IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE CIVIL

CASE NO. 240/2010

In the matter between:

REX

VS

PHUMLANI MASUKU

CORAM: OTA J,

FOR THE CROWN: MR. S. FAKUDZE

ACCUSSED IN PERSON

JUDGMENT

OTA J.

[1] The accused Phumlane Masuku was arraigned before the Magistrates Court charged with the offence of Rape. The crown alleged that upon or about the 17th of May 2010, and at or near Enjeni area in the Hhohho region, the said accused person an adult male did

intentionally have unlawful sexual intercourse with one S M a female who was at the time 13 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 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 infection.
2. The accused stabbed the complainant with a knife.

[3] The accused pleaded not guilty to the charge. Thereafter, the crown led 5 witnesses in proof of it's case. At the close of the case for the crown, the accused testified on oath and called no witnesses. The trial Court in its judgment found the Accused guilty and accordingly convicted him of the offence as charged. After mitigation, the trial Court referred this case to this Court for sentencing pursuant to

Section 292 (1) of the CP & E. The Supreme Court of Swaziland in it's recent case of **Sithembiso Shongwe V Rex Criminal Appeal No. 21/2010,** exploded the purpose of the above Section of our criminal statute with reference to section 293 (3) of the CP & E as well as the case of **The State V Romatswidi (2005) 1 BLR, 452 at para G-H,** where the Court stated thus

> " *It would appear to me that the object of this section is to enable this court to consider the evidence on record and the judgment of the Court a quo and to make up it's own mind as to whether the conviction was in the circumstances proper. This Court is not bound by the finding of the trial Court in relation to the question of the accused's guilt— the Court is in my view entitled to assistance although the question of whether it is satisfied on the correctness of the conviction must soley rest with this Court*".

[4] I deem it thus expedient at this juncture to first review the evidence tendered a quo to ascertain for myself if the conviction of the accused before that court was proper, before I proceed to sentence. I have carefully reviewed the totality of the evidence tendered in the Court a quo, and I am satisfied that the return of verdict of guilty and the conviction of the Accused by the Court a quo was proper. I say this

because the evidence of the crown witnesses on the events of the day in question is clear and consistent. The case for the crown as told by its witnesses is that on the day in question PW1 the complainant, PW2 and another, had alighted from a bus and walked on the foot path through the forest. That the accused a stranger to them caught up with them and asked if thy knew Samkeliso Ginindza. They responded that they knew him. The accused then joined them because he said he wanted to speak to said Samkeliso. That when they reached the thick part of the forest, the Accused produced a knife from his purse and threatened to kill them if they made a noise. That PW2 ran away towards the compound, where he alerted PW3 and PW4 of the incidence. PW1 on the other hand ran a different way and was intercepted by the Accused who kicked her on the legs and she fell down. The Accused then dragged PW1 into the forest. Before reaching the deep forest the Accused stabbed PW1 on her left arm with the knife he was carrying. That the Accused caused PW1 to lean against a tree truck, he stabbed the tree truck saying he was going to kill this dog, referring to PW1. That the Accused proceeded to remove PWl's pants and panties and inserted his penis into her vagina. That when they heard people coming, the Accused again stabbed PW1 on her left

breast saying he will leave her dead. Thereafter, the Accused pulled up his trousers and ran away. That PW1 then got dressed and when she got to the footpath, she met up with the rescue party whom Pw2 had a alerted. PW1 pointed out to them the direction in which the Accused had run. Suffice it to say that a chase ensued and the Accused was apprehended. PW4 told the Court that he attended to PW1 who was bleeding and who reported to him that she was raped by the Accused.

[5] PW5 3505 D Sgt Raymond Nxumalo, told the Court that he received a telephonic complaint of Rape on the day in question. That when the police arrived at the scene the Accused who was already apprehended was handed over to them together with a knife. That he escorted the Accused and the Complainant to Pigg's Peak Police Station and from there to the Pigg's Peak Government Hospital, where PW1 was examined by a Doctor. The medical report was tendered in evidence by consent as ext A. The knife was however not tendered as PW5 told the Court that he could not locate it. Nothing in my opinion turns on the Accuseds cross examination of the crown witnesses as he failed to impeach their evidence.

[6] The Accused's testimony on oath was that when he joined PW1, PW2 and the third person, at the thickness of the forest, he produced a knife and the children ran in different directions. That he caught PW1 scratched her on the shoulders with the knife and demanded money from her. That PW1 begged him not to kill her but to have sexual intercourse with her instead. That he told PW1 that he did not want to have sexual intercourse with her. At that stage PW1 undressed herself. That when some people arrived he scratched PW1 again on the chest with the knife and ran away. The people gave chase and the Accused was apprehended. The Accused maintained that he did not rape PW1. That all he did was demand money from her. Under cross examination the Accused confirmed that PW1 had 2 stab wounds.

