**IN THE HIGH COURT OF SWAZILAND**
**HELD AT MBABANE**

**CASENO. 239/2010**

**In the matter between:**

**REX**

**VS**

**SENZO SHABANGU**

**CORAM: OTA J.**
**CROWN: MR. S. FAKUDZE**
**ACCUSED: IN PERSON**

**JUDGMENT**

**OTA J.**

[1] The accused person Senzo Shabangu was arraigned before the Magistrates Court charged with the crime of rape. The crown alleged that during the month of May, 2010 and at or near Herefords area in the Hhohho region, the accused person, did intentionally have unlawful sexual intercourse with one L S, a female who was at the time aged 10 years and incapable in law of consenting to sexual intercourse and did thereby commit the said crime of rape.

[2] The crown further alleged that the rape is accompanied by aggravating circumstances as envisaged by section 185 bis of the **Criminal Procedure and Evidence Act 67/ 1938 (CP & E)** in that

1. At the commission of the offence the accused did not use a condom thereby putting the complainant at risk of contracting sexually transmitted diseases and infections.
2. The accused repeatedly raped the complainant.

[3] The accused person who appeared in person pleaded not guilty, to the charge. Following this plea of not guilty a trial in which the accused was assisted by a guardian was conducted. At the end of the trial the accused was found guilty by the court a quo and convicted of the crime of Rape with aggravating factors.

[4] Pursuant to section 292 (1) of the CP & E, the court a quo committed this case to the High Court for sentencing. Before passing sentence, I deem it expedient first to review the evidence led at the lower court to ascertain for my self if the crown proved it's case

against the accused beyond a reasonable doubt, warranting his conviction before that court.

[5] In proof of it's case the crown led a total of five witnesses. PW1 told the court that the accused was a herd boy at the complainant's (PW1) parental homestead. That PW1 used to sleep in the main house with 1 and 2 other children. That the accused entered the bedroom at night, he removed PWl's panties and inserted his penis into her vagina. That there was electricity outside the house such that a person inside the house could be seen via the light outside. That when the accused finished he went out and locked the door. That PW1 did not report the matter to anyone because she was afraid of the accused's threats that he would beat her up.

[6] That after this incidence PWl's grandmother ordered them to sleep in another house. That one day whilst sleeping in that other house the accused entered the house through the window. The accused who was then carrying a twig threatened to beat PW1 if she told anyone. Accused then took off PWl's panties and inserted his penis inside her

vagina. When he finished he went out through the window. PW1 did not report to anyone because she was afraid of being beaten by the accused. Yet again PWl's grandmother moved them to another house because she wanted to keep her bananas in the house they had been sleeping in. The accused again entered the house through the window which was faulty and could not close, carrying a twig. Once again accused took off PWl's panties and inserted his penis inside her vagina. When the accused finished he went out through the window.

[8] The following day PW1 panicked and started crying when asked by her grandmother to go and fetch a blanket and when asked by her grandmother what the matter was, she explained that she was haunted by the image of the accused who had been having sexual intercourse with her. The grandmother took her to Buhleni Police Post to report and the police took her to the Emkhuzweni Health Centre where she was examined by a doctor. PW1 said that the accused did not use a condom when he raped her. That she got to know what a condom is after the rape. Under cross examination the accused sought to establish that the case against him was fabricated because he had a misunderstanding with PWl's grandmother. PW1 whilst admitting that

there was a misunderstanding between her grandmother and the accused, however denied that her grandmother told her to fabricate her evidence against the accused.

[9] PW2 was Nellie Simelane. She told the court that accused was a herd boy and resident at the parental homestead for 5years. That on the 15th May 2010, PW1 panicked and cried when sent to fetch a towel by PW2's mother. When asked by PW2's mother why she was crying, PW1 replied that she was haunted by the image of the accused who had raped her several times. That they then reported the matter to the Buhleni Police Post. Under cross examination the accused again sought to establish that the evidence against him was fabricated because he had a misunderstanding with PWl's grandmother. PW2 denied this allegation.

[10] PW3 was Beauty Simelane Pwl"s grandmother. She told the court that the accused was a herd boy and resident at her homestead for 5years. That on the 15th May 2010, she sent Pwl to fetch a towel. PW1 panicked and started crying. That on being questioned by her, PW1

told them that she was haunted by the image of the accused who raped her several times. That she then reported the matter to the Buhleni Police Station. Under cross examination PW3 denied that she was fabricating evidence against the accused because they had a misunderstanding.

