IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. APPEAL NO. 12/09

In the matter between:

BHEKITHEMBA KUNENE

VS

APPELLANT

REX

RESPONDENT

CORAM MASUKU J MAMBA J

FOR APPELLANT IN PERSON
FOR RESPONDENT MS Q. ZWANE

JUDGEMENT

17th December, 2009

Mamba J,

[1] The Appellant, who at the time was represented by Counsel, appeared before a Principal Magistrate in Manzini on two counts. He made his first

appearance on the 28th May, 2004 but whilst he was granted bail on the 13th August, 2004 he was unable to meet the terms of his release and remained in custody as an awaiting trial prisoner until he was sentenced on 31st August 2007. He had been arrested on the 26th May, 2004. (The court a quo mistakenly thought it was a day earlier and ordered that his sentence should start to run with effect from the 25th May 2004).

[2] On the first count it was alleged that the Appellant was guilty of the crime of rape in that during the course of 2004 he had unlawfully and intentionally raped his daughter, N. K. It was alleged that the offence was committed at Mhlaleni area in Manzini. The second count alleged that the appellant was guilty of assault with intent to cause grievous bodily harm perpetrated upon the same victim on the first count. She was 8 years old at the time of the commission of these offences.

[3] The Appellant pleaded not guilty on both counts but was eventually found guilty on both. He was sentenced to undergo a term of imprisonment for 9 years on the first count whilst on the second count he was sentenced to "seven months imprisonment or E700.00 fine." We have no doubt that what the learned Magistrate intended to convey by this, in a rather unorthodox phrase was that the appellant is sentenced to pay a fine of E700.00 failing which to undergo a term of imprisonment for seven months. The court a quo clearly wanted to give the Appellant the option of a fine and that he must only serve a term of imprisonment if he failed to pay such fine. Both sentences were ordered to run concurrently with effect from the date of his arrest and incarceration that is to say, 26th May, 2004. He has appealed against his conviction and the sentence imposed on him on the first count.

[4] His main contention or ground of appeal is that the evidence by the crown; in particular that of the complainant, was such that it was not sufficient to merit or warrant his conviction. I examine this below, but before I do so, I observe that after the appeal on the first count had been argued before us on the 12th August, 2009, the court realised that whilst the Appellant had been convicted on both counts, he had not been sentenced on the second count. After an explanatory note by the presiding officer in the court a quo, this court issued an order directing the said officer to deal with and finalise the issue on the second count. This has since been done and thus the sentence I have referred to above on this count. When this court invited the Appellant, who appeared in person on appeal, to say something on the assault conviction, he had no quarrel with either the conviction or sentence thereon. In light of the evidence and the nature and gravity of the injuries he inflicted on the complainant, his decision not to contest this charge was a wise one, I think.

[5] As is often the case in such matters, the only eye-witness to the rape charge was the complainant herself. She told the court, and this was common cause, that at the relevant time she lived together with the Appellant, her step mother and step sister at their rented house at Mhlaleni. The said stepsister was younger than her. Her biological mother had been reported to her by the appellant to have died. However, her mother later resurfaced - laying bare the lie about her death that had been peddled by the Appellant to the complainant.

[6] It is common cause further that on the 25 May, 2004 the complainant was left alone at home to look after her step sister whilst the appellant and

his wife went to consult a religious healer for some sickness that had affected one of their children. When the appellant and his wife returned home in the evening, they found that the child that had been left in the care of the complainant was crying. She was crying because she was hungry. When the Appellant enquired from the complainant what had become of the child's food, the complainant informed him that it had been eaten by children from a neighbouring homestead. This turned out to be a lie. The complainant had herself eaten the food. The Appellant was enraged. He picked up a stick and severely assaulted her. She was badly assaulted that she bled from her private parts and her buttocks. He then ordered her to take a bath and wash the blood on her body. (I pause here with the narrative and note that, it would appear from the other evidence that the appellant actually ordered his wife to bathe the complainant. However, for purposes of this judgement, I do not find it necessary to come to any firm conclusion or decision as to which of these two versions is the correct one. The common thread in each is that he caused the complainant to have a bath and wash off the blood on her before she went to bed).

