



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 227/12

In the matter between

REX

and

BHEKUMUSA REUBEN MATFUMBU DLAMINI

Neutral citation: *Rex v Bhekumusa Reuben Matfumbu Dlamini* (227/12)
[2013] SZHC 162 (07th August 2013)

Coram: Mamba J

Heard: 25,29,30,31 July, 2013

Delivered: 07 August, 2013

- [1] Criminal Law and Evidence – Rape – two young complainants’ evidence – credible and reliable and corroborated by medical examination.
- [2] Criminal Law – Rape – hymen scared and not torn or ruptured. This constitutes sufficient penetration.
- [3] Criminal Law and Procedure – definition of aggravating factors in section 185 (bis) of

Act 67 of 1938 – factors that worsen the moral gravity of the offence.

- [4] Criminal Law – accused found guilty of rape with aggravating factors as defined in section 185 (bis) of Act 67 of 1938. Court enjoined to pass a minimum custodial sentence of 9 years.
- [1] The Accused, a 42 year old Swazi widower is facing an indictment that alleges that he is guilty of three counts of rape.
- [2] The first count alleged that he unlawfully and intentionally had sexual intercourse with Ntombikayise Nokuthula Dlamini, a female minor aged ten years without her consent. This crime is alleged to have been committed at Nsingweni area in the Hhohho region in 2009, the exact date being unknown to the Public Prosecutor.
- [3] On the second count he is alleged to have raped Thulile Dlamini who was also aged ten years. This offence was also committed at Nsingweni in 2009 and 2010. The alleged victim or survivor on the third count is Duduzile Dlamini, a six year old female.
- [4] All three complainants are, it is common cause, the biological children of the accused.

- [5] When the accused made his first appearance before me, I advised him of his rights to have or instruct an attorney of his choice to represent him in these proceedings, if he so wished and had the means to do so. He, however, informed the court that he did not wish to exercise such right and would instead conduct his own defence.
- [6] Before arraignment, the crown applied to amend its indictment by adding a fourth count which alleged that the accused had raped a four year old minor named Sipehelele Dlamini. This proposed amendment had been served on the accused just about an hour before the proceedings started. The Accused objected to this move stating that he was not aware of this new charge and was also not aware that the alleged victim on this count had been examined by a medical doctor following the alleged crime.
- [7] After considering the objection by the accused, I came to the conclusion that its essence was that the accused was being taken by surprise by the proposed amendment and was hearing about it for the first time and had thus not had sufficient or adequate time to prepare his defence thereon. I thus refused the amendment in view of the fact that such a late amendment was potentially

prejudicial to the accused. I also considered that the crown was not going to suffer any prejudice by such ruling as it was still at liberty to charge and try the accused with this offence in the future, after giving him due and adequate notice of course.

[8] On all the three counts, the crown alleges that the “offence is accompanied by aggravating factors as envisaged under section 185 (bis) of the Criminal Procedure and Evidence Act 67 of 1938 as amended in that:

- (i) The victim was a minor of a tender age;
- (ii) The accused stood in *loco parentis* as he is the biological father of the complainant;
- (iii) The accused abused the relationship of trust as he is complainant’s natural father; [and]
- (iv) The accused did not use a condom thus exposing the victim to the risk of contracting sexually transmitted infections including HIV/AIDS.”

I explained the significance of these allegations to the accused; namely that in the event he is convicted on any of these counts and the court finds that there are aggravating factors as alleged, the court shall be enjoined to impose a minimum custodial sentence of nine years on him.

- [9] Upon being arraigned, the accused pleaded not guilty on all three counts.
- [10] I mention from the outset that when Duduzile Dlamini, the alleged victim in count 3 was called to give evidence, she stated that she did not know what the truth or a lie was. She was therefore immediately withdrawn by the crown as she could not be of any assistance to the court. There was further no evidence submitted to court suggesting that she was raped by the accused. That being the case, the accused was acquitted and discharged on count three at the close of the crown case.
- [11] The two complainants, ie, Ntombikayise and Thulile Dlamini gave their respective evidence and the court had the assistance of an intermediary in the form of Nelisiwe Mhlabane-Fakudze. She was duly sworn to undertake this task whilst both complainants were admonished before giving their respective testimonies.
- [12] Ntombikayise gave evidence as Pw2. She testified that she, together with her siblings used to sleep in the same room with their grandmother. Apparently the accused was working at Emageydini area looking after cattle for his employer, and he would occasionally come home.

- [13] On one of his visits home, the accused arrived in the evening and found the children already in bed with their grandmother. He scolded the grandmother and told her that he did not want the children to sleep in the same room with her but that they should sleep in the dining room. He then took the children to his bedroom and caused them to sleep in his bed with him. After a while he pulled Pw2 closer to him and rape her. After raping her, he warned her not to tell anyone what he had done to her. When all these took place, her two siblings Thulile and Duduzile were sleeping on the same bed. She was unable to determine whether they were fast asleep or not or whether they noticed what her father was doing to her. At this time she was in Grade 2 at the local primary school.
- [14] On the second occasion, the accused, whilst in his room, asked her if she had reported the earlier rape to any one. After telling him that she had not done so, he then raped her again.
- [15] On the third occasion, the accused found her in her granny's room and told her to go to fetch his cigarettes for him in his room. He immediately followed her into his room and once inside he caused himself and Pw2 to sit

on his bed. He tried to have sexual intercourse with her but when she screamed and resisted his attacks, he stopped and called her a fool-presumably for her resistance.

