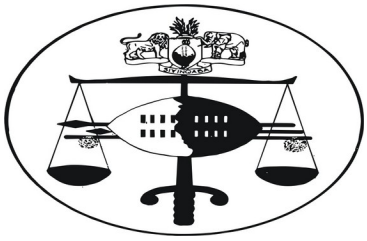

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No. 35/11

In the matter between

SONNYBOY SIBUSISO VILAKATI **Appellant**

and

REX **Respondent**

Neutral citation: *Sonnyboy Sibusiso Vilakati v Rex* (35/11) [2012] SZSC 05 (31 May 2012)

Coram: RAMODIBEDI CJ, DR. TWUM JA and AGIM JA

Heard: **4 May 2012**

Delivered: **31 May 2012**

Summary: Criminal Appeal; conviction for rape with aggravating circumstances by Magistrate's Court; committal to High Court for higher sentence; practice and procedure under ss 292 and 293 of Criminal Procedure and Evidence Act. High Court confirms conviction and sentences accused to 14 years imprisonment. Appeal to this court against sentence. Considerations that inform the court in considering appeal.

TWUM J.A.

[1] This is an appeal from the judgment of Ota J. sitting at the High Court, Mbabane, on 5th July 2011. She convicted the appellant of the offence of rape with aggravating circumstances and sentenced him to 14 years imprisonment without the option of a fine. The appellant has appealed against only his sentence to this Court.

[2] The facts of this case are that on 21st March 2010, the complainant, one, Nolwazi Vilakati, then aged 12 years travelled to a traditional wedding at a Dlamini homestead. At about 2 pm she was returning home when she met the appellant, her brother's son. She was alone. He asked her to go back to the place where the wedding was held and ask for water for him from a homestead nearby. She did not get the water. As she returned to inform the appellant she met him at the gate of the homestead where she had gone to ask for the water. According to the complainant, the appellant held her and clapped his hand firmly on her mouth and pulled her to another homestead. There were 3 children in that homestead. Undaunted, the appellant pulled her to a nearby river where he forcibly undressed her and had sexual intercourse with her without her consent. When she cried, she said the appellant hit her with an open hand. She managed to raise an alarm and

some women went to rescue her. She said the appellant was drunk and he did not use a condom.

[3] The complainant was taken to a Health Centre where she was examined by a doctor who issued a report of his findings to the police.

[4] The appellant was subsequently arrested by the police and charged with the offence of rape before a Senior Magistrate's Court. He pleaded "not guilty". A total of 5 witnesses testified for the prosecution in proof of the charge preferred against him. The appellant who appeared in person, testified on oath and called 2 witnesses. In sum, the appellant denied that he raped the complainant.

[5] In his judgment after the trial, the Senior Magistrate found the appellant guilty as charged and convicted him accordingly. After taking his plea in mitigation, the Magistrate took the view that the appellant ought to be sentenced to a term of imprisonment which exceeded his sentencing jurisdiction. He therefore ordered that the appellant be remitted to the High Court pursuant to section 292 (1) of the Criminal Procedure and Evidence Act (as amended), for appropriate sentence.

[6] The appellant subsequently appeared before Ota J. sitting at the High Court, Mbabane. As she was required to do under s293 (2) she enquired into the circumstances of the case, by carefully examining the record of proceedings in the Magistrate's Court in order to satisfy herself of the guilt of the appellant as well as whether his conviction was proper.

[7] The learned Judge carefully analysed the evidence at the court below and concluded that the complainant was a witness of truth and that the prosecution witnesses, particularly, PWs 2 and 3, corroborated the evidence that it was the appellant who had ravished her. The medical report, Exhibit A, issued by the doctor and admitted in evidence by consent, stated that the complainant's hymen was bruised and torn. In simple parlance, the Doctor found "evidence of recent forced vaginal penetration". The fact that the complainant raised an alarm, she added, was consistent with the complainant's evidence that she did not consent to the sexual intercourse.

[8] The learned Judge noted that the appellant's defence before the court below was that he beat the complainant and P.W. 1 because he said he suspected that P.W.1 was the complainant's boyfriend. The learned Judge rejected this line of defence as an afterthought since the appellant did not put it to the complainant herself, or to other prosecuting witnesses, particularly, P.W.1. Next, the learned Judge rejected the appellant's other line of

defence; namely, that the charge of rape against him was fabricated against him by the complainant's family who were not on good terms with him. The learned Judge dismissed this as untrue as the appellant suggested no motive why the complainant's family would do that to him.

