THE HIGH COURT OF SWAZILAND

REX

Vs

SDUMO ELPHAS DLAMINI

Criminal case No. 227/2002

Coram: S.B. MAPHALALA – J

For the Crown: MISS N. LUKHELE

For the Defence: IN PERSON

JUDGMENT

(19th April 2006)

[1] The accused person is charged with three counts of the rape of three small girls in December and January 2001, at an area called Lushini (Hosea) in the district of Shiselweni. In all three counts it is alleged that the rape is accompanied by aggravating factors as envisaged under Section 185 (bis) of the Criminal Procedure and Evidence Act of 1938 to the effect that in each count the complainant was a minor and that at the time of the commission of the crime complainant was a virgin. The complainant in Count 1 was aged 8 years old and the two complainants in Count 2 and 3 were each 7 years old at the time of the alleged rape.

[2] The accused person was conducting his own defence and the prosecution is represented by *Miss N. Lukhele* and accused pleaded not guilty in respect of all the counts against him.

[3] The Crown led a number of witnesses in this case. The first witness for the Crown was PW1 S S who is the complainant in Count 1. She gave a lengthy account of what transpired in December 2001. She told the court that she knew the accused person who stays in a homestead not very far from where she resides. On the day in question the accused person

came to her homestead when her parents were away. The accused asked her to fetch her father's tobacco which was in another room. When she entered the said room the accused followed her. He led her to a mattress in this small room. He removed her clothes including her panties. He took off his pants up to his knees. He took out his penis and inserted it in her vagina. He then made up and down sexual movements on top of her. She cried. She felt that he was killing her. She saw a white discharge which came out of his penis. She did not know what this substance was. After that the accused person left her. During the event one child by the name of N H opened the door and gained entry into the hut. She said she had been sent by other men to get cigarettes. Accused told PW1 to stop crying because another child he had sexual intercourse with did not cry. Accused told N that there were no cigarettes and she left the hut. Accused person then left the hut and she also went to report what had happened to her grandmother. She was later taken to hospital and to the police where the matter was reported.

[4] This is about the extent of her testimony she was cross-examined at some length by the accused person. Generally it was put to her that she had fabricated her evidence where she replied in the negative.

[5] The second witness for the Crown was PW2 N H and is related to the accused who is her cousin. She deposed that on the day in question she was sent by her brother-in-law M V to go and get tobacco from accused's home. She found the accused having sexual intercourse with PW1. PWl's back was facing the accused person. She told the accused that she had been sent to get tobacco. She said they had a blanket covering them. PW1 was hiding. They were sleeping on top of a mattress. After she left PW1 followed shortly. She then went to her brother-in-law who had sent her.

[6] This witness was cross-examined briefly by the accused person.

[7] The third witness for the Crown was one PW3 C Z X who is the complainant in Count 2. She related at some length how she was raped by the accused person on the day in question. On that day her mother had sent her to her aunt one C M to get salt. She saw the accused seated somewhere in that homestead. The accused person is her brother-in-law. The accused told her to go and collect firewood in the forest nearby. She did not find her aunt C M and she told the accused about her errand by her mother. The accused told her that her aunt was not present. They then proceeded together to the forest to collect firewood. The forest is not very far from the homesteads. Within hearing distance from the homestead the accused spread his shirt on the ground. The accused directed her to lie down and she asked what for. The accused then threw her down on the ground. He inserted his penis in her vagina. It was painful. When

he had finished he wiped her with a cloth. He then gave her firewood and told her to go home. When she got home she did not report what had happened to her because the accused person had warned her not to tell anyone. However, her mother got to know about this after the incident with PW1. Her mother then asked her what had happened and she told her. She was then taken to hospital by the police. She testified that the accused had also had sexual intercourse with her in another prior incident. She described at some length what the accused did in that incident.

[8] PW3 was cross-examined briefly by the accused.

