

IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NUMBER 229/06

In the matter between

BANDILE MPENDULO HLOPHE

VS

REX CORAM: MONAGENG J

FOR THE CROWN: MS. L. HLOPHE

MR. S. FAKUDZE

ACCUSED: PRESENT IN PERSON

**JUDGEMENT 11th
AUGUST 2008**

MONAGENG J.

[1] The accused person, Bandile Hlophe, who was unrepresented, pleaded guilty to the criminal offence of rape on the 13th June 2008, it being alleged that on the 10th August 2008, he had sexual intercourse with a 10 year old girl without her consent. The Crown confirmed that he was a first offender. After conviction, the accused informed the Court, while mitigating, that in fact when he committed the offence he was 16 years old.

[2] When this information came to light, I called his mother to confirm it and she did give a date of birth that

confirms that he was born on the 10th July 1989. I then, rather belatedly in the circumstances, issued an order for a social welfare pre-sentencing report. The report was duly prepared and filed by one Vierah Tsabile Hlatshwayo, a social welfare officer with the Social Welfare Department.

[3] When I went through the report, it emerged that there were allegations of the accused displaying signs of mental retardation while he was still at school. Based on this information, I issued an order requiring a psychiatric evaluation of the accused and the evaluation was done by Dr. Walter Mangezi, a qualified psychiatrist. Dr. Mangezi who works for the National Psychiatric Hospital, Swaziland Government in Manzini, was called to explain his findings and to present his report.

[4] The doctor's report starts off by giving a brief historical background of the accused person's birth. The accused is said to have taken a long time to cry after birth, which is an indication of brain damage. He also had delayed developmental milestones - he walked at age 2 years and started speaking at age 4 years. He dropped out of school in Grade 2 because he was a slow learner. He has problems with basic arithmetic and was unable to work out basic change on purchasing goods. The doctor further said that although the accused could narrate what happened on the day of the rape, he has no understanding of the meaning and consequences of sexual intercourse.

[5] More details emerged when the doctor gave evidence in Court. The doctor's evidence was that, looking at the history of the accused, he is mentally subnormal, which should be distinguished from mental disorder. The mental sub-

normality, he says, is due to events that occurred from birth and surrounding social circumstances. He said that the accused person's brain has developed slowly, which means that although he is currently 19 years old, mentally he could be 11 or 12 years old. The doctor could not attest to the accuracy of this, since Swaziland does not have the relevant instruments to establish the assessment beyond doubt. He concluded however, that the accused was a child in an adult's body.

[6] The doctor further said that the accused person's condition does not require medication, since it is not a mental disorder, but that he needs parental guidance into proper adulthood. This means his parents treating him like a child and providing proper guidance leading to adulthood. He also observed that regarding the rape charge, the accused is not a habitual offender, who should be given medication to reduce his sexual drive.

[7] He advised against the Court sending the accused to a formal correctional facility, where drug use is rife and where sodomy is the order of the day, saying that this could prove disastrous for the accused, given his mental state. The issue of the Matsapha facility for convicts with diminished responsibility was raised as an alternative, but the doctor wondered what would be achieved by sending the accused to this facility and advised against it.

[8] Another observation was that, the accused has no understanding of the meaning and consequences of sexual intercourse. He was also of the view that the best predictor of the future is past behavior, and that since the accused person has not displayed any such negative behavior, with proper supervision, he was not a risk. One other observation the

doctor made was that, at the time of commission of this offence, the accused person could have been a child of 8 years of age mentally.

[9] The Crown Counsels, Mr. Fakudze and Ms. Hlophe were given an opportunity to cross examine the doctor and this was done extensively. This proved to be quite helpful to all of us in appreciating and understanding the accused person's situation and I thank both lawyers for this.

[10] Looking at the accused person's circumstances in totality from a medical viewpoint, the conclusion I reach is that, when the accused committed the offence, he was probably only 8 years old due to his mental sub-normality. At this point in time, I am convinced that he is no more than 12 years old mentally. He does not appreciate what sexual intercourse means, its consequences and implications. I am of the view that he is a case that should not be committed to the Matsapha facility for people with diminished responsibility. I am left with only one alternative, and this is that his parents should come to his rescue.

