



IN THE HIGH COURT OF ESWATINI
JUDGMENT

HELD AT MBABANE

CASE NO. 412/2010

In the matter between:

REX

Versus

MLUNGISI EDWARD DLAMINI

Neutral Citation: *Rex vs Mlungisi Edward Dlamini [412/2010] [2020]SZHC 238*
(11 November 2020)

Coram: M. LANGWENYA J

Heard: 26 August 2019; 3 June 2020; 8 July 2020; 27 July 2020; 11
November 2020

Delivered: 11 November 2020

Summary: *Criminal law- rape- accused charged with rape –aggravating factors alleged- essential elements of the offence considered- all elements of offence have been established by the Crown- accused convicted of offence of rape with aggravating factors.*

JUDGMENT

- [1] The accused is charged with rape, it being alleged by the Crown that on or about the month of September 2010 and at or near Khalangilile area in the Manzini district, the accused intentionally had unlawful sexual intercourse with Mbali Dlamini, a female minor aged seven (7) years old who in law is incapable of consenting to sexual intercourse and did thereby commit the crime of rape.
- [2] In line with the provisions of section 185*bis* of the Criminal Procedure and Evidence Act 67/1938 further alleged that the crime is attended by aggravating circumstances in the following terms: (i) the complainant is a minor of tender age; (ii) the accused did not use a condom thus exposing the complainant to the risk of contracting sexually transmitted infections including HIV/AIDS.
- [3] The accused pleaded not guilty to the charge.
- [4] The Crown made an application in terms of section 223*bis* of the Criminal Procedure and Evidence Act to enable the complainant to give evidence with the assistance of an intermediary. The Court granted the application. The intermediary took an oath before assisting the complainant in giving her evidence.

- [5] The medical report was entered as exhibit 1. It reflects that the complainant was examined by a doctor on 22 September 2010 at Mankayane government hospital. The doctor's remarks and opinion were that there is evidence of penetrative sexual intercourse in addition to the complainant carrying a sexually transmitted infection. The report reflects also that the vaginal examination of the complainant was painful and that she had copious discharge.
- [6] The complainant was admonished to speak the truth, and, she understood what was expected of her. The complainant testified that she is related to the accused. In 2010, she was a student at Khalangilile Primary School where she was doing Grade 1. She had a friend-Wendy Mahlambi-who also attended the same school. Wendy lived in accused's homestead. The complainant would from time to time go to accused's home to play with Wendy after returning from school.
- [7] In September 2010, she returned from school and went to visit Wendy at her homestead. Wendy's homestead is close to that of the complainant. She did not find Wendy at home. Only the accused was at Wendy's home. Mbali testified that he greeted the accused and enquired about Wendy's whereabouts. Accused told her she was not at home. Accused then directed Mbali to get inside his house. Once she got inside the house, the accused picked her, lifted her and took her to his bedroom. He lay her on his bed, took off complainant's panty, pants, T-shirt and jersey. The accused also

undressed and thereafter inserted his penis into Mbali's vagina and had sexual intercourse with her. As a result of the rape, blood and other white fluids came out. When the accused was finished with his act, he told the complainant that he loved her. The complainant says he retorted by saying the accused was mad. The accused admonished the complainant not to tell anyone about what had happened and that if she ever told on him, he would kill her. The complainant obliged and told no one about her ordeal.

[8] She went home and on the following day, she went to school. Her class teacher noticed that she was walking with difficulty a week after she had been raped. Her class teacher asked what the matter was and complainant told her she had a rash between her thighs and also a bad odour. When her teacher probed further, complainant told her when she passed urine she felt pain. Mbali says she was scared to tell her teacher about what had happened as the accused had threatened her with death if she told anyone about her ordeal.

[9] Mbali's class teacher is said to have referred her to her career guidance teacher. She told her the same version that when she passed urine she felt pain. She was told by her teacher to go home and ask her guardian to take her to hospital. She was taken to Luyengo clinic and later to Mankayane government hospital. When she went to Mankayane government hospital she was in the company of anti Tenele and the police. She was examined by a doctor. Mbali testified that she told the doctor she was raped by the accused,

a person that she knows as Mtheni Mlungisi Dlamini. She was given treatment.