[9] The Crown then called PW4 C S who is the complainant in Count 3. She testified that on the day in question she was sent by her grandmother to take some **mahewu** (sour porridge) to one Sidumo who was working in the homestead close by. When she got there Sidumo who is the accused before court ordered her to sit down. After that the accused forcefully ordered her to lie down. He inserted his penis in her vagina. She said she felt pain. After she had finished accused told her not to tell her grandmother. She told the court that when the accused had sexual intercourse with she cried as she felt pain. After he had finished he stood up and left. She also left and went home. She did not tell anyone as accused had told her not to tell anyone.

[10] The accused person briefly cross-examined this witness where he put it to her that her version of events in not the truth, however she maintained that she was telling the truth.

[11] The fifth witness for the Crown was PW5 K S. She testified briefly on what she was told by PW1 of what happened to her at the hands of the accused person.

[12] The sixth Crown witness was T S who is biological mother of S the complainant in Count 1. Her evidence was brief on what she gathered from S and others.

[13] The seventh witness for the Crown was PW7 Gcoshoma Myeni who is the girlfriend to the accused person. Her evidence did not advance the Crown case in anyway as she related what she was told by other people of what had happened to the complainants in this case.

[14] The eighth witness for the Crown was PW8 J B S who is the mother to complainant in Count 2 C X. She also did not advance the Crown's case any further except to tell the court what she was told by other witnesses.

[15] The ninth witness for the Crown was one T S who testified that PW1 S was her child and was born on the 15th July 2001. She also did not advance the Crown's case any further except relating what she was told by other Crown witnesses.

[16] The tenth witness for the Crown was the Investigating Officer in this case PW10 2750 Detective Constable Nonhlanhla Mkhabela. She related how she arrested the accused person regarding the three counts before court. She further testified as to how she took the three complainants to be examined by the doctor. She also tried to get birth certificates for the complainants but could only find health cards for C and C.

[17] The eleventh witness for the Crown was PW11 Dr. Augustin Aram who handed to the court the medical examination reports in respect Of the three complainants in this case. The doctor handed the medical examination reports as exhibits in terms of Section 221 of the Criminal Procedure and Evidence^ Act of 1938 as amended.

[18] In his defence the accused person elected to make a sworn **statement** where he gave very brief testimony to the effect that he does not know why he was (arrested. He only saw the community police who charged him with the crime of rape. After that he was then arrested by the police in connection with these three offences. His cross-examination by the Crown was also brief.

[19] The court then heard submissions from both the Crown and the accused person. The Crown submitted that though the three complainants are minor children they all gave credible evidence before court. In this regard the court was referred to the High Court case of *Solomon Petros Malambe vs R- Criminal Appeal &o. 59/1999* and the *South African case ofR vs J1958 (3) S.A. 69* and that of *R vs S1948 (4) S.A. 419, S vs Nkomo 1975 (3) S.A. 598.*

[20] The accused person advanced submissions *per contra* challenging the evidence of one K S who was introduced as PW5 by the Crown. The accused person submitted that the evidence of this witness is concocted and therefore the court ought to disregard it in its totality. The accused further challenged the evidence of the three complainants stating that it was also concocted. Tjie accused further challenged the evidence of the doctor stating that it was hearsay evidence and the court should disregard it. On the main the accused person took the vi^w that the whole evidence of the crime is concocted against him.

[21] I have considered the facts presented before me and the submissions made by the Crown and the accused person and it appears to me that the Crown lias proved only in Count 1 beyond a reasonable doubt. Starting with the issue of the three medical reports the accused

person has contended that the medical reports are hearsay evidence as the doctor who handed them to court was not the doctor who examined the three complainants.

