IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 255/2011**

In the matter between:

REX VS

SIKHUMBUZO SIMELANE

CORAM: **OTA, J**

FOR THE CROWN

FOR THE ACCUSED

JUDGMENT

OTA, J

[1] The Accused **Sikhumbuzo Simdane** was arraigned before the Magistrates Court charged with the offence of Rape.

[2] The crown alleged that on or about the 26th of February 2010, at or near Magobodvo area in the Hhohho region, the said Accused person did intentionally have unlawful sexual intercourse with one **Ncobile**

Mavuso, a female who was at that time aged 10 years and incapable in law of consenting to sexual intercourse and did thereby commit the said crime of Rape.

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

[4] 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.

[5] The Accused pleaded not guilty to the charge. Thereafter, a trial in which the Accused was assisted by his grand mother, **FikOe Msfl ri,** was conducted. The crown paraded six witnesses in proof of the offence. Thereafter the Accused testified on oath and called no witnesses. The trial Court in its judgment found the Accused guilty of the offence as charged and convicted him accordingly. Thereafter, the Court a quo,

remitted the case to this Court for sentencing in terms of Section 292 (1) of the CP & E.

[6] From the record I am satisfied that the crown proved its case beyond a reasonable doubt a quo. I say this because the Accused person was positively identified by the Complainant as being the one who raped her. The evidence of the Complainant was that even though she did not know the name of her attacker, she however knew him by sight on account of the fact that they had both attended the same school, St Benedicts Primary School before the Accused transferred to the school he was attending at the material time of this incidence, St Adams Primary School. Upon her return home from the rape incidence, the Complainant informed her mother **PW2 Siphuhihi Masango,** and her uncle **PW3 Jimmy Mamfaa,** that she knew her attacker by sight because both of them had attended St Benedicts Primary School at some point. The Complainant also described to PW2 and PW3, the clothings which the Accused was wearing at the material time of the attack. She told them that the Accused was wearing a long sleeved white shirt with some stripes running downwards, and a pair of grey trousers. The description of the Accused's wearing apparels

juggled the memory of PW3, Jimmy Mamba, who is a teacher at St Adams Primary School. PW3 remembered accosting the Accused who was wearing apparels of similar description, that day in school. PW3 then proceeded to the Accused's homestead and brought the Accused who was positively identified by the Complainant as being the person who raped her on that day. The Accused himself admitted that he and Complainant used to attend St Benedicts Primary School, before he transferred to St Adams Primary School. From the record I have no doubt that the crown indeed proved the identity of the Accused beyond a reasonable doubt before the Court a quo.

[7] Furthermore, the fact of sexual intercourse was also proved beyond a reasonable doubt a quo. The Complainants evidence was that the Accused inserted his penis into her vagina during the incidence. The fact of sexual intercourse to my mind was corroborated by the evidence of PW6, **Dr Halidi - Hassan Mabano,** the medical doctor who examined the Complainant at the Pigg's Peak Government Hospital on the day of this incidence, as well as exhibit A, the medical report of the said Medical Examination. PW6 told the Court that when he examined

the Complainant's genitals, he discovered that there were bruises on the left side of her labia majora. That her hymen was lacerated and reptured with some fresh blood. That his conclusion after the medical examination was that the Complainant had been sexually abused. This fact is confirmed by exhibit A, which demonstrates evidence of sexual injury on the Complainant.

[8] Also the fact that the Complainant did not consent to the sexual intercourse is also extant from the record. In the first instance it is the position of Roman Dutch Common Law that a girl of below the age of 12 years is incapable of consenting to sexual intercourse and that even if she consents sexual intercourse with her is rape **see Rex V Zimele Samson Magagula Criminal Case No 371/08, Rex V Senso Shabangu Criminal Case No 239/2010.** Since it is not disputed that the Complainant was 10 years old when the Accused had sexual intercourse with her, she was thus under the law incapable of consenting to same. And in any case, it was Complainants evidence that upon her refusal to undress herself, that the Accused undressed her himself and forced her into submission to the sexual intercourse by threatening to kill her.

[9] In conclusion, from the record, there is no doubt in my mind that the crown proved its case beyond a reasonable doubt before the Court a quo. I therefore confirm the Accused's conviction before that Court.

[10] Judgment on Sentence

> In mitigation before the court a quo the accused begged for leniency. He said he is 16 years old and is doing STD V now at Kwaluseni Primary School. He pleaded for a suspended sentence. The accused's grandmother also asked for leniency and a suspended sentence on behalf of the accused.

