



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 73/2011

In the matter between:

THE KING

And

MANCOBA LWAZI SHONGWE

Neutral citation: *The King v Mancoba Lwazi Shongwe (73/2011) [2020] SZHC 52 (13 October 2020)*

Coram : **T. L. Dlamini J**

Heard : 22/08/2017 to 29/04/2020

Delivered : 13 October 2020

Summary: *Criminal law and procedure – Accused person charged with two counts of Rape with aggravating factors – With respect to count 1 the victim is a minor aged 7 years – With respect to count 2 the victim is a minor aged 10 years – Accused pleaded not guilty to both counts – In defence, he pleaded that he is being persecuted because he demanded to be given back his cellular phone which disappeared or was stolen at the homestead of the victims –The evidence and elements of the offence considered.*

Held: *That the crown proved its case beyond reasonable doubt – The accused is found guilty on both counts.*

JUDGMENT

Background

- [1] The accused person, **Mancoba Lwazi Shongwe**, is charged with two offences of Rape. In respect of count 1, the Indictment states that on 19 December 2010, at Gucuka area in the Lubombo District, he intentionally had unlawful sexual intercourse with Tengetile Mamba, a female minor aged 7 years who in law is incapable of consenting to sexual intercourse. The offence is accompanied by aggravating factors in that the complainant was a minor of tender age; the accused caused her to suck his penis; the complainant was sexually inactive; and that he exposed her to the risk of sexually transmitted infections and HIV/AIDS as he did not use a condom.
- [2] In respect of count 2, the Indictment states that on 19 December 2010, at Gucuka area in the Lubombo District, he intentionally had unlawful sexual intercourse with Siphesihle Mamba, a female minor of 10 years who in law is incapable of consenting to sexual intercourse. The offence is also accompanied by similar aggravating factors as those in count 1.
- [3] On trial the accused pleaded not guilty to both offences. The crown paraded six witnesses while the defence paraded two witnesses.
- [4] I first wish to record that trial was to commence on 21 November 2016 but could not because the complainants were attending school and writing

examinations during that time of the year. The trial could still not proceed on the first and second sessions of 2017 as the accused had requested and was allowed time to secure the services of an attorney. This effort was unsuccessful due to funds constraints. On the third session of this court, I ruled that the trial must proceed as it doesn't appear, in my view, that the accused will be able to secure the services of an attorney. The trial eventually commenced on 22 August 2017 and the accused was without a defence attorney during the first day of trial.

Chronology of the crown's case

- [5] The first witness for the crown (PW1) is Siphesihle Mamba. She gave evidence on 22 August 2017 and testified that she is 16 years old and doing Grade 6 at Sihlangwini Primary School. She also testified that there was a television at her parental homestead and people would come to watch it. On another day, Mancoba came to watch television. She sat her on his lap whilst watching the television and then took out his manhood (penis) and instructed her to take off her underwear. She obliged as she was afraid of him and went to take off the underwear. She then went back to sit on his lap. As she sat on his lap, Mancoba inserted his penis in her vagina and used vaseline to lubricate her.
- [6] On another day when her brother was away looking after cattle, the accused again sent her to fetch vaseline. He applied the vaseline in her vagina and then inserted his two fingers. He then came on her top and inserted his penis in her vagina. According to her evidence, it was very painful.

[7] PW1 also testified that on the day in question, her mother was away. She and her younger sister Tengetile went to play at a nearby parental homestead of Siphephelo. Her brother Sabelo was at home. The accused came to call them and said they were being called at home. They told him that they will go back home when they are hungry as their mother allowed them to come to Siphephelo's homestead. The accused however, persuaded them to go back home and promised to give them five emalangeneni (E5.00). She refused but her friends, Siphephelo and Phiwe, told them to go as it might be true that they are wanted at home.

[8] Indeed they went back home and their brother who had finished cooking gave them food to eat. He also dished food for himself and for the accused person as well and they ate. Thereafter their brother went to wash the dishes and the accused remained with them in a rondavel hut which the males used at the homestead. The accused then sent Tengetile to keep an eye and watch through the window to alert them when Sabelo was coming back. Tengetile did as instructed by the accused. While Tengetile was keeping watch through the window, the accused laid PW1 on Banele's bed and instructed her to open her legs. She did and the accused inserted his penis into her vagina. After having had sex with PW1, the accused instructed them to change roles and asked PW1 to stand by the window and keep watch to see if Sabelo was coming back. He then did the same thing to Tengetile.

[9] After having finished with Tengetile, their brother Sabelo came back and informed them that he was going to look after cattle. He asked them to mind the home and the accused remained with them. The accused then undressed himself and exposed his manhood. He instructed PW1 and Tengetile to suck

his manhood and they did. He forced them to suck the penis by holding and pressing their heads to his penis. As they sucked his penis, according to PW1, he seemed excited and looked up, and spermatozoa came out of his penis.

[10] PW1 further testified that the accused thereafter told her to come on top of him. He held her on the waist and inserted his penis in her vagina. He then pushed her up and down and when she resisted and tried to shout, he roughly held her on the waist and it would hurt.

[11] She testified further, that in a previous instance, the accused pushed them using a wheelbarrow. He sat Tengetile at the front of the wheelbarrow and PW1 at the back. The accused would then insert his penis into PW1's vagina as she did not usually wear an underwear then. He did this for a long time, according to PW1.

[12] PW1 informed the court that she was afraid to tell her mother about these incidents. She was raped by the accused several times and on different occasions. This went on for approximately a year. On this day when the accused raped her with her younger sister Tengetile inside the rondavel hut, Tengetile told their mother that "*today it was nice*". Their mother asked her about what happened and Tengetile told her that Mancoba inserted his penis in them. PW1 then quickly touched Tengetile on the shoulder signaling to her that she should be quiet. It was her evidence that she did so because she was afraid to report the incident to their mother as she was afraid of the accused person.

