IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CRIM. TRIAL NO. 213 OF 2007**

In the matter between:

REX

VERSUS

MFANZILE MPHICILE MNDZEBELE

Dates heard: 11, 15, 16, 19, 29 June, 14 July, 04, 08, 10, 12 August, 2009.

Date of verdict: 26 August, 2009.

Date of sentence: 26 October, 2009.

Date of judgment on sentence: 25 November, 2009.

Ms. Attorney N. Lukhele for the Crown Accused in Person

Mr. Attorney B.J. Simelane ***AmicusCuriae***

J U D G M E N T

MASUKU J.

[1] In the accused persons' dock stands one Mfanuzile Mphicile Mndzebele, a Swazi young juvenile. I shall henceforth refer to him as "the accused". He is indicted on a single count of rape, it being alleged by the Crown that on 9 December, 2006 and at Malindza area, in the Lubombo District, he did intentionally have unlawful sexual intercourse with one F P M, and then aged 7 years, who was then incapable in law of consenting to the act of sexual intercourse.

[2] The Crown further alleged that the said offence was accompanied by the following aggravating circumstances, in line with the provisions of section 185 *bis* of the Criminal Procedure and Evidence Act, 67 of 1938, hereinafter referred to as "the Act", namely: that the complainant was a minor at the time of the offence alleged; that she had reposed her trust in the accused person and that the accused person betrayed her: trust aforesaid; that the accused took advantage of the existing relationship and authority between him and the complainant; the complainant was raped on more than one occasion, thus she was subjected to sexual abuse and trauma; and that the complainant was, at the time she was ravished, a virgin.

[3] I must mention that from a reading of the aggravating circumstances as fully stated above, it would appear to me that the allegation that the complainant had reposed her trust in the accused and that the latter thereafter abused that trust, need not be considered, as the Crown has sought to do, as two totally independent factors that should cumulatively weigh as a millstone on the accused's neck, so to speak. In my view, the two issues should be read conjunctively in order to show that the accused stood, as it is alleged, in a fiduciary relationship to the complainant but abused that relationship for his own ends.

[4] The accused person, who indicated that he would conduct his own defence, on account of his impecunious state, pleaded not guilty to the indictment, thus joining issue with the Crown. In support of its case, the Crown led the evidence of four (4) witnesses, whose essential evidence is chronicled below. I should, before narrating the evidence led, identify the matters that appear to be common cause from the evidence adduced, particularly by the Crown.

Common Cause Facts

[5] It is common cause and is not seriously contested, or at all, that F is a young girl born on 30 August, 1999. The

accused, on the other hand, was a young man who was in the employ of F's parents as a herd's boy. Whether this arrangement of child employment was legal is certainly doubtful and may properly be a subject of other proceedings. All that I need to state is that it would appear that at the material time, the accused was a child and should not, in terms of our Constitution, notwithstanding his apparently desperate economic situation, have been subjected to child labour, as that is specifically proscribed by section 29 (1) of the Constitution of Swaziland, 2005. This is certainly an issue on which civic education is acutely necessary.

[6] It is also common cause that the accused lived at the complainant's parental homestead and specifically slept in a hut referred to as the grandmother's hut. He slept there with other boys. F, on the other hand, slept with other girls, in another rondavel. It appears common cause that on the date mentioned in the indictment, F's parents were away from their matrimonial home, having had to attend a cleansing ceremony of F's maternal grandmother, who had passed on earlier. The said ceremony was held in Phonjwana area, in the Manzini District. The parents returned home during the night of 9 December, 2009 and it would appear that this was, on the uncontested evidence, between 21h00 and 22h00.

[7] It is also common cause that upon her arrival from the cleansing ceremony aforesaid, F's mother suspected that something untoward had happened to her and this eventually led to F, her parents, sister and the accused going to the Mpaka police post, where a report of an offence of rape was laid against the accused. F was taken to a doctor for examination but the accused was allowed by the police to return to his ordinary place of abode at F's parental home as investigations into the allegations ensued. The accused was finally arrested by the police on 12 December, 2006 and was formally charged with the offence of rape.

Chronicle of Evidence

[8] PW1 was the complainant F P M, to whom I shall, for ease of reference refer to as "F". On account of her age, after satisfying myself that she could not understand the import of a religious oath, I admonished her to tell the truth. I had, before that stage, satisfied myself that she fully understood the difference between the truth and lies and gave an admonition that I was further satisfied, was calculated and did in fact serve to bind her conscience.

[9] It was her evidence that the accused person had had sexual intercourse with her on two separate occasions. On

the first, she testified, the accused, on a date she could not recall, invited her to accompany him to a forest where they were to go and collect firewood. F was pushing a wheel barrow. When they reached the forest where they were supposed to collect the firewood, the accused told her to undress and he also undressed. The accused proceeded to sleep on top of her. In the course of sleeping on top of her, the accused "jumped" and later told her to dress up. It was her evidence that when the accused jumped, she experienced pain in her organs of generation. He also told her to collect small pieces of firewood and he proceeded through the fence and went to herd the family's cattle.

