



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 324/11

In the matter between

REX

V

MANDLA MAXWEL GADLELA

Neutral citation: *Rex v Mandla Maxwel Gadlela (324/11) [2012]*
SZHC 154

Coram: OTA J.

Heard: 16th July 2012

Delivered: 18th July 2012

Summary: **Aggravated Rape-victim an 11 year old child-sentence of 18 years imposed.**

[1] The Accused person **Mandla Maxwell Gadlela** aged 37 years, stands before this court charged with the offence of rape. The Indictment reads as follow:-

“

*In that upon or about the 8th April, 2011 and at or near Dumisa Compound in the Lubombo Region, the said Accused did intentionally have unlawful sexual intercourse with **TEMLANDVO TENELE SIMELANE**, a female minor aged eleven (11) years old who in law is incapable of consenting to sexual intercourse, and did thereby commit the Crime of RAPE*

TAKE NOTICE FURTHER that this offence is accompanied by aggravating factors as envisaged under Section 185 (bis) of the Criminal Procedure and Evidence Act 67/1938 as amended in that:

- (i) The victim was a minor of tender age*
- (ii) The Accused did not use a condom thus exposing the victim to the risk of contracting sexually transmitted infections including HIV/AIDS*
- (iii) The Accused stood in loco-parentis relationship with the complainant*
- (iv) The Accused inflicted a life long trauma on the victim*
- (v) The Accused broke the victim's virginity*

[2] When the Accused was arraigned before this court, his right to legal representation was duly explained to him. The Accused opted to conduct his own defence. Thereafter, the charge was

read and explained to the Accused in the language of his choice, Siswati. The Accused pleaded guilty to the charge.

[3] In the wake of the Accused's plea of guilty, the parties prepared a statement of agreed facts, which was signed by both the Crown and the Accused. The statement of agreed facts was duly read out and explained to the Accused person in the language of his choice, Siswati. Thereafter, the court enquired from the Accused whether he understood the statement of agreed facts, and whether same was a true reflection of the facts of this case and whether he accepts it to be so. The Accused replied that the statement of agreed facts is true. The court then admitted the statement of agreed facts in evidence as exhibit A.

[4] Similarly, the Medical Certificate of the Medical Examination carried out on the Complainant at Siteki Good Shepherd Hospital on the 12th of April 2011, and signed by one **Dr Ndakati**, was also read out and explained to the Accused in Siswati. The Accused informed the court that he understood the content of the Medical Certificate. Thereafter, the Medical Certificate was admitted in evidence, by consent, as exhibit B.

[5] It is expedient for me to recite the content of the statement of agreed facts at this juncture. It states as follows:-

STATEMENT OF AGREED FACTS

Mandla Maxwell Gadlela (hereinafter referred to as the Accused) stands

Charged, with the offence of RAPE. He has pleaded guilty to the charge, which plea the Crown accepts.

It is agreed between the Crown and the Accused as follows:-

On the 8th April, 2011 at or near Dumisa Compound in the Lubombo Region, the complainant (Temlandvo Tenele Simelane) went to fetch water at KaMacwele with Nonkululeko and Sihuliso. She came back earlier and put the container in the house and went outside to play.

While the Complainant was about to leave the compound to join Phindile to collect grasshoppers, she was followed by the Accused. The Accused grabbed the Complainant and pulled her to his room where he undressed her and had sexual intercourse with the Complainant.

The Complainant reported this matter to her mother, Ntombikayise Mamba (PW2) and to Rebecca Masango (PW3) who then reported same to the police.

On the 12th April, 2011, the Complainant was examined by PW6 (Dr. Kambale Ndakiti) at Good Shepherd Hospital who reached the opinion that “clinical findings play in favour of a lower genital infection.”

The Accused was arrested on the 12th April 2011 by Absalom Gumbi, a community police who then handed him over to 1853 Detective Sergeant Dlamini a police officer. The Accused is remorseful of his actions.

Accused more specifically admits that:

- ***The Complainant, Temlandvo Tenele Simelane was a minor aged 11 years.***
- ***He intentionally had unlawful sexual intercourse with the Complainant who in law is incapable of consenting to sexual intercourse.***
- ***By not using a condom, the Accused exposed the Complainant to the risk of contracting sexually transmitted infections and HIV/AIDS.***

- ***He stood in loco-parentis relationship with the Complainant .***
- ***He inflicted life long trauma on the Complainant.***
- ***He broke the victim's virginity.''***

[6] Having carefully perused the statement of agreed facts, I am of the firm view that it exudes sufficient particulars of the offence committed. In the circumstances, Section 238 of the Criminal Procedure and Evidence Act would holdsway, rendering the necessity of any further evidence, otiose.

