IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CIVIL CASE NO. 62/10

In the matter between:

REX

VS

SIMPHIWE MKHALIPHI

Coram Hlophe J
For Plaintiff Miss L. Hlophe
For Respondent In person

JUDGMENT

HLOPHE J

[1] The accused person stands charged with the crime of rape it being alleged by the Crown that on or about the 10th November 2009, he the said accused, did intentionally have unlawful sexual intercourse with one T N, who was four years at the time and who was in law incapable of consenting to sexual intercourse.

[2] The Crown further alleged that the offence in question was attended by aggravating circumstances in that the complainant was a minor of a tender age, that prior to the sexual abuse the complainant was sexually inactive and that the accused exposed the Complainant to sexually transmitted infections such as HIV/AIDS as he did not use a condom.

[3] At the commencement of the trial the Court was informed that the accused would conduct his own defence whilst the Crown was to be represented by Miss Hlophe.

[4] When the charges were put to him the accused pleaded not guilty to the charges levelled against him.

[5] In an attempt to discharge the onus placed on it to prove the case against the accused person beyond a reasonable doubt, as enjoined to do so in law, the Crown led five witnesses including the Complainant.

[6] In view of the fact that a minor girl of around 7 years as at the time of trial, although 4 years at the date of the commission of the offence, was the Complainant, it became necessary that her evidence be led through the assistance of an intermediary as required in terms of Section 223 of the Criminal Procedure and Evidence Act No. 67 of 1938. After satisfying myself of her qualifications and suitability to act as an intermediary in the matter I granted the Crown's application to have one Nelsiwe Fakudze appointed as such intermediary in terms of Legal Notice No. 23 of 2005. I had no hesitation that the said Nelsiwe Fakudze met the requirements to be appointed in terms of Section 2 (1) (f] and (g) of said the Legal Notice given her having introduced herself as a nurse registered as such under the Nurses and Midwives Act of 1965 and who had commenced practising as such since 2005. This gave her some five if not six years of experience, including her having practised as a child counsellor during the said period.

[7] The matter was otherwise proceeded with through the use of the special Court which is fitted with the necessary machinery devices for the giving of evidence by such witnesses.

[8] Otherwise the Crown's evidence tendered in Court revealed that on the date in question (that is the 10th November 2009 or thereabout) the accused person, who it is common course stayed in the same homestead with the Complainant and one Sizolwethu Mpila (also known as Masizwane) and one Mbuso, sent the Complaint's companion at the time, Masizwane, to go and untie a certain goat somewhere on the compound whilst he called the Complainant to a certain chicken shed where he is said by the Complainant to have proceeded to insert his private part (penis) into her private part (vagina). When he did this, the Complainant says, the accused was lying on top of her.

[9] According to PW3, one Cynthia Dlamini, she was from Mbowane School where she had gone to work, when she found her son S M M, crying by the gate leading to the homestead

where she stayed together with both the Complainant and the accused. She was otherwise the mother of the said M. She says when she enquired from the said M as to why he was crying, the latter said that he had been injured by the goat he had gone to untie on the instructions of the accused.

[10] She was then to confront the Complainant and enquire from her as to where she was when Masizwane had gone to untie a goat. Complainant's answer was that she had remained with the accused who she allegedly said had inserted his penis into her private part, whilst having caused her to sleep on some sweet potato leaves behind the door of the chicken shed

[11] PW3 testified further that she thereafter reported the matter to the Complainant's grandmother, one Thandi Gama, PW4. She was subsequently to report matter to the Police after which the Complainant was taken to the Piggs Peak government hospital where she was examined by the Doctor.

[12] According to the Doctor who testified to have examined the Complainant, PW2 Dr. Mweiwa Mutoke, the Complainant was examined by her after having been brought to her for such examination by the Police. She testified that the Complainant was four (4) years at the time. She made the following observations on her genital organs: -

> Her *labia mqjora, labia minora* and vestibule were normal but her hymen had some bruise or was bruised. Her fourchette had an abrasion or cut, whilst her perineum was bruised. Her private parts emitted a thick whitish discharge whilst the examination was painful.

[13] She says she took some vaginal smears and examined them where she found no spermatozoa but a certain bacteria. From her observation she said she concluded that "<u>There was an attempted forced sexual penetration within 24 hours of examination."</u>

[14] The Police Officer who investigated the matter, gave evidence as PW5 and introduced herself as 5419 Constable Thando Dlamini. He narrated how he arrested the accused person after having cautioned him in accordance with the Judge's Rules.

[15] The accused person cross examined all the Crown witnesses except the Complainant's grandmother PW4, Thandie Gama. The accused challenged the complainant by denying ever having sexual intercourse with her, to which she maintained he did. He tried to suggest that she had been told to say what she said in Court but she maintained that she had not been told by anyone. She revealed during this stage that she had told her grandmother about her ordeal which she said was after the accused had already left. When the incident occurred, she was unequivocal that the accused was present. Otherwise the Complainant did not hesitate in identifying the accused as a person very well known to her.

