as referred to in Paragraph 15 above, the Appellant further compounded his problems by simply saying the Doctor was lying and fabricated the evidence.

[24] Accordingly the Court *a quo* cannot be criticised or faulted in any way and as such correctly convicted the Appellant of the offence of rape.

[25] As regards the sentence, I mention here that the issue of the sentence was not raised by the Appellant in his address to this Court, but I nevertheless believe that it should be dealt with.

[26] The Court *a quo* in a fully detailed Judgment relating to the legal and theoretical basis for punishment and fully exploring the triad, namely the interest of the Appellant, the nature of the offence, the interest of society including the interest of the Complainant, found that it was necessary to pass a sentence that would send a proper message that such offences are not going to be tolerated in society and that they should be deterred.

[27] By reference to **Daniel Mandlenkosi Ndwandwe vs Rex, Criminal Appeal Case No. 39/2011** which stated that **"It is now settled in this Court that the range of sentences for aggravated rape lies between eleven and eighteen years as demonstrated in Mgubane Magagula vs**

Rex, Criminal Appeal Case No. 32/2010", the Court *a quo* sentenced the Appellant to fifteen (15) years imprisonment and ordered that **"This sentence shall be construed in such a manner so as to take into account the period spent by the accused person in custody before he was released on bail; and the further one he spent in custody after the termination of his bail but before the finalization of his matter in Court."**

[28] For all of the above reasons I agree completely with the findings of the Court *a quo*.

[29] I associate myself entirely with the sentiments of the Court *a quo* relating to the abhorrent behaviour which seems to have permeated the fibre of society in Eswatini. Not a day goes by without one reading in the daily newspapers about rape being perpetrated on women and children. This barbaric behaviour has to be brought under control and seemingly the only way in which this may happen would be for harsher sentences to be imposed on the monsters who perpetrate these crimes.

[30] In passing it would be remiss of me not to mention that the Crown should ensure that the medical reports given by Medical Practitioners in matters of this nature should be more comprehensive and that the standard form should

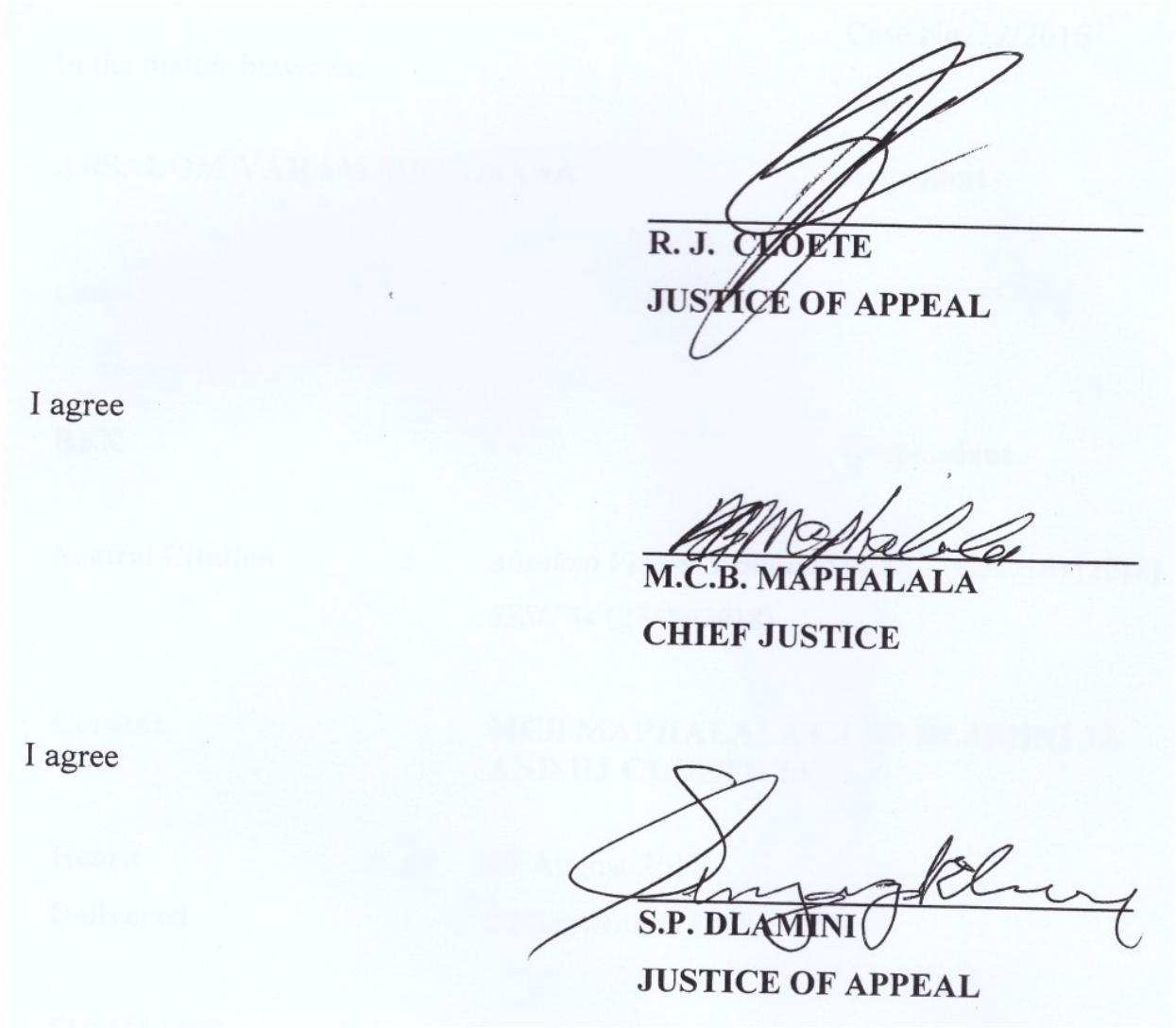
be accompanied by some form of expert opinion by the Medical Practitioner as to the injuries to rape victims and the possible causes of such injuries.

JUDGMENT

1. The appeal of the Appellant against his conviction and sentence is hereby dismissed.

2. The Judgment of the Court *a quo* is upheld and both conviction and sentence are confirmed.

3. The name of complainant shall not be published in any publication.



R. J. CLOETE
JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA
CHIEF JUSTICE

I agree

S.P. DLAMINI
JUSTICE OF APPEAL

For the Appellant : In person

For the Respondent : L. Hlophe