[10] After the matter was reported to the police, the complainant testified that the accused started looking at her in a bad way.

[11] During cross examination, Mbali stated that the accused is her uncle and that it was not the first time she had gone to visit Wendy at accused person's home. It was put to Mbali that after school hours Wendy did not go home, she would, instead go to the market place and spend time with her grandmother-the accused person's wife. Mbali admitted that Wendy did go and be with her grandmother after school hours but stated that Wendy would go home if they had planned on visiting each other.

[12] According to the complainant, the accused was not a violent person; he was friendly towards her prior to the rape incident. Even though accused was not violent person, Mbali testified that after the rape, she thought if she told anyone about it there would be problems as the accused was an older person. She testified that she could not raise an alarm when accused raped her because the accused shut her mouth forcefully and told her not to make noise.

- [13] After the accused had finished raping her, he told her to put on her clothes and that he loved her. It was put to the complainant that she was not raped by the accused and her response was that she was raped by the accused.
- [14] PW3 is Nomsa Patience Dlamini and a maternal grandmother of the complainant. She testified that she examined Mbali after she came home with a letter from school that requested them to take her to the hospital. She testified that Mbali emitted a bad smell and when she examined her she saw she had a rash between her thighs and there was also a discharge coming from her vagina. She sent Tenele to take complainant to Luyengo clinic and to Mankayane hospital. It is her evidence that the matter was reported to the police by Mbali's teachers. She told the court she was pained by the fact that the accused-an uncle to Mbali-raped the child. PW3 confirmed that Mbali and Wendy Mahlambi were friends and that they used to play with each other.
- [15] As a result of the rape incident, the relationship between the accused's family and the family of PW3 took a turn for the worse. Before PW3 was even aware that the complainant had been raped, she testified that the accused came to her and stated that there are rumours that he has raped Mbali. The accused is said to have told PW3 that it was not true that he had raped Mbali. At the time accused made these utterances, PW3 says she was not yet aware that the accused was a suspect. This evidence was not controverted by the accused.

[16] It was put to PW3 that evidence will be led to the effect that the accused called Tanele and told her that the school wanted Mbali's guardian to come to the school. Aside the fact that no such evidence was led by the defence, the question that begs an answer is why the accused would take an active interest in the matter if he had nothing to hide.

[17] The Crown further led the evidence of the investigating officer 5019 Sergeant Thenjiwe Madonsela. She told the court she was assigned the docket of this matter while she was stationed at Malkerns police station in 2010. She recorded a statement from the complainant. She also went to accused's homestead at Khalangilile in the company of 3147 Sergeant Motsa and 3449 Constable Fakudze. They found the accused at his home, introduced themselves and explained their mission to him. The accused was cautioned in terms of the Judges' rules and was taken to the Malkerns police station where he was again cautioned in terms of the Judges rules and RSP 218 was filled. The accused was charged with rape.

[18] Statements were also recorded from complainants' teachers.

[19] It was the investigating officer's evidence that she did not take Mbali to Mankayane government hospital, different police officers did so.

[20] The Crown closed its case.

Defence Case

- [21] The accused gave his evidence as DW1. He testified that between the years 2009 and 2010 he was employed at Paper Mills and left home at 7am, started work at 8am and returned home at around 6pm. It was his evidence that Wendy was his wife's granddaughter who lived with them at his home. The accused stated that she does not know that Wendy was friends with Mbali as he had never seen them play together. He testified also that when Wendy came out of school, she would not go home but would go to the market and stay with her grandmother.
- [22] The accused denied having sexual intercourse with Mbali. He stated that he could not have raped Mbali as he was at work at the time it is alleged he did so.
- [23] During cross examination, the accused was asked why the version that he was at work was not put to the Crown witnesses. Instead of responding to the question, the accused prevaricated. He insisted he was at work; that his wife prepared a lunch box for him; that when police came to take him to the police station he was still in his work uniform; that is why, he stated for good measure, he was sure he was at work.
- [24] The accused testified that Mbali was not a frequent visitor at his home-and this was because during the day, no one was there. He told the court that the

motive for Mbali to accuse him of raping her was because he cut power at the house PW3 was using on the instruction of a family member.

