IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL APPEAL NO. 27/08

In the matter between:

GEORGE M. MOTSA **Appellant**

And

REX **Respondent**

Date of hearing: 3 March, 2009 Date of judgment: 29 April, 2009

Appellant in person
Ms. Attorney N. Lukhele for the Respondent

J U D G M E N T

MASUKU J.

[1] In a bifurcated trial held at the Magistrates' Court in Manzini, one George Motsa, hereafter called "the Appellant" was, on 18 April, 2008, convicted of four counts of rape and was sentenced in relation thereto to four 7 year terms of imprisonment in respect of each count. These sentences were, however, ordered to run concurrently. It is the propriety of the certitude of guilt returned by the said Court and the sentence

imposed upon the Appellant that are the subject matter of this appeal.

[2] In his notice of appeal dated 27 June, 2008, the Appellant, in the main alleges that the conviction was predicated on the evidence of untruthful witnesses who exhibited signs of having been schooled. He contends further that the doctor, who examined the complainant, stated that he did not find anything untoward with the complainant. He attacks the sentence on the ground that it was not backdated notwithstanding that he spent a considerable period in custody pending trial. Are any of the Appellant's contentions meritorious so as to lead this Court to find it proper to interfere with either the conviction or the sentence or both?

[3] In order to answer that question, it is proper to first consider the charges faced by the Appellant and the nature of the evidence marshaled against him by the prosecution. The charge sheet alleged in the first three counts that during the year 2006 (without mentioning the days and months) and at Ekukhanyeni, Bhekinkhosi and Sigcineni areas

respectively, the Appellant, on diverse occasions had unlawful carnal connection with D S, a female juvenile aged 9 years without her consent. On the last count, the Crown alleged that the Appellant had unlawful carnal knowledge of the above-named complainant on 15 October, 2007 at or near Nhlambeni area without her consent.

[4] In the last count, the complainant was alleged to have been 10 years of age. Interestingly, no allegations were made regarding any aggravating circumstances which would otherwise merit on conviction, the invocation of the provisions of section 185 *bis* of the Criminal Procedure and Evidence Act, 67 of 1938, hereinafter referred to as "the Act".

[5] I should mention that the district(s) in which these offences were alleged to have been committed was not disclosed in the charge sheet. This is not just an idle and useless practice. It must be recalled that the jurisdiction of Magistrates in part is dependant upon the offence alleged being committed within their jurisdictional area. This is contained in the provisions

of section 71 of the Magistrates' Court Act, 66 of 1938. It must, therefore be clear from the charge sheet that the Court before which an accused person is arraigned does have the jurisdiction to try the said accused person.

[6] In the particular circumstances of this case, I do not find that the Appellant was in any way prejudiced or embarrassed by the non-disclosure of the district in which the offences allegedly occurred. In every other respect, save what I say later in the judgment, the accused was aware of the charges he had to face and it cannot be said that there was any failure of justice resultant from the omission I have mentioned. It is, in any event, common cause and I can take judicial notice of the notorious fact that all the four areas in which the said offences allegedly took place are within the jurisdictional area of the Manzini Magistrates Court. This is not to be construed in any way to be a licence to the prosecution to approach the drafting of charge sheets or indictments in a lackadaisical manner.

[7] Having dealt with the matters relating to the charge sheet, I now turn to the evidence led. The Crown relied on the evidence of five witnesses in support of its case. It having been determined that the Appellant had a case to answer, he adduced sworn testimony but did not call any witness to testify on his behalf. The first Crown witness was the complainant, to whom I shall henceforth refer as "D". In a nutshell, her evidence was that she lived with her mother one Nomsa Dlamini in diverse areas which are mentioned in the charge sheet.

[8] It was her evidence that in all the places where she lived with her mother aforesaid, the Appellant, her mother's live-in-lover and to whom she referred as 'father' lived with them, including her young brother called Bhuti. She testified that in 2006, at Ekukhanyeni, whilst her mother was absent, the Appellant called her into a house and told her to come and have food. Upon getting to him, he did not live to his promise but instead closed the door, removed D's clothes, removed his own clothes, laid her on the carpet and laid himself on top of her and inserted his *virilia* into her organs of generation and

proceeded to have sexual intercourse with her. Having presumably satiated his lust, he dressed her and released her to go.