[10] The second occasion occurred at the family home. It was F's evidence that on that day, the accused requested her to go with him to herd the cattle. On their return from that mission, after eating their food, they proceeded to her grandmother's hut which was situated within the main homestead. F and the accused went into the hut, which it appears common cause, was used by the male members of the family, including the accused to sleep in. The accused then locked the door to the hut such that when F's sister T came with Mthobisi, they failed to gain access to the hut. The accused thereafter switched off the lights. T asked the accused to open the door but he did not oblige. Her

protestations to the effect that it was dark outside and that they were afraid did nothing to persuade the accused to relent. He just did not open the door.

[11] The accused thereafter told F to undress, which she did. The accused suggested that they should go to the bed with F and she obliged and the accused followed suit. At his direction, F went onto the bed and he told her to touch his penis which she did. He reciprocated by touching her vagina. He thereafter instructed her to lie facing downwards and he got on top of her and he proceeded to insert his *virilia* into her organs of generation and he slept on top of her for a long time. He gain jumped whilst on top of her, held her buttocks and pulled them towards him.

[12] It was at that very point of the action that a vehicle approached, prompting the accused to stop his forays, instructing F to dress up. She went outside the hut and was asked by her mother where she was coming from and she told the latter. The answer prompted F's mother to ask if girls were allowed to sleep in the hut from whence she came. F's mother then picked up a stick and chastised her with it. She called T and asked her to interrogate F as to what had happened to her.

[13] It was F's evidence that she did not want the accused to insert his penis into her vagina and that when he did do so, it was painful. It was also her evidence that she trusted the accused and did not expect him to do what he did to her. In cross-examination, the accused denied complicity in the offence alleged. His cross-examination was detailed and thorough. He denied that he had gone with her to collect the firewood. He also denied having had sexual intercourse with her as alleged on the second occasion.

[14] Asked as to why she did not report the first incident to anyone, F testified that the accused told her not to disclose what had happened to her to anyone, a suggestion he flatly denied. F however stuck to her story like a postage stamp to an envelope. In response to a question why she did not cry when she felt the pain as the accused inserted his penis into her vagina, F stated that the accused had told her not to cry and that as a result, she did not cry for long. Asked why she had not told this in her evidence in chief, F told the Court that she had forgotten that aspect. The accused also denied her evidence that he habitually put F and Siko on his lap. Finally, when the accused denied having ravished F, as a parting shot, she insisted that he did and that in the forest, he had had sexual intercourse with her under a *mntulwa* (fig) tree.

[15] When T was with F, the latter disclosed that the accused slept on top of her and she also told T that this was not the first occasion for such an incident to occur between them. They went to report the matter at the police station.

[16] PW2 was T T M, (T). She was PWl's elder sister. In her evidence, she testified that on the day in question, PW1 and the accused went to herd cattle and the former refused to come to them when they beckoned her to. She even told them that she was going to sleep with the accused. Later that evening, the accused and PW1 went together into the hut and they closed the door behind them. When T knocked on the door, the two would not open, having switched off the lights. T decided to go to sleep.

[17] Later that night, PW2's mother asked her why PW1 had slept in the boys' room and PW2 narrated to her mother that PW1 had refused to come to sleep with them as usual. At her mother's behest, PW2 spoke to PW1 and the latter told her that the accused had had sexual intercourse with her, a piece of information that she later imparted to her mother. There was nothing of consequence raised in cross-examination by the accused.

[18] PW3 was T L M, the mother to both PW1 and PW2. She testified that on her return from the cleansing ceremony, between 21h00 and 22h00, she saw PW1, emerging from behind her and told her that she had been sleeping in the accused's room, something that angered PW3 tremendously. Eventually, after PW2, had spoken to PW1, it was her evidence that she took PW2 for a physical examination of her organs of generation. She discovered that there traces of semen on PWl's vagina. She called her husband to come and also see but he preferred not to.

[19] She then called the accused and asked her what it is that he had done and at first, he denied any complicity in the offence. When she advised the accused that she had examined PWl's private parts, the accused then apologized, saying that he had succumbed to temptation. They then proceeded to the police station where the incident was formally reported.

[20] In cross-examination, the accused denied having admitted that he had sexual intercourse with PW1. PW3 maintained her evidence in this regard. It was her evidence that when the accused admitted and apologized, it was just the two of them with no one else in attendance. He put to her that she had beaten PW1 in order to force her to lie against

him, an allegation that PW3 denied, reasoning that even if she had beaten PW1, she would still have found the semen. PW3 also testified that she forgave the accused after he apologized and she even tried to have the charges withdrawn but the police stated that the offence was serious and had to be pursued.

[21] The next witness was the investigating officer, Constable Douglas Mdluli, a duly attested member of the Police service. e testified how the case was reported to him by PWl's parents on the night of 9 December, 2006, at around 22h00. He, in the course of investigations, went to the alleged scene and PW1 showed her where the offence was allegedly committed. He later got to know who the suspect was and he introduced himself to the accused, cautioned him in terms of the Judges' Rules. He then proceeded to detain him after formally warning him of the charge.

[22] In cross-examination, the accused in essence denied that he was ever cautioned in terms of the Judges' Rules, a suggestion that the officer denied, insisting that upon cautioning the accused, the latter chose to say something which he recorded in writing, using form RSP 218. In re-examination, the officer showed to the Court the said RSP 218 form he had completed and which was signed by him

and the accused person. The accused, was in the circumstances afforded an opportunity to put questions to the officer relating to the said RSP 218 form but he did not ask any.

