IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No. 438/11

In the matter between

REX

and

MUSA MAZIYA
SIZWE DLAMINI

Neutral Citation: *Rex v Musa Maziya &Another* (438/11) [2012] SZHC 248 (23 October 2012)

Coram: **Mamba J**
Heard: **30/07/12, 01/08/12, 03, 04 and 08 October, 2012**
Delivered: **23 October 2012**

[1] Criminal Procedure – on a charge of rape – complainants shown to have lied on many material aspects – their evidence rejected.

[2] Criminal law and procedure – cautionary rule in respect of evidence of young children – corroboration only required where the evidence of such young children is credible and reliable. Where such evidence cannot be relied upon, no corroboration necessary or required.

[3] Criminal law and procedure - on a charge of rape – where the accused is shown to have allowed a ten year old girl to play with his penis – such is an immoral and indecent act.

[4] Criminal law - on a charge of rape – a contravention of section 3 (1) of the Girls' and Women's Protection Act, is a competent verdict – where the evidence proves a commission of an immoral and indecent act.

[5] Criminal Procedure – where indictment alleges the existence of aggravating circumstances as defined in section 185(bis) – the import and nature of these allegations should be explained by the court to an undefended accused.

[1] Both Accused persons face an indictment that alleges that they are guilty of the crime of rape. The first Accused, Musa Maziya is alleged to have raped Nosimilo Matsenjwa, a ten year old girl whilst the second accused, Sizwe Dlamini is alleged to have raped Tengetile Matsenjwa, who was also ten years old at the time of the commission of the offence. These offences are said to have been committed on 28th May 2011 at or near Mzilikazi area in the Lubombo Region.

[2] The indictment also alleges in each instant that the crime is accompanied by aggravating factors as defined under section 185 (bis) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended) in that:

'(i) The victim was a minor of a tender age.

(ii) The accused did not use a condom thus exposing the victim to the risk of contracting sexually transmitted infections including HIV/AIDS.

(iii) The accused raped the complainant repeatedly.

(iv) The accused inflicted a life long trauma on the victim [and],

(v) The accused broke the victims virginity.'

[3] Immediately after the plea by the accused, I took the liberty to advise them that the significance of the allegations by the crown that the crimes were accompanied by aggravating factors was that in the event they are found

guilty of rape and the court holds that indeed there are aggravating features present, the court shall be enjoined to pass a sentence of not less than 9 (nine) years of imprisonment. I took this step because, procedurally I think, a court is enjoined to do so where the accused is not represented, otherwise simply reading the indictment to him as it is without this explanation seems meaningless to me. In saying so though, I do not for a moment suggest that where such information or explanation is not conveyed to the accused, the court is precluded from invoking the provisions of the relevant section of the law or that this lack of explanation amounts to an irregularity in the proceedings. The explanation merely makes the allegations of aggravating factors meaningful to the undefended accused and brings the seriousness or gravity of the charge closer home to him.

[4] Although the second accused (A2) was acquitted and discharged at the close of the crown case, this judgment also contains my reasons for that discharge.

[5] Both Accused persons pleaded not guilty to the indictment and the crown led a total of nine witnesses in the quest to prove or establish its case. I observe from the outset that the evidence of the two complainants Pw2 and Pw3, is materially or substantially the same and both witnesses gave their evidence through the aid of an intermediary, Ms Olivia Ndlangamandla, a

social worker with about nine (9) years experience in the job. She was duly sworn in before she could undertake the task at hand after I had satisfied myself that she qualified to act as an intermediary.

[6] The complainants have one father but have separate mothers. Their father is Isaac Themba Matsenjwa (Pw7). Thobile Dlamini, Pw6 is Pw2's biological mother. The court was not told who the mother of Pw3 is. Both children, however, lived together with their father and Pw6. Their home was at a place known as eMatjeni in the Mzilikazi area near Siteki. It is apparently situated near the home of Brenda Sithole who runs or operates a shebeen from there. The accused were apparently, some of her regular customers or patrons of her liquor business.

