IN THE HIGH COURT OF SWAZILAND

JUDGMENT

In the matter between**:** **Criminal Review Case No. 129/11**

THE KING

Vs

MAKHUTHUZA SIPHO DLAMINI

Neutral Citation **:** *The King v Makhuthuza Sipho Dlamini (120/11) [2012] SZHC 173 (08 August 2012)*

Coram **: OTA J**

Issued **: 10 August 2012**

Summary **:** ***Automatic review from Magistrates Court – charge irregular – no miscarriage of justice noted.***

OTA J

[1] This case came to me on automatic review from the Pigg's Peak Magistrates Court. I decided to put down a few words in this review, which I am compelled to do because of the irregularity glaringly evident in the charge sheet. This irregularity further led me to embark on an exercise to ascertain whether lack of consent which is one of the ingredients requisite to found the offence of rape was established before the accused's conviction. This fact is not evident from the judgment of the Court *a quo* which forms a part and parcel of the record of proceedings.

[2] I should point out at this juncture that this case was forwarded to me for review without the certified true copy of the record of proceedings. What I have here to grapple with is the hand written manuscript of the Magistrate, which is barely legible. The proper practice is that the Registrar should prepare a certified true copy of the record of proceeding from the Court *a quo* and transmit same to this Court, in the event of review. This was not done in this case.

[3] The foregoing notwithstanding, since the Court *a quo* gave a comprehensive summary of the totality of the evidence led before it in its judgment, I will proceed on the strength of the facts contained in the judgment which is certified, in conducting this exercise.

[4] Now, the indictment on which the accused stood trial before the Court *a quo* reads as follows:-

> " ***Makhuthuza Sipho Dlamini*** *Swazi male adult 31 years of Malibeni area Chief Mlungeli is charged with the offence of Rape in that upon (or about) 03. 04. 2011 and at (or near) Manjengeni Area, in the said district the said accused person, did intentionally and unlawfully have sexual intercourse with one Harriet Khumalo a female of 13 years who is in law incapable to consent to sexual intercourse and did thereby commit the said crime".* (underline mine)

[5] It is beyond dispute from the tenor of the charge sheet, that the accused was arraigned for statutory rape of the complainant. This is because the charge sheet alleges that the 13 year old complainant is in law incapable of consenting to sexual intercourse.

[6] I however find that the charge sheet was irregular and ought not to have been framed in the way and manner it was framed. This is because the allegation therein that the 13 year old complainant was incapable of consenting to sexual intercourse runs contrary to the position of the law. I say this because, it is the position of the Roman Dutch Law which holds sway in this jurisdiction, that a girl below the age of 12 years is incapable of consenting to sexual intercourse and even if she consents, sexual intercourse with her constitutes the offence of rape.

[7] This position of our law was captured in clear and unambiguous terms by **Zietsman J.A** in the Botswana Case of **Christopher Ketlwaetetsiwe** v **The State CLCLB ─ 000066 ─ 06**, with reference to several other authorities which include the following, **R v Z 1959 (1) SA 73 9 (A) at 74 2 D – E** where the Court stated as follows:-

> " *According to our practice a girl under the age of twelve cannot give consent to sexual intercourse. Even if she consents, sexual intercourse with her according to our law is rape."*

[8] Similarly, in **Sucout Ally v R 190 7 T.S 336, Innes** C J stated as follows:-

> " *It seems clear that in regard to charges of rape upon children, the common practice in South African Courts, both here and in the Cape, has been to adopt the rule laid*

down by Carpzovius (C.68, XX) that a child under the age of twelve is conclusively presumed not to be able to consent to the Commission of the Crime of rape upon her."

The foregoing position of the law has been adopted and applied in this jurisdiction. The cases a legion. They include the following: **Rex v Mfanzile Mphicile Mndzebele Criminal Trial No. 213/2007, Rex v Senzo Shabangu Case No. 239/2010, The King v Bennet Tembe Criminal Trial No. 22/2011.**

It is thus inexorably apparent from the totality of the foregoing that the allegation in the charge sheet to wit: that the 13 year old victim of the rape incident in casu, is in law incapable of consenting to sexual intercourse, is contrary to the established Roman Dutch Law practice, thus rendering the charge sheet irregular.