[9] When Nomsa returned from work, D reported to her that the Appellant had had sexual intercourse with her. Nomsa confronted the Appellant with these allegations and the Appellant denied any complicity. The following day, D further testified, the Appellant repeated this. D also testified about what happened when they left Ekukhanyeni to live at kaBhekinkhosi, still during the same year as in the first count. There, during her mother's absence, the Appellant told her to go and dish some food in the kitchen. She proceeded to the kitchen followed by some children whom the Appellant chased away. He then called D under the pretext that he wanted to give her an egg but again ravished her in similar fashion as in the previous occasion. When her mother returned, D reported to her the ordeal she was caused to endure by the Appellant, which the Appellant again denied upon being confronted by Nomsa.

[10] Similar incidents happened after the 'family' moved to Sigcineni. Taking advantage of Nomsa's absence, the Appellant sent a boy called Ganda to get hold of D, which he did. Ganda took D into a house and went away, leaving the Appellant alone with D. On that occasion, the Appellant again ravished her in the sanctity of the house. Upon Nomsa's arrival, D told her, as had now become her custom, what the Appellant had done to her and as his custom was also, the Appellant denied the accusations leveled at him.

[11] Apparently exasperated at the allegations, Nomsa finally took stern action. She forced the Appellant to undress so that she could examine his *virilia.* She also asked another lady to inspect D's organs of generation. This lady reported to Nomsa in D's presence that D had been raped. D left the said lady, her mother and the Appellant. The 'family' thereafter relocated to Nhlambeni and not long thereafter, to Bethany, where they lived at the home of an elderly lady called Gogo Mtsetfwa.

[12] At that homestead, the Appellant again sexually molested D but she did not report that incident to Nomsa. A few days later whilst Nomsa was away in town, the Appellant called D into the house and upon her arrival, he again had sexual intercourse with her as he had done before. This time, however, there was, to the Appellant's surprise and possibly chagrin, an unwelcome spectator to the whole action. This was Bhuti, D's younger brother. As the Appellant was vigorously going through the motions, Bhuti peered through the window and saw scenes of live action unfolding before his very-young eyes. Bhuti posed what appears to be a rhetorical question as to what the twosome were doing. D told him that the Appellant had called her into the house, removed her clothes and caused her to lie down as he lay on top of her. The Appellant then stopped and dressed up.

[13] When Nomsa arrived, Bhuti told him of the spectacle he beheld and D also reported this to her. This was now the last straw that broke the camel's back. Nomsa went to report the ordeal to one Gogo Khumalo, Gogo Mdluli and the community police. The

matter was eventually reported to the police, who later arrested the Appellant on the charges of which he was eventually convicted. During the trial, D was subjected to grueling cross-examination by the Appellant, who in questions put to her, largely denied ever having had carnal connection with D, alleging that he first got to know of the allegations against him at the police station. In fairness to D, she was totally unruffled by the searching cross-examination to which she was subjected. She was as constant as the northern star.

[14] PW2 was Nomsa. Nomsa's evidence in large measure corroborated that adduced by D. In particular, she confirmed that D reported allegations of sexual abuse by the Appellant on several occasions to her and when she confronted the Appellant about these allegations, the Appellant admitted having had sexual contact with D, apologised and asked for forgiveness. Nomsa thereupon pleaded with the Appellant not to do this again as he would have to spend a long time in jail. The Appellant however continued unabated. Nomsa also confirmed the occasion when after the Appellant denied having carnally

known D, she forced him to produce his penis. It was her evidence that the condition of the Appellant's penis suggested that he had recently had sexual intercourse, consistent with D's allegations. It was then that the Appellant pointed to the devil as the one who led him to do this dastardly act. She again forgave him.