[7] I have reviewed the evidence tendered in the Court a quo. The elements that the crown must establish to prove the offence of rape beyond a reasonable doubt were aptly captured in the case of **Rex V Dumisani Matimba Case No. 226/07** with reference to the dictum of **Rooney J in the King V Valdeman Dengo Review Case No. 843/08**

as follows:

> *" The need to be aware of the special dangers of convicting an accused person on the uncorroborated testimony of a complainant in such cases must never be overlooked. Corroboration may be defined as some independent evidence, implicating the accused which tends to confirm the complainants testimony. Corroboration in sexual matters must be directed to:*
>
> 1. *The fact of the sexual intercourse or indecent assault*
> 2. *The lack of consent on the part of the complainant and*
> 3. *The identity of the accused*
>
> *Any failure by the trial Court to observe these rules of evidence may lead to the failure of justice—*

[8] I hold the view from the evidence tendered that the fact that the Accused had sexual intercourse with the complainant has been proved. I say this because to my mind the evidence of the complainant that the Accused had sexual intercourse with her is corroborated by ext A, the medical Report which was admitted in evidence by consent in the Court a quo. Even though the Accused took the view in his plea in mitigation before this Court, that the medical report will show the Court that the evidence against him was fatricated, I do not however

agree with the Accused. I say this because I find that the medical report rather goes to confirm the Complainants testimony that the Accused had sexual intercourse with her on the day in question.

[9] The Complainants evidence was that the Accused dragged her into the forest, lent her against a tree trunk, took off her pants and her panties, and then inserted his penis into her vagina. This incidence took place on the 17th of May 2010. It is not disputed that on the same 17th of May 2010, the complainant was taken to the Pigg's Peak Government Hospital where she was examined by a Doctor. The Doctor was not called to testify however the medical report was admitted in evidence as ext A, by consent, and by virtue of our laws pursuant to Section 221 of the criminal procedure and Evidence Act, the medical report is " *prima facie evidence of the matters stated therein*"

[10] Ext A shows that the Doctor's opinion after examining the complainant was

> "*No Genital injuries in keeping with forced penetration. However non intact hymen cannot rule out the possibility of penetration on the day in question*".

[11] I hold the view that even though the doctor in his opinion was not conclusive that penetration took place, the fact of the broken hymen to my mind is consistent with penetration. It is obvious from ext A that it is the fact of this broken hymen that led the doctor to conclude that he "cannot *rule out the possibility of penetration on the day in question*"

[12] This evidence in my view corroborates the complainant's version that the Accused inserted his penis into her vagina. There was obviously penetration causing the break of the hymen, in the face of the fact that there is no evidence to show that the complainant was sexually active prior to the day of the incidence. We must not lose sight of the fact that in law to establish rape what is required is the slightest degree of penetration. It is immaterial whether semen is emitted or not. It is also immaterial whether the hymen was broken or not. What is relevant is that the male organ is in the slightest degree within the females's body. This position of the law was demonstrated in the **Case of Rex V Zamele Samson Magagula Criminal Case**

No. 371/08, with reference to Hunt and Milton in their Book South Africa Criminal Law and Procedure, Volume II Revised second Edition, at page 440, in the following terms

"There must be penetration, but it suffices if the male organ is in the slightest degree within the female's body. It is not necessary in the case of a virgin that the hymen be ruptured, and in any case it is unnecessary that semen be emitted".

[14] In *casu,* I find that the broken hymen establishes penetration, thus corroborating the Complainant's evidence that the Accused had sexual intercourse with her on the day in question, and is proof beyond reasonable doubt that the Accused did have sexual intercourse with the Complainant and I so hold.

[15] I also find that the Complainant did not consent to said sexual intercourse. Her evidence was that she ran away from the Accused and was caught by him. That Accused threatened her into submission to the sexual intercourse with the knife he was welding. The Accused himself in his evidence corroborated the Complainant's evidence to a large extent, by his admissions that he did chase the Complainant,

catch her, and proceeded not only to threaten her with a knife but to also actually inflict two stab wounds on her, even though he said that he only scratch her with the knife. The fact of the stab wounds is confirmed by the medical report ext A. Even though the Accused in his defence sought to demonstrate that his mission on that day was to rob the Complainant, thus the threats and the stab wounds, but that he did not rape the Complainant, I however find this line of defence unmaintainable in the face of my findings ante, that the Accused did have sexual intercourse with the Complainant on the day in question. I'll thus disregard the Accused's testimony on this wise, as the desperate attempts of a drowning man grasping at straws. Since I have found that the Accused called in aid the knife to threaten the Complainant into submission to the sexual intercourse, it is thus an ineluctable fact that the crown proved beyond a reasonable doubt that the Complainant did not consent to the sexual intercourse.

