



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 52/2013

In the matter between:

REX

VS

TIMOTHY MANCEBA SHONGWE

Neutral citation: *Rex vs Timothy Manceba Shongwe (52/2013)*
[2014]SZHC 96 (03 April 2014)

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

Summary

Criminal Law – Rape – accused charged with two counts of rape of minor children aged 6 years – essential requirements of the offence considered – held that all three requirements of the offence have been established by the Crown – accused convicted and sentenced to eighteen years imprisonment in each of the two counts – held further that the sentences will run concurrently

JUDGMENT
03 APRIL 2014

[1] The accused was charged with two counts of rape. On the first count the Crown alleges that on the 27th September 2012 at Mandlovu area in the Lubombo region, the accused unlawfully and intentionally had sexual intercourse with Nombulelo Shongwe, a female minor aged six years old who in law is incapable of consenting to sexual intercourse. The Crown contends that the offence is accompanied by aggravating factors as envisaged under section 185 bis of the Criminal Procedure and Evidence Act 67/1938 as amended in that the victim was a minor child of a tender age, the accused is the grandfather of the complainant, and, that the accused did not use a condom thus exposing the victim to the risk of contracting sexually transmitted infections including HIV/Aids. The accused pleaded not guilty to the first count of rape.

[2] On the second count of rape the Crown alleges that on the 27th September 2012 at Mandlovu area in the Lubombo region, the accused unlawfully and intentionally had sexual intercourse with Bethusile Shongwe, a female minor child aged six years old who in law is incapable of consenting to sexual intercourse. The Crown further alleges that the offence is accompanied by aggravating factors as envisaged under section 185 bis of the Criminal Procedure and Evidence Act 67/1938 as amended in that the victim was a minor child of a tender age, the accused is the grandfather of the complainant and the accused did not use a condom thus exposing the

victim to the risk of contracting sexually transmitted infections including HIV/Aids. He pleaded not guilty to the second charge of rape.

[3] PW1 Dr. Pascal Jinguri, a medical practitioner based at Sithobela Health Centre, examined Nombulelo Shongwe aged six years on the 27th September 2012 in respect of the first count of rape. She was brought at the hospital by the police after being sexually assaulted by a known person. Her vaginal area had fresh bruises but the hymen was still intact. He observed that the bruises were consistent with an attempt of traumatic vaginal penetration of the complainant. The medical report prepared by the doctor was admitted in evidence and marked Exhibit 1.

[4] PW1 further examined Bethusile Shongwe, aged six years, on the 27th September 2012 in respect of the offence in the second count of rape. She was also brought by the police at Sithobela Health Centre where the doctor was stationed. There were fresh bruises on her vaginal area but the hymen was intact. The doctor observed that there was an attempt of traumatic vaginal penetration. The medical report prepared by the doctor was admitted in evidence and marked Exhibit 2.

[5] PW2 Philile Dlamini is the mother of Nombulelo Shongwe in the first count of rape. She testified that she also knows Bethusile Shongwe in the

second count of rape, and, that she is the daughter of Todvwa Gwebu. PW2 is the daughter in-law of the accused; and, she had gone to town when the incident occurred. The two complainants and one Maria Shongwe met this witness on her way home and, Nombulelo Shongwe told her that the accused called them to his house and ordered them with Bethusile Shongwe to undress; he first climbed on top of her and inserted his penis into her vagina and made some movements. When he was finished with her, he did the same thing on Bethusile Shongwe.

[6] PW2 reported the incident to her mother in-law as well as her sister in-law. The police were called to the scene. After recording statements with the police, the two children were driven by the police to Sithobela Health Centre for medical examination. She maintained her evidence under cross-examination.

[7] PW3 Todvwa Gwebu is the mother of Bethusile Shongwe. She testified that on the afternoon of the 27th September 2012, she went to the main homestead to fetch Bethusile Shongwe and Maria Shongwe who are both her children. She met PW2 along the way walking with the children, and, PW2 told her that the accused had sexually assaulted Nombulelo and Bethusile Shongwe. The police were called to the scene, and, after

recording statements, they transported the children to Sithobela Health Centre in the company of PW2.

[8] PW4 Detective Constable Thandazile Mafu is the investigator in the matter, and, she is attached to the Domestic Violence and Sexual Abuse Unit of the Police Service and based at Siphofaneni Police Station. She received a report of sexual abuse of the two minor children, and, they were later brought to her by the police based in the General Duty Unit, in the company of their mothers Philile Dlamini and Todvwa Gwebu. The children appeared traumatised, and, she interviewed them in a separate office. The children told her that they have been sexually assaulted by the accused in his house. They further complained of severe pain in their vagina. After recording their statements, she transported them to Sithobela Health Centre for medical examination in the company of another police officer Makhosazane Shongwe.

[9] The accused was subsequently arrested by the police and brought to her office. She was with other police officers. She introduced herself to the accused and further told him that she was investigating a rape case in which he was the suspect. She further cautioned him in accordance with the Judges Rules that he was not obliged to say anything but whatever he said would be used in evidence during the trial; that is his right to remain silent.