[23] The Officer was then recalled and he gave evidence regarding the efforts he made to find the doctor who had examined PW1. It was his evidence that he went to Good Shepherd Hospital in Siteki to locate Dr. D. Mukuvisi but discovered that he had left Swaziland in 2007 and that his whereabouts were not known. The Grown, in the circumstances, applied for the admission of the medical report in terms of the proviso to section 221 (1) of the Criminal Procedure and
Evidence Act, 67 of 1938. The accused objected to the admission of the said report, insisting that he wanted to put some question to the doctor concerned. I granted the application by the Crown and indicated that my reasons therefore would be disclosed in the judgment. Those reasons now follow.

[24] Section 221 (1) reads as follows:

"In any criminal proceedings in which any facts are ascertained -

(a) by a medical practitioner in respect of any injury to, 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

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 <u>but such court shall not so require if -</u>

(i) <u>The whereabouts of the person are unknown; or</u>

(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." (Emphasis added).

The prosecution applied that the proviso to the above section, particularly (i) thereof should apply in the instant case, an application that commended itself to me in the circumstances of the case.

[25] The said section, it would appear to me, is designed primarily to obviate the need to have a medical practitioner attend Court in order to testify about the report made, the observations made, conclusions and opinions therein stated.

This, it would appear is the position if two requirements are met, firstly, that the said report must be signed by the said practitioner and secondly, that it must be dated by the same practitioner. That being the case, the Court will admit the report as *prima facie* evidence of its contents.

[26] This, does not, however, close the door on the face of the Court, the prosecution or the accused, if justice so demands, that the said practitioner be called to come and testify regarding the said report. The situations where the said doctor can be called are many and varied and it would not be wise to draw a *numerous clauses* of the circumstances where it would be so necessary. It may be that there are issues that need to be clarified; inconsistencies in the report or even deficiencies about some aspects which the Court finds necessarily needed to be remarked upon but the doctor did not.

[27] It would appear to me that even where there may be a need on the part of any of the three aforementioned parties, to have the practitioner called, if the said practitioner's whereabouts are unknown, the Court may not call the said practitioner and it may rely on the said report, as *prima facie* proof of the contents thereof. This is to be found in the proviso to the said section under (i). In that eventuality, it

would appear to me that the question of the justice of the case does not feature, as opposed to (ii) of the proviso. I may mention though that in the present case, I came to the conclusion that there was nothing in the circumstances, that could have served to prejudice the accused in his defence even if the practitioner was not called, on account of his whereabouts being unknown.

[28] It would therefore seem to me that because the report in issue was signed and dated by the said practitioner, and there is nothing to gainsay that, nor were those two facts disputed, the Court could rely on the contents thereof being the *prima facie* evidence of the matters therein stated. Furthermore, as indicated above, it was established in evidence that the said doctor had left this country permanently, with his whereabouts being unknown. These factors placed the matter squarely within the rubric of the proviso to the said section.

Analysis of the Crown's Evidence

[29] I must mention that on the whole, the evidence of the Crown was largely reliable, consistent and therefore credible. This was so notwithstanding that PW1, in particular, was a young child, whose evidence, according to good practice,

should be accepted with a measure of caution. Her evidence, in certain respects, found corroboration in that of PW2 and PW3 and to some extent, in the medical report. For the most part, PWl's evidence struck me as being unrehearsed and she gave a graphic detail of what occurred to her on both the occasions she testified about. Furthermore, she stood up well to cross-examination and was for the most part unruffled as a bishop presiding over a tea party.

[30] One particular instance when her evidence impressed me was when the accused denied that he had had sexual contact with her in the forest. In response, PW1 told testified that the accused he had sexual intercourse with her under a fig tree. Her demeanor, in spite of her age, was also impressive. The one blot on her evidence, however, was when she testified that in the hut, the accused caused her to lie on her stomach and that as he went through the motions of copulation, he at some stage pulled her buttocks towards him, an impossible feat in the circumstances.

[31] The accused, in his submissions, harped on this point and asked the Court to find that PW1 was not a credible witness. In my view, although she may have been mistaken in her evidence on this score, it is patent that her evidence, particularly regarding the sexual intercourse, was

corroborated by the medical report. It should also not be forgotten that she was only of the tender age of 7 at the time she testified and regard being had to her inexperience in matters of sexual intercourse, which is common cause and of course the fact that she testified some three years after the incident, would constitute understandable reasons for her to have mixed up some of the evidence, without the intention of lying to or misleading the Court.

[32] There were also some minor inconsistencies in the evidence of the witnesses, which do not, however, serve to detract from the truthfulness of their accounts, viewed objectively. One such instance relates to the number of huts in the homestead and certain pieces of evidence that PW3 testified about as having been told to her by PW2, who surprisingly did not mention same. The latter, would obviously fall to be disregarded as hearsay evidence. Regarding the inconsistencies, however, two factors must necessarily be considered in my. view.

