



IN THE HIGH COURT OF SWAZILAND

JUDGMENT ON SENTENCE

Case No: 372/10

In the matter between:

REX

v

PETER SIBANYONI

Neutral Citation: Rex V Peter Sibanyoni (372/10) [2013] SZHC 49 (28 February 2013)

Coram : MABUZA J

Heard : 18th February 2013

Delivered : 28th February 2013

Summary : Criminal Law – Accused charged with rape – Trial in Magistrates Court – Accused convicted – Magistrate having no jurisdiction to sentence Accused – Sentencing referred to High Court in terms of section 292 and 293 of Criminal Procedure and Evidence Act No. 67/1938

[1] The Accused was charged with the crime of rape it being alleged that on or about the 26th February 2007 at about 0100 hours at or near Musi Area in the Manzini District, the Accused did wrongfully unlawfully and intentionally have sexual intercourse with the complainant who was then 37 years old

once without her consent and did thereby commit the crime of rape. The rape was accompanied by aggravating factors in that the Accused did not use a condom when committing the offence thus exposing the complainant to the risk of contracting sexually transmitted diseases.

[2] The Accused was found guilty and convicted of the crime of rape by the learned Magistrate sitting at Manzini on the 5th August 2010. The learned Magistrate committed the Accused in terms of section 292 (1) of the Criminal, Procedure and Evidence Act No. 67/1938 (the Act) to the High Court for sentencing. Section 292 (1) provides that:

“If on the trial by a magistrate’s court any person is convicted of an offence, the court, on obtaining information about his character and antecedents, is of opinion that they are such that a greater punishment should be inflicted for the offence than it has the power to inflict, such court may, for reasons to be recorded in writing on the record of the case, instead of dealing with him in any other manner, commit him in custody to the High Court for sentence”.

[3] Section 293 of the Act sets out the procedure to be followed on committal of an accused for sentencing under section 293 which provides as follows:

- “(1) If a magistrate court commits a person for sentence under section 292, it shall forthwith send a copy of the record of the case to the High Court.
- (2) Any person committed to the High Court for sentence shall be brought before the High Court at the next convenient session thereof or earlier if so directed by such court.
- (3) If any person is brought before the High Court in accordance with subsection (2), such court shall enquire into the circumstances of the case and, if, after consideration of the record, it is satisfied of the accused’s guilt, it shall thereafter proceed as if such person had pleaded guilty before it in respect of the offence for which he has been so committed.
- (4) If the High Court, under this section, passes any sentence upon any person he shall be deemed to have been tried and convicted for the offence concerned before the High Court”.

[4] The learned Magistrate has set out in the record the circumstances of the case as to why it was necessary for this matter to be committed for sentencing to this Court. At page 40 of the record the learned Magistrate states that the reason she is committing the Accused to the High Court for sentencing is because he is charged with the offence of rape with aggravating circumstances. She states that she had no jurisdiction at the

time to preside over the matter. She heard the matter pursuant to a directive that all Magistrates should preside over cases set before them regardless of jurisdiction because of the backlog of cases. At the material time she presided over cases at Mankayane on Fridays and this matter appeared on her roll there.

- [5] The evidence set out in the record is that when the complainant was raped the Accused was carrying a knife which he used to scrape her private parts. He had intercourse with her without her consent and before he could ejaculate his friend called him and he stopped and left. She got up and ran to seek help from her neighbours where she reported her entire ordeal including the rape. She did not see the features of her assailant and could not identify him at all. The issue of his identity was solved by the accomplice witness Pupu Sibanyoni (PW1). PW1 accompanied the Accused to the home of the complainant on the material night. Their mission was to rob her of her pay. At some point during the night PW1 left the Accused keeping guard over the complainant outside her house while he ransacked it looking for money. It was while guarding her that the Accused raped the complainant.

- [6] Subsection 3 hereinabove states that after consideration of the record and I am satisfied of the Accused's guilt, I shall thereafter proceed as if such person had pleaded guilty before me in respect of the offence for which he has been so committed. Indeed I am satisfied of the Accused's guilt.
- [7] In the spirit of the said subsections I invited the Accused to address me in mitigation notwithstanding that the record reflects that he addressed the learned Magistrate in mitigation in the court *a quo*.
- [8] He asked the Court to be lenient with him when sentencing him and to suspend the sentence as he was innocent of the charge. He did not know anything about the rape. He believes that his co-accused turned accomplice witness was the perpetrator herein who had fabricated the evidence against him with the assistance of the police. He promised not to commit a similar offence if this Court gave him a non-custodial sentence. He stated that he was 28 years old and had a baby due in June 2013 with his girlfriend. He had another child who lived with its mother. That he supported himself and his siblings from money he made from piece jobs. That he ended his education in Standard 5.

[9] In passing sentence I have taken into account the above submissions and that for purposes of this conviction, the Accused is a first offender and that the aggravating factors were not proved. He did however wielded a knife at the complainant and this I have taken into account.

[10] The Accused was charged with the offence of rape herein on the 26th December 2008 at Matsapha Correctional facility where he was serving a sentence for a different offence for which he was released on the 16th October 2010. He has been at large since then until his arrest to abide the sentence 4th December 2012 in respect of the rape case herein.

[11] The Accused is sentenced to seven (7) years imprisonment without an option of a fine. The period(s) from the 26th December 2008 to the 16th October 2010; and the period from the 4th December 2012 to the 28th February 2013 deducted from the sentence.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Crown : Ms. L. Hlophe
For the Accused : In person