



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 190/05

In the matter between

REX

Versus

NKOSINATHI SIBANDZE

ACCUSED

Neutral citation: *Rex v Nkosinathi Sibandze (190/05)* [2014] SZHC 144
(17 July 2014)

Coram: M. S. SIMELANE J

Heard: 20 JUNE 2014

Delivered: 17 JULY 2014

Summary: Criminal procedure – Aggravated rape – Victim a minor aged six (6) years old – Accused convicted on a charge of Rape.

Judgment

SIMELANE J

[1] The Accused person is charged with the Rape of a six (6) year old girl.

[2] The Crown alleges that upon or about 5th August 2004 and at or near Mathendele, location Nhlango, in the Shiselweni region, the Accused did intentionally have unlawful sexual intercourse with Mayibongwe Zikalala a female minor aged six (6) years old at the time and who is in law incapable of giving consent to sexual intercourse. The Crown further alleges that this rape is accompanied by aggravating circumstances as envisaged under Section 185 (*bis*) of the Criminal Procedure and Evidence Act, 1938 (as amended) in that:-

- 1) The Accused was a neighbour, trusted and held an authoritative position over the Complainant.
- 2) Complainant was of a tender age and lacked sexual experience.

- 3) Complainant was traumatized by the experience and physically scarred.
- [3] When the charge was read and explained to the Accused in SiSwati he pleaded not guilty, which plea was confirmed by learned defence counsel Mr. S. B. Motsa.
- [4] The Crown called four witnesses to prove its case.
- [5] The first witness for the Crown was Mayibongwe Zikalala (hereinafter referred to as the Complainant). She told the Court that she was born on the 11th February 1998. She further told the Court that in 2004 she was staying at Mathendele, Nhlangano in the Shiselweni region. It was her evidence that on the day in issue she was invited by the Accused to his house alleging that he wanted her to see what he had cooked. The Complainant indeed proceeded to Accused person's house and on arrival found that the Accused had cooked some chicken meat. The Accused wanted to dish the food for the Complainant but the Complainant said she did not want the kind of food he had prepared.
- [6] She informed the Court that the Accused thereafter closed and locked the door. He advised the Complainant to sit on his bed and the Complainant complied. He removed her underwear and also removed his trousers and underwear. He thereafter inserted his penis into her vagina. She told the Court that the Accused forcefully pushed his

penis into her vagina and she felt a lot of pain. She further told Court that the Accused thereafter wiped her vagina with a towel. She further told the Court that the Accused was on top of her for quite some time.

[7] I should interpose at this stage and state that the Accused was well known to the Complainant. The Accused was a neighbour to the Complainant. It is the evidence which is undisputed that the Accused was a regular at the Complainant's house.

[8] The Complainant further told the Court that upon arrival at home she was afraid to report the incident to her mother. A few minutes after the return of the Complainant to her house, the Accused emerged and found Complainant with her mother. He asked for some water to drink. The mother of the complainant PW2 requested Complainant to give the Accused the water but the Complainant refused until her mother gave the Accused the water. After the Accused had left, it is the Complainant's evidence that her mother asked her why she did not give the Accused the water and why she was so rude. It was at that stage that the Complainant related to her mother her ordeal.

[9] It was the Complainant's evidence that her mother then requested one Makhosazana Lushaba to inspect her vagina and PW2's evidence was that Makhosazana Lushaba told her that the Complainant had been injured in her vagina. The matter was thereafter reported to the police.

[10] PW2 was Nonhlanhla Zikalala the Complainant's mother. She testified that the Complainant was born on the 11th February 1998. She further testified that on the 06th August 2004, the Complainant told her that the Accused inserted his penis into her vagina after the Accused had called her to his house. I will not analyse her evidence in extenso as it corroborates that of the Complainant in all material respects.

[11] PW3 was the investigating officer 3853 Detective Sergeant T. Nxumalo, who was based at Nhlngano police station at the commission of the offence. The police officer related to the Court how she carried her investigations in this case and eventually arrested the Accused person. She told Court that she introduced herself to the Accused and cautioned him in terms of the Judges rules. She told the Court that she eventually detained and formally charged the Accused with the offence of Rape.

[12] The last witness for the Crown was Doctor Mirira, the medical doctor who examined the Complainant at Hlathikhulu Government Hospital on 7th August 2004. The doctor testified that she examined the Complainant and thereafter produced a medical report which was entered as Exhibit "A". The report is signed and dated by the medical doctor. The doctor told Court that on his examination of the Complainant's vagina he observed that there were some bruises on the Complainant's labia minora. The doctor opined that penetration might have been attempted. He further stated that medically they say

penetration occurred if an object goes beyond the hymen. The doctors testimony is corroborated by exhibit A, the medical report.