[15] It was her evidence that she requested a Mrs. Dlamini to inspect D's organs of generation as she inspected the Appellant's. Thereafter, she asked Mrs. Dlamini to speak to both of them i.e. herself and the Appellant about the issue, whereupon the Appellant apologized profusely. She also testified about the last occasion when the matter was eventually reported to the police. In cross-examination, she was also an impressive witness. Asked by the Appellant why she did not report the first three incidents of alleged rape, Nomsa said this was because she loved the Appellant and did not want to get him into trouble, considering also that he was apologetic in most instances.

[16] The Appellant denied ever having ravished D and alleged that Nomsa was fabricating evidence against

him, a suggestion that Nomsa dismissed with contempt. In particular, she dismissed as laughable the suggestion that she contrived the evidence out of jealousy as he has found a new lover. Nomsa told the Court that the Appellant was a naturally shy person who could not propose to a woman such that one of the Appellant's relatives made entreaties on his behalf for her to fall in love with him as he could not on account of his shy deportment approach her himself. The Appellant's relative was afraid the Appellant would die without a wife.

[17] PW3 was Alfred Hlophe, who is from Sigcineni. It was his evidence that after a church service, Nomsa reported something about the Appellant abusing D. He called the Appellant and in Nomsa's presence and the Appellant admitted that he had had sexual intercourse with D. He blamed it on temptation and expressed his remorse. A few days later, Nomsa made a similar report and again the Appellant upon being confronted by Hlophe, admitted and said he was sorry and the two went away. They eventually left the area. In cross-examination the Appellant

denied the allegations and Hlophe maintained his evidence that the Appellant had admitted the allegations and stated that he was sorry for his indiscretions.

PW4 was B S, D's brother. He was duly admonished in terms of section 219 of the Act and he adduced his evidence. In particular, he confirmed D's evidence regarding the incident in Nhlambeni where he saw the appellant lying on top of D and that he reported this incident to Nomsa. The Appellant, in cross-examination denied this incident, suggesting that PW4 had been schooled. PW4 maintained his story, denying that he had been schooled, stating emphatically that he had testified about what he had seen. It was his evidence that he went looking for D as he was bereft of a playmate in D's conspicuous but unexplained absence.

PW5 was 4636 Detective Constable Fakudze, a duly attested member of the Royal Swaziland Police Service. He adduced formal evidence regarding the report made regarding the matter and the investigative work he undertook, including taking D to a doctor and arresting the

Appellant. He was cross-examined and it was put to him by the Appellant that he never committed the offence in question.

As earlier indicated, the Appellant adduced sworn evidence which was mainly targeted at how he was arrested. Nothing of any substance was stated regarding the details contained in the evidence of the witnesses and which implicated the Appellant in the commission of the offences in question. He was thereafter subjected to scorching cross-examination by the Crown and it was put to him that he had committed the offence and that none of the witnesses could conceivably fabricate the evidence against him.

[21] In his judgment, the learned Magistrate found that the prosecution had proved its case beyond reasonable doubt. He was of the firm view that the Crown's witnesses were truthful and had not presented fabricated evidence. It must be stated that the trial Magistrate was at a vantage point as he had both the time and opportunity to observe the witnesses' demeanour in the witness box. For that reason, I

> would be loath to readily upset his assessment of the witnesses and reading the record, I have no reasons to differ with him on that score. I can also not find fault with his assessment of the child witnesses, being D and Bhuti as witnesses of truth despite their tender age. It is clear that the learned Magistrate approached their evidence with the necessary caution and it is a fact that on most of the issues, their evidence dovetailed and was corroborated.

It is therefore clear that from the Court *a quo*'s assessment that the Appellant's first ground of appeal should fail. The evidence of the witnesses was certainly not contrived. Furthermore, that evidence was corroborative in crucial respects. There is no evidence or suggestion that the witnesses, or any of them were schooled, including those that can be regarded as ordinarily impressionable and suggestible. There was strong and admissible evidence which the Appellant could not explain away to the effect that he had admitted having committed the offences in question. In point of fact, it is clear that Nomsa did all that was unreasonable and clearly prejudicial to D in order to try and keep her shy lover from trouble and this was to the detriment of her own daughter.