The foregoing notwithstanding, I am of the firm view that since this fact has not occasioned any miscarriage of justice or the accused suffered any prejudice by reason thereby, that the irregularity noted cannot therefore vitiate the proceedings a quo.

I however find the need to state here as I have done in a couple of my judgments, that the Crown must employ the greatest skill

and expertise is drafting charges. In my decision in the Case of **Rex v Friday Magagula Criminal Case No. 191/2009,** paragraph 5, I stated as follows:-

> " *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 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."*

[9] The foregoing said and done, let us now proceed to the evidence led in this case before the Court *a quo*, to ascertain if the offence of rape was established, especially with regards to the lack of consent of the complainant to same, warranting the conviction of the accused. I say this because in Cases of rape, the Crown must prove the following constituent ingredients, beyond reasonable doubt

1. the identity of the accused
2. the fact of sexual intercourse
3. the absence of consent

See Rex vs Mfanzile Mphicile Mndzebele (supra) Rex v Senzo Shabangu (supra), The King v Sibusiso Xolani Dlamini Case No. 42/2011.

From its judgment, the Court *a quo* established that the Crown proved the identity of the accused beyond reasonable doubt. This is borne out of the fact that the accused was very well known to both complainant and **PW2, Zethu Mamba** who were both together when the accused perpetrated this offence. The fact of sexual intercourse, according to the judgment of the Court *a quo*, was proved beyond reasonable doubt by the doctors report which shows evidence of recent vaginal penetration. The only issue not addressed by the Court *a quo* in it's judgment was the issue of lack of consent of the complainant to the sexual intercourse. I can only presume that on this issue the Court *a quo* proceeded on the basis of the allegation in the charge sheet that the 13 year old complainant was incapable in law of consenting to sexual intercourse.

[10] The lack of consent on the part of the complainant to the sexual intercourse is replete from the summary of the evidence led *a quo* which is contained in that Court's judgment. The accused enticed the complainant into the sugar cane fields, sent **Zethu Mamba PW2**, who was there with the complainant away with his cell phone. Then accused caused complainant to lie down then he proceeded to insert his penis into her vagina and had sexual intercourse with her without her consent. This was the evidence of the complainant in the Court *a*

quo. This evidence of lack of consent is corroborated by **PW2, Zethu Mamba**, who told the Court that in the Cane fields, the accused gave her his cell phone, then picked the complainant up and left with her. That the complainant was crying. And that when the accused's wife called on the accused's Cell phone, **PW2** went in search of the accused and complainant and she saw the accused on top of the complainant and the complainant was still crying.

The evidence further revealed that after having sexual intercourse with the complainant, the accused told her and **PW2** to wait for him whilst he goes back home to fetch money that they would spend in school. This in my view was an attempt by the accused to purchase their acquiescence and keep them silent. But the efforts of the accused in this regard proved abortive, because the complainant and **PW2** did not wait for the accused's return but proceeded back home, where the complainant reported the rape incident to her grandmother and her Aunt.

The fact that the complainant was crying, was not enticed by the offer of money made by the accused and promptly reported this matter to her grandmother and Aunt, all show lack of consent.

The defence that the accused strove to set up on this wise cannot stand. I say this because, the accused alleged while cross examining complainant that complainant was his girl friend, and that she consented to the sexual intercourse. However, during his evidence in chief in defence, the accused made a dramatic summersault and now

alleged that he did not rape or have sexual intercourse with the complainant. The accused's evidence is therefore inconsistent. He was obviously striving for perfection and his evidence thus stands rejected.

[11] In conclusion, I find that the complainant did not consent to sexual intercourse with the accused on the day in question. I thus find that the accused was properly found guilty and accordingly convicted by the Court *a quo*.

It is recommended that this judgment be served forthwith on the following entities:-

1. *His Worship H. J Khumalo Senior Magistrate Pigg's Peak Magistrates Court.*
2. *The Prosecutor a quo*
3. *The Accused Person*
4. *Correctional Services*

[12] Under my hand this the 10th day of August 2012.

OTA J

JUDGE OF THE HIGH COURT

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