[11] PW4 was 4086 D Sgt Patrik Dupont; the investigating officer in this case. He told the court that on the 15th May 2010, whilst on duty at Buhleni Police Post, PW1 was brought to the police post by her aunt. That he interviewed PW1 who told him that the accused had raped her on several occasions. That he took PW1, to Emkhuzweni Health Centre where she was examined by a doctor. That the accused was arrested on the same day. Nothing turns on the accused's cross examination of PW4.

[12] PW5 though reflected in the record as PW6, was Dr. N. Mhlalela, the medical doctor who examined PW1 at the Emkhuzweni Health Centre. He confirmed that PW1 was brought to the Heath Centre on

the 15th May 2010. That he examined PWl's genitals and noticed a break or a laceration in the continuity of the hymen which was fresh.

[13] That the examination on the genitals was painful. That his findings pointed out that there was some slight penetration into the vagina. That there was penetration but it did not go beyond opening. That he compiled and filled the RSP 88 which the court admitted in evidence by consent as ext A.

[14] Under cross examination PW5 confirmed that the laceration occurred within 1 to 7 days of the examination.

[15] In his defence the accused told the court that he is innocent. That the evidence against him was fabricated and that the evidence against him is contradicting.

[16] Having carefully reviewed the evidence, the question that arises at this juncture is, did the Crown prove it's case against the accused beyond a reasonable doubt? In the offence of rape, the crown is

required to established corroboration of the evidence of the complainant, which corroboration must be directed towards three elements:-

1. That there was sexual intercourse or indecent assault on the complainant
2. That the complainant did not consent to the sexual intercourse
3. The identity of the accused.

See **The King v Sibusiso Xolani Dlamini case no. 42/2011.**

[17] It is in my view inexorably apparent from the totality of the evidence tendered a quo, that the accused had sexual intercourse with PW1. I say this in the face of the evidence of PW1 that the accused had intercourse with her on 3 different occasions. In her evidence she testified that on each of these occasions, the accused would threaten her before taking off her panties and then inserting his penis into her vagina. She did not tell anybody of this because the accused threatened to beat her. I agree with the learned trial Magistrate when he held.

"*on the evidence the court finds that the complainant was sexually molested on 3 occasions. She had been threatened with violence should she report. She is a child and she might not have realized the seriousness of the crime and that is the reason she did not report immediately the crime was first committed. Young girls are targeted because some do not know what to do after they had been sexually molested*".

[18] In accepting the evidence of PW1, I am mindful that the law requires that her evidence be treated with caution and that corroboration is imperative. In the case of **The King v Valdemar Dengo Review Case No 843/88 (unreported), the learned Rooney J is quoted in Rex v Justice Magagula criminal case no. 330/02** (unreported) page 2 on the need for corroboration as follows :-

"*The need to be aware of the special danger of convicting an accused on the uncorroborated testimony of a complainant in such cases must never be overlooked. Corroboration may be defined as some independent evidence implicating the accused which tends to confirm the complainants testimony...*"

[19] I find corroboration for PWl's evidence in the medical report ext A and the evidence of PW5 the doctor who examined her at the health centre, a day after the 3rd sexual assault by the accused. PW5 told the court that there was slight penetration into PWl's vagina. That she noticed a break or laceration of the hymen which was fresh. This evidence is confirmed by ext A the medical report which demonstrates that PWl's hymen was broken. The foregoing fact in my view corroborates PWl's evidence of sexual intercourse. I say this because the broken hymen is consistent with penetration. Before there can be sexual intercourse there must be penetration. For the purposes of rape the slightest degree of penetration would suffice in law. This principle was laid down **by Hunt and Milton in their book South African Criminal Law and Procedure, Volume 11, Revised 2nd edition 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*"

[20] Therefore the mere fact that PW5 in evidence stated that there was slight penetration does not derogate from the fact of the sexual course. I also find that PW5's evidence under cross examination that the estimated time within which the laceration on the complainant's hymen occurred, was 1 to 7 days of the date of examination, is also consistent with PWl's evidence that the accused raped her in the night prior to the 15th of May 2010, when she was taken to the health centre for examination. The fact that the sexual intercourse was recent was further confirmed by PW5's evidence that the laceration on PWl's hymen was fresh and that her examination of PWl's genitals was painful. In conclusion, I thus find that the crown proved beyond a reasonable doubt that the accused had sexual intercourse with the complainant.

