IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.: 29/2016

In the matter between

REX **Applicant**

VS

NKOSINGIPHILE ZWANE **Respondent**

Neutral Citation: *Rex* Vs *Nkosingiphile Zwane (29/2016) [2018] SZHC 77 (25 April 2018)*

Coram: Hlophe J.

For the Applicant: Mr S. Mdluli

For the Respondent: Mr S. Gumedze

Date Heard: 7/12/2017;11/12/2017; 27/02/2018;20/03/2018; 03/04/2018

Date Judgement Delivered: 25 April 2018

Summary

Criminal Law –Accused charged with the rape of a four year old girl –No direct evidence on the act of sexual intercourse –Circumstantial evidence relied upon – When reliance on circumstantial evidence would lead to a conviction –Such evidence must be the only reasonable inference which must be consinstant with all proven facts – Evidence of the complainant not credible –Evidence of the other two witnesses conflicts, contradicts and does not prove case beyond a reasonable doubt –Medical evidence neither conclusive nor reliable – Although the cautionary rule in its original form is no longer a part of our law, Court of the view the circumstances of the matter call for a cautionary approach –Court of the view the totality of the evidence does not prove a case against the accused beyond a reasonable doubt – Accused accordingly acquitted and discharged.

JUDGMENT

[1] The accused person herein stands charged with the offence of rape; it being alleged by the Crown that on the 3rd January 2016 and at or near Mfabantfu area in the Manzini District, he did have unlawful and intentional sexual intercourse with one Fisiwe Queen Mnisi, a female minor aged 4 years who in law was incapable of consenting to sexual intercourse and that he thereby committed the said offence.

[2] It was contended by the Crown that the commission of the said offence was attended by aggravating factors in that the complainant was a minor girl of the tender age of four years together with the fact that during the commission of the offence the accused exposed the minor child to the risk of contracting sexually transmitted diseases including HIV/AIDS as he did not use a condom.

[3] The crown relied on the evidence of seven witnesses, including the intermediary who assisted the complaint during the giving of her testimony as she was of a tender age. Ofcourse this was in line with the practice in this jurisdiction which was brought about by an amendment to the Criminal Procedure and Evidence Act of 1938, recorded in Section 223 bis thereof.

[4] The evidence on how the case against the accused arose is that on the 3rd January 2016, a brother to the accused, one Sibusiso Simelane, PW4, returned from a night vigil he had attended the previous night and went to his half brother's house, (the accused's flat) to collect his keys he had left there the previous day or night when he went for the night vigil. This was around the mid morning hours on the picture painted in Court.

[5] He told this court that as he approached the accused's house or flat, he noted that there were the complaint's shoes or slippers outside the door of the accused's house which was closed at the time. Upon knocking at the door, he said that the accused opened up the door but as he did so he was half dressed in that he had his pair of trousers on whilst naked on the top part of his body, that is, from the waist upwards. He was given his keys by the accused. He in the process saw the complainant who was seated next to the bed inside the accused's house or flat. They otherwise were not doing anything.

[6] It is worthy of note at this point that other than his painting the casual picture above, he did not say anything else to help one conclude that the setting in the said house was abnormal. He said nothing for instance to suggest that the accused delayed in opening the door after he had knocked or that he saw the accused putting on his pair of trousers or raising his zippers. Other than the complainant, a girl of 4 years at the time, being found seated next to the accused's bed, which in his own words was normal behaviour on the part of the children who included the complainant, he did not say

anything suspicious about the state or the appearance of the child. For instance he said nothing about she being found in a sombre mood or crying or anything of the sot. He infact painted a picture of the complainant and the setting having appeared normal. The reasons why I am recording this state of affairs at this point shall become apparent later on in this judgement.

[7] Another factor which perhaps needs to be recorded again at this stage which also transpired during the trial is that the accused and the said Sibusiso Simelane, (PW4) are related (they are in fact half brothers) born of the same mother. Whereas the accused is a Zwane, the other children born of his mother are Simelanes. This is the surname of PW4's mother's husband. The accused and his said brother stayed at the Simelane homestead. In simple language, the accused was a step child to the head of the family and therefore a step brother to Sibusiso Simelane and the other children born of their mother.

