THE HIGH COURT OF SWAZILAND REX

Vs

MSUNDUZA KHUMALO

TIMOTHY KHUMALO

Criminal Case No. 26/2002

Coram	S.B. MAPHALALA - J
For the Crown	MS M. LANGWENYA
For Accused No.1	IN PERSON
For Accused No.2	MR. Z. JELE

JUDGEMENT

(12/09/2003)

The two accused persons stand charged as follows:

"Count 1

Accused no.1 is guilty of the crime of rape. In that upon or about the period, January 2000 at or near Ecansini area, Hhohho region the said accused person did intentionally have unlawful sexual intercourse with Vuyisile Mamba, a female minor child aged about 7 years old, who in law is incapable of consenting to sexual intercourse.

Count 2

Accused no.2 is guilty of the crime of rape. In that upon or about the period of January 2000, at or near Ecansini area, Hhohho region the said accused person did intentionally have unlawful sexual intercourse with Vuyisile Mamba, a female minor child aged about 7 years old, who in law is incapable of consenting to sexual intercourse".

The Crown contends that the rape in both counts is attended by aggravating factors in that:

1. The complainant is a minor;

2. The complainant was an orphan and accused no.1 was responsible for her welfare;

3. Both accused persons are elderly men who stood in a loco parentis relationship with the complainant;

4. When accused no.1 had sexual intercourse with complainant, complainant was a virgin; and

5. Both accused person did not use a condom or take any precautionary measures when having unlawful sexual intercourse thus exposing the complainant to venereal diseases and HIV/Aids.

Both accused persons pleaded not guilty to the charges. Accused no.1 is conducting his own defence and accused no.2 is represented by Mr. Jele. The Crown is represented by Miss Langwenya.

The Crown called a total of five witnesses to prove its case. At the close of the Crown case Mr. Jele for accused no.2 applied that accused no. 2 be discharged in terms of Section 174 (4) of the Criminal Procedure and Evidence Act (as amended). The import of which was that the Crown at that stage had failed to advance a prima facie case to put him to his defence. The application was opposed by the Crown. The court found that the Crown had satisfied the requirements of the Section and ruled that both accused persons had a case to answer. A ruling in that respect forms part of this judgment, for ease of reference.

As accused no.1 was unrepresented the court fully explained his rights at the close of the Crown's case. He elected to make a sworn statement. Accused no. 2 also made a sworn statement being led by his attorney Mr. Jele.

The substantial facts by the Crown in this matter are that the complainant PW3 is an orphan who had been adopted by accused no.1 and his wife. Accused no.l's wife was the complainant aunt. Accused no.1 and no. 2 are elderly men aged 59 and 58 respectively. Complainant lives in accused no. 1 's homestead while accused no. 2 is a neighbour in the area of Ecansini, Ezulwini.
During the month of August 2000, PW2 Hunter Shongwe was at a Sithole homestead at Ezulwini when the complainant came rushing to him crying. She was pursued by a certain woman who he ascertained later was the child's aunt. PW2 was puzzled by this whole episode. Feeding his curiosity he asked this child why she was not going to her aunt. The child said her aunt was calling her to take her to a certain man. PW1 then suspected that a crime had occurred between these people. He then called the child to where he was and interrogated her. The child confided in him implicating accused no.1. She told him that accused no.1 threw her on a bed and then applied "Vaseline" on his penis and in her vagina. Thereupon he placed his penis into her vagina and proceeded to have sexual intercourse with her. After the child had related this PW2 then reported the matter to the police. Accused no. 1 and accused no.2 were then arrested for these offences. She further narrated to PW2 how accused no. 2 called her to the toilet and raped her. She complained to her aunt about the incident.

PW3 the complainant related at great length how she was raped by the accused persons at different times.

PW1 Dr Themba Sithebe is the doctor who examined the complainant and compiled exhibit "A" being a medical report where the doctor opined as follows:

"Hymen absent, easy but painful entry into vagina indicates there may have been forced entry in the past. No trauma or bleeding seen at this time, but may have been there earlier".

PW4 Rosemary Sithole related that the child PW3 confided in her that accused no. 2 gave her oranges and thereafter led her to a toilet where he had sexual intercourse with her. PW3 also told her about accused no. 1 that when her aunt was away accused no.1 would kiss her and also asked her to suck his private parts. This witness told the court that she did not report this because she was afraid.

