Criminal Case No.19/99

In the matter between:

REX

VS

[D] [E] [C]

CORAM : **MASUKU J.**

For the Crown : **Mrs S. Wamala**
For the Accused : **Mr B. Sigwane**

RULING ON ADMISSIBILITY OF STATEMENT
6th March 2003

The accused stands before me charged with two Counts of rape and two further Counts of incest, it being alleged that on diverse occasions between 1995 and 1999, the accused did have sexual intercourse with his daughter [A] [B] [C], then aged 13 and sixteen respectively. In respect of the rape charges, the Crown alleges that the offences are attended by aggravating circumstances which have been alleged. The accused pleaded not guilty to all the Counts.

The question to be determined is the admissibility of a statement allegedly made by the accused in the presence of PW 6, 3267 Detective Constable V. Mdlovu at [S] Police Station on the 12th March, 1999. Mr Sigwane's gripe is that there is no evidence that the said statement was made freely and voluntarily by the accused having been duly informed and cautioned of his rights available at law.

Mrs Wamala held a different view and advised the Court that the said statement was not a confession as envisaged by the provisions of Section 226 of the Criminal Procedure and Evidence Act 67/1938 (as amended). She submitted that the statement was in fact exculpatory. I am not privy to the contents of the statement at this juncture.

In proof of the assertion that the accused made the statement freely and voluntarily, a duty whose proof lies on the Crown, Mrs Wamala called PW 5, who testified that on the date in question, he received a report in this matter and there after proceeded to the accused's home at [M], [S] area, where he arrested the accused after having cautioned him in terms of the Judges' Rules. He repeated the words of the caution in Court.

It was his evidence that he later formally cautioned the accused by completing a *pro forma* RSP 218. In this instance, the accused was asked if he wished to make his own statement or he wished the Police to do so for him. He testified that the accused opted for the former and in consequence, wrote a statement annexed to RSP 218 which was in the SiSwati language.

It would appear to me that the form and content of RSP 218 is central to the decision of this matter. So is the interpretation to be attached thereto. I therefor find it apposite to duplicate the form and to consider the interpretations to it advocated by Counsel on both sides.

The *pro forma* reads as follows: -

Page 1

STATEMENT, *WRITTEN BY A PERSON/WRITTEN BY A POLICE OFFICER AT THE REQUEST OF A PERSON; UNDER CAUTION IN TERMS OF THE JUDGE'S RULES

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*Delete if Not Applicable

I, No…….Rank……... Full Name…….of Residential Address ……... Nationality …….. Chief …….. Induna ……that I am investigating the commission of the offence of. I said to

*him that she is not obliged to say anything unless *he wishes to do so, but anything *he may say will be taken down in writing and may be given in evidence.

*He replied in the……. language;……..(which translates into English) …….

WHEREUPON, I enquired from *him whether he wishes to write a statement himself.

*He replied, I, (Full Name) …… wish to make a statement. *I would write it down myself. I make this statement of my own free will. I understand that I need not say anything unless I wish to do so and what I say may be given in evidence.

_____

SIGNATURE

Date: ……

STATEMENT OR SEE ANNEXURE

*****I have read the above statement/The above statement has been read to me. I have been able to correct, alter or add anything I wish. The statement is true. *I have written it/it is recorded of my own free will.

_____

SIGNATURE/RIGHT THUMBPRINT

Date……

a. Cautioned by: Full Name…….

_____

SIGNATURE

Date……

b. Recorded by: Full Name……

_____

SIGNATURE

Date……..

c. Witnessed by: Full Name…….

_____

SIGNATURE

Date: …….

CERTIFICATE OF TRANSLATION

I, No…….Rank……..Full Name……solemnly declare that I am conversant with both…….and English languages. I have correctly translated the statement of (Full Name) ……..from…….language into the English language to the best of my ability.

_____

SIGNATURE

Date: …….

Mr Sigwane's contention is that the signature appearing on the first page immediately above the words "Statement or See Annexure" must be that of the Police Officer, who filled in the particulars above the signature. When this was put to PW 6, he reasoned that it is the suspect who signs that and his contention was that this was apparent from the paragraph immediately above the signature on that page and which is in the first person, suggesting therefor, he stated, that it is actually the suspect who says the words, fills in the appropriate details and deletes the irrelevant. It was PW 6's evidence that in his experience, it is the accused/suspect who signs there and the officer always signs or affixes his thumb print at the top of the second page.

I entirely agree with Mr Sigwane's contention for it is clear that in the last paragraph, it is the Police Officer, who continues to record what the accused person said and the choices he made. The only deficiency is that the last paragraph should be in inverted commas, indicating the

exact words or choices made by the accused person. That paragraph is a report by the Police Officer of what the accused chose to do, having been duly warned of his rights.

Below that signature and date should be the accused's statement or annexure as the case may be. *In casu*, the accused, according to PW 6's evidence, chose to write his own statement and which was marked "A". The above words are immediately followed by the words quoted below: -

> *"I have read the above statement/the above statement has been read to me. I have been able to correct, alter or add anything I wish. The statement is true. I have written it/it is recorded of my own free will."*

According to PW 6, the signature or thumbprint, following immediately below this must be that of the Police Officer who administered the caution according to established Police practice. This practice, if it indeed is, is wrong. I say this for the reason that it is clear from the above paragraph that it is the accused or suspect who will have read or have the statement read to him and he would also confirm that he was able to correct, alter or add anything thereto as he wishes. It is only he, and not the Police Officer who could vouch as to its truthfulness and that it was recorded of his (accused's) own free will.