[8] The evidence further revealed that the people staying at the said Simelane homestead did not depict a uniform family. It was in fact divided due to a church dispute which involved the members of their church known as the

Gwamile Faith Apostolic Church. This factionalization of the church somehow crept into this family, because whilst all the other members of it, including the head of the family, his wife and the accused's step siblings were part of one faction of the divided church, the accused alone, was a member of the opposing faction. Although he stayed and shared almost everything else with the Simelane family members, who were a vital cog in the rival faction of the, the accused appeared sympathetic to the other faction. In fact just before the alleged offence, a meeting had been set between Mr Simelane the Head of the family and his wife on the one hand together with the accused. The intention was apparently to warn the accused about the position he had taken which was seen as a betrayal to the Simelanes. There was therefore some obvious tension between the accused and his other family members. Ofcourse, the accused in his defence wanted the Court to see the matter of his charges in that light.

[9] The evidence revealed that the complainant's mother, one Gugu Shongwe, who testified as PW5, was closer to the Simelanes. In fact according to PW4, the complainant, Gugu's daughter, was, from the age of two months old, brought up by the accused's mother such that she was more closer to the

Simelane's than she was to her said mother, who was herself taken to be part of the Simelane family in many respects.

[10] Reverting to the testimony of Sibusiso Simelane, this witness told the Court that after having obtained the keys from the accused, he received a call from the complainant's mother, PW5, who inter alia asked him if he had seen the complainant anywhere that day and that his answer was that he had seen her inside the accused's flat. I record that there is a difference between the evidence of PW4 and that of PW5 on how the two of them came to talk about the whereabout of the complainant resulting in the allegations of rape against the accused.

[11] Under cross-examination, PW4, confirmed that when he found the accused and Fisiwe (complainant) in the former's flat, the two were not doing anything or put differently, the accused was not doing anything to Fisiwe. He further confirmed that it was common not only for Fisiwe to occupy the accused's flat, but all the children were used to sit in the accused's flat as he was friendly to them. In fact the children used to spend time not only in the accused's flat or room, but in their rooms or flats as well.

[12] PW4 also confirmed under cross-examination that there was bitterness among his family members, particularly his father and mother about the accused's attending a rival church as they viewed his action as that of a sell out. PW4 did not agree however that the charges against the accused were a result of a conspiracy against him.

[13] The version by to PW5, Gugu Shongwe, the mother of the complainant, which differed from that of PW4 was confronted by PW4, who found her at her room and asked her where Fisiwe (the complainant) was. Her answer had allegedly been that, Fisiwe had left earlier on that morning to the Simelane homestead claiming to be going there to meet a certain Lusanda and to there await the arrival of her grandfather, Mr Simelane. She told the court that Sibusiso had then told her to fetch Fisiwe and that she was likely to get hurt or injured. He had further asked her to enquire from Fisiwe what it is she had been doing at the house of the accused. She was in fact told by the said Sibusiso to scold Fisiwe if she had to, in ascertaining what she had been doing in the accused's house.

[14] PW5 went on to testify that she then left for the complainant, who she however met along the way. She called her into her room where she asked her what she had been doing in the accused's house. This solicited no answer for sometime from the child, who only responded as a result of an insistence from PW5. Even in her response she had allegedly said she feared answering because she suspected she was going to be beaten by her. It is then that she said the child told her that Tema's father (the accused), was proposing for love from her (abengisoma). She said when she asked her what he was using to "propose" for love from her the child had said he had used his manhood to do so. Even this she allegedly divulged after having initially refused to cooperate with her claiming she feared she was going to beat her. The complainant had also allegedly disclosed, when asked, further that the accused had "proposed for love" on the bed.

[15] PW5 testified further that after the child had told her that, she went to the accused's mother and informed her about it. She further claimed to have also informed her about what Sibusiso, PW4 had also told her. She clarified that she had found it important to divulge that to the accused's mother before reporting the accused to the police. The accused's mother allegedly agreed with her confirming that what she had done was the proper procedure in

such matters. The child was thereafter taken to the Sigodvweni Matsapha Police who later arranged for her to be taken to the RFM Hospital in Manzini, where she was examined by a doctor.