[7] I am firmly convinced that the statement of agreed facts, exhibit A together with the Medical Certificate exhibit B, constituted proof beyond a reasonable doubt that the Accused person committed the offence.

[8] I say this because the Accused not only pleaded guilty to the charge, but exhibit B the Medical Certificate shows that the Accused indeed had sexual intercourse with the Complainant. Exhibit B shows that the complainants hymen had ebrations covered with whitish discharge and her fourchettee was redish. The opinion of the doctor was that *“clinical findings play in favour of a lower genital infection.”* These findings coupled with

exhibit A the statement of agreed facts in which the Accused expressly agreed to having sexual intercourse with Complainant, is proof beyond a reasonable doubt that he did have said sexual intercourse with the Complainant. The kind of lower genital infection demonstrated in exhibit B, which shows that the Complainant had whitish and pus like discharge from her genitals, is consistent with an infection probably contracted from unprotected sexual intercourse which is a par with the facts of this case.

[9] Furthermore, on the question of lack of consent, it is common cause that the Complainant was only 11 years old when the Accused had sexual intercourse with her. It is the position of the Roman Dutch Common Law, which holdsway in this jurisdiction, that a girl below the age of 12years is incapable of consenting to sexual intercourse and even if she consents, sexual intercourse with her constitutes the offence of rape. See **R v Z 1959 (1) SA 239, The King V Sibusiso Xolani Dlamini Case No. 42/2011, Rex v Mfanzile Mphicile Mndzebele Criminal Case No. 213/2007.**

[10] In the circumstances, since the Complainant was only 11 years at the material time of this offence, I find that the sexual

intercourse which the Accused had with the Complainant constitutes rape of the Complainant.

[11] Finally, the identity of the Accused person is not in issue. The Accused himself pleaded guilty to the offence as charged.

[12] It is also proved beyond a reasonable doubt from the statement of agreed facts, that the Accused person did not use a condom in the rape enterprise. That the Accused stood in loco parentis to the Complainant. That he inflicted life long trauma on the Complainant and that he broke the Complainant's virginity.

[13] In the light of the totality of the foregoing, I find that the crown has proved its case beyond a reasonable doubt. The Accused person is found guilty and is accordingly convicted of the offence as charged

JUDGEMENT ON SENTENCE

[14] In his plea in mitigation, the Accused asked for leniency because he is remorseful. He said he left children at home who are now left unattended since he has been in custody.

[15] In Reply, **Ms Hlophe** prayed for a punitive sentence to serve as a deterrent to other pedophiles like the Accused in the face of the prevalence of the rape of the girl child in the Kingdom. **Ms Hlophe** referred the Court to the following cases, **Rex V Sikhumbuzo Simelane Case No. 255/2011, Mbuso Blue Khumalo V Rex Appeal Case No. 12/2012 and Mgubane Magagula V Rex Appeal Case No. 32/2010.**

[16] Now, in passing sentence, I am mandated by law to take into account, the seriousness of the offence, the interest of the Society, the personal interests of the Accused and the peculiar facts and circumstances of the offence. See **Chicco Manyanya Iddi and 2 others V Rex Criminal Appeal No. 03,09 and 10/2010, Mfanasibili Gule V The King Criminal Appeal Case No. 2/2011.** To this end, I have thus considered the fact that the Accused is a first offender, and is remorseful. I have also considered the fact that the Accused has children who have been left unattended in the wake of this incidence, due to the Accused's arrest and incarceration.

[17] **Mandla Maxwell Gadlela**, having carefully considered your personal situation, I wish to however point out to

you that the offence you committed is a very serious one. Rape is a rude debasing invasion of a persons personality and bodily integrity. It has far reaching physical, emotional and psychological impact on its victims. See **Fanana Nkosinathi Maliba v The King Criminal Appeal Case No. 5/2011, Paul Dlamini v R 1982-6 SLR part (2) page 411, The King v Sibusiso Xolani Dlamini Case No. 42/2011.**

[18] In the case of **R v Makhosi Dlamini review Case No. 5/2010**, the Court expressed its abhorrence of the unpleasantness of this offence in the following words:-

“

In its countless judgments delivered by a number of judges, the Supreme Court and this Court have used different epithets to describe this offence, the common denominator being that this is an ugly offence that violently robs its victim of self worth, bodily integrity and the right to refuse to indulge in sexual activity”.

