

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

CASE NO. 80/11

In the matter between:

REX

VS

MPENDULO SIBANDZE

CORAM: OTA J.

CROWN: MR. S. FAKUDZE

ACCUSED: IN PERSON

JUDGMENT

OTA J.

[1] The accused Mpendulo Sibandze was arraigned before the Magistrates Court charged with the crime of rape. The crown alleged that upon or about the 23rd October 2005, at or near Mangwaneni area in the Hhohho Region the said accused did wrongfully and intentionally have unlawful sexual intercourse with one K M 19 years of age without her consent.

[2] The crown further alleged that the rape was accompanied by aggravating circumstances in terms of Section 185 bis of **The Criminal Procedure and Evidence Act 67/1938**, as amended (CP & E) in that:

1. The accused did not use a condom exposing the complainant to sexually transmitted diseases and HIV/AIDS.
2. The Rape was accompanied by violence as accused threatened the complainant with a knife.

[3] The accused pleaded not guilty to the charge. Thereafter, a trial was conducted in which the crown paraded a total of 4 witnesses in proof of the offence. For his own part, the accused testified on oath and called one other witness in support. The record demonstrates that the court a quo subsequently in its judgment found the accused guilty of rape with aggravating factors and convicted him accordingly as charged. Thereafter, the court remitted this case to the High Court for sentencing in terms of Section 292 (1) of the CP & E.

[4] It is incumbent upon me at this juncture to review the record of the court a quo, to ascertain for myself whether the conviction of the accused before that court was proper before proceeding to sentence.

[5] After a careful consideration of the record, I must say that I agree entirely with the court a quo on its return of the verdict of guilty and the consequent conviction of the accused.

[6] There is no doubt in my mind that the crown proved the identity of the accused beyond a reasonable doubt a quo. Even though this offence was committed on the 23rd of October 2009, and it was not until the 10th December 2009, that the complainant saw the accused at the Swazi Plaza, and alerted the Police Officers on duty thereat, leading to the accused's arrest, I have no doubt from the record that the complainant positively identified the accused as being her attacker. The complainant's evidence on this wise was corroborated by the evidence of PW2, Nosipho Bulunga, in whose company the complainant was on her way to an evening church service at the material time the accused accosted the both of them and subsequently made away with the complainant whom he proceeded to

rape. The complainant and PW2 told the court that there were street lights on at the material place and material point in time when the accused accosted them, thus they could positively identify him. Both witnesses also told the court that the accused has small side burns and looks like Senzo of Generations Soap Opera, thus their ability to identify him inspite of the fact that they did not know him prior to the incidence. Their evidence on the identity of the accused was not shaken under cross examination.

[7] There is also the fact that both the complainant and the accused stay at Mangwaneni in Mbabane where this incidence took place, and that the accused by his own showing knows the complainant even though he alleged that he had never approached her.

[8] The accused in his defence laboured to convince the court that he was already at home at the material time of the incidence on the day in question. He however failed to call any witnesses to substantiate his claim on this wise.

[9] I agree with the court a quo that the accused's witness did not tell the court where the accused was at the material time of this incidence.

[10] It is also my view based on the record, that the crown proved the fact of sexual intercourse beyond a reasonable doubt. The complainant's evidence was that the accused had sexual intercourse with her on the day in question. The fact of the said sexual intercourse is corroborated by ext A, the medical report of the medical examination carried out on the complainant by PW3, Dr. Lungile Dlamini at the Mbabane Government Hospital on the same day of the rape incidence, as well as the evidence of PW3. PW3 told the court that when he examined the complainant on the day in question it was obvious that she had been penetrated. This is also confirmed by ext A.

[11] Finally the fact that the complainant did not consent to the sexual intercourse is also replete from the record of the court a quo.

Complainant's evidence was that the accused threatened her into submission to the sexual intercourse with the knife which he was then wielding and that this is why she failed to raise an alarm at the material time of the rape. This evidence was not impeached during cross

examination. In conclusion, I find that the court a quo properly convicted the accused.

[12] Judgment on sentence

In mitigation before the court a quo, the accused begged for leniency. He said he is 30 years old, not married, but has 4 children who are still young. That he is educated as far as form V. That he is a sickly person suffering from tuberculosis. In mitigation before this court on the 26th of June 2011, the accused again begged for leniency that he is the breadwinner of his family and his children are not benefiting from the free Education Program. That he knows that the Government does not have the intention of condemning the youth but to correct them.

[13] In response Mr Fakudze for the crown told the court that the accused does not appear to be remorseful. That the complainant who was 19 years at the time of the incidence was on her way to church when the accused grabbed her and threatened her into submission to

sexual intercourse with the knife which he was welding. He called for a fitting sentence contending that the offence committed is a serious one.

[14] In passing sentence, I am obligated by law to consider the triad, that is, the seriousness of the offence, the interests of the society, the personal interests of the accused and the peculiar circumstances of the case. These factors were explored by the Supreme Court in the case of **Chicco Manyanya Iddi and two others V Rex Criminal Appeal No's 03, 09 and 10/2010**. See also **Mfanasibili Gule V The King Criminal Appeal case No 2/2011 paragraph 17**.

[15] In honour of the foregoing duty placed on me by law, I have considered that the accused is a first offender. I have considered that the accused is remorseful. I take heed of his allegation that he has four young children all still school going. I am also in sympathy with the accused for his ailment, Tuberculosis.

[16] Having weighed the factors ante, it is however a well established fact that the offence committed by the accused is regarded by the entire society as a very grievous one. That is why parliament saw it fit to advocate a minimum mandatory sentence of 9 years for rape where aggravating factors are found, vide Section 185 bis (1) of the CP&E.

[17] Mpendulo Sibandze, the mood of the society to the offence you committed was buttressed by the Supreme Court in the case of **Mgubane Magagula V The King Crimanal Appeal No.32/2010, wherein Moore JA**, speaking the mind of the court, pegged the appropriate range of sentence for the offence of rape with aggravating factors to be between 11-18 years.

[18] In casu, Mpendulo Sibandze, you accosed this 19 year old complainant who was minding her business on her way to church. You dragged her to the bush and threatened her with a knife, forcing her to submit to sexual intercourse with you. I cringe to imagine the terror this poor girl must have experienced. The use of the knife to my mind

is clearly an aggravating factor. See **Paul Dlamini V R 1982-6 S.L.R (part 2)**.

[19] Furthermore, you did not use a condom when you raped the complainant, thereby exposing her to the risk of sexually contracted infections such as HIV/AIDS. This also to my mind is an aggravating factor, in view of the prevalence of this disease in this day and age which has engendered a world wide campaign on safe sex achieved through the use of condoms. I want you to know Mpendulo Sibandze, that the nefarious activity you orchestrated on the complainant has the ill consequence of damaging her not only physically, but psychologically and emotionally for life.

[20] It is thus in my view inexorably apparent that the interest of the society, especially in view of the prevalence of this sort of offence in the Kingdom, demands that a fitting sentence be meted out for the offence you committed. In the circumstances, I sentence you to 13 years imprisonment to serve as a deterrent to others who are even now plotting their evil enterprise upon unsuspecting females. Sentence

backdated to the 10th of December 2009 being the date of arrest of the accused. It is so ordered. Right of Appeal and Review explained.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 11 DAY
OF JULY 2011**

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