[7] In the morning on the next day, the complainant was locked out of the house and left at home alone. Her injuries from the previous night's beating were still fresh, bleeding and visible and these were observed by a neighbour - referred to in the evidence only as Thandeka's mother - who promptly called the police. The police came, took the complainant first to the police station and then to the Raleigh Fitkin Memorial Hospital (RFM) in Manzini.

[8] At the RFM, Nandipha Nkonyeni (PW1), who worked in the social welfare office, noticed or "realized that there was a discharge realisable from [the complainant's] thighs running down her leg." This caused her to suspect that the complainant had been sexually abused and referred her to a gynaecologist, Dr Ondo, within the hospital.

[9] The Doctor examined the complainant and compiled a report on his examination and this was filed as exhibit A in the court a quo. I shall revert to this medical report later in the judgement in analysing the evidence relating to the rape charge.

[10] Following PW1's suspicion that the complainant had been sexually abused and her referral to Dr Ondo, PW1 called the police and told them of her suspicion as well. She relayed her suspicion to PW2 Constable Dlamini who got to the RFM to interview the complainant. This was on the 28th May 2004. (See page 20 line 22). This date is significant because it is the date on which the police were told for the very first time by the complainant that she had been sexually molested. I shall return to this later in the judgement as it was an issue hotly debated in the court a gjjo, when the Appellant argued that he was initially not charged with the crime of rape.

[11] It was during the interview that PW2 had with the complainant at the RFM hospital that the complainant told her (PW2) that the appellant had raped her some days before assaulting her as stated above. This evidence was repeated by the complainant in her testimony in court. Whilst admitting that he had assaulted the complainant, the Appellant steadfastly denied ever raping her.

[12] The Appellant's reason for beating the complainant, it would seem from his evidence, was not so much for eating the food that was reserved for the sick child, (Phindile) but for initially telling a lie that the food had been eaten by the neighbour's children. He said he beat her on the buttocks with a small stick. He said the beating was modest as he stated in Siswati that *"Ngamkhwishashwisha"* - a very light beating with a very small stick or switch. According to his evidence he "beat her on the lower parts ... the area around the loins." The complainant indicated that the beating was concentrated around her genitalia (private parts), the buttocks and the hands.

[13] The doctor who examined the complainant on the 27th May, 2004, two days after the assault, observed that she was

> "...very sick physically with multiple sceptic wounds which means infected, bruises all over the body, but most especially on her trunk and her limbs. She also had sceptic wounds that were much bigger on her buttocks. She also had multiple bruises and cuts which had a lot of puss around her organs of generation and lot of puss discharge from her vagina. The hymen was absent. During the examination the patient was apprehensive and it was painful.. all over the body [and] when we came to the private parts it was very painful." (See page 72 line 6-15)

[14] Even accepting for the moment that the complainant had committed a punishable offence by eating the food reserved for Phindile, her younger step-sister and lying about this fact, the beating that was inflicted on her by the Appellant was brutal, barbaric, vicious, wicked , evil, inhuman, cruel and completely disproportionate to what she had done. This can not under any circumstances in my judgement, be referred to as moderate chastisement; either at common law, or as stipulated under article 29 (2) of

our Constitution. His conviction was therefore justified on this count. As stated above he was sentenced to pay a fine of E700.00 or face a term of imprisonmentfor 7 months. That too, was, in my judgement, in order and I find no reason whatsoever upon which this court as an appellate court could interfere with the trial court's discretion in this regard.

[15] An examination of the evidence on the rape charge reveals the following:

(a) The complainant could not remember the date or month on which she was raped by the Appellant.

(b) She claimed that she had reported to Thandeka's mother that the Appellant raped her. (see page 42 line 21- page 43 line 2 of record).

