



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 450/2010

In the matter between:

REX

VS

SOTJA BHEKIMPI MATSENJWA

Neutral citation: *Rex vs Sotja Bhekimpi Matsenjwa (450/2010) [2014]
SZHC 221(22nd September 2014)*

Coram: **M.C.B. MAPHALALA, J**

Summary

Criminal Law – Rape – accused charged with rape accompanied by aggravating circumstances as envisaged under section 185bis of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended – essential requirements of rape considered – accused accordingly convicted as charged.

JUDGMENT
22nd September 2014

[1] The accused is charged with Rape, and, the Crown alleges that on the 27th December 2009 at Khokhamoya Compound in the Lubombo region, he unlawfully and intentionally had sexual intercourse with Zama Mathonsi, a female minor aged five (5) years who is in law incapable of consenting to sexual intercourse.

The Crown further alleges that the offence is accompanied by aggravating factors as envisaged under section 185bis of the Criminal Procedure and Evidence Act 67/1938 as amended on the two following the factors. Firstly, that the complainant was a minor of tender age; secondly, that the accused exposed the complainant to the risk of sexually transmitted infections as he did not use a condom.

[2] PW1 Dr. Petros Hail Marium is an Ethiopian Medical Doctor employed by the Good Shepherd Hospital. He is also a specialist surgeon. He testified that on the 27th December 2009, he examined the complainant Zama Mathonsi and found that the hymen was intact, there was a smelly discharge white/yellow in colour, a vaginal smear was taken and spermatozoa was found; no sexual infections were found, and, she tested negative for HIV/Aids. He treated her for possible sexual diseases and HIV/Aids. He concluded that the complainant, aged five years, had been sexually abused by an adult. He explained that the vaginal smear was

taken from the labia majora and labia minora where the spermatozoa had been emitted. He maintained her evidence under cross-examination. The medical report was admitted in evidence and marked exhibit 1.

[3] PW2 Zanele Mathonsi is the mother of the complainant, and, she testified that her child was born on the 17th June 2004. She further testified that they left their homestead at Tikhuba area in the Lubombo region on the 27th December 2009 to visit her husband who is employed at Big Bend. Her husband is Mzwandile Mthonsi.

[4] The accused saw the complainant and her father looking for mangoes outside their house, and, he suggested that they should go with the complainant to pick mangoes outside his house within the compound. The complainant's father agreed. Subsequently, the accused returned with the complainant carrying the mangoes; and, the complainant reported to PW2 that the accused had sexually abused her. When she made the report to PW2, the complainant was crying and she further complained of pains in her private parts. PW2 noticed that the complainant's private parts were wet. PW2 inturn reported what the complainant had told her to her husband PW3; he sent PW2 and the complainant to the accused's mother to report the incident.

The complainant's father telephoned the police and reported the incident. The police arrived and took PW2 together with the complainant to Big Bend Police Station where they recorded a statement with the police. She emphasised that the complainant did not wash herself after the incident until she had been examined by the doctor. She maintained her evidence under cross-examination.

- [5] PW3 Mzwandile Peter Mathonsi is the biological father of the complainant. He corroborated the evidence of PW1 and PW2 in all material respects. He confirmed that he allowed the accused to go with the complainant to pick up mangoes at his homestead after the accused had offered the mangoes. After a short while the accused and the complainant returned with the mangoes, and, PW3 gave a packet of morvite to the accused in return.

PW3 further testified that PW2 subsequently gave him a report that the accused had sexually abused the complainant. He sent PW2 and the complainant to report the incident to the accused's mother. On their return he also went to the accused's mother to discuss the incident; however, he was told that the accused was not at home. He looked for him in the neighbourhood and found him behind his mother's house. He confronted the accused on the incident, and, in response, he told him that he was

apologising if he had sexually abused the complainant. Thereafter, PW3 reported the incident to the police.

- [6] PW4 Detective Sergeant Zubuko, a police officer stationed at Big Bend Police Station in 2009 testified that he received a report of a rape case at Khokhamoya Compound in Bing Bend. Pursuant thereto he went to the homestead of the complainant in the company of Constable Musa Mtsetfwa. They recorded statements of PW1, PW2 and PW3. Thereafter, they transported the complainant to Good Shepherd Hospital for a medical examination.

They looked for the accused at his parental homestead but could not find him. They left a message with his father that he should inform the accused to report at Big Bend Police Station in respect of allegations that he had raped the complainant. The accused did not report at the police station until the 9th February 2010 when he was brought by his mother. The accused did not explain why it took him such a long time to report at the police station when the incident had occurred on the 27th December 2009.

The police introduced themselves to the accused and further cautioned him on his rights to silence and legal representation. The accused said

something about the case which led to his arrest. Under cross-examination PW4 agreed that the accused had surrendered himself to the police on the 9th February 2010; however, he lamented and decried the fact that the accused had taken such a long time to surrender himself to the police.

[7] During the criminal trial, the Crown made an application in terms of section 223bis of the Criminal Procedure and Evidence Act 67/1938 with a view to admit Lindiwe Ndzabukelwako as an intermediary to assist the complainant in giving evidence. The application was not opposed by the defence. The intermediary testified under oath that she is employed by the Mbabane Government Hospital as a Nurse Counsellor under the Voluntary Testing and Counselling Unit. She holds a Diploma in General Nursing, Diploma in Midwifery as well as a degree in Psychology. She is duly registered with the Nursing Council as required by law.

[8] Section 223bis of the Criminal Procedure and Evidence Act 67/1938 provides the following:

“223bis. (1) In this section, whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if such person testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an

intermediary in order to enable such witness to give the evidence through that intermediary.