[21] On the question of lack of consent, It is not disputed that PW1 was 10 years old when the rape occurred. It is the position of the Roman Dutch Common Law that a girl of below the age of 12 is incapable of consenting to sexual intercourse and that even if she consents, sexual intercourse with her is rape. See **Rex v Mfanzile Mphicile**

**Mndzebele criminal case No. 213/2007,** pages 29 - 30. Since it is not disputed that PW1 was 10 years old when the accused had sexual inter course with her, I therefore hold that she did not consent to said sexual intercourse, since she was in law incapable of consenting to same. The crown therefore proved that PW1 did not consent to the sexual intercourse,

[22] The identity of the accused person is also beyond doubt. The accused was well known to PW1 having worked and lived in her parental homestead for 5 years as a herd boy prior to the incidence.PW1 also testified that on all the occasions of rape which occurred at night, that there was electricity outside the room which shown inside the room. I hold the view that she was therefore in a position to identify the accused as the rapist besides knowing him well.

[23] I must say that the accused's feeble attempts at imputing fabrication to the crown witnesses could not lie in the face of the very consistent evidence tendered by the witnesses. I will disregard the accussed's evidence as mendacious in the circumstances. In the light of the totality of the foregoing, I find that the crown indeed proved

beyond a reasonable doubt that the accused raped PW1, a 10 year old girl, on 3 occasions and without a condom. I thus confirm the verdict of guilty by the court a quo and the consequent conviction.

[24] **JUDGMENT ON SENTENCE**

> In mitigation in the court a quo the accused asked for leniency. He said he is 17 years old and had worked in the homestead for 4 years prior to the crime. That he does not have parents. This fact was confirmed by accused's grand mother Rose Tsabedze who also mitigated on behalf of the accused. Rose Tsabedze also told the court that she is now responsible for all accused's father's children in the wake of his demise. In mitigation before this court on the 26th of June 2011, the accused also pleaded for leniency, because his parents passed away leaving only his grandmother, whom he solely takes care of. Accused drew the court's attention to the fact that he is still young.

[25] In response Mr. Fakudze for the crown told the court that the interest of the accused does not out weigh the other interests of the

triad. That the complainant was still very young., when the rape occurred.

[26] In passing sentence, I am very mindful of the oft quoted dictum of **Holmes JA in the case of S v Rabie 1975 (4) SA 855 (A),** where he declared as follows:-

> "*Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances* "

[27] In passing sentence on you therefore, I have considered the fact that you were 17 years of age at the time you committed the offence, which by law is the age relevant in these proceedings. Even though the charge sheet states that the accused was 18 years at the time of the commission of the offence, I however prefer to go with the age of 17 years which the accused told the court in mitigation, was his age at the time of the commission of the offence, since this is the only evidence serving before court as to the accused's age at that time. I have also considered the fact that by reason of that age bracket you were a child by the definition of that word pursuant to section 29 (2) of the constitution of the Kingdom of Swaziland Act 001, 2005, a fact

demonstrated in the recent judgment of the Full Bench of the High Court of Swaziland, in the case of **Sikumbuzo Masinga v The Director of Public Prosecutions and 2 others case no. 21/2009.** I have considered the fact that you are an orphan who now caters for his grand mother. I also give heed to the fact that you are a first offender and has demonstrated remorse.

[28] Senzo Shabangu by reason of being a child at the time of the commission of the offence, you are therefore availed of the decision in **Sikhumbuzo Masinga v Director of Public Prosecutions (Supra).** By reason of the reading in into the provisions of section 185 bis (1) of the CP & E, in that judgment, you are saved from the category of persons liable to a mandatory minimum sentence of 9 years for the offence of rape with aggravating factors .

[29] Inspite of your circumstances demonstrated above, I however hold the view that the offence of rape with or without aggravating factors is a serious crime that must be discouraged in the interest of the stability of the society.