[13] Having heard what Tengetile said, their mother then asked PW1 who responded to the affirmative. She then related to their mother the entire story concerning what the accused did to them. According to PW1, their mother was pained and did not sleep well on that night. In the morning she sent their brother Mandla to go and call the accused who he came back with. She talked to him and they then went to the accused person's homestead and on their way, their mother chastised him for what he did to them. Her mother thereafter called their father who was at work in the Republic of South Africa. The father came home on the following day and PW1 and Tengetile were then taken to Sithobelweni Health Centre where they were both examined by a doctor. The matter was also reported to the Sithobelweni police station.

[14] When asked in-chief about why she did not report the rape incidents to her parents, PW1 stated that the accused told her not to tell anyone about it and would hold her rough around her waist and it was very painful. She further stated that red finger marks remained where he held her on the waist as the accused had uncut nails. She was asked about who is this Mancoba that she talks about and she pointed to the accused person.

[15] PW1 was asked by the accused during cross-examination about what she meant when she testified that she is still hurting. In response she testified that she meant that the accused destroyed her future and that she wished she was still like other young girls of her age who have not been sexually violated. The witness was also asked by the accused about how she responds to pain and her answer was that at times she cries and wishes that the terrible thing should not have happened. The accused then put it to PW1 that she is

lying when she says that what happened caused her pain because when something hurts, the victim cries. PW1's response was that it is a fact that she felt the pain and also cried inside herself as the accused inserted his fingers into her vagina.

[16] When PW1 was asked by the accused about what the other people said when the accused told her to go and take off her underwear, she testified that most of them were inside the room while she was sitting outside, and no one suspected any foul play. She further testified that she went behind the house where she took off her underwear and hid it behind a stone. When the accused put to PW1 that he never raped her, her response was that he raped her and that most of the time he raped her inside the rondavel. On few occasions, he raped her outside and would make her to lie on a handmade mat.

[17] The witness confirmed that they were taken to Sithobelweni Health Centre where they were examined by a doctor, and were also taken to Sithobelweni Police Station where the rape was reported.

[18] Lastly, the accused asked PW1 if she remembers that his phone was stolen at her parental homestead. In response, PW1 stated that she doesn't know anything about that and that she never heard anything about the accused person's lost cellular phone.

[19] The second witness for the crown (PW2) is Tengetile Mamba. She testified through an Intermediary following an application made by the crown in terms of **s.223 bis of the Criminal Procedure and Evidence Act, 1938**. The intermediary is one Makhosazana Shabangu. According to her, she is

employed by Eswatini Action Group Against Abuse (SWAGA) as a Child Counsellor since 2009. She possesses a Certificate in Psycho-Social Support and a Certificate in Child Development obtained from the University of KwaZulu Natal. She was trained as an intermediary and has the experience of assisting the court as an intermediary.

[20] PW2 gave evidence on 20 March 2018 and testified that she is 13 years. She also testified that in the year 2010 she was playing at the homestead of Siphephelo with her sister Siphesihle Mamba (PW1). Whilst playing at Siphephelo's home, Mancoba (the accused) came and told them that their brother Sabelo is calling them back at home. According to PW2, they told the accused that they do not want to go home as they were still playing. The accused then gave them five emalangenani (E5.00) but they refused to take it. They were however persuaded to go home with the accused as he might be correct that they are being called back at home.

[21] PW2 further testified that they then went home where their brother Sabelo gave them food to eat. Thereafter Sabelo left them in the rondavel hut and went to look after cattle. The accused closed the door and started touching Siphesihle. He then took off his trouser and told Siphesihle to suck his penis but she refused. She however, eventually gave in and sucked his penis. The accused did the same thing to her and made her to suck his penis. It was her evidence that when they were reluctant to suck his penis, the accused would roughly hold them, particularly on their waists.

[22] This witness also testified that after making them to suck his penis, the accused smeared vaseline on his penis and thereafter on their vagina. He then

inserted his fingers into Siphesihle's vagina. At first, he inserted one finger, then two fingers and lastly three fingers. He then inserted his fingers into PW2's vagina in the same manner that he did to Siphesihle. He thereafter tried to insert his penis into Siphesihle's vagina but it could not enter. He then came to PW2 and tried to insert his penis into her vagina but it did not enter as well.

[23] PW2 further testified that on realizing that their brother Sabelo and their mother might be now coming back home, the accused then left the homestead. It was her further testimony that she informed their mother and brother Sabelo about the rape incident. She confirmed that they were taken to Sithobelweni Health Centre where they were examined by a doctor, and were also taken to Sithobelweni Police Station where the rape was reported. She further confirmed that this was the first and only time that she was raped by the accused.

[24] During cross-examination, PW2 confirmed that she is the one who told her mother about the rape incident and that she did so on the same day that it happened. She also confirmed that it was the first and only time that the rape happened to her. When asked about who came back home first between Sabelo and their mother, PW2 stated that Sabelo came back home first. On being asked if they went to the Sithobelweni Health Centre on the same day that they went to the police station, PW2 answered in the affirmative.

[25] Lastly, PW2 was informed that the accused says that he never had sexual intercourse with both PW1 and PW2. This was denied by PW2 and she called it a lie. PW2 was further informed that the version of the accused is that he

never put his penis into the vagina of both PW1 and PW2. This was denied by PW2 who maintained that the accused inserted his penis into their vagina. The witness was then asked about what is meant by her evidence that the accused tried to insert his penis but it could not enter. In response she stated that the accused tried to enlarge their vagina by inserting his fingers, and that he inserted his penis although it could not go deep.

[26] The third witness for the crown (PW3) is Mandla Mamba. He is a brother to the complainants, PW1 and PW2. He testified that on the day of the rape incident, they were going to play a soccer game at Sithobelweni with his brother Banele. They met as a team at their usual meeting point near a water tap. Mancoba was part of those going to the soccer game. When they boarded the motor vehicle to the soccer game, Mancoba had a change of heart and decided to remain behind.