There are therefor all indications that the accused does not sign on the first page. He must sign on the top of the second page, immediately after the words that I have quoted above. Below his signature would be the full name and signature of the officer who administered the caution and *in casu*, that would be PW 6. The next signature would be that of the person who recorded the statement, whether the accused or a Police Officer. The last is the signature of the person, normally a Police Officer who witnesses the entire transaction.

The last portion is headed "Certificate of Translation", which from a plain reading, suggests that it must be filled by a Police Officer who is conversant with the English language and the language used by the accused in writing or causing his statement to be written. He must translate that statement, which will be at the foot of page 1 or annexed to RSP 218 from the other language into English. *In casu*, this certificate was not filled because according to PW 6, neither he nor any other officer undertook the translation of the statement written in SiSwati and attributed by the Crown to the accused.

The principle upon which the question of the admissibility of the statement must be decided is in my view akin to that applicable to confessions by accused persons, namely, whether the Crown has proved that the statement was freely and voluntarily made by the accused person. Can it be said *in casu* that the Crown has shown on a balance of probability that the statement in issue was freely and voluntarily made?

There appears to me to be some insuperable difficulties in the way of the Crown *in casu*. The chief of these is the fact that the form was not properly filled by both the accused and PW 6. As indicated earlier, PW 6 signed where the accused should have and *vice versa*. As a result, the free and voluntary nature and ability of the accused to correct, alter or add anything thereto cannot be guaranteed. This I say because it is the officer who attests to having done what I have mentioned above and not the accused.

Secondly, there is no indication which is verifiable that the accused, who according to Mr Sigwane, is illiterate and there is nothing, to gainsay that, understood what his rights were according to the caution contained in RSP 218. The document is written in the English language and in the absence of any positive indication that the contents of RSP 218 were translated and understood by the accused, I cannot say without diffidence that the accused freely and voluntarily made the statement, having fully understood his rights. The Police cannot, in my view rely on the verbal caution in SiSwati administered at the point of arrest because it is clear from PW 6's evidence that the accused said nothing there. Where he is alleged to have then said or written something, the Court must be satisfied that he did so after having been duly cautioned and in full appreciation of his rights, conveyed to him in a language that he perfectly understands.

Thirdly, and as indicated above, it was put to PW 6 that the accused is illiterate. The Crown, through PW 6 alleged that the accused himself wrote the statement which is the subject of this Ruling. If that be so, the question that naturally follows and which I may add, Mrs Mawala failed to convincingly answer is why in the last paragraph on page 1, where PW 6 erroneously said the accused should have signed, it was PW 6 who wrote the accused's name. If the accused is literate, he would have written his own name and in his own handwriting and would have proceeded to append his signature rather than the thumbprint that appears thereon.

By so saying, it is my finding that it has not been demonstrated to satisfaction by the Crown that the accused is literate and did in fact understand his rights, conveyed to him in a language that he understands. The findings above militate against that conclusion that the statement was made by the accused freely and voluntarily.

In sum, I am of the view that the statement allegedly made by the accused on the 12th March 1999 be and is hereby declared inadmissible for the reasons stated above.

I further order that this judgement be transmitted to the Commissioner of Police for onward transmission to Police Officers around the country regarding how RSP 218 must be properly interpreted and filled. Further more, there must be evidence in RSP 218 that the accused, who does not understand English had his rights spelt out therein translated to him in a language that he understands. This can be achieved by one of two ways, having a portion in the *pro forma* where the accused declares that his rights were translated to him in a language that he understands, and that he understood the same. The other alternative is to translate RSP 218 into SiSwati for accused persons who are not conversant with the English Language.

T.S. MASUKU
JUDGE

RULING ON APPLICATION FOR ACQUITTAL AND DISCHARGE
(In terms of Section 174 (4) of the Criminal Procedure and Evidence Act, 67 of 1938)
8th July 2003

Background

This trial has a chequered and an unhappy history. It has been pending for a number of years due to a series of calamities. The first and telling one was the demise of Mr M.T. Nsibande, who was prosecuting it. The process of transcribing the record in order to enable new Counsel to finalise the trial took inordinately long. It is therefor heartening that this trial, is reaching completion, hopefully

marking the end of the accused's understandable apprehension and frustrations regarding his fate, whether guilty or not.

Indictment

The accused stands before me indicted on two Counts, one of rape and the other, of incest. The particulars of the indictment appear below: -

Count One

The accused is guilty of the crime of **RAPE.**

In that during the years 1995 to 1998, on diverse occasions and at or near **[M2] COMPOUND** and **[M]** areas, in the … Region, the said accused, an adult male, did intentionally have unlawful sexual intercourse with **[A] [B] [C]**, a female aged 13 years in 1995 and presently aged 16 years, without her consent and did thereby commit the crime of **RAPE.**

The crown shall contend that the crime was attended by aggravating circumstances in That: -

(i) The accused is the biological father of the complainant
(ii) The accused' conduct towards the complainant was callous
(iii) The accused' conduct was repeated over a long period of time
(iv) The accused abused a relationship or trust

Count Two

The accused is guilty of the crime of **INCEST.**

In that during the years 1995 to 1998, and at or near **[M2] COMPOUND** and **[M]** areas in the … Region, the said accused, an adult male did unlawfully and intentionally have sexual intercourse with **[A] [B] [C]**, the accused being by blood relationship the father of **[A] [B] [C]**, whom he is consequently prohibited from marrying.

