



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal trial no. 368/2009

Rex

V

THEMBA MAGAGULA

Accused

Neutral citation: *Rex v Themba Magagula (368/2009)* October 2012 [SZHC] 241

Coram: OTA J.

Trial ended: 20th September 2012

Delivered: 12th October 2012

Summary: **Aggravated rape: principles thereof: accused giving unsworn evidence: weight to be attached thereto: accused convicted**

OTA J.

[1] The Accused is charged with the crime of Rape. The indictment alleged that *“upon or about the 10th January 2009 and at or near Lobamba area in the Hhohho Region, the said accused person did intentionally have unlawful sexual intercourse with one Dudu Shabangu a female minor of 7 years old who in law is incapable of consenting to sexual intercourse and did thereby commit the crime of rape”*

[2] The indictment further alleged that the crime is accompanied by aggravating factors as envisaged by section 185 (bis) of the Criminal Procedure and Evidence Act 67 of 1938 in the following manner:-

1. The complainant was very young at the time of the sexual assault as she was 7 years of age.
2. The accused exposed the victim to sexually transmitted infections such as HIV/AIDS as he did not use a condom for protection.
3. The Accused stood in loco parentis position over the child.

[3] When the Accused was arraigned before court, his right of legal representation was duly explained to him and he chose to conduct his own defence. The charge was thereafter put and explained to the Accused in siSwati and he pleaded not guilty to the charge. This therefore necessitated that the crown proves the offence of rape beyond reasonable doubt.

[4] In a bid to discharge this onus of proof, the crown called a total of six witness. I will now proceed to detail the relevant portions of the evidence of these witnesses.

[5] PW1 was Ntombi Ntjangase the complainants mother. She told the court that the complainant was born in August 2000. That she and the Accused are neighbours in the same compound. That on the day in question in the evening, the children including the complainant were playing outside. That complainant said she was going to the toilet. The complainant took a long time to come back from the toilet. She then enquired from the other children where the complainant was and was told by them that she was in the Accused's house. She proceeded to the Accused's house and knocked. She knocked for a long time but there was no response. That one Nozipho (PW3)

heard her knocking and came to join her and they both continued to knock without success until Nozipho told the Accused that they were calling the police. It was then the Accused opened the door and they enquired as to why the complainant was in his house. While they were still talking the complainant came out of the Accused's house shaking and crying. That upon enquiry, the complainant told them that the Accused took hold of her and inserted his penis into her. Thereafter, PW1, the complainant and Nozipho proceeded to the police station where they reported the matter. PW1 told the court that the complainant was taken to the Mbabane Government hospital the same day.

[6] Under cross-examination, PW1 told the court that the way to the toilet is close to the Accused's home. PW1 further told the court that complainant said the Accused grabbed her on her way from the toilet and took her into his house. It was further PW1's evidence that she hates the Accused person because he crippled her child. She denied being the one that sent the complainant to the Accused's house in order to put the Accused in trouble. She also denied that it rained on the day in question. Under re-examination, PW1 told the court that she hates the Accused because he raped her child, but that before the incident, the Accused was just an ordinary man to her.

[7] PW2 was Dr Iheanyi Ehiobuche a psychiatrist at the National Psychiatric Hospital. He told the court that on the 9th of May 2011, and on the request of the Lobamba Police force, he conducted a psychiatric evaluation of the complainant and also interviewed the mother for collateral family history. That he found significant evidence of mental illness consistent with Post Traumatic Stress Disease. PW2 told the court that post traumatic stress disorders occur as a memory disturbance following traumatic incidents – which are incidents that are beyond human experience, so that they can cause a disturbance of the mental functioning. That the symptoms and signs of such mental disturbance include anxiety, fear and dread relating to avoiding things that may harm the individual.