[27] Upon return from the soccer game, PW3 heard from his mother that her younger sisters have been raped. On being informed that the perpetrator is Mancoba, PW3 testified that he asked his young sisters about where Mancoba found them before the rape incident. Their response, according to PW3, was that he found them playing at a nearby homestead of Mr Mamba. He called them to go back home and promised to give them E5.00. At home they went inside the rondavel hut where Mancoba raped them. He testified that he then left the complainants with their mother who continued to question them about the incident.

[28] PW3 also informed the court that their mother again asked the complainants in the morning concerning the rape incident. Thereafter she sent him to go and

call the accused and he did. It was his evidence that he found the accused with his brothers at their homestead and he informed him that his mother wants to see him. Indeed, they left together with the accused and his mother asked the accused about what he did on the previous day at the homestead. In response, PW3 testified that the accused apologized.

[29] PW3 further testified that his mother asked the complainants in the presence of the accused about what the accused did to them and they stated that he raped them. She then went to the homestead of the accused with the complainants and the accused and stated that she wanted to report the rape incident to the mother of the accused. This witness did not go with them but remained behind. On being asked in-chief, this witness confirmed that the rape was reported to the police.

[30] During cross-examination, PW3 was asked about the date when the rape was reported to the police. In response, he stated that it was reported on 28 December 2010. He further stated that if his memory serves him well, that was about five (5) days after the incident occurred. He also confirmed that he was sent by their mother to go and call Mancoba, and that was not on the same date of the rape but on the following day.

[31] PW3 was also asked about why he and his mother did not confront the accused about the matter on the same day that the incident was reported. In response, he stated that his mother wanted to confirm and to be sure that the rape indeed took place.

[32] The fourth witness for the crown (PW4) is Dr. Justine Kavulu Mukanya. He is the doctor who examined the two complainants at Sithobelweni Health Centre. He testified that on 25 December 2010 he was on duty at the Sithobelweni Health Centre. At around 09:00 hours he saw two minor girls who came with a history of being sexually abused. One is Tengetile Mamba whose age was seven (7) years and the other is Siphesihle Mamba whose age was ten (10) years.

[33] PW4 also testified that Tengetile expressed herself clearly and was coherent when talking. When examined on her private parts, she had a slight cut on the fourchette. There was also a bad smell that came out of her private parts and her hymen was absent. It was his evidence that Tengetile had lost her virginity, and that this conclusion was based on the fact that she lost her hymen. He further testified that laboratory tests for sexually transmitted infections were done but all came back negative.

[34] Concerning Siphesihle Mamba, PW4 testified that she had a history of sexual intercourse with the accused even before the 18 December 2010. According to the evidence of PW4, Siphesihle also expressed herself clearly and coherently. On examination of her private parts, PW4 testified that she had a slight cut around the vaginal opening. Her hymen was absent and the conclusion he made was that she had lost her virginity. She was tested for syphilis and HIV and both tests came back negative.

[35] PW4 testified that he is the one who filled-in and signed Form RSP 88. This is the form which records the medical findings of a doctor after examining a patient following injuries from an assault. He recorded and signed Form RSP

88 in respect of both Siphesihle and Tengetile. These Forms were handed-in and admitted as part of the crown's evidence. There was no objection by the defence. The one in respect of Tengetile Mamba is marked as EXHIBIT "A" while the one in respect of Siphesihle Mamba is marked as EXHIBIT "B".

[36] Form RSP 88 in respect of Tengetile reflects and recorded that the loss of hymen is suggestive of penetration. This witness was not cross-examined by the defence and was therefore excused by the court.

[37] The fifth witness for the crown (PW5) is Hlobsile Mamba. She is the biological mother of both the complainants. She testified that on the day the complainants were raped, she had gone to attend a cooperative organization's meeting within the community. On her return, she was informed by the complainants that the accused inserted his penis into their vaginas, and into their mouths as well.

[38] PW5 also testified that she sent Mandla to go and call the accused as she wanted to ask him about what the complainants told her. Indeed, the accused was called and he came. She then told the complainants to relate in the presence of the accused about what they told her. It was her evidence that the accused apologized. She then told him that they should proceed to his mother where he would apologize. They went to the homestead of the accused with the accused and the two complainants. They did not find his mother but found his brother Melusi. She told the complainants to relate about what they told her but the accused then disappeared and went away.

[39] It was her evidence that she met the mother of the accused when she was walking back to her homestead. They then returned to the parental homestead of the accused where PW5 told the complainants to relate to the accused person's mother about what the accused did to them. The complainants told the mother of the accused about all that the accused did. On return to their homestead, they found the accused waiting next to a water tap near the home and he again apologized. She however told him that he should have done that in front of her mother.

[40] PW5 further testified that she then called the father of the complainants who was at work and informed him about the rape incident. Evidence before this court is that the father works in the Republic of South Africa. On arrival, the father instructed that they should take the complainants to hospital, hence they took them to Sithobelweni Health Centre where they were examined by a doctor. According to PW5, the doctor confirmed after examining them, that the complainants were sexually molested and that their hymen was lost to both of them.

[41] PW5 confirmed that the rape incident was reported to the police and the complainants recorded statements at Siphofane Police Station. She then handed-in certified copies of birth certificates of the complainants as part of the crown's evidence. There was no objection by the defence and the certificates were admitted as part of the evidence. The certificate in respect of Tengetile was marked as ANNEXURE "C" while the one in respect of Siphesihle was marked as ANNEXURE "D".

[42] Per Annexure “C”, Tengetile was born on 05 April 2004. She therefore was six (6) years and eight (8) months when she was allegedly raped. Per Annexure “D”, Siphesihle was born on 19 March 2001. She therefore was nine (9) years and nine (9) months when she was allegedly raped.