[9] The learned Judge next heard the appellant's plea on mitigation of sentence. He said he was 21 years old and was drunk on the day in question. He said he was remorseful for what he did to the complainant and asked for a lenient sentence. He concluded his plea by adding that he was not physically well and that his grandfather had died and he was the one looking after his grandmother.

[10] In reply, Crown Counsel submitted that the offence was a very serious one which called for a stiff sentence. He said, not only was the complainant a young girl of 12 years, the appellant was a close relative of hers. He ought to have realized that the complainant would naturally regard him as somebody who would protect her as his own daughter. Rather, he submitted, the appellant ravished her without using a condom; not caring whether he infected the complainant with HIV/AIDS or other sexually transmitted infections.

[11] In passing sentence, the learned Judge carefully considered the well-known triad of sentencing; ie that the punishment must fit the crime, be fair to the accused, the victim of the offence and broad interests of society. To this end, the learned Judge emphasized the gravity of the offence and the breach of trust by the appellant who ought to have regarded himself as somebody who stood in *loco parentis* to the complainant. She said the menace of rape of young girls in the Kingdom was becoming a vicious cancer which ought to be ruthlessly exorcised by all arms of government. For their part, the courts must give would-be rapists a clear message that they should not expect lenient sentences if they are apprehended, tried and found guilty. She sentenced the appellant to 14 years imprisonment without the option of a fine.

The appeal before this Court

[12] As has been noted above, the appellant appealed to this court solely against his sentence. By his letter dated 19th July 2011, he stated that his main ground was that the sentence of 14 years imprisonment was too harsh and severe for him to bear. He even submitted that it should be reduced by 5 years. He added that he did not pre-plan the offence as he was totally intoxicated when he committed it.

[13] At the hearing of the appeal, it was pointed out to the appellant, who was unrepresented, that at the Magistrate's court when the complainant testified that he was drunk he stoutly and fiercely denied it. Surely, the appellant cannot now be heard to say that he was drunk when he committed the offence. He is estopped and cannot be allowed to over-reach the criminal justice system by blowing hot and cold when it suited him.

[14] It is also clear to me from the manner in which he feigned a thirst and sent the complainant away to a homestead, which he probably thought was empty, showed clearly that the crime was premeditated. The presence of 3 children in that homestead must have caused him to shift the scene of the crime to a nearby river.

[15] There seems to be a misconception abroad among prison inmates that the penalty for rape is 9 years imprisonment. I believe it is about time would-be rapists were told that it was no accident that section 185 of the Criminal Procedure and Evidence Act was amended by Parliament. Legislators in this Kingdom view the crime as heinous, particularly when it is accompanied by aggravating circumstances. The new section 185 *bis* is intended to ensure that no rapist, properly convicted, was sentenced to a term of less than 9 years. Where there are aggravating circumstances like failure to use a condom, or physical assault on the victim to overcome her

resistance, or as happened in this case, a rape which is so outrageous in its depravity as to constitute a clear breach of trust which the victim would normally repose in the rapist, then the court is exhorted by Parliament to articulate society's disapproval and disapprobation of that conduct and give the accused a long period of sentence. Those hackneyed words -"it induces a sense of shock"- in the circumstances, become a meaningless grievance, as a prison sentence, though intended to reform the accused, should not be toyed with by him. It is not meant to be an invitation to a tea party. It is a sentence and must naturally cause the accused considerable deprivation and discomfort. It must truly be a deterrence.

[16] I have carefully examined the judgment of Ota J. and I am in complete agreement with her that the appellant was properly convicted by the Magistrate. I endorse her subsequent conviction of the appellant on the uncontroverted evidence she so meticulously distilled from the record. I myself may have given the appellant, at least, 18 years imprisonment. But I hasten to remind myself that sentencing is predominantly a matter within the discretion of the sentencing Judge. Consequently, I will not disturb the sentence of 14 years imprisonment imposed by the learned Judge. She was perfectly entitled to pass that sentence. I confirm it. As the learned Judge ordered, that sentence is to be back-dated to 22nd March 2010. It is ordered accordingly.

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DR. SETH TWUM
JUSTICE OF APPEAL

I agree.

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M.M. RAMODIBEDI
CHIEF JUSTICE

I also agree.

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A.E. AGIM
JUSTICE OF APPEAL

APPELLANT:	**IN PERSON**
COUNSEL:	**D.M. NXUMALO – D.P.P.**