[11] I am going through this consideration with the full appreciation that he has committed aggravated rape as envisaged by Section 185 (bis) of the Criminal Procedure and Evidence Act 67 of 1938 in the following manner:

1. The complainant was of a very tender age - 10 years.
2. The accused was in an authoritative position and he abused these powers, although without a trial, I am not sure if we can authoritatively say this.
3. The accused exposed the complainant to sexually transmitted infections such as HIV/AIDS or STIs as it appears

that the did not use a condom.

[12] The penalty for this type of rape is a minimum sentence of 9 years imprisonment in terms of Section 185 (bis) (1). I note that this section does not differentiate between adult and child offenders in terms of the sentence the Court should pass on conviction. I also note that the accused pleaded guilty to this charge. I have given a lot of thought to his personal circumstances and particularly to the fact that he has already pleaded guilty. In my view, his plea of guilty under his personal circumstances as we now know them, and for all intents and purposes, cannot be taken as a plea at all.

[13] This is a person who is said not to be able to understand what he is pleading to. He does not know that he committed an offence, let alone the consequences thereof, he was not represented by a guardian at all stages. I do not blame the Crown that agreed to the facts with him since they did not know the true facts as they know them today.

[14] I have advised myself that this is a case that needs my intervention. I am aware that all these inquiries should have been made earlier, were the true facts known to me and the Crown. This failure also brings to focus the role of the prisons and police departments in criminal matters. These are the authorities that should know the age of the detainee and alert the Courts and Prosecution timeously so that proper procedures are followed by the Court. In this particular case, I am not saying that these authorities should have known what we now know through the doctor, but that when the accused was first incarcerated, he was about 16 years old and this fact should have been made known by these authorities to the Magistrate because he was a minor. The accused has been in goal since 10th August 2005 and this does not reflect positively

on the system.

[15] The doctor advised that in the accused person's situation, social intervention is necessary. He said that the family should restructure in need to ensure that there is always somebody supervising the accused person. Further that there is also need for social welfare supervision and a firm commitment from the accused person's parents to supervise and guide him, and also for them to cooperate with the social welfare department.

[16] Unfortunately the social welfare officer Vierah Hlatjwayo was not in Court to be part of this enquiry. She is therefore not privy to the facts of this peculiar and very important case. I was also verbally informed that the social welfare department could not provide an alternative officer to sit with us. However, be that as it may, given the peculiarity and totality of the circumstances of this case, I have decided to exercise my inherent powers as the upper guardian of the accused person, and to take a decision which is in his best interests. His parents were in Court and I interviewed them and I am satisfied that they can be trusted to guide him, with the assistance of the social welfare officer.

[17] I believe that it is important for him to be kept out of gaol. He has been in gaol for 3 years and I am of the view that this is punishment enough. I am taking the decision with a lot of sensitivity to the feelings of the parents of the rape survivor and the survivor herself whose feelings were made known to the Court through the report of the social welfare officer, and by the parents in Court. The parents are neighbours with the accused person's parents, and know each other.

[18] The social welfare report indicates that the incident has brought tension between them, which is not surprising, but after this enquiry, which they both attended, it appears to me that tempers have cooled a bit.

[19] Under the circumstances, I make the following order:

1. The 3 years that the accused Bandile Mpendulo Hlophe has been in gaol shall be taken as his sentence.
2. The accused be and is hereby released from gaol with immediate effect.
3. The accused be placed in the custody of his parents Beauty Muhle Hlophe (Mother) and Simon Malamu Hlophe (Father).
4. The parents provide him with the necessary guidance and control required of parents, into adulthood, with the assistance of the Social Welfare Department.
5. The parents and Bandile Hlophe cooperate fully with the Social Welfare Department.
6. A report on his progress be made to this Court on 11th February 2009 by the Social Welfare Officer and the parents.
7. A copy of this Court Order be served on the Social Welfare Department, the Accused and both sets of parents.

**SM MONAGENG
JUDGE**