[33] First, the lapse between the time when the incident occurred and the time when they testified. *Ceteris paribus,* human memory does not improve with time. To the contrary, it deteriorates and witnesses cannot be correctly accused of not recalling all the minute details of events they testify

about years after their occurrence. Otherwise, they would be punished for their memory failing them, which is not an offence. See State *v Gogannekgosi* [1989] B.L.R. 133 (HC) at 140 B-C, where Gyeke-Dako J. said:

> "For an inconsistency to be material, such inconsistency must in my view, be of a material nature, capable of turning the result of the case one way or the other. For there could hardly be any witness of truth if the prince-pies were otherwise, since in nine cases out of ten, witnesses are called upon to give evidence upon matters about which they might have witnessed or given statements months or even years before.
> In such cases, the possibility of minor slips, which may be in conflict with their previous statements, cannot be ruled out. But that should not necessarily make them untruthful".

[34] Closer home, Tebbutt J.A. made similar observations in *Kennneth Gamedze and Others v The King* Crim. App. No. 1 of 2005, where the learned Judge of Appeal said the following at page 11 of the cyclostyled judgment:

> "It is well known to our Courts that there are frequently some inconsistencies in the evidence of two or more witnesses. Witnesses hear and see events from different perspectives. Then too, their evidence is usually given months or even years later after the events when their memory of them has faded to some extent, particularly in regard to the minor details of them."

[35] Second, there would sometimes be a reason to suspect collusion if the evidence of witnesses were to dovetail in every respect, including minor evidential details. In this regard, Dr. Twum J.A. stated the following in the Botswana Court of Appeal case of

[36] I now turn to consider the accused's evidence. The accused's version was nothing but a complete bald denial of the Crown's evidence. His evidence was that on 12 December, 2006, PW4 came to PW3's homestead where the accused lived and told him to board a vehicle and took him to Mpaka police station. He was carrying a baton. There, he gave the accused a pen and paper and dictated to him what he should write. PW4 threatened to assault him with the baton if he did not do as he was told. It was the accused's version that he was not granted an opportunity to ask any questions and he did as he was told. After that, the accused was taken to Siteki where he was detained until his release on bail in 2007.

[37] He further testified that on 11 December, 2006, PW3 accused him of having had sexual intercourse with her daughter and which was unlawful. She tried to force him to admit complicity but he stood his ground and maintained that he did not know what she was talking about. The

accused was cross-examined at length and he denied the evidence led by the Crown witnesses and which incriminated him.

[38] The accused, in my assessment was unimpressive as a witness, although he adduced his evidence impressively, particularly for a young man of his age and relative inexperience in Court matters. In particular, there are issues that he raised for the first time and which had not been put to the Crown's witnesses though they were material. For instance, he alleged that PW4 was carrying a baton, threatened to bash him with it if he did not do as told and dictated to him what to write in the statement. None of these allegations were put to PW4 in cross-examination, important as they were to the accused's case. His version in this regard, is therefore liable to be declared an afterthought. See *Rex v Dominic Mngomezulu and Others.* Furthermore, the accused's denial that he made any statement, which was put to PW4, and proved palpably false when the statement was eventually shown to the Court, nailed the accused's colours to the mast.

[39] He also testified that he knew of the rape allegations for the first time on .12 December, 2006. In cross-examination however, he was painted himself into a corner and was

forced to admit that he was taken to the police on 9 December, when the matter was first reported to the police in his presence. In my assessment, the accused's determined attempts to distance himself from the offence were not the success he would have hoped for. The evidence led by the Crown, as stated, was compelling and corroborative in material respects. The fact of PW1 having been in the accused's hut was seen by PW2 and detected by PW3.

[40] It was after the report was made that PW1 was taken to the doctor for a medical examination, which appears to corroborate PWl's story as testified in evidence. Furthermore, even if PW1 may have manufactured the oral evidence in order to implicate the accused, which I find not to be the case, regard being had to the general quality of her evidence, considered *in tandem* with that of the other witnesses, she could not, with her best efforts in three lifetimes, manage to manufacture the evidence upon which the doctor opined that sexual intercourse had occurred. The doctor, it must be mentioned, was an independent professional in this matter and who cannot be accused of having been partisan, regard had to the relationship of the rest of the witnesses, PW4 excepted.

[41] There is no suggestion as to why the Crown's witnesses would have set out to wrongly implicate the accused person. No suggestion or mention of any grudge or reasonable motive was made to the Crown's witnesses, which may have actuated them, particularly PW1, to implicate the accused. The evidence of all the witnesses was that the relationship between them and the accused was cordial and with PW1, good. This the accused himself confirmed. The only suggestion that he was ill-treated by the family or some unnamed members thereof, but which had no bearing on the concoction of the evidence, emerged from the accused for the first time in cross-examination and little regard may be placed thereon as it was never put or suggested to PW1, 2 or 3.

[42] In the premises, I find that the evidence of the Crown is credible, corroborative and therefore reliable. The evidence of the accused, on the other hand was nothing but a bald denial, as earlier indicated and which was peppered with lies with hope that dust could possibly thrown into the Court's eyes to good effect as far as the accused was concerned. I accordingly have no hesitation in finding that the version testified to by the accused on oath is, in view of my assessment of the entire evidence, as stated earlier in the

judgment, beyond doubt false and there is no reasonable possibility of its being true. I accordingly reject it.

