



IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 178/98

In the matter between:

REX

VS

MBHONO SHONGWE

CORAM	:	MATSEBULA J
FOR THE CROWN	:	MS. S. NDERI
FOR THE ACCUSED	:	IN PERSON

JUDGMENT

The accused stands charged with the crime of rape. The allegation being that on or about the 1st of May 1998 and at or near [M] area in the [M] region the accused an adult did intentionally and unlawfully had sexual intercourse with [A] a female minor aged 11 years and she was incapable in law of giving consent and the accused thereby committed the crime of rape. The accused was warned in terms of provisions 185(bis) of the **CRIMINAL PROCEDURE AND EVIDENCE ACT** that the rape was attended by aggravating circumstances in that: -

- (a) the complainant was a minor;
- (b) the complainant was in the sanctity of her home;

(c) accused abused the trust of the complainant and her family arising from their social relationship.

Provisions refer to the sentence that may, in terms of the Act be prescribed to be above the sentence of nine (9) years as a minimum.

The accused pleaded not guilty when the charge was put to him and he was not represented. The Court took the trouble of explaining to the accused his legal rights to legal representation and the procedure during the trial. The accused confirmed that he understood his rights but said he had no money to engage services of a counsel.

The Crown called the first witness Dr. Paluku who stated that he was a specialist, a gynaecologist and has been in the medical service for 23 years. He further stated that he was attached to RFM Hospital since 1998 and he examined the complainant and made a report in the RSP88 form. He read his findings in the RSP88 form, confirmed and handed it as exhibit "A." He confirmed the age of the complainant. He said when he examined the complainant's private parts he found some whitish secretions and these secretions were checked for sperm identification. He also found that the complainant was a child and that she had no breasts. Her private parts were childish. He stated that the hymen was absent and her private parts could only accommodate one small finger. He said the fourchette and perineum were intact but there was some whitish discharge but he did not find any haemorrhage. He said the examination was painful and said it was difficult to access the uterus because of the pain. Smears were taken from her private parts for sperm identification. Under opinion, the doctor's findings read as follows:

"The findings hereby noted and the laboratory result does not give me way of confirming any sexual assault by medical assessment."

That was the doctor's evidence. Ms. Nderi asked what would cause the hymen to be absent and he gave various explanations and said this dependent on an individual. He also did not exclude sexual penetration by a male person. The accused was not in a position to challenge any of the findings by the doctor. It is the findings of the doctor that part of my judgment will be based.

The Crown also led the evidence of the complainant, [A] who stated that she was 13 years and it was confirmed by subsequent handing in of a birth certificate. She also stated that she is

attending school at [B] Primary School doing Standard Four. She did say that she lives at the place where the crime is alleged to have taken place with her grandmother [C], [D] and two others. I do not propose to go into details of the evidence.

It is common cause that on the day in question the accused arrived at the complainant's homestead and sent [D] to take a griller to another house which was being built. The accused then went into the kitchen where the complainant was busy cleaning the floor. The accused asked where his wife Molly is who is much younger according to the evidence than the complainant. This is a common practice to joke with your grandchildren born by your own daughter and refer to them as "*your wives.*"

According to the evidence of the complainant the accused went into the kitchen, he grabbed and tripped her that she fell down. He then pulled her panties down to her feet and pushed her skirt up and the accused opened his zip-fly and started having sexual intercourse with her. She said when she tried to call out [D], the accused covered her mouth with his hand to stop her from shouting. She was overpowered and the accused proceeded to have sexual intercourse with her but in the process the complainant managed to call out [D] when the accused had at some stage removed his hand from her mouth. The complainant said the accused tried to penetrate her three times and on the third occasion he removed his hand from her mouth and that is when she called for [D].