The Crown, in support of the charges paraded a total of six (6) witnesses. At the close of the Crown's case, the defence moved an application for the acquittal and discharge of the accused in terms of the provisions of Section 174 (4) of the Criminal Procedure and Evidence Act. No.67 of 1938 (as amended), hereinafter referred to as "the Act". The primary ground upon which the said application was moved was that the Crown's evidence, particularly that of PW1, the complainant in

this matter is highly improbable and that there are certain material imperfections in the Crown's case, which justify the Court in acquitting the accused even at this stage, obviating the need for him to be called to his defence. The particular references to these issues will be addressed later in this ruling.

The Law Applicable to Section 174 (4) of the Act.

The operative sub-section, as amended, provides the following: -

> *"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."*

In **THE KING VS DUNCAN MAGAGULA AND 10 OTHERS CRIMINAL CASE NO.43/96,** Dunn J. examined the applicable authorities and in interpreting this Section, came to the conclusion that the test is whether at the close of the case for the prosecution, there is evidence on which a reasonable man, acting carefully might or may convict. The test is not whether a reasonable man should convict. I fully associate myself with the learned Judge's conclusions in this regard.

From the Legislative nomenclature employed, it is clear that the decision whether or not to grant a discharge lies within the discretion of the trial Court. This discretion must be judiciously exercised and may not be questioned on appeal – See **GEORGE LUKHELE AND 5 OTHERS VS REX CRIMINAL APPEAL CASE NO.12/95**. That the Court has a discretion in this regard is confirmed by the use of the word "may" in the sub-section in question.

Brief Chronicle of Evidence Led.

I will briefly recount the evidence led and which is relevant to the challenge raised by the defence. PW1 was the complainant [A] [B] [C] whose home is at [M] in [S]. She testified that the accused was her biological father and that in 1995 whilst employed at [Place], the accused used to tell her to go and collect money from him in [Place]. During those occasions, the accused had sexual intercourse with her and that this continued for a long time as she did not report it to her mother.

One day, in December 1998, she decided to tell her mother. She first reported the complaint to her mother in veiled terms and later wrote a letter, explaining in detail what her father was doing to her and how she felt about it. The letter was handed in and marked Exhibit "A". It was her evidence that her mother at first did not believe her but later became convinced and therefor went to report the matter to the Save the Children Fund (S.C.F.) in [S], who in turn reported the matter to the Police. This eventually led to the arrest of the accused.

PW 2 was [F] [G] [C], PW 1's mother. She confirmed that PW 1 first reported this ordeal to her orally and the following day she received a letter from PW 1 and in which fuller details of the assaults were revealed. She confirmed further that on receipt of the letter, dated 3rd December 1998, she went to report to S.F.C., the following day i.e. 4th December. It was her evidence that she never discussed the contents of the letter with the accused.

In the letter, PW 1 revealed the details of how her father started having sexual intercourse with her without her consent whilst she was in Grade V. She narrated how the accused warned her against reporting the ordeal to PW 2 and that if she did so, she would be a fool. He also threatened to kill her if she reported the matter. He further threatened to stop providing for her. PW 1 described at length how she felt about the accused's actions i.e. it caused her a lot of pain and caused her to wonder if the accused was really her father. She also mentioned that it lowered her self-esteem in that she felt like other people are able to notice what happened to her and that as a result, she feels dirty, no matter how much she may wash herself. PW 1 also stated that the accused said he would never stop having sexual intercourse with her until she gets married. PW 1 further enumerated some events when the accused would have sexual intercourse with her in the house, veld and in the cane fields.

PW 3 was Sandile Ronald Ndzimandze, an employee of S.C.F. It was his evidence that PW 1 was his client and that on the 11th December 1998, PW 2 came to his office at [S] carrying Exhibit "A". On reading its contents, PW 3 decided to take PW 2, together with the letter to [S] Police Station. There he handed PW 2 to an officer by the surname Ndlela.

PW 4 was 1571 Detective Sergeant Ndlela who testified that on the 10th December 1998, he received a report in this matter. He set out to find the accused whom he found late on that day. The following day, he spoke to the accused about the allegations having cautioned him in terms of the Judges' Rules.

PW 5 was 2962 Sergeant Cynthia Rosa Maria Barbosa, then based at [S] Police Station. She testified that on the 10th March, 1999, PW 3 asked her to accompany him to PW 1's home. PW 5 saw PW 1 on the 11th March and she reported a rape case. It was her evidence that she recorded the statement from PW 1 and she noted some strange behavioural traits from PW 1 during the interview. At times, PW 1 would sob and the following moment, she would be laughing. She told PW 5 that she had been raped the previous day i.e. 10th March and that the accused had been raping her since 1998. She told PW 5 that at times, she would wait for the children to go to sleep and would thereafter take the opportunity to go and have sexual intercourse with the accused without him initiating the intercourse. She also disclosed that she was familiar with her father's looks and could readily tell when he wanted to have sexual intercourse with her.