She is corroborated in her evidence regarding the Appellant's admissions.

[23] In argument, the Appellant tried to argue that the record was incorrect in certain instances as it did not record questions' put by him to the witnesses. It is clear that he was given a copy of the record in good time and he did not, at the appropriate time challenge the correctness of the record. In the circumstances, we are liable to confine ourselves to the record as we find it. I cannot find any reason why the learned Magistrate would have had the desire or motive to deliberately falsify the record by excluding things that the Appellant would have put to the witnesses.

[24] The Appellant also made the point that the first three charges did not bear any dates and that for that reason, he should not have been convicted thereon. Is there any merit in this assertion? Section 122 of the Act stipulates that the charge sheet or indictment should set forth the charge against the accused in a manner and with sufficient particulars as to the alleged time and place of committing the offence.

These must be included to reasonably give sufficient information to the accused of the alleged nature of the offence.

[25] In the instant case, it is worth noting that the first three counts are deficient in the sense that they allege that in the year 2006, the accused committed the crime of rape on D. No date or month when these incidents were allegedly perpetrated is given. Does this not offend against an accused's right to a fair trial, particularly the provisions of section 122 referred to above?

[26] In her written submissions, though admitting the deficiencies noted above, the learned Crown Counsel stated that notwithstanding the deficiencies, the Appellant still knew the case he had to meet. It was her further contention that the deficiencies did not go to the root of the matter so as to lead the Court to quash the convictions thereon. She referred the Court to *R v Bernnet* 1970-76 S.L.R. 127 at 129, where the Court stated that notwithstanding that the charge sheet made erroneous reference to a non custodial sentence, it still made it clear

what case he had to meet. The Court accordingly amended the charge sheet.

[27] In the *Bernnet* case, the facts were quite different from those at play in the instant matter. The charge sheet was not deficient in the manner under scrutiny and in any event, the Court held, and correctly so in my view, that the proper course was to amend the charge sheet accordingly. In the instant case, the Court cannot amend the charge sheet as the particulars which are presently not disclosed did not even emerge from the evidence, so as to provide this Court with the wherewithal, on application, to invoke the provisions of section 154 of the Act and to amend the charge sheet as the Court did in the *Bernnet* case. I have also had occasion to consider the judgment referred to the Court by Ms. Lukhele in S *v Theunsus Transport & Others* 1981 (2) S. A. 469 (E.C.D.) but I found it unhelpful to the Court in unraveling the present quandary.

[28] I am of the considered opinion that having regard to the nature of the charges preferred, particularly the provisions of section 122 aforesaid, it was important for the Crown to inform the Appellant at the least, the

months during which it is alleged he committed the acts in question. This would, in my view be accepted, notwithstanding that the exact dates on which it is contended he committed the acts could not be disclosed. In the present case, there are defences e.g. an alibi, which may be open to the Appellant and which may be lost to him on the present charges, considering that the 365 days of a year is a long time. If at least the charge sheet indicated the months during which it was alleged he committed the offences that could enable an accused person to know and be able to prepare his defence accordingly.

[29] Section 122 (3) of the Act provides that if any of the particulars referred to above i.e. including the date and month are unknown to the prosecution, it shall be sufficient to state so in the indictment or summons. In the instant case, there is no indication that the aforesaid particulars were unknown to the prosecution and there was certainly no mention in the charge sheet that that was indeed the case. The Crown cannot hide behind this section in the present circumstances. It is my view that section 122 (1) of

> the Act is designed not only to make the accused person aware of the nature of the offence he faces but it also serves the important purpose of ensuring that with the essentials it requires, the accused is able to adequately prepare his defence.

[30] I am of the view that the prosecution, together with the police, did not do their homework properly in the present case. Granted that the dates when the offences were allegedly committed could not be readily established from the complainant, there was nothing, in my view, to stop the prosecution from ascertaining as closely as possible the months from Nomsa. There is a great likelihood that she could have provided sufficient information relating to the months to the prosecution which could have enabled the Appellant to receive particulars that could have fairly afforded him an opportunity to marshal his defence during the trial.

