THE HIGH COURT OF SWAZILAND

Criminal Case No. 171/02

In the matter between:

REX

VS

SIPHO DUBE

CORAM **:SHABANGU A.J.**

For the Crown **:Ms Wamala**

For the Defence **:Accused in person**

JUDGEMENT 8th DECEMBER, 2004

The accused is charged with rape it being alleged b^ the Crown that he is guilty of rape,

> *"In that upon or about the 16"' April, 2000 and at or near Mangcongco area in the district of Manzini, the accused did wrongfully and intentionally have unlawful sexual intercourse with Vuyisile Bhembe, without her consent and did thereby commit the crime of rape. "*

The crown further gives notice in the indictment that it will contend during the trial that the alleged rape was attended by aggravating factors as envisaged under section 185 *(bis)* of the Criminal Procedure and Evidence Act 1938, in that: -

"(a) At the time of the commission of this crime, the complainant was a female aged nine (9) years.

(b) At the time of the commission of this crime, complainant was throttled by the accused."

The complainant gave evidence during the trial and testified that sometime in April, 2000 she was at her grandparent's home when the accused sent her to take his traditional beer and a slasher to his (that is the accused's) house. The complainant was supported on this aspect of her testimony by her mother. The complainant went on to testify that she proceeded to the homestead of the accused who is known in the area as Mdladlana. The complainant says she did not have any prior knowledge of the accused before this day even though she goes on to say later in her testimony that she had seen the accused a few days prior to the alleged rape incident. She goes on to say that as she walked towards the homestead of the accused she saw the accused follow her. As she reached the accused's homestead the accused showed her the hut she was supposed to go to for purposes of delivering the traditional beer and slasher. The complainant further testifies that she entered the hut but was blocked by the accused on her way out. The accused allegedly closed the door thus preventing the complainant from leaving. The complainant says the accused took out a knife to threaten her. She says she cried and requested that the accused allows her to go home because her parens were waiting for her. There was allegedly some red ointment in the hut which the accused is said to have picked up using his knife and smeared the ointment on the complainants genital area. Following this the accused is then alleged to have "lied" on top of the complainant putting his penis in the genital organs and that when the complainant cried the accused throttled her and "inserted his penis on the 'complainants' buttocks." The complainant also states that the accused hit her with a knobstick on the lower part of her vagina. At this stage the complainant's mother arrived outside the hut shouting the name of the complainant. Apparently according to the complainant's testimony her mother was moving from one hut to another shouting her name in search for her. When the mother came to the hut in which the complainant and the accused were allegedly in, the accused is said to have proceeded to answer the door whereupon he is alleged to have told the mother that the

complainant was not there but had gone to the river with his wives. The complainant testified further that whilst all this happened she was lying inside the accused's hut. I might mention at this stage that it does not appear that she attempted to raise an alarm at this stage. This is strange because she heard the voice of her mother from outside. After the mother left the accused is said to have opened the door for the child and let her go. The child (complainant) left the hut, proceeded to her grandparent's homestead and reported to her mother. The matter was then reported to the Police who took the complainant to hospital where she was examined by the doctor. Even though the child was nine years at the time of the alleged incident in April, 2000 by the time matter came to trial she was already thirteen years.

The accused denies the incident and claims that the evidence against him is fabricated.

Later during cross-examination the complainant states, in response to a question by the accused that accused's penis "could not penetrate" her vagina. The complainant's testimony during cross-examination on this aspect of the matter is as follows: -

Accused's (question): How old am I in relation to you to have done such a thing.

Complainant's answer: Yes you are old but what you did is what you did and it is true.

Accused : You testified I inserted my penis into you how did you manage to walk home after I had inserted my penis in your vagina because you are too young. You ought to have been injured to such an extent that you could not walk.

Complainant : Your penis could not enter or penetrate my vagina

Later on the cross-examination proceeds like this

Accused : Where were you injured **or** bruised during the alleged incident.

Complainant : You were not able to penetrate my vagina because my vagina is **too** small **for** a penis **to** enter me.

Later the complainant testifies "you closed the door to your hut, inserted your penis in my vagina and then at my back or buttocks. In light of this last statement by the complainant the reliability of the complainant's testimony on penetration is open to reasonable doubt. It is trite that on a charge of rape there must be penetration. (See **R vs. V. 1960(1) SA 117 @ 119, R v. E 1960 (2) SA 691 (Fc) @ 692, Milton J.R.L., South African** Criminal **Law and Procedure Vol.11 2nd edition).** In the circumstances the accused cannot be found guilty of rape. There is no medical report.

There is however an alternative charge wherein the accused is charged with contravening Section 3 (1) of the Girls and Woman's Protection Act 39 of 1920 "in that upon or about 16th April, 2000 and at or near Mangcongco area in the district of Manzini, the accused did intentionally have carnal connection with Vuyisile Bhembe, a female aged nine years. In assessing the evidence on this charge also I am required to exercise caution because of three reasons, namely the only evidence implicating'the accused of any offence under the statute is that of the complainant who is a young child. There is also the fact that this is a matter involving sexual allegations. Whereas the Criminal Procedure and Evidence Act declares the evidence of a single witness to be sufficient for a conviction I can only convict the accused on this kind of evidence if the evidence is clear and satisfactory in every material respect. Where the evidence of the single witness, in this case, the complainant who is also a young child is not clear and satisfactory in every material respect, the provisions of the Criminal Procedure and Evidence Act cannot be relied upon for a conviction. Where the witness contradicts herself /himself in the witness box or does not give his or her evidence in an ungarbled manner it cannot be said that his or her evidence is clear and satisfactory in every material respect. (See **R VS.** MOKOENA

1932 OPD 79 @ 80. S VS. ARTMAN 1968 (3) SA 339 A @ 341B, S VS. SNYMAN 1968 (2) SA 582G; S VS. MGENGWANA 1964 (2) SA 149 (C). It is trite that in cases of a sexual nature 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. (See **HOFFMAN AND ZEFFERT S.A. Law of Evidence 3rd Edition page 455).** As already pointed out above it cannot be said that the complainant's evidence **is** clear and satisfactory in all material respects. This is because having said during her testimony in

chief, that the accused inserted her penis "in her" the complainant later said in cross-examination that the accused penis did not penetrate her vagina. In her testimony she did not raise an alarm when according to her evidence her mother was at the door of the accused's hut with the latter. The complainant's testimony on her prior knowledge of the accused is vague to say the least. There is also the fact that the denial by the accused that he sent the complainant to take his traditional beer to his homestead is denied by the accused who says he does not drink alcohol or traditional beer. This appears to be supported by the complainant's grandmother and mother who admitted during cross-examination that the accused does not drink. In the circumstances I am not satisfied that it would be safe to convict the accused even of the alternative charge including indecent assault. It follows that he is acquitted and discharged of both charges.

ALEX S. SHABANGU
ACTING JUDGE