[16] I make certain observations on the inconsistences and contradictions in the evidence of PW4 and PW5. According to PW5, PW4 had told her that when the accused came to open the door of his flat after he, (PW4) had knocked thereon, his zippers were undone over and above his being half naked. She further said he had allegedly also said that although he had looked for Fisiwe, he had not seen her in the accused's room. He had also allegedly said that he had only seen Fisiwe later when he peeped through the crevices on the door. At that point she was allegedly lying on the accused's bed facing up. She allegedly had no underwears on and her private parts were allegedly exposed. PW5 said PW4 told her this after she had already reported the matter to the police. At that point she had allegedly come back to him to enquire more on what the latter had seen. As stated above this contradicts sharply and materially from the evidence of PW4, who made no such mention in his testimony.

[17] There is legally a problem with this aspect of PW5's testimony. For starters, what she says here is unconfirmed hearsay evidence as she says she was told same by PW4. PW4 did not tell the Court about all this; particularly that the accused had undone zippers as he opened the door to hand over the keys to him. PW4 had also never said anything about the child, the complainant, having been found by him lying on her back on the bed with her underwears not worn. He further said nothing about the child's exposed private parts as she allegedly lied on her back on the bed. If anything, he said the contrary. PW4 was, under cross-examination, unequivocal that he had found the two, the accused and the complainant, doing nothing in the accused's flat. The complainant had testified that he found her seated next to the bed inside the accused's room and not that she was lying on her back on the bed. He had not said anything about a child who was at the time unhappy or crying as reality would no doubt have called upon her to do. He had also said nothing about failing at any point to see the complainant inside the accused's flat.

[18] Worse still, when PW4 did not confirm this in Court, which would have been against his statement, the crown, which was represented by experienced counsel, did not bring that to the attention of the Court nor did it seek to proceed against the said witness in terms of Section 200 of the

Criminal Procedure and Evidence Act 67 of 1938 nor did it attempt to have him declared a hostile witness so that he could have been dealt with as such. It worsens it that these contradictions happened on what can easily be referred to as the crucial part of her testimony in a rape matter as it was on the element of sexual intercourse.

[19] The reality is that the testimony of the Complainant's mother does not amount to admissible evidence on this point and cannot be accepted. It shows desperation for a conviction on the part of PW5 which would not be necessary as all a witness needs to do is to give the Court the evidence within her knowledge in, as dispassionate a manner as she possibly can be. This conclusion I have come to with regards the testimony of PW5 shall become more apparent later on and as I deal with the evidence of PW1, the medical doctor who examined the complainant. This aspect becomes more apparent as one turns to Exhibit A, the Medical report as filled in by PW1.

[20] When the turn for the complainant to give evidence as PW3 came, I observed that she had a great difficulty to testify and tell the Court what happened to her if anything had happened. This is despite the fact that she

had an experienced intermediary, Miss Olivia Ndlangamandla, assist her. She is on record having said, a number of times that nothing had happened to her only to change her story after a sustained insistence to say that the accused "proposed for love" (wangisoma) from her. Again when asked what she meant by that she struggled to tell the Court. The situation was so dire that she was eventually asked to demonstrate using the dolls in front of her in the special room meant to enable her testify. In her demonstration she simply took one doll and put it on top of the other and that was all. It would be fair to say that she had left the court in much confusion when she testified.

[21] I must say I had been prepared to take it that this was because of her age. She was only four years at the time given that the incident is said to have occurred on the 3rd January 2016 when the trial itself commenced on the 7th December 2017. I was however clear that the testimony of this witness was the type on the basis of which it would not be safe to rely on it without corroboration. It was the kind of testimony on the basis of which this court had to caution itself.

[22] According to the evidence tendered in Court the complainant was examined by Dr S.R. Kavira. She after setting out her qualifications testified to the effect that she was a medical doctor, based at the Manzini Nazerene Hospital, also known as the RFM Hospital. She said that her job entailed the examination of patients who in the main comprised victims of sexual assaults. This she said she had done for 10 years as of the date she gave her testimony. She confirmed having examined the complainant who had been brought to her on the 3rd January 2018. This person was, Fisiwe Mnisi, who she said was a girl of four years. She had been given a certain form to fill in with her observations or findings.