[43] During cross-examination, PW5 was asked about who she found the children with when she returned home. Her response was that she found them with their brother Sabelo. She was also asked about why it did not come to her mind that the complainants should be taken to hospital immediately after the rape incident. She was asked this question because the doctor’s report (Form RSP 88) reflects that they were brought to hospital on 25 December 2010 yet the rape incident happened on 19 December 2010. In response, she stated that she was surprised by what befell her. She was further asked about why she did not report the rape to the police after it happened as it was reported on the day the complainants were taken to hospital. Her answer was that she went to the accused person’s mother as she found it proper to first report it to his parents. The mother of the accused told her that she will report to the elders of the accused’s family but when the complainants’ father arrived, he instructed that the complainants be taken to hospital.

[44] It was put to PW5 that the reason she went with the accused to his mother is because she had the hope that the accused will confess to her as he refused to confess to PW5. In response, PW5 testified that the accused never denied to her but did confess, and that his mother knows about that as well. It was also put to PW5 that the reason she did not immediately report the rape to the police is because she knew that the complainants were not raped by the accused. This was denied by PW5 who testified that the complainants are the

ones who said they were raped by the accused and that he raped PW1 on different occasions.

[45] PW5 was informed that she had always been aware that one of her relatives was sexually abusing the complainants and even the community knew about this. This was denied by her and she insisted that they were sexually abused by the accused. She was then informed that the defence will lead a witness who will testify that PW5 was aware that the complainants were being sexually abused. Her response was that she hears about this for the first time. The only person she knows to have sexually abused the complainants is the accused.

[46] The defence attorney informed PW5 that the accused informed her that he lost a phone that he had gone to recharge at the parental homestead of the complainants. This was denied by PW5 who testified that there is no cell phone that was lost by the accused at the homestead and that she is hearing about this for the first time. She was also informed that instructions from the accused are that he never raped the complainants. This was however denied by PW5 who stated that the accused did rape them.

[47] The sixth witness for the crown (PW6) is officer 4577 D/Sgt. Sebenzile Maziya. She is a police officer based at the Siphofaneni Police Station in the Criminal Investigation Department under Domestic Violence and Sexual Offences. She testified that Tengetile Mamba and Siphesihle Mamba were brought to her at the police station on 25 December 2010 at around 09:30 hours by officer 3316 Sgt. Vilane. She was informed by Sgt. Vilane that the

two children are reported to have been sexually abused and that PW6 was to investigate the incident.

[48] It was her evidence that she took the complainants to the children's room where she then took Siphesihle to another room where she interviewed her and recorded a statement as well. Thereafter she interviewed Tengetile who was the youngest and also recorded a statement from her. The children were brought to her after they had been examined by a doctor who then prepared examination reports. These reports were given to her by Sgt. Vilane.

[49] In carrying out her investigation, she went to the complainants' parental homestead where she recorded statements from the parents. The complainants took her to the scene of crime, a rondavel hut. They showed her where the accused sexually abused them. Thereafter she proceeded to the homestead of the accused where she found him. His mother was present as well. She testified that she was with officer 5385 D/Const. Mafu. They introduced themselves to them and she then cautioned the accused according to the Judges' Rules. Having been cautioned, the accused opted to say something and he was thereafter taken to the police station.

[50] PW6 also testified that the accused was again cautioned at the police station and he still said something which was recorded down. Thereafter she formally charged the accused with two rape charges. When asked if she gathered any evidence from the crime scene, she testified that she did not but only saw beds inside the rondavel hut.

[51] During cross-examination, PW6 was only asked if she knows who sleeps in the rondavel hut where the crime was committed. In response she stated that she only found that the rondavel is “*indlu yakagogo*” (main hut) but did not find out about who sleeps there. The crown closed its case after this witness.

Defence case

[52] The accused took the witness stand and testified as the first witness for the defence (DW1). He testified that on the 19 December 2010 he went to the parental homestead of the complainants to recharge his cell phone. At the homestead he found Sabelo Mamba who was seated at the door of the rondavel hut. He was with both complainants and Vusi, whose surname he did not mention. He asked Sabelo to recharge the phone for him and Sabelo took it and plugged it into a charger. He then went back to his parental homestead.

[53] The accused also testified that he later went back to the complainants’ homestead at around 13:00 hours to take back his cellphone but found it missing. Sabelo informed him that it might have been taken by Vusi because it was last seen in his possession. He then returned to his parental homestead but asked Sabelo to inform Vusi when he comes back that he wants his cellphone back. When asked in-chief about why he had to recharge his cell phone at the parental homestead of the complainants, his response was that the homestead was the only one that had electricity in the area at that time.

[54] The accused also testified that the rondavel hut is used by the boys of the homestead. That is where they sleep. When asked if he occasionally visited the Mamba homestead, he stated that he would only visit when there was a need to recharge his cell phone. It was also his evidence that he never got

back his cell phone and this issue was reported to the parents of Sabelo and Vusi. According to the accused, the parents promised to pay for the phone as Vusi told them, after he was called, that he went with it to his grandmother's place.

[55] The accused was asked in-chief if the mother of the complainants called him in order to ask about the rape of the two complainants. In response, he testified that Mandla was sent on the following day by the mother to call him. On his arrival, she asked him about where he was on the previous day and why he raped the two minors. In response, he told her that he doesn't know anything about the rape but only came to the homestead to recharge his cell phone and then went away. The mother insisted that the accused raped the minors and told him that she wants to see his mother.

[56] She then went with him to his parental homestead but his mother was away and was called on the phone by the accused's brother. On arrival she was told about the rape and she then asked the accused about why he raped the complainants but he denied having done it. He however told his mother that he went there to recharge his cell phone which later disappeared at the homestead. The mother of the complainants, according to the accused, then left and told them that she will talk to her husband about the rape.