[7] According to Pw2 and Pw3, the complainants – in the evening of 28th May, 2011 they were playing with other children at the home of Brenda Sithole. These children included Celimpilo Dlamini, otherwise also known as Sizumbulu. He gave evidence as Pw4. As the complainants left Sithole's homestead on their way to their home, they were called by the accused persons who indicated that they wanted to send them somewhere. When they got to the accused, the first accused got hold of Pw2 by her arm and the second accused did the same to Pw3. The accused pulled the children into a nearby forest or bush and once in there, each of the accused ordered

his victim to lie down on the ground and remove her panties. They were then each raped by her captor whilst a knife was placed on her neck. They were told not to shout or cry out for help. They were threatened with death should they do so. Pw4 came and witnessed them both being raped and went away without having said or done anything. Later, the children heard their mother, calling out their names. Again their captors ordered them not to respond to her, lest they would be killed by them. By this time it was dark in the forest.

[8] Later, a police motor vehicle came by and shone its lights near Sithole's place, but then left the scene without sporting the accused and their victims in the forest. The accused again held the complainants by their arms and pulled them to a homestead that was unknown to these witnesses. (It is common cause that this is the home of Vumelani Mamba who gave evidence as Dw2). At this home, the accused were give a room by one of the persons found there. The accused laid or spread out grass mats on the floor. Again, each accused caused his victim to lie thereon and they were raped once more. After the rape, the complainants were caused to sleep on one grass mat whilst the two accused shared another one in the same room.

[9] The next morning, the complainants were released by their captors and told to go home. Pw2 went home whilst Pw3 went to her teacher's house.

[10] On arrival home, Pw2 was received and interviewed by Pw5 (Ntombikayise Mahlalela) who is a community social worker. Pw2 related to Pw5 where she had been over night and how she and Pw3 had been each raped by the accused. The matter was then reported to the police and subsequently, the complainant was taken to the Good Shepherd hospital where she was examined by a medical practitioner, Dr Asha Varghese (Pw1).

[11] Pw1 noted that Pw2's hymen was absent and that she was suffering from gonorrhoea. She said Gonorrhoea is a sexually transmitted disease or infection. She was unable to say what had happened to Pw2's hymen and when she had lost it. Again, she was unable to say when Pw2 had contracted the said infection.

[12] In her evidence, Pw2 told the court that A1 had raped her twice before the incident of the 28th May 2011 and on each occasion he had warned her not to reveal this to anyone or he would kill her. She had obeyed, out of fear, she said.

[13] As stated above, the evidence of Pw3 is substantially similar to that of Pw2, in respect of how they were abducted and eventually raped by the accused persons. Pw3 stated that they were raped at two different spots in the forest

before they were led to the Mamba homestead where they slept for the night. She also mentioned that after the first rape incident, she heard her father calling out her name nearby and the accused persons threw stones in his direction. This caused him to retreat. It was then that the accused moved them to another spot and there raped them for the second time. Unlike Pw2, she did not mention the issue of the arrival or presence of the police in the area that night.

[14] Pw3, who is also known as Zanele or Ntjompiza explained that she did not immediately return home upon being released by the accused because she was afraid her parents were going to scold her for having spent the night away from home without their permission. She then opted to go to her teacher's house.

[15] Celimpilo Sizumbulu Dlamini gave evidence as Pw4. He was a neighbour and close friend of Pw2 and Pw3. He testified that upon receiving information that the girls had gone with the accused, he followed them stealthy from a distance until he found them near a forest not very far from his home. He saw, at very close range, Pw2 laughing or giggling and playing with or shaking the penis of the first accused which was exposed. On another spot not far from them stood the second accused with Pw3. He overheard Pw3 reminding A2 of a sum of R0.60c he had promised her. He

immediately retreated and went back home to report to Pw5 what he had seen or witnessed. He then returned to the scene and this time he found the first accused "on top of Pw2 with the zip of his trousers open." The second accused was nearby urinating. On seeing him the first accused got off Pw2 and pretended to be walking away from her. He told Celimpilo not to tell anyone what he had just seen.