(c) The police in the form of PW2 were, apart from Thandeka's mother, the first people to be told by the complainant that the Appellant had raped her. This was on the 28th May, 2004.

(d) The complainant was reluctant to tell any one that the appellant had raped her. In her evidence in chief and under cross examination she alleged that Nellie Matsenjwa was present and witnessed her being raped and had not intervened as she busied herself with her child. But later when asked by the court, she retracted this testimony and said only two young children, Thoba and Phindile were present in the house when she was raped. She also retracted her evidence that she had informed Thandeka's mother about the rape. Part of her evidence under cross-examination was as follows:

D/C : [I put it to you] that at the first instance when Thandeka's mum approached the police she did not tell the police about you being made to lie facing up or the sexual abuse because no such report had ever been made to her [by you]. PW3 : That is true.

D/C : The rape charge...was laid against the accused person after you [had] spoken to this lady officer PW2 and the first person to report to the police had not mentioned about the sexual abuse? PW3 : That is true.
D/C : I further put it to you that the rape charge was suggested by the police to you when they were taking the statement from you? PW3:1 agree.

[16] The complainant maintained and was adamant in her testimony that she had been sexually molested by the appellant. Her three answers to the above three questions in the passage quoted above, do not adequately support her claim. It has to be remembered that the Appellant was arrested, charged and detained by the Police on the 26th May, 2004. He was charged with the crime of assaulting the complainant. There was no allegation of rape at that time as such an allegation was made for the first time to the police by the complainant on the 28th of that month to PW2 at the RFM Hospital. The Appellant was to some extent correct in testifying that he was initially arrested and charged with the crime of assault and not rape.

[17] According to the evidence of the Police Officer (PW2) who interviewed her at the RFM Hospital, on being asked about the sores or injuries on her body, the complainant told her that she had been assaulted by the appellant and the reason she could not walk properly, was because the appellant had beaten her on "her urinal object." The police officer testified further that

"I carried on with the interview and then at the end she told me the truth that she is not able to walk because her father did something to her. She said that her [father] normally works at night and usually returns from work and call her and then asks her to climb on the bed and lie facing up. She said that he would say that she must lift her knees and then her father would then take

out his penis and put it into her vagina. She continued and told me that that had happened for several occasions and it had happened for a long time." (at page 21-22).

(The emphasis is mine). The witness stated further that the complainant had reported her sexual ordeal to Nellie Matsenjwa who in turn kept promising to report it to the police but never did. The complainant did not tell this to the court a quo, save that she said Nellie did witness her being raped but did nothing about it. This was of course, later retracted by her. I have not read anything in her evidence that suggests that she was being repeatedly raped or that she was raped on several occasions. The complainant's evidence in court was that the appellant was no longer working when he sexually assaulted her and this is clearly contrary to her story given to PW2 that he was employed at the time, but working at night. Again, according to PW2, the complainant told her.

> "...that the last occasion he had had sex with her was before he assaulted her, so that before beating her he had had sex with her."

(Vide page24 line 18-19). In her evidence in court, the complainant could not remember when her last rape had been. It was, however, certainly not on the 25th May, 2004, i.e. the day of the assault with the stick. These inconsistencies between what the complainant told the court on the one hand and what she told the investigating officer on the other hand, are substantial and serious.

[18] It is also important to bear in mind in assessing the evidence of the complainant that she was only eight years old when she was being interviewed by PW2. PW2 had "some difficulty, [interviewing her] such that it was difficult for her to come to me" (page 27 line 1516). But she did answer the questions on the beating quite freely -she was un-inhibited. Why was she then difficult and not forthcoming with the information

pertaining to the sexual encounter? There is no evidence that she had been warned or threatened against telling anyone about her sexual molestation.