[8] PW 2 told the court that the complainant presented with fear and dread of being left alone because the rape occurred when she was alone. That she exhibited general fear of men who conjure the rapist's image. PW2 further told the court that the complainant also exhibited helplessness syndrome as a result of the agony of the rape incident when she was helpless and that this brings about acute depression. That the depression is evident from the complainant being most of the time in a bad mood. PW2 further told the court that he also found in the complainant a sense of guilt and loss of

appetite, leading to weight loss. He also found insomnia or sleep disturbances as well as pain and suffering or sense of terror. That all these factors put together render the complainant at a risk of a mental breakdown. PW2 further told the court that after weighing all the factors in the balance in accordance with the relevant standard diagnostic criteria, he found it consistent with the diagnosis of PTSD, which is Post Traumatic Stress Disorder. PW2 also told the court that the complainant was tested following the rape incident and was found to be serum positive or HIV positive, which also has its own implications in the complainant developing further mental complications.

[9] It was further the evidence of PW2 that in the face of all these facts, it was his considered view that the complainant will be unfit for trial. That she runs the risk of retraumatization syndrome, if she is subjected to court procedures and interrogations. Retraumatization syndrome is triggered by such exposures and the complainant may be further damaged by retraumatization. It was also PW2's evidence that in keeping with standard procedures for therapy in children, he recommended a follow up of PTSD counseling. The report of PW2's findings was admitted in evidence as exhibit A.

[10] Under cross-examination, PW2 told the court that on the 9th of May, 2011, when he conducted his evaluation on complainant she was 10 years old. That complainant's social functioning before the rape incident was well, however the current social functioning after the rape incident is that the complainant is always frightened leading to the diagnosis of PTSD. PW2 further told the court that since PTSD is a bisotic disorder i.e it comes and goes, he would not know when the complainant will be fit for trial.

[11] PW3 was Nozipho Magongo. Her evidence corroborated PW1's evidence in material respects. She told the court that on the day of the incident she was on her way to the toilet when she came across PW1 knocking on the Accused's door. She told the court that upon enquiring, PW1 told her that she was informed by the other children that the complainant was in the Accused's house and that Accused had refused to open the door. PW3 told the court that she also shouted at the Accused to open the door and further told him that she was calling the police. It was further PW3's evidence that she called the police and gave them directions to the house. PW3 told the court that it was then the Accused opened the door and the complainant came out of the house crying and shaking. The complainant reported to them that the Accused inserted his penis in her. That complainant said this

pointing at her vagina. That they went to the police station and reported the matter. Thereafter, the complainant was taken to the Mbabane Government hospital by the police in the company of PW1.

[12] Under cross-examination, it was put to PW3 that she did not witness anything about the rape all she saw was as a child coming out of the house. PW3 agreed. It was further put to PW3, that PW1 came with the complainant to the Accused to enquire from him where the complainant had been, PW3 replied that she saw the complainant come out of the Accused's house. PW3 further denied that it rained on the day in question.

[13] PW4 was 5211 Constable N. Phiri a police officer. She told the court that on the day of the incident, PW1, PW3 and complainant came to the police station to report that the complainant had been sexually assaulted. She said that complainant pointed out to her that the Accused inserted his penis in her vagina. That complainant pointed at her vagina when she said this. That while waiting for a vehicle to transport her and the complainant to the hospital for medical examination, the Accused came to the police station but enquired of a certain police officer who was absent. Upon being informed

that the Accused was the Magagula involved in the alleged rape, she stopped the Accused from leaving. That she took the Accused to an office and thereafter informed her superiors of the presence of the Accused. Thereafter, she left the Accused with her superiors, and took the complainant together with an RSP 88 form to the Mbabane government Hospital where she was examined, after that they went back to the police station. It was further PW4's evidence that when the complainant came to her she was scared and was trying to hide from men even the male police officers. That after observing this, complainant was taken to their offices for counseling, then to Save the children's Centre. That since they did not see any improvement in her, they took her to the psychiatric hospital where she was examined by a psychiatrist.

[14] Under cross-examination PW 4 told the court that she took the complainant to the psychiatric hospital on the 9th May 2011. She told the court that the two police officers who investigated the crime were 1734 Sgt Bhembe and 4343 constable Nkambule now deceased.

[15] PW5 was 1734 Sgt Bhembe a police officer. He told the court that on the day of the incident complainant came with PW1 to the Lobamba Police Station where PW1 reported that the complainant had been raped. That while 5211 Constable N Phiri was still interviewing the complainant and her mother, the Accused also came to the police station. That when he was informed of the Accused's presence at the station, he took the Accused to the office with him. That he cautioned the Accused according to the Judges rules after which the Accused said something which he recorded. Thereafter, he formally charged the Accused and detained him. PW5 further told the court that constable Phiri took the complainant to the hospital. Thereafter, PW5 and Constable 4343 Nkambule took the complainant for counseling because they could not understand her behavior.