[16] The accused asked the Doctor who examined the Complainant if the latter was the only person she should have examined and not him as well. The Doctor clarified that she only examined a person brought to her but had no right to go around examining everybody she felt like.

[17] After completing cross-examination and re-examination, I asked the Doctor PW2, Mweiwa Mutoke, to explain her conclusion or opinion particularly as concerned penetration. The Doctor did not hesitate to say that there was only an attempt to penetrate the Complainant. He did not say that the Complainant was penetrated to a limited degree or that any portion of the accused person's penis did enter the Complainant's vagina at least on a slightest degree. She was also not asked to clarify if ever there was any slightest entry of the male sexual organ into the girls vagina, even though there was no tearing or rupture of the hymen. For me the Doctor was the only person who could have corroborated the Complainant that even though the hymen was not torn, there was nonetheless penetration because the

accused's male organ had already entered the Complainant at least in the slightest degree.

[18] The accused put it to PW3 that he was not present at their home on the day he is alleged to have committed the offence, but the said witness was unequivocal in her answer that although he had not slept at home the night before, she had found him by the gate when she arrived from school, and he was clearly exiting the homestead carrying a food parcel. She maintained he was approaching his friend then who was standing a few metres from the gate having apparently come to meet him. Complainant's vagina at least on a slightest degree. She was also not asked to clarify if ever there was any slightest entry of the male sexual organ into the girls vagina, even though there was no tearing or rupture of the hymen. For me the Doctor was the only person who could have corroborated the Complainant that even though the hymen was not torn, there was nonetheless penetration because the accused's male organ had already entered the Complainant at least in the slightest degree.

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[19] When the accused tried to enquire why he would have raped the Complainant this time around when he had remained with her previously without doing so, this witness, (PW3) stated that it was not the first time the accused had done so as previously there had been such allegations against him from the same Complainant. This no doubt sounded very unfavourable to the accused but other than this brief general allegation there were no specific particulars to enable one conclude that indeed there had been

such rape or sexual intercourse between the two previously. The Crown did not pursue this as well.

[20] As against the Investigating Officer, it was alleged that he had assaulted the accused forcing him to admit committing the offence which he denied maintaining that there would not have been a reason for him or even them to assault him as he had co-operated and they already had all the evidence they needed connecting him with the offence.

[21] As concerns the assault allegations I can only comment that this Court cannot digress to enquire into the correctness or otherwise of these allegations during the hearing of the current matter such allegations are not germaine to the current enquiry. It suffices to say that the accused was informed that such was a matter he could pursue differently should his attorneys so advise.

[22] The Crown then closed its case which necessitated that the accused be advised of his rights going forward. I duly advised him

inter alia that he could choose one of the three options available to him which are not to say anything and close his case; that he could give unsworn testimony from where he stood and tell the Court his story but he would not be cross examined and lastly that he could give sworn testimony which would necessitate that he crosses over to the witness stand and thereat tell his story after which he was to be cross examined. I also explained to him the effect of each one of the scenarios he was at liberty to choose. He chose to give sworn testimony and withstand cross examination.

[23] In his evidence the accused person told the Court that he was not home on the day he is alleged to have committed the offence concerned. He stated that on the day preceding the one he is alleged to have committed the offence; he had gone to play soccer with some friends of his. He said he was later asked by a friend of his to spend a night with him at a certain place that friend of his had been asked to watch over or look after as the owner was away but the friend was afraid to be there alone. He

said he was only to come back to his home the next day at around 1100 o'clock where he was then seen by his sister in law, Cynthia Dlamini, PW3 by the gate. He otherwise denied having committed the said offence.

[24] Under cross-examination he was asked as to why he had not put it to the Complainant that he was not at their home on the day he is said to have committed the offence to which he said he considered relaxing his questions to the Complainant as she was still a child and therefore needed to be asked questions she could answer. Asked again why he had not disclosed by way of questions to the Complainant that he was with his friend called Oscar on the day in question, he said he thought the Complainant knew about that. There can be no doubt that these questions were important in clearing the issues in the matter but the answers to them completely lacked merit.

[25] The accused indicated that he had no witness to call and was therefore closing his case after his being cross-examined.