[19] The evidence of PW2 clearly shows in my judgement that the complainant was, without any explanation, not willing at all to speak about the alleged sexual abuse to anyone. It is perhaps regrettable that when PW2 interviewed the complainant, she (PW2) approached her and questioned her based on her belief that the child had been sexually assaulted and all that PW2 wanted to know from her was who her assailant was. That is why when she identified the Appellant as her assailant, that was, according to PW2, the truth that brought the interview to an end. It was a poisoned or biased or prejudiced approach that ought to have been avoided, especially when dealing with an eight-year-old child. This clearly demonstrates that PW2 did not approach this child with an open mind. Experience has taught us that she is, at that age, prone to suggestion and imagination. Her imagination and that which has been suggested to her, easily becomes a fact in her young mind.

> "...It has frequently been emphasised that [the evidence of young children] should be scrutinised with great care. The danger is not only that children are highly imaginative but also that their story may be the product of suggestion by others. In sexual cases, for example, a child who is prompted by leading questions when he or she first makes a complaint is quiet likely to believe that things which were suggested to him or her really happened." (DT ZEFFERT et al, **The South African Law of Evidence, 2003 at 806).**

[20] I have already referred to the doctor's report herein. After examining the puss discharged from her vagina, the Doctor (PW4) came to the conclusion that it contained or showed evidence of bacteria and fungus.

He said the type of bacteria found was not normal to children of the age of the complainant and may have been "as a result of sexual abuse or extremely poor hygiene." He concluded that because of the absence of the hymen on the complainant, that there was a tear on her fouchette, and general bruising in the organs of generation, that the complainant had been sexually interfered with. Finally, the doctor testified that some females may be born without a hymen at all. The bruises and lacerations on the complainant's genitalia, the doctor observed, were consistent with the wounds on the buttocks, legs and hands of the complainant having been caused by a stick. It was the complainant's evidence also, that her father hit her on the vagina with the stick in the course of the admitted assault.

[21] The trial court came to the conclusion that the bacteria referred to above was not caused by extreme poor hygiene but by sexual infection. It came to this conclusion primarily based on its finding that the complainant's family observed acceptable minimum standards of hygiene. That the appellant ordered the complainant to take a bath after beating her, was evidence of such a practice, it said. I am constrained not to agree.

[22] The reason why the appellant ordered the complainant to have a bath was because she was bleeding from the beating and her body was covered in blood and the Appellant wanted such blood to be cleaned. This cannot be put down to observance of good hygiene. The other significant aspect of this evidence is that the complainant was bleeding, as a result of the stick assault, from her private parts. (See page 37 lines 20-22). It was not the evidence of the complainant that she was already bleeding from

her private parts when the appellant assaulted her. Until cornered and or pressured by PW2, she said the cause of her bleeding was the assault with the stick by the appellant.

[23] The tenor of the medical report herein is such that it can not be held to be cogent corroboration of the evidence of the complainant that she was sexually interfered with. But, even before this court may be called upon to look for corroboration for the complainant's testimony, this court must be satisfied that her evidence is worthy of credit in all its essential aspects. She made two material allegations that she had reported her rape ordeal to two women and these women did nothing about it. She withdrew these allegations [upon further questioning later]. No reason was offered for either making these allegations in the first place or for withdrawing them.

[24] I entertain no doubt that the complainant was very bitter towards the Appellant, even if he was, to her knowledge, her only surviving parent. Her anger is understandable. She had been severely assaulted for what appears to have been a venial infraction and the next day she had been locked out of her house and left alone with no medical attention for her injuries.

[25] I have indicated above the many material unsatisfactory features of her evidence and I can not, in the circumstances, hold that the guilt of the appellant was established beyond a reasonable doubt. For these reasons, I would therefore uphold the appeal on this count.

[26] There is another reason or ground upon which I would allow this appeal. This concerns the manner or procedure that was adopted by the

court a quo immediately before the complainant gave her evidence on the merits of the case. This is what happened:

"PW3 N K (APPARENTLY AGED 8-10 YEARS)

Court to witness - sisi, How old are you?

Witness : I am nine (9) years (first lifted both her hands with respective fingers and only folding one and finally stated nine (9) years).

Court : Do you attend school?

Witness: Yes.

Court: What is the name of your school?

