IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 42/2011

In the matter between:

THE KING

VS

SIBUSISO XOLANI DLAMINI

Coram: Ota J

For The Crown: Ms. L Hlophe

Accused in Person

JUDGMENT

OTA, J

[1] The accused **Sibusiso Xolani Dlamini,** stands charged with rape. Accordingly to the crown upon or during the month of June 2010, at or near Mgambeni area in the Lubombo Region, the accused did intentionally have unlawful sexual intercourse with **T T N,** aged 5 years old who in Law is incapable of consenting to sexual intercourse and did thereby commit the crime of rape.

[2] It is further alleged by the crown that this offence is accompanied by aggravating factors as envisaged under Section 185 bis of the Criminal Procedure and Evidence Act 67/1938, as amended, in that

1. The complainant was a minor of tender age
2. The accused exposed the complainant to the risk of contracting sexually transmitted infections and HIV/AIDS as he did not use a condom.

[3] When the accused person was arraigned before this Court on the 13th of June 2011, he was reminded of his right to be represented by counsel. The accused however opted to represent himself.

[4] Thereafter, the charge was put to the accused and explained to him in the language of his choice, *Siswati.* The accused pleaded guilty to the charge.

[5] At this juncture, the Prosecuting Counsel **Ms L Hlophe,** applied for a short adjournment of the case to enable the parties prepare a statement of agreed facts. This application was granted and the case stood down for a period to enable the parties achieve this objective. When the Court reconvened, **Ms Hlophe** informed the Court that the parties had prepared a statement of agreed facts, which had already been signed by both the Prosecution and the Accused. Thereafter, the statement of agreed facts which made references to the accompanying Medical examination report form "*R.S.P 88*", was read out and explained to the Accused in *Siswati.*

[6] Following this, the Court enquired from the Accused whether he understood the contents of the statement of agreed facts and if said statement of agreed facts is a true reflection of the facts of this case, and whether he accepts same as so.

[7] The Accused informed the Court that he understood the statement of agreed facts and that he agrees to the facts stated therein.

[8] The statement of agreed facts and the medical examination report were admitted in evidence as exhibits A and B respectively, by consent.

[9] The statement of agreed facts demonstrates the following which I reproduce hereunder in extenso.

> ***Statement of agreed facts***
>
> ***Sibusiso Xolani Dlamini (hereinafter referred to as the accused) stands charged with the offence of RAPE. He has pleaded guilty to the charge, which plea the Crown accepts.***
>
> ***It is agreed between the Crown and the accused as follows:-***
>
> ***In the month of June 2010 at or near Mgambeni area in the Lubombo Region, the complainant (Thulile Temagilija***

Nhleko) was playing with Sethu at a Maseko homestead. The complainant left the Maseko homestead for her home. While the complainant was walking, she met the accused who grabbed her and took her to the mountain where he had sexual intercourse with her. PW2 (Gcinile Kunene) approached and called the complainant who then put on her panty and trouser and ran to this witness. This witness enquired from the accused what he was doing to the complainant. This witness (PW2) reported this matter to PW3 (Nomsa Nhleko) who then reported same to the police and further accompanied the complainant to Sithobela Health Centre. On the 7th June, 2010 the complainant was examined by PW4 (Dr John Mangunda) who reached the opinion that '-intact hymen in a minor-suggestive of possibility of sexual assault"

The accused was arrested on the 29th July, 2010 and he is presently in custody. The accused is remorseful of his actions. Accused more specifically admits that;

- **The complainant, T T N was a minor aged 5 (five) years**
- **He intentionally had unlawful sexual intercourse with the complainant who in law is incapable of consenting to sexual intercourse**
- **By not using a condom, the accused exposed the complainant to the risk of contracting sexually transmitted infections and HIV/AIDS**

The following will be produced as evidence

- Medical examination report R.S.P.88

DATED AT MBABANE ON THE 13th DAY OF JUNE, 2011"

[13] It is trite law that when a case has to be decided on a statement of agreed facts, it is necessary that sufficient particulars of the event be included in the statement, not only to prove the guilt of the accused, but also to enable the Court to determine what will be an appropriate sentence for the offence committed. This trite principle of law was clearly stated in the case of **Zwelithini Dlamini v Rex Criminal Appeal No. 5 of 2008 at page 4.**

[14] I am satisfied that the statement of agreed facts has demonstrated sufficient particular of the event to decide this case. In view of the accused's plea of guilty, there is no need to lead further evidence in accordance with Section 238 of the Criminal Procedure and Evidence Act of 1938, as amended. I hold the view that the statement of agreed facts ext A, as well as the Medical report ext B, constitute evidence beyond reasonable doubt that the accused committed the offence charged. I say this because, in **Jonathan Burchelli and John Milton's Principles of Criminal Law, Third Edition 2005 at page**

162 and 699, Rape is defined as the unlawful, intentional sexual intercourse with a woman without her consent.

