IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 185/11

In the matter between

REX

VS

DUMISANI SHONGWE **1ST ACCUSED**
VUSI MFOKENG DLAMINI **2ND ACCUSED**

Neutral citation: *Rex v Dumisani Shongwe and Vusi Mfokeng Dlamini* (203/09) [2012] SZHC 11

Coram: **OTA J.**

Heard: **24th February 2012**

Delivered: **28th February 2012**

Summary: ***Sentencing of juvenile offender for the offence of Rape with aggravating factors. Case remitted to the High Court in terms of Section 292 of the Criminal Procedure & Evidence Act, 1938 (as amended)***

OTA J.

[1] The 1st Accused Dumisani Shongwe was jointly charged with Vusi Mfokeng Dlamini on several counts of different offences, before the Magistrates Courts. In count 1, 1st Accused was charged for the offence of rape with aggravating circumstances. In count 2, 1st and 2nd Accused persons were charged with the offence of assault with intent to cause grievous bodily harm. In count 3, 1st and 2nd Accused persons were charged with the offence of theft, and in count 4 the 1st Accused was charged with the offence of assault with intent to cause grievous bodily harm.

[2] It is on record that both Accused persons pleaded not guilty to all the charges. Thereafter, a full trial ensued with the crown parading a total of 9 witnesses in proof of the offences. At the close of the crown's case both Accused persons testified on oath and called no witnesses. Suffice it to say that the court a quo in its judgment, found both Accused persons guilty as charged on all counts and proceeded to convict them accordingly. Thereafter, the court a quo sentenced the Accused persons in respect of counts 2,3 and 4 respectively. The court a quo however remitted the case to this court for sentencing of the 1st Accused in

respect of the offence of Rape in count 1, pursuant to Section 292 (1) of the Criminal Procedure and Evidence Act 1938 (CP &E), as amended. This was in consideration of the fact that the crown alleged aggravating factors which were proved, thereby removing the question of sentence outside the jurisdiction of the trial court.

[3] It is the sentencing of the 1st Accused in respect of count 1 that presently vexes this court.

[4] It is apposite for me at this juncture to demonstrate the charge in respect of count 1, as contained in the charge sheet, a quo. It states as follows:-

> *‘‘ The said Accused is charged with the offence of Rape. In that upon or about the 15th of May 2009, in the Hhohho District the said accused person*
>
> *The said accused did intentionally have unlawful sexual intercourse with Lungile Dlamini a female of twenty three years (23) years of age without her consent and did thereby commit the crime of rape.*
>
> *Take further notice that this rape is accompanied by aggravating circumstances as envisaged by Section 185 bis of the Criminal Procedure and Evidence Act 67/1938 in that:*

At the commission of the offence the Accused did not use a condom thereby putting the complainant at risk of contracting sexually transmitted disease and infections''

[5] Let me interpolate here for one moment, to detail certain issues I take with this charge. In the first instance, the charge failed to indicate which of the Accused persons 1 or 2 who committed the offence of rape alleged therein. This is a very serious irregularity, However, after a very careful perusal of the record, I am inclined to treat this irregularity as insufficient to vitiate the entire proceedings. I say this because the arraignment of the Accused persons a quo, as well as the evidence tendered in the trial that ensued thereafter, demonstrate in full glare, that count 1 of the charge is in respect of the 1st Accused. In any case the 1st Accused failed to raise any objections to the charge but rather pleaded to it.

[6] Furthermore, the sheer inelegance of the charge is another issue that has seriously assaulted my sense of judicial propriety. The particulars of the offence are disjointed and near out of context. The importance of the charge proffered against an Accused person cannot be

overemphasized. It is the hub of the entire criminal trial. I find my words in the case of **Rex V Friday Magagula Criminal Case No. 191/2009, at paragraph 5**, germane to these circumstances. I stated as follows:-

> *''[5] I however find a need to admonish that the charge sheet constitutes notice to the Accused person of the case he is called upon by the crown to answer. The purpose of the charge sheet is to identify and isolate the particulars of the offence allegedly committed by the Accused. The prosecution of the Accused for the alleged offence will be done strictly on the basis of the particulars of the offence as identified and isolated in the charge. Therefore, the charge should be drawn up with the greatest legal skill, accuracy, elegance and expertise which the crown can muster.''*

