IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 383/19

In the matter between:

THABISO PHUTHALIYENZEKA NTSHANGASE **APPELLANT**

AND

REX **RESPONDENT**

Neutral citation: *Thabiso Phuthaliyenzeka Ntshangase vs Rex [383/19] [2020] SZHC 34 (5th March, 2020)*

Coram: FAKUDZE, J

Heard: 20th February, 2020

Delivered: 5th March, 2020

Summary: *Criminal Law – Appellant charged under Section 3 of the SODV Act for rape – medical report excludes sexual penetration – Appellant acquitted and discharged – conviction also set aside.*

INTRODUCTION

[1] The Appellant has filed a Notice of Appeal before this court against the judgment of the Magistrate's court sitting at Nhlangano. The Magistrate convicted the Appellant on two counts, namely; Count 1 contravention of Section 77 (1) (a) of the Sexual Offences and Domestic Violence Act, 15 of 2018 in that on or about the 14th September, 2019 and at or near Nhlangano Correctional Service, the accused unlawfully and physically abuse one Nonsindiso Mdluli by assaulting her with kicks, fists, and tied her with an extension against a tree and further hit her with a blind object on the left eye and did commit the offence. Count 2 pertains to the contravention of Section 3 (1) of the Sexual Offences and Domestic Violence Act 2018 in that upon or about the 14th September, 2019, and at or near Nhlangano Correctional Services the Appellant did unlawfully and intentionally had sexual intercourse with one Nonsindiso Mdluli without her consent this committing the offence of rape.

[2] With respect to Count 1, the Appellant was convicted and sentenced to a term of 10 years imprisonment with an option of a fine of Twenty Thousand Emalangeni (E20,000.00). With respect to Count 2, he was convicted to 15 years imprisonment without an option of a fine. In both counts, the Appellant had pleaded guilty.

[3] When the appeal commenced, the Appellant's legal representative stated that they are no longer challenging the conviction and sentence with respect to

Count 1. The Appeal is now directed at Count 2. So now the appeal deals with Count 2.

THE PARTIES' CONTENTION

The Appellant

[4] The Appellant contends that the evidence tendered by the Crown does not prove the commission of count 2 beyond a reasonable doubt. The evidence by the complainant is that the Appellant had sex with her without her consent. The Crown tendered a medical report in a bid to prove the count. In the opinion section of the report the medical practitioner says that in his opinion.

> *"There was no evidence of sexual penetration. However penetration cannot be excluded. The pregnancy test done confirms the pregnancy."*

[5] Based on the medical report, the Appellant contends that the doctor's finding was that there was no sexual penetration although penetration cannot be excluded because after all, the complainant was sexually active, leading to her being pregnant. The complainant testified that she was pregnant but not by the Appellant.

[6] The Appellant submits that the complainant's evidence in count 2 coupled with the medical report does not prove a case against the Appellant. The Appellant should be acquitted and discharged.

The Respondent

[7] The Respondent states that the prosecution successfully proved its case beyond a reasonable doubt. The Crown led the evidence of the complainant and further filed a medical report. The evidence of the complainant was crucial in sustaining conviction. She adequately narrated her traumatic experience at the hands of the appellant in the forest where both offences were committed. The complainant in her evidence stated that the Appellant tied her on a tree with her hair extension and further removed her shirt and belt and tied her with it and strangled her……….. when he undid the belt and hair extension, he then forcefully had sex with her. The complainant further told the Appellant that he was hurting her but he ignored that. The Appellant never even disputed her evidence even on cross examination.

[8] The Respondent submits that the Appellant physically abused the complainant on the day he had unlawful sexual intercourse with her. This is clear evidence that the physical assaults were incurred solely for the Appellant to unlawfully induce the complainant to submit to the intercourse.

