



**IN THE HIGH COURT OF SWAZILAND**

**SENTENCE**

Case No. 251/2013

In the matter between

**THE KING**

**V**

**SANDILE HAYIND LUKHELE**

**Neutral Citation:** *Sandile Hayindi Lukhele v The King (251/2013) [2015] SZSC 17 (20<sup>th</sup> February 2015)*

**Coram:** Dlamini J

**Heard:** 11<sup>th</sup> December 2014

**Delivered:** 20<sup>th</sup> February 2015

Summary: The accused appeared before this court for sentencing. He was convicted by the Senior Magistrate in Manzini for the crime of rape of his ten year old daughter.

Evidence adduced at the court *a quo*

- [1] Londiwe Tsela (PW1), a minor of eleven years of age at the time of giving evidence, informed the court that she was a resident of Ludzeludze with her mother. She identified the accused as her biological father who would pay visits to her mother. She inherited her surname (Tsela) from accused who, however, later changed his surname to Lukhele. The accused was a resident of Kukhanyeni. He was not married to her mother.
- [2] Narrating on the events that led to the crime, PW1 testified that accused came to Ludzeludze and found that her mother was at work. He obtained permission from one of the tenants to take her away to Kukhanyeni. At accused homestead there were three detached rooms. She slept in the one room together with the accused.
- [3] On the 4<sup>th</sup> May, 2011, the fateful day, accused invited PW1 to sleep in his bed. She complied. She was wearing only her panty while accused an underwear. They shared the same blanket. While asleep, she realised that she had urinated. The accused warned her not to urinate again. He then inserted his penis over her vagina and admonished her not to tell anyone about the act as he would beat her. She cried as she was in pains. Accused ordered her to keep quiet. He had sexual intercourse with her. When he was through, he slept. He woke up again to have sexual intercourse with her. It was her evidence that she felt great pain.

- [4] Accused woke up and told PW1 that he was leaving to collect a bank slip from PW1's school. He instructed PW1 to remain in the homestead and that should anyone enquire on how she was walking, she should state that she broke her leg.
- [5] When accused had gone, this witness ran out to the neighbour where she found a girl of about seventeen years and she narrated her ordeal. This girl then told her mother who in turn reported the matter to her neighbour. PW1 narrated the same to the girl's mother. The neighbour telephoned the police.
- [6] Accused returned later and went to where PW1 was. He took her to his homestead where he packed her clothes. He left with her and headed to her grandmother, Manana in the same area Kukhanyeni. She remained there until the schools opened the following day. He then took her to school in the same area. When she was at school, the police came and enquired on her incident. She recorded a statement.
- [7] She was taken to hospital and received treatment. She informed the new school that her actual school was at Ludzeludze. Her mother took her back to Ludzeludze where she proceeded with her education.
- [8] Under cross examination, PW1's version was that PW1's mother and himself searched for PW1 below Mdzimba Mountain for three days. When she was found by accused it was agreed between accused and PW1's maternal relatives that accused should take PW1 away. PW1 had at that time run away from her mother because she had refused to take her sibling to a certain homestead before going to school. She had further complained to accused that her mother was ill-treating her. As a result a meeting was

held where her aunt, Sipiwe, informed the meeting that PW1 was eating from dustbins and that she was sleeping in toilets. PW1 disputed this version as false.

[9] It was further stated by accused that PW1's mother had said that accused had raped her and as a consequence PW1 was born. PW1's mother would therefore avenge the rape upon her by accused by inserting her finger into PW1's vagina in order for accused to be arrested for rape upon PW1. PW1 denied this and informed the court that she heard from her mother that accused had raped his children on four instances. Accused put to her that she had been absent from home for four days and he had to beat her for absenting herself from school. She disputed saying whenever she had to leave home she would go to church and come back around 6.00 p.m. to be beaten by accused because he wanted to do so.

[10] Accused in cross examination stated that PW1 had sexual intercourse with Boy Dlamini who was residing at his home. As a result he chased him away and that he had to beat PW1 for following Boy Dlamini to his home. She flatly denied this. Accused denied raping PW1 and put it to PW1 that if he had raped her, she would not have been able to walk to the neighbour's homestead and further that she was schooled to incriminate him. She disputed the same.