[31] I am of the view that the fact that the Appellant did not raise the issue of the deficiencies of the charge sheet during the trial should not be overstated, considering that he was unrepresented during the trial and appears not to

be *au fait* with Court proceedings and stated as much during argument of the appeal. In the premises, I am of the considered view that the charge sheet, as it relates to the first three counts, was lacking in essentials that could have assisted the accused in his defence and these deficiencies I find, were material to the fairness of the trial. I accordingly uphold the Appellant's contention regarding this aspect. I shall henceforth not have regard to these charges and the evidence led in connection therewith, save to the extent that I may deem it necessary or expedient.

[32] The Appellant has further argued that the doctor said there was nothing wrong with D. I understand this to suggest that the medical report did not support the allegation that D had been sexually molested. Nothing could be further from the truth. The Appellant admitted the medical report even when it was explained to him by the trial Court that he had the right to have the doctor examined. The doctor's opinion, which must be accepted, was to the effect that there was a bruise in D's organs of generation and that there was a small tear in the vestibule, thereby evidencing that the vestibule had been

tampered with although the hymen had managed to remain intact.

[33] There cannot, on the matrix of the evidence, be any question or dispute, as the learned Magistrate found, as to the identity of the perpetrator. This is because the Appellant lived with and was known to D. Furthermore, as earlier indicated, the Appellant admitted having had sexual contact with D on more than one occasion and vehemently tried, according to Nomsa, to wiggle his way out by trying to persuade her to drop the charges after he had been arrested. The only decisive question is whether penetration was fully achieved, regard being had to the entirety of the evidence led.

[34] It is in evidence that during the last encounter, D was taken to a doctor for examination. This is clear from D's evidence and that of Nomsa and the police man, Fakudze. This was on 17 October, 2007. It is abundantly clear that the medical report issued by the doctor who examined D, related not to any other occasion but the incident which occurred on that very day. It is now settled law that for penetration to be adjudged to have occurred at law, it is

not necessary for the hymen to have been ruptured, but it is sufficient if the *virilia* of the accused person has even to the slightest degree entered the female organ. In this regard, the hymen need not be ruptured. See Joubert, Law of South Africa, Vol.6, Butterworths, 1996 at p 257, para 271.

[35] It will be clear therefore that on the admitted report of the doctor, penetration in respect of the last count was at law achieved. I say so because although the hymen was not ruptured, there was evidence of a tear on the vestibule and that the vulva was tampered with. That being the case, and had I come to the conclusion that the first three charges should stand, then I am of the view that the learned Magistrate would, in the circumstances, not have been correct or justified in finding and holding that in relation to the three previous occasions, the offence of rape was proved. This would, in my view be so notwithstanding that the Appellant, as previously stated, admitted having carnally known D. The medical report would to my mind throw a grave doubt as to whether penetrative sexual intercourse can properly be held to have occurred on those three occasions.

[36] On the issue of consent to sexual intercourse, it is clear on the evidence that D was regarded, on account of her age as incapable of consenting to sexual intercourse at law. In support of that proposition, I cite the Botswana Court of Appeal case of *Christopher Ketlaetswe v The State* CLCLB-000066-06, where Zietsman J.A., writing for the majority of the Court, said the following, after an extensive compendium of authorities on Roman-Dutch law, which like in Botswana, is also the law of Swaziland:

> "Finally, there is an arbitrary age limit below which a girl is irrebuttably presumed to be incapable of consenting to sexual intercourse. This limit is the completion of the girl's twelfth year. Intercourse with a girl below the age of . twelve is therefore rape, even if she has consented".

[37] It is therefore clear, regard being had to the analysis of the evidence above that in respect of the fourth count, all the essential ingredients for the offence of rape were established by the prosecution beyond reasonable doubt. In particular, the identity of the accused was proved indubitably, so was the fact of sexual intercourse and lastly, the absence of consent. It is my considered opinion

therefore that the Appellant was correctly convicted of the said offence and his arguments to the contrary cannot stand.

