IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.31/10

In the matter between:

THE KING

VS

MELUSI MASEKO

CORAM: OTA, J

FOR THE CROWN MR. S. FAKUDZE

ACCUSED IN PERSON

JUDGMENT

OTA, J

[1] The accused person was arraigned before the Magistrates Court charged with the crime of rape. The crown alleged that on the 30th January, 2010 and at Mahlabatsini in the Shiselweni Region, the said accused did wrongfully, unlawfully and intentionally have sexual intercourse with L P K, a female juvenile aged 15 years old without her consent.

[2] The crown further alleged that the offence was accompanied by aggravating circumstances as stipulated in section 185 bis of the Criminal Procedure and Evidence Act 67 of 1938 as amended, (CP&E) in that the complainant was diagnosed by the doctor and found to be infected with a sexually transmitted disease.

[3] The accused pleaded not guilty to the charge. Thereafter, a trial was conducted, wherein the crown led a total of 4 witnesses in proof of its case. At the close of the case for the crown the accused testified on oath and called two other witnesses. In it's judgment the court a quo found the accused guilty of rape without aggravating factors and accordingly convicted him of that offence.

[4] After the plea in mitigation, the court remitted this case to the High Court for sentence pursuant to Section 292 (1) of the Criminal Procedure and Evidence Act 67/1938,(CP & E) on the basis that the accused person is a subsequent offender. I am obliged pursuant to Section 293 (3) of the CP & E, to first enquire into the record of proceedings of the court a quo, to ascertain for myself whether the conviction of the accused before that court

was proper before proceeding to sentence. I have accordingly reviewed the evidence and I must say that I am satisfied that the court a quo properly convicted the accused of the offence of rape without the aggravating factors named in the charge sheet.

[5] I agree entirely with the trial court that the accused was well known to the complainant, since the accused used to charge his cell phone at the complainant's parental homestead. This incidence took place in broad day light, therefore the complainant was in a position to positively identity the accused as her attacker. Her evidence on the identity of the accused was corroborated by PW1, who was with the complainant at the material time the accused called her to go to him and take the cell phone to be charged. The accused could not shake the evidence of the complainant or PW1 as to his identity under cross examination. The accused laboured to confuse issues on

the question of what direction he was coming from when he emerged from the location of the river, and by the suggestion that the maize stalks were tall at that point in time, therefore he could not possibly be seen by PW1 and complainant, and that the complainant could have been raped by one of the Jericho Zionists attending the dam at Emanganganeni. None of these defences could avail the accused to my mind in the face of the evidence of the complainant and PW1 who knew the accused prior to the incidence and who positively identified the accused. In fact PW1 told the court under cross examination, that she did not only see the accused, but that she heard and recognized accused's voice when he called the complainant. From, the evidence tendered a quo, I have no doubt that the crown proved the identity of the accused beyond a reasonable doubt.

[6] The fact of sexual intercourse with the complainant was also

proved beyond a reasonable doubt. The complainant's evidence that the accused had sexual intercourse with her was corroborated by ext A, the medical report, of the medical examination carried out on the complainant at the Mankayane Hospital on the same day of the incidence. The remarks of the doctor who conducted the medical examination as per ext A was as follows:-

> "*There is evidence of sexual encounter as seen by the hyperaemia of the vestibule and Fourchette*"

[7] The opinion of the doctor as per ext A was:-

> "*Sexual abuse cannot be ruled out. There are sperm cells in specimen taken. The painful examination is a result of the infection which she has*".

[8] It is in my view proved beyond a reasonable doubt by the evidence of the complainant juxtaposed with ext A, that the accused did have sexual intercourse with the complainant on the day in question. Accused contended that ext A, demonstrates that the complainant had a sexually transmitted disease at the time of the incidence, therefore, so goes the argument, since ext B accused's own medical report shows that he did not have any sexually transmitted disease, that the charge against him must thus fail. This line of defence cannot avail the accused person. I agree entirely with the court a quo that the doctor's findings upon examination of the complainant to the effect that "*The painful examination is a result of the infection which she has*" does not mean that the complainant had a sexually transmitted disease. I also agree with the court a quo that if the findings of the medical doctor were that the complainant had a sexually

transmitted disease, the doctor would have stated so in clear and unambiguous terms on ext A.

[9] What I gather from ext A and as rightly held by the court a quo, is that the infection was as a result of the hyperaemia of the complainant's vestibule and Fourchette. The word hyperaemia is defined by The New International Websters Comprehensive Dictionary, at page 621 as follows "*Abnormal accumulation of the blood in any part of the body also smelled...*"

[10] It is thus an obvious fact to my mind that there must have been injuries or bruises to the complainants vestibule and Fourchette as a result of the forced sexual intercourse with the accused, obviously resulting in the hyperaemia i.e accumulation of foul smelling blood in those sensitive parts of the

complainants anatomy, leading to the infection found by the doctor. The defence the accused sought to set up in relation to this factor in thus unmaintainable. To my mind my findings ante also goes to defeat the charge of rape with aggravating factors, a quo. This is because the aggravating factor alleged by the crown was that the complainant was diagnosed to be infected with a sexually transmitted disease in consequence of the rape. The crown reached that conclusion based on ext A, and on the doctor's verdict that the complainant had an infection.