[57] It was the further evidence of the accused that after the father of the complainants had arrived, they were called to the main homestead of the Shongwe family where the grandmother of the accused resides. They found the father and mother of the complainants together with Mandla sitting with the other Shongwe family members. He was told that the father of the

complainants reported that he committed an offence at their homestead and was asked about what happened. In response, he told them that he went there to recharge his cell phone but it was then stolen whilst left in the charger. The father then said that the family of the accused should pay a fine although he was not specific about the type of fine they needed to pay.

[58] According to the accused, the meeting at the main Shongwe homestead took place after about six days following the day the cell phone disappeared at the complainants' homestead. He denied having ever sexually molested the two minors.

[59] During cross-examination, the accused was asked about how often he visited the Mamba homestead. His response was that he would only go there when he needed to recharge his cell phone battery. When asked if this was the only reason he would go to the homestead, he answered in the affirmative. When reminded that the evidence of PW1 is that he would go there to watch soccer on television, the accused denied and stated that he would not go there to watch soccer. He was then reminded that when PW1 tendered this evidence, it was not denied and was not challenged either. In response, the accused stated that he denied to PW1 that he ever went to watch soccer at her homestead.

[60] When the accused was asked about the place where he found the complainants on the day of 19 December 2010, he stated that he found them at their parental homestead with Sabelo and Vusi. When reminded that the evidence of PW1 and PW2 is that he found them playing at Siphephelo's parental homestead, he flatly denied and insisted that he found them at their parental homestead.

[61] When the accused was questioned about the evidence of PW3 (Mandla Mamba) and PW5 (Mrs. Hlobisile Mamba), he denied and stated that he is being persecuted by them for his phone that went missing at the Mamba homestead. He was then asked why he did not report the missing phone to the police. In response, he stated that he did not report because he was eventually promised that the phone will be brought and given back to him. When asked by the court to be specific about who told him that, he testified that he was told by Mrs. Mamba (PW5). He was also asked by the prosecutor if there was a time frame mentioned for bringing back the phone to him. His response was that she did not mention any time frame but only said that when her husband comes back home, she would tell Vusi to bring the phone.

[62] Before the accused was excused from the witness box, the court *mero motu* asked him to explain how the lost cell phone issue is connected with the rape charges preferred against him. He was asked to narrate to the court about the events of that day. In response, he stated that after he found his phone missing, he went back to his parental homestead. Later on, he again went back to the Mamba homestead. This time around he found Mrs. Mamba back from where she had gone to. Vusi was called and he acknowledged to have taken the phone but promised to bring it back. On the following day, things changed and Mrs. Mamba came to his homestead to report about the rape of the two children.

[63] The second and last witness for the defence (DW2) is Melusi Shongwe. According to his evidence, he is an elder brother of the accused. He testified that he does not recall well about the dates but informed the court that Mrs.

Mamba (PW5) came to his parental homestead looking for their mother. She was with Mandla and the accused. He had to call his mother as she had gone to the fields. He however explained that Mandla first came to call the accused but is not aware about why they called him. All that he knew is that the accused regularly visited the Mamba homestead in order to recharge his cell phone battery.

[64] When the mother of the accused arrived, Mrs. Mamba requested that they should talk as parents and he was therefore not privy to what they talked about.

[65] DW2 was asked in-chief if he was present at the meeting that involved the Mamba and Shongwe families' members and he answered in the affirmative. When asked about what was discussed, he testified that his recollection is that the Mamba family members made a complaint which they described as a bad omen that needed to have their homestead cleansed by payment of a beast. He further testified that the beast was paid as they were trying to make peace with the Mamba family. According to DW2, the father said that the matter should not be formally reported for the courts to deal with.

[66] He was further asked in-chief if the accused was asked about the rape during the meeting of the two families. His response was that he doesn't remember anything as the elders were the ones talking, and that he was young then.

[67] During cross-examination, DW2 was asked if he knows who are the complainants in the rape charge whose proceedings are before this court. In response, he stated that he doesn't know as he mentioned in his earlier

evidence that the people who were talking in the meeting of the two families' members are the elders. When asked what the meeting was about given that he was present, DW2 testified that he was only physically present but emotionally and spiritually, he was not there and he never heard what the families' members were talking about.

[68] DW2 was informed by the prosecution that evidence given before this court is to the effect that Mancoba would go to the Mamba homestead to watch television. He was then asked about what he can say concerning these visits by Mancoba. In response, he testified that the Mamba homestead is the only home that had electricity and a television at that time, and that young people, including Mancoba (accused), would go there to watch television.

[69] In his evidence, DW2 confirmed that the accused lost his phone at the Mamba homestead. He also confirmed that the accused went there to find the cell phone but without success. He further confirmed that a promise was made to the accused that his phone will be given back to him. On being asked by the court before being excused from the witness box, DW2 confirmed that he has no first-hand knowledge of these issues but was told about them by the accused person. He was also asked by the court about how old he was at the time when the two families held a meeting given that in his evidence, he testified that he was young at the time and never participated in the discussions that were held and does not know what the discussions were about. In response, he told the court that he was twenty-four (24) years old. This court noted however, that this answer was given after an unreasonable lapse of time. When asked about his level of education, he testified that he

completed Form 5. The case for the defence was closed after the evidence of PW2.

Appraisal of the evidence

[70] On the basis of evidence placed before this court, certain facts are common cause and are not in dispute. The fact that the accused went to the parental homestead of the complainants on the date of the alleged rape is undisputed and has been proved on the evidence before court. It has also been proved that the complainants and accused were together at the complainants' parental homestead on the day the rape was allegedly committed. It also has been proved that the two complainants and the accused are known to each other and none of them is pointing out the other under a situation of mistaken identity. The accused frequently visited the homestead of the complainants and they know him by name and by physically identifying him. From the evidence, it appears that the parental homestead of the accused and that of the complainants are within a walking distance.