[43] In cases of rape, the Crown should satisfy the Court of the following constituent ingredients, beyond reasonable doubt:

(a) the identity of the perpetrator;

(b) the fact of sexual intercourse; and

(c) the absence of consent. See *Valdemar Dengoe v Rex*

In the instant case, the first element is not in dispute for the reason that the accused lived with PW1 and her family in the same homestead and was very well known to the complainant and her family members. There could not, in the circumstances, be any question or possibility of mistaken identity. I accordingly find that the question of the identity of . the perpetrator, has been proved indubitably by the Crown.

[44] I would next wish to deal with the issue of absence of consent. It is common cause in the instant case that the complainant was only 7 years of age at the time of the commission of the offence in question. This was not disputed or put in issue and from my own observation of the child, her appearance at the time she testified would accord with the evidence that she was of the age alleged in the indictment.

The Roman-Dutch common law position on this issue was laid down with absolute clarity by Zietsman J.A. in the Botswana case of *Christopher Ketlwaeletswe v The State* CLCLB-000066-06.

[45] In his judgment, the learned Judge of Appeal made reference to a number of authorities on the Roman-Dutch law in this regard. I will just cite two of these. In *R v Z* 1959 (1) S.A. 739 (A) at 742 DE, (translation):

> "According to our practice a girl under the age of twelve years cannot give consent to sexual intercourse. Even if she consents, sexual intercourse with her according to our law is rape."

On the other hand, in the case of *Socout Ally v R* 1907 T.S. 336, Innes C.J. said:

> "It seems clear that in regard to charges of rape upon children, the common practice in South African courts, both here and in the Cape, has been to adopt the rule laid down by *Carpzovius* (C.68,xx) that a child under the age of twelve is conclusively presumed not to be able to consent to the commission of the crime of rape upon her."

In the premises, I come to the conclusion that in the instant case, the Crown has succeeded in proving absence of

consent beyond reasonable doubt. It is clear therefore on account of the evidence of PWl's age that she is in law regarded as incapable of consenting to sexual intercourse and this aspect of the elements of the offence has, as I have said, been indubitably proved.

[46] The last, element is that of the fact of sexual intercourse. The medical report in my view, shows that for legal purposes, there was penetration of the complainant's organs of generation by the accused person, which suffices for purposes of finding that the crime of rape has been proved. This is so notwithstanding that the complainant's hymen, according to the medical report, remained intact.

[47] According to the learned author P.M.A. Hunt, South African Criminal Law and Procedure, 2nd Ed, Juta, 1982, at page 440, "there must be penetration, but it suffices if the male organ is in the slightest degree within the female's body. It is not necessary that the hymen should be ruptured, and in any case, it is unnecessary that semen should be emitted. Bu if there is no penetration there is no rape, even though semen is emitted and pregnancy results." The medical report indicates that PW2's labia minora and her fourchette were bruised and this is consistent with a case of rape.

[48] I should, however state that I have not placed any reliance on the evidence of PW3 at two levels. In the first, her evidence regarding what she saw on examining the complainant cannot be allowed to stand because she is not a medical expert. Secondly, I felt totally comfortable in relying on her evidence regarding the accused's admission that he had had sexual intercourse with her daughter. This mainly stemmed from the fact that she was in authority over the accused as his employer and the reality of his admission cannot be guaranteed in the circumstances.

Re-opening of the case

[49] I should add that at the tail end of the proceedings, and after the evidence had been closed, it occurred to me that there was no evidence regarding the Accused's age. From the indications, there was a looming possibility that he was below the age of 14 and therefore regarded as *doli incapax,* a factor that may well have inured to his benefit at law and of which he would not be expected to know, given that he is unlettered in law. It was at this stage that I determined in the interests of justice and so as to ensure that the Accused's rights are fully protected as he is young and is

unrepresented, I ordered an *amicus curiae* to be appointed to deal with an enquiry into his age.

[50] This necessarily required the case to be re-opened and Mr. Simelane's services were procured for that purpose. In the case of *Rex v Elizabeth Matimba and another* Crim. Case No. 184/98, I had occasion to deal with the principles that serve as a guide to a Court in deciding whether or not to re-open a case that had been closed. I relied, in part on the judgment of Nathan C.J. in the case of *R v Cassamo (1)* 1979-82 SLR 328 at D-F. There, the learned Chief Justice reasoned as follows:

> the Court of Appeal Act 74 of 1954, and the High Court has similar powers in regard to matters emanating from the magistrate's court, under s 5 (b) and (c) of the High Court Act, 20 of 1954. It has also power to do so in civil actions. See *Guggenheim v Rosenhaum (2)* 1961 (4) S.A. 21 (W). . . It appears to me that the High Court should in the interests of justice assume similar powers by virtue of its inherent jurisdiction in a criminal trial before it in which judgment has not been delivered although the cases for both the prosecution and the defence have both been closed. Such power however, should only be exercised subject to safeguards and requirements. These have been laid down in relation to the Court of Appeal in several cases. See S *v de Jager* 1965 (2) S.A. 612 (A) at 613 CD, where they are stated as follows:-

(d) There should be some reasonably sufficient reason based on allegations which may be true, why the evidence which it sought to lead was not led at the trial;

(e) There should be a *prima facie* likelihood of the truth of the evidence;

(f) The evidence should be materially relevant to the outcome of the trial." See also Hoffman and Zeffert, The South African Law of Evidence. 4th Ed, 1988, at p.475.