PW 5 testified further that after recording the statement, she took PW 1 to Good Shepherd Hospital for a medical examination which was conducted by Dr Gebedi. The Doctor, on carrying out a routine pregnancy test discovered that PW 1 was pregnant and PW 5 was seized with the task of breaking this news to PW 1 and counselling her, which she did later at the Police Station. The paternity of this child, it must be mentioned was attributed to [X].

All these witnesses were subjected to close and searching cross-examination by Mr Sigwane, particularly PW 1, PW 2 and PW 3. From the cross examination, the defence case could be gleaned as constituting a denial that the accused ever had carnal connection with his daughter, whether at the times alleged or at all. It was put to PW 1 and PW 2 that they concocted this story to have the accused arrested because he dealt firmly with PW 1 for engaging in nocturnal sexual escapades with [X] [Z], PW 1's boyfriend and with whom PW 1 had two children as at the time she testified before Court. These escapades drew PW 1, a primary school student away at home during some nights, seeing, her return home very early the following morning. The question of escapades with [X] was not denied but PW 1 denied that they concocted the story and for the reasons alleged. PW 1 informed the Court that she did not mind the accused chastising her for her immoral nocturnal escapades but what she detested was that in addition to inflicting immoderate chastisement on her, the accused would drag her into the forest on the way from [X]'s home and would rape her. This, it was put to PW 1 by the defence was untrue.

Grounds in support of Application for discharge.

In support of the application, Mr Sigwane in his able, insightful and spirited argument, submitted that there were certain inherent improbabilities, imperfections and contradictions attendant to the Crown's case and which would justify this Court in acquitting the accused at this stage without even having heard him in his defence.

Firstly, it was argued that the report by PW 1 was made to PW 2 after a period of about three years and during this period, no report was made to anyone nor were any reasons for not so doing elicited by the Crown from PW 1. Furthermore, there was no event or occurrence which could have jerked PW 1 to suddenly report the incident after having remained in painful silence at it were for three years.

Secondly, it was argued that the manner in which the reporting was done of its own, borders on the improbable. It was argued in this regard that there was no need for PW 1 to have written the letter since she could have told her mother there and then the whole story, since she had summoned enough courage to report the matter after three years. It was pointed out that it was PW 1 and 2 only in the house, making the atmosphere conducive for reporting. It was further submitted that there was clearly an opportunity for PW 1 to confer with others between the reporting and the delivery of the letter so as to concoct a sufficiently moving and believable story.

Thirdly, there is no evidence of any physical or emotional discomfort which was suffered by PW 1 over the entire three years. It is improbable, it was submitted, that with the degree and duration of abuse alleged, PW 1 would show no signs of trauma, sufficient to attract PW 2's attention.

Fourthly, it was submitted that from the evidence, it was clear that PW 1 had two boyfriends and that the accused was against this and would chastise PW 1 if he found her to have yielded to her sexual appetite by spending nights at [X]'s home. It was argued that this was the real reason why the story was concocted i.e. to allow PW 1 unfettered access to and enjoyment of her relationship with [X].

Fifthly, that the accused resided with his sister [W], who would have heard or witnessed the alleged instances of sexual abuse. This was submitted to have been another *inducium* of the improbabilities attendant to this case.

Mr Sigwane further punched holes in the nature of the evidence led. He submitted that the contradictions, together with the improbabilities, cumulatively obviated the need for the accused to defend himself in the witness box. Mrs Wamala argued strongly to the contrary.

Analysis of the evidence.

Before embarking on an analysis of the evidence, it is important that I rule on the admissibility of Exhibit "A", which is annexed hereto. In **ELIZABETH MATIMBA AND ANOTHER CRIM. APPEAL NO.9/2001**, at page 7, it was held that the contents of letters, such as Exhibit "A", although they are not strictly speaking hearsay if the author is called, do not however constitute evidence of the truth of their contents. Browde J.A. proceeded to refer to authorities in this regard, one of which is **WEINTRAUB VS OXFORD BRICKWORKS LTD 1948 (1) SA 190 T**, where Price J. stated the following: -

> *"A letter is only evidence of the fact that it was written by the person who wrote it and that that person said what the letter contains. It is not evidence that what he said in the letter is true."*

In the light of the above judgement, I am compelled to treat the letter Exhibit "A" not as evidence that the contents thereof are true. This is in my view not withstanding that after its introduction, PW 1 confirmed that the contents thereof were true. PW 1 had an opportunity to tell the Court about all the incidents of sexual abuse and how she felt about the ordeals but she did not do so. She should have been led in evidence on all the crucial aspects and the letter may then have been handed in later and it would have accorded with the her evidence. The letter may not, in my view, be used to embellish PW 1's evidence in this case in respect of matters which were not elicited in examination in chief.

It is apparent, from a reading of the issues raised by the defence that it is necessary, in order to arrive at a decision regarding the propriety or otherwise of acceding to the application, to consider in some meticulous detail, the evidence thus far led, and where necessary, the credibility of the Crown witnesses.