[23] According to the form she filled in, Exhibit A, the complainant Fisiwe Mnisi had been brought to her for examination following allegations of sexual assault. She was four years at the time. Her physical condition was healthy, she observed. Her mental state was normal. She was not sexually active. She had not started menstruation. She had no pregnancies previously. She had not been assaulted. On whether or not she had suffered any injuries she recorded nil. On the Status of her breasts she recorded, it was tanner stage 1. Her Labia Majora had no injury. Her Labia minora had no injury as well. Her Vestibule had no injury. On the condition of her hymen she entered the

following phrase: “wide, appear stretched but regular”. No vaginal finger insertion was done. On the condition of her Fourchette she recorded nil meaning it had no injury. Her Perineum had no injury as well. She had no haemorige from her private parts. She also had no Discharge. The examination she said was painful.

[24] She said because of the pain felt by the patient taken together with the “wide, stretched but regular hymen”, she had concluded that penetration was “likely”. She also revealed that vaginal smears were taken for laboratory examination. It was not so easy to tell what she meant by penetration being “likely” instead of clarifying whether or not same had occurred. This therefore called for an explanation from her. I shall revert to that later on in this judgement as it is an area she covered.

[25] This witness was cross examined at length on the meaning and effect of the examination and the findings reached by her. Asked on what made her conclude that penetration had been “likely”; she attributed that to the pain allegedly felt by the complainant when examined. She agreed when challenged on that conclusion that it was possible with a child of the

complainant's age to conclude that she was feeling pain when she was crying out of fear of what was being done to her than really out of a painfull examination. Speaking for my own I must say I find it very hard to believe that the child's crying during the examination depicted the pain she felt then when considering she had not been found crying immediately after the alleged rape as testified to by PW4 and her own mother when she confronted her about what had happened to her inside the accused's house or flat. Furtherstill, although it was on the same day of her alleged rape, the doctor had found both her physical and mental state to be normal, which was not consistent with a child of that age who would have just been raped.

[26] I am certain that for the finding of the Doctor to stand in this regard, one needs to understand that she was reasoning by inference. That is to say she was construing by circumstantial evidence. This in law can only stand if it is shown to be the only reasonable inference to draw from the set of facts, which is consistent with all such facts. The inference by the Learned Doctor on this point was clearly not the only one. On the process of reasoning by inference and what it means, see the judgements of **Rex Vs Musa Fakudze and 11 Others, High Court Criminal Case No.42/2007, Gofhadimidimo V The State, 1984 BLR 119 (CA); R V Blom 1939 AD 188 at 202-203**.

[27] From the Doctor's findings it cannot be denied that there was some interference with the complainant's private parts in any other way than she being penetrated. The Doctor herself said as much when she eventually rendered the penetration doubtful but maintained that interference had taken place. In a matter where the facts are heatedly debated and disputed it would not be safe to conclude on the basis of an inference where such inference is not the reasonable one to draw from the facts. In a matter where the evidence reveals lots of controversies and disputes, the inference should not only be that there was interference with the girl's private parts but also on who had done it.

[28] Firstly, and most importantly, although vaginal smears were taken according to the Doctor, there were no results brought to Court from the laboratory where she said they had been taken to. Although she in fact asked for a break in Court to go and collect same when I insisted on seeing them as I believed those results would answer the question on who interfered with the complainant, particularly if it was the accused, when she returned the answer

was that the swabs in question or their results had been lost without a trace. This complicates the matter further as it means that the identity of the person who interfered with the complainant's private parts could not be scientifically ascertained when it could have and in fact should have been, which means that the person responsible for that could not readily be ascertained, so as to eliminate markedly the possibility of convicting an innocent man.

[29] That I cannot possibly or realistically find there to have been penetration of the complainant's private part is because there is no proof beyond a reasonable doubt in that regard because from the Doctor, PW1 herself, when she used the phrase "penetration likely", she actually meant to distinguish the case from that where penetration had realistically been proved. She in fact said that she meant to say that there had been some interference with the girl's private parts than that there had been real penetration.