[25] The accused's wife-Sibongile Gugu Dlamini testified on behalf of her husband. She was called as DW2. She confirmed the evidence of the accused that he was not at home on the day he is alleged to have raped Mbali. She also confirmed that the accused had a misunderstanding with Mbali's grandmother. PW3 Nomsa Dlamini is said to have had an illicit affair with her husband's brother. The accused is said to have admonished the pair to desist from what they were doing. According to DW2 this might have been the reason Mbali's grandmother started saying the accused raped Mbali. This evidence does not take into account the fact that it was not Mbali's grandmother who reported the matter to the police; it was Mbali's teachers who did so. This version was also not put to Mbali's grandmother.

[26] When DW2 was asked if, when she is away at the market she would know if any person came to her homestead, she embellished her response as follows: she said no one remained at home; accused was at work. When pressed further about the same question, she relented and stated that she would not know who came to her home if that person did so while she was away at the market.

[27] It was DW2's evidence that Mbali would not come to accused's home because she was not acquainted with Wendy Nontobeko. It was DW2's view

that Mbali may have been told by her grandmother to implicate the accused in the rape. When DW2 was confronted with the evidence of the doctor that Mbali was indeed raped, her response was that she has nothing to say.

[28] DW3 is Richard Nathi Bhembe. His evidence is that he worked with the accused at Paper Mills. DW3 was attached at the Tissue department while the accused worked at the Iron cutting department. He would see the accused during the lunch hour at work. The accused was always the last one to leave work because he had to account for all the tools they used and report to the employer. It was his evidence that he wonders how the accused could have raped someone because he was at work all the time. The evidence of DW3 must be taken with a pinch of salt. DW3 was not part of the human resource department nor was he a supervisor of the accused to know when he would or would not be at work.

Application of the Law to the Facts

[29] The fundamental principle of our law is that the prosecution has a duty to prove the guilt of the accused beyond reasonable doubt. In a rape case, the prosecution must prove the identity of the accused, the fact of sexual intercourse as well as lack of consent¹. There is no dispute with the identity of the accused as the complainant knows the accused well. Further, the medical report corroborates the evidence of the complainant in material respects as it further proves the existence of the aggravating factors alleged

¹ See: *Mbuso Blue Khumalo* Criminal Appeal Case No. 12/2012 at para 28.

by the Crown. The doctor concluded that there was penetrative sexual intercourse attended by a sexually transmitted infection.

[30] The complainant was only seven years old at the time the incident occurred. Her grandmother testified that she was born in 2003.

[31] In terms of our law, a child of complainant's age is regarded as incapable of giving consent to sexual intercourse. The Crown did allege in the indictment that the complainant was incapable of granting consent as aforesaid. In this case, the complainant was attending a primary school in grade 1 at the time of the incident. Consequently, the child could not, under the circumstances be reasonably regarded as having both the *intellectus* and *judicium* to consent. Her age leads to the only inevitable conclusion that she was clearly far below the age of consent.

[32] The complainant positively identified the accused as Mtheni and as her uncle.

[33] Our law requires me to adopt a 'cautionary approach' to the evidence of a child-this is less than a need for corroboration. This legal position is eloquently stated by the court in *S v Koch*² in the following terms:

² (CC20/2017)[2018] NAHCMD 290 (18 September 2018)

‘[12] There is no requirement that a child’s evidence must be corroborated. It is settled however that the trier of fact must approach such evidence with caution and be alert to the dangers inherent therein³.’