[51] I should state that the instant case falls in an unusual category from the cases referred to above. I say so for the reason that the decision to have the case re-opened was not at the instance of any of the parties but at the behest of the Court. The Court, as indicated before, realized that there was a possible defence available to the accused at law and which he, on account of a number of factors, including his youth, his short encounter with the classroom, his being unrepresented and the fact that he is unlettered in law, he was not able t appreciate.

[52] In the case of *R v Hepworth* 1928 A.D. 265, Curlewis J.A. had this to say about the role of a judge in criminal matters:

"A criminal trial is not a game . . . and a judge's position in a criminal trial is not merely that of an umpire to see to it that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, and he has

> not only to direct and control the proceedings according to recognized rules of procedure but to see that justice is done."

It was in appreciation of this added responsibility that I considered that the interests of justice required that the case be re-opened. If the Court were to close its eyes and say to itself that it was the responsibility of the accused to press the matter of his age, it is clear that on account of the factors 35 militating against him, mentioned in the paragraph above, he may well have been convicted when there was a chance that he could escape the conviction on account of his defence, which is rather obscure to an ordinary person, who is particularly young and unlettered in law. This would have left a bitter after-taste in my mouth and with which I would not be able to reconcile my judicial conscience with.

[53] In the premises, I am of the view that in cases like the present, where the Court necessarily intervenes in order to ensure that the interests of justice are correctly served, it may not be necessary to satisfy all the above elements. The overriding one, it would appear to me is whither the interests of justice lie in a particular case. If they lie in favour of the case being re-opened then the Court should not hesitate to do so, even if the other requirements may not actually be met. Each case, it would seem to me, must be dealt with in

the light of its own facts and circumstances, for to approach the matter from the position of sterile formalism may result in the interests of justice being dealt a shattering blow.

[54] The case having been re-opened, Dr. Austin Ezeogu, of the Mbabane Government Hospital was called to give evidence regarding the accused's estimated age. It was his evidence that he used bone estimation to estimate the accused's age i.e. an x-ray of the long bones, looking in the premises, at the maturity and bone unification. He testified that the procedure is not 100% accurate but has +_ 18 months margin of error. It was his evidence; finally that the accused's lowest age would, in the instant case be 17 years 6 months and that his highest age would be 19 years.

[54] In the circumstances, it seems to me that the Court should adopt the age that is most favourable to the accused person. Counsel on both sides eventually reached common ground that the accused was above the age of 14 years at the time when the offence was allegedly committed. It therefore became clear that he was *doli capax* at the time. Any possible defence heralded by his age was in the circumstances excluded. The result is that the conclusion reached earlier about the accused's guilt is not affected.

[55] I therefore come to the conclusion that the Crown has in the circumstances proved the crime of rape beyond reasonable doubt. I am accordingly satisfied that this is a proper case in which certitude of guilt ought to be returned as I hereby do. The accused Mfanzile Mphicile Mndezebele be and is hereby found guilty of the crime of rape.

S E N T E N C E

[56] On 26 October, 2009, I imposed a sentence on the accused person in open Court, having read, considered and listened to written and oral submissions filed by both sets of Counsel. I indicated therein that reasons for the sentence imposed would be delivered in due course. Following below are those reasons.

[57] The enquiry at this stage is to decide what a condign sentence in the circumstances is. I should start by stating that Ms. Lukhele, after a mature consideration of the evidence in its entirety, came to the correct conclusion that regard had to the accused's age and position vis-a-vis the complainant, the aggravating circumstances alleged in terms of section 185 *bis* are insupportable and therefore fall away. It could not, for instance be alleged that a young boy of the Accused's age could be described as having been *in loco*

parentis and abused his position of trust and would have known about and expected to procure and use a condom.

[58] For that reason, the Court will not impose the otherwise mandatory minimum sentence on the accused, it being clear . that the weight of the evidence does not support the invocation of section 185 *bis.* There is also a lingering question on the constitutionality of imposing the said mandatory sentence on children and juveniles as the accused person herein is. In view of the abandonment of the aggravating circumstances referred to above, I do not find it necessary to consider the constitutional question raised by the provisions of section 185 *bis* aforesaid.

[59] It is clear from the record that the accused is a first offender and who has hitherto had no recorded brush with the law. It is also not in contention that he was just above the age of 14 at the time he committed this offence. Furthermore, it also clear, as I have held that the accused did not use any force in perpetrating this offence and the finding that I made during the judgment on conviction that he was in an adventure as to what his young body was capable of doing is to be taken into account.

[60] I should, at the same time, take into account that the accused knew that his excursions with the complainant were wrong and must realize that the law does not, in spite of his age, countenance such behavior on his part and which has the potential to wound the victims emotionally in the long run. A message must also be sent out that young girls in the complainant's position must be protected from sexual activity, particularly where they are below the age of 12 and that any such activity is unlawful and is generally punishable at law.

[61] Having said so, I do have in mind the fact that this is a serious offence committed on a child very much junior to the Accused in age. At the same time, I will not act in oblivion of the fact that the Accused was himself a child, just above the age of 14 when he committed this offence. It is also to be borne in mind as I have said that at his age, he would have been adventurous, discovering what his young body is capable of doing.