[30] To try and understand what she meant when she said penetration was likely, she was asked where she would put it on the scale of 1-10 (one being the lowest and 10 the highest that it had occurred). She had informed the court

that it would be at 5 out of 10. I have no hesitation this means that there is a doubt on whether there had been any penetration despite that this is one of the essential elements of the crime of rape which needed to be proved for a successful conviction as it would go to proving sexual intercourse.

[31] This means that even if it would remain unanswered on who did it were to be agreed that an interference with the complainant's private parts had taken place, the question on who did it would remain unanswered and to try and answer it would highly speculatory. Whereas I have no hesitation the vaginal swabs that had been taken from the complainant for examination, would have cleared this once and for all, their loss has not helped matters because it means that a case has not been proved beyond a reasonable doubt in a matter where the Court had to engage a cautionary approach as in this one. This simply means that it has not been proved beyond a reasonable doubt on the evidence that the accused committed the alleged offence. Where that is the case the law is clear on what the outcome should, taking into account that the accused has no duty to prove his innocence.

[32] Although the cautionary rule as applied and defined in such cases as **R V Mthimkhulu, Mzamo 1987-1995 (2) S.L.R.403 (HC); R V Phazamisa Kunene, Review Case No. 198/1989** as well as **Sandile Dlamini V Rex Appeal Court Case No.19 of 1988,** is no longer the law in this jurisdiction as was decreed by the **Supreme Court in Sandile Shabangu Vs The King, Criminal Appeal Case No.15/07 (unreported),** nothing stops this court from applying a cautionary approach where the evidence in a particular matter calls for such. See in this regard **SV Jackson 1998 (1) SACR 470 (SCA); Gcinumuzi Manana Vs The King (241/2017) [2017] SZHC 187 (13th September 2017**). I am afraid the evidence analysed above calls for such an approach to eliminate the possibility of convicting and sending into custody an innocent man which is the primary function of a Court in criminal proceedings.

[33] Otherwise the now outmoded cautionary rule, which is no longer part of our law was expressed in the following words in the **RV Mthimkhulu (Supra) judgement**:-

> *"The need for corroboration of a complainant's evidence in cases of rape has been dealt with in*

numerous decisions of the High Court. The Principal Magistrate's treatment of the evidence does not indicate that his attention was ever directed at the question of corroboration. His finding that the issue in the trial boiled down to being the word of the complainant against that of the accused clearly indicates the absence of corroboration of the complainant's evidence and the failure of the prosecution to prove the accused's guilt beyond (a) reasonable doubt." (underlining is mine)

[34] That this cautionary rule is no longer a part of our law was captured in the following words in **Sandile Shabangu V Rex Criminal Appeal Case No.15/07 at paragraph 10** of the unreported judgement:-

*"In the present case the trial Judge, Mamba J, adopted the reasoning in the **Jackson** case and came to the conclusion that the cautionary rule in sexual cases is outmoded and should no longer be part of the Law of Swaziland. I agree. My conclusion is that the approach set out in the Jackson case is to be applied in Swaziland.*

The evidence in a particular case may call for a cautionary approach but there is no general cautionary rule applicable to the evidence of complainants in rape cases. (underlining is mine)

[35] In departing from the cautionary rule as hitherto applied and as expressed to in the Mthimkhulu Judgement referred to above, the South African Supreme Court of Appeal had said the following in **SV Jackson 1998 (1) SACR 470 (SCA) (the so called Jackson Judgement)**, which is similar to the position expressed in **Sandile Shabangu V Rex (Supra)**.

"In my view, the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complaints in sexual assault cases (overwhelmingly by women) as particularly unreliable. In our system of law, the burden is on the state to prove the guilt of an accused beyond a reasonable doubt- no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from

the application of a general cautionary rule."

(underlining is mine)

I must clarify that the principle enunciated in the Jackson judgement, was a result of a comparative study of the legal position in the concerned area from local, foreign and even intercontinental jurisdictions.

