IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE In the matter between: REX VERSUS DUMSANE PHENYANE

CRIMINAL CASE NO. 126/97

CORAM

SHABANGU AJ MS. WAMALA

FOR THE CROWN FOR THE DEFENCE

ACCUSED IN PERSON

JUDGEMENT 12th October, 2004

The accused a young man of about 24 years, a certain Dumsane Phenyane has been indicted before this court on a charge of rape, it being alleged that;

> *"... upon or about 18th May, 1997 and at or near Mgobodzi area in the Hhohho Region, the said accused, an adult male did intentionally have unlawful sexual intercourse with Thandeka Goodness Ndwandwe a minor female who was at that time aged eleven years and incapable in law of consenting to sexual intercourse and did thereby commit the crime of rape. "*

The indictment proceeds to give notice to the accused that the crown shall during the trial contend "that the Rape was attended by aggravating circumstances in that :-

(i) This was the first experience of sexual intercourse for the complainant.

(ii) The complainant was a minor.

In all fairness to the accused it needs to be pointed out at the outset that the accused himself was a minor on 18th May$1997 which is the date of the alleged rape. Evidence of the accused's age was given by her stepmother, one Betty Phenyane born Dlamini. This witness testified that she has know^the accused since birth on 15th November, 1978. She says she is married to the father of the accused one Dzingabaleni Phenyane of Vusweni. She has children of her own, the eldest among her children having been born, before the accused had completed one year in age, in June 1979. She claimed to have a clear recollection of the accused's date of birth because of the factors I have referred to, in her testimony. The father of the accused who was also called as a witness said he did not recall the date of birth of the accused. If the testimony of the complainants' mother is accepted as correct then the age of the accused was eighteen (18) at the time the incident which forms the subject of the rape charge occurred. There may be a doubt as to the correct age of the accused now and at the time of the alleged offence. From the documents filed in court it appears that even though the application that the accused be indicted before this court for summary trial was made on 14th November, 1997, he was by order of this court referred for psychiatric examination to establish inter alia his fitness to stand trial. His father in giving evidence before this court stated that he did not know the age of the accused, his son. The father also testified that he had not obtained a birth certificate for his son because he (the son) was mentally sick. A psychiatric report prepared by Dr. R. Ndlangamandla and dated 5th February, 2001 describes the accused as a 16 year-old-male. This would mean that if by 5th February, 2001 he was sixteen years of age, then he must have been below the age of 14 years at the time of the alleged rape. The Roman-Dutch law authorities appear to have been divided on whether the rule of Roman law that boys under the age of 14 years were irrebutably presumed to be incapable of performing sexual intercourse. Some Roman-Dutch law writers accepted the Roman law rule that boys under the age of 14 were irrebutably presumed to be incapable of having sexual intercourse. On the other hand some of the Roman-Dutch law authorities appear to have considered that the question of capacity to have sexual intercourse on the part of a boy under the age of fourteen, was a matter for evidence and therefore depended on the circumstances. (See MILTON J.R.L SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE VOL.ONE 2nd edition page 431.) See also

 The South African common law appears also to have accepted the rule that boys under the age of 14 years are irrebutably presumed to be incapable of having sexual intercourse. In R V. M 1949(4) SA 831 (AD) the Appellate Division of the South African Supreme Court considered that it was too late to question the rule. MILTON expresses the view that this may have been unfortunate. See MILTON *supra* page 433. English law appears to have taken the same position as Roman law and South African law. In light of the differences of opinion among the Roman-Dutch law authorities this court might have to make a choice between the two views discernible amongst the Roman-Dutch writers and decide in light of prevailing public policy which view to adopt as representing the law of Swaziland. The public policy considerations which might be paramount on the matter may be discerned from the Girls' and Womens' Protection Act which act also makes it impossible for a boy who is under the age of[f] **J**?..to be convicted of the crime created under the statute. The fact that the legislature has deemed it appropriate to ensure that boys who have not reached the age are not charged with the offence created under the Girls and Women's Protection Act indicates that public policy is to discourage the prosecution of young boys for crimes involving sexual intercourse. Other than what is contained in Dr. Ndlangamandla's report the accused does look young to me and it is possible that he is a year or two years older than the complainant. Furthermore apart from what is already said regarding the age of the accused another rule applicable is that there is a general rebuttable presumption that a child between the ages of 7 and 14 does not have capacity criminal conduct. A child who has completed the seventh but not the fourteenth year is, to use the language of the courts presumed to be *doli incapax*, even though the presumption may be rebutted, either by direct or by indirect evidence. The onus is on the prosecution to prove that the child has criminal capacity. In the present case no attempt was made by the crown to prove that the accused who was a child possessed the necessary criminal capacity and or that he was capable of having sexual intercourse. Having alerted crown counsel to this as a possible question at the beginning of the trial no other attempt was made by the crown to deal with this issue. It was obvious that the accused was also very young and might even have been younger in May, 1997 which is about seven years from today when the alleged