[38] Before I can conclude the matter, there is one other matter that I need to address. This relates to the doctor's report being submitted to Court in its handwritten form. This is not proper. The prosecution should ensure that a typed version of the same is handed to the Doctor concerned for his signature. In the instant case for instance, the Court has been put to the vexation, which I certainly do not appreciate, of trying to decipher exactly what it is that the doctor recorded as some portions of his writing are intelligible to us. This should not be repeated.

[39] I should mention that the Appellant's assertion that the sentence was not backdated flies in the face of the record. I say so for the reason that at page 35 of the record, it is clear that the learned Magistrate correctly antedated the sentence, taking into account of course the period the Appellant had already spent in custody at the time he was convicted. In this regard, the sentence was antedated to 18 October, 2007, the date, according to the evidence, on which

the Appellant was arrested by the police on the present charges. The Appellant is, however, correct that in fact, the sentence was not backdated in line with the Magistrate's order because the warrant of committal incorrectly and inexplicably reflected that the sentence was reckoned to run from 18 April, 2008. This has to be corrected.

[40] In conclusion, I should mention that lightning appears to have struck unfortunate D twice. In the first place, it would appear that her mother Nomsa, sacrificed D's mental, physical and emotional well-being at the altar or shrine of pleasing her lover, the Appellant and trying to maintain his love at whatever cost. This is unpardonable. Secondly, whereas it is clear that this offence is one which necessarily required the invocation of section 185 *bis* of the Act for the reason (i) that the Appellant, though being *in loco parentis* in relation to D totally abused the trust that D and her mother, to some extent, reposed in him and (ii) considering D's tender age, the Appellant should in this regard, have been charged under the aforesaid section for the minimum statutory penalty to be

imposed on him. Regrettably, the Crown for reasons that are not apparent, has chosen not to do so, a serious indictment indeed, which may justifiably cause D to perceive rightly that an injustice was perpetrated on her by both her mother and the prosecuting authority.

[41] In order to curb the unreasonable behaviour of persons in Nomsa's position, I am of the considered view that it is high time that the prosecution considers charging parents, particularly the mothers, as accomplices after the fact. This would hopefully serve to drive home the enormity of their actions and how seriously they are likely to devastate and traumatize their young children for the rest of their lives.

[42] Because of the reason that the Appellant was not charged in terms of the provisions of section 185 bis of the Act, the Courts have held that it would constitute an unfair practice for this Court, notwithstanding section 5 of the High Court Act, 1954, to then enhance the sentence when the accused would not, at any stage have been made

aware in the charge sheet of the seriousness of the offence preferred against him and in particular, the hefty sentence that is likely to accompany a conviction thereon.

[43] For the foregoing reasons, I am of the opinion, given the circumstances of this matter, including the omission on the part of the prosecution that I have alluded to earlier, the following is the appropriate order to issue in the circumstances:

(l)The conviction of the Appellant on counts 1,2 and 3 be and is hereby quashed and the sentences imposed thereon be and are hereby set aside.

(2) The conviction of the Appellant for the offence of rape on Count 4 be and is hereby confirmed.

(3)The sentence of 7 years' imprisonment imposed on the Appellant in relation to Count 4 be and is hereby confirmed and is hereby ordered to run with effect from 18 October, 2007.

[44] Lastly, the Appellant be and is hereby advised that should he be minded to appeal to the Supreme Court

against either the upholding of the conviction and/or the sentence imposed by the trial Court, he is, in terms of Rule 52 as read with Rule 49 of the Rules of this Court, required to file with the Registrar of this Court within fourteen (14) days from the date of this judgment, an application to this Court for a certificate of leave to appeal to the Supreme Court with full grounds therefore.

DELIVERED IN OPEN COURT ON THIS THE 29™ DAY OF APRIL, 2009.

T.S MASUKU
JUDGE

S.M MONAGENG
JUDGE

Appellant in Person

Directorate of Public Prosecutions for the Respondent