[7] Let me also at this juncture recount another irregularity I observe in the proceedings a quo. It is obvious from the charge that the 1st Accused was a juvenile, being of the age of 16 years when he was arraigned before the Court a quo. The 1st Accused upon arraignment had no legal representation. The law is that he should have been assisted in the trial by either a guardian or the department of social welfare. However, the record demonstrates, that the 1st Accused was arraigned before the court

a quo on the 21st July 2009, in the absence of counsel, a guardian or a representative of the social welfare. Thereafter, the trial proceeded still in the absence of any of these personnel, with the crown calling 5 witnesses. It was only on the 7th of July 2010, after PW 5 had testified, that the prosecutor realized this error and not only intimated the court of same, but produced the 1st Accused's mother, Pauline Shongwe, to assist the 1st Accused. It is on record that in the face of these developments, PW1, PW2 and PW4 were recalled by the Court. The evidence of these witnesses were respectively read back to the Accused persons, in the presence of the witnesses and the 1st Accused's mother. Thereafter, both the 1st Accused and his mother were afforded the opportunity of crossexamining these witnesses. None of the Accused persons objected to this procedure adopted a quo.

[8] It is also on record that at some point, the 1st Accused's mother dropped out of the proceedings refusing to come to court. The court a quo in the face of this development appointed Wandile Bhembe**,** a social welfare officer to stand in as guardian for 1st Accused. The record shows PW 5 was recalled, his evidence read back to both Accused persons and the social welfare officer, who were thereafter

afforded the opportunity of crossexamining him. None of the Accused persons objected to this procedure.

[9] I am firmly convinced that by procuring a guardian for the 1st Accused and recalling all these witnesses whose evidence tend to the offences committed by the 1st Accused, for crossexamination by the Accused and his parent and or guardian, saved the proceedings a quo, thus disabling the initial apparent irregularity from vitiating the proceedings.

[10] Having said the foregoing, I deem it expedient at this juncture, before proceeding to sentence, to state that from the record, I am satisfied that the crown proved its case beyond a reasonable doubt a quo. I say this because both the complainant Lungile Dlamini PW 1, and her husband Machawe Mamba, PW 2, who were in the house together at the material time of the rape positively identified 1st Accused as being the person who raped complainant. Both PW 1 and PW 2, not only knew 1st Accused by sight but also knew him by name. They knew that 1st Accused was from Mgobodzi which is adjacent to Vusweni where PW1 and PW2 live. They were able to identify the 1st Accused on that night because of the paraffin lamp which was lite in the house. Even though

the paraffin lamp was dim, they could however clearly see and identify the 1st Accused, even though they had denied knowing 1st Accused when questioned by him in these respects. Their evidence on this issue was corroborated by PW 5, Detective Constable Sergeant Mlangeni, who told the Court that on the day of the incidence when he went to the residence of PW 1 and PW 2, that PW 1 told him that she was raped by 1st Accused. PW 5 stated that PW 1 called 1st Accused by name. At the end of the day from the record, there was no doubt left in my mind that the crown proved the identity of the 1st Accused beyond a reasonable doubt. All attempts made by the 1st Accused to defeat the evidence led by the crown in these respects, proved abortive.

[11] Further, the fact of sexual intercourse was proved by the evidence of PW1, PW2 as well as the medical certificate exhibit E. In the face of the evidence of PW1 and PW2 to the effect that the 1st accused had sexual intercourse with PW1 on that day, I find the contention that PW1 and PW2 had already had sexual intercourse prior to the rape incidence immaterial. The evidence of PW1 and PW2 on the fact of the rape by the Accused person was not shaken under crossexamination.

[12] Finally, Pw1's lack of consent to the said intercourse is replete from the record. PW1 told the court that 1st Accused demanded to have sexual intercourse with her. That 1st Accused demanded that she spreads her thighs and that she did as she was told. That 1st Accused then proceeded to have sexual intercourse with her. It is obvious to me from this evidence that PW1 did not consent to the said sexual intercourse but was intimidated by the 1st Accused into submission to same. It is also obvious from the uncontroverted evidence of PW1, that the 1st Accused failed to use a condom in the rape enterprise.