[15] It is therefore now the judicial consensus that in proving the offence of rape beyond a reasonable doubt, the Crown is tasked to prove 3 factors namely:-

1) the fact of sexual intercourse or indecent assault
2. The lack of consent on the part of the complainant and
3. the identity of the accused

See **Rex V Justice Magagula Criminal Case No. 330/02 (unreported) page 2, The King V Valdemer Dengo Review Case No. 843/88 (unreported) Rex V Zimele Samson Magagula Criminal Case No. 371/08 (unreported).**

[16] Now, there is no doubt in my mind from the evidence tendered, that the accused had sexual intercourse with the complainant. This

fact is extant from the Medical report ext B, which demonstrates that on the 7th of June 2010, the Complainant was examined by PW4, **Dr John Mangunda** who after examining the Complainant reached the following opinion

" *non-intact hymen in a minor suggestive of possibility of sexual assault*". This evidence tends to support the statement of agreed facts to the effect, that on the faithful day, whilst the Complainant was walking, she met the Accused who grabbed her and took her to the mountain where he had sexual intercourse with her. In coming to this conclusion, I am mindful of the fact that for there to be sexual intercourse, there must be penetration and for the purposes of rape, the slightest degree of penetration will suffice in law. This position of the law was elucidated by **Hunt and Milton in the text South African Criminal Law and Procedure, volume II Revised Edition at page 440,** in the following terms:-

" *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 in the*

case of a virgin that the hymen be ruptured, and in any case it is unnecessary that semen be emitted."

[17] From the evidence tendered via ext B, though the Doctor did not say with certainty that sexual intercourse occurred, his discovery that the Complainant's hymen was not intact, is clearly suggestive or consistent with penetration, thus the conclusion reached by the doctor of possibility of sexual intercourse. In the light of the totality of the foregoing, I find that the Accused did have sexual intercourse with the Complainant.

[18] Furthermore, on the question of lack of consent by the Complainant, it is the position of Roman Dutch Common Law, that a girl below the age of 12 years is incapable of consenting to sexual intercourse. The law dictates therefore, that sexual intercourse with a girl below the age of 12 years constitutes the offence of rape. This position of the law was enunciated in the Case of **R V Z 1959 (1) SA 739,** in the following language:-

" *According to our practice a girl under the age of 12 years cannot give consent to sexual intercourse. Even if she consents, sexual intercourse with her according to our law is rape*".

[19] More to the above is the very crisp statement of **Steyn JA,** in the opening paragraph of the Case of **Mandla N. Matsebula v Rex Appeal Case No. 6/2002 (unreported),** wherein his Lordship declared as follows:-

" *The Appellant was charged and convicted in the High Court on a charge of rape. The Complainant was a young girl, 9 years of age, and as such was incapable of consenting to sexual intercourse*".

[20] See **Rex V Mfanizile Mphicile Mndzebele Criminal Case No. 213/2007, per Masuku J, Rex V Dumisani Matimba Case No. 226/07 per Hlophe J and Rex V Zimele Samson Magagula (supra) per Hlophe J.**

[21] Now, it is not disputed that the Complainant herein, was 5 years of age when the sexual assault was committed on her. Being therefore below the age of 12 years, she is in law incapable of consenting to sexual intercourse. In the face of these facts, I find that the sexual intercourse which the Accused had with the Complainant constitutes rape of the complainant, because at the time the sexual assault was committed, the complainant was in law incapable of consenting to same, being a girl of 5 years of age.

[22] Finally, I find that the crown has proved beyond a reasonable doubt, that it was the accused who raped the Complainant. This fact is admitted by the Accused himself without waivering, through out this trial.

[23] In the light of the totality of the foregoing, I come to the ineluctable conclusion, that the crown has proved the case against the

accused beyond a reasonable doubt and I find him guilty and he is hereby convicted as charged.