[11] The second witness for the Crown was Hloniphile Simelane, PW2. She informed the court that PW1 came to her one morning and informed her that accused had, during the night, removed her panty and inserted his penis into her vagina. He said he was stopping her from urinating. She cried and accused clapped her and warned her not to tell anyone as he would kill her. PW2 then informed her mother when she came back home. Her mother

then took over the matter. PW1 narrated the incident again to her. This witness was not cross examined by the accused.

[12] The third Crown's witness was Sindisiwe Magagula, PW3. Her evidence was that she left home early morning to the fields. She returned late in the afternoon and found PW1. She was with PW2 who was residing in the same home. PW2 looked at PW1 direct into her eyes and stated "*here is mummy, tell her.*" PW1 kept quiet. She enquired from PW2 as to what it was that she had to be told. PW2 then informed her of PW1's ordeal. She turned to PW1 who told her what accused did to her at night. She called the community police.

[13] The accused came to her home to fetch PW1. PW1 cried and resisted saying "*I do not want to go with him as he will insert the thing he uses for urinating in my vagina*". PW3 then cautioned accused not to beat PW1. She saw PW1 the following day who, upon enquiring, informed her that accused did not beat her again.

[14] PW3 was cross examined. Accused first enquired as to what she had been informed to tell the court. She replied that she should tell what she saw. She was taken to task for not inspecting PW1's vagina. She stated that she hoped that the community police would request her with other women to inspect PW1. She was asked whether she recalls accused informing her that the child had been given to him by his uncles because she was troublesome and that she was refusing to go to school. She replied in the positive.

[15] PW4 was Robert Dlamini who identified himself as the community police who responded to a call by PW3. He called the police to attend to the rape matter reported by PW3.

[16] His cross examination was brief. He was asked what he was told to say in court. He stated that nobody told him anything but he came to testify. He was asked whether it was correct that he was told by police to arrest him before investigating the matter and he said it was. He was asked whether he inspected the child and he said that he instructed PW3 to do so.

[17] PW5 was Ntombi Penelope Simelane. She is the mother of complainant. She testified that she once had a love relationship with accused but it stopped when she was pregnant with PW1. She stated that PW1 was born on 21<sup>st</sup> August, 2000. PW1 resided with her and was attending school at Ludzeludze. In May, 2010, PW1 was taken away by accused without her permission while she was away at work. She received a call that PW1 had been raped and she went with her uncle to fetch her.

[18] When accused came to take PW1, she had last seen him five years ago and had not communicated with him. Accused was not visiting or maintaining PW1. She disputed that PW1 ran away from school and that even her sister who used to be visited by PW1 never complained about her behavior. She informed the court that she then took PW1 to a clinic where she was given ARV medication to take for a month.

[19] This witness was cross examined extensively. It was said that she had laid charges against accused three times. She said that it was once when he threatened to burn her in the house. He stated that he was permitted by PW5's uncle to take PW1 from Ludzeludze. He also received a call from

her uncle that PW1 was missing, eating from dustbins and no longer attending school because PW5 was ill-treating her. He found PW1 below Mdzimba Mountain eating guavas and PW1 said that PW5 was ill-treating her by forcing her to look after her siblings. PW5's neighbours told him to take PW1 because PW5 might kill her as she was mistreated. PW5 informed accused that she would insert her finger on PW1's vagina and thereafter have him arrested for raping PW5 because she had failed to have him arrested on three previous occasions. PW5 denied all this.

[20] PW6 was Simphiwe Simelane. She was PW5's sister. She narrated that complainant did at one point reside with her in order to concentrate on her studies. She was a teacher at the same school PW1 was attending. She narrated on several attempts by accused to take PW1 from Ludzeludze to Kukhanyeni. On the day PW1 was finally taken by accused she had gone to hospital taking her child who had burned wounds. Accused had arrived before her departure, demanding to take PW1. She refused, instructing accused to get permission from her uncle. The accused left taking the direction of her uncle's homestead. It is then that she left for hospital. When she came back, she did not find PW1 and was informed that she had been taken by accused. She enquired from her uncle as to whether he had granted accused permission to take PW1. Her uncle stated that he did not.

[21] The accused put to this witness that all that he had told the court was untrue. She maintained her evidence as correct.

[22] The last witness on behalf of the Crown was PW7, the investigation officer, 4919 Constable M. Ndzinisa. He attended to PW1 the following day 5<sup>th</sup> May 2011 and by then PW1 was at Kukhanyeni Primary School. He did

his investigations which led to accused's arrest on 17<sup>th</sup> June 2012 at Ngwazini area.