Witness : Creche (Kindergarten)

Court: Do you also go to church?

Witness: Yes.

Court: Sisi, do you like to go to church?

Witness: Yes.

Court: When you are at church, what do you normally do?

Witness : We listen to the verse.

Court: Do you remember some of the verses you have listened to at church, sisi?

Witness: I have forgotten it.

Court: Other than listening to the verse, what else do you do or is done at church?

Witness: Shies off and keeps quiet.

Court: Don't you sing at church?

Witness : We do sing.

Court: Do they teach you anything at church?

Witness: Yes.

Court: Can you remember one of the things you were taught at church?

Witness: (Says something where she cannot be clear but seems like citing a verse and only says "In the beginning ..." (then again says "Jesu unelusizi kubo bonkhe bantfwana labangati lutfo."

Court: Sisi, is it good to insult another person?

Witness: It is not good.

Court: Is it good to steal?

Witness: It is a bad think and your not supposed to do it.

Court: Is it good to greet a person?

Witness: Yes it is a good thing.

Court: Is it good to share with others what you have if they don't have it for instance, food?

Witness:It is a good thing.

Court: Is it a good thing to tell lies?

Witness: It is a bad thing.

Court: Do you yourself like to share what you have with others if they don't have it like food?

Witness: I like it.

Court: Do you like to steal?

Witness: No.

Court: Do you like to tell lies?

Witness: I don't like.

Court: Do you know where you are as you are seated there?

Witness: I do know I am at the police.

Court: Do you know a court?

Witness: Yes

Court: What is a court?

Witness: It is at the police.

Court: [Do] you want to tell us lies today?

Witness: [Shakes] head in disagreement and says I do not.

Court: Why don't you like to tell lies?

Witness: It is because Jesus will burn you.

Court: Having established that the witness can differentiate what is good and in particular that she states that it is not good to tell lies, the court then admonished the witness to tell he the court the truth, the whole truth and nothing else but the truth."

[27] From the aforegoing extract, one immediately notes that the complainant was not asked (a) if she could differentiate between the truth and a lie or (b) an oath, its meaning, nature and import.

[28] Section 217 of our Criminal Procedure and Evidence Act 67 of 1938 (as amended and hereinafter referred to as the Act) provides that:

> "217 (1) Any person other than a person described in section 218 or 219 shall not be examined as a witness except upon oath."

The other two sections referred to under ss1 provide as follows:

> "218 (1) If any person who is, or may be, required to take an oath objects to do so, he may make an affirmation in following words: "I do truly affirm and declare that" (here insert the matter to be affirmed or declared).
>
> (2) Such affirmation or declaration shall be of the same force and effect as if such person had taken such oath. ...
>
> 219 Any person produced for the purpose of giving evidence who, from ignorance arising from youth, defective education, or other cause, is found not to understand the nature, or to recognise the religious obligations, of an oath or affirmation, may be admitted to give evidence in any court or preparatory examination without being sworn or being upon oath or affirmation:
>
> Provided that before any such person proceeds to give evidence a presiding officer before whom he is called as a witness shall admonish him to speak the truth, the whole truth, and nothing but the truth, and shall further administer or cause to be administered to him any form of admonition which appears, either from his own statement or other source of information, to be calculated to impress his mind and bind his conscience, and which is not, as being of an inhuman, immoral or religious nature, obviously unfit to be administered; and
>
> Provided further that any such person who wilfully and falsely states anything which, if sworn, would have amounted to the crime of perjury or any offence declared by any statute to be equivalent to perjury, or punishable as perjury, shall be deemed to have committed such crime or offence...."

The provisions of Section 217(1) are peremptory. All persons produced for purposes of giving evidence shall not be examined as witnesses except upon oath, unless they are exempted or excluded from doing so in terms of Section 218 or 219 of the Act. See **SvNdlela 1984 (1) SA 223 (N)**

Jamludi Mkhwanazi v R (Criminal Appeal 4/97, judgement delivered on 1st October, 1998)

R v Mfanukhona Siyaya, Review case No. 45/09, judgement dated 30th October, 2009 (and the other cases cited therein).