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later was the child's aunt. PW2 was puzzled by this whole episode. Feeding his curiosity he asked this child why she was not going to her aunt. The child said her aunt was calling her to take her to a certain man. PW1 then suspected that a crime had occurred between these people. He then called the child to where he was and interrogated her. The child confided in him implicating accused no. 1. She told him that accused no.1 threw her on a bed and then applied "Vaseline" on his penis and in her vagina. Thereupon he placed his penis into her vagina and proceeded to have sexual intercourse with her. After the child had related this PW2 then reported the matter to the police. Accused no.1 and accused no. 2 were then arrested for these offences. She further narrated to PW2 how accused no. 2 called her to the toilet and raped her. She complained to her aunt about the incident.

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PW5 2491 Sergeant Bhembe is the Investigating Officer in this case. He related to the court how he conducted his investigation leading to the arrest of both accused no. 1 and accused no. 2.
The Crown's witnesses were thoroughly cross-examined by Mr. Jele for accused no. 2 and also accused no. 1. The story put to them was that they are fabricating a story against the accused persons.

The two accused persons' evidence in their defence under oath is that they did not commit these offences which the Crown has preferred against them.

When the matter came for arguments at the close of evidence Miss Langwenya for the Crown contended that the Crown has proved its case beyond a reasonable doubt as required by the law. Miss Langwenya relied heavily on the authority of an article which appeared in the Australian law journal titled "Comparative Evidence: Admission of evidence of recent complainant in Sexual Offence Prosecutions - Part 1 by Justice T.H. Smith and O.P. Holdenson QC dealing with complaints of a complainant in sexual cases.

Mr. Jele contended on behalf of accused no. 2 that the Crown has not proved a case beyond a reasonable doubt as required by the law. He submitted that he still maintains his arguments advanced at the close of the Crown case where an application was made in terms of Section 174 (4) of the Criminal Procedure and Evidence Act (as amended).

I have considered the evidence adduced in this matter and also the submissions made for and against the accused persons in this case. My considered view is that on the facts the Crown has not proved a case beyond a reasonable doubt in this case.

First of all, the evidence of the police officer PW5 Bhembe as to how he investigated the case leaves more questions than answers. The officer could not assist the court as to when the alleged offences were committed and further could not assist the court as to the month or date on which the rape occurred. There was no attempt by the officer

to investigate this crucial aspect of the matter. The court is left in the dark as to when this rape took place. The Crown has applied to the court to amend the charge sheet to reflect the dates revealed in evidence. I do not think it would be proper to grant this application at this stage of the proceedings without putting the accused persons at a disadvantage. Even if the court were to do that it is not clear from the evidence when the rape took place. The evidence in this regard is so diverse that one will have to resort to guesswork. The officer failed to take the complainant to the scene of crime in order to confirm her evidence. The officer did not investigate the various versions of the Crown witnesses against each other. The officer did not talk to the people at the Sithole homestead who were close to this matter.

Secondly, the court should be cautious in accepting the evidence of the complainant in that she failed to report the rape to the people who were close to her but reported to a man (PW2) who was relatively a stranger to her six months after the occurrence of the alleged offence. The complainant failed to tell her aunt who was in locus parentis. She also failed to tell the Sithole family which evidence has shown was very close to her. There was evidence that complainant frequented the Sithole homestead and would sometimes sleep there. The Sithole family on a number of occasions have given her refuge when she was in trouble with her aunt. One would have expected the complainant to have appealed for help, advice or consolation from the Sithole family as she had done so on previous occasions when she had a tiff with her aunt.
According to Swift's Law of Criminal Procedure (2nd ED) at 443 to be admissible the complaint must:

"(a) Have been made without undue delay and at the earliest opportunity which under all the circumstances could reasonably have been expected (R vs Gannon 1906 TS 114). The mere fact that the complainant, a young girl, had made her complaint late did not require the court to draw an adverse inference against her, provided that the court had appreciated the risks in relying on the evidence of a young complainant (R v M. 1959 (1) S.A. 352 (AD)). What could be reasonably expected will, depend on all the circumstances, as to which (see R v T. 1937 TPD 389 - victim aged five, six weeks reasonable; R v Sideropoulos 1910 CPD 15; R v Gow 1940 (2) PHH148 (C); R v Ellis 1936 SWA 10; R v Du Plessis, 1922 TPD 153 - nine days unreasonable, R v Msome 1931 S L. L. J 351 more than four months unreasonable; R v Du Plessis 1922 TPD 153 one month unreasonable, child of sixteen; Westermeyer v R. 1911 NPD 197 - two days after, unreasonable in

case of married woman; and see R v Tangent 1937 TPD 389; R v Meyer 1925 TPD 390 - three months unreasonable; R v Mapoyana (1899), 20 NLR 139 - two days after, admissible R v Busse 1932 SIVA 16; R v C 1955 (4) SA 40 (N) - girl aged five, complaint five days after admitted.