[26] The position has now crystallised that in matters of rape the Crown is required not only to prove beyond a reasonable doubt the identity of the accused, the fact of the sexual intercourse and the lack of consent but also to show that these aspects are corroborated as well. This principle was enunciated in the case of Rex vs Vadelman Dengo Review Case No. 843/88 where the learned Rooney J, said the following:-

> "*The need to be aware of the special dangers of convicting an accused on the uncorroborated testimony of a Complainant in such cases must never be overlooked.*
>
> *Corroboration may be defined as some independent evidence, implicating the accused, which tends to confirm the Complainant's testimony .... Corroboration in sexual matters must be directed to:-*
>
> 1. *The fact of the sexual intercourse or indecent assault*
> 2. *The lack of consent on the part of the Complainant and*
> 3. *The identity of the accused.*"

[27] As concerns the identity of the accused there can be little doubt that the accused was very well known to the Complainant as they stayed in the same homestead. The accused himself did not dispute that they knew each other very well.

[28] Although the accused tried to raise an *alibi,* alleging that he was not present at home on the day the incident occurred, same cannot stand for two reasons - Firstly there has in my view been led impeccable evidence which reveals that the accused was present at the said homestead on the day in question. In fact the Complainant' assertion that she was raped by the accused and nobody else, and therefore that the accused was at the scene, is corroborated by the accused's sister in law Cynthia Dlamini, who confirms having seen him leave the said homestead on the day in question, after having already established that he had sent one of the children who had been with Complainant to go and untie a goat.

[29] Secondly, the *alibi* in question was brought very late in the day as it was not put to the Complainant at the time she was

cross-examined. The reason given by the accused under cross examination that he did not put the question to the Complainant because she was still too young and needed to be asked questions she could respond to is rejected as being fanciful and unreal.

[30] In Celani Maponi Ngubane and two others vs Rex Criminal Appeal Case No. 6/06, and whilst quoting Holmes AJA (as he then was) in Rex vs Hlongwane 1959 (3) SA 337 (A) 340 at -341, Browde JA had the following reference to make on the law as regards an alibi;

> '*The legal position with regards to an alibi is that there is no onus on the accused to establish it, and if it might be true he must be acquitted ... but it is important to point out that in applying this test, the alibi does not have to be considered in isolation. The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses.*"

[31] Having referred to this extract, Browde JA then stated the following which in my view is directly on point in this matter.

"It is a well established principle that the accused must raise the defence (of an alibi) at the earliest possible opportunity, but that cannot include the immediate response to his warning on arrest. At that time he is not only told that he needs to say nothing, but it is his accepted privilege to remain silent. However, the position alters when he comes to trial. He cannot then maintain silence regarding the alibi since the onus is on the Crown to prove the falsity thereof if it wishes to do so; and in order to do that it must obviously be appraised of it so as to give the Police an opportunity to investigate it. An accused cannot expect the Court to place too much reliance on the evidence of the alibi if the accused chooses not to mention it until late in the trial."

[32] Furthermore the position is now trite that a party is required in law to put his case to the Crown witnesses during cross examination for them to react thereto. Should the accused fail to do so but attempt to present new evidence or matter when he gives his evidence in Chief, that action is called an afterthought and the Court is then entitled to reject such evidence on that basis. See in this regard the case of Dominic Mngomezulu and Ten others vs Rex Criminal Case No. 94/1990.

[33] In the matter at hand the accused himself acknowledges that he did not put some aspects of his case to some Crown witnesses, particularly the Complainant in so far as he did not put to her that he was not at their home when the alleged rape occurred. Whatever reasons he had for not doing so (which in his case I have already rejected) cannot override the important principle that a party has a duty to put its case to the witnesses of the other side if he seeks to rely on such a case. I therefore have to reject the accused person's *alibi* even on this ground (it is an after thought).

[34] Consequently, as concerns the issue of the accused person's identity, it is my considered view that the Crown has proved this aspect of the matter beyond a reasonable doubt.

[35] As concerns the issue whether the fact of the sexual intercourse has been proved one has to weigh the evidence of the Complainant against that of the Doctor who examined her.

Whereas the Complainant did not hesitate to say that the accused person did insert his pennies into her vagina, the Doctor only talked of an attempt to penetrate the Complainant. In fact a verbatim opinion of the Doctor is recorded as follows:-

> "*In our opinion, there was an attempted forced sexual penetration within 24 hours of examination.*"

[36] Can it be said that the evidence of the Complainant on the allegation that the accused inserted his penis into her private part (vagina) be said to have been corroborated? I would not answer this question in the affirmative if I take into account the evidence of the Doctor. Although he does indicate that the hymen was bruised but he did not hesitate to say that such was only consistent with an attempt to penetrate the Complainant and said nothing more. In my view the Doctor was the best placed person to tell the Court if there was any penetration even in the slightest possible degree but would not confirm that there had been even when asked a specific question on whether there was any penetration by this Court.

[37] I am therefore doubtful that owing to her age, (she was 4 years at the time of the incident) the Complainant could tell the difference between penetration and an attempt. I say this because of the disparity between her evidence and that of the doctor; an expert. This disharmony in their evidence simply means that there is no corroboration of the complainant's evidence on a very material point.