[23] Under cross examination, the officer together with other officers were said to have abused and assaulted the accused. It was put to her that she was on menstrual period and she sat on accused and ordered accused to suck her menstrual blood. She also unzipped accused in order to see the penis that was used to rape children. She told accused that he will not go back to his homestead alive. All these assaults happened at night upon his arrest. PW7 flatly denied all this. The Crown closed its case.

[24] Accused gave evidence under oath. Accused first gave a narration of his arrest. He further informed the court that PW6 telephoned him stating that PW1 had disappeared from home. He then searched for PW1 for four days. He found her at Zombodze in the veld. He enquired on why PW1 had failed to attend school. PW1 refuted her absence from school. He took PW1 to PW6. PW6 refused to keep PW1 and suggested that she be taken to her sister Thembi until such time accused fetches her to his homestead. He, however left PW1 and gave PW6 money. He requested PW6 to inform PW5 that he will take PW1 to reside with him. He later learnt that PW5 refused that PW1 lives with him. At this juncture PW5 threatened to have accused arrested if he insisted on taking PW1. However, PW6 told him to take PW1. PW5 further told accused in the presence of PW6 that she will insert a finger into PW1's vagina in order for accused to be arrested.

[25] At the police station upon his arrest, he was informed that he would die. He was instructed by the police to demonstrate how he had raped PW1. He was tied on a bench and assaulted. He was also suffocated. As a result he admitted to having committed the crime. He was caused to suck a vagina



of a police officer who was menstruating. He however bit her. He then denied ever raping PW1.

[26] Under cross examination he was asked as to what steps he had taken after receiving reports that PW1 was raped by the boy he had said was living at his homestead. He said that there was none as PW1 was alive. The Prosecution then put to him that his failure to take any steps is proof that the story about PW1 being raped by the boy was a fabrication and that after all, PW1 denied any sexual intercourse to her by the boy. He indicated that he had twenty six children and a twenty seventh one yet to be born.

[27] It is on the basis of the above evidence that the learned Senior Magistrate then convicted the accused. The learned Senior Magistrate then invited the accused to mitigate.

[28] In mitigation accused stated that he was forty nine years old, married with a total of twenty six children born from different women. He was self employed. He pleaded for a lenient sentence that will ensure that he is reunited with his family. He undertook to duly warn other men not to take their children against the will of their mothers. He insisted that all the evidence adduced by the Crown witnesses was manufactured. He also stated that as he received the doctor's report very late, this was an indication of doctoring the evidence against him.

*In contra*, prosecution advanced:

- “i) *That the accused is a biological father of the complainant thus his action amounting to incestuous relationship which is forbidden by law.*
- ii) *That the rape was pre-meditated and well orchestrated by the accused upon his own child. He manipulated the child to abandon her bed and come and sleep with him on his bed under the pretext of some honesty.*

*The child did not have the strength to question her father's decision and motives due to her vulnerability and immaturity.*

- iii) *That accused failed to use protective devices like the condom to avoid transmission of eithersexual diseases or HIV/AIDS pandemic, thus making the child vulnerable to such disease. But there was no evidence of any actual transmission of diseases but his carefree sexual intercourse has the potential or great possibilities of infection of any sexual diseases."*

[29] After due consideration of both the accused and the Crown's submissions together with the evidence presented, the honourable Magistrate wisely concluded:

*"These factors as described above are opined constituted aggravating circumstances which warranted the imposition of a sentence above my punishment jurisdiction of ten years. Further considerations were the compelling decisions by the High Court and Supreme Court with regards to the sentences to be meted out against the convicted accused. References is made to the case **Mgubane Magagula v Rex Appeal Case 32/2010** where the Supreme Court stated that sentences of rape ranges between 11 years and 18years imprisonment. In the case of **Phumlani Masika v The King Appeal Case 33/2011 (unreported)** allowed the bringing of cases by Magistrates to the High Court for sentence upon making a finding of existence of aggravating circumstances and that he opines that the sentences should be above his/her sentencing jurisdiction.*

*Reference is made to the case of **Mandla Shongwe v The King Criminal Case 21/2011 (unreported)** where His Lordship MCB Maphalala AJ at page 13-14 remarked as follows:*