(2) In these proceedings—

(a) no examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary; and

(b) the said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give the evidence at any place—

(a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his testimony.

(4) In this section—

(a) the Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries; and

(b) an intermediary who is not in the full-time employment of the Government shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister, with the concurrence of the Minister of Finance, may determine.”

[9] PW5 Zama Mathonsi, the complainant, was admonished to speak the truth and, she undertook to speak the truth after declaring that she knows and understands the truth. She testified that she was now (10) years old and attends Grade IV at St John School in Big Bend. She further testified that on the 27th December 2009, she looked for mangoes with his father and younger sibling around the compound house where her father was staying. She had come to visit his father in the company of her mother and younger sibling, and, that they were staying at her parental home at Tikhuba area in the Lubombo region.

PW5 further explained that they were picking the mangoes to take with them to her parental home at Tikhuba and, that they had found few mangoes. The accused arrived and offered them more mangoes at his father’s house nearby . The accused asked her father to let her go with him to pick the mangoes, and, her father agreed.

[10] She told the court that the accused led her to a toilet where he raped her. He ordered her to undress and had sexual intercourse with her. After the incident the accused went with her to her father's house where he delivered the mangoes; and, in return her father gave the accused a packet of morvite. She reported the sexual abuse to her mother, and, her mother went to the accused's home to report the matter whilst she remained behind and slept. The police arrived and drove her with her mother to hospital where she was examined by a doctor. She was able to identify the accused in court,

[11] The complainant proved to be a trustworthy, honest and reliable witness during her evidence in-chief as well as cross-examination. She remembered all the events associated with the incident, and, she answered all questions with ease and without hesitation. She maintained her evidence under cross-examination that the accused had led her to a toilet where she ordered her to undress before having sexual intercourse with her.

[12] The accused testified in his defence, and, he told the court that they went to pick mangoes with the complainant. Before they could pick the mangoes, he went to a toilet to drink, and, the complainant followed him. He contended that he wanted to have sexual intercourse with the complainant in the toilet; he told her to lie down but he was disturbed by a tractor before

having the sexual intercourse. He went out of the toilet and the complainant followed him.

He told the court that when the tractor disturbed him, he was aroused and ended up ejaculating on the complainant's thighs because he had already taken his penis out of the trouser. He confirmed that the complainant never consented to sexual intercourse.

[13] Under cross-examination the accused told the court that he was kneeling over the complainant when he ejaculated on her thighs. He denied and disputed the Medical Report that semen was found in the complainant's vagina. He conceded, however, that his defence attorney did not dispute the Crown's evidence that there was spermatozoa in the complainant's vagina; to that extent, he denied that he inserted his penis into the complainant's vagina and had sexual intercourse with her.

[14] The Supreme Court in the case of *Mbuso Blue Khumalo V. Rex* Criminal Appeal Case No. 12/12 at para 28 where I had this to say:

“28. In a rape case the prosecution bears the onus of proving beyond reasonable doubt three essential requirements of the offence, namely, the identity of the accused, the fact of sexual intercourse as well as the lack of consent. See cases of *Mandlenkosi Daniel Ndwandwe v. Rex*

**Criminal Appeal No. 39/2011 at para 8; *Mandla Shongwe v. Rex*
Criminal Appeal No. 21/ 2011 at para 16.”**

[15] The identity of the accused is not in issue. The complainant was able to identify the accused, and, the said identification was never challenged by the defence. Similarly, the lack of consent is not in issue on the basis that the accused in his evidence in-chief admitted that he had actually ordered the complainant to undress and lie down facing upwards inside the toilet. Furthermore, it is well-settled that a girl below the age of twelve years is incapable of consenting to sexual intercourse, and, that sexual intercourse with such girl constitutes the offence of rape. See *Rex v. Z* 1960 (1) SA 739 (A) at 742, 744.

Furthermore, the fact of sexual intercourse was proved by the Crown beyond reasonable doubt. The Medical Report which was admitted in evidence shows clearly that there was sexual intercourse between the accused and complainant, and, spermatozoa was found in the vaginal smear taken from the complainant’s vagina.

[16] The accused contends that he ordered the complainant to undress and lie down facing upwards. He states that he wanted to have sexual intercourse

with the complainant but he was disturbed by a passing tractor. He contends that since he had taken out his penis and was aroused, he ejaculated on her thighs; he concedes that he could not explain how his spermatozoa was found in the complainant's vagina. However, the accused conceded under cross-examination that the defence did not dispute the Crown's evidence relating to penetration or the fact of sexual intercourse.

[17] In the case of *Mbuso Blue Khumalo v. Rex* (supra) at para 31, I had this to say:

“31. P.M.A. Hunt in his book entitled, South African Criminal Law and Procedure, 2nd edition, Juta Publishers, 1982 at page 440, the learned authors state the following with regard to the act of sexual intercourse:

‘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 the semen should be emitted. But if there is no penetration, there is no rape even though semen is emitted and pregnancy results.’ ”

[18] It is apparent from the evidence that there was a slight penetration into the complainant's vagina and, this suffices to prove sexual intercourse in law. Needless to say that the presence of spermatozoa in the complainant's

vagina shows that the accused had sexual intercourse with the complainant. The fact that the hymen was not ruptured does not assist the accused in this regard. Accordingly, the accused is convicted of rape as charged.

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

For Crown
For Defence

Principal Crown Counsel Lomvula Hlophe
Attorney Kush Vilakati