



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE

CRIM. CASE NO. 137/11

In the matter between:

REX

v

MELUSI LUSEKWANE DLAMINI

Neutral Citation: Rex v Melusi Lusekwane Dlamini(137/11) [2014] SZHC 370 (22 OCTOBER 2014)

Coram : Q.M. MABUZA -J

Heard : 5/2/14; 6/2/14; 23/2/14; 29/7/14; 3/9/14

Delivered : 22 OCTOBER 2014

SUMMARY: THE ACCUSED STANDS CHARGED WITH THE RAPE OF A TWO MONTH OLD BABY. INSUFFICIENT EVIDENCE UPON WHICH TO CONVICT CREATING REASONABLE DOUBT. REASONABLE DOUBT EXERCISED IN FAVOUR OF THE ACCUSED. ACCUSED ACQUITTED AND DISCHARGED.

JUDGMENT

MABUZA –J

[1] The Accused is charged with the crime of rape it being alleged that on or about the 4th February 2011 at or near Magele area in the Shiselweni Region the said Accused person did intentionally have sexual intercourse with Belinda Msibi aged 2 months old who is in law incapable of consenting to sexual intercourse. The charge is accompanied by aggravating factors as envisaged under section 185 *bis* of the Criminal Procedure and Evidence Act 67/1938 as amended in that:

- (a) The complainant was a minor of a tender age.
- (b) The complainant was in the care of the Accused and he abused the relationship of trust.
- (c) The Accused exposed the complainant to the risk of contracting sexually transmitted infections and HIV/AIDS as he did not use a condom.

[2] When the charge was put to the Accused he pleaded not guilty thereto Mr. Malinga confirmed that the plea was in accordance with his instructions.

[3] The evidence herein is that on the 4th February 2011 at about 8.00 a.m. the Accused's step mother (PW2) left baby Belinda and a 4 year old boy with

the Accused while she went to the river to fetch water. When she returned she found Belinda crying and suspected that she was wet. After fetching a clean napkin with which to change Belinda she took the child from the Accused who was carrying her and trying to calm her. She laid the child on the floor in readiness to change her nappy but discovered that she had no napkin on. Her napkin had been taken off by the Accused because it was soiled and was placed on the floor together with a wet cloth which was used to wipe her clean. She was only wearing a jumpsuit. When PW2, who is a maternal grandmother to Belinda tried to lift the child's bottom, the child cried. PW2 says that she noticed some blood coming out of the child's vagina and suspecting foul play she took the child to her neighbor PW3 so that PW3 could examine the child and confirm her own suspicion that Belinda had been sexually molested.

- [4] After inspecting Belinda's private parts, PW3 suggested that PW2 take the child to the hospital where she would be professionally examined. Upon her arrival at the hospital the doctor PW1 advised her to report the matter to the police who would give her a form RSP88 for him to complete. PW2 went to the Hlatikulu police station where she requested form RSP88 and the police gave it to her.

- [5] She returned with the form to the hospital where PW1 completed the form after examining Belinda. PW2 took the form back to the police station where she laid a charge of rape against the Accused.
- [6] The defence advanced on behalf of the Accused and it was put to PW2 that PW2 was fabricating the story of rape because she was aggrieved with the Accused whom she had asked to have sex with her and he had refused. PW2 is a widow. She denied this story as being untrue. It was put to her that the Accused denied having had sex with Belinda. The possibility of an unknown person having had sex with Belinda was put to PW2 but she denied this. She responded that she owned vicious dogs and no stranger nor neighbours could easily enter her home without the dogs being alerted. Had someone arrived even the Accused would have been alerted by the bark from the dogs.
- [7] PW3, Mavis Sibandze is a neighbor to PW2. In her testimony she confirmed that on the 4th February 2011, PW2 arrived at her home carrying Belinda and asked her to help examine the child. She examined the child and found that her private parts were red and when she touched them Belinda cried hysterically and her temperature was high. She advised PW2 to take Belinda to a hospital for professional help.

[8] PW1, Doctor A. Shabangu testified that on the 4th February 2011at about 10:30a.m, he examined Belinda. Because he suspected sexual assault he suggested to PW2 to go and report the matter to the police who would then give her the police form RSP88. She did so and upon her return he then examined Belinda and completed form RSP88. When he examined her vagina he found that she was injured inside the labia and bleeding slightly. He found that her hymen was no longer there. He noted as his findings that the absence of the hymen meant that sexual assault was highly likely.