[13] At the close of the Crown's case this Court ruled that the Crown has established a prima facie case and consequently called the Accused to his defence. The Accused elected to present sworn evidence and did not call any witness.

[14] The Accused person's version of events is that he was staying at Mathendele in 2004 and a neighbour to Complainant. He told the Court that PW2 made sexual advances to him. He told court that PW2 would at times call him to her house when her husband was away. PW2 would call him to her bedroom, made sexual advances to him and dish him some food. He told Court that he never acceded to her sexual advances.

[15] The Accused further told the Court that on the day in issue he left Mathendele for his parental homestead to check on his sick mother at Madulini. He told the Court that he was later arrested and charged for raping the Complainant. He denied that he raped the Complainant as he was at Madulini and not at Mathendele on the day in issue.

[16] The Accused was cross-examined by the Crown on why he did not put it to PW1 and PW2 that on the day in issue he was not at Mathendele but at Madulini. He had difficulty responding to this question but eventually put the blame on his attorney arguing that it is the attorney

who was putting the questions to the Crown witnesses not him. He stated that he does not know why the Crown witnesses were not cross-examined on this evidence.

[17] It was further put to the Accused that it was not true that he would be called by PW2 to come to her house for food and that PW2 would make sexual advances to him.

[18] In our law the Crown has to prove three factors to establish the offence of rape, namely:-

- (i) The identity of the Accused.
- (ii) The fact of sexual intercourse.
- (iii) Lack of consent by the victim.

[19] The evidence of the Complainant implicated the Accused and the identity of the Accused is not in issue. The Complainant had known the Accused very well before this incident and she knew where his house was in the same location. There is therefore no question of mistaken identity.

[20] The evidence of the Complainant is very clear and I am of the opinion that she was a credible and truthful witness.

[21] The evidence of the doctor who examined the Complainant is that penetration might have been attempted. He stated that there were bruises on the labia minora. This evidence corroborates that of the

Complainant that she was sexually assaulted. Legally, the slightest degree of penetration would suffice to constitute the crime of rape. The Doctor's report indicates that there were some bruises in the Complainant's *labia minora*. To me, this is consistent with penetration and a case of rape.

[22] According to the learned author **P.M.A. Hunt in South African Criminal Law and Procedure 2nd Edition, Juta, 1983 at page 440,**

“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 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.”

[23] I am of the considered view that all this evidence clearly shows that the Accused sexually molested the child on the day in question as stated by the Complainant and corroborated by PW2 and PW3.

[24] The fact of lack of consent is also proved by the Crown. It is an undisputed fact that the Complainant was only six (6) years old when the Accused sexually molested her. She was in law incapable of consenting to sexual intercourse. This is because according to the Roman Dutch Common Law which holds sway in Swaziland, a girl below the age of 12 years is incapable of consenting to sexual intercourse and even if she consents, sexual intercourse with her is rape.

[25] The Accused defence that he was at his parental home at Madulini is rejected. I consider same to be an afterthought. This, I say because, this evidence was not put to the Crown witnesses. In this regard the dicta by Hannah CJ (as he then was) in the often cited case of **Rex V Dominic Mngomezulu and 10 Others Criminal Case No. 96/94** is apposite. The learned Chief Justice in that case held that failure by the defence to put the story of the Accused, entitles the Court to draw an inference that whatever he says for the first time in his evidence in chief must be clearly an afterthought.

[26] I also consider the defence that there was bad blood between the Accused and PW2 to be a fabrication by the Accused. He himself told the Court that he would go to the Zikalala homestead and PW2 would dish out some food for him. It is indeed unfathomable how the Accused would go there and have food yet he alleges on the other hand that there was bad blood between himself and the Zikalalas. I also fail to understand how PW2 would invite the Accused to her bedroom, as the Accused alleges, yet there was animosity between the Accused and the Zikalalas.

[27] The Accused further did not put it to the Crown witnesses that there was bad blood between himself and PW2. PW2 vehemently denied that there was any animosity between herself and the Accused. She further denied that she ever made sexual advances on the Accused. In my view the defence put forward by the Accused is so absurd as to be incapable of belief. I reject it.

[28] In the circumstances of this case and for the reasons I have given above, I find that the Crown has proved its case beyond a reasonable doubt as to the guilt of the Accused person for the offence of Rape charged. I also find that the rape was accompanied by aggravating circumstances as contended by the Crown.

[29] In the result, the Accused is found guilty of the rape of Mayibongwe Zikalala who was aged six (6) years at the commission of the offence. He is accordingly convicted for the offence as charged.

M. S. SIMELANE J.
JUDGE OF THE HIGH COURT

For the Crown: Ms. L. Hlophe

For the Accused: Mr. S.B. Motsa