



IN THE HIGH COURT OF ESWATINI
JUDGMENT

Criminal Case No. 260/2016

HELD AT MBABANE

In the matter between:

SIBHUBHULULU MHLANGA

Applicant

And

THE KING

Respondent

Neutral Citation: *Sibhubhululu Mhlanga vs The King* (260/2016) [2023]
SZHC 47 (09/03/2023)

Coram: **J. M. MAVUSO J**

Heard: 02nd August, 2022.

Delivered: 09th March, 2023.

SUMMARY: *Automatic review of a Magistrate's Courts' sentence by the High Court under section 79 of The Magistrate's Courts Act 66 of 1938 – Accused charged with rape, convicted and sentenced to nine (9) years imprisonment by the Piggs' Peak Magistrate Court – Matter*

taken on review in terms of Section 80 of the Magistrate's Court Act – On review – Court finds no “direct and circumstantial evidence” which commutatively points to the accused having committed the offence – Conviction and sentence on the rape charge, set aside – Accused found guilty of the lesser offence of assault with intention to cause grievous bodily harm – Accused sentenced to three (3) years without a fine – Sentence backdated to 01/08/2019.

JUDGMENT

J.M. MAVUSO – J

- [1] Before Court is an automatic review application, brought under section 80 (2) of the Magistrate's Courts Act No. 66 of 1938 which provides as follows:

“80(2) If a magistrate court imposes upon any person convicted of an offence or any such punishment as in section 79 mentioned, the clerk of the court shall transmit to the registrar of the High Court, not later than one week next after the determination of the case, the record of the proceedings in the case together with such remarks, if any, as the presiding officer may desire to append thereto, and with

any written statements or arguments which the accused may within three days after the sentence supply to the clerk of the court, and the registrar shall, with all convenient speed, lay the same before the Judge, in chambers for his consideration.”

Section 79 deals with sentences eligible for automatic review by this Court.

- [2] Applicant appeared before the Piggs’ Peak Magistrate’s Court charged with the offence of rape it being alleged that:

“Upon or about the 28th August, 2015 and at or near KaZwayimbane Area in the Hhohho Region, the said accused person did intentionally have unlawful sexual intercourse with one Nonhlanhla Mahlalela a Swazi Female Adult aged forty three (43) years, once (1) without her consent and did thereby commit the crime of Rape”.

The charge sheet goes on to allege the presence of aggravating factors as envisaged by Section 185 *bis* of the Criminal Procedure and Evidence Act 67 of 1938 as amended, that:

“1. The accused person inflicted physical and life time mental trauma to the complainant.

2. At the commission of this Rape, the accused did not use a condom thereby putting the complainant at risk of contracting sexually transmitted diseases and infections.”

[3] When the accused was asked to plead on the 5th December 2016, he pleaded not guilty. Accused appeared in person, in the Court *a quo*. After leading the evidence of several witnesses, accused was found guilty of the offence and sentenced to nine (9) years imprisonment without the option of a fine. Accused’s sentence was backdated to the 1st August 2019. His rights of review and appeal were explained to him by the Court, after sentencing.

[4] (i) In proof of the commission of the offence of rape, the Crown led the evidence of Doctor Nsetjwa Mzamo Mahlalela, he being the Medical Practitioner who conducted a medical examination upon the

complainant after the Buhleni Police suspected that she could have been raped and brought her before him.

- (ii) According to the Doctor's findings, reflected at page 73 of the typed record of proceedings, he opined that:

“....there was no medical evidence to show that she had recently been penetrated, but these findings cannot exclude a penetration considering the fact that she (sic) had many births as the penis could penetrate easily without damaging (sic) the parts of the woman”.

- [6] In light of the above, with the Court being desirous of hearing the parties on the element of corroboration in sexual offences the Court, following the provisions of **Section 81(3) of the Magistrate's Court Act 66 of 1938** which provides as follows:

“If in any case the Judge desires to have any question of law or fact arising in any such case argued at the bar, he may direct the same to

be argued by Director of Public Prosecutions and by such other person as the Judge may appoint.”

The Court directed that the matter be heard in open Court. The office of the Directorate of Public Prosecutions, was represent by Counsel whilst the accused appeared in person.