[11] I have already held that the said infection was not sexual but was as a result of the hyperaemia of the complainant's vestibule and Fourchette by reason of the forced sexual intercourse. Besides, it is my view that the evidence of DW3, Dr Ndakiti put the allegation that the accused passed on to the complainant a sexually transmitted infection, to rest. I say this because under re examination by the accused a quo, DW3 told the court in response to a question posed by the accused, that

there is no sexually transmitted disease which shows itself after hours or same day after one has contact with the carrier. That most sexually transmitted diseases manifest after weeks or a month after contact. It is thus beyond dispute that the infection found on the complainant, on the same day of the rape as per ext A, cannot therefore be termed a sexually transmitted diseases contracted from the rape incidence, as the crown- was wont to allege. On these premises, I agree entirely with the court a quo that the crown proved the offence of rape, without aggravating factors.

[12] It is also extant from the record a quo, that the fact of lack of consent by the complainant was proved beyond a reasonable doubt by the crown. This fact is replete in the complainants evidence, where she clearly demonstrated that the accused slapped her with an open hand when she started shouting, the accused grabbed her. That he then throttled her. After that, he pulled her by the hand to the maize fields where he proceeded to

force her to lie down and then to remove her panties and to insert his penis into her urination organ. The medical report ext A also demonstrates that the complainant had abrations on the right side of her neck which in my view corroborates the complainant's evidence of the force which the accused employed to make her succumb to the sexual intercourse.

[13] It is indeed beyond dispute from the conspectus of the foregoing, that the crown proved the offence of rape beyond a reasonable doubt a quo. I confirm the verdict of guilty and the consequent conviction of the accused by the court a quo, on these premises.

[14] <u>Judgment on Sentence</u>

> In mitigation a quo the accused begged for leniency as he has 3 children and is presently serving sentence for a previous offence. The accused also called his mother and father to plea in mitigation. Both parents asked for a suspended sentence as the accused is currently serving a seven year sentence and has three school going children

who are now their sole responsibility. In mitigation before this court on the 26th of June 2011, the accused once again begged for leniency because he has children who are still young. The accused also told the court that the sentence he is currently serving has taught him a lot of lessons.

[15] In response Mr Fakudze for the crown prayed the court for a stiff sentence to serve as a deterrent to others, in line with the gravity of the offence committed which is recognized by legislation. He contended that the accused violated a child from a homestead which had extended courtesy to him by allowing him to charge his cell phone there. He drew the courts attention to Ext A, contending that the complainant was diagnosed with a sexually transmitted disease in consequence of the rape.

[16] In passing sentence, I have considered your circumstances as fully demonstrated in your plea in mitigation. I take cognizance of the fact that you have four little children, three who are currently school going. I take heed of the fact that you are remorseful. In as much as I am in sympathy with you for your personal circumstances, I am however firmly convinced that your personal interests cannot override the interest of the complainant and that of the society.

[17] I say this because rape with or without aggravating factors is recognized by parliament, by the courts and by society as a very grievous offence. The gravity of rape in the kingdom is heightened by its ubiquity. What I find most disheartening is the prevalence of the rape of children and minors. We are faced with

a very dire situation where the girl child and minors are being sexually victimized almost as the norm and not the exception. This is a trend which we must all join hands to discourage in the overwhelming interest of the society.

[18] Melusi Maseko, your victim was a minor of 15 years. An unsuspecting, defenceless and innocent young girl, whom you lured to the slaughter by asking her to come and collect a cell phone from you to be charged at her homestead. You chose to violate a young girl whose parents had extended courtesy and kindness to you. Like the camelion, you hid behind the pretence of sending her on an errand to deprive her of her innocence with impunity. Your enterprise Melusi Maseko, has the ill consequence of scarring the complainant for life.

[19] You traumatized the complainant by your rude invasion of her privacy, personality and bodily integrity. The fact of complainant's trauma is demonstrated by Ext A which shows that the complainant was "*irritable, crying during narrating incidence*". This fact is also replete from other parts of the record before the court a quo. This is little wonder since rape is recognized as having an adverse effect on the victim's emotions and psychology.

[20] Melusi Maseko, in as much as I am in sympathy with you due to your personal circumstances, I cannot however give you the suspended sentence for which you contend, even though you are convicted for rape without aggravating factors. This is because as I have already stated the offence of rape with or without aggravating factors, is a grievous crime that must be discouraged in the interest of the society. Therefore, the stiff

punishment advocated by both parliament and case law for this offence.

[21] In the case of **Paul Dlamini V R 1982-6 SLR (part 2) p.411** Hannah CJ, demonstrated the mood of the courts to the offence of rape in general in the following words:-

> *'*Parliament 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 "

[22] Similarly parliament, via Section 313 (1) and (2) of the CP&E, prohibits the suspension of any part of any sentence

imposed for a third schedule offence, under which rape falls. I cannot go against such clear words of statute.

[23] It is thus an obvious fact Melusi Maseko, that the mood of the courts and legislation is that the offence of rape be punished in the interest of the society. To compound the gravity of your own offence, the record demonstrates that you are a subsequent offender, having been previously convicted of the offence of rape in respect of which you are currently serving a seven year sentence. The record shows clearly that you committed the present offence while you were out on bail for the previous offence, whilst standing trial in respect thereof. I thus take the view that the overwhelming interest of the society demands that you be put away for a considerable length of time to serve as a deterrent to others. In the circumstances, I am firmly convinced that a sentence of 9 years is condign, of the offence committed.

Sentence backdated to the 14th of February 2010, 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 DAY

THE 15th DAY OF.....July....2011

OTA J
JUDGE OF THE HIGH COURT