[62] In the case of *Mabuza And Others v S* (174/01) [2007] ZACA 110, the Supreme Court of Appeal of South Africa, per Cachalia J.A. had something to say about the sentencing of young people. I intend to apply these principles in the present case; The learned Judge of Appeal said at para 22:

"Youthfulness almost always affects the moral culpability of juvenile accused. This is because young people often do not possess the maturity of adults and are therefore not in a position to assess the consequences of their actions. They are also susceptible to peer pressure and to adult influence and are susceptible when proper parental guidance is lacking. There are, however, degrees of maturity, the younger the juvenile, the less mature he or she is likely to be. Judicial policy has thus appreciated that juvenile delinquency does not inevitably lead to adult criminality and is often a phase of adult development. The degree of maturity must always be carefully investigated in assessing a juvenile's moral culpability for the purpose of sentencing." See also my judgment n the Botswana case of *Goabaone Goitse v The State* CLHFT-000040-06 (yet unreported).

It will be clear from the evidence that there are certain factors that placed the accused in a vulnerable position. As indicated, he was a young boy, who dropped out of school in Grade 6 on account of poverty. At that tender age, he was employed to herd cattle at a distant place, away from his kith and kin. Parental guidance was in the circumstances, clearly lacking. He was clearly immature and his degree of culpability is therefore markedly less.

[63] In the case of offenders such as the Accused, the proper approach was stated by Ponnan J.A. in S *v B* 2006 (1) SACR 311 as follows at paras 18 and 19:

> "The principle that detention is a matter of last resort and for the shortest appropriate period of time is the *leit motif* of juvenile justice reform.
>
> Those principles are articulated in international law and enshrined in the Constitution. . . The overriding message of the international instruments as well as the Constitution is that child offenders should not be deprived of their liberty except as a measure of last resort, and where incarceration must occur the sentence must be individualized with emphasis on preparing the child offender from the moment of entering into the detention facility for his or her return to society." See also S *v Brandt* (513/2005) [2004] ZA SCA. (emphasizes added).

[64] In *Centre for Child Law v Minister of Justice and Constitutional Affairs {infra)* at paragraphs 31 and 32, the Constitutional Court of South Africa made the following trenchant remarks:

> "Detention must be a last, not a first or even immediate resort; and when a child is detained, detention must be 'only for the shortest appropriate period' bearing not only on whether prison is a proper sentencing option, but also on the nature of the incarceration imposed. If there, is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole option. But if incarceration is unavoidable, its form and duration must also be tampered, so as to ensure detention for the shortest possible period of time.
>
> In short, section 28 (1) (g) requires an individuated judicial response to sentencing, one that focuses on the particular child who is being sentenced, rather than an approach encumbered by the rigid starting point that minimum sentencing entails. The injunction that the child may be detained only for the shortest 'appropriate' period of time relates to the child and to the offence he or she has committed. It does not import a supervening legislatively imposed determination of what would be 'appropriate' under the minimum sentencing system."

[65] Although not unmindful that some of the comments were made in appreciation of the legislative position in the Republic of South Africa and that some of the comments were made in relation to prescribed mandatory minima sentences, it is my considered opinion that the above considerations should, in my view, apply in this country as well. This is more so because not only have children's rights been enshrined in the Constitution, but the country has also ratified the Convention on the Rights of the Child. The ethos

of the two documents, should, in my view influence the sentencing process and regime in this country, where children and juvenile offenders . are at the stage of being sentenced.

[66] In this regard, Article 40 of the above convention is instructive. It provides that child offenders should be "treated in a manner that is consistent with the promotion of the child's sense of dignity and self-worth, which reinforces the child's respect for human rights and fundamental freedoms of others and takes into account the child's age and the desirability of promoting the child's integration and the child's assuming a constructive role in society".

[67] In the recent case of *Centre for Child Law v Minister for Justice and Constitutional Development and Two Others* CCT 98/08 [2009] ZACC 18, the Constitutional Court of the Republic of South Africa said the following at para [26]-[28]:

> "The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults.

> These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders. Not only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. And most vitally, they are generally more capable of rehabilitation than adults.
>
> These are the premises on which the Constitution requires the Courts and Parliament to differentiate child offenders from adults. We distinguish them because we recognize that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognize that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility."

I am of the considered view that these are considerations that are fully applicable in our jurisdiction and I accordingly adopt them in the instant case.

[68] It is worth mentioning that our own Constitution makes special provisions relating to the rights of the child. Section 29 (2) and (7) (d), in my view, as read with section 18 (2), show that children are in a special category and must for that reason, be treated with a measure of care. Section 29 (2) prohibits the subjection of children to abuse, torture or other inhuman and degrading treatment or punishment. Subsection (7) of the same section calls upon Parliament to

enact laws to ensure that children receive special protection against exposure to physical and moral hazards within and outside the family. These hazards, particularly outside the family, may, in my view, be heralded by imposing custodial sentences in respect of children and juveniles who stand convicted of certain offences.

