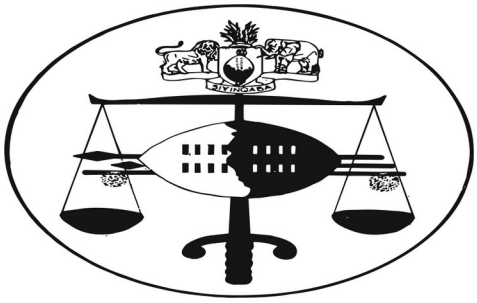

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

JUDGMENT

Criminal Appeal No. 17/2013

In the matter between

SANDILE MACHAWE MTSETFWA **Appellant**

And

REX **Respondent**

Neutral citation: Sandile Machawe Mtsetfwa *v Rex (17/2013)* [2013] SZSC 49 (29 November 2013)

Coram: RAMODIBEDI CJ, MOORE JA, and OTA JA

Heard: **1 NOVEMBER 2013**

Delivered: **29 NOVEMBER 2013**

Summary: **Criminal law – Rape – Appellant convicted of rape and sentenced to 12 years imprisonment backdated to 6 August 2010 – Appeal dismissed. Both conviction and sentence confirmed.**

JUDGMENT

RAMODIBEDI CJ

[1] The proceedings leading up to this appeal commenced in the Pigg's Peak Magistrate's Court. The appellant was charged with the offence of rape, accompanied by aggravating circumstances as envisaged by s 185 bis of the Criminal Procedure and Evidence Act 67/1938 as amended. It was alleged that upon or about 4 August 2010, and at or near Buhleni area in the Hhohho region, the appellant intentionally had unlawful sexual intercourse with one Nomcebo Maphanga, a minor who was allegedly incapable of consenting to the act.

[2] Upon his arraignment the appellant pleaded not guilty to the charge. At the end of the trial, however, he was found guilty as charged and sentenced to twelve (12) years imprisonment backdated to 6 August 2010. He has appealed to this Court against both conviction and sentence.

[3] The prosecution story against the appellant amounted to this. On 4 August 2010, and at or near Buhleni area in the Hhohho region, the complainant (PW1), who was 18 years of age according to the evidence of her mother Siphiwe Mhlanga (PW3), was coming from school at Mkhuzweni Primary School. She then went to the Buhleni bus rank to sell fruits. She, however, ended up in a nearby forest with her boyfriend Ncamiso Dlamini ("Ncamiso"). While the two young lovers were busy kissing, the appellant unexpectedly pounced. Both PW1 and PW2 corroborate each other that he suddenly grabbed the complainant and pulled her deeper into the forest by force.

[4] PW1 testified that once in the deep forest, the appellant "pressed" her on the ground, climbed on top of her and raped her, without using a condom. The appellant was a complete stranger to her. She testified that she had never seen him before.

[5] PW1 reported the incident to her mother. Ultimately the matter was reported to the police at Buhleni Police Station. PW1 testified that the appellant subsequently ran away from the police.

[6] PW1 was subsequently examined by a medical doctor, namely, Dr Nsizwa Mahlalela (PW6) who confirmed that there had been vaginal penetration although it could not be ascertained whether it was recent or not. The hymen was broken. It had "multiple breaks." However, there were "no fresh bruises or tears on the vaginal opening." The doctor testified that PW1 was on her monthly periods at the time of the medical examination on her.

[7] It is important to record at this stage that Ncamiso corroborated the complainant that the appellant pulled her into the forest. This

version was not challenged in cross-examination. It must accordingly be accepted as correct in the circumstances of the case. On the contrary the appellant put the following incriminating question to Ncamiso:-

"Q: I put it to you that I could see you when I was with the complainant.

A: I do not know about that."

[8] Detective Constable Thando Dlamini (PW5) testified that as he and Sgt Dupont proceeded to arrest the appellant at a place called Pick Yours on 5 August 2010, the latter ran away as soon as he saw them. As will be recalled from paragraph [5] above, this piece of evidence corroborates PW1 in this respect.

[9] After his rights were fully explained to him by the learned trial Magistrate, the appellant elected to give an unsworn statement. It was indeed his constitutional right to do so. In a long and

rambling story, he said that on the date in question, namely, 4 August 2010, he was at Buhleni looking for a job. He met the complainant (PW1) and proposed love to her persistently until she accepted the proposal. Later that day, he saw, fortuitously it would seem, a person who had promised to give him a job going towards the forest. He followed him. Once in the forest, he stumbled upon PW1 and PW2 kissing each other inside the forest. He greeted them and went past in the direction of the bus stop. He had intended to board a bus but it had already left when he got to the bus stop. He then went to a local bar where he met one Thokozani Dlamini who was a friend to his brother. He told Thokozani that a certain boy had taken his girlfriend.