[22] The Crown introduced the three medical reports in terms of Section 221 of the Criminal Procedure and Evidence Act No. 67 of 1938 as the medical doctor who examined the complainants has since left Swaziland for good to his home country. The said Section provides as follows:

221. (1) In any criminal proceedings in which any facts are ascertained-

(a) by a medical practitioner in respect of any injury to, or state of mind or condition of the body of, a person, including the results of any forensic test or his opinion as to the cause of death of such person; or

(b) by a veterinary practitioner in respect of any injury to, or the state or condition of the body of, any animal including the results of any forensic test or his opinion as to the cause of death of such animal. Such facts may be proved by a written report signed and dated by such medical or veterinary practitioner, as the case may be, and that report shall be *prima facie* evidence of the matters stated therein: Provided that the court may of its own motion or on the application of the prosecution or the accused require the attendance of the person who signed such report but such court shall not so require if: -

i) the whereabouts of the person are unknown; or

ii) such person is outside Swaziland and, having regard to all the circumstances, the justice of the case will not be substantially prejudiced by his non-attendance.

(2) Where a person who has made a report under subsection (1) has died, or the court in accordance with the proviso to subsection (1) does not order his attendance, such report shall be received by the court as evidence upon its mere production, notwithstanding that such report was made before the coming into operation of the Act.

[23] It was in terms of the above-cited provisions that the three medical reports were entered as evidence of the Crown. The medical examination in respect of the first complainant S S states that **"sexual intercourse very likely to have occurred"** and it was entered as exhibit "A". The medical examination in respect of the second complainant C X was entered as exhibit "B" and it states that **"sexual intercourse occurred".** The medical examination in respect of the third complainant C S was entered as exhibit "C" and records that **"sexual intercourse occurred".** The Crown witnesses say it is the accused person whilst the accused person states that he did not commit these offences but these were concocted by the Crown witnesses against him. The evidence of the commission of the offence is that of the three complainants before court. All the three complainants at the time of the commission of the offences were of tender years. The first complainant S S was at the time 8 years old. The complainant in Count 2 C X was 7 years old and the third complainant in Count 3 C S was

also 7 years old.

[24] It has been accepted that the evidence of young children should be treated with great caution owing to the dangers inherent in such evidence, (see *R vs Manda 1951 (3) S.A. 158 (A)* at *163* Q. The imaginativeness and suggestibility of children are only two of the elements against which a trier of fact should guard, and a trial court is required to indicate in the reasons furnished for its decision that it has fully appreciated these dangers and duly taken account of such safe guards as there may be in the circumstances of the case. The primary concern of a trier of fact is to ascertain whether the evidence of young witness is trustworthy.

[25] In the South African case of *Woji vs Santam Insurance Co. Ltd 1981 (1) S.A. 1020 (A)* at *1028 B - D* the court examined the concept of trustworthiness and found, relying on the views of *Wigmore (paragraph 506)* that it comprised of the following components:

a) **The capacity of observation, as to which the court should ascertain whether the child appears sufficiently intelligent to observe.**

b) **The power of recollection, which depends on whether the child has "sufficient years of discretion" to remember what occurs.**

c) **Narrative ability, which raises the question whether the child has "the capacity to understand the questions put, and to frame and express intelligent answers".**

d) **Sincerity, in regard to which the court should satisfy itself that there is a "consciousness of the duty o speak the truth".**

[26] Where the nature of the evidence given by the child is of a simple kind, related to a subject-matter falling clearly within the field of his understanding and interest, and the circumstances are such as practically to exclude the risk arising from suggestibility, then clearly there may be sufficient indicia of trustworthiness to dispense with corroboration (see *R vs Manda (supra)* at *163);* where, on the other hand, the circumstances are somewhat complex, giving ample scope for suggestion and imagination, the courts are inclined to insist on corroboration of the child's evidence (see *R* v *J1958 (3) S.A. 699 (SR)* at *702; RvsS 1984 (4) S.A. 419 (GW), R vs De Beer 1933 NPD 30* at *34* and *R vs Bell 1929 CPD 478* at *480).*

[27] It remains to be seen therefore in *casu* whether the evidence of the three complainants prove that they were raped as alleged in the indictment and also the effect of the evidence of the other Crown witnesses who gave evidence of the events after the commission of the offences. Starting with the complainant in the first count PW1 S S, she gave a lengthy account of the incident of rape and she was cross-examined at length by the accused person where in my considerate opinion she maintained that she was raped by the accused on the day in question. Her evidence is corroborated by her cousin PW2 N H who was sent by her brother-

in-law M V to get him tobacco from accused's homestead. In a hut she saw PW1 sleeping together with the accused person. She saw that the accused was having sexual intercourse with PW1.

