**IN THE HIGH COURT OF SWAZILAND**
**HELD AT MBABANE**

**CASE NO. 140/2010**

**In the matter between:**

**THE KING**

**VS**

**SONNYBOY SIBUSISO VILAKATI**

**CORAM** **OTA J**

**FOR THE CROWN** **MR. S. FAKUDZE**

**ACCUSED IN PERSON**

**JUDGMENT**

**OTA J.**

[1] The accused person Sonnyboy Sibusiso Vilakati was arraigned before the magistrates court charged with the offence of Rape. The crown alleged that upon or about the 21st of March 2010, and at or near Mawasha area in the Hhohho region, the accused person, an adult male, did intentionally have unlawful sexual intercourse with one

N V a female aged 12 years without her consent and did thereby commit the said crime of Rape.

[2] The crown further alleged that the Rape was accompanied by aggravating circumstances as envisaged by **Section 185 bis of the Criminal Procedure and Evidence Act 67/1938 (CP&E)** in that.

1. At the commission of the offence the accused did not use a condom thereby putting the complainant at risk of contracting sexually transmitted diseases and infections.
2. The accused has broken a relationship of trust in that he is a blood relative of the complainant.

[3] The accused pleaded not guilty to the charge. Thereafter, the crown led a total of 5 witnesses in proof of it's case. At the close of the crown's case, the accused who appeared in person testified on oath and called 2 other witnesses. In its judgment, the Court a quo found the accused guilty and convicted him accordingly of the offence as charged. After mitigation, the Court a quo remitted this case to the

High Court for sentencing in terms of **Section 292 (1) of the CP & E** as amended.

**Section 293 (3) of the CP & E** provides as follows:-

> " *If any person is brought before the High Court in accordance with Subsection (2) such Court shall enquire into the circumstances of the case and, if after consideration of the record, it is satisfied of the accused's guilt, it shall thereafter proceed as if such person had pleaded guilty before him in respect of the offence for which he has been so committed*"

[4] The legislation ante enjoins this Court to enquire into the record of the Court a quo, to satisfy itself that the conviction before that Court was proper, before it proceeds to sentence see **Sithembiso Shongwe V Rex Criminal Appeal No. 21/2010.**

[5] In honour of the duty imposed upon this Court at this stage, I have therefore reviewed the record of Proceedings before the Court a quo. I must say that I commend the trial Magistrate for the proper conduct of the proceedings and the summary of the evidence of the crown witnesses as

well as the Accused and his witnesses. The trial Court took the pains of rendering a detailed summary of the totality of the evidence tendered before it in it's judgment. This state of affairs renders a regurgitation of the evidence at this stage otiose. The Court a quo however failed to comprehensively analyse the evidence before conviction. It behoves this Court to undertake this task in the circumstances. I will now proceed to the law and analysis of the evidence tendered a quo to ascertain for myself if the crown proved it's case beyond a reasonable doubt before that Court to warrant the Accused's conviction.

[6] I count it now judicially settled that for the crown to establish the offence of rape, it is required to prove beyond a reasonable doubt the following factors

1. The fact of sexual intercourse or indecent assault
2. The lack of consent on the part of the complainant.
3. The identity of the accused.

[7] The Court is required to apply the cautionary rule and ensure that there is corroboration of the Complainant's evidence, which

corroboration must be directed to the three factors identified ante.

**See Rex V Justice Magagula Criminal Case No. 330/02.**

[8] Now from the evidence tendered a quo there is no doubt in my mind that the Accused took advantage of the festive atmosphere in their locality on the day in question, which was occasioned by the traditional wedding ceremony that was in progress as at the time of the incidence, to have sexual intercourse with the Complainant. The Complainant told the Court that whilst on her way home from the Dlamini homestead where the wedding was in progress, she met the Accused, who is her brother's son. That the Accused pulled her to the nearby river where he forcefully undressed her and proceeded to insert his penis into her vagina. That the Accused had sexual intercourse with her without her consent. And that the accused did not use a condom. That when she raised an alarm the Accused hit her with an open hand. The fact that the Accused and the Complainant were at the scene of the incidence on the day in question and at the material time of the incidence, is confirmed by PW2, Fikile Dlamini, who was one of the women that the Complainant met upon leaving the scene of the incidence. PW2 told the Court that she had just crossed the river when

she heard a person raising an alarm. She then saw the accused running from the direction she had heard the alarm. Thereafter, she also saw the Complainant coming from where the Accused had come from. That the Complainant was crying. The evidence of Complainant on this wise is further corroborated by PW3 Macebo Gwebu who told the Court that he was on his way to the grazing land to look for his family's cattle, when he met 2 women who told him that there was a person raising an alarm next to Mawasha River. That he went to investigate. As he approached the scene he started singing. The Accused and the Complainant stood up. The Accused ran away and the Complainant came to him.

[9] To my mind it is inexorably apparent from the evidence rendered by Complainant, PW2 and PW3, that the Accused and the Complainant were at the scene of this incidence at the material point in time this offence was committed. The record demonstrates that PW2 and Pw3 positively identified the Accused as the person they saw at the scene with Complainant. They also described the items of clothing the Accused was wearing at that point in time. Their evidence in this regard was consistent.