[38] Miss Hlophe submitted, whilst citing the case of Rex v Justice Magagula Criminal Case No. 330/2002 as well as an excerpt from the book by P.M.A Hunt, titled, "South African Criminal Law and Procedure Volume II, 2nd Edition, Juta 1982," page 440, that for legal purposes the slightest degree of penetration suffices and the hymen need not be ruptured, nor does semen have to be emitted. I cannot quarrel with this principle as it is a salutary one.

[39] In fact the position was put as follows in Rex vs Justice Magagula (Supra) at page 3 of that unreported judgment:-

> "*Whatever penetration may be in the medical field, it (is) however settled that for legal purposes, the slightest degree of penetration suffices.*"

[40] P.M.A Hunt on the page cited above puts the position as follows:-

> "*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 in the case of a virgin that the hymen should be ruptured and in any case, it is unnecessary that semen should be emitted.*"

[41] To dispel whatever doubt there could be on the principles cited by Miss Hlophe and referred to in the foregoing paragraph, I must say I associate myself fully with them. That however does not mean I should agree that in the circumstances of the matter the fact of the sexual intercourse has been proved beyond a reasonable doubt or corroborated. In my view it must be proved as a fact that there was penetration of whatever degree even that of the slightest degree and such penetration must be corroborated. If it were to be said that the allegation by the

Complainant that the accused person inserted his penis into her vagina was evidence of such penetration, then such evidence was not corroborated by the Doctor, an expert in the field, who examined Complainant *expost facto* and came to the conclusion there was only an attempt to forcefully and sexually penetrate her.

[42] It has to be remembered that although in the Rex v Justice Magagula (Supra) case the hymen was shown not to have been torn or ruptured, the Doctor is recorded at page 3, the last but one paragraph, as having said that he could not rule out the slightest degree of the penetration, whilst suggesting as observed by the Judge therein, that the tip of the accused's penis in that matter had entered the Complainant's vagina.

[43] Other than having to speculate I have no such suggestion let alone evidence to that effect in this case. In fact the Doctor was unequivocal that there was no penetration as discussed above. In fact in dispelling the penetration of the Complainant in this matter the doctor clarified that nothing much should be read into the

bacteria she found on her as she said such was no proof of sexual intercourse or that there had been penetration as she said such bacteria could be easily picked up or words to that effect.

[44] I therefore would be speculating if I were to come to the conclusion that simply because the hymen was bruised, (which made the Doctor conclude was a result of an attempted penetration) there was proof of penetration and by extension, of the fact of the sexual intercourse. This in my view means that the fact of the sexual intercourse has not been proved beyond a reasonable doubt, or put differently has not been corroborated, and if it has not been so proved, the doubt must then accrue to the benefit of the accused, which is the conclusion I have reached on the proof or otherwise required in this particular element.

[45] As concerns the question whether or not there was proof of the lack of consent beyond a reasonable doubt, there can be no doubt that there was no such consent. There was for instance no disputing that the Complainant was born on the 29th January

2005 and was therefore four (4) years old on or about the 10th November 2009 when she was allegedly raped.

[46] The position is now settled in terms of the Common Law, that a girl below 12 years cannot consent to sexual intercourse. The case of R v Z 1959 (1) SA 739 (A) at 732 D-E - is instructive in this regard.

> It has been stated in numerous decisions of this Court and the Supreme Court that even if a girl below the age of 12 were to purport to consent to sexual intercourse, sexual intercourse with her is rape. See in this regard Rex v Mgcineni Mamba High Court Criminal Trial No. 217/07 and the case of Rex vs Justice Magagula Criminal Case No. 330/02.

[47] It suffices for me to say that the fact that the Complainant was below 12 years of age can also be ascertained from her physique which I had an opportunity to observe in Court as it was

a very a small body consistent with one who was now seven years and had been four years at that time. The medical report by the Doctor also proved that in my view as she was recorded as one who had not yet started menstruating.

> Consequently the lack of consent has been proved beyond a reasonable doubt.

[48] Before concluding the matter I must clarify that I was very much alive to the fact that I was dealing with the evidence of a child in the Complainant. I have however accepted her evidence because I was convinced she understood the difference between telling the truth and lies just as she also exhibited intelligence and could appreciate and answer all the questions directed at her with ease.

[49] I have therefore come to the conclusion that in so far as it was not proved beyond a reasonable doubt that there had been

penetration of whatever degree, I cannot find the accused guilty of rape and must therefore acquit him of the said charge.

[50] That however does not bring about an end to the matter in my view but instead brings about the question of indecent assault which in terms of Section 185 (1) of the Criminal Procedure and Evidence Act is a competent verdict to rape and a person charged with rape could be found guilty of same where it is proved.

I accordingly find the accused person guilty of indecent assault for the reasons given above.

Delivered in open Court on this the 21st day of March 2011.

N.J HLOPHE

JUDGE