IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 381/08

In the matter between:

THE KING

VS

THULANI MHLANGA

CORAM: OTA, J

FOR THE CROWN: MR. S. FAKUDZE

ACCUSED IN PERSON

JUDGMENT

OTA, J

[1] The accused person Thulani Mhlanga was arraigned before the Magistrates court charged with the crime of Rape. The crown alleged that upon or about the 4th of June 2008 and at or near Mayiwane area in the Hhohho Region the said accused person did intentionally have unlawful sexual intercourse with Z M a female child who was at the time aged 11

years and incapable in law of consenting to sexual intercourse and did thereby commit the 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 as amended (CP & E) in that at the commission of the offence, the accused did not use a condom thereby putting the complainant at risk of contracting sexually transmitted infections.

[3] When arraigned before the court a quo, the accused who conducted his own defence pleaded not guilty to the charge, whereupon the crown paraded a total of 4 witnesses in proof of its case. At the close of the crown's case the accused testified on oath and called one witness Leonard Gwebu. The court a quo in it's judgment found the accused guilty and convicted him of the offence as charged. Thereafter, the court remitted the case to this court for sentencing in terms of Section 292 (1) of the CP & E.

[4] I deem it expedient to first ascertain for myself whether the conviction of the accused before the court a quo was proper, before I proceed to

sentence. From the record there is no doubt in my mind that the crown proved the identity of the accused beyond a reasonable doubt a quo. The complainant positively identified the accused as her attacker. She ealled the accused by name when she was reporting the rape incidence to her mother, PW2, on the same day of the incidence. She was in a position to positively identify the accused as her attacker because the rape incidence took place in broad day light. It is also obvious to me from the record that the accused was very well known to the complainant. This is because not only are their parental homesteads situate at the location of this incidence, but they are relatives, both Mhlangas, the accused being the Son of complainants Uncle, or as PW2 put it, the accused being the son of PW2's brother in law. Even though the accused sought to show that he was not at the location of this incidence, Mayiwane, at the time of the rape, his evidence on this wise is inconsistent and ought to be disregarded. I say this because in cross examination of PW2, the accused sought to demonstrate that at the material point of this incidence, June 2008, he was away in South Africa. However in his evidence in chief in defence, he told the court a quo that in June 2008, he was at Piggs Peak. The evidence of the accused as to his exact whereabouts at the material time of this incidence is inconsistent, thus unreliable and

stands disregarded. I hold the view that the court a quo properly found that the accused was at his parental homestead at Mayiwane at the time of this incidence, and only left for South Africa after the offence had been committed.

[5] Furthermore, I find that the fact of sexual intercourse was also proved beyond a reasonable doubt before the court a quo. The complainant's evidence was that the accused raped her. The record shows that the complainant was escorted to the Emkhuzweni Health Centre on the 10th of June 2008, a day after the rape incidence where she was examined by PW4 Dr Fikadu Woreta. Ext A is the report of the medical examination conducted by PW4. PW4's testimony was in part as follows "*she had ulcers on her vagina. She had white vaginal discharge. In the discharge there was a spermatozoon. Having examined the discharge, I came to the conclusion that the child had been sexually abused*"

[6] PW4's evidence is confirmed by ext A which shows that the complainants labia majora and labia minora had ulcers, her vagina had whitish Pv discharge, the vaginal examination was painful and her vaginal smear

contained wet semen and spermatozoon. The opinion of the doctor as reflected in ext A was "*The findings are suggestive of child sexual abuse*"

[7] It is beyond dispute from ext A that the accused indeed had sexual intercourse with the complainant on the day in question. I also agree with the court a quo that the presence of the semen and spermatozoa in the complainants vagina is prove that the accused did not use a condom whilst carrying out the rape. I agree with the court a quo that even though the complainant testified that she did not know what a condom is, if the accused had put anything on his penis before raping her she would have stated so in her evidence. The presence of the spermatozoa is thus in my view prove of the fact that the accused did not employ the aid of a condom in the rape enterprise.

[8] Furthermore, the lack of consent to my mind was also proved beyond a reasonable doubt before the court a quo. It is not disputed that the complainant was only 11 years old when she was raped by the accused. It is the position of the Roman Dutch Common Law that a girl under the age of 12 years is incapable of consenting to sexual intercourse, and that, even if she

consents, sexual intercourse with her is rape. See **Rex v Senzo Shabangu case No. 239/2010. Rex v Mfanzile Mphicile Mndzebele Criminal case No. 213/2007.**

[9] It is therefore ineluctable that the 11 year old complainant did not consent to the sexual intercourse since she was in law incapable of so consenting to same. Besides, her lack of consent is replete from the record. She told the court that she was on her way from playing when she met up with accused who grabbed her, pulled her into a ditch, took off her skirt and proceeded to rape her. That the accused closed her mouth with one hand and threatened to kill her before proceeding to have sexual intercourse with her. It is thus obvious from the record that the accused threatened the complainant into submission to the sexual intercourse. Let me just add at this juncture that the accused's defence to the effect that he was framed for this offence because his homestead and the complainant's homestead are not in talking terms has no legs to stand upon. This is because the accused failed to put this line of defence to any of the Crown witnesses especially the complainant and her mother PW2. The first time this line of defence surfaced was during the defence itself. It is trite, that where an accused person fails to put his case to the crown witnesses under cross-examination, then the court

is entitled to treat such a defence as an after thought and to disregard it. See **The King v Sonnyboy Sibusiso Vilakati** Case **No 140/2010, Rex v Zimele Samson Magagula** Criminal **Case No 371/08**

The court a quo was thus right to my mind to disregard this line of defence.