[16] The identity of the Accused is not in issue. The Accused himself demonstrated that he was the one that chased and stabbed the complainant in the forest on that day, thus corroborating the evidence of PW1, PW2, PW3 and PW4 on this wise. I thus find in the light of the

totality of the foregoing that the crown indeed proved its case beyond a reasonable doubt. I confirm the verdict of guilty and the conviction of the Accused in the Court a quo.

[17] <u>Judgment on Sentence</u>

In mitigation in the Court a quo, the Accused begged for leniency. He said he is 23years old, a school drop out because there was no money to pay his school fees. That he went as far as Grade IV before dropping out and that he still intends to go back to school. That his parents are elderly, his siblings still young and there is no one to take care of them if a custodial sentence is imposed. That he only intended to rob the Complainant on the day of the incidence. In mitigation before this Court on the 26th of June 2011, the Accused called upon the Court to consider the doctors report which in his view demonstrates that the case against him was fabricated. He asked for leniency because he is still looking at a brighter future. That he is a sickly person he has Tuberculosis.

[18] In passing sentence I have considered your plea in mitigation ante. I must say that I am in sympathy that you dropped out of school because of lack of funds. I am also sorry that you are sick suffering from Tuberculosis. Case law has however demonstrated that the Swaziland Correctional Services in fact has been found to have in place a praiseworthy program in order to take care of the medical needs of it's inmates. See the case of **Rex V Khanyakwezwe Dludlu Criminal Case No. 61/2006 per Annandale J.** Therefore, the institution you are presently at, and where you will be spending sometime from now, is well versed to accommodate your ailment. I have not shut my eyes to your plea for leniency and your desire not to be saddled with a custodial sentence so that you can regain your freedom to enable you go back to school and also to take care of your elderly parents and siblings. I am also considerate of the fact that you are a first offender and a young man. As I said, I am in sympathy with you.

[19] However, whilst expressing my sympathy, I am also quick to point out to you Phumlane Masuku, that the offence you committed is a very

grevious one. It is an offence that is recognized by the Courts, parliament and the society as a whole, as a grave offence. Its gravity is heightened by it's prevalence in the Kingdom.

[20] In your own case you did not just commit rape, you committed rape with aggravating factors. You in your depravity choose to defile a defenceless 13 year old, who was going about her business. You dragged her into the forest and not only raped her, but you also threatened and stabbed her with the knife which you were welding. You inflicted two stab wounds on an innocent and defenceless child, in you unlawful enterprise of devouring her. You called her a dog whilst you carried out your enterprise of depravity upon her. I shudder to think of what terror and fright this innocent child would have suffered. To crown it all Phumlane Masuku you did not use a condom, thus exposing the Complainant to the risk of sexually transmitted diseases as well as HIV/AIDS. You may not have only scarred the Complainant physically but also emotionally and psychologically, by your nefarious activity.

[21] The Complainant was an innocent and defenceless child of only 13 years when you violated her. You took away from her with reckessness, her innocence. A treasure which women generally guard jealously. You gave her no choice to decide whom to surrender it to.

[22] The most frightening aspect of this whole sordid affair is that depraves like you abound in the Kingdom. This is why the incidence of violation of the girl child is on an alarming high prevalence. It is a demon future tomorrow. If she is not protected from dangerous people like you, then our future tomorrow is doomed. This is because it will have a mother who is scared physically, psychologically and emotionally, with no capacity to offer it any succor or help. God Forbid. It is thus the overwhelming interest of the society that people like you be put away in the interest of the stability and advancement of the society. Parliament in recognition of this need, advocated a minimum mandatory sentence of 9 years imprisonment for the offence of rape with aggravating circumstance via Section 185 bis (1) of the CP & E. This is to serve as a deterent to other villains like you who are even now plotting their evil enterprise upon unsuspecting females. Still in recognition of the seriousness of this sort of offence, the Supreme

Court of Swaziland in it's decision in **Mgubane Magagula V Rex Appeal No. 32/2010,** raised the notch higher, by pegging the appropriate range of sentence for the offence you committed at between 11 to 18 years imprisonment.

which if not discouraged will end up consuming our future tomorrow. I say this because the girl child is the mother of our

[23] It is worthy of note that in the case of **Mgubane Magagula v Rex (supra)** the aggravating factors were that the victim was a 10 year old and that the Appellant had not used a condom. The trial court imposed a sentence of 18 years and this was affirmed by the Supreme Court.

[24] In conclusion Phumlane Masuku, I have carefully considered the triad, and I find that your circumstances must submit to the circumstances of the complainant and the society, as they far outweigh you interests. The interest of the society will only be served if you are put away for a considerable length of time to serve as a deterent to other. I thus sentence you to 14 years imprisonment. This

sentence is accordingly backdated to the date of your arrest being the 17th of May 2010. It is so ordered. Right of Appeal and review explained.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE 5th **DAY OF** July**...2011**

OTA J.
JUDGE OF THE HIGH COURT