[16] Under cross-examination, it was put to PW5 that Accused made a statement after he had been assaulted, PW5 denied this. He also denied that Accused was tied to a bench and suffocated. PW5 further denied that the Accused told him that he had come to the station to report a case.

[17] PW6 was doctor Danha Joshua a medical doctor at the Mbabane Government Hospital. PW6 told the court that on the day of the incident the complainant was brought to him for examination on allegations of sexual abuse. He told the court that he examined the complainant and discovered that her hymen was broken. That his opinion was that penetration had taken place. That he signed the medical report and it was stamped on 5th April 2009. The medical report was admitted in evidence as exhibit B.

[18] Under cross-examination, PW6 told the court that the complainant was 6 years old when he examined her. That he asked for the age and it was given to him as 6 years. He further told the court that he examined the complainant and completed the form on the 10th of January the day of the incident, but it was stamped on the 5th April 2009 when it was collected from the hospital by the police officer who took it for stamping. PW6 further told the court that an intact hymen forms a complete circle without a tear but in the complainant's case it was not complete. When asked by the Accused if it was possible that the complainant used her own fingers to tear the hymen, PW6 replied that he did not think so because it will be a very painful process so that the complainant could not have proceeded to tear the hymen by herself.

[19] At the close of crown's case the Accused's rights of defence and their implications were fully explained to him. He elected to give unsworn evidence and called one witness.. Accused told the court that on the day of the incident the complainant came to his house of her own accord. That the weather was very cold as it was about to rain. The complainant was not properly dressed for the weather. She was wearing light clothes. That since complainant was someone whom he knew before, although he had not seen her for a long time, he took her into his house and enquired from her what she was doing in his house. The complainant did not respond. That due to the fact that complainant looked sick he told her to go back to her house. Accused told the court that thereafter, it rained heavily.

[20] It was further the Accused's evidence that after the rains, PW1 came back to his house with the complainant and told him that complainant said he had raped her. Accused told the court that when he enquired about these allegations from the complainant, she denied them saying that she only alleged that because her mother was beating her up asking where she had been. Accused told the court that thereafter they left for the police station and he followed them. That at the police station they reported the matter and the police arrested him, handcuffed and tortured him. They told him to agree

that he committed the offence if not they will kill him. Thereafter, they took him into custody.

[21] DW2 was 5313 Zakhele Masango a police officer based at Nhlangano Police Station. He told the court that on the day of the incident, he heard shoutings from a group of about 10 people all his neighbours. That one of them was saying “why should you do this to the child”. That he approached them and told them not to take the laws into their own hands but to report the matter to the police. Thereafter, they calmed down but that he does not know whether they went to the police. Later he saw the Accused who told him that he was going to the police station before the police officers come for him. This witness was not cross-examined.

[22] Now, in rape cases the crown bears the onus of proving three elements beyond reasonable doubt, which proof entails corroboration, namely:-

- (1) The identity of the Accused
- (2) The fact of sexual intercourse
- (3) The lack of consent by the complainant

See Rex v Justice Magagula criminal Case No. 330/102, Rex v Mfanzile Mphicile Mndzebele, Criminal Case No. 213/07, The King v Bennet Tembe Criminal Trial 22/2011, The King v Valdemar Dengo Review case no. 843/88

[23] In considering the fact of sexual intercourse, I must point out first and foremost that the complainant did not testify in this case. The decision not to produce complainant in court as submitted by crown counsel, was borne out of the medical advise of PW2. Dr Iheanyi Ehiobuche, the Psychiatrist who carried out the psychiatric evaluation on complainant and came to the conclusion that complainant was suffering from Post Traumatic Stress Disorder (PTSD). This diagnosis is confirmed by exhibit A the report of the psychiatric evaluation. PW2 told the court as I have already demonstrated in this judgment, that the complainant was unfit to stand trial as she runs the risk of retruamatization. In these circumstances we are left with the evidence of PW1, Ntombi Ntjangase, PW3, Nozipho Magongo, PW4 Constable Phiri and PW6, Dr Danha and whether the court can draw the inference from the evidence of these witnesses, that the Accused had sexual intercourse with the complainant on the faithful day .