[71] The accused testified that on the date of the alleged rape, he found Sabelo Mamba, Vusi and the two complainants seated at the door of the rondavel hut. This is the same rondavel hut in which the complainants testified that they were raped in. Both complainants gave a graphic detail of how they were sexually molested by the accused. Their evidence was not placed in doubt by the defence during cross-examination other than the bare denial which the accused made.

[72] The case placed before this court by the accused is that the rape charges are nothing but meant to persecute him for demanding to be given back his cell

phone that was stolen whilst being placed on a battery charger at the homestead of the complainants. The crown submitted that this cell phone issue is an afterthought as its case was not put to the witnesses of the crown.

[73] On the evidence, my finding is that the accused person's evidence is not consistent regarding the issue of his lost cell phone. In his evidence in-chief, he testified that he left his phone being recharged and went back home. At around 13:00 hours he went back to get the phone but found it missing and was told that it was last seen in the possession of Vusi. He then told Sabelo that when Vusi comes back, he must inform him that he wants his cell phone back. He then returned to his parental homestead. He never testified that after the visit he made at 13:00 hours, he later on the same day went back to the complainants' homestead.

[74] However, when the accused was *mero motu* asked by the court to explain how the cell phone issue is connected to the charges he is being tried for, he explained that PW5 came to report to his homestead the rape allegation against him after he demanded to be given back the cell phone. He further testified that PW5 had promised that the cell phone will be given back to him. It was at this moment that the accused gave a modified version of his evidence. He testified that having left the complainants' parental homestead following the visit he made at 13:00 hours, he later on again went back to the complainants' homestead. This time around he found Mrs. Mamba (PW5) back from where she had gone to. Vusi was called and he promised to bring back the phone.

[75] This evidence, *viz.*, that the accused went back to the homestead of the complainants after the visit he made at 13:00 hours and found PW5 back, was never mentioned by the accused in his evidence save only when the court *mero motu* asked him to explain how the issue of the lost phone is connected to the charges he was called upon to answer.

[76] In his evidence, the accused maintained that he was promised to be given back his cell phone. On being asked by the court about who made the promise, he testified that it is the mother of the complainants. He was then asked during cross-examination if Mrs. Mamba gave a time frame for bringing back the cell phone. In response, the accused testified that no time frame was given by her. According to the accused, she only said that when her husband arrives home, she would tell Vusi to bring the phone. With due respect, this part of the evidence doesn't make sense to me. I don't understand why PW5 would need to await the arrival of her husband from the Republic of South Africa where he was employed before she could tell Vusi to bring back a phone that he took from her marital homestead.

[77] What worsens the case for the accused is that his evidence that he came back to the complainants' homestead and found their mother back from where she had gone to was not put to PW5. It was also not put to PW5 that she promised to give back to the accused the lost or stolen cell phone, and that the cell phone issue motivated her to fabricate a case of rape against the accused. The court was therefore denied an opportunity to hear the reactions and responses of PW5 to these claims by the accused.

[78] During cross-examination, PW5 was informed that according to instructions from the accused, the accused lost his cell phone that he had gone to recharge at the parental homestead of the complainants. In response, PW5 denied that the accused lost his cell phone at their homestead. She stated that she was hearing about the lost cell phone here in court for the first time. This response was not challenged nor disputed by the defence. Even PW1 testified that she has never heard that the accused lost his cell phone at their parental homestead.

[79] On a preponderance of probability, it does not seem to be truthful that the accused and the mother of the complainants saw each other on the day of the rape. This is equally true with the evidence that the mother of the complainants (PW5) promised to give back the cell phone to the accused.

[80] In **Rex v Simanga Mabaso (108/2012) [2013] SZHC 184 (16 August 2013)**, this court stated that it is trite law that an accused must put his defence to crown witnesses in order for the court to appreciate their response, and that a failure to do so is considered to be an afterthought. The latter version of evidence that the accused saw PW5 on the day the phone got lost and that she promised to bring the phone back is, in my view, an afterthought, and I therefore reject this portion of evidence.

[81] During cross-examination, the accused denied that he would go to the complainants' parental homestead to watch soccer on television, as per the testimony of PW1. Below is an excerpt of how the cross-examination went on:

Crown: Was it your first time to go to the Mamba home on 19 December 2010?

Accused: It was not the first time.

Crown: How often would you go to the Mamba homestead?

Accused: I would go there to recharge my phone.

Crown: Was it the only reason that you would go to the Mamba home for?

Accused: That is correct.

Crown: Siphesihle Mamba (PW1) told this court that you would go to her home to watch soccer on television.

Accused: I would not go there to watch soccer.

Crown: When she said this you did not challenge her evidence on that aspect, why did you not?

Accused: I denied to her that I ever went to watch soccer at her home.

[82] DW2 (Melusi Shongwe) who is a brother to the accused and a witness for the defence testified and confirmed during cross-examination that the accused would go to the complainants' parental homestead to watch soccer on television. Below is an excerpt of how the cross-examination proceeded:

Crown: There is evidence before this court that Mancoba (accused) would go to the Mamba homestead to watch television. What can you say to that?

DW2: What I can say is that the Mamba homestead is the only home that had electricity and a television. All the young people, including Mancoba, would go there to watch television.

[83] The above evidence shows, in my view and finding, that the accused is denying even things that he knows to be truthful. On the totality of the evidence, I find it as a fact that the accused frequented the parental homestead of the complainants not only to recharge his cell phone battery, but also to watch television as testified to by the complainants.

[84] The evidence of DW2 who testified as a witness for the accused is that a beast was paid by the family of the accused in order to make peace between the

families of the accused and the complainants. I find no logical reason why the family of the accused would pay a beast in order to make peace between the two families in a situation where a member of their family has not committed any wrong. In my view, this was a clear case of admitting the rape allegation made against their family member. It was also a way of influencing the aggrieved family members against reporting the case to the police.