[10] Furthermore, the allegation of the sexual intercourse is corroborated by the medical report ext A, which was admitted in evidence by consent. I say this because the allegation of the Complainant was that Accused forcefully undressed her then proceeded to insert his penis into her vagina. PW4 constable Cindy Magagula told the Court that on the same day of the incidence, the Complainant was brought to the Horo Police Post and she then took the Complainant to the Emkhuzweni Health Centre where she was examined by a Doctor. Ext A is a report of the said medical examination Ext A demonstrates that the Complainant's hymen was "*Bruised and torn at 4,5,6, 8 o'clock, fresh tears noted*"

Ext A also shows that the Complainants Vestibule and Fourchette were Bruised. The Doctor's remarks as appear on Ext A is as follows

"*Evidence of recent forced vaginal penetration noted*".

[11] It is beyond dispute in my view by the Complainants freshly torn and bruised hymen, bruised Vestibule and Fourchette, as well as the

Doctors findings of recent forced vaginal penetration, that the Accused had sexual intercourse with the Complainant on the day in question as alleged. The findings of recent forced vaginal penetration as per ext A establishes the fact of sexual intercourse beyond dispute. The Complainant who knows the Accused who is related to her, being her brothers son, positively identified the Accused as the rapist. PW2 and PW3 also by their evidence which I have demonstrated ante, proved that the Accused and the Complainant were at the scene of the incidence on the day in question. In fact PW3's evidence was that when he approached the scene, the Accused and Complainant got up. Though PW3 said he did not know what they were doing, his evidence to my mind goes to corroborate PWl's evidence that the Accused was having sexual intercourse with her when they heard people approaching accused and complainant got up. From the evidence tendered, I have no doubt that the Accused had sexual intercourse with the Complainant on the day in question.

[12] The evidence tendered a quo also shows lack of consent. Complainant's evidence was that the Accused dragged her to the

nearby river, forcefully undressed her and had sexual intercourse with her. That when she tried to raise an alarm the Accused slapped her.

[13] The fact that the Complainant raised an alarm at the material time of the sexual intercourse, is confirmed by both PW2 and PW3. It was the fact of the alarm that attracted them to the scene. I hold the view that the mere fact that the Complainant was raising the alarm demonstrates that she did not consent to the sexual intercourse. The only purpose of raising the alarm to my mind, would be to attract possible rescuers and that purpose was realized by the intervention of PW2 and PW3. I also hold that the finding of forced vaginal penetration as per ext A, also corroborates the lack of consent and Complainants evidence that the Accused forcefully undressed her and inserted his penis into her vagina . It is the reason of this force obviously occasioned by the lack of consent on the part of the Complainant, that caused the bruises to the Complainants Vestibule and Fourchette, as well as bruishes and tears to her hymen, leading the Doctor to the conclusion of "*recent forced vaginal penentration*"

[14] In the face of the overwhelming evidence adduced by the Crown, the Accused's defence to my mind is tantamount to the desperate attempts of a drowning man grasping at straws. The defence the Accused sought to set up is unmaintabable. He laboured to convince the Court that all he did was beat up the Complainant and PW1 Mciniseli, whom he alleges to be the Complainant's boy friend on the day in question. The problem with this line of defence is that the Accused failed to put it to the Complainant or the other crown witnesses under cross examination. The first time this line of defence surfaced was during the Accused's testimony itself. In the circumstances, I will disregard this line of defence as an after thought. I say this because it is a trite principle of law, that where an Accused person fails to put his case to the crowns witnesses, then the Court is entitled to treat such a defence as an after thought and disregard it. **See Rex V Zimele Samson Magagula Criminal Case No. 371/08.**

[15] More to this is that DW1 and DW2 whom the Accused called as his witnesses did not substantiate this line of defence. Their testimony was that the Accused only beat up DW1 but that they did not know if he

also beat up the Complainant. I will thus reject this line of defence and it stands rejected.

[16] There was also another line of defence which the Accused sought to raise whilst cross examining PW5 the arresting police officer, to the effect that the allegation against him are mere fabrications because the Complainant's family and his family are not in good terms and the Complainant's family does not want to see him. Again the Accused failed to put this defence to the Complainant herself. It is thus disregarded as an after thought. More so as it was not the line of his defence via his evidence and that he sought to demonstrate via the testimonies of DW1 and DW2.

[17] In the light of the totality of the foregoing, I find that the crown indeed proved it's case beyond a reasonable doubt against the Accused in the Court a quo. I accordingly confirm the verdict of guilty and the consequent conviction of the Accused by that Court.

**[18] Judgment on Sentence**

In mitigation in the Court a quo, the Accused begged for leniency. That he is 21years and was drunk on the day in question and cannot remember most of the things that happened. That his grandmother lives alone since he has information that his grandfather has passed away.

[19] In mitigation before this Court on the 26th of June 2011. the Accused once more asked for leniency. He told the Court that he is not physically well. That his grandfather passed away, leaving his grandmother alone to care for his daughter.