- [7] (i) The accused argued before Court that he did not commit the offence he
- was arraigned for and that the Doctor’s evidence exonerated him from any wrong doing as it did not point to any penetration having taken place upon the complainant.
- (ii) In a way seemingly conceding to the short coming of the medical report on the aspect of penetration, the Crown argued that, the Court should rely on evidence presented by Bheki Manana, who was in terms of the record of proceedings called as prosecution witness one (PW1). The Court, in addition to the foregoing, was implored to

consider the totality of the Crown's case and not to concentrate on the medical report, in deciding the matter.

[8] (i) Concerning the aspect of rape, Bheki Manana, who was called as PW1,

testified as follows:

“On the 28/8/15 I was at home with my grandmother and my wife, we all slept in our different houses i.e. myself with my wife while Gogo slept in her own house. We then put off the paraffin lamps and during the night I was woken up by footsteps of a human being. I then woke up and there was someone who was a female who pronounced her presence at our home. I then woke up my wife who was asleep there and I asked her to listen to the voice outside. I then asked my wife what should I do and she said (sic) I should open up and talk with her.”

Bheki goes on to state that:

“I then opened the door, and there I saw a woman who was just wearing a black shirt with a white bra. I then asked her as to who she was and she said she was Nonhlanhla Matsebula. While talking to the lady there my grandmother opened her house door and came out (sic). She asked what was happening, and I told her that there had been an alarm raised by that Matsebula lady and I asked her to join us so as to hear for herself, and she did come.”

The witness went on to testify that:

“Nonhlanhla Matsebula stated that she had been raped and asked that we accommodate her. When I asked her as to who had raped her (sic) she said it was Tibhubhululu Mhlanga. I asked her where was she when raped.they had been drinking alcohol at Zinyane and they then walked towards Zwayimbane area where accused told her that he will buy her some beers. As the time was 11:00 p.m. I told my grandmother that we should accommodate the lady till the following morning and that she would sleep together with my wife and myself in the same house. I then got the mattress bed for her to sleep alone while me and my wife slept on the

sponge mattress together. I then closed the door of my house. Nonhlanhla showed us the face where she was bruised and also on the neck it was (sic) reddish indicating strangulations. We all slept until the next morning.”

- (ii) From the above testimony, extrapolated, from the record of proceedings, all that PW1, Bheki Manana does, save for having noted complainant’s bruised face, and some reddish marks on her neck, is to repeat what he was told by the complainant, namely that she had been raped by the accused.

- [9] (i) In the case of **Rex v Abraham Ngwenya and Another Criminal Appeal Case No 33/96**, this being a rape case where no medical evidence was led, Justice Leon JA, at page 5 of the Judgment, stated as follows:

“The failure to lead medical evidence does not, in my view, mean that such failure must inevitably lead to the conclusion that is fatal to a conviction. In fact, when this point was put to Counsel for the Appellant he was constrained to concede to the correctness of that

view. There is no rule of law which requires a Court to refuse to convict an accused in the absence of corroborative evidence of penetration. Caution must be exercised because rape cases are easy to lay and difficult to disprove. But even where there is no corroboration properly so called of the actual penetration there may be direct and circumstantial evidence which cumulatively points in that direction and in that direction only.”

The Learned Justice of Appeal went on to state that:

“Where a Court is dealing with circumstantial evidence it looks not at the sum total of the probabilities but rather at the compound result of them.”

- (ii) In the Abraham Ngwenya case (*supra*) the accused persons were charged with the offence of rape. There were two complainants, namely Sibongile Kunene and Lungile. The evidence of Sibongile Kunene was substantially similar to that of Lungile except that in her case she was raped by the second appellant and was not present when the first complainant was raped. She heard her crying and confirms

that she was naked apart from a towel she wore when she ran out of the bedroom. The Court found that her evidence was consistent with the evidence of Lungile and inconsistent of the denial on the part of the first appellant.