[D] was also called as a witness and to a very great extent she corroborated the evidence of the complainant in that she looked through the door and saw the accused on top of the complainant. The accused got up and left the kitchen. According to the complainant, the accused said that he is coming back because he has not finished. [D] asked the complainant what happened. The complainant told her that the accused had raped her. I must add that this is not corroboration but a report made to show consistency in the report made by the victim of rape. Similarly, when PW4 [A]'s grandmother came back, a report was made which is also consistent with what the complainant had told [D]. Therefore, there cannot be any allegation that there was fabrication on the part of the complainant. The grandmother immediately took the matter seriously and reported it to the community police. There again, a similar report was made which PW5

confirmed. The accused was arrested and taken to [M] police station where he was handed to PW6 who took him to the [M] police station. PW6 went to see the accused where he was remanded and obtained a statement handed in, in which the accused denied that he raped the complainant but admitted that he went there on the day in question.

The accused himself gave evidence. All he said in one sentence was that, *“I am innocent of this charge.”* That is all. He was cross-examined by Ms. [N] and said he is surprised why these children, according to him relatives, especially the complainant should accuse him of having raped her. He suggested that they could have been schooled by PW4 the grandmother because they had previous quarrels with her. Asked further why he had not put it to the grandmother, he said he was not saying the grandmother fabricated the story because of the drudge but that he suspected that could be reason. In my view, the accused’s answers in cross-examination are a bare denial.

There has been one problem worrying my mind, that is an answer by the complainant to the accused’s question that he did not penetrate her. Looking at the doctor’s report and also the evidence of the complainant herself in her evidence in chief, she said in no uncertain terms that the accused penetrated her at least three times. I am convinced that notwithstanding the answer which was given by the complainant to the accused, it is clear to me that the accused did in fact penetrate the complainant. This has been supported by Miss [N]’s submission that even the slightest penetration suffices for purposes of rape and the fact that no sperms were found after the examination of the complainant’s private parts does not necessarily mean that the rape did not take place. I would accept that perhaps because of the disgusting act the complainant felt she should say she had not been penetrated. And also as Miss [N] has correctly pointed out in my view that because of her age and inexperience in such matters as having sexual intercourse she could not taken this to mean she was not penetrated in the true sense of the word because she knows nothing about this.

Considering the totality of the evidence by the Crown and the evidence given by the accused in cross-examination, I am satisfied that the Crown has proved its case beyond reasonable doubt and I find the accused guilty as charged.

JUDGMENT ON SENTENCE

Mr. Shongwe you have placed me in a very difficult position and I have convicted you of a very serious crime. You have yourself admitted that this is a horrible thing to have happened to a child although you deny having done it yourself.

The Court is going to take into account the state of trauma the child suffered. She stated in her evidence that she never expected this from her grandfather. The grandmother has also expressed mistrust on people close to her like you, as her brother-in-law. She even went to the extent of saying she does not know who can she leave her homestead to if you as her brother in law cannot be trusted.

There has been such an outcry especially in Swaziland and some neighbouring states against the tendency of old people rape children who are not even old enough to be referred to as girls. The Court is going to take into account what we referred to here as triad, that is the interest of the community, the prevalence of crime and your personal circumstances. In this particular case, your personal circumstances are far outweighed by the interests of the community, and the prevalence of this type of crime. The legislature has even enacted a provision which will call upon this Court to pass a prescribed sentence and removed the discretion this Court has on people convicted of crimes under the circumstances under which you have been convicted. The least you should be given is a sentence of not less than nine (9) years. That shows how serious the community is taking these matters of abuse of children.

I am not saying the sentence I am about to pass will prevent people from committing this type of crime but the Court has to send a very clear message to any person who might be of the similar mind that if they are convicted, they will be dealt with severely. Although you have mentioned that if you are sent to prison, your homestead will be completely ruined by the time you come out but the Court has to take into account the interests of the complainant and her family.

Considering all these factors, the Court feels the following sentence should be an appropriate one:

You will be sentenced to an imprisonment for twelve (12) years and the sentence is backdated to the 1st May 1998, the date of your arrest.

J.M. MATSEBULA

JUDGE

Delivered on this day 20th October 1999.