He was further advised of his right to legal representation. The accused opted to say something pertaining to the matter, and, she subsequently charged him with the two counts of rape of Nombulelo and Bethusile Shongwe.

[10] The Court granted an application by the Crown in terms of section 223 bis of the Criminal Procedure and Evidence Act to enable the complainants to give evidence with the assistance of an intermediary, Nelisiwe Fakudze, a mid-wifery nurse employed by the Swaziland Government and based at the Paediatric ward at the Mbabane Government Hospital. She took an oath before assisting the complainants in giving their evidence.

[11] PW5 Nombulelo Shongwe was admonished to speak the truth, and, she understood what was expected of her. She told the Court that she went playing with Bethusile and Maria Shongwe collecting marula fruits. Their grandfather, the accused, called them to his house and told them with PW5 to undress; and Bethusile Shongwe demonstrated using a male and female dolls what the accused did to both of them starting with her. She undressed the female doll, and made her lie facing upwards, then she placed the male doll on top. PW5 explained that after they had removed their panties, the accused removed his underwear and inserted his penis into her vagina. Meanwhile Bethusile Shongwe was watching. Thereafter, the

accused told Bethusile Shongwe to undress and lie down facing upwards, he inserted his penis into her vagina. When he was finished, he told them to go home. They reported the incident to Philile Dlamini; and, they were subsequently taken to hospital by the police. The accused did not cross-examine PW5. She was able to identify the accused in Court as the person who had sexually assaulted them.

[12] PW6 Bethusile Shongwe was also admonished by the Court to speak the truth. She corroborated the evidence of PW5 in all material respects. She identified and pointed at the accused as the person who had sexually assaulted them. Again the accused declined to cross-examine her.

[13] The accused gave evidence in his defence. He told the Court that he was sleeping during daytime when he heard children making noise next to a nearby stream. The children further came and woke him up and told him that they were hungry and asked for food. It was Nombulelo, Bethusile and Maria Shongwe. He told them that there was no food because their grandmother did not cook before she left in the morning; then he told the children to go home. Late in the afternoon, the police came and arrested him alleging that he had sexually assaulted Nombulelo and Bethusile Shongwe.

[14] The accused conceded that he did not challenge the evidence of the Crown that he had sexually assaulted PW5 and PW6; however, he denied committing the offences and argued that if he had committed the offences, their hymen would have been torn.

[15] It is trite law that 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 *Mbuso Blue Khumalo v. Rex* Criminal Appeal Case No. 12/2012 at para 28. There is no dispute with the identity of the accused as the complainants know the accused very well. Furthermore, the evidence of the complainants is corroborated by the evidence of PW1, Dr. Pascal Jinguri, who examined the complainants and observed the fresh bruises in their vagina. The doctor had concluded that there was an attempt at forced penetration of their vagina.

[16] In the case of *Mbuso Blue Khumalo v. Rex* (supra) at para 31, I quoted with approval the learned author P.M.A. Hunt in his book entitled *South African Criminal Law and Procedure*, second edition where he said the following:

“31. 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.”

[17] It is not in dispute that the complainants were both aged six years at the time the offences were committed. It is well-settled in our law that a girl under the age of twelve years cannot give consent to sexual intercourse. Even if she consents, sexual intercourse with her amounts to the offence of rape. See *R. v. Z* 1960 (1) SA 739 (AD) at 742. Accordingly, the accused is convicted on the two counts of rape as charged.

[18] In mitigation of sentence the accused contended that he was eighty years of age, a first offender, illiterate and that his home is now dilapidated and abandoned since he was arrested. On the other hand the Crown argued that the offence is accompanied by aggravating factors and that a deterrent sentence should be imposed.

[19] I have considered the triad, that is the personal circumstances of the accused, the interests of society in curbing and eradicating the offence of rape as well as the seriousness of the offence. In the case of *Mbuso Blue Khumalo v. Rex* (supra) at para 39 and 41, I referred to section 185 bis (1) of the Criminal Procedure and Evidence Act 67/1938 which provides that a

person convicted of rape with aggravating circumstances shall be liable to a minimum sentence of nine years without an option of a fine and that no sentence or part thereof shall be suspended. Furthermore, I referred to the judgment of *His Lordship Stanley Moore JA* in the case of *Mgubane Magagula v. Rex* Criminal Appeal No. 32/2010 where His Lordship found that the range of sentences for aggravated rape lies between eleven and eighteen years of imprisonment.

[20] Accordingly, the accused is sentenced to eighteen years imprisonment in respect of the first count of rape, and another eighteen years imprisonment in respect of the second count of rape. The sentences imposed in respect of the two counts will run concurrently. It is common cause that the accused was arrested on the 28th September 2012 and that he has been kept in custody ever since. The period of eighteen months spent in custody will be taken into account in computing the period of imprisonment.

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

For the Crown

Senior Crown Counsel Nomvula Hlophe

Accused in person