[24] <u>Judgment On Sentence</u>

> Now, I turn to the issue of sentence in this case. In mitigation of sentence, the Accused submitted that he would like to apologize before this Court for what he did and to the parents of the Complainant. That he would like to apologize personally to the mother of the Complainant. The Accused entreated the Court to help him profer the said apology to the Complainant's mother. He implored the Court to be lenient with him because he is a sick person. That he has a child at home, his parents are not well as they had an accident, therefore no one is taking care of his child. That what he did was not his intention and that he is remorseful. He begged for leniency.

[25] The crown for it's own part informed the Court that the Accused has no previous convictions. The crown further drew the Courts attention to Section 185 bis (1) of the Criminal Procedure and Evidence Act 1938, as amended, and implored the Court to mete out a sentence that would send out a signal to other would be offenders.

[26] In passing sentence, I am mandated by law to take into account the seriousness of the offence, the interests of the society, the accused's personal interests and the peculiar circumstances of the case. These factors were exploded and set out in very clear terms by his **Lordship Moore JA, in the case of Chicco Manyanya Iddi and Two others v Rex criminal Appeals No. 03,09 and 10/2010,** as follows.

> "*A sentencer must consider*
>
> *(i) The penalties and other forms of treatment prescribed by the legislature*
>
> *(ii) The circumstances of the case*

(iii) The circumstances of the offender

(iv) The interests of the society at large. Under the above broad headings the court must also consider such factors inter alia as :

1. *the evidence in mitigation*
2. *the effect of the offence upon the victim and the community*
3. *whether the offender had made reparation or has compensated the victim*
4. *the effect which the sentence may have upon continuing relationships between the offender and the victim e.g. in cases of domestic violence.*
5. *The prevalence of the offence at the time of it's commission*
6. *The potential for inflicting harm upon the innocent and the vulnerable*

(g) It's potential for undermining the integrity of the society and it's public officials"

[27] It is worthy of note that in the very recent decision of the Supreme Court in the case of **Mfanasibili Gule v The King criminal Appeal Case No. 2/2011 paragraph 17, his Lordship Moore JA,** replicated the foregoing factors as follows:-

"*1) the circumstances of the offender*

2. *the public interest*
3. *the mitigating and aggravating factors applicable to the offence arising out of all the materials before the Court.*
4. *the law and practice relating to sentencing in Swaziland*

5) the sentencing guidelines, norms and trends obtaining in contemporary Swaziland as disclosed in the most recent decisions and pronouncements of the Supreme Court and, where appropriate those of the High Court"

[28] I will now proceed to weigh the factors ante, which I consider relevant to the accused's case, in my enterprise of determing what will be a deserving sentence in the circumstances of this case.

[29] To this end, I have considered that the accused is a first offender with no previous convictions. I have considered that the accused is remorseful going by his profuse apologies to the court and the complainant's family as well as his plea of guilty. I have also adequately considered his allegation that he is sick and has a child who is presently unattended.

[30] Having carefully weighed the factors ante, I have notwithstanding come to the conclusion that the offence committed by the Accused is not only a very serious one , but I am bound to say here, is a henious one. This is no ordinary rape but rape with aggravating factors as envisaged by section 185 bis (1) of the Criminal Procedure and Evidence Act. The Accused person an adult male of 24 years of age at the time of the commission of the offence, shut his eyes and his mind tightly to the females of his age and older ones, who abound in this Kingdom, and who may be willing to reciprocate his amorous desires, rather choosing to prey on a defenceless and innocent young girl of 5

years of age. Thereby perhaps scaring her not only physically, but emotionally and psychologically for life. This is because rape is a very serious and violent crime. It carries with it a rude invasion of one's privacy, personality and bodily integrity.

[31] My view on the seriousness of the offence committed is buttressed by the fact that at the time of the commission of the offence, the Accused did not use a condom, thereby putting the Complainant to the risk of contracting sexually transmitted diseases and infections, like HIV/AIDS, a disease of which prevalence in this day and age, is a universal nightmare that has struck fear into the hearts of many.