[11] In mitigation before this court on the 26th of July 2011, the accused again begged for leniency and for a suspended sentence to enable him go back to school and also look after his grand parents since his father had passed away. The Accused also informed the court that he is now 19 years old. That he was 18 years when he committed the offence. That the 16 years recorded as his age by the court a quo during mitigation was a mistake by that court.

[12] In response Mr. Fakudze for the crown called for a punitive sentence to serve as a deterrent to other youths who may be conceiving this sort of crime. He implored the court not to allow the accused's personal circumstances becloud the seriousness of the offence committed. He drew the courts attention to the medical certificate which demonstrates that the accused's activities on the complainant on the day in question were horrific. He implored the court to show its abhorrence for this uncivilized offence by imposing a fitting sentence.

[13] In passing sentence, I warn myself of the oft quoted dictum of **Holmes JA in me case of S v Rabie 1975 (4) SA 855 (A),** where he stated thus:-

> "*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.*"

[14] Skhumbuzo Simelane, I have carefully considered your personal circumstances demonstrated in mitigation. I must say that inspite of

your personal circumstances demonstrated ante, I am still of the firm view that the offence of rape is a serious crime that must be discouraged in the overwhelming interest of the society. The seriousness of this offence especially where aggravating factors are found was recognized by parliament in 1986, when it advocated a minimum mandatory sentence of 9 years for rape with aggravating factors vide section 185 bis (1) of the CP&E. The mood of parliament towards this offence was backed up by the Supreme Court in its recent judgment in the case of **Mgubane Magagula v The King Appeal case no 3^2010,** where the court evolved the appropriate range of sentence for this offence as between 11 and 18 years. In arriving at the appropriate range of sentence, the court had this to say in paragraph 15 of that judgment.

> "*(15) Succeeding generations of Judges in every jurisdiction, including the judges of this Kingdom have inveighed against the barbarity of rape. They have condemned in the strongest terms it's brutality and savagery, it's affront to the dignity and worth of its victims, its dehumanizing reduction of women to the status of mere objects for the unrequited*

gratification of the basest sexual passions of rampant males, and the long term havoc which the trauma of rape is capable of wreaking upon the emotional and psychological health and well of ravishment. It is for these reasons, and because of the disturbing frequency of the abominable offence of rape in this Kingdom, that persons convicted of this heinous crime must expect to receive condign sentences from trial courts".

[15] It is worthy of note that inspite of the tough stance of both parliament and the courts against this offence, that the prevalence of rape especially the rape of the girl child is on the increase. The activities of pedophiles like the accused instant in the Kingdom have attained nightmarish dimensions. These group of people specialize in the molestation of the girl child, thus reducing the girl child to an endangered specie in the Kingdom. It is thus of overwhelming societal interest that this offence be discouraged. This need was recognized by the court a quo whilst remitting this case to this court for sentencing in the following language:-

recognized by the court a quo whilst remitting this case to this court for sentencing in the following language :-

"*Rape cases are on the increase and it would seem that the sentences that the court passes are not deterrent because such cases keep on flooding the courts. It is unfortunate that in such cases such serious crimes are committed by young people like you*"

[16] It is thus beyond dispute that it is in the interest of the society that this offence be discouraged.

[17] Sikhumbuzo Simelane your relative youthfulness when you committed this offence does not derogate from the seriousness of the offence. Your victim was a 10 year old child. A child whom you silenced into submission to sexual intercourse with you by threats that you will kill her. You took away this child's innocence by force. You gave her no opportunity to choose whom to surrender her innocence to. You violated her privacy and bodily integrity and debased her womanhood by your actions. In your enterprise you failed to use a condom, thus

exposing the complainant to the risk of sexually transmitted diseases and infections such as HIV/AIDS, a disease of which prevalence in this day and age has engendered a world wide campaign on safe sex to be achieved through the use of condoms. You haven't done well at all Sikhumbuzo Simelane.

[18] In as much as I am in sympathy with you because of the fact that you were relatively young yourself at the time you committed this offence, and therefore prone to the societal forces that do so easily beset people of your age, I am still mindful of the fact that the offence you committed is a very serious one which needs to be curbed in the interest of the stability of the nation. I do not therefore think that the interest of the society will be served by giving you the suspended sentence for which you contend. Besides, parliament pursuant to Section 313 (1) and (2) of the CP & E, prohibits the that criminal statute, under which rape falls. I cannot go against such clear words of statute.

[19] In conclusion, having carefully considered the triad, I am of the firm conviction that a sentence of 11 years is deserving of the offence

committed. Sentence backdated to the 26th of February 2010, the date of accused's arrest. It is so ordered. Right of Appeal and Review explained.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE……25th**……DAY OF** …..July**……2011**

OTAJ.
JUDGE OF THE HIGH COURT