[10] In conclusion, I find that the crown indeed proved its case beyond a reasonable doubt before the court a quo. I thus confirm the conviction of the accused before that court.

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

In mitigation before the court a quo, the accused begged for leniency. He asked for a suspended sentence. He said he dropped out of school in Form one in the year 2006, due to financial problems and that his mother passed away in the year 2000. In mitigation before this court on the 26th of June 2011, though the accused asked for leniency, he however maintained that he is innocent and that the evidence against him was fabricated.

[12] In response Mr. Fakudze for the crown drew the courts attention to the fact that the accused refused to mitigate before this court. He contended that in the circumstances the accused is not remorseful. He posited that since the accused failed to mitigate the court has not heard the accused's

personal circumstances therefore the three elements of the triad are not in conflict. He submitted that the 11 year old complainant is worse off in that she is under perpetual suffering because of the ordeal she went through in the hands of someone she knew very well. He called for a sentence that will serve as a deterrent to others in the interest of the society.

[13] In passing sentence on you I have in the interest of justice considered your personal circumstances which you demonstrated before the court a quo, which forms part of the record, even though you have refused to mitigate before this court. I take cognisance of the fact that you did beg for leniency before this court and that you are a first offender.

[14] In meting out sentence the law demands that I consider your age being 17 years at the time of the commission of this offence. I thus take cognisance of the constitutional ethos demonstrated in the interest of the child as elucidated by the full bench of the High Court in it's recent judgment in the case of **Sikhumbuzo Masinga v The Director of Public Prosecutions** and **others Case No 21/2009.**

[15] I also take cognizance of the fact that both the Constitution and International Conventions do not however prohibit incarceration of the child in appropriate circumstances. All they advocate is that if incarceration must occur it should be for the shortest appropriate period of time and that the child be kept separate from adult inmates.

[16] Thulani Mhlanga, having however considered your personal circumstances, I am still of the firm conviction that the offence you committed is not just a grievous one but also a heinous one. This fact has been recognized by local jurisprudence over the decades. For instance in **R v Makhosi Dlamini** review **case No. 5/2010,** the court declared as follows:-

> "*In it's countless judgments delivered by a number of its judges, the Supreme Court and this court have used different epithets to describe this offence, the common denominator being that this is an ugly offence that violently robs its victim of self-worth, bodily integrity and the right to refuse to indulge in sexual activity*"

[17] The ugliness of this offence is compounded by its prevalence in the Kingdom, a fact which engendered parliament to advocate a minimum mandatory sentence of 9 years for the offence of rape where aggravating

factors are found to be present vide Section 185 bis (I) of the CP&E in an effort to discourage it's prevalence. The efforts of parliament on this wise was complemented by the Supreme Court in the case of **Mgubane Magagula v Rex, Appeal Case No 32/2010,** wherein the court evolved the appropriate range of sentence for this offence to be between 11 and 18 years.

[18] It is worthy of note that not withstanding the punitive stance of parliament and the Supreme Court ante, this offence has become even more ubiquitous in the Kingdom. The most frightening part of this horrific saga is the increased activities of pedophiles like the accused in the kingdom. These group of depraves specialize in the defilement of the girl child. The activities of this group of persons have reduced the girl child to an endangered specie in the kingdom, thus the heightened or urgent need to curb this offence.

[19] Thulani Mhlanga, you violated an 11 year old innocent girl who was on her way back from her play. You dragged this innocent, helpless and defenceless child into a ditch by the side of the road where you proceeded to plunder her innocence. You deprived her of her innocence in a most inglorious and undignified manner. You threatened her into submission to

the sexual intercourse. You gave her no opportunity to choose whom to surrender her innocence to. By your nefarious sexual exploit you degraded the complainant debasing her woman hood. You did not have the common sense to use a condom in your rape enterprise, thereby exposing the complainant to the risk of sexually transmitted diseases and infections such as HIV/AIDS a disease of which prevalence is a universal nightmare that has elicited a world wide campaign on safe sex, achieved through the use of condoms. I want you to know that your illicit enterprise has the dangerous potentials of adversely affecting the complainant's physical, emotional and psychological heath.

[20] Thulani Mhlanga, having carefully considered the triad, I am firmly convinced that the overwhelming interest of the society demands that this offence be discouraged in the Kingdom for the sake of posterity. We can achieve this end by meting out sentences that will serve as a deterrent to other youths who are even now bidding their time to pounce on unsuspecting females. In the circumstances, I deem a sentence of 10 years condign for the offence committed. I will afford you the advantage of the recent decision in Sikhumbuzo Masinga v The Director of Public Prosecutions

and others (Supra), and suspend 2 years of the sentence for a period of 2 years on the condition that you are not convicted of any offence of which unlawful sexual intercourse is a factor for the period of suspension. Sentence back dated to the 6th of November 2008 date of accused's arrest. It is so ordered. Right of Appeal and Review explained.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 28th DAY OF...July..2011

OTAJ.
JUDGE OF THE HIGH COURT