*"This court is inundated with many appeals of aggravating rapes of women and children some of whom are as young as three years. Women and young children are brutally raped because they are defenceless; this is a matter of grave concern to this court. The time has come for this court to impose sentences that will act as a deterrent to the prevalent sexual assaults of women and children. It is against this background that this court in the case of **Moses Gija Dlamini vs Rex Criminal Appeal 7/2007** confirmed a sentence of twenty years imprisonment for an aggravating rape of a nine year old girl."*

*And in the case of Sam Du pont vs Rex Criminal Case Appeal No.4/08 (unreported) at page 11 is stated as follows:*

*“It remains for me to emphasize that the court have fundamental duty to protect society against the scourge of sexual assault perpetrated against young children in particular.”*

[30] When the matter came before me, I invited the accused to mitigate. The matter had to be postponed in order to allow accused to find an attorney. His attorney appeared on 11<sup>th</sup> December 2014 and mitigated as follows:

- The accused was a witch doctor and a subsistence farmer. He was supporting eleven out of his twenty six children. His eldest child was nineteen years old. He was arrested and has been in custody since 17<sup>th</sup> June 2011. He was cooperative with the Police on his arrest.

[31] The Crown urged this court to consider that the complainant was young, aged eleven and was abused at the hands of her father. Accused planned his crime as he went from Kukhanyeni to another area, Ludzeludze to fetch the child and then have sexual intercourse with her. Both Counsel urged this court to incorporate the mitigating and aggravating factors adduced at the Magistrates' Court.

#### Sentence

[32] Their Lordships in **Mthaba Thabani Xaba v Rex, Appeal Case No.9/2007** highlighted with regard to sentencing:

*“It is of critical importance that the sentence of an accused person should be premised on a thorough investigation of all the relevant facts surrounding the commission of the offence. The personal circumstances of an accused person obviously need to be taken into account. However, the degree of his moral guilt is also dependent on the gravity of the offence as well as the mitigating and*

*aggravating features of the offence. If the court process does not elucidate these factors, the court sentencing an offender may fail to do justice to an accused, or per contra fail to ensure the protection of the public.”*(underlined my emphasis)

[33] It appears to me that from the *ratio decidendi* in **Mthaba**'s case *supra*, three factors need to be investigated in considering whether mitigating and aggravating circumstances exist for purposes of passing an appropriate sentencing. These may be outlined as particulars relating to:

- a) the offence itself;
- b) peculiar to the accused;
- c) moral guilty which may be inferred from the conduct of the accused during or towards the trial

Particulars relating to the offence itself:

[34] The totality of the evidence pointed out that the accused was a biological father of the complainant. She was at all material times residing away from the accused. The accused came to her place of residence while her mother was at work. He took the child without any prior permission from the mother. The mother could not search for her when she came back from home because accused had left a message with one of the tenants that he had taken the complainant. This was during school vacation.

[35] Accused took complainant to his own home where there were three detached houses. He caused the complainant to sleep in the same room he was using. In this room they were the only two. One of the nights, accused aged forty nine invited the eleven year old to sleep with him on the same bed, sharing the same blanket. Complainant woke up during the night and realised that she had wet herself. Accused, as narrated by complainant, stated:

*“I should never again urinate during my sleep, and as such he will insert his penis (umpipi) into my vagina and warned me that I should not tell anyone*

*because if I did he will beat me up. The accused took off my panty as it was wet and he then inserted his penis into my vagina. The house was dark by that time. The penis actually penetrated my vagina and it was painful as he did that such that I cried out and he beat me on my head saying I should keep quite. He made up and down sexual movements in the process and he later removed his penis from my vagina and we slept.”*

The complainant continued to point out:

*“After some time during the sleep again accused inserted his penis into my vagina and I felt great pain as he inserted the penis and that was in the morning of the next day. After removing his penis he then washed himself and left. In fact accused did a total of two sexual episodes with me.*

She also revealed:

*“Accused then told me not to leave the homestead and that if anyone come and asked how I walked I should tell them that “Ngephukile” meaning that I fractured myself.”*

From the above summary, it is clear that:

- The accused stood in a *loco parentis* relationship with the complainant. PW1 looked towards the accused as her father for protection. This protection included physical and emotional abuse. However, accused turned out to be a wolf in a sheep skin;
- The complainant was young, aged eleven. From this circumstance, it goes without saying that, out of her biological composition, she lacked the necessary strength and ability to resist a man of accused stature who was at that time forty nine years of age let alone that he was her father. Worse still, she did not have experience in sexual intercourse and her virginity was forcefully and prematurely ruptured.