[24] The principles that must guide the court in reasoning by inference was enunciated in the case of **R v Blom 1939 AD 188 at 202- 3** as follows:-

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored:-

- 1. The inference sought to be drawn must be consistent with all proved facts. If it is not, the inference cannot be drawn.*
- 2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct”*

[25] The question at this juncture is, whether when the principles above are juxtaposed against the evidence of PW1, PW3, PW4 and PW6 the inference can be drawn that the Accused had sexual intercourse with the complainant? My answer to the above poser is an emphatic yes. I will now proceed to demonstrate why I say so.

[26] Let me start by saying that I believe the evidence of these crown witnesses whom I find credible, truthful and reliable. PW1 and PW3 who were in the premises where the rape occurred corroborated each other in material respects. Their evidence was consistent to the effect that in the search for the complainant they knocked on the Accused's door for a considerable period of time and the Accused refused to open the door. That the Accused only opened the door after PW3 threatened to call the police. That when the Accused finally opened the door the complainant came out of the Accused's house shaking and crying and upon enquiry, she informed PW1 and PW3 that the Accused had taken her into his house and inserted his penis in her vagina. The evidence of these witnesses stood up under cross-examination. They were not impeached even though the Accused employed several tactics to do just that. I find these witnesses truthful and I accept their evidence.

[27] Furthermore, there is evidence from the crown that after rescuing the complainant from the Accused, PW1 and PW3 promptly took her to the Lobamba Police Station where complainant was taken by PW4 to the Mbabane Government Hospital and was examined by PW6, Dr. Danha on the same day. PW6 told the court that upon examining the complainant he reached the conclusion that her hymen was not intact and that penetration

had taken place. PW6 further told the court under cross-examination, that the complainant's hymen was not intact because it did not form a full circle as part of it was torn. He told the court that the penetration into the complainant was done by a blunt object, but he did not think that complainant tore the hymen with her own fingers as that would have been a very painful process, impossible for the complainant to carry out. PW6's evidence was corroborated by exhibit B the medical report of the medical examination conducted on the complainant on the faithful day which demonstrates the following:- *"Hymen not intact----- penetration may not be ruled out ---- penetration occurred"*

[28] It is thus beyond dispute from the factual matrix of this case, that the Accused was the last person (male) who came in contact with the complainant before the medical examination was conducted. The only logical deduction to draw from the totality of the foregoing evidence, and this court will draw that deduction, is that the Accused indeed had sexual intercourse with the complainant on the day in question resulting in her broken hymen. This is moreso as there is no evidence whatsoever to show that the complainant was sexually active prior to that day. I thus find it to be

a fact, that the Accused had sexual intercourse with the complainant on the day in question.

[29] Now, the question of lack of consent of the complainant to the sexual intercourse, is closely tied to the complainant's age at the time of this unfortunate incident. That is why the indictment alleges that the complainant who is said therein to be 7 years old at the time of the commission of the offence, is in law incapable of consenting to sexual intercourse. This allegation is borne out of the established practice of the Roman Dutch Common Law which holds sway in the Kingdom, that a girl below the age of 12 years is incapable in law of consenting to sexual intercourse and even if she consents, sexual intercourse with her is rape.

[30] As was stated by **C.R Snyman in the Text Criminal Law (second edition) at page 448:-**

“In the sixth instance, there is an arbitrary age limit below which a girl is irrebutably presumed incapable of consenting to sexual intercourse. This

limit is the completion of the girls twelfth year. Intercourse with a girl under the age of twelve is therefore rape, even if she consented”.

[31] This position of our law was replicated by the court in the case of **Rex v Mfanzile Mphicile Mndzebele (supra)** with reference to the case of **R v Z 1960 (1) SA 739 at 742 D - E** where the court stated as follows:-

“According to our practice a girl under the age of 12 years cannot give consent to sexual intercourse. Even if she consents, sexual intercourse with her according to our law is rape”

[32] Having stated as above, it is imperative for me to point out at this juncture that the evidence led in these proceedings as to the age of the complainant at the material time of this offence, is one that was fraught with inconsistencies.