In her case she was threatened with a knife and was examined by a Doctor. A medical report was handed in which was to the effect that she had been carnally assaulted. An abrasion was found and the examination was painful. A young boy 10 years of age, doing standard one testified that he saw the appellants at his home where the complainants were. He told the Court that he heard the first complainant crying and they were ordered by the first appellant to undress so that he could repeat her, meaning to have sexual intercourse with her. PW5 was Gertrude Simelane who had defrauded the first appellant by selling him a fake diamond and to whom she owed several thousand Emalangenis. The second complainant was her daughter who complained to her about the rape of herself and Lungile.

When the two appellants were arrested, a pistol, a knife and 13 (thirteen) rounds of ammunition were recovered from the dashboard of the first appellant's van.

The appellants testified under oath and denied all the allegations levelled against them, save for admitting having gone to Gertrude's house to look for her. First appellant claimed that he had been Lungile's lover since April 1994 but that was not put in cross-examination. He was unable to give any reason why the complainants should falsely accuse him, but he admitted both the pistol and the knife belonged to him. The evidence of the second appellant was similar to that of the first appellant.

Although there was no medical evidence to support that of the complainant, the Court found that the Magistrate had correctly found that the evidence was supported:

“in the direct and circumstantial evidence of the second complainant.”

- [10] Granted that medical evidence in this case is to the effect that the Medical Practitioner who conducted the medical examination upon complainant did not find any evidence of “*recent penetration*” the enquiry must now shift to

the question whether, there was any direct circumstantial evidence cumulatively pointing to penetration and penetration alone, led by the Crown.

[11] (i) With respect to finding an answer to the above question, the Court was

implored by the Crown to consider the evidence of (PW1) Bheki Manana. Bheki Manana's evidence is more fully set out in paragraph 8 of this Judgment.

(ii) In summary form the witness testified to the effect that:

(a) He saw complainant wearing a black shirt and a white bra and that the time was about 11:00 p.m., when he observed this;

(b) She had a bruised face and;

(c) A reddish mark on her neck, probably caused by strangulation.

Doctor Mahlalela who found no evidence of sexual penetration also noted these injuries and had them included in the medical report.

- [12] (i) The question to ask of and concerning Bheki Manana's evidence is whether it is direct circumstantial evidence which cumulatively points towards rape. In **Abraham Ngwenya** (*supra*) each of the two complainants was raped by a different accused person such that their evidence was substantially similar, though one was not present when the other was raped but only heard the other crying and confirms that she was naked at the time and only had a towel wrapped around her when she ran out of the bedroom. Based on the consistence of the evidence and on the inconsistent denial on the part of the first accused, the accused were found guilty.
- (ii) In addition to the foregoing, when one of the victims was raped she was threatened with a knife, which the Police recovered from the accused person. The Court of Appeal found that though there was no medical evidence to support that of the complainant, the Magistrate correctly found that the evidence of the witnesses supported in the

direct and circumstantial evidence of the second complainant before going to hand down a sentence of 9 (nine) years imprisonment.

- [13] (i) The Court finds that complainant's visit to the accused place of residence was, an act, freely and voluntarily undertaken by her and probably part of the incentive being that complainant had made it known to the accused, that her husband was away from home attending a traditional wedding (*umtsimba*) ceremony. This explains why complainant was able to imbibe alcohol with the accused until very late at night and ending at accused place of residence, despite her being a married woman.
- (ii) Prosecution Witness Four (PW4) Hleziphi Magagula told the Court that on the 28/8/15 at about 10:00 a.m. she was in the company of complainant, when they established that accused had alighted from a kombi (mini bus) and proceeded to a certain Gwebu homestead where alcohol is sold. She told the Court that they walked to the homestead, found accused seated with another man. After exchanging greetings, the accused complained of being hungry and upon hearing this,

Complainant requested the witness to accompany her to her homestead to get porridge for the accused, to eat. The witness went on to state that not only did complainant handover the porridge to the accused but that they proceeded to eat same together. From the foregoing it is clear that the accused and complainant, had a cosy relationship.