‘[13] It is important in hearkening to the injunction for caution, for the court to pay special attention to aspects and circumstances which accentuate the risk of the child’s evidence having been influenced in some way or being the product of a child’s fertile imagination. It is unhelpful in that exercise to take the armchair approach to the evidence. As the primary fact-finder, the trial court must, within the parameters of law of evidence, be guided by common sense. All told, a court should only convict on a child’s evidence if it is safe to do so. It should be satisfied beyond reasonable doubt as to the truth of the child’s evidence and the guilt of the accused.’

[34] I am alive the risks associated with the evidence of a single child witness in sexual offences and I accordingly warn myself in considering the evidence of the complainant.

[35] The accused failed to put his case to the Crown witnesses. It was only when the accused was giving evidence that he raised the defence of an *alibi*. It was never put to the Crown witnesses that the accused was away at work when it is alleged he raped the complainant.

[36] It is settled law that an opposing party is under a duty ‘when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’ attention to the fact by questions put in cross examination showing that the imputation intended to be made and to afford the witness an

³ See also: *R v Mhanda* 1951 (3) SA 158(A) at 163; *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020(A) at 1027H-1028A.

opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character⁴.’

[37] There is accordingly no basis in law for this court to discredit any of the Crown witnesses on aspects of their evidence which was left unchallenged in cross examination. To the contrary, evidence that only emerged during the testimony of the accused might be criticized of having the making of an afterthought or being fabricated.

[38] In the present matter none of the Crown witnesses who implicate the accused as the perpetrator was discredited during cross examination and neither is there proof these witnesses having jointly concocted their respective versions to falsely incriminate the accused.

[39] The legal position on *alibi* is trite. There is no duty on the accused to prove his *alibi* if it is reasonably true, then he must be acquitted. The *alibi* must further not be considered in isolation but in light of the totality of the evidence. When the court is faced with an *alibi* that is false, the effect thereof on the accused’s case is that it places him in a position as if he had never testified at all⁵. The giving of a false *alibi* in the circumstances where there is direct evidence of the commission of the offence, *ipso facto* tends to

⁴ *The President of the Republic of South Africa and Others v South African Rugby Football Union & Others* 2001 (1) (CC) at 37 A-B.

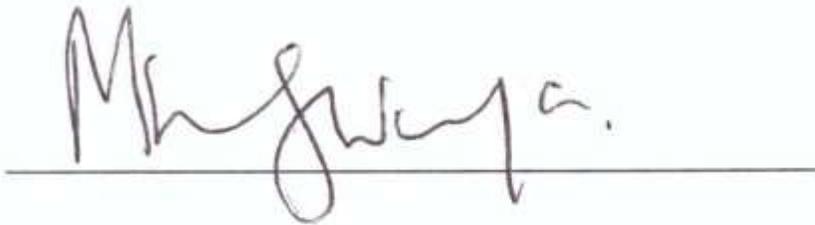
⁵ *S v Shabalala* 1986 (4) SA 734(A) at 736B-C.

strengthen the direct evidence against him as there is no evidence gainsaying it.

[40] I formed the distinct impression that the version of the accused is inconsistent with his possible innocence for the following reasons: He took an active interest in the matter going so far as to inform Nomsa Dlamini that he was not responsible for the rape of the complainant before complainant's grandmother even knew accused was a suspect; the accused did not dispute the version of the complainant of what happened prior to her being raped, when she was raped and after she was raped; and that the accused did not confront the Crown witnesses with the defence of the *alibi*.

[41] The Crown witnesses, despite some imperfections in minor aspects of their evidence are found to be credible and reliable. The evidence of the accused on the other hand is not only a bare denial and a belated *alibi*, it is also the epitome of prevarications on crucial parts. On the proved facts, there is no reasonable possibility that the accused's evidence might be true and therefore, beyond reasonable doubt, is found to be false.

[42] In the result, the court is satisfied that the accused is guilty of the offence of rape with aggravating factors and is accordingly convicted.

A handwritten signature in black ink, appearing to read 'M. Langwenya J.', is written above a solid horizontal line.

M. LANGWENYA J.

For the Crown: Ms Gamedze

For the Defendant: Mr A. Mkhwanazi