[16] PW2 also told the court that Thulile had told her that the accused had also raped her.

[17] PW2 told the court that the accused first raped her in 2009 whilst she was in Grade 2. She could not remember the date when this took place.

[18] Thulile Dlamini's evidence was almost similar to that of her sister, PW2. She was unable to remember the number of occasions she was raped by the accused and the specific times when this occurred. She also added that the accused would also physically assault them if they had failed to collect water from the nearby spring or tap.

[19] It is common cause that the two complainants mentioned above reported to their respective school teachers that the accused was sexually molesting them. Following these reports, the teachers; PW4, Tamari Ndlovu and PW5, Phumzile Dlamini reported the matter to their headmaster.

- [20] When the accused came to the school during a parent's working day, the teachers (together with the headmaster of the school) confronted the accused with the rape allegations. Both PW4 and PW5 informed the court that the accused first denied that he was sexually molesting his children but later told the meeting that he had been possessed by a demon and asked them to pray for him.
- [21] The accused denied that he raped the complainants herein. He also denied having told the teachers that he had been possessed by a demon or that he needed their prayers, for anything. He repeated his denials in his evidence in his defence.
- [22] The accused was very sketchy in cross examining the crown witnesses. He told the court under cross-examination that he did not specifically or extensively cross examine the complainants because they were his children and it pained him to see them in court under the circumstances. The accused also told the court that he had received information, before his arrest, that PW2 had been sexually abused by a certain boy at her school. He had, however, not followed or taken this up with anyone.

- [23] After the matter was reported to the police, the complainants were taken to the Raleigh Fitkin Memorial Hospital in Manzini and were both examined by Dr Daniel Addisu, PW1.
- [24] Ntombikayise was examined by PW1 on 6 November 2010. PW1 observed an old scar on the hymen of PW2. He concluded that this was evidence of penetration that had taken place sometime ago. The doctor's report was handed in as exhibit A.
- [25] Thulile Dlamini was examined on 10 October 2011. The doctor noted multiple scars around her hymen. From these observations, PW1 came to the conclusion that such scars were indicative of repeated sexual penetration committed on her. PW1's report on this count was handed in as exhibit B.
- [26] I have stated above that the accused made a bare denial of the allegations against him. He also told the court that the complainants lived at his home with their grandmother and uncle whilst he was away at work at Emageydini. He said he did not know what happened to the complainants in his absence. In fact he stopped short of accusing their uncle of raping them,

by saying that it had been reported to him that the said uncle used to wear his children's pair of panties.

[27] From the evidence led by the crown, I have no hesitation in accepting and holding that indeed the accused did, during the relevant period sexually molest his children, ie Ntombikayise and Thulile Dlamini herein. Their evidence is materially corroborated by the evidence of PW1 as stated in exhibits A and B herein. I also accept that the accused impliedly admitted to PW4 and PW5, (the complainant's teachers), that he had sexually molested the complainants. He was ashamed of himself or his actions and blamed the devil or demons for it and consequently asked the teachers to pray for him.

[28] I have referred above to exhibits A and B which indicate that both complainants still had their respective hymens when they were examined by the doctor. Usually the hymen is torn during sexual intercourse – with a virgin. This of course solely depends on the degree of penetration of the penis into vagina. That the hymen is or was not torn or ruptured but merely bruised, scared or superficially damaged is no indication that the required penetration to constitute sexual intercourse has not been satisfied.

‘There must be penetration, but it suffices if the male organ is in the slightest degree within the female’s body. It is not necessary in the case of a virgin that the hymen should be ruptured, and in any case it is unnecessary that semen should be emitted. But if there is no penetration there is no rape, even though semen is emitted and pregnancy results.’

(PMA Hunt, *South African Criminal Law and Procedure (vol 2) 1970 ed*).

[29] For the foregoing reasons I find the accused guilty as charged on count one and count two.

[30] Our Criminal Law and Procedure Act, 67 of 1938 does not define what is meant by an aggravating factor as stated in section 185 (bis) thereof. I do not consider it as either necessary, possible or desirable to define such factors. To my mind, there can never be a closed set or exhaustive list of such factors. Suffice to say that, in the criminal law, an aggravating factor is the converse of an extenuating factor or circumstance; it is that factor or circumstance that worsens the gravity or moral blameworthiness of an offence.

[31] In *Nkosana Petros Dlamini v Rex, Criminal Appeal 20/2012*, Supreme Court judgment delivered on 30th November 2012 Moore JA stated as follows:

‘[3] There appears to be some uncertainty concerning the proper meaning of the expression *aggravating circumstances* as elements to be taken into account in fashioning an appropriate sentence following a conviction. The sub-section does not define or specify what factors would elevate the offence from one of rape simpliciter to one of rape with aggravating circumstances. This means that the court must determine what factors would amount to aggravating circumstances within the meaning of the sub-section.

