



THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 51/2000

In the matter between

REX

And

MANDLA MATSEBULA

Coram
For the Crown
For the Accused

S.B. MAPHALALA – J
MR. P. DLAMINI
IN PERSON

JUDGEMENT

(17/10/2001)

The accused person is charged with the crime of rape with aggravating circumstances.

It is alleged by the crown that upon or about the 14th February 2000, at or near Ndzingeni area, Hhohho region, the accused, an adult male of 36 years of age did intentionally have unlawful sexual intercourse with N, a female minor of 9 years of age, who in law is incapable of consent, and did thereby commit the crime of rape.

The crown contends that the rape is attended by aggravating factors in that:

- i) Accused stood in a *loco parentis* relationship with the complainant;
- ii) Complainant was infected with a venereal disease by the accused person;
- iii) Complainant was a virgin during the time of rape.

The accused person pleaded not guilty of the charge and he was conducting his own

defence. The crown was represented by Mr. P. Dlamini.

The crown called a number of witnesses to prove its case. The evidence of the crown is that on or about the 14th February 2000, complainant was called by the accused person to his homestead. She complied. The accused caused the complainant to enter his sleeping hut. He instructed the complainant to remove her underwear and had sexual intercourse with her. Accused warned the complainant not to tell anyone, as he would assault her severely.

On the same day the complainant was searched by her mother PW1 M. She did not find her until the next morning when she was discovered sleeping in a house under construction.

Two days or so later, the complainant was observed by PW1 to have a discharge emanating from her private parts. She asked her about the discharge. The complainant revealed that accused had had sexual intercourse with her.

PW1 reported the matter to members of the community police. Accused was approached and he admitted having committed the offence. The matter was reported to the police and the accused was arrested. The complainant was taken to hospital where she was examined by Dr Christopher Aish (PW4) who stated that the complainant was raped.

The accused person gave evidence under oath where he denied that he committed this offence. His evidence was that he was being implicated in this case by complainant's mother. Accused called a witness in his defence who told the court that accused admitted to him that he raped the complainant.

After considering the evidence adduced in this case it is my view, that the crown has proved its case beyond a reasonable doubt. It is common cause that the complainant was raped on the day in question. There is ample evidence linking the accused person to the commission of the offence. The story by the accused is nothing but an after thought. The accused person failed dismally to put vital questions to complainant who implicated him in the commission of this offence. His own witness stated that he confronted the accused person about the rape and the accused admitted having committed the rape.

I also found from the facts of the case that the crown has proved the aggravating factors. The accused person was related to complainant. The complainant contracted venereal disease as a result of the unlawful sexual encounter with the accused person.

In the result, the accused is found guilty of the crime of rape on the person of the complainant Ntombenjani Vilakati on the 14th February 2000, at Ndzingeni area in the Hhohho region.

SENTENCE

At this stage of the proceedings, three competing interests arise for a proper balance by the court. These are referred to in legal parlance as the *triad* i.e. the nature of the crime, the interests of the society and the interests of the accused. (see *S v Zinn 1969 (2) S.A. 537*).

Regarding the approach and the considerations to be taken into account at this stage the sentiments expressed by Jones J in *S v Qamata 1997 (1) S.A. 479 at 480* are apposite:

“It is now necessary for me to pass sentence. In doing so, it is proper to bear in mind the chief objectives of criminal punishment, namely, retribution, the prevention of crime, the deterrence of criminals, and the reformation of the offender. It is also necessary to impose a sentence, which has a dispassionate regard for the nature of the offence, the interests of the offender, and the interests of the society. In weighing these considerations I should bear in mind the need:

- a) to show an understanding of and compassion for the weaknesses of human beings and the reasons why they commit serious crimes, by avoiding an overly harsh sentence;
- b) to demonstrate the outrage of society at the commission of serious crimes by imposing an appropriate, and, if necessary, a severe sentence; and
- c) to pass a sentence, which is balanced, sensible, and motivated by sound reasons and which will therefore meet with the approval of the majority of law-abiding citizens. If I do not, the administration of justice will not enjoy the confidence and respect of society.

In the present case, you pounced on a frightened and suspecting child whom you sent to collect money belonging to her mother from your homestead. Out of obedience to a man senior in age and who was also related to her you pounced on her ordering her to strip off her under garments and you proceeded to rape her. This amounts to an aggravating factor.

Furthermore, this girl was at the time only nine (9) years old and clearly incapable of consent to sexual intercourse. She clearly could not be regarded ready for sexual intercourse with a man of your age. As a result of this sexual encounter she was inflicted with a venereal disease. You did not see it fit to engage in protective sex by using a condom. You exposed this little girl to the dreaded HIV – Aids which has become a scare in this country and elsewhere. This again is an aggravating factor.

I find it apposite to cite the trenchant words of CJ Ismail Mahomed commenting on

rape. The learned Chief Justice had this to say:

“The time has come for this court to say that women of South Africa are entitled to walk the street of the country in peace and that courts cannot invade their peace...we are determined to protect the equality dignity and freedom of all women, we shall have no mercy to those who seek to invade these rights”.

These sentiments equally apply in this jurisdiction.

In the present case you were in *locus parentis* and you abused your status in pouncing on this little girl. The fact that the complainant lost her virginity under such sordid circumstances will always prey on her mind. This again is an aggravating factor.

I take into account factors that are favourable to you which include the following:

- a) That you are a first offender.
- b) He has two minor children.

I have considered these and state that a crime like rape cannot be committed unintentionally. Furthermore, you must consider the consequences of your action before engaging in crime.

Having considered the factors that weigh in your favour, there is nothing to gainsay the fact that this is a very serious offence. Furthermore, it is accompanied by aggravating circumstances and Parliament found it fitting to prescribe a minimum sentence of nine (9) years in such cases. Yours will not be treated differently.

Rape has become a national crisis in this country and instances of children of this age group being victims of rape are on the increase. The court have, in such cases the responsibility to mete out stiff sentences which will send clear and unambiguous messages that society is disgusted by such behaviour. Such sentences, therefore, should meet with the approval of the majority of law abiding citizens. If they do not, the administration of justice will not enjoy the confidence and respect of society.

You will be sentenced to twelve (12) years imprisonment. The sentence will not be backdated.

S.B. MAPHALALA

JUDGE