[19] It is an apparent recognition of the grievousness and ugliness of this offence, that compelled Parliament to prescribe a minimum mandatory sentence of 9 years for the offence of aggravated rape via Section 185 bis (1) of the CP&E. This was in an

apparent effort to discourage this dehumanizing crime. The Supreme Court in the case of **Mgubane Magagula v Rex, (supra)**, backed up the efforts of parliament in this regard, by evolving the appropriate range of sentence for the offence of aggravated rape to be between 11 and 18 years. It is worthy of note that in paragraph 20 of **Mgubane Magagula (supra)**, the Supreme Court prescribed a sentence even above the upper echelons of the range in the case of the rape of a child.

[20] Similarly, in the case of **Dupont v Rex Criminal Appeal No. 4/08** at **paragraph 15, Ramodibedi JA** (as he then was) issued the following warning to rapists, especially those that specialize in the rape of the girl child:-

“

*15 It remains for me to emphasize that the courts have a fundamental duty to protect society against the scourge of sexual assaults perpetrated against young children in particular. As this court pointed out in **Makwaka's case (supra)** the courts should mark their abhorrence of the prevalent sexual attack of young children, as a deterrent. This they can do by imposing appropriately stiff sentences. Indeed in **Moses Gija Dlamini v Rex (supra)**, this court had no difficulty in confirming a sentence of 20 years imprisonment for the*

rape of a nine (9) year old girl. Sexual offenders against young girls have therefore, sufficiently been warned''

[21] It however appears that notwithstanding the tough stance of parliament and the courts on the offence of rape, that this offence, especially the rape of the girl child, is on the increase rather than a decrease. I myself recognised this disturbing trend in the case of **Rex v Sikhumbuzo Simelane (supra)** at **paragraph 15**, in the following words:-

“

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''.

[22] It was also in apparent dissatisfaction with the continued prevalence of the offence of rape in general in the Kingdom, that the Supreme Court in its recent judgment in the case of **Mbuso Blue Khumalo v Rex (supra)**, increased the sentence of the Accused to 18 years. In that case the High Court had imposed a sentence of 12years on the Accused for the aggravated rape of his girl friend. Dissatisfied with both his conviction and sentence, the Accused launched an appeal to the Supreme Court. The Supreme Court confirmed the conviction of the Accused. Set aside the sentence of 12years imposed by the High Court and

substituted same with a heightened sentence of 18 years. This was to serve as a deterrent to other would be rapists. It is worthy of note that the victim in that case was an adult female.

[23] In casu, **Mandla Maxwell Gadlela**, your victim was an 11 year old child to whom you stood in loco parentis. By your evil enterprise, you not only breached the trust that the Complainant reposed in you by virtue of this relationship, but you also violated her bodily integrity, ravishing her innocence forcefully and in a most undignified manner.

[24] To crown it all, you did not have the good sense to employ the use of a condom, thus exposing the Complainant to the risk of contracting sexually transmitted infections and HIV/AIDS. The conclusion of the medical examination contained in exhibit B shows clearly that the Complainant had a lower genital infection. Your cruel venture on the day in question has traumatized the Complainant physically, emotionally and psychologically for life.

[25] The Complainant was a normal 11 year old going about her business, minding her play when you captured and violated her. The 11 year old Complainant was entitled to her play without the threat of any molestation or sexual harassment. However, that is not the trend we see in the Kingdom in the recent past. Rather the sexual molestation of the girl child has reached such a heightened level, in the Kingdom that if no progressive and consistent measures are taken to curb this trend, the day is nigh when the girl child has to be perpetually locked away for her safety in the face of these molestations. God forbid. May that day never come. Thus, the need to discourage this trend by

imposing appropriately stiff sentences to serve as deterrent to others.

[26] **Mandla Maxwell Gadlela**, having carefully considered the triad, I find that your personal circumstances must therefore submit to the interests of the society. I am firmly convinced that a sentence of 18 years is fitting of the offence committed to serve as a deterrent to other pedophiles who are even now lurking in the corner waiting to pounce on the girl child.

[27] This sentence is backdated to the 12th of April 2011, the date of Accused's arrest and incarceration. It is so ordered.

[28] Right of appeal and review explained

For the Crown: Ms L Hlophe
Accused in person

**Delivered this theday of
in open court**

**OTA J
JUDGE OF THE HIGH COURT**