[9] He stated that washing the child would not bruise her because the vagina was well protected by the labia. Even if the labia were washed with something corrosive the labia would not be injured, instead she was injured inside the labia. He handed in the medical report of his findings as Exhibit A Mr. Malinga asked him if it was possible for a blunt instrument to have caused the injuries and he replied that that was possible. It was not put to him that the injuries inside the labia could have been caused by the orange sack when the Accused washed her.

[10] The medical report (Exhibit A) states as follows:

Injuries: (Extra genital) Bruises on vaginal introitus and labia

Breasts: NAD

Labia Majora: Bruises

Labia Minora: Bruises

Vestibule: Bruises

Hymen: Nil

Vagina: (1,2,3 Fingers) None

Fourchette: Bruises

Perineum: Intact

Discharge: -

Haemorrhage: Minimal

Examination: (Easy – Painful) – Painful

Uterus: Swab stained with blood

Opinion: Visible bruises on vaginal introitus. Vaginal swab blood stained. No laceration noted. Sexual assault is highly likely.

[11] PW4, Thembekile Dlamini is the biological mother of Belinda. She confirmed that Belinda was born on the 23/11/2010 making her 2 months old on the 4th February 2011 when the alleged offence occurred. She further confirmed that PW2 made a report to her that Belinda had been sexually molested. She stated that she resided at her workplace at Ludzeludze. She confirmed that the dogs at her parental home were vicious and that whenever she went home she would call first or raise an alarm so that she is met and someone controls the dogs from attacking her.

[12] The confession statement was handed in after PW4 had given her evidence raising concerns by Mr. Malinga that he was being taken by surprise as the Crown was hitherto mum about any presence of a confession. I too expressed my concern about this unprecedented behavior of the Crown who to her vindication stated that it had only recently come to her attention. Nevertheless the statement was handed in and marked Exhibit B with Mr. Malinga making an application to allow him to recall certain Crown witnesses in relation to the statement should the need arise. I granted the application as there was no opposition to it from the Crown and also because I deemed it fair in the circumstances.

[13] Exhibit B was recorded before the learned Magistrate Musa Nxumalo sitting at Nhlanguano on the 9th February 2011, 5 days after the alleged offence.

This is what it states:

“I do recall on 04/02/11 my step mother Mrs. Ngwenya (sic) whose first name I do not recall and with whom I reside at Magele area asked me to look after two babies aged two (2) months and four (4) years.

It was about 09:00 a.m. and she was off to fetch water in the river. After she had left the baby aged two (2) months cried and needed a change of nappy.

I attended to her and washed her off with a sack cloth which is used to carry oranges.

When my stepmother returned, she accused me of having had sexual intercourse with the baby as she was injured on the vagina. I explained to her that I had only washed her as she had defecated on herself before I could change the nappy.

That is all I wish to say about this matter.”

[14] PW6, 4542 Detective Constable T. Ngwenya is the investigating officer herein. He arrested the Accused and charged him for the offence of rape. Thereafter the Crown closed its case.

[15] The defence thereafter moved an application for the discharge of the Accused in terms of section 174 (4) of the Criminal Procedure and Evidence Act No. 67/1938 which provides:

“If at the close of the case for the prosecution the Court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him”.

[16] After a careful analysis of the evidence I found that a *prima facie* case had been made out against the Accused and that he had a case to answer. I refused the application under section 174(4) of the Criminal Procedure and Evidence Act No. 67/1938.

[17] Thereafter the Accused took the witness stand and gave evidence in his defence. He testified that at the material time he was staying with his step-mother PW2 on the 4th February 2011 she left the two months old Belinda in his care while she went to the river to fetch water and she asked him to remain with Belinda together with another young boy aged 4 years old. The Accused was with Nathi a half-brother to him. Nathi was helped the Accused construct a house.

[18] While building the house, the Accused heard Belinda crying and he went to check up on her. He found that she had soiled her napkin. He took off her clothes and washed off her faeces with an orange sack – the ones in which oranges are sold. While he was washing Belinda PW2 returned and found him still washing Belinda. PW2 asked if Belinda had soiled herself and the Accused replied that she had. He left Belinda with her and returned outside and continued constructing the house.

[19] After a little while PW2 stepped outside and informed the Accused that she was taking Belinda to the hospital because she was injured. He asked how Belinda was injured but PW2 did not respond.

