

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE No. 247/10

In the matter between:

REX

VS

CELUCOLO MAGAGULA

CORAM: SEY J.

FOR THE CROWN: MR. S. DLAMINI

FOR THE ACCUSED: IN PERSON

JUDGMENT

5th AUGUST 2011

SEYJ.

[1] The accused is indicted on a single count of Rape as appears on the indictment dated at Mbabane on the 7th day of December, 2010.

[2] The particulars of the indictment being that upon or about 30th March, 2010 and at or near Mlindazwe area in the Hhohho District, the said accused did intentionally have unlawful sexual intercourse with Z P N aged 2 years who in law is incapable of consenting to sexual intercourse.

[3] On the 29th day of June, 2011, the accused appeared before this Court and, before the indictment was read to him, he was reminded of his rights to be represented by an attorney of his choice. The accused elected to conduct his own defence and he pleaded not guilty to the indictment. The Crown led the evidence of six (6) witnesses in support of its case, closing it on 30th June, 2011.

[4] PW1 was Magistrate X Hlatshwayo of Mbabane Magistrate Court who recorded a confession statement from the accused on the 8th day of April 2010. The witness identified the accused in the dock and he produced and

tendered the said confession statement which was admitted in evidence as Exhibit A. PW1 was not cross examined by the accused.

[5] PW2 Zinhle Magagula was the interpreter who was present when PW1 recorded Exhibit A from the accused. She testified that the accused made the statement in the Siswati language and that she interpreted from Siswati to English and from English to Siswati. She said she made sure that the accused understood and that he showed no signs of not understanding and he would often nod his head to show them he understood. PW2 finally identified the accused as the person she had interpreted for. She was not cross examined by the accused.

[6] PW3 was Sebenele Magongo who is the mother of the complainant and a sister to one Dumsile Magongo. She testified that on 31st March 2010 she had gone to fetch the complainant from her sister's place at Mlindazwe. On their return home she bathe her and whilst she was doing that the

complainant cried and complained of pain and she pointed to her vagina. When PW3 asked her the cause of her pain she said "Celucolo." This witness said she reported the matter to her mother Thembi Magongo who then phoned Dumsile to come and explain what had happened. She said Dumsile and her husband arrived two days later to pick up her mother to go with them to Mlindazwe and that on their return to Elangeni they informed her that the complainant had been raped by the accused. She said the accused had apologised to her but she could not say anything. The matter was reported to the police and this witness accompanied the complainant to the Mbabane Government hospital where she was examined by a doctor. PW3 further testified that the complainant Z P N was born on 9th August 2007. The said Z was then brought into the courtroom for the Court to see her. PW3 was not cross examined.

[7] Dumsile Magongo testified as PW4. She confirmed that she is a sister to PW3 and an aunt to the complainant Z and that the latter had gone to spend time with her at her place at Mlindazwe in March 2010. She also confirmed

that the accused had been employed by her. PW4 further testified that she had received a report from PW3 that when she bathed Z she had cried and complained of pain in her vagina. She said she and her mother questioned the accused about the incident and he admitted that he had put her on his lap and he demonstrated using a cornflakes cardboard. She said this happened in the presence of her husband and together they proceeded with her mother and the accused to Elangeni to report the matter to PW3 and then they went to Lobamba police station. She said there was no other person mentioned by Z and that she had said "Celucolo did this to me."

[8] Under cross examination, PW4 maintained that the complainant had pointed at the accused only. She also denied that she and the accused had a dispute before the incident and she insisted that she had paid him his salary that month.

[9] PW5 Xolile Nomcebo Dlamini was the maid who was looking after the complainant on the day the incident occurred. She said that when she bathed her she noticed that blood was coming from her vagina and she asked her what had happened. She said she confronted Banele, Simon and the accused and asked them what had happened to the child. Banele and Simon said they had no idea as to what had caused the bleeding but the accused admitted that he was the one who had raped the child. PW5 reported the matter to PW4 when she returned from work. She identified the accused in the dock as the man who had admitted to raping the complainant. In answer to questions put to her under cross examination, PW5 stated that the accused had admitted raping the complainant after she had noticed blood coming from her vagina.

[10] PW6 was 2974 D/Inspector A. Kunene who was the Investigating Officer in this matter. He said on the 7th day of April 2010 he was on duty at Lobamba police station where he met the accused. He said he cautioned him in terms of the Judges' Rules before recording his statement. He said that he

later charged the accused for the offence of rape and he explained to him his rights to legal representation in the matter.