[20] In response Mr Fakudze called for a stiff penalty. He contended that the Accused appears to care for his own daughter but not for the Complainant who is also a close relative of his and who was only 12 years when the Accused violated her. He posited that the circumstances of the Accused do not out weigh the seriousness of the offence committed.

[21] In passing sentence, a sentencer, is enjoined by law to consider the triad, i.e the circumstances of the Accused person, the seriousness

of the offence, the interests of the society and the peculiar circumstances of the case.

**See Chicco Manyanya Iddi and two others V Rex Criminal Appeal No. 03, 09 and 10/2010, Mfanasibili Gule V The King Criminal Appeal Case No. 2/2011 paragraph 17, The King V Sibusiso Xolani Dlamini Case No. 42/2011 para 26 and 27.**

[22] More to the foregoing is that a sentencer in sentencing is expected to blend in a measure of mercy according to the circumstances. **In the case of S. v Harrison 1970 (3) SA 684 (A) st 686, Addleson J** demonstrated this trite principle of law in the following language

" *Justice must be done, but mercy, not a sledge - hammer is its concomitant*".

[23] In honour of the above trite principles of law, I have considered the fact that the Accused is a first offender, I have considered his

youthfulness being 21 years when he committed the offence. I have considered the fact that he has a daughter who is now left solely to the care of his grandmother. I take heed of his allegation that he is physically sick. He has my sympathy for whatever ailment afflicts him. However, the Swaziland Correctional Services, I take judicial notice, is well equipped to carter for the medical needs of it's inmates. I have also taken into consideration the fact that the Accused is remorseful.

[24] Having considered all the factors ante, I however deem it expedient to point out that the offence committed by the Accused is a very serious one. The Accused violated a 12 year old girl. To crown it all, the Accused violated a girl who is his own blood, the Accused being the son of the Complainant's brother. The Accused held a position of trust to the Complainant in that he is her relative. The Accused breached this relationship of trust by his irresponsible and reckless sexual assault on the Complainant. This is an outrage that needs to be addressed as it is fast gaining hold in the Kingdom. I say this because the incidence of the girl child being violated by older male relatives is fast becoming the norm rather than the exception. We are beginning to see more incidence of children being raped by their older

male relatives. If this trend is not stopped it has the dangerous potentials of destroying the close family ties in the Kingdom, ultimately leading to a break down of the stability of the nation.

[25] The Accused dragged this poor defenceless child to the river and proceeded to violate her innocence. When in her fright the complainant tried to raise an alarm, the Accused physically assaulted her by slapping her whilst he orchestrated his act of barbarism upon her innocence. To add to the gravity of the Accused's despicable enterprise, the Accused did not use a condom, thus exposing the Complainant to the risk of sexually transmitted diseases and HIV/AIDS.

[26] As an older relative to the Complainant, Sonnyboy Sibusiso Vilakati, you did not do well at all. Your duty was to protect her and not to molest her. You were to protect her and not to subject her to this sort of victimization, barbarism and outrage. I want you to know that your activity has the dangerous potentials of harming the complainant physically, physiologically and emotionally for life.

[27] I notice that in mitigation in the Court a quo, you sought to hide behind the allegation that you were drunk on the day in question. You cannot hide behind the allegation of influence of alcohol to escape responsibility for the offence you committed. It is all well and good to commit the offence and then blame it on alcohol. This old line is now out dated and has little weight as a mitigating factor. Besides in your case, I am not swayed at all by this alleged mitigating factor. This is because you maintained all through the trial a quo that you were not drunk at the time of this incidence.

[28] I agree entirely with Mr Fakudze that your personal interests do not overweigh the interests of the Complainant or the society. The Complainant was coming from a wedding when you grabbed her, dragged her to the river and violated her. This sort of victimization against the girl child which is on the high prevalence in the Kingdom must be discouraged. Therefore miscreants like you ought to be put away in the interest of the society.

[29] The girl child is entitled to her personal dignity and pride. She is entitled to her liberty, freedom and play. It is for the society to ensure

that these rights of the girl child are protected. That is why Parliament saw it fit to advocate a minimum mandatory sentence of 9 years, for the offence of rape with aggravating factors, vide Section 185 *bis* (1) of the CP & E, to discourage this sort of outrage.

[30] You fall within the group contemplated by Section 185 *bis* (1) of the CP & E. I cannot go against such clear words of statute. I am also bound by the minimum range of sentence of between 11 to 18 years for the offence of rape with aggravating factors, evolved by the Supreme Court in the case of **Mgubane Magagula V The King Appeal No. 32/2010.**

[31] In conclusion, having carefully considered the triad, I am of the firm conviction that a sentence of 14 years is appropriate for the offence committed and will help discourage other would be child Molesters. Sentence backdated to the 22nd of March 2010, which date I take as the date the Accused was arrested. It is so ordered. Right of Review and Appeal explained.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS**

**THE 5th DAY OF JULY 2011**

**2011**
**JUDGE OF THE HIGH COURT**