[29] The persons excused or excluded from taking an oath under section 218(1) are those who object to do so. The objection may not be taken *mero motu* by the presiding officer **(Ndlela's** case supra). In lieu of the prescribed oath, they are required to make an affirmation or declaration in the prescribed form. The complainant was not told or asked anything about the oath, and she did not object to take the oath. Consequently she was not required to and did not make an affirmation or declaration. There is nothing in the record which indicates that the court a quo came to the conclusion that the witness did not know what an oath is or the religious obligation attached thereto. Her situation was therefore not covered by S218 of the Act.

[30] The persons covered by s219 are those "who, from ignorance arising from youth, defective education or other cause, [are] found not to understand the nature, or to recognise the religious obligations of an oath or affirmation." This category of persons shall be admonished to speak the truth, the whole truth, and nothing else but the truth; or any other "form of admonition which appears, either from his own statement or other source of information, to be calculated to impress his mind and bind his conscience." In casu, the witness was never asked anything about either an oath or affirmation, or the meaning, nature and purport of either of these things.

She was not and could not therefore have been found not to understand the nature or recognise the religious obligations of an oath or affirmation. She was therefore not one covered by section 219 of the Act. That being the case, she could not have given evidence under admonition.

> "Where there is no enquiry as to whether a witness understands the nature and import of the oath and where the warning is not in the form prescribed by this section, the evidence given by the witness is inadmissible (S v Mashava 1994 (1) SALR 224 (T). The section is mainly utilized for the reception of evidence from young children but may also be for other persons who through lack of intellectual capacity or education can not understand the nature of the oath...the court has to be satisfied that the child understands what is entailed in telling the truth...."

(Du Toit et al, **Commentary on the Criminal Procedure Act, 1995 at 22-19 to 22-20).**

The enquiry referred to herein need not be formal but facts or other material must be present to enable the presiding judicial officer to make a finding that the witness does not understand the nature and import of the oath. In the Botswana Appeal Case of **Modibedi Magasele and Another v The State, CLHFT-000112-06,** Masuku J expressed this point as follows:

> "I am of the view that there are cases where it appears obvious, either from the age of the witness or in some cases from the area the witness comes from and upbringing that they would have had, that he or she will not understand the import of the religious oath. In that case, the presiding officer may proceed to admonish the witness accordingly, having received relevant information that will conduce to the officer giving an admonition that will impress upon his or her mind the momentousness of the occasion. In cases where the witnesses are young children, this becomes easy to do."

See also the cases cited in this judgement.

[31] In light of the above position of the law, the learned Principal Magistrate erred in receiving the evidence of the witness under the circumstances described above. Her evidence was inadmissible and should not have been considered in the determination of the guilt or otherwise of the Appellant. There was no other evidence, unaffected by this irregularity, that established the guilt of the appellant herein. For this reason, I would also uphold the appeal on this count.

[32] The conviction on the charge of assault, however, stands on a different plane. There is the evidence of PW1, PW2, PW3 who all described the nature and extent of the injuries they each observed on the complainant. This evidence is not tainted or affected by the irregularity referred to above. It is admissible and receivable. The appellant admitted that he inflicted these injuries on the complainant but sought to exonerate himself from his actions by giving the reasons for assaulting her in the manner he did. The gravity and extent of these wounds or injuries bears no comparison whatsoever to the transgression committed by the complainant. His conviction and sentence must therefore stand.

[33] In summary, I would uphold the appeal on the charge of rape. The conviction and sentence imposed on the Appellant are hereby set aside and the appellant is acquitted and discharged thereon. However, the conviction and sentence imposed on the appellant on the second count are hereby confirmed, subject to or as corrected by this court in paragraph 3 above; that is, a fine of E700.00 failing which to undergo imprisonment for a period of seven months.

M.D. MAMBA
JUDGE

I agree

T.S MASUKU

JUDGE