On the issue of credibility of Crown witnesses at this stage, Williamson J. stated the following in **S VS MPETHA AND OTHERS 1983 (4) SA 262 (C.P.D) at 265 D-G**: -

"Under the present Criminal Procedure Act, the sole concern is likewise the assessment of the evidence. In my view, the cases of BOUWER AND NAIDOO correctly hold that credibility is a factor that can be considered at this stage. However, it must be remembered that it is only a very limited role that can be played by credibility at this stage. If a witness gives evidence which is relevant to the charges being considered by the Court, then that evidence can only be ignored if it is of such poor quality that no reasonable person could possibly accept it. This would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed. Before credibility can play a role at all, it is a very high degree of untrustworthiness that has to be shown. It must not be overlooked that the triers of fact are entitled 'while rejecting one portion of the sworn testimony of a witness, to accept another portion' – See ***R VS KHUMALO 1916 AD 480 at 484****. Any lesser test than the very high one which, in my judgement, is demanded would run counter to both the principle and the requirements of S.174".*

A similar conclusion was reached by Cotran C.J. (as he then was), in the Kingdom of Lesotho in the case of **REX VS TEBOHO TAMATI ROMAKATSANE 1978 (1) LLR 70 at 73-4**, where the following excerpt appears: -

"In Lesotho, however, our system is such that the judge (though he sits with assessors is not bound to accept their opinion) is the final arbiter on law and fact so that he is justified, if he feels that the credibility of the crown witnesses has been irretrievably shattered, to say to himself that he is bound to acquit no matter what the accused might say in his defence, short of admitting the offence."

The first salvo launched by the defence was with regard to the complaint. It is common cause that the report was made by PW 1 about three years after the commencement of the assaults according to her evidence. In **R VS C 1955 (4) 40 (N.P.D.) at G-H,** Caney J. stated the following regarding the making of a complaint: -

"To qualify for admission, the "Complaint" must have been made voluntarily, not as a result of leading or suggestive questions, nor of intimidation; and it must have been made without undue delay but at the earliest opportunity which, under all the circumstances

could reasonably be expected to the first person to whom the complainant could reasonably be expected to make it."

In casu, it would not appear that there was any suggestion or intimidation behind the complaint. It does however appear that the complaint was not made at the earliest opportunity to the first person to whom the complainant could reasonably be expected to make it. Mr Sigwane urged the Court, in view of the delay running into years, to reject PW 1's story, as she had ample time and reasonable opportunities to report immediately or within a reasonable time after the occurrence but to no avail.

Mrs Wamala submitted and correctly in my view, that this was not the run of the mill rape case but it involved a relative being the complainant's father as the assailant. It would be expected, it was argued, that it would be difficult for PW 1 to report this to the mother. I agree with Mrs Wamala in this regard. The time within which a report may reasonably be expected to be made must take into account the peculiar circumstances of the case. If a girl or woman is raped by a stranger, she would be expected to report this to the first available person and as soon as a reasonable opportunity avails itself. Her failure to report it at the earliest opportunity and to the first person she would be expected to make it to, would in my view, be sufficient ground to harbour a suspicion about the truthfulness of her account and may result in her credibility being dented, sometimes irretrievably.

Different considerations however apply in cases which involve family members, particularly one which involves, not just a fiduciary relationship, but a father/daughter relationship. It is to be expected that girls would have difficulty reporting this because they are torn between protecting the family and their parents' marriage on the one hand and suffering silently, on the other. They are placed in an irresoluble quandary which might take long to resolve. It is worth noting *in casu,* that PW 1 was a very young and immature girl who should not be disbelieved only because she never reported the matter within a reasonable time. This I say taking due cognisance of the factors attendant to her. It is my finding therefor that her failure to report this within a reasonable time and to the first person to whom she would be expected to report, standing alone is not sufficient to lead me to the conclusion that her story is improbable and must therefor be rejected out of hand.

The second issue appertains to the fact that there were no visible signs of abuse. According to PW 1, when she went to see her father in [Place], he had sexual intercourse with her the whole night, such that she would not sleep a wink. According to PW 1, she never told the mother of these incidents and PW 2 saw nothing untoward in PW 1's behaviour or mental state.

When such ordeals take place, they normally have psychological effects on the victims. In all the cases I have dealt with and where children alleged abuse by an elderly person, initially, they may conceal the story but its toll begins to show in other ways e.g. withdrawal, unhappiness, mood swings e.t.c. *In casu,* PW 2 testified that there was nothing unusual with her daughter that she noticed. This is not convincing and irreconcilable, regard had to the manner in which PWI says she felt about the ordeal. The effects of the abuse would obviously show, particularly to mothers who normally tell that something is amiss with their children even if the children do not volunteer that information.

The other feature of the case which raises a doubt is that PW1 informed the Court that after telling her mother about her father's illegal acts on her, her mother did nothing about it, saying that such a thing would never happen. It was her evidence that after reporting the incident to her mother and her mother dismissed her accusations as false, her father continued to have sexual intercourse with her. (See page 8 & 9 of the record).

This evidence sharply contradicts the evidence of PW 2, who testified that although she initially disbelieved PW 1 after the verbal report, she however believed that PW 1 had told the truth after reading the written account. It was her further evidence that she proceeded to report the issue the day after she read PW 1's letter. There was therefor no opportunity for the accused to abuse PW 1 after the report because the Police were informed soon after the first report. This, in my view, constitutes a very material contradiction in the Crown's evidence.