THE APPLICABLE LAW

[9] In the case of **Mbuso Blue Khumalo V Rex (12/12) SZSC 21 (31 May, 2012)** paragraph [35] the Supreme Court, citing with approval the case of **S V Swiggelar 1950 (1) PHH (A) at 110-111**, stated that:

> *"If a man intimidates a woman so as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman while persisting in her objection to intercourse, is afraid to display or realises is useless."*

[10] In **Rex V Mpundana Cham'bhulukile Mkhabela Case No. 246/10**, Mabuza J. held that a medical report which stated that the findings were suggestive of sexual abuse are conclusive led to the conclusion that the doctor's report does not suggest any penetration and proceeded to acquit the accused on a charge of rape.

[11] On the issue of an unrepresented accused, it was stated in **Dallas Busani Dlamini and Another V The Commissioner of Police Civil Appeal Case No. 39/2014** that:

> *"I want to repeat again what this court has said on a number of occasions that when an accused is unrepresented and when he is not very well educated, not the sort of man who is likely to*

understand clearly all the intricacies of court procedure it is very wrong for a trial court to hold against such an accused the mistakes he might make such as failure to cross examine; to hold against him for instance, that he has not cross examined on a particular issue because one would have expected a skilled lawyer to have done so. It is the court's duty to assist unrepresented accused of this description in their defence and not to take technical points against them because of mistakes the accused might make in procedure."

<u>COURT'S ANALYSIS AND CONCLUSION</u>

[12] The Appellant and the Respondent base their contestation on Count 2. The Appellant is not challenging the verdict and the sentence in relation to count 1. Appellant's argument as far as Count 2 is concerned is that the medical doctor's report shows that there was no sexual penetration. Even though the complainant did state in her evidence in chief that rape took place and the surroundings circumstances suggest so, the medical report does not confirm that. The Appellant contends that the Respondent did not prove its case beyond a reasonable doubt. The Appellant is also imploring the court to consider that the Appellant had no legal representation. He did not therefore challenge the evidence of the Crown by way of cross examination.

[13] The Respondent argues that the Crown has proved its case beyond a reasonable doubt. In our jurisdiction, there is no need for the evidence of the

complainant to be corroborated before a conviction is secured. As long as the complainant's version is credible, that suffices.

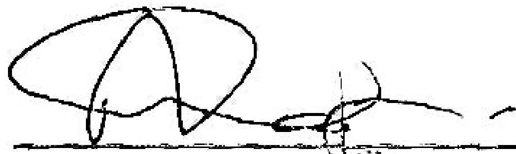
[14] The court's finding and analysis is that rape under the Sexual Offences and Domestic Violence Act is the same as in common law. Common law rape entails that there has to be sexual penetration no matter how slight it is. The medical record indicated that there was no "sexual penetration" although penetration cannot be excluded. The penetration that could not be excluded was not described by the doctor. The purpose of the medical report was to strengthen the Crown's case to establish the fact that rape had taken place. It was therefore improper for the court *a quo* to convict the Appellant based on the complainant's version whereas the medical report does not support the version that sexual penetration did take place. There is no proof beyond a reasonable doubt in that regard. The doctor should have been called to clarify his report. He should have been called either by the Crown or the judicial officer given that the Appellant was unrepresented.

[15] In **Rex V Nkosingiphile Zwane [29/2016] [2018] SZHC 77 (25 April, 2018)** His Lordship Hlophe J. on the issue of sexual penetration with respect to a rape charge observed as follows:

> *[29] "That I cannot possibly or realistically find there to have been penetration of the complainant's private parts is because there is no proof beyond a reasonable doubt in that regard because from the Doctor, when she used the phrase "penetration likely" she actually meant to distinguish, the case from that where penetration had realistically been proved."*

[16] This court is therefore of the view that sexual penetration has not been realistically proved by the Crown.

[17] Taking into account all that has been said above, Count 2 cannot stand and the Appellant is accordingly acquitted and discharged. The sentence with respect to Count 2 is also set aside.



FAKUDZE J.

JUDGE OF THE HIGH COURT

APPELLANT : Mr. Mwelase

RESPONDENT : Mr. Gama