[33] I say this because the indictment alleged that the complainant was a female minor of 7 years old when the offence occurred. The medical report exhibit B and evidence of PW6 tell us that complainant was aged 6 years at the

material time of this offence. On the other hand PW1, complainant's mother told the court that the complainant was born in August 2000. Thus her evidence is effectively that the complainant was 8 years old at the material time of this offence in January, 2009. I agree with learned crown counsel Ms L. Hlophe that in the face of these inconsistencies, it is the evidence of PW1 complainants mother to the effect that complainant was born in August 2000, that must prevail. As is stated in the text **The South African Law of Evidence by Hoffman and Zeffertt (1990) (4th ed) page 149.**

“Proof of age may be furnished by a birth certificate or by the evidence of the mother or someone else who was present at the birth”

[34] It follows from the above, that in the absence of the complainant's birth certificate, I accept the evidence of PW1 her biological mother that she was born in August 2000.

[35] In coming to this conclusion, I am mindful of the fact that all the ages alleged, 6, 7 and 8 all fall below the age of 12 years which is the age range a girl is deemed in law to be incapable of consenting to sexual intercourse. Therefore, the Accused person has suffered no prejudice by the inconsistencies extant in the evidence led regarding the complainant's age and by reason of the age of 7 years alleged in the indictment. I am also mindful of the fact that the Accused did not contest the issue of lack of consent in his defence.

[36] Since I have found that the complainant was born in August 2000, it is beyond controversy that she was only 8 years old at the time the Accused had sexual intercourse with her in January 2009. She was in law incapable of consenting to sexual intercourse. Therefore, the sexual intercourse which the Accused had with her is rape.

[37] Finally, I find that the identity of the Accused is not in issue. He was very well known to PW1 and PW3 who rescued the complainant from his house prior to the medical examination.

[38] I hold the firm view that the flimsy and pathetic defence which the Accused struggled to advance has no legs to stand upon in the face of the overwhelming, cogent and reliable evidence adduced by the crown. The Accused's lone witness DW2, said absolutely nothing in support of his defence. Accused for his part, after his right of defence and implications thereof were carefully explained to him, elected to give unsworn evidence, which automatically meant that he could not be cross-examined by the crown. The danger of such evidence as established by jurisprudence is that it carries little or no weight when pitched against evidence given under oath. As was stated by the court in the case of **Sandile Shabangu v The King Criminal Appeal No. 15/07 at 9.**

“There seems to be no clear and binding decision on the matter. What is clear, however, is that an unsworn statement, which cannot be tested by cross-examination, carries less weight than evidence given under oath. Some consideration must, however, be given to the statement, if the statement contains allegations of fact which are not disputed by the evidence given by the crown witness, such allegations must be considered and a decision made as to the weight, if any, to be attached thereto. On the other

hand, if the statement made are in conflict with and are disputed by evidence given under oath, very little if any weight can be attached thereto”

[39] In casu, the Accused’s defence to the effect that it was the complainant that approached him in his home, that he subsequently sent the complainant away, that complainant and PW1 came back to his house after the rains wherein PW1 accused him of raping the complainant and that when he accosted the complainant, she denied that he raped her and said she alleged this because she was beaten up by her mother, are not only inconsistent with the evidence led by the crown but are also vehemently disputed by the crown witnesses. I find that Accused’s defence has no weight at all when juxtaposed against the overwhelming, credible and consistent evidence adduced by the crown. I thus reject the Accused’s defence. The only believable fact from his evidence is that he was at some point alone in his house with the complainant in the course of this sordid saga.

[40] In the light of the totality of the foregoing, I find that the crown has proved it’s case beyond reasonable doubt and I find the Accused guilty of the offence of rape as charged and accordingly convict him

For the Crown:

L. Hlophe

(Crown counsel)

Accused in person

**DELIVERED IN OPEN COURT IN MBABANE ON THIS
THE DAY OF 2012**

**OTA J.
JUDGE OF THE HIGH COURT**