The other aspect is PW 1's evidence that the accused was arrested for the offence and was later released. This is confirmed by the Police witnesses. According to PW 1, after his release, the accused continued having sexual intercourse with her and this was reported the Police. This allegation does not find support in the evidence of PW 2, who would have definitely known about it. There is evidence that this allegation of rape was reported to the Police as testified by PW 5 but PW 1's demeanour and actions raised serious concerns as evident in PW 5's evidence. No medical or other evidence was tendered by the Crown in support of this allegation. This casts a serious shadow on the truthfulness of PW 1's evidence in this regard.

It is also worth noting that according to the medical report, Exhibit "B", which was compiled on the 10th December, 1998, PW 1 informed the Doctor who attended to her that she had been raped on that

very day, presumably by the accused at around 15h00. The Doctor noted that there was evidence of recent sexual activity. There were however no signs normally consistent with rape cases that were observed by the Doctor and this is evident from Exhibit "B".

However, in her evidence, PW 1 never told the Court that the accused raped her on that day. From the evidence, it is also clear that she never reported this rape even to PW 2 or PW 3 for that matter i.e. that the accused raped her on the 10th December. There is therefor a grave doubt about the truthfulness of the report that she made regarding that incident. It is my view that if it had been true, she would have told PW 2, PW 3 and PW 4 that the accused had raped her on the 10th. It is also noteworthy that the basis for PW 2's report was not a fresh allegation of rape but the verbal and written report made to her by PW 1 on the 2nd December.

There is also a serious contradiction between the evidence of PW 1 and PW 2 on the one hand and that of PW 3 and 4 on the other, regarding the date when PW 2 made the report to the Police and S.C.F. According to PW 1 and PW 2, the report to PW 3 and PW 4 was on the 4th December, whereas according to PW 4, it was on the 10th December. PW 3 testified that it was on the 11th. I am of the view that PW 3 was mistaken as to the date and I cannot say that he deliberately set out to mislead the Court on this issue. The same cannot however be said of PW 1 and PW 2. It is clear that their evidence on this aspect is false, as it is clear even from documentary evidence that the report was not made on the 4th December. In view of the circumstances of this case, I cannot merely assume that both made a mistake on the date when the report was made. This contradiction is in my view material.

Furthermore, it was put to PW 1, in denying that the accused could have had sexual intercourse with her in his house in [Place] that the accused lived with his sister [W] [C]. Following is the record of the battle of wits between PW 1 and Mr Sigwane on this issue, as appears on the record: -

Q: Now, you say that your father used to reside at a compound in [Place]. Is it correct? [that] at his house at [Place], there was another Auntie residing there?
A: No my lord, there was none.

Q: Do you know a lady with whom you share the same surname, whose name is [W] [C]?
A: I know [W].

Q: It is correct that she used to use a bedroom in your Father's house at [Place]?
A: That is true, except that she spent a few days.

Q: During the time when your father would be staying at [Place], you, as a school child would be at [M], attending school, is that not correct?
A: That is correct.

Q: Surely on these occasions, you would not know whether [W] would be using the bedroom in your father's house at [Place] or not, would you?
A: I know that she was at my father's house.

Q: So, she was residing there after all?
A: Yes she was residing there.

Q: Now on occasions when you would go to the compound to visit your father the accused, is it not correct that you would from time to time find [W] in the house?
A: That is not true.

Q: I put it to you that it is true and it is for that reason that earlier on you told this Court that she would be there a few days, because you saw her there?
A: Yes I did find her there, but it was only for a few days that she was there.

It is clear from the above exchange that PW 1 was prevaricating. At one stage, she was saying that [W] was at her father's house and residing there. Later she said she would not find [W] in the house from time to time but at some stage, it was her testimony that she saw [W] there and that it was for a few days. In view of this vacillation, it is in my view dangerous to rely on PW 1's evidence in this regard. She was very shifty and exhibited signs of overheating when taxed on this issue and this is an indication that the accused may well be correct regarding his defence on this score.

Another aspect, which in my view compels me to grant the application is that it would appear from page 70 that PW 2 knew that the accused, would chastise PW 1 and would thereafter forcibly have sexual intercourse with her. The following appears at that page, where she was being cross-examined: -

Q: So, in your view, her father was wrong in what he was doing, is that correct (i.e. chasting PW 1)?

A: It would not have been wrong if the father only beat the child for the reason that the child had gone to her boy friend, but the bad thing about it is that he was doing more more to her. That time, I knew that whenever he would fetch the child there is some thing that he would do to her and he would always fetch her whenever he did not find her at home, even during the night. (My emphasis)

From the above passage, particularly where my emphasis is made, PW2 appears to be saying that she was aware that the accused would fetch PW 1 from [X]'s home and have sexual intercourse with her. If that was indeed the case, the logical question becomes why she did not report that to the Police? Furthermore, from her evidence, the only time she did get to know of the abuse was after PW 1 told her of it. She never testified to have received any further complaint or that she independently established that the accused was abusing his daughter.