[85] In its closing submissions, the defence implored the court to treat the evidence of the complainants with caution as it has to be corroborated. The defence cited **Hoffman and Zerffert** in their book **The South African Law of Evidence, 4th ed., at p.579** where the following is stated:

“Experience has shown that it is very dangerous to rely upon the uncorroborated evidence of the complainant unless there is some other factor reducing the risk of a wrong conviction in cases which involve a sexual element. ...But the bringing of the charge may have been motivated by spite, sexual frustration or other unpredictable emotional causes.”

[86] In *casu*, no evidence has been furnished to suggest why the complainants would have been motivated to lie against the accused about the rape. The evidence shows that the seven years old victim who was being sexually molested for the first time is the one who broke the news of the rape to her mother. The ten years old victim confirmed the story told by her younger sister. The same story was told by the victims to their brother Mandla (PW3), and also to the police. The fact that the victims were indeed sexually molested was confirmed by a doctor after conducting an examination on them.

[87] The legal authors, **Hoffman and Zerffert (supra) at p.581** state what is quoted below about young children:

“Young children are competent witnesses if the judge considers that they are old enough to know what it means to tell the truth, but it has been frequently emphasized that their evidence should be scrutinized 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 first makes a complaint is quite likely to believe that things which were suggested to him really happened.”

[88] On the evidence placed before court, I am satisfied that PW2 who first reported to their mother about the rape did so without being persuaded or told by someone else to report to her about it. She innocently told their mother about an incident that befell them. Nothing suggests that what she reported was suggested to her by another person. PW1 confirmed to their mother the truthfulness of the incident that PW2 told her about. Nothing from the evidence either, suggests that they reported to their mother about the rape through leading questions.

[89] The defence also submitted that the evidence of PW2 is in contrast with that of PW1. It submitted that PW2 testified that it was the first time that the accused did this to her while PW1 testified that it was not the first time the accused did this to them. This submission is incorrect regarding the evidence of PW1. This witness testified that it was not the first time for her to be sexually abused by the accused. With regard to the 19 December 2010 incident, the accused sexually molested the two of them. There is absolutely no contrast in the evidence of PW1 and PW2 regarding the number of incidents in which they were raped by the accused.

[90] I wish to mention that I was not impressed by DW2. His credibility is, in my view, doubtful. He denied having heard what the discussions were about

between the family members of the complainants and that of the accused yet he was part of that meeting. He claimed to have been young at the time yet according to his evidence he was twenty-four (24) years. He had no first-hand knowledge of most of the evidence he gave but testified about facts that were told to him by the accused.

The law applicable

[91] In rape cases, the crown bears the onus to prove beyond reasonable doubt three factors, *viz.*, the fact of sexual intercourse; the absence of consent; and the identity of the accused as the offender. **See: R v Ndwandwe Fannie 2000 – 2005 SLR 110 at 118; Nkosinathi Sibandze v Rex (31/2014) [2014] SZSC 19 at para 4; and Ndukuzempi Mlotsa v Rex, Criminal Appeal No. 11/2014 (unreported)**

[92] Both complainants testified that the accused inserted his fingers and penis into their vaginas. The interference with their vaginas was confirmed by Dr. Justine Kavulu Mukanya who examined them after they were taken to the Sithobelweni Health Centre. Regarding PW1, the doctor testified that after an examination of her private parts, he found that this complainant had a slight cut around the vaginal opening. The hymen was lost and she had lost virginity. Regarding PW2, the doctor testified that she had a slight cut on the fourchette and that there was a bad smell coming out of the private parts. The hymen was absent and the conclusion was that she lost her virginity.

[93] The slightest penetration of the vagina suffices for purposes of the offence of rape. Legally, it suffices if the male organ is in the slightest degree within the woman's genitals. **See: Nkosinathi Sibandze v Rex (31/2014) [2014] SZSC**

19 at para 11; and Phumlani Masuku v The King, Criminal Appeal No.33/2011 at para 13 (unreported).

[94] Premised on the above cited authorities, the fact that it was difficult for the perpetrator to fully penetrate the vaginas of the complainants with his penis does not exonerate him from the offence. The fact of sexual intercourse has therefore been proved.

[95] The offence was committed against minors aged seven and ten years. In their evidence, they testified that they never consented to having sexual intercourse with the accused. The evidence tendered does not show or even suggest that there was consent by the complainants to the sexual intercourse with them.

[96] In our law, a girl under the age of twelve years cannot give consent to sexual intercourse. Even when she consents, sexual intercourse with her constitute the offence of rape. **See: Nkosinathi Sibandze v Rex (supra) at para 12,** and the authorities listed therein.

[97] The complainants were minors of tender age at the time of the commission of the offence. They were in law incapable of consenting to sexual intercourse, hence the lack of consent has been proved.

[98] The complainants identified the accused as the person who raped them. He is known to them and was not mistaken for another person. He is someone who frequented visiting their parental homestead and is known by the members of the family as well. When the complainants reported to their mother about the rape, they mentioned the accused by his name. Even when recording

statements with the police, they mentioned the accused by his name. All the witnesses who testified pointed at the accused person as being the Mancoba Lwazi Shongwe who the rape allegations were made against. It is therefore a finding of this court that the identity of the accused as the offender is not in dispute

[99] On the totality of the evidence, it is my finding that the crown has proved its case beyond reasonable doubt. All the three elements of rape, *viz.*, the fact of sexual intercourse, the absence of consent, and the identity of the accused as the offender have been proved. In the circumstances and finding of this court, the accused is found guilty of both count 1 and count 2.