[4] The Concise Oxford Dictionary defines the word aggravate in this context as to “make worse”. Black’s Law Dictionary Eighth Edition defines aggravated in relation to a crime as “to make worse or more serious by circumstances such as violence, the presence of a deadly weapon, or intent to commit another crime.” In the South African Criminal Law and Procedure Second Edition by Milton Vol. 2 at page 451 the editors tell us that it has become the approach of South African Courts not to impose the death sentence for rape unless the rape was accompanied by aggravating circumstances. They then list

some of the factors which have been held to be relevant to the assessment of punishment for rape. These are:

- (i) previous convictions for rape;
- (ii) the degree of violence used;
- (iii) whether physical or psychological injuries were inflicted and, if so, their severity;
- (iv) the age and state of health of the complainant;
- (v) her character;
- (vi) premeditation.

[5] In cases reaching this Court the following seemingly neutral factors have been advanced as amounting to aggravating circumstances:

- (i) The complainant is traumatized by this experience.
- (ii) Accused persons exchange complainants during the commission of these offences
- (iii) The accused was well known to the victim
- (iv) The accused was a neighbor to the complainant
- (v) The rape took place in a potato field.
- (vi) The rape took place when the victim had gone to collect firewood from the forest.
- (vii) The appellant would promise to give the complainant some money **after** the sexual encounter (singular) but he would eventually not give her the promised money.

- (viii) He would further caution the complainant not to report the incident to anyone.
- (ix) The complainant eventually reported the matter to her mother when she realized that the appellant was persistent with the sexual abuse.
- (x) The medical report disclosed that the hymen of the complainant was intact but that there was marked hyperemia.

[6] The offence of rape is a member of the inglorious family of offences against the person. These range in order of seriousness from common assault or assault simpliciter to murder. There is a long list of crimes which are rendered more serious and, for that reason, attract more severe penalties if they are accompanied by aggravating circumstances. Examples are:

- i. Aggravated assaults.
- ii. Aggravated robberies.
- iii. Sexual offences with accompanying aggravating circumstances.

[7] Black's Law Dictionary affords a rich source of the meaning of aggravating circumstances and related definitions:

- i. Aggravated in relation to a crime – “made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime”.
- ii. Aggravated assault – “criminal assault accompanied by circumstances that make it more severe such as the intent to

cause serious bodily injury especially by using a deadly weapon”.

- iii. Aggravate battery – “battery accompanied by circumstances that make it more severe, such as the use of a deadly weapon or the fact that the battery resulted in serious bodily harm.”
- iv. Aggravated kidnapping – “kidnapping accompanied by some aggravating factor such as a demand for ransom or injury to the victim.”
- v. Aggravated robbery – “robbery committed by a person who either carries a dangerous weapon or inflicts bodily harm on someone during the robbery.”
- vi. Aggravated sodomy – “criminal sodomy that involves force or results in serious bodily injury to the victim in addition to mental injury and emotional distress.”...

...[12] The statutory definitions contained in the English Theft Act afford an example of the kind of particulars which ought to be provided to a person charged with rape with aggravating circumstances. In addition, the definitions cited from the Oxford Dictionary and Black’s Law Dictionary strongly suggest that aggravating circumstances in relation to the offence of rape include circumstances which make the offence more severe in its commission and consequences, and would exclude circumstances which do not

make the offence itself worse, but are merely incidental to the commission of the offence or to the setting where it takes place.

[13] Viewed in this way, aggravating circumstances would evidently include:

- i. The use of a weapon, or other instrument to threaten or injure the victim.
- ii. The application of physical force to the victim over and above the degree of physical contact involved in the act of unlawful intercourse, such as beating, strangling, or causing injuries to the victim by means other than the use of a weapon.
- iii. The rape of a young person. The younger the victim, the greater the degree of aggravation.
- iv. Rape by more than one offender – the so-called gang rape.
- v. Rape without a condom exposing the victim to HIV infection or other sexually transmitted diseases.
- vi. Multiple rapes such as where the victim is raped repeatedly in one episode for example by being kidnapped and raped repeatedly during the night.
- vii. Where the victim is manifestly pregnant.
- viii. Where the rape is accompanied by robbery.
- ix. Where the victim is an elderly or disabled person or mentally incompetent.
- x. Where the rape involves the abuse of authority such as rape by a parent or guardian, school teacher or similar authority figure.

- xi. Where there is admissible expert evidence that the victim has suffered severe emotional or psychological trauma.’

[32] From the foregoing I hold that the offences in the instant case were indeed accompanied by aggravating factors. These factors are:

- (a) The two victims were young – just aged ten years at the time of the commission of the crimes.
- (b) The accused did not use a condom or any other protective device and thus exposed the complainants to contracting HIV infection or other sexually transmitted infections.
- (c) The complainants were raped on several occasions; and
- (d) the accused raped his own daughters and thus grossly betrayed the parental trust that the complainants and society in general placed on him as their protector and defender.

MAMBA J

For the Crown: Ms L. Hlophe

For the Accused: In person