(b) Be made to a person to whom the victim would naturally appeal for help, advice or consolation (R v Jenkinson 21 SC 233).

(c) Not have been solicited by questions of a leading and inducing or intimidating character (Gannon's case (supra); S v T. 1963 (1) S.A. 484 (AD); R v Asamu 1938 SR 81 -inadmissible where made after two days of persistent questioning; R v Osborne [1905] 1 KB 551; R v Lillyman, [1896] 2 QB 167), but some reasonable persuasion to overcome the initial and natural timidity to make the complaint will not make it inadmissible.

(d) Be made by a person competent to give evidence (R v Malete, 1907 TH 235), but the mere fact that the complainant is under the age of consent does not exclude the complaint (R v C. (supra))."

Further on the cautionary rule the learned authors Hoffmann's Zeffert, The South African Law of Evidence (4th ED) had this to say at page 581; and I quote:

"The cautionary rule for children's evidence is similar to that for accomplices witnesses cases. The danger of acting upon such evidence must be borne in mind by the trier of fact. It makes no difference whether the child's evidence has been sworn or unsworn. The court is entitled to take into account the falsity or

absence of evidence by the accused or any other features which show that the child's evidence is unquestionably true and the defence story false, but it should not ordinarily convict unless the evidence of the child has been treated with due caution. There is no requirement of law or practice that requires that the child has to be corroborated either in criminal or, a fortiori, in civil cases. There is no particular age below which the cautionary rule applies; this is obviously a matter of common sense to be applied in each particular case and the degree of corroboration or other factors required to reduce the danger of reliance on the child's evidence will vary with his age and the other circumstances of the case, but the children were concerned. And when the child is the only witness implicating the accused the dangers are even greater -particularly in a sexual case." (my emphasis)

The above is the legal framework on which this case ought to be decided.
Thirdly, there are a number of material contradictions in the evidence of the Crown witnesses rendering their evidence remarkable. The evidence of Hunter Shongwe (PW2) contradicts that of the complainant in a number of material instances. Further,

the evidence of Rosemary Sithole in some material respects contradicts that of PW2 Hunter Shongwe and that of the complainant.

The complainant told the court that accused no. 2 was the first one to rape her yet PW2 and PW3 told the court that first it was accused no. 1 then accused no. 2. This is a material contradiction which tends to affect her credibility. One would have expected PW2 and PW3 to corroborate her in this regard.

Fourthly, in my view the evidence of PW2 Hunter Shongwe was incredible in that he told the court that when the complainant came to pour out her heart to tell him what had befallen her, complainant was being pursued by her aunt yet Rosemary Sithole (PW4) denied this aspect of Shongwe's testimony. The complainant also denied that her aunt was at the gate at the material time and was pursuing her. This was the most important occurrence according to PW2 which aroused his suspicious that something was amiss with the complainant.

Fifthly, the evidence of the doctor further compounds the matter. The doctor examined the complainant seven months after the alleged rape and also told this court that the child was in pain when he examined her. When the doctor was asked in cross-examination what that meant he told the court that the sexual assault on the child might have been days old or a week old or even months.

Another uncanny aspect of PW2's evidence is that after the complainant had related what had happened to her Shongwe did not approach the people at the Sithole homestead where he was also a visitor to report what he had just heard. In my view, that would have been a natural thing to do under the circumstances. Instead Shongwe conducted his own investigations and thereafter reported the matter to the police.

It was unfortunate for the Crown case that the complainant's aunt Betfusile Mamba died before giving evidence in this case. She was listed at the third witness in the list of witness in the summary of evidence. She was a crucial witness in this case as her name features prominently in this sad occurrence. Her demise dealt a death knell to the Crown's case.

All in all, it would be unsafe to convict on the evidence before me as there is a lingering doubt in my mind that the accused persons committed these offences.
In law, therefore the accused persons are given the benefit of the doubt and found not guilty of the offences preferred against them.

As an aside, my observation in this case is that the investigations were of a very poor quality as it has been demonstrated above. The officer merely recorded statements from witnesses without confirming

some aspects of their evidence. It is the duty of investigating officers to conduct thorough investigations in criminal cases, moreso, in cases of rape involving small children so that perpetrators of such crimes are not let loose on account of poor police investigations.

They are accordingly acquitted.

S.B. MAPHALALA

JUDGE