[36] By referring to these various judgements on what the cautionary rule is, including its application or otherwise in our current law I am just trying to illustrate that although I am not really applying the so called cautionary rule, there is a need in appropriate cases, like the present one, to adopt a cautionary approach as was stated in both the **Sandile Shabangu V Rex (Supra) and S V Jackson (Supra)** judgements. Dealing with a similar situation in **Gcinumuzi Manana V The King, High Court Appeal Case No. (241/2017) [2017] SZHC 187**, I said the following at paragraph 14 therein:-

"It follows that I cannot agree with Mr Dlamini for the appellant that it was wrong for the Principal Magistrate to have convicted the appellant without the evidence of the complainant having been corroborated or on its being the

evidence of a single witness, namely the complainant. It is something else though whether the evidence in the matter did call for a cautionary approach… In so far as Mr Dlamini sought to suggest that the version of the complainant's testimony should have been corroborated and that because it was not, there should not have been a conviction, that is no longer a correct expression of the position of our law and it should therefore be rejected."

[37] The point being made herein is that from the facts of the matter set out above, it is clear that although a cautionary rule is no longer a part of our law, it is nonetheless imperative that this court adopts a cautionary approach because of the nature of the facts and circumstances revealed by the evidence in the matter. This is because of the overall unreliable nature of the evidence connecting the accused with the offence herein given that it is characterized by inconsistencies, contradictions, lack of credibility and even insufficiency of evidence as discussed above.

[38] Otherwise on the applicable law in rape matters, the position is settled that three things have to be proved beyond a reasonable doubt in such matters. These are the identity of the accused, the lack of consent by the complainant and proof of sexual intercourse having occurred as a fact. See in this regard **Mandlenkosi Daniel Ndwandwe Vs Rex Appeal Case no.39/2011; Mbuso Blue Khumalo V Rex Supreme Court Case No.12/2012 and Nkosinathi Sibandze V Rex, Supreme Court Case No.31/2014**.

[39] The identity of the accused is not in issue at all. The accused is known, not only to the complainant but also to his brother Sibusiso Simelane PW4, who is the one that set the ball rolling by informing PW5 about his suspicions. Although his version contradicts markedly that of PW5 in material respects, it is a fact that he is the one who raised the suspicion and perhaps even added some fabrication if the testimony of PW5, which he did not confirm in Court, is to be believed. The only issue towards the identity of the accused is as concerns the question whether or not the accused has been proved beyond a reasonable doubt to be the one that interfered with the complainant's private parts on the evidence before Court. I deal comprehensively with this aspect of the matter later on in this judgement.

[40] The lack of consent is also a non-issue in this matter given that the complainant was admittedly four years at the time the offence occurred. The position of our law, which has been referred to in numerous judgements of this court, is that a girl of less than 12 years cannot consent according to the common law such that even in those cases where she purport's to consent, sexual intercourse with her is rape. In this matter the complainant was four (4) years at the time the offence was committed which means that if there had been sexual intercourse with her, then rape would have to be construed as having occurred in our law. See in this regard **RV Mgcineni Mamba H.C. Criminal Trial No. 217/07; Rex V Simphiwe Mkhaliphi H.C.Criminal Case No.62/10; Rex Vs Justice Magagula Criminal Case No. 330/03; R V Z 1959 (1) SA 739 (A) at 732 A-D**.

[41] In **Rex Vs Sicelo Dlamini High Court Case No.34/2016 [2016] SZHC 10 (4 December 2016)** I captured this position in the following words:-

> *"21 The position of the law on this point is however that for there to be found that indeed sexual intercourse or penetration had occurred, it is not a requirement that the hymen be broken or*

torn as it sufficed for the male organ to be found to have gone inside the body of the complainant in the slightest possible way. Equally important, and although it would often be the case, semen need not have been emitted. The case of ***Nkosinathi Sibandze vs Rex, Supreme Court Case No. 31/2014*** *is instructive in this regard.*

"22 To underscore this principle, it is important to once again refer to the oft quoted excerpt from ***PMA Hunt's book, The South African Criminal Law and Procedure,2nd Edition, Juta and Company, 1982 at page 440****, where the correct position of our law is expressed in the following words:*

> *"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 be raptured, and in any case it is not necessary that semen be emitted. But if there is no penetration, there is no rape even though semen is emitted and pregnancy results."*

[42] In the case of sexual intercourse having to be proved as a fact, it is apparent that this is where the issue is in the present matter. Although after a lot of dilly – dallying the complainant ended up implicating the accused as having had sexual intercourse with her, it is a fact same was not said in a convincing manner. It was after the complainant had said several times that the accused did not do anything to her that she implicated him. Whereas the benefit of a doubt could have been given to her in view of her age and particularly, if there was any credible evidence proving not only that there was sexual intercourse, but that it was by the accused, that turned out not to be the case even though means had been made to prove this aspect through the forensic examination of the vaginal smears that had been taken.