offence was committed. There is also the report on the psychiatric examination of the accused by Dr R. Ndlangamandia which having been conducted as a result of an order of the court refers to the accused as a young man of sixteen years in 2001. It seems to me that I cannot ignore information brought before court in this manner. The complainants' mother also gave evidence of the date of birth of the complainant as 30th August, 1986 and produced the birth certificate of the child in support of her testimony. At the time of incident the child was ten years old.

At the time the child testified in court in the year 2004 she was already 17 years of age to turn 18 years on 30th August, 2004.

The only evidence implicating the accused in the rape is that of the complainant who was a minor child both at the time of the alleged rape and at the time she gave evidence in court. The complainant testified that on the morning of 18th May, 1997 at about 08.00 hours she left her homestead to look for her necklace at the water-tap close to her homestead. She says she was grabbed by the accused who slept with her. She says the accused "grabbed" her "threw her onto the grass" and made her sleep facing up and slept with her. On being asked specifically what she meant by saying "accused slept with her" by Crown Counsel, her answer was that she raped her. When Crown Counsel had to continue to probe further what she meant by this she again testified that the accused grabbed her, threw her onto the grass and made her sleep facing up. She then says the accused took out his penis at this stage and inserted it into her vagina. The witness continued to say that at this stage one Masotsha and another person appeared on the scene where the accused was raping her whereupon the accused ran away. She says she then went to report to the accused's aunt known to her as LaPhenyane that she had been raped. At LaPhenyane's homestead she found one LaMaseko to whom she reported. LaMaseko advised her to go and report at her parental home because there was no one. She then proceeded to her home and there reported to her mother. The mother took the complainant with her to LaPhenyane's homestead with the intention of reporting the matter to the accused's aunt. The aunt was not there. She then proceeded to hospital with the complainant but on reaching the hospital she was told to go and report to the

police first which she did. After reporting to the police they gave her a form described as RSP 88 for completion by jthe dqctor who would examine and assess her condition. The complainant says she did raise an alarm and that she had never had sexual intercourse before. In cross-examination the accused appears to have placed significance on the fact that there were homesteads near the spot of the alleged rape and the fact that there was a road very close to the sport of the alleged rape. The complainant also stated during the cross-examination by the accused that as a result of the alarm she raised one Masotsha and another person came to the scene. The said Masotsha or the another person who allegedly accompanied him when they appeared at the scene of the alleged rape were not called to corroborate the complainants testimony, even though one Masotsha Dlamini was listed in the crown's list of witnesses as prosecution witness number two. One Winile Dlamini also described as LaMaseko testified to the fact that the complainant came to her crying and told her she had been grabbed by Dumsane Phenyane, the accused. On being asked whether the complainant did explain to her what she meant by saying she was grabbed by Dumsane Phenyane the witness says the complainant explained to her that the said Dumsane Phenyane had told her to lie down and face upwards. I must mention at this stage that there appears to be a contradiction between the description given in court by the complainant on how the rape occurred and what she reported to Winile Dlamini on how she ended up lying on the ground facing upwards. The complainant does not say during her evidence in chief that she raised an alarm, this only emerges during cross-examination. The complainant who was already seventeen years of age at the time she gave her evidence in court did not give her evidence in a clear and straight forward manner as illustrated by the effort crown counsel had to exert to elicit answers about the rape. It is also not clear from the evidence whether the rape occurred at the watertap where the complainant had gone to look for her necklace. The Doctor who examined the complainant could not be traced for purposes of giving evidence in court. The Crown applied for the handing in of the doctors' report under section 221 of the Criminal Procedure and evidence Act, 67 of 1938. The report which was handed in an interpreted by another doctor, a certain Doctor Sitsebe reflect that the complainant was examined by a certain Dr Ogwal on 18^{lh} May, 1997 at 11:15 a.m. This was about three hours from the time of the alleged rape. Dr Sitsebe says the reference to