Mr Sigwane's further argument, regarding why PW 1 and PW 2 concocted the story was that the accused did not like PW1's nocturnal visits, which appears to have irked both PW 1 and PW 2. If indeed the accused was abusing PW 1 as alleged, it is to be expected that she would have told [X] about it or even his parents because he fetched her from [X]'s parental homestead. She could have simply refused to go with him citing her reasons therefor. It is clear that [X] never got to know of these allegations, considering that from the evidence, he was the closest person to her and whom she trusted and found to have been a refuge in the face of the marauding and abusive father. She could have been expected to use him as a repository of her closest confidences. [X]'s evidence could have served to provide the necessary consistency to PW 1's complaint.

Furthermore, it is inconceivable that the accused, however much of a "sexaholic" he was, could fetch PW 1 from [X]'s, beat her brutally, have sexual intercourse with her and later go home to his wife in that unhygienic state, considering that he did not stay at home most of the time. There is no way that PW 2 would not have found out that the accused was having extra-marital sexual relations, although she may not have readily known with whom. This issue renders the Crown's story improbable.

In view of the foregoing, it is therefor not out of place to lend credence to the submissions by the defence that the motive may have been to get the accused out of the way in order for PW 1 to enjoy

an unbridled relationship with [X]. It is noteworthy that after accused incarceration, both PW 1 and PW 2 engaged in relationships which saw both of them falling pregnant. If indeed it was the accused who was having sexual intercourse with PW 1, there was no intimation at any stage that he could be the father of PW 1's first child.

From the medical report, Exhibit "B" it is clear that PW 1 had had numerous sexual encounters and it is common cause that [X] was the primary, if not sole beneficiary of PW 1's erotic favours. The unproved and uncorroborated allegation that she had had sexual intercourse on the 10th December cannot without any shadow of doubt be said to point to the accused as the assailant.

I am not oblivious to the weight or importance to be attached to exhibit "A", but one would have expected that PW 1 would have narrated the events surrounding the accused fetching her from [X]'s home, severely beating her and having sexual intercourse with her in the forest. These incidents, which should have been and were a great source of agitation to PW 1 according to her evidence are starkly absent. This is surprising.

An accumulation of all these facts and factors may then offer an explanation as to why PW 1 never reported. I say this not oblivious to my earlier finding that PW 1's failure to report, standing alone must not perforce be said to be a sign of the improbability of the Crown's case. Viewed together with the other issues, the question of improbability of the Crown's story becomes more pronounced in my view.

In dealing with corroboration, Hoffman and Zeffert, "The South African Law of Evidence," Fourth Ed, Butterworths, 1997, state the following at page 579: -

> *"Experience has shown that it is very dangerous to rely upon the uncorroborated evidence of the complainant unless there is some other factor reducing the risk of a wrong conviction in cases which involve a sexual element…The cautionary rule is not an inflexible rule of evidence, but a practice, tested by time and experience, that is aimed at avoiding a possible injustice to the innocent. What is required is that the trier of fact should show awareness of the special dangers of convicting upon the evidence of the complainant in a sexual case."*

I have taken especial care in dealing with this matter. There is in my view no corroboration of PW 1's evidence in view of the contents of Exhibit "B" as analysed above. There is no evidence linking the accused with the rape which allegedly occurred on the 10th December. In the case of **THE KING VS VALDEMAR DENGO REVIEW CASE NO.843/88**, Rooney J. stated the following about the cautionary rule and the need for corroboration at page 4 – 5: -

> *"…The need to be aware of the special dangers of convicting an accused on the uncorroborated testimony of a complainant in such cases must never be overlooked.*
>
> *Corroboration may be defined as some independent evidence, implicating the accused, which tends to confirm the complainant's testimony…..Corroboration in sexual cases must be directed to (a) the fact of sexual intercourse or indecent assault (b) the lack of consent on the part of the complainant and (c) the identity of the accused. Any failure by the trial court to observe these rules of evidence may lead to a failure of justice."*

It is my view that the requirements set out by Rooney J. above can hardly be said to have been met. With regard to the other allegations, there are in existence the problems I pointed out earlier, which lead to the conclusion that the Crown has failed to make out a *prima facie* case against the accused.

Conclusion

In my view, a reasonable man acting carefully, cannot convict the accused on the basis of the evidence already adduced by the Crown. He must therefor be acquitted and discharged.

In coming to this conclusion, there are some curious features of the case which leave a bad aftertaste. A prime example is the evidence of PW 6 to the effect that PW 1 would cry and laugh from one moment to another, which she found to have been unwonted behaviour. This may have been a pointer to some psychological problem. PW2, who lived with PW1, never testified to have noted any such signs. Indeed, Exhibit "B" records that during the examination, all was normal with PW1, including her mental state, an indication that nothing untoward was observed. The other is that PW 1 told PW 6 that she would at times initiate sexual intercourse with the accused. I give the latter assertion due weight, which is trifling.

It must be understood that if there is a doubt in a criminal trial, and there is one *in casu*, it must enure to the accused's benefit. The above curious features tend to suggest that the accused may have had some sexual relations with PW 1. If that indeed is the case, notwithstanding the acquittal, the accused would be severely cautioned not to stoop to such low levels of abusing his own helpless and vulnerable children. Cases of incest and rape of children, particularly girls, by their relatives, is on the rise. This is an aberration that must be nipped in the bud. Courts expect relatives, particularly fathers, to protect their vulnerable children. They are not to be first in the list of abusers of their children, thus transforming shepherds into ravenous wolves. Persons who do the contrary are not treated leniently by the Courts and they must expect to be so treated.