[28] In respect of the second and third complainants in my assessment of their evidence I cannot say that their evidence prove accused's guilt beyond a reasonable doubt. I say so because their evidence is not corroborated by any other independent evidence, as it was the case with the first complainant who led the evidence of her cousin PW2 N H. It will be clearly unsafe to convict the accused person on the basis of their evidence standing alone. In the circumstances on the facts I am inclined to grant the accused person in respect of the two counts *viz,* counts 2 and 3 the benefit of the doubt therein.

[29] In the result, I have come to the considered view that the Crown has proved its case beyond a reasonable doubt in respect only of Count 1 and in respect of Count 2 and 3, the accused person is given the benefit of the doubt and is accordingly found not guilty and acquitted forthwith.

[30] In respect of Count 1 the accused is found guilty as charged and the aggravating factors as envisaged under Section 185 *(bis)* of the Criminal Procedure and Evidence Act of 1938 have been proved that (a) at the time of the commission of the crime, complainant was a female of seven (7) years and (b) at the time of the commission of the crime complainant was a virgin.

SENTENCE

[1] On the 19th April 2006, the accused person was convicted of the rape of a minor child one PW1 S S and acquitted in respect of two other charges of rape on the basis that the Crown had not advanced a case beyond a reasonable doubt in respect thereto. Presently, the court is concerned with what appropriate sentence to impose in the circumstances.

[2] According to Winston Churchill in *Fox "English Prisons and Bostal System (1952)":*

> **"The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm and dispassionate recognition of the rights of the accused against the state, and even of convicted criminals against the state, a constant heart - searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an**

> **unfaltering faith that there is a treatment, if you can find it, in the heart of everyone - these are symbols which in the treatment of crime and criminals mark and measure the store-up strength of a nation, and are the sign and proof of the living virtue in it"**

[3] What must also be considered is the *triad* consisting of the crime, the offender and the interest of society (see *S vs Zinn 1969 (2) S.A. 537 (A)* at *540 G).* The element of the *triad* contain an equilibrium and a tension. A court should, when determining sentence strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfied the requirements. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern. This conception as expounded by the courts is sound and is incompatible with anything less. Therefore, all the elements of the triad, although not identical are indissociable.

[4] The sentence must be commensurate with the gravity or otherwise of the crime, and is a necessary concomitant of punishment, (see *S vs Zinn (supra)* and *S vs Haas Broek 1969) (1) S.A. 356 (E)).*

[5] In the present case this court has heard in mitigation of sentence by the accused person that he is a first offender and that he is 40 years old. The accused has two minor children and has been in custody since he was arrested for this offence and the other offences he has been found not guilty and acquitted. He also stated that he is a sickly person with a poor eyesight and Tuberculosis. The court was urged to impose a lenient sentence in view of these factors in mitigation of sentence.

[6] I have considered all the factors in mitigation of sentence as outlined in paragraph [5] *supra* and it cannot be gainsaid that the offence accused has been convicted of is a very serious offence where a child of 8 years has been sexually abused in this way. This abuse has been perpetrated by a person who resides in close to her family. I have also considered what has been stated by *Miss Lukhele* for the Crown that the court ought to also look at the prevalence of such crimes perpetrated on young children by adults. In the circumstances of the present case it is my considered view that a sentence of 15 years imprisonment without the option of a five (5) would be appropriate in the circumstances of this case.

[7] In the result, the accused person is sentenced to a period of 15 years imprisonment without the option of a fine after finding that aggravating factors as envisaged under Section 185 *(bis)*

of the Criminal Procedure and Evidence Act of 1938 have been proved that (a) at the time of the commission of the crime, complainant was a female of seven (7) years and (b) at the time of the commission of the crime complainant was a virgin. The sentence is further backdated to the date in which the accused was incarcerated.

S.B. MAPHALALA

JUDGE