"P-Cells 5-8" in Dr Ogwal's report is infact a reference to "pus cells which indicated that "an infection which had been trpre for 6-8 hours" was present on the complainants' genital organs. The reference to "pus cells" is abbreviated in Dr. Ogwals' report as "P-cells" and is therefore not described in language which is susceptible to an ordinary meaning. In light of the fact that Dr. Sitsebe is not the author of the report I am not certain that the meaning he attaches to the abbreviated sections is admissible. No authority was cited to me by Crown Counsel to support the view that such an interpretation by another doctor of words or marks which are not ordinary language is admissible. Similarly the meaning of the symbols "WBC - 15-20" cannot be ascertained from anyone else other than the person who was the author of the report. This is because this is not normal language either used by layman or even by doctors uniformly. There is however a reference in ordinary English language to absence of spermatozoa and parasites from a laboratory examination of vaginal smears. Dr Ogwal expresses an "opinion" on the report as follows: "there is evidence of sexual intercourse as evidenced by foul discharge from introitus, hyperaemic fourchette. Laboratory results show "WBC 15-20" P-Cells 5-8 indicating infection. Rape is a possibility" Nowhere does the doctors report state that there was penetration of the complainants.

As a matter of principle whereas an accused person may be convicted of any offence on the single evidence of any competent and single witness a court is required to demonstrate caution in acting upon the uncorroborated evidence of certain types of witnesses, such as young children and complainants in sexual cases. In acting on such evidence the court must be satisfied that there is either corroboration of the evidence in question or some other indication of trustworthiness. A useful formulation of the principle involved is that of the Appellate Division of the Supreme Court of South Africa in S V. FRENCH-BEYTAGH 1972 (3) SA 430@ 445-6 and as quoted by HOFFMAN AND ZEFFERT in their SOUTH AFRICAN LAW OF EVIDENCE 3rd edition.

"Although section 256...specifically provides...that a court may convict an accused of any offence alleged against him on the single evidence of a competent and credible witness, this court held in R V. MOKOENA 1956 (3) SA 81 (A) that, before doing so, a court should bear in mind the cautionary remarks of DE VILLIERS JP in R V. MOKOENA 1932 OPD 79 at 81, namely that the section should only be relied upon where the evidence of the single witness is clear and satisfactory in every material

respect and that the section should not be invoked where, for instance, the witness has an interest or bias advene to the accused. "

In the other MOKOENA CASE decided in the Orange Free State Provincial Division and referred to above it was mentioned that the section which is the South African counterpart of our section 236 of the Criminal Procedure and Evidence Act 67 of 1938, ought not be invoked where for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had a proper opportunity for observation, etc. There is no closed category of pointers to the truth however. If the court is satisfied upon rational grounds that a witness is reliable it is not obliged to reject his evidence because those grounds have not yet been mentioned in any decided case. The ultimate requirement, as HOLMES J.A. observed in S V. ARTMAN 1968 (3) SA 339(A) is proof beyond reasonable doubt. Satisfaction of the cautionary rule does not necessarily warrant a conviction. In light of what is stated above in relation to the analysis of the evidence and the fact that I cannot find a factor in the evidence which provides a safeguard to a sufficient degree against the risk of a wrong conviction, I am unable to find that the guilt of the accused has been established beyond a reasonable doubt. As observed earlier the complainant, whose evidence was the only evidence implicating the accused, did not give her evidence in a clear, straightforward and satisfactory manner, inspite of the fact that she was already seventeen years of age at the time she gave her testimony. Crown Counsel had a difficult task trying to elicit the evidence of penetration, if such did occur, from her. On raising the alarm she says one Masotsha and another person appeared at the scene of the alleged rape, yet strangely none of the two people were called to support her testimony. I am not satisfied on the totality of the evidence that the guilt of the accused has been established beyond a reasonable doubt. He is therefore acquitted and discharged.

ACTING JUDGE