[100] The complainants were minors of tender age when they were raped. Tengetile was 6 years and eight months, while Siphesihle was nine years and nine months. In the appeal case of **Mgubane Magagula v The King (32/2010) [2010] SZSC 46 (30 November 2010)**, the Supreme Court considered the range of sentences for aggravated rape. With regard to young victims, the court stated what I quote below:

“... The tables also reveal that this Court has treated the rape of a child as a particularly serious aggravating factor, warranting a sentence at or even above the upper echelons of the range.” (para 20)

[101] Both complainants were raped without using a condom. By so doing, the accused put the complainants at the risk of contracting sexually transmitted diseases and infections. He went on to make them suck his penis. The court therefore finds the accused guilty of rape with aggravating factors in both count 1 and count 2.

JUDGMENT ON SENTENCE

[102] It was submitted in mitigation that the accused is a first offender and was doing Grade 7 when he committed the offence. His reasoning capacity was therefore not one that enabled him look at things with mental maturity. He is a school drop-out who went as far as Form III. He now has two minor children who are aged two and three months respectively. Prior to his conviction, he was employed as a labourer and supported his children. Their mothers are unemployed and is therefore the breadwinner.

[103] It was also submitted on behalf of the accused that he is remorseful and has been cooperative throughout his trial. He religiously attended court whenever needed although he lives far away from Mbabane. He has been commuting from Gucuka in the Lubombo Region during the entire trial period.

[104] It was further submitted that he was arrested on 26 December 2010 and thereafter admitted to bail on 29 May 2011 after spending five months in custody. From May 2011 up to this year, this matter has been hanging over his head like a sword ready to strike at any moment. This, it was submitted, is punishment on its own.

[105] The crown, on the other hand, first confirmed that the accused is a first offender. It however implored the court to impose a stiff custodial sentence which will send a strong message to other would be offenders because of the prevalence of the offence. It also implored the court to consider the provisions of the **Criminal Procedure and Evidence Act of 1938 (as amended)**,

hereinafter called the “Act”, and the range of sentences meted out for aggravated rape by the Supreme Court.

[106] **Section 313 of the Act** precludes the court from suspending any sentence or part of a sentence for persons convicted of Murder, Rape and Robbery, including any conspiracy, incitement or attempt to commit any of these three offences. The accused cannot therefore be granted the benefit of a suspended sentence or the benefit of a suspended portion of the sentence. This position is true even in terms of **s.185bis of the Act**.

[107] In deciding the appropriate sentence, I took into account the fact that the accused is a first offender, had a low level of education which had a negative bearing to his thinking capacity, and that he has been cooperative in all respects with law enforcement agents and the trial court. I also take into account the fact that he is now a father of two very young kids. These are factors which I have considered in his favour.

[108] I will however not turn a blind eye to the fact that rape is one of the most inhuman invasions of the dignity and privacy of humankind, particularly against very young innocent children as *in casu*. In the appeal case of **Mbuso Blue Khumalo v Rex (12/12) [2012] SZSC 21 (31 May 2012), para 42, M.C.B. Maphalala JA**, as he was then, stated that “*The prevalence of the crime of rape in this country continues to be a great source of concern, and this court is obliged to effect deterrent measures...*”. He continued in paragraph [44] and stated that “*this court has a Constitutional duty to protect society against the scourge of sexual onslaught committed against defenceless women and children by selfish sex predators who have no regard for the*

fundamental right to dignity. This jurisdiction is fraught with rape victims as young as three years of age. If this trend continues, the fundamental rights entrenched in the Constitution would count for nothing.”

[109] In the appeal case of **Mgubane Magagula v The King (supra)**, **His Lordship Moore JA** stated that “*it would appear that the appropriate range of sentences for the offence of aggravated rape in this Kingdom now lies between 11 and 18 years imprisonment.*” This was confirmed by **M.C.B. Maphalala CJ** in **Nkosinathi Sibandze v Rex (supra)**, **para [21]**, where he stated that “*It is well settled in this jurisdiction that the range of sentences for aggravated rape lies between eleven and eighteen years imprisonment; however, this Court has exceeded the sentence of eighteen years imprisonment in serious cases of aggravated rape such as cases where violence is used or where the complainant is a very young girl.*”

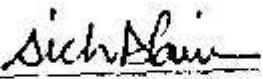
[110] In the case of **Mbuso Blue Khumalo v Rex (supra)**, the Supreme Court considered an appeal against conviction and a sentence of twelve (12) years imposed by this court for aggravated rape. The aggravating factors were that the accused did not use a condom when committing the offence, and that he brutally assaulted the complainant prior to committing the offence. The 12 years sentence was considered to be lenient by the Supreme Court. The sentence was accordingly set aside and replaced with a sentence of eighteen (18) years imprisonment. The court stated that “*Such a lenient sentence will send a wrong message to those men who continue to sexually abuse innocent and defenceless women and children.*”

[111] Having considered the personal circumstances of the accused, the offence and its prevalence, and the interest of society, I am satisfied that imprisonment of fifteen years in respect of each count is appropriate. On the question of whether to serve these sentences concurrently or consecutively, I fully align myself with **His Lordship Mlangeni J** who, in the case of **Doctor Victor Mkhabela vs The King (Appeal No. 74/14) [2017] SZHC 184 (8 September 2017)**, stated what I quote below:

“On the example of rape, which is possibly the ‘ultimate invasion of human privacy’, it might occasion injustice to hand down concurrent sentences to a rapist who has violated several people, merely because he achieved that in one spell of wickedness... the more serious the offence the more reluctant should the courts be to order concurrence.” (para [8])

[112] I therefore make the following order:

- (a) In respect of Count 1, the accused is sentenced to fifteen (15) years imprisonment without the option of a fine.
- (b) In respect of Count 2, the accused is sentenced to fifteen (15) years imprisonment without the option of a fine.
- (c) Both sentences are to run consecutively.
- (d) The period of imprisonment is backdated to take into account any period which the accused has spent in custody in respect of these two offences.



T. L. DLAMINI
JUDGE OF THE HIGH COURT

For the crown: Ms F. Gamedze

For the accused: Ms N. Ndlangamandla