[32] In coming to the above conclusions, I am guided by the decision of the Supreme Court in the Case of **Fanafana Nkosinathi Maliba V The King Criminal Appeal Case No. 5/2011,** where the Court reproduced the words of **Hannah CJ** in the Case of **Paul Dlamini V R 1982 - 6 S.L.R** part (2) P. 411 on this subject matter, as follows:-

"*rape is regarded by parliament, by the courts and by society as a whole as a very grave offence*

1. *rape involves a severe degree of emotional and psychological trauma, in effect obliterating the personality of the victim.*
2. *the physical consequences of rape are of differing severity, including the fear of veneral disease or pregnancy.*
3. *rape is also particularly unpleasant because it involves such intimate proximity between the offender and victim.*
4. *(d) rape involves abuse of an act which can be a fundamental means of expressing love for another, to which considerable value is attached*".

[33] It is the seriousness of rape, particularly one with aggravating factors, like the one instant, that engendered parliament to mandate courts via section 185 bis (1) of the Criminal Procedure and Evidence Act, to impose a minimum mandatory sentence of nine years in cases of rape with aggravating factors. Inspite of the seeming draconian punishment advocated by section 185 bis (1) of the Criminal

Procedure and Evidence Act, the prevalence of the offence of rape with aggravating factors persists and appears to be even on the increase. These factors elicited the voceferous lamentations of the supreme court in the case of **Mgubane Magagula v The King Criminal Appeal No. 32/2010,** and engendered **Moore JA,** to come out with **"The Appropriate Range"** of sentences in order to achieve a uniform range of sentencing in the case of rape with aggravating factors, which would serve as a deterrent to other would be offenders. In setting **"The Appropriate Range"** of sentences, **Moore JA,** declared as follows, in paragraph 20 of that decision:-

> "20. From *Tables A and B set out in paragraphs (16) and (17) above, it would appear that the appropriate range of sentences for the offence of aggravating rape in this kingdom now lies between 11 and 18 years imprisonment- which is the mid range between 7 and 22 years- adjusted upwards or downwards, depending upon the peculiar facts and circumstances of each particular case. 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."

[34] In **Mgubane Magagula v The King (supra)** the aggravating factors were that the victim was a child of 10 years and that the Appellant had not used a condom. These are the same aggravating factors demonstrated in the case instant, which I have hereinbefore reproduced. The trial court imposed a sentence of 18 years in that case, this was affirmed by the supreme court.

[35] Furthermore, in the, case of **Mfanasibili Gule v The King (supra)** the trial court had imposed a sentence of 10 years imprisonment for the offence of rape with aggraving factors. In that case the complainant was 30 years old and the aggravating factor was that the accused did not use a condom thus exposing the complainant to the risk of sexually transmitted diseases and infections. On Appeal to the supreme court against sentence, the supreme court whilst

affirming the sentence of the court a quo, however noted that the sentence was lenient. The court noted that "*it ought to point out that many of the sentences which it has upheld were not disturbed simply because they fell within the permission and compassionate discretion of the court below, even though this court, because of the gravity of the offence, would have imposed a substantially higher award. Indeed the case before us is a case in point*" It is worthy of note that in that appeal, the supreme court made references to **"The Appropriate Range"** of sentences in the case of **Mgubane Magagula v The King (supra),** as being the fulcrum for sentences for this sort of crime.

[36] In conclusion, having carefully considered the triad, as well as the other factors emanating from the case of **Mfanasibile Gule (supra),** which I have hereinbefore set forth, I have come to the conclusion, that in the present case, the interest of the sociely far out weighs that of the accused, as demonstrated in his plea in mitigation. Children, most especially the girl child, are entitled to protection from this sort of victimization by vicious characters such as the accused. The only way in which the society can ensure this protection is to ensure that this

sort of outrage and barbarism, which the accused unleashed on the complainant is discouraged. The society can achieve this end by imposing sentences that will deter other would be perverts who may even now be nursing the desire of orchestrating their barbaric fantasies upon the girl child. The accused's plea in mitigation to the effect that he did not intend to rape the complainant, is borrowing the words of **Moore JA, in Mgubane Magagula v The King (supra),** at paragraph 24, **"reminiscent of the explanation given by the little boy who was caught with his hand in the cookie jar,** "*I don't know how my hand got in there*". I will dismiss this plea as being of little weight as a mitigating factor. In the circumstances, I am of the firm conviction that a sentence of 16 years is condign of the offence committed, as this will serve as a deterrent to other would be offenders, in the face of the ubiquity of this sort of crime in the Kingdom. This sentence is backdated to the date of the arrest on the accused.

DELIVERD IN OPEN COURT IN MBABANE ON THIS

THE……17 DAY OF *June* **2011**

OTA J.

JUDGE OF THE HIGH COURT