- [14] (i) The Court finds some aspects of complainant's evidence to be incoherent. The complainant, at page 19 of the record of proceedings, is recorded as having testified that after having noted that the accused was fast asleep and snoring, she took her skirt (which the accused had earlier used to wipe himself with, after ejaculating) held it by her hands together with her shoes before escaping and finally reaching PW1 Bheki Manana's homestead. She told the Court that, along the way she wore her skirt.
- (ii) PW1 told the Court that on the 28/8/15 at about 11:00 p.m. he heard a female pronounce her presence at his homestead. He went on to testify that he woke up, went to investigate and found a woman;

“who was just wearing a black shirt with a white bra.”(see page 7 of the record of proceedings).

The woman identified herself as Nonhlanhla Mahlalela. The impression given by this witness’s testimony, whether deliberate or not, is that the lower part of the complainant’s body was naked, which is false on account of complainant’s own evidence that, along the way and before she reached PW1’s (Bheki Manana) homestead she wore the skirt.

- (iii) PW1 narrating the fateful events which took place on the 28/08/2015, told the Court, in his evidence in chief that, he asked the complainant, the question, where and when the alleged rape was said to have taken place. The response he got, which is not an answer to the question was that:

“they had been drinking alcohol at Zinyane and they then walked towards Zwayimbane area where accused told her he will buy her some beers.”

Could complainant's failure to answer the two important, otherwise simple questions, be due to fear that, she could end up in trouble with her husband if he came to know that in his absence, at the middle of the night, complainant was not at home but at accused persons' homestead, with accused, who had no woman companion at his premises. The answer is anyone's guess.

- (iv) PW4 Hleziphi Magagula had this to say and testified as follows, in Court:

“I and (sic) Nonhlanhla are used to each other but were (sic) friends. I know that Mahlalela is married. I know that Nonhlanhla had extra-marital (sic) relationship with one Sithembiso Gwebu a young boy of the area. I do not know if there's a love relationship with the accused at all, and if she was having a relationship with accused she would not have told me. I asked her on three occasions if she was not in love with accused and she denied being in love with accused.....I

asked her because I found her seated together at a Magagula homestead and I asked her if she was in love with the accused and she said she was not. The second occasion was after I had been called by my kids when.....after sunset and we were at the Magagula homestead (sic) when she (sic) got a cell call from the accused who asked where she was and Nonhlanhla told him (sic) that we were by Duncan Magagula and we waited for his arrival then and he did come there. ...”

The foregoing is reflected at page 61 of the record.

- [15] (i) The Court has considered the evidence of the other Crown witnesses, with a view of establishing whether any of their testimony in the circumstances can be said to point directly, to the complainant having been raped.
- (ii) In **Abraham Ngwenya and Another** (*supra*), Justice Leon JA who penned the Judgment, at page 5 of same, stated as follows:

“Caution must be exercised because rape cases are easy to lay and difficult to disprove.”

With the Court of Appeal having required Courts to exercise caution when adjudicating upon rape cases, this Court accordingly cautions itself, as above expressed. Having cautioned itself and based on the facts as recounted by the Crown witnesses the Court comes to the conclusion that their evidence does not directly point to the rape of complainant by the accused nor does it provide circumstantial evidence having the cumulative effect of pointing towards complainant having been raped by the accused.

[16] Following the provisions of **Section 81(2) (a)(i) of the Magistrate’s Court A 66 of 1938** which provides as follows:

“(2) if upon considering the proceedings aforesaid it appears to the reviewing officer or the Judge, as the case may be, that they are not in accordance with justice or that doubt exists whether or not they are in such accordance;

(a) The reviewing officer may;

(i) Alter or reverse the conviction or reduce or vary the sentence of the Court which imposed punishment.”

[17] *In casu*, there is evidence that complainant had;

“abrasions and bruises on the left and on the right shoulder occasioned upon her by the accused.”

Accused does not deny this.

[18] Accordingly the Court makes the orders hereunder:

(i) The conviction and sentence on rape are set aside.

(ii) Accused is found guilty of assault with an intention to cause grievous bodily harm and is sentenced to three (3) years imprisonment, without the option of a fine.

- (iii) Sentence is backdated to the 01/08/2019 this being the date to which the Court *a quo* correctly backdated its sentence to.

J. M. MAVUSO
JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant: IN PERSON

For the Respondent: FUTHI GAMEDZE FROM DPP'S CHAMBERS.