[13] It is in the light of the totality of the foregoing that I agree with the court a quo that the crown proved the offence of rape with aggravating factors against the 1st Accused. I thus confirm the verdict of guilty and consequent conviction of 1st Accused by the court a quo on count one. Let us now proceed to sentence.

JUDGMENT ON SENTENCE

[14] In mitigation before this court, the 1st Accused led evidence on oath in which he told the court that he is presently 20 years old, not married, has no children and is not educated. He told the court that prior to his arrest for this offence, that he was a bricklayer and that he was a first offender.

[15] Defence counsel for his own part called for leniency because the 1st Accused is a first offender. Counsel submitted, that the emphasis in sentencing should be correctional not punitive, in view of 1st Accused relative young age. He prayed the court to impose a suspended sentence in the circumstances.

[16] In response, Mr. Fakudze for the crown called for a stiff sentence to serve as a deterrent to other young men who may be nursing desires of like contemplation as the 1st Accused. Counsel decried the offence committed as incomprehensible, in view of the fact that the 1st Accused raped PW1, right in the presence of her husband. Counsel opined that surely in these circumstances, the 1st Accused is in need of

rehabilitation which is best achieved in a juvenile institution. He condemned the notion of a suspended sentence in these circumstances, stressing that the society awaits a fitting sentence.

[17] Dumisani Shongwe, in passing sentence on you, I am mandated by law to consider the triad, that is the seriousness of the offence, the interests of the Accused, the interests of the society and the peculiar circumstances of the case.

[18] I have thus in honour of the foregoing principles, considered your relative young age of 16 years when you committed this offence. I have considered the fact that you are a first offender and uneducated. I also take heed of the passionate plea of your counsel during mitigation.

[19] Dumisani Shongwe, having weighed the foregoing factors, I however wish to stress here that the offence you committed is regarded by the society as a grievous and hienous one. That is why parliament went to great lengths to prescribe a minimum mandatory sentence of 9 years for this offence. The mood of parliament was amplified by the Supreme Court in the case **of Mgubane Magagula v The King Criminal**

Appeal No. 32/2010, wherein the court pegged the appropriate range of sentence for this offence at between 11 – 18 years.

[20] However, in view of the fact that you were still a child of 16 years yourself at the time of commission of this offence, and in view of your complete lack of education, I have sympathy with you. I chose in the circumstances, to invoke the decision of the full bench of the High Court in the case of **Sikhumbuzo Masinga v The Director of Public Prosecution and 2 others case no. 21/2009**.

[21] By reason of your age at the commission of the offence, that decision removes you from the category of persons liable to a mandatory minimum sentence of 9 years imprisonment for the offence of rape with aggravating factors as advocated by section 185 bis of the CP&E. That decision also allows me the liberty of imposing a suspended sentence on you if I deem it expedient.

[22] Dumisani Shongwe, the foregoing does not however suggest that I should allow your walk away scotfree. No this will not serve the interests of the society. As I have indicated, rape is a serious offence

and its prevalence in the Kingdom adds more weight to its seriousness. Allowing you to walk away in the circumstances of this case as you urge, will not serve the interests of the society. You not only raped the complainant without a condom thereby exposing her to the risk of sexually transmitted deceases and infections, but you committed this reprehensible act, right in the presence of her husband. This in my view is an outrage, that inspite of your relative young age, deserves to be punished adequately, to serve as a deterrent to other aspiring young offenders.

[23] Dumisani Shongwe, having carefully considered the triad, I come to the conclusion that a sentence of 8 years is condign of the offence committed. I will suspend 2 years of this sentence, for a period of 2 years on the condition that you are not convicted of any sexually related offence during the period of suspension.

[24] It is obvious from the record a quo that 1st Accused was incarcerated from the 16th of May 2009, when he was arrested. The record also shows that on the 12th day of February 2010, he was admitted to bail by the High Court. It is however not clear from the record when 1st

Accused was actually released on bail. However, this sentence is backdated to cover the totality of his period of incarceration. It is so ordered. Right of Appeal and review explained.

For the Crown: **S. Fakudze**

For the Accused: **S. Dlamini**

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE…….. DAY OF …….2012

OTA J.

JUDGE OF THE HIGH COURT