[16] Sizumbulu also confirmed that he had led the father of the complainants to the spot where he had seen them with the accused persons. Pw5 and Pw6 followed them from a distance. The accused and their captives or victims were not found at the scene. When Pw7 called out the complainants' names, there was no response other than that they realized that stones were being thrown in their direction. Fearing being hurt in the dark, the two retreated and the matter was reported to the police. The evidence of Sizumbulu Dlamini is materially corroborated by Pw5, Pw6 and Pw7 regarding the search referred to herein.

[17] Sizumbulu gave his evidence in a clear straight forward manner. He was not shaken even under cross-examination by the first accused who denied ever being found on top of Pw2 or that Pw2 was found playing with his penis. Sizumbulu really impressed me as a truthful and honest witness and

I have no hesitation whatsoever in accepting his evidence and the veracity thereof. That, however, cannot be said about the complainants.

[18] When the complainants were taken from near their home by the accused, it was not yet dark. This occurred near Sithole's home where there were a lot of people. If indeed they were abducted or taken against their will, one would have expected them to cry out for help. Again at Vumelani Mamba's home where they spent the night with the accused, they did notice the presence of some one there to whom a report could have been made if they had been brought there against their will. No report was made. Even at night, no attempt by them was made to try and escape whilst their captors slept. On being released by their captors, Pw3 never went home to report that she had been abducted by the accused. Instead she went to stay with her school teacher until she was collected from there by Celimpilo. Her explanation or reason that she was afraid to go home because she spent the night away from home without her parents' permission is, even for a girl of her age, plainly unreasonable and unbelievable. Its only reasonable explanation is that she had gone away from home willingly and was afraid to face the consequences of her indiscretions. If she had been taken away against her will, I see no reason why she would be afraid to return home to explain this to her parents. There is further no evidence that she reported her supposed abduction to the said teacher.

[19] The above criticism leveled against the evidence of Pw3 applies with equal measure to the testimony of Pw2. On her return home, she was afraid to talk to her mother. Infact when her mother approached her she retreated and was only able to relate her story of having been abducted by the accused to Pw5 (Ntombikayise Mahlalela). But more importantly and fundamentally, the evidence of Pw4, Celimpilo establishes in my judgment that the complainants willingly went away with the accused persons and were willing participants with whatever took place between them and the accused persons. The complainants have deliberately lied that they were taken and kept away from home by the accused persons against their will.

[20] Experience has taught the courts and taught them well, that young children are prone to suggestions and are impressionable. Because of this fact, the court has to view their testimony with caution and where they, as witnesses, are credible and trustworthy, the court has to find corroboration of their testimony before it can say that the crown has proven its case on the matter under consideration. In Bhekithemba Kunene v Rex Criminal Appeal 12/2009 this court had this to say:

> '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**).'

Even where corroboration is required, it is in respect of credible evidence. Evidence that is not worthy of credence requires no corroboration. It stands to be rejected.

[21] In the present case and for the reasons stated above, I am unable to believe the evidence of the complainants herein. It would be extremely and dangerously unsafe to rely on their evidence. Because of this conclusion, there is absolutely no reason to go into the next stage in the inquiry; namely to determine whether or not their evidence is corroborated by other independent and credible testimony.

[22] But, just in case I am wrong in the analysis and evaluation of the evidence of the complainants, there is no evidence that either of them had sexual intercourse at the relevant time. That both witnesses did not have their hymen is no evidence that they had sexual intercourse at the relevant time. Pw3 was examined by a doctor on 30th May 2011; the 2nd day after the alleged sexual assault. If indeed she had lost her hymen then and also bled

at the scene as a result of the alleged sexual intercourse, evidence of such tearing of the hymen or injury to her organs of generation would have been observed or noted by the doctor who examined her, as such would have been fresh or been recent injuries. Some women of course are born without a hymen.