[10] The appellant stated in his unsworn statement that as they approached the forest, they saw the complainant (PW1) and the boyfriend standing up and leaving. The appellant talked to PW1 but she was hostile. He grabbed her by the arm and wanted to know why she was making a fool out of him by not telling him that the other boy was her boyfriend. In the process, she

struggled and fell to the ground. When she got up she told him that she was going to report him to the police. And so they parted company at that stage.

[11] The appellant further stated in his unsworn statement that on the following day, namely, on 5 August 2010, he went back to Buhleni. He saw the complainant in the company of a certain woman. He overheard the complainant telling the other woman that he had raped her on the previous day and that she would report the incident to the police. He says that as he was going towards the Buhleni bus stop a police van arrived. He saw the complainant running towards the police van. On his own version, he then "ran away" towards the forest. Ultimately he returned home.

[12] The appellant did not call any witnesses. He simply closed his defence at that stage.

[13] Although not stated expressly, it is apparent from the record of proceedings that after seeing the witnesses and observing their demeanor the trial court accepted the version of the prosecution and rejected that of the appellant. In the result the court found that the prosecution had established the appellant's guilt beyond reasonable doubt. I am unable to fault this finding in the circumstances of this case.

[14] It is useful to point out that in several of its decisions this Court has stressed the principle that as a matter of law corroboration is not required to secure a conviction on a charge of rape. It is sufficient if the court only cautions itself of the dangers inherent in convicting on uncorroborated evidence. See, for example, **Themba Donald Dlamini v Rex, Criminal Appeal No. 14/1998; Roy Ndabazabantu Mabuza v The King, Criminal Appeal No. 35/2002; Eric Makwakwa v Rex, Criminal Appeal No. 2/2006; Fana Msibi v Rex Criminal Appeal No. 7/2008; Vusumuzi lucky Sigudla v Rex, Criminal Appeal No. 01/2011;** Nevertheless, I am satisfied that there was sufficient

corroboration in the present matter to justify conviction. As pointed out above, Ncamiso corroborated the complainant that the appellant pulled her into the forest. She promptly reported the rape to her mother and to the police. The medical doctor, too, confirmed that there had been penetration of the complainant's vagina. The fact that the appellant ran away upon seeing the police also lends credence to the prosecution case in the circumstances.

[15] There is also the fact, as alluded to above, that the appellant did not testify on oath but exercised his constitutional right to elect to make an unsworn statement. It is trite that such a statement carries very little weight, plainly because it does not undergo the rigours of cross-examination in order to test its veracity.

[16] On a conspectus of these considerations I have come to the conclusion that the appellant's appeal on conviction cannot succeed. It is completely unmeritorious.

[17] Turning now to sentence, the starting point is to recognise the basic fundamental principle, as this Court has so often held, that the imposition of sentence lies pre-eminently within the discretion of the trial court. An appellate court is loath to interfere in the absence of a material misdirection resulting in a failure or miscarriage of justice. See, for example, such cases as **Phumlani Masuku v The King, Criminal Appeal No. 33/2011; Sikhumbuzo Mazibuko v Rex, Case No. 46/2011; Joseph Arlindo Chicco Sambo v Rex, Criminal Appeal case No. 2/2012; Nkosana Petros Dlamini v Rex, Criminal Case No. 20/2012; Mjenga Dlamini v Rex, Case No. Criminal Appeal No. 40/2012.**

[18] It is convenient to point out at this stage that because of the seriousness of the offence which the appellant had been convicted of, the learned trial Magistrate took the view that a greater punishment than he was empowered to impose was called for. Accordingly, he invoked the provisions of s 292 (1) of the

Criminal Procedure and Evidence Act as amended. He committed the appellant to the High Court for sentence.

[19] In determining an appropriate sentence, the High Court commendably took into account the triad consisting of the offence, the offender and the interests of society. This is a correct approach as laid down in several decisions of this Court. The *court a quo* did not misdirect itself in any way. See, for example, **Sam-Dupont v Rex, Criminal Appeal No. 4/2008.**

The sentence of 12 years imprisonment was indeed well within the appropriate range of 11 and 18 years imprisonment for the offence of aggravated rape as laid down in the seminal case of **Mgubane Magagula v Rex, Appeal No. 32/2010.** See also **Ndumiso Obert Maseko v The King, Criminal Appeal Case No. 08/2011**.

[20] In the result the appeal is dismissed. Both conviction and sentence recorded by the *court a quo* are confirmed.

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M.M. RAMODIBEDI

CHIEF JUSTICE

I agree **_____**

S.A. MOORE

JUSTICE OF APPEAL

I agree **_____**

E.A. OTA

JUSTICE OF APPEAL

For Appellant **:** **In Person**

For Respondent **:** **Mr S. Fakudze**