



IN THE HIGH COURT OF SWAZILAND

Criminal case No. 233/2012

In the matter between:

**REX**

**VS**

**MFUNDISWA TEMBE**

Neutral citation: *Rex vs Mfundiswa Tembe (233/2012) [2012] SZHC230 (2012)*

CORAM

MCB MAPHALALA, J

**Summary**

Criminal law – accused charged with rape with aggravating factors including infecting complainant with genital warts and HIV/Aids – convicted and sentenced to twenty two years imprisonment

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**Judgment**  
12<sup>th</sup> September 2012

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- [1] The accused was charged with rape and it was alleged by the Crown that in February 2007 at Mkhalamfene area in the Lubombo region, he wrongfully and intentionally had sexual intercourse with Futhi Goodness Dlamini. He pleaded not guilty to the offence. The aggravating factors were as follows: First, the accused had sexual intercourse with a thirteen year old minor without a condom; secondly, the accused traumatized the complainant; thirdly, the accused infected the complainant with H.I.V./Aids; fourthly, the accused infected the complainant with genital warts.
- [2] PW1, the complainant, testified that in July 2006 she stayed at Mkhalamfene area with the accused who was her cousin, two young children and her grandfather who used to return home at night drunk. Her father had died and her mother had abandoned her.
- [3] Sometime in 2006 whilst she was asleep at night, she noticed that the accused was lying on top of her and trying to undress her. When she enquired from him what he was doing, the accused told her that he was looking for a cat since he had a problem with rats. She was able to identify him during the incident; in the morning, the accused warned her not to tell anyone about the incident otherwise he would kill her, and, PW1 obliged.
- [4] The accused slept in a separate house within the homestead. PW1 slept with the two young children in another house which was made up of stick and mud

and could not be locked; hence, the accused could enter the house at night wherever he wanted.

[5] Sometime in February 2007 PW1 was woken up by the accused who was on top of her, and, he was having unlawful sexual intercourse with her. She pushed him but he resisted. She raised an alarm but nobody came to her rescue. He threatened to kill her if she disclosed the incident to any person. This was her first time to have sexual intercourse, and, she was a virgin before the accused raped her.

[6] She was able to identify the accused because of the moonlight which lit the house through holes in the mud house. In addition he stayed on top of her for a long time. The accused didn't use a condom, and, there was a white fluid in her private parts; and her vagina was painful. In the morning she again warned her not to tell anyone about the incident. She reiterated her evidence that she didn't consent to the sexual intercourse. She disclosed that the accused subsequently raped her twice on various occasions without using a condom; on each occasion he would threaten her with violence if she disclosed to anybody that he had raped her.

[7] After some months PW1 noticed warts in her private parts and she reported this to her grandmother who in turn informed PW1's aunt; her aunt asked her how she was infected with a sexually transmitted disease, and, she told her that

she was infected by the accused. Her family reported the incident to the Big Bend Police Station; and, the police took her to Good Shepherd Hospital. She was examined by a doctor and subsequently treated. The police could not find the accused at home because he was running away from the police after the family had reported the crime.

[8] Under cross-examination PW1 disclosed that she was afraid to report the accused to her family because he carried an okapi knife and had threatened to kill her if she told any other person about the rape. She also told the court that the house in which they slept had holes, and, that the moonlight penetrated through the holes and lit the interior of the house; hence, she was able to identify the accused. She further told the court that the accused fled to a nearby homestead to avoid arrest after the family had reported the crime to the police; he was eventually arrested him at that homestead.

[9] PW2 Ntombi Eunice Mthembu, a sister to PW1's mother, testified that the accused is a son to one of her sisters. Sometime in September 2007 she was invited to the homestead by her mother who is the grandmother to PW1 and told her that PW1 had a sexually transmitted disease. On arrival at the homestead, she inspected PW1 and noticed that she had vaginal warts; PW1 disclosed that the accused had infected her with the disease. PW1 further told her that she did not consent to sexual intercourse with the accused.

- [10] PW2 took PW1 to Matata Clinic in Big Bend; however she was advised by the clinic that the disease was severe and that the matter should be reported to the police. The family reported the matter to the police who in turn transported them to Good Shepherd Hospital. On the next day, they recorded a statement with the police.
- [11] She corroborated the evidence of PW1 that when the police arrived at the homestead looking for the accused, they didn't find him at home; and, that he had relocated to the homestead of Lulane in the same neighbourhood after learning that the family had reported the matter to the police. She learnt that the accused was then residing at the Lulane homestead, and, he advised the police who came and arrested the accused. She maintained her evidence during cross-examination.
- [12] PW3 Detective Constable Sibusiso Dlamini, the investigation police officer in this case, testified that on the 9th September 2007, he received a report of a rape case from the family of PW1. They went to the homestead and found members of the family together with PW1. They took her to Good Shepherd Hospital for treatment. Thereafter, she recorded a statement at the Big Bend Police Station together with family members. They arrested the accused at the homestead of Themba Lulane after failing to arrest him at his homestead.

[13] PW3 maintained his evidence under cross-examination and further confirmed that in his investigations, he found that it was the accused who had committed the offence. He formally charged the accused with the offence of rape and further cautioned him in accordance with the Judges' Rules to the effect that he was not obliged to say anything but whatever he said would be recorded in writing and used as evidence during the subsequent trial.