[23] I am not unmindful of the undisputed evidence by the doctor that Pw2 was found to have been afflicted with gonorrhoea which is a sexually transmitted infection. But again, that fact does not inexorably point to the fact that she had sexual intercourse at the relevant time and that such sexual intercourse was with the first accused herein. There is merit in the argument or suggestion by the first accused that if indeed he had had sexual intercourse with her at the material time, he would have contracted the same infection too. There is no evidence that he suffered from such infection. (There is evidence that upon his arrest and being told that Pw2 was infected with Gonorrhoea, he demanded that he be examined to prove that he had no such infection as he reasoned that if he also had such an infection, that would go a long way to disprove his claim of innocence.

[24] In *R v Mario Masuku, Criminal case 348/2008,* in considering section 174 (4) of the Criminal Procedure and Evidence Act 67/1938, this court stated as follows

'[3] Section 174(4) of the Criminal Procedure and Evidence Act 67 of 1938 provides as follows:

"If at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him."

The meaning and import of these provisions were explained by Masuku J in the case of **REX V OBERT SITHEMBISO CHIKANE AND ANOTHER, Crim 41/2000** (judgement delivered on the 16th July, 2002) as follows:

"An analysis of the application of this Section in our jurisdiction was undertaken by Dunn J in THE KING VS DUNCAN MAGAGULA AND 10 OTHERS, CRIM. CASE NO. 43/96 (unreported). He came to the following conclusion at page 8 of the judgement:-

'This section is similar in effect to section 174 of the South African Criminal Procedure Act 51 of 1977. The test to be applied has been stated as being whether, there is evidence on which a reasonable man acting carefully might convict.'

From the legislative nomenclature employed, it is clear that the decision to refuse a discharge is a matter that lies within the discretion of the trial Court. The use of the word "may" is indicative of this. In the case of GEORGE LUKHELE AND 5 OTHERS VS REX C.A. CASE NO. 12/95 (unreported), it was held that no appeal lies against the refusal of a trial Court to discharge an accused at the conclusion of the prosecution's case. It is however important to mention that this discretion must be exercised judicially and whether in any case the application will be granted is dependant upon the particular circumstances of the matter before Court."'

I reiterate these remarks herein.

Based on the above analysis and evaluation of the evidence by the crown, I ruled that there was no real evidence implicating the second accused herein, i.e. there is no evidence on which a reasonable man acting carefully might convict him. Consequently he was acquitted and discharged at the close of the crown case. But based on the evidence of Sizumbulu that he found the first accused lying on top of Pw2 and that he also witnessed Pw2 shaking or playing with the exposed penis of the first accused, I held that there was evidence implicating him. The first accused denied the allegations by Pw4 on this issue in his evidence in his defence.

[25] I have already analysed the quality of the evidence of Pw4 above and I entirely accept it. I accept that he was no doubt an inquisitive person who specifically went out to find out what was going on between the accused and the complainants. The presence of the accused in the company of the complainants at the relevant time is not in issue herein. Further, the first accused did not dispute or deny the presence of Sizumbulu in the forest whilst he was with the complainants and his co-accused. He denied the sexual intercourse or alleged nature of his conduct or interaction with Pw2. His evidence in this regard cannot reasonably possibly be true insofar as it is contrary to that of Pw4. It is hereby rejected as a lie.

[26] The next question in the inquiry or trial is what does the evidence by the crown and in particular by Pw4 establish or prove? Plainly, it does not prove that the accused had sexual intercourse with Pw2. It establishes beyond any reasonable doubt two things namely that:

(a) the accused permitted himself and did expose his person or penis to Pw2 and Pw2 enjoyed and played with it and,

(b) at one stage or instance the accused laid on top of Pw2 whilst the zip of his trousers was unfastened.

