THE SUPREME COURT OF SWAZILAND

JUDGMENT

Appeal Case No: 31/2011

In the appeal between:

ZIMELE SAMSON MAGAGULA **Appellant**

and

REX **Respondent**

Neutral citation: *Zimele Samson Magagula vs The King 31/2011 SZSC 01 [2012] (31 May 2012)*

Coram: **EBRAHIM JA**

DR. TWUM JA

M.C.B. MAPHALALA JA

Heard: **3 MAY 2012**

Delivered: **31 MAY 2012**

Summary: **Criminal Appeal – Conviction of rape of four year old girl – Appeal against conviction and sentence dismissed – No misdirection by the trial court – Sentence not grossly excessive or harsh – Cautionary rules relating to sexual offences.**

EBRAHIM J.A.

[1] The appellant in this matter appeared both in this court and in the High Court.

[2] He was convicted of rape of a young girl aged four years. The Crown alleged that aggravating circumstances as mentioned in section 185 bis of the *Criminal Procedure and Evidence Act 67 of 1938* as amended were present. He was sentenced to fifteen (15) years imprisonment.

[3] The facts are that on the 26th April 2008, the father of the complainant proceeded to where his grandmother resided in a different village to which he lived. He was accompanied by his minor children, one of whom was the complainant, a little girl of four years of age. They travelled in a motor vehicle and on the way met the appellant who then joined them. The car was parked a distance away from his grandmother's homestead and only the complainant, the appellant and the father proceeded to meet the grandmother at her home. The other children were left behind in the vehicle.

[4] Whilst the father was involved in discussions with his mother the appellant left the hut with the complainant. It was after he had completed his visit that the father looked for his four year old daughter and the appellant. They were nowhere to be found. He proceeded to where he

had left his car and his other children only to find that the appellant and the complainant were not there. He called out for the appellant and the complainant and soon thereafter the appellant emerged from a nearby bush and it appeared to this witness that he had been running.

[5] The appellant apologised to the complainant's father without explaining why he was doing so. They then all returned to their home. This all happened on a Saturday.

[6] On the Monday whilst the complainant was being bathed she complained of pain on her private parts. The witness who was bathing her, observed what looked like dried blood around the complainant's vagina. On being questioned on what had happened to her she told the witness that she had been pricked with a thorn by the appellant. The witness reported the matter to the victim's aunt who then questioned her only to be told that the appellant had inserted his penis into her vagina. On being confronted the appellant denied the accusations levelled against him.

[7] The complainant told the court how she and the appellant had left the grandmother's house whilst her father was talking to her. They went to a certain homestead where the appellant was given some brew which he drank. They then left. Along the way they branched off into a nearby bush where the appellant caused her to sit on his lap and inserted his penis into her vagina. They then left but before reaching the car, they stopped

and the appellant obtained a thorn and pricked her on her vagina. She also confirmed on what had transpired when being bathed on the Monday.

[8] The complainant was taken to a medical practitioner who examined her. He noted that her hymen was perforated whilst her fourchette had a tear. It was a painful examination. The doctor concluded that penetration had been effected.

[9] The appellant was arrested on 3rd June 2008 and was brought to trial. He was convicted and sentenced to fifteen years imprisonment. The sentence was backdated to 3rd June 2008.

[10] The complainant in this case was for all intents and purposes a single witness in relation to the incident in which she was embroiled with the appellant. The learned trial judge was conscious of the dangers inherent in convicting the appellant when faced with such evidence. This is evident from his judgment. He stated:

> "The position is now settled that in rape matters the court should not only apply the cautionary rules and seek that there be corroboration of the complainant on certain specific areas, but must be alive to the fact that the crown bears the onus of proving three things beyond a reasonable doubt including corroboration of such things as, the identity of the accused, the fact of the sexual intercourse and the lack of consent by the complainant. In *The King v Vlademar Dengo Review Case No.843/88 (unreported)* the

learned *Rooney J* is quoted in *Rex v Justice Magagula Criminal Case No.330/02 (unreported)* at page 2 as having stated 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 cases must be directed to.
>
> (a) the fact of sexual intercourse or indecent assault;
> (b) the lack of consent on the part of the complainant; and
> (c) the identity of the accused. Any failure by the trial court to observe these rules of evidence may lead to a failure of justice."