[14] The medical report was admitted in evidence by consent. The report shows that PW3 was thirteen years at the time of the offence; and that she had a history of repeated sexual assaults, the last one committed in February 2007. Her labia majora, labia minora and perineum were full of genital warts; the vestibule was not visible because of the presence of the genital warts. Similarly, the hymen could not be examined because of the genital warts. His opinion was that the presence of multiple genital warts was a result of "chronic child sexual abuse". Worse still the doctor found that PW1 was HIV positive.

[15] During his evidence in-chief, the accused told the Court that he didn't have anything to say about the evidence of PW1; and that PW2 was not present when the offence was committed but was merely told by PW1. He conceded under cross-examination that he did not dispute the evidence of PW1 that he had unlawfully sexual intercourse with her on three occasions without a condom.

[16] The Supreme Court of Swaziland in the case of *Melusi Maseko v. Rex* Criminal Appeal No. 43 /11, when delivering the unanimous judgment of the court, I said the following at page 8:

**“It is trite law that in rape cases the Crown bears the onus of proving beyond reasonable doubt the identity of the accused, the fact of the sexual intercourse and the lack of consent by the complainant. In certain cases the evidence of the complainant must be corroborated in order to prevent a failure of justice. See the case of *Mandla Shongwe and Rex* Criminal Appeal No. 21/11 (unreported). Corroboration in rape cases is not strictly required in this jurisdiction. However, the evidence in a particular case may call for a cautionary approach.”**

[17] I am satisfied that in the present case the identity of the accused, the fact of the sexual intercourse as well as the lack of consent are not in dispute; the Crown has proved all these elements beyond reasonable doubt.

[18] Furthermore, the complainant in this case was thirteen years of age when the offence was committed; hence, the issue of a cautionary approach to her evidence doesn't arise. The cautionary rule has to be applied in cases where the complainant is a very young girl; however, the emphasis during the trial is that the Crown should prove the commission of the offence beyond reasonable doubt; and in particular, the identity of the accused, the fact of sexual intercourse as well as the lack of consent. It is for the court to decide in each particular case, depending on the circumstances, whether the cautionary rule should be applied.

[19] The Supreme Court of Swaziland in the case of *Zimele Samson Magagula v. Rex* Criminal Appeal No. 31/2011 at page 6 quoted with approval the case of *S. v. Jackson* 1998 (1) SACR 470 (SCA) where *Olivier JA* who delivered the unanimous judgment of the full bench stated the following:

**“In my view, the cautionary rule in sexual assault cases is based on irrational and outdated perception. It unjustly stereotypes complainants in sexual cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt, no more no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.”**

[20] At page 7 of the *Zimele Samson Magagula* case (supra), *Ebrahim JA* who delivered the unanimous judgment of the court also quoted with approval the Court’s judgment in the case of *Sandile Shabangu v. The King*, Criminal Appeal No. 15/2007 at pages 8 and 9 where he stated the following:

**“In the present case the trial judge, *Mamba J*, adopted the reasoning in the Jackson case and came to the conclusion that the cautionary rule in sexual assault cases is outmoded and should no longer be part of the law of Swaziland. I agree. My conclusion is that the approach is to be applied in Swaziland. The evidence in a particular case may call for a cautionary approach but there is no general cautionary rule applicable to the evidence of complainants in rape cases.”**



[21] In the *Zimele Samson Magagula* case (supra), the victim was a four year old child; however, the Supreme Court did not apply the cautionary rule since it was satisfied with the evidence of the complainant.

[22] Applying the authorities cited above to the evidence before me, I am satisfied that the Crown has proved the commission of the offence beyond reasonable doubt.

[23] In mitigation of sentence the defence submitted that the accused was a first offender, that he was twenty three years of age when the offence was committed, that he is unemployed; and, that he went as far as Grade IV at school. He was arrested in September 2007 and has been in custody since then. On the contrary, the Crown submitted that the offence was accompanied by aggravating factors as alluded in the preceding paragraphs. In particular it has not been disputed by the defence that PW1 was a virgin prior to the offence, that the accused raped her on three occasions without using a condom or that he infected her with genital warts as well as HIV/Aids.

[24] In the case of *Mgubane Magagula v. Rex* Criminal Appeal No. 32/2010 the Supreme Court accepted the principles that the appropriate range of sentences for rape cases in previous decisions in this country lies between eleven and eighteen years imprisonment. However, the present case is distinguishable on the basis that in the present case the complainant was infected with both genital

warts and H.I.V./Aids; in the *Mgubane* case, the emphasis was on the failure of the accused to use a condom and thus putting the complainant at risk of contracting sexually transmitted diseases. This makes this case more serious; hence, it calls for a more severe sentence.

[25] In arriving at a proper sentence, I will consider the triad, that is, the personal circumstances of the accused, the interests of society as well as the seriousness of the offence. Undoubtedly the accused is a young man of twenty three years of age, and, at the time of commission of the offence, he was eighteen years of age. However, the seriousness of the offence as well as the interests of society far outweigh the personal circumstances of the accused. The increase in rape cases in this country is a cause for concern with victims as young as three years; in most of these cases, the perpetrators do not use a condom and expose the victims to sexually transmitted diseases as well as HIV/Aids.

[26] Having considered all the circumstances of the case, I sentence the accused to twenty two years of imprisonment.

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M.C.B. MAPHALALA  
JUDGE OF THE HIGH COURT

For Crown  
For Defence

Crown Counsel M. Nxumalo  
Accused in person