[20] After PW2 returned from the hospital she asked the Accused what he had done to Belinda and he responded the he had not done anything to her. After

that he says that a letter was read to him in which the doctor had stated that the child may have been sexually assaulted.

[21] He says that on the 8th February 2011 he was informed by PW2 that the police wished to see him. Indeed when he arrived at the police station, the police asked him to explain what had happened on the 4th February 2011 when Belinda was left in his care. He told them the story that he has narrated to this court. The police did not believe his story. Ultimately the Accused was taken to the Magistrate at Nhlangano where he recorded a statement (Exhibit B). He denies that he had sexual intercourse with Belinda.

[22] He says that when he washed Belinda he removed her napkin and wiped her with the napkin, put water in a dish put her in the dish, took the orange sack and removed the rest of the faeces using the orange sack. He scrubbed the top of her vagina and inside her thighs and her buttocks. He washed Belinda in the vagina with the sack.

[23] The Accused further testified that on the morning of the 4th February 2011, PW2 had called him to her. She then told him that every time she looked at him, he reminded her of his father, her late husband and that he was at an age where he could replace his dead father sexually with her. He says that

this declaration by PW2 did not go down well with him and he told her that to him she was as good as his biological mother and that he could not agree with what she was suggesting. She called him a fool and asked him to leave her house.

[24] Miss Matsebula asked the Accused in cross-examination what exactly was his defence and he responded that he did not have sexual intercourse with Belinda. He stated that he could not possibly have sex with Belinda as she was very young. This he repeated at least on three separate occasions during cross-examination. When he was asked why he did not use a towel when washing Belinda he responded that he did not think that washing her with an orange sack would be a problem as he was trying to remove the faeces. It was put to him that he was lying that PW2 asked to have sex with him and he responded that this was true. Thereafter the defence closed its case.

[25] The Crown has an onus to prove its case beyond a reasonable doubt. Has it discharged that onus herein?

[26] The evidence that has been adduced by the Crown is circumstantial. However, this is understandable because Belinda is too young to give evidence and such crimes usually occur in private and unless caught in the

act only the perpetrator is aware of what took place and is unlikely to give any evidence to incriminate himself.

[27] In *casu* there were no witnesses to the alleged crime and the only credible evidence should have been that of the doctor PW1. PW1 after examining Belinda concluded that “suspected sexual assault is highly likely”. This conclusion was not helpful to the court because it is inconclusive.

[28] The evidence of PW1 left me with misgivings about the veracity of his evidence and I ordered that Belinda be examined by a different doctor at the Mbabane Government hospital. This was done. She was examined by Dr. J.K. Mathe on the 9th October 2014. Belinda was 3 years old as on the 9th October 2014. In his report (Exhibit C) Dr. Mathe found Belinda’s hymen to be intact which in his opinion was a normal finding for her age.

[29] I now have two professional opinions before me and I must choose one. I do not know which one to choose. The loss of a hymen or a torn hymen is a strong indication that penetration took place. In *casu* one doctor says there was no hymen due to the sexual assault, the other doctor says that he found the hymen intact. This state of affairs makes me doubtful as to whether or not there was any rape of Belinda. My doubt is further fortified by the fact that PW1’s evidence was inconclusive. The Accused refrain throughout his

evidence in chief and cross-examination was his constant denial that he had sex with Belinda because she was too young. Furthermore his story that he washed Belinda with an orange sack in order to remove the faeces is credible especially because he made that statement before the Magistrate at Nhlanguano five days after his arrest when events were still fresh in his mind. That may have explained the bruising and slight bleeding that PW1 found in Belinda's vagina.

[30] In my considered opinion, the fact that I have these doubts is an indication that the Crown has not discharged the onus placed upon it to prove its case beyond a reasonable doubt.

[31] The law says that if I have a doubt then I should exercise it in favour of the Accused by not convicting him but acquitting and discharging him. The range for sentences in rape cases involving minors is an average of 15 years imprisonment. If the Accused is innocent then I would have sentenced him to 15 imprisonment years for a crime that he did not commit thereby committing a grave injustice. It is better to err on the side of caution than to send an innocent person to jail for such a considerable length of time.

[32] In the circumstances, I find the Accused not guilty and he is acquitted and discharged.

Q.M. MABUZA

JUDGE OF THE HIGH COURT

For the Crown : Ms. Matsebula

For the Accused : Mr. Malinga