[69] It is clear therefore, regard had to the foregoing that the Courts must, in sentencing children and juveniles, ensure that the Constitutional ethos are encompassed. It has been held for instance, that a sentence may be regarded as cruel, inhuman or degrading if it is so unfit having regard to the offence and the offender as to be grossly disproportionate. In deciding whether the sentence is disproportionate, involves the exercise of a moral judgment. See *Petrus v The State* [1984] B.L.R. 14 (C.A.) at 41 D-E (per Aguda J.A.). In *Moatshe v The State* [2004] 1 B.L.R. 1, (C.A.), the word "inhuman" was described by the Court of Appeal of Botswana as meaning 'destitute of natural kindness or pity, brutal, unfeeling, cruel, savage, barbarous'.

[70] It is clear therefore that in imposing a sentence on the accused person in the instant case, particularly taking into account that he is a juvenile and who was a child at the time he committed the offence in question, I must avoid meting

out a sentence that is "inhuman" as described above. I must, as directed by the aforestated cases, give greater weight to the element of rehabilitation and also ensure that if imprisonment is called for; it is a measure of last resort and is ordered to last for the shortest possible time.

[71] There is an issue regarding the constitutionality of the provisions of Section 313 (1) of the Act which prohibits the imposition of a suspended sentence in relation to offences listed in the Third schedule namely, murder, rape, robbery and any conspiracy, incitement or attempt to commit any of the above. In view of the sentence that I imposed, which does not include a suspended sentence, I do not find it necessary to decisively deal with this question.

[72] Counsel on both sides did, however, concede that the mandatory nature of the section in so far as it relates to juveniles and children is manifestly unconstitutional for the reason that it obliges the Court not to suspend any portion of any custodial sentence even if on a proper conspectus of the facts, that is imperatively called for. This, it would appear to me, is not in keeping with the solicitudes that I have expressed earlier in the judgment regarding the proper approach to the sentencing of juveniles.

[73] My attention was pertinently drawn by Mr. Simelane to the Court of Appeal case of *Justice Sipho Magagula and Others v Rex* Appeal Case No: 4/2000, where Van den Heever J.A. notwithstanding the provisions of Section 313 (1) above, found it fit, on account of the youthfulness of the Appellant, to impose a suspended sentence in a case of robbery. This goes to show how sensitive Courts ought to be in dealing with juveniles within the criminal justice system.

[74] Having regard to all the attendant circumstances of this case, it is my considered opinion that the following sentence will meet the justice of the case:

The accused, Mfanuzile Mphicile Mndzebele be and is hereby sentenced to fourteen (14) months' imprisonment, which shall take into account the pre-trial and post conviction incarceration, namely, between 12 December, 2006 and 19 December, 2007 and between 16 August and 26 October, 2009.

[75] There are, however, a few matters that I feel in duty bound to comment about and which arise from this case. First, it is high time that the Ministry of Justice and Constitutional Affairs sets up structures that shall deal exclusively with children and juveniles. The present scenario where children and juveniles are dealt with in the ordinary Courts as if they were adults is completely unacceptable. Special courtrooms and personnel steeped in the peculiarities of children and juveniles should be procured and the latter trained. That is the trend in many societies and we cannot afford to lag behind in that regard.

[76] The time is also nigh, in my view, for the Government to ensure that children and juveniles, who find themselves in the throes of the . justice system are provided with legal representation at the expense of the State. This is so because if conducting one's defence in a Court of law is a nightmare for adults, who may be educated, how much more difficult would that be for a young person who is still growing and developing? The accused person in the instant case was

well above average in the conduct of his defence but he may just have been an exception.

[77] The trauma and consequences of a child or juvenile being arrested and having to appear in Court unassisted by the knowledgeable and calming hand of Counsel on the tempestuous seas of the Court room may be ghastly indeed. It is in that connection that the recommendation above is particularly made. Furthermore, the presence of defence Counsel lightens the burden on the shoulders of the judicial officer to safe guard sedulously the interests of an unrepresented, timorous and young accused person.

[78] Another feature of this case, which cries out for mention and possible consideration relates to the need for diversion of matters involving children and to an extent, juveniles from the criminal justice system in the first instance. The ready resort to the invariably retributive criminal justice system in every case may not be appropriate or just in every case for the journey that the child is forced to undertake in that system, may leave him or her scarred for life. The complainant's

mother for instance, in this case, had sought for diversion but

the police refused. Restorative justice must be considered as a good end in some of these matters, where the interests of both the child perpetrator and the child victim are adequately catered for.

[79] Last but by no means least, it is fitting that I mention the need on the part of the prosecution to scrupulously and sedulously examine indictments relating to children and juveniles in order to ensure that the evidence proposed to be led is *in tandem* with the charge preferred. In the instant matter, for instance, the Crown had, at the eleventh hour, to withdraw its reliance on the provisions of section 185 *bis {supra)* after the evidence did not support the invocation of the same. A careful reading of the witness' statements in good time may have served to avoid this ugly spectacle. In this regard, more stands to be gained from disclosing the age of accused persons in all indictments or charge sheets, for age may be more than just a number, but the fulcrum upon which the entire case oscillates.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 25th DAY OF NOVEMBER, 2009.

T.S. MASUKU
JUDGE

Directorate of Public Prosecutions for the Crown

Messrs. B.J. Simelane & Associates appearing *Amicus Curiae*