[27] There is no evidence as to what the first accused was doing as he laid on top of Pw2 or in what position the two were in. It may be too tempting or easy to assume or suspect that some form of sexual encounter was taking place between them but such assumption or suspicion cannot, in law, ground a conviction for rape or any of the competent verdicts cognizable in our law. I say so fully recognizing that assault is a competent verdict on a charge of rape, and, to lie on top of someone may in an appropriate case constitute such offence. But, in the circumstances of this case, where Pw2 was enjoying the company of the first accused, I cannot hold that the crown has proven a case of assault beyond any reasonable doubt against him. Perhaps the maxim volenti non fit injuria applies here. (He who wills or wishes to be injured may not be injured or that to which a person consents cannot be considered an injury).

[28] The first accused is 29 years old and must have been about 28 years old in May last year when this offence was allegedly committed. He is married. On the other hand, Pw2 was ten years in May last year. So, the age difference between them is 18 years. The two could not have been play-mates so to speak, but the accused allowed his person to be exposed to Pw2. Infact he did not just expose it to her but rather allowed and permitted her to play with it. This court has been told Pw2 was laughing as she did so, probably fascinated by what she saw and touched. The court has not been told in what condition the accused penis was – whether erect or not – but this is immaterial in my judgment. Something is immoral or indecent if it is depraved, dissolute, perverse or corrupts or has the potential to corrupt one's morals. I am of the firm view that it is immoral and indecent for a 28 year old man to allow a ten year old girl to play with his penis in the manner and under the circumstances described by Sizumbulu herein . It offends against the boni mores of a civilized and morally upright society such as ours.

[29] The facts in this case are distinguishable from those in Rex v Ndumiso Masango, Review Case No. 25/2010, where this court stated as follows:

> 'The mere proposal of love by a 26-year-old male to a 14-year-old girl is, to my mind, not on its own immoral or indecent. It may of

course be immoral or indecent if for example, the two persons involved fall or are within the prohibited bounds or degrees of marriage or, where the expression by which the proposal is made, the words or gestures used to convey it, are foul, ill tempered, ill mannered or undisciplined. Nothing of the sort is conveyed by the charge sheet in this case.'

This is not the case in the present matter.

[30] Section 3(1) of the Girls' and Women's Protection Act 39 of 1920 provides as follows:

> 'Every male person who has unlawful carnal connection with a girl under the age of sixteen years or who commits with a girl under the age immoral or indecent acts or who solicits or entices a girl under such age to the commission of such acts shall be guilty of an offence and liable on conviction to imprisonment not exceeding six years with or without whipping not exceeding twenty-four lashes and with or without a fine not exceeding one thousand emalangeni in addition to such imprisonment and lashes.'

And, section 185(1) of the Criminal Procedure and Evidence Act 67 of 1938 provides that:

> 'Any person charged with rape may be found guilty of assault with intent to commit rape; or of indecent assault; or of assault with intent to do grievous bodily harm; or of assault; or of the statutory offence of unlawful carnal knowledge of, or committing any immoral or indecent acts with, a girl of or under the specified age; or of the statutory offence of having or attempting to have unlawful carnal connection with a female idiot or imbecile under circumstances which do not amount to rape, or an attempt to commit rape, or of committing or attempting to commit any immoral or indecent act with such female, if such be the facts proved.'

[31] The only reported case I was able to get during my brief research on the topic is **R v DLAMINI, CECIL, 1987 – 1995 (1) SLR 146**. The facts in that case are of course distinguishable from the present case, as the accused was convicted of committing an immoral or indecent act on the basis that the evidence by the crown 'fell short of establishing that the accused had succeeded in penetrating' the complainant.

[32] A girl below the age of 12 years is irrebuttably presumed incapable of consenting to sexual intercourse or to an immoral or indecent act.

Vide **R v Ndwandwe, Doctor, 1987 -1995 (3) SLR 201** (which is incidentally repeated at page 362 of the same report), where the accused was found guilty notwithstanding that the girl had consented to the sexual intercourse.

[33] For the foregoing reasons, the first accused is found guilty of committing an immoral and indecent act with a girl under the age of 16 years in Contravention of section 3(1) of the Girls' and Women's Protection Act 39 of 1920.

MAMBA J

For the Crown:	**Ms E. Matsebula**
For the Defence:	**In person**