[43] The very suspicion that the accused had sexual intercourse with the complainant, as brought up by Sibusiso Simelane has been shown by the evidence to be completely unreliable. That is why in my view there is a contradiction between the evidence of PW4 and PW5. Whereas it is clear that PW4 developed the suspicion he did because he found the accused and the complainant inside a closed room where the accused came out half naked in response to his knock, even though everything else appeared normal in all other respects, PW5, despite that she was not even there, suggests that when

the accused came out of the flat/ room after PW4 had knocked, he had his zippers down and that PW4 had not seen the complainant. According to PW5, PW4 had allegedly only seen her later as he peeped through some crevices on the door, where she was allegedly now seen lying on the bed on her back with her underwears having been removed.

[44] These allegations were not confirmed by PW4. This is further contrary to PW 4 having said that he had actually seen the child when the accused opened the door in response to his knock at the door and that she was actually seated next to the bed. Crown Counsel did not did not indicate any discomfort with PW4's evidence yet if he was deviating from a recorded statement or generally refusing to testify as envisaged by Section 200 of the Criminal Procedure and Evidence Act 67 of 1938, he should have been dealt with according to law.

[45] The evidence depicts the complainant's mother, PW5, as having desperately tried to fabricate a case against the accused in the hearsay evidence she gave. The instances she referred to as cited above, implicating the accused are for that reason unreliable and are inreality not evidence recognized in law.

Furtherstill although her evidence sharply contradicted or became inconsistent with that of PW4, the Crown had not applied to have PW4 dealt with in terms of the law if what he was saying could be taken as a deliberate deviation from the statement recorded. It only complicated matters in Court when PW5 herself started accusing PW4 of being untrustworthy and of having told lies in court.

[46] The position worsened by the unreliable nature of the medical evidence as recorded in the Medical Report by the Doctor, PW1 as taken together with her oral testimony. The doctor could not only not confirm lack of sexual intercourse but some interference. Such would not be enough in a matter like this to result in the conviction of an accused where although vaginal smears were taken through the use of certain swabs for medical examination to prove who it is that was responsible for that interference, the results of the examination of the swabs could not be tendered in Court it being alleged they got lost. The loss of such crucial evidence in a matter where those results may have been the only evidence to link the accused with the offence unequivocally, is telling and cannot be taken lightly.

[47] The position of our law is clear that an accused person has no duty to prove his innocence, it being the duty of the crown to prove his guilt beyond a reasonable doubt.

[48] Although it was suggested by the crown that the slightest degree of entry into the complainants private parts amounts to penetration and by extension to rape in law, a principle with which I agree fully, there is no evidence that what had allegedly interfered with complaint's genetalia was a male sexual organ let alone that of the accused given the disappearance of the laboratory results taken together with the lack of quality in the evidence by the crown witnesses, around this vital evidential requirement. Where the quality of the evidence is not so clear in the backdrop of all these conspiracy theories, this court need to be extremely cautious in its approach.

[49] Lastly although all sorts of conspiracy theories were raised by the accused on why a case had allegedly been fabricated against him, ranging from the church factions and the complainant's mother having been jilted by him and therefore allegedly getting even by implicating him, I make no findings in that regard. Some parts of these allegations would require me to draw

certain inferences. It however would be unsafe for me to do so as those inferences suggested are not the only ones to draw from the facts as the principle of law requires. I cannot rule out the possibility that a misplaced suspicion caused all this; regard being had to the evidence of Sibusiso Simelane, PW4 which was the genesis of the charges.

[50] For the foregoing reasons, I am convinced that a case of rape has not been proved against the accused person beyond a reasonable doubt which is the applicable standard in criminal matters. Consequently the accused person is found not guilty and he is acquitted and discharged.