[30] This fact was recognized by the court in the case of **Paul Dlamini v R (982 - 6 SVR (Part 2) p. 411,** where the court declared as follows, per **Hannah CJ.**

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

[31] In the same case of **Paul Dlamini v R (Supra) Hannah CJ** further stated thus:-

> " *Paliament has recently seen fit to require the courts to impose a minimum mandatory sentence of nine years in cases of rape where aggravating factors are found to be present. In what may be termed "ordinary" cases of rape the courts invariably impose a substantial custodial sentence. The length of such sentence will vary depending on the circumstances of the offence and to a lesser degree the circumstances of the offender but in my experience the sentence normally falls within the range of five to seven years. This is so even where the offender has no previous conviction for a sexual offence. When he has a previous conviction for a sexual offence the normal sentence to be expected would be in excess in that particular range....*"

**See Fanafana Nkosinathi Maliba v the King Criminal Appeal Case No. 5/2011.**

[32] In the present case Senzo Shabangu, your victim was a child of 10 years old, a child much younger than you. A child whom you frightened into silence with threats of beatings and by welding a twig whilst you molested her. She is a child who is panicked, scared for life by your illicit actions and probably damaged physically emotionally and psychologically. You took advantage of your position as a herd boy in her homestead, and her helplessness and violated her innocence. You took away her most prized treasure without her consent by raping her not once, not twice but three times. To crown it all you did not use a condom thus exposing her to the risk of contracting sexually transmitted diseases and HIV/ AIDS. You did not do well Senzo Shabangu.

[33] In as much as I have sympathy for you for the fact that you still are a child yourself struggling with the societal forces which threaten to swallow people of your age every day, I am still mindful of the fact

that the offence you committed is a very serious and prevalent one in the Kingdom. I thus take cognizance of the fact that the interest of the society demands that the girl child, like your victim in this case, be protected from people like you. It would not be appropriate to impose a fine on you. No it wont. It wont be appropriate to impose on you community service so that you can remain outside the prison. No it wont. The interest of the society demands that you be removed from the society for a significant period of time to serve as a deterent to other would be rapists of your age, lurking in the dark, bidding for the appropriate opportunity to pounce on the girl child.

[34] Senzo Shabangu, I want you to know that inspite of the fact that pursuant to the constitutional ethos and the decision in **Sikhumbuzo Masinga (Supra),** enjoining the court to consider punishment as a measure of last resort for the child, that both the constitution and international conventions, do not however prohibit incarceration of the child in appropriate circumstances. Local jurisprudence thus demonstrates that the child can be incarcerated when the need arises.

[35] The cases abound. A case in point is the case of **Paul Dlamini VR (Supra).** In that case the Appellant dragged his victim into the bushes and then threatened her with a knife and forced her to submit to sexual intercourse with him. The court held that the use of the knife was an aggravating factor The court also held that the previous good character of the accused and his youth at the time the offence was committed, being seventeen or eighteen years, rightly allowed the Principal Magistrate to impose a sentence of five years imprisonment only.

**See Sikhumbuzo Masinga v The DPP & Others (Supra) paragraph 65.**

[36] The foregoing therefore goes to show that a child can be incarcerated in appropriate circumstances. Therefore, Senzo Shabangu, I have no choice but to put you away in prison in the overwhelming interest of the society.

[37] In coming to this conclusion, I have considered that when you raped the complainant you fully appreciated the wrongness of your actions. If not why did you deem it fit to threaten to beat up PW1 with a twig, thus intimidating her into submission and silence. I hold that you threatened PW1 because you knew the consequences of being discovered in your illicit activities. So put you away I must.

[38] In the case of **Mgubane Magagula v The King Appeal No. 32/2010. Moore JA** demonstrated the appropriate range of sentence for the offence of rape with aggravating factors, as between 11 and 18 years imprisonment. **Moore JA** also expressed the view in that decision, that the Supreme Court of Swaziland 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.

[39] In your case because you were a young boy of 17 years, at the time of the commission of the offence, I choose not to invoke the appropriate range of sentence, evolved by **Moore J A.** This is in consideration of the fact that by reason of your youthfulness, you are

also prone to societal forces; and must be given the chance to reform yourself and make amends.

[40] It is also a fact that pursuant to the severance of the words "*other than one specified in the third schedule*" from Section 313 (1) 8b (2) of the CP &E, as per the decision in **Sikhumbuzo Masinga v DPP & other (supra),** that the court can now suspend any part of it's sentence passed on the child, in relation to the Third Schedule offences, of which rape is one.

[41] In conclusion, having considered all the factors in the triad, I am of the considered view that a sentence of 8 years is deserving of the offence committed. 2 years of this sentence is suspended for a period of 2 years on the condition that you are not convicted of any offence of which sexual intercourse is a factor for the period of suspension. This sentence is back dated to the 15th of May 2010 your date of arrest. Right of appeal and review explained.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS**

**THE....5th.....DAY OF ..July....2011**

**OTA J.**
**JUDGE OF THE HIGH COURT**