[11] Pursuant to Section 221 of the Criminal Procedure and Evidence Act No. 67/1968, the Crown then handed into Court the medical report of the complainant signed by Dr. S. Dlamini and dated 7th April 2010. The accused had no objection and the document was admitted and marked as Exhibit B. The Crown thereafter closed its case.

[12] When called upon to enter into his defence, the accused elected to give unsworn evidence and called no witnesses. He stated that he was 20 years old and he denied PW4's allegation that the complainant had only pointed at him. He said the issue between him and PW4 was that he had not been paid his salary. He further stated that he had nothing to say on the issue of the rape charge. That was his entire defence.

[13] It is invariably accepted by the Courts that in proving the offence of rape beyond reasonable doubt, the Crown needs to prove three factors namely:

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

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

(unreported) at page 2.

[14] Having carefully considered all the evidence adduced before the Court, it is clear to me that the accused had sexual intercourse with the complainant.

In Exhibit A which is the confession statement of the accused, he stated as follows:

"Since I had an erection I asked the child to come to me. I laid back on the bed and straddled her across my lap. She did not have any underwear and she was wearing only a T-shirt. I penetrated her and had sexual intercourse with her for about fifteen minutes until I ejaculated into her. Then when I was done

I let her down and she went to the housemaid who did not notice anything."

[15] Moreover, there is before this Court the Medical Report (Exhibit B) which shows that in the opinion of Dr. S Dlamini "penetration occurred. Hence - Hymen not intact." This evidence tends to support the evidence of PW1 who recorded Exhibit A. I therefore find that the accused did have sexual intercourse with the complainant.

[16] On the question of lack of consent, Roman Dutch Law dictates that a girl below the age of 12 years is incapable of consenting to sexual intercourse. See **R v Z 1959 (1) SA 739** where the Court held as follows:

"According to our practice, a girl under the age of 12 years cannot give consent to sexual intercourse. Even if she consents, sexual intercourse with her according to our law is rape."

In this present case, it is in evidence that the complainant Z P N was born on the 9th day of August, 2007 which means that she was aged 2+ years at the material time of the rape and as such was incapable of consenting to sexual intercourse.

[17] It must also be mentioned that all the witnesses identified the accused in the dock as the person who had raped the complainant. In the light of all the foregoing, I am satisfied that the Crown has proved the offence of rape beyond reasonable doubt. In the result, I hereby find the accused guilty as charged and I convict him accordingly.

[18] The Crown has further alleged that the act of rape was accompanied by aggravating circumstances as envisaged by In this present case, it is in evidence that the complainant Z P N was born on the 9th day of August, 2007 which means that she was aged 2+ years at the material time of the rape and as such was incapable of consenting to sexual intercourse.

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[18] The Crown has further alleged that the act of rape was accompanied by aggravating circumstances as envisaged by opined that the appropriate range of sentences for aggravated rape in Swaziland now lies between 11 and 18 years imprisonment.

[20] In **Mgubane Magagula** (supra) the aggravating factors were that the victim was a child of 10 years and that the appellant had not used a condom. The trial Court imposed a sentence of 18 years which was affirmed by the Supreme Court. Likewise in this instant case, the complainant was a minor of a tender age and the accused did not use a condom.

[21] As **Hannah CJ** succinctly put it in the case of **Paul Dlamini v R 1982-6 SLR** part 2 at 411:

"rape is regarded by parliament, by the Courts and by society
as a whole as a very grave offence

(a) rape involves a severe degree of emotional and
psychological trauma, in effect obliterating the personality of
the victim."

[22] I wholeheartedly agree with the above remarks and I am emboldened to add that in this Kingdom the prevalence of the offence of rape with aggravating factors appears to be on the increase. It is therefore imperative that the Courts should impose very severe sentences which would serve as a deterrent to other would be offenders.

[23] In arriving at my sentence, I have taken into account all the mitigating circumstances of the accused which said factors usually influence discretionary sentences. However, I must also not lose sight of two other

applicable factors namely, the gravity of the crime and the interests of society. In the circumstances, and taking into consideration that the accused was 19 years old at the time of commission of the offence, I am of the firm view that an appropriate sentence would accordingly be 12 years imprisonment without the option of a fine. The said sentence is backdated to the date of the arrest of the accused on 07/04/2010.

M.M. SEY(MRS)

JUDGE OF THE HIGH COURT