It is fitting that I mention in conclusion that I am of the view that the Crown's case was not well presented by the initial Crown Counsel. It appears that the witnesses' statements were not fully studied and the allegations therein contained were not fully ventilated and exploited in Court. In this regard, it appears that there is a lot of information pertaining to PW 1 and PW 2 that was not elicited and which has to a large extent caused some doubts in the Crown's case. With more vigilance and dedication, this would have been avoided. There is little that Mrs. Wamala could have done to address these issues at the stage when she took over the prosecution.

T.S. MASUKU
JUDGE

EXHIBIT "A"

It say's, "*3rd December 1998. Mother, how are you, I am still okay a little bit. Mother there is something that is troubling me in my life. My father is having sex with me and he started having sex*

with me whilst I was going Grade 5. He did that for some time and the he stopped. He started having sex with me at the compound. Whilst I was sleeping, he asked me if I did not feel the heat. I told him that I could feel the heat. He then asked me as to why then was I not taking off my clothes and I told him that I was not used to sleeping with my clothes off. He asked me what I was afraid off. He said I must not be afraid of anything because I was his child. He said even if I could take off my clothes I must be afraid, but that surprised me because I wondered as to whether I was allowed to take off my clothes and walk naked in front of my Father. I was afraid to walk naked in front of my Father being a girl and I then refused to take off my clothes. He then again asked me if I did not hear what he had said to me. After having taken off my clothes, he then told me to stand and face him and then he said, I had a good structure which resembled that of my Mother. That surprised me and just at that point, he then told me to come to him and sleep together with him. I started crying and he then pulled me and made me sleep with him. The then took of his clothes and started having sex with me. I continued crying and he told me that I shouldn't mention this thing at home, but that troubled me in my soul because what he did to me, I did not know. He continued doing this even though it made me feel pain about it and he told me that I shouldn't tell you what he was doing with me. He said if I would mention such a thing, he would then realise that in fact I was a fool, because I was not supposed to mention a thing of this nature. I then asked myself as to why he was doing such a thing if he realised that it was not good and was and that I was not supposed to mention it. He said if I ever told you, he was going to kill me and he continued having sex with me. He continued having sex with me despite the fact that I was crying and feeling pain. And what my Father is doing Mother, pains me a lot that he should have sex with me, yet I am his daughter. I even asked myself if in fact I am his daughter and I am, should he be sleeping with me. I wonder as to why then Mother, you don't tell me that I am not a [C] or do not belong to the [C] family. And for her to show me my natural father and I would then go to him. Because if I were his daughter he would not be doing this, having sex with me, even now he is continuing having sex with me. It is even worse when I have gone to the compound, at that place he takes me as a wife and I am not even able to sleep. He has sex with me until in the morning that is why Mother I usually say I do not want to go to the compound. It is because I know that he is going to do such a thing to me. He has sex with me for the whole night, even on Saturday he had sex with me at the cane fields and I cried. Mother I request that you see what you can do about this matter. I do not like the life I am living now. The life that I am living now at his homestead, it does show that he is not my natural Father. We came back Mother, and when we got to eLutfokosile, he went with me into a forest and had sex with me there. Mother, the thing that he is doing to me, I do not like and it is going to trouble me in my whole life. I am even afraid when I walk, it is like everybody realises what has happened to me

and I feel that I am dirty in my whole body. No matter how many times I wash myself but I will always feel dirty. Mother this thing he is doing to me, I do not like. He said he cannot stop doing it to me because he had already done it. When he came home he called me into the house where he was and he told me to take off my clothes and he continued to have sex with me I felt pain. I even asked myself as to how long this was going to go on, leading this painful life. That it should be my Father who causes me to live this painful life, even when he was leaving, he again had sex with me. He had sex with me in the house and when I told him that I did not like what he was doing to me, he said it was therefore that he stops whatever he intended doing for me. He said I was a fool and that he would not take me as his daughter so that I would fend for myself. I then asked myself as to whether he was taking me to school because he wanted to have sex with me or doing whatever he was doing in order to have sex with me. At the same time he is saying he doesn't want me to fall in love, because the boy's only want to have sex with us, only. Personally I am surprised that it is him, who is doing this thing and yet he is saying he doesn't want it. He say's he doesn't want me to do it, and yet he is doing it. I wonder what he wants me to think about what he is doing because what I think is that he is teaching me that what he is doing is good, and he is teaching me to do that. Even if I did not do it, because it is him who is teaching me to do this thin, he is not even ashamed to have sex with me and yet I am his daughter.

Mother I do not like this type of life I am living, it make me feel a lot of pain in my life. I would ask you to see or decide what you do about this Mother, because I do not even wish to see or face him. In the light of what he is doing to me being his daughter, in fact Mother, I do no wish to see him in my whole life. The question I ask myself is how long am I going to lead such a life. Even though he had said if I passed he was going to organise a place for me at Ndzevane, I was not going to agree. I do not want to become his wife or be turned into his wife in the house. He say's he is not going to stop having sex with me. He said he was only going to stop after I had got married. Mother you can think how young I am and as to how long it is going to be before I get married. Mother I would like you to decide what to do about such a matter."