[11] In the case of *Sithembiso Shongwe v Rex Criminal Appeal 21/2010* I stated:

> "In the case of *R v Manda 1951(3) S.A. 158* at 163 at para C to F *Schreiner, JA* stated as follows:
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> The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinized with care amounting, perhaps to suspicion. It seems to me that the proper approach to a consideration of their evidence is to follow the lines adopted in the case of accomplices (*Rex v Ncanana, 1948 (4) S.A. 399 (A.D.))* and

> in the case of complaints in charges of sexual assault (*Rex v W., 1949 (3) S.A. 772 (A.D.)).* The trial court must fully appreciate the dangers inherent in the acceptance of such evidence and where there is reason to suppose that such appreciation was absent a court of appeal may hold that the conviction should not be sustained. The best indication that there was proper appreciation of the risks is naturally to be found in the reasons furnished by the trial court.

See also *Eric Makwakwa v R Criminal Appeal 2/2006*."

I also made reference to the case of *S v J 1998 (1) SACR 470 (SCA)* where *Olivier JA* on behalf of all members of the FULL BENCH stated:

> "In my view, the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainants in sexual cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the state to prove the guilt of an accused beyond reasonable doubt – no more 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.

In the case, however, of *S v van der Ross 2002 (2) SACR 362 (c)* the court sounded the following caveat regarding the abolition of the cautionary rule.

> The judgment in *S v J 1998 1 SACR 470 (SCA)* does not mean that trial courts are free to convict in an indiscriminate and reckless manner where the charge is of a sexual nature. It also does not mean that in those cases courts no longer have to be cautious. On the contrary, criminal courts should be encouraged to exercise

extreme caution before they convict people on serious charges, such as rape.

The issue of the cautionary rule relating to sexual offences in Swaziland was dealt with by *Zietsman J.A.* in *Sandile Shabangu v The King CA 15/07* [available on the internet on the Swazi Legal Information Institute Website] at pages 8 and 9 where he stated:

> 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 assault 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 [*S v J, supra*] 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.

This does not mean that the nature and circumstances of the alleged sexual offence need not be considered carefully."

[12] I am satisfied that on the evidence in this case the appellant was properly convicted. The complainant who gave evidence was just barely four years old. She told of how the appellant had sat her on his lap and he penetrated her with his penis. She also stated how he had then pricked her with a thorn. In my view it would be stretching credulity too far to hold that she made up this story in order to secure the appellant's conviction.

[13] The fact that the appellant clandestinely filtered her away from her grandmother's homestead whilst her father was talking to her grandmother is clearly consistent with the nefarious conduct of the appellant.

[14] The medical evidence is also corroborative of her story. She also remained consistent in telling her story to the court.

[15] In my view the complainant has not manufactured the allegations that she was raped by the appellant. There is nothing to suggest, applying all the cautionary steps necessary in determining the truthfulness of the complainant; that the learned judge a quo got it wrong in convicting the appellant.

[16] I turn now to deal with the appeal against sentence. In the case of *Phumlani Masuku v The King Criminal Appeal No.33/2011 Dr. Twum JA* stated:

> "Generally, an appellate court would not interfere with a sentence passed on an accused person by the court below, unless the court below misdirected itself, or the sentence breached a statutory compulsory minimum sentence or it was unduly severe or lenient, as to run counter to guidelines set by the appellate court."

[17] I refer also to the case of *Sithembiso Seven Dlamini Criminal Appeal No.34/2011* where *Farlam J.A.* stated:

> "A instructive collection and analysis of sentences imposed in cases of this kind is contained in the as yet unreported judgment of this court in *Mgubane Magagula v The King, Criminal Appeal 32* of 2010, delivered on 30 November 2010. From that judgment it appears that the sentences imposed in this case are well within the appropriate range for offences of this kind and no basis exists for interfering. Indeed this appeal, like the appeal in *Magagula* can correctly be described as 'entirely devoid of merit'."

[18] It is instructive also to look at what *Moore J.A.* stated in the case of *Mgubane Magagula v Rex Criminal Appeal No.32/2010* and in particular from pages 12 to 16 of the cyclostyled judgment.

[19] In the present case the appellant behaved in a barbaric manner in raping a little girl of four years of age. He has shown no remorse. In my view he deserves no sympathy.

[20] His appeal both against conviction and sentence is devoid of merit and accordingly is dismissed in its entirety.

A.M. EBRAHIM
JUSTICE OF APPEAL

I AGREE : _____

DR. S. TWUM

JUSTICE OF APPEAL

I AGREE : _____

M.C.B. MAPHALALA

JUSTICE OF APPEAL

For Appellant : **In person**

For Respondent : **Ms. L. Hlophe**