- PW1 was repeatedly raped at the hands of her father, the accused.

[36] The accused in mitigation stated before the Senior Magistrate:

*“I am aged forty nine years, married with a total of twenty six children born from different women.”*

[37] These averments were repeated by his Counsel during mitigation before me. From this evidence which comes from the mouth of the accused, it was clear that the accused led a loose life and because PW1 testified that accused did not use any condom during the sexual intercourse with her;

- PW1 was exposed to a likely high risk of contracting HIV-AIDS and other vulnerable diseases. It is not surprising that when PW1 was taken to the clinic by her biological mother after the incident, ARVs medication (presumably prophylaxes) was administered to her for a period of a month.

a) Particulars peculiar to the accused:

[38] The accused informed the court that he:

- was in gainful self employment viz. a witch doctor and a subsistent farmer. In other words, he was a responsible member of society in that he was also contributing towards the development of his society. He was not idle as a member of his society.
- He had twenty six children and one was about to be born. He was desirous to be given a non custodial sentence in order to go back home and maintain his eleven children he was residing with. One infers that if

- incarcerated for inordinate period, his eleven children who depend on him might suffer.
- The accused is a first offender. He has never been on the wrong side of the law despite that he is forty nine years old. He has a clean criminal record and this also goes to his credit.

b) Moral guilt

[39] The accused, went to town criticizing almost all the witnesses herein. He put it to them that they have been schooled to criminate him. He accused the complainant of being a vagabond and one who refused to take instructions. This was refuted not only by PW1 but by her mother and aunt who were residing with PW1 since birth. He further stated that the person who raped the complainant was a boy whose name he did not divulge throughout the proceedings. He accused complainant's mother of orchestrating a false crime against him by stating that she inserted a finger on her daughter in order to have him prosecuted for rape he never committed. What was surprising was when he accused a man of high esteem, the doctor who examined complainant of doctoring the report. At the end of the day it became difficult for the court to ascertain what exactly his defence was as he stated a number of things.

[40] After conviction, and when called upon to mitigate, he stated:

*“The evidence against me has been manufactured by the crown witnesses assisted by the police. The medical report I got after the court intervened in giving me the medical report. The doctor is supposed to complete all details as required and put a date stamp of the hospital and thereafter endorse his signature. I had a thought that because of the delay in giving me the report and*

*that it's clear that they wanted to doctor the report. I still maintain my innocence in this case."*

[41] Considering all the above on the question of remorse or what their Lordships termed as degree of moral guilt, I find that the accused *in casu* failed to demonstrate any.

[42] Having considered the above, I am also guided by their Lordships in **Mandla Shongwe v The King Crim. Appeal Case No. 21/2011** where they wisely observed and articulated:

*"25. This court is inundated with many appeals of aggravated rape of women and children some of whom are as young as three years. Women and young children are brutally raped because they are defenceless; this is a matter of grave concern to this court. The time has come for this court to impose sentences that will act as a deterrent to the prevalent sexual assault on women and children."*

[43] Their Lordships pointed out at paragraph 23:

*"His Lordship Justice Moore JA in the case of Mgubane Magagula v Rex Criminal Appeal No. 32/2010 made a comparative study of rape sentences in this court from 2004 to 2009 and found that the appropriate range of sentences for aggravated rape lies between eleven and eighteen years imprisonment."*

[44] It appears to me that the rate of rape cases as observed by their Lordships in **Mandla Shongwe** has not decreased despite a custodian sentence ranging from eleven to eighteen years. It is therefore imperative that the length of the custodian sentence needs to be extended beyond eighteen and I am not persuaded to deviate from imposing a similar sentence as in **Mandla Shongwe**.



[45] Taking into consideration the circumstances of the three factors highlighted above, accused is hereby committed into gaol for a period of twenty years without an option of a fine and the sentence is backdated to 17<sup>th</sup> June 2011, the day of his arrest.

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**M. DLAMINI**  
**JUDGE**

**For Applicant : L. Malinga of Malinga Attorneys**

**For Respondent : A. Nxumalo from the Director of Public Prosecutions**