IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Appeal Case No.: 241/2017

In the matter between

GCINUMUZI MANANA **Appelant**

And

THE KING **Respondent**

Neutral Citation: *Gcinumuzi Manana* Vs *Rex (241/2017) [2017] SZHC 187 (13th September 2017)*

Coram: Hlophe J.

For the Crown: Mr L. Dlamini

For the Defence: Miss L. Hlophe

Date Heard: 21st August 2017

Date Judgement Handed Down: 13th September 2017

Summary

Criminal Appeal against a Magistrate Court's decision –Appellant appeals a conviction for rape returned by the Nhlangano Principal Magistrate –Although appellant pleaded guilty to rape; he contends that came about because he was not legally represented –Appellant claims that sexual intercourse had been consented to and that the court a quo should have picked that from his evidence –Whether appellant's contention justified by the evidence on record –Court of the view a thorough probing of the circumstances surrounding the act of sexual intercourse were not done and this makes it difficult for the court to be certain an innocent person has not been convicted –Court of the view the fairest thing to do would be to send the matter for retrial by a different Judicial Officer or even a different court. Accordingly both conviction and sentence set aside –Matter referred for retrial before any court as may be found to have jurisdiction.

JUDGMENT

[1] The appellant was found guilty of rape by the Nhlangano Principal Magistrate and sentenced to 10 years imprisonment. The rape in question was found to have been attended by aggravating factors in as much as the appellant had allegedly not used a condom in the process and had thus exposed the complainant to sexually transmitted diseases including the HIV Aids. It is perhaps important to mention at this point, and with the benefit of hindsight, that it was not really the case of the appellant not having used a

condom than that the one he had put on had burst during the process, which perhaps has the same effect in law.

[2] It is not in dispute that at the time the offence was allegedly committed, the appellant was 21 years of age whilst the complainant was 18 years old. They were in fact both still attending school at the time.

[3] The common cause facts are that on the 26th May 2017, a Friday, around 2100 hours; the appellant and the complainant had sexual intercourse within the complainant's parental homestead's compound, a bit further from the houses and on some bushy area or at an area with long grass, away from the electric lights. Although it is not common cause why these two had to be at that secluded area at that time of the night, it is not necessary for this court to make a finding of fact in that regard as the matter turned on different facts than these.

[4] It suffices to point out that whereas the appellant painted a picture of them having had to be there for some quality time as boyfriend and girlfriend, the

complaint contended otherwise. She alleged that she had been called by the appellant who allegedly said he wanted to obtain some change from her. She denied specifically they were boyfriend and girlfriend. Whatever the merits or demerits of these contentions by the complainant, she did though say that the appellant was proposing for love from her.

[5] The crucial fact is that whilst at that secluded area, within the compound of the complainant's parental homestead the two ended up having sexual intercourse. The complainant said that same was forced on her by the appellant as she had not consented thereto, whilst the appellant said she was his girlfriend. This contention by the appellant features prominently on the record. It was only once, and as he was giving his own testimony after the crown had closed its case, that the appellant is shown on record as having said that the two of them had "agreed" to have sexual intercourse.

[6] According to the complainant, the appellant prevented her from screaming during her ordeal by closing her mouth with his hand. She further claimed that he grabbed her, managed to put on a condom and went on to have sexual intercourse with her without her consent, with the condom bursting in

the process. It is not in dispute that she had not screamed during the ordeal and had not told anyone else about her ordeal including her own parents and that she only reported to the police the next morning still without her parents allegedly not knowing. These are the issues with which the appellant took issue in his argument as shall be seen herein below. I note that no detail was given on how the closing of her mouth, the grabbing of her and the putting on of a condom at the same time was done notwithstanding that this was so crucial in the matter particularly in view of the appellant being unrepresented. Again no reason was given on record why she had not informed anyone including her parents and why she had reported only to the police the next morning. There was again no probing in that regard.

[7] When the trial commenced the appellant pleaded guilty to the charges. It is noted that he had also not put his case to the crown witnesses in a manner that established a cognizable defence. He appeared to emphasize that she was his girlfriend. As noted above he only stated briefly when he gave his testimony after the closure of the crown case, that they "agreed" to the sexual intercourse.

[8] In his Notice Of Appeal, the appellant contended that the court a quo had erred by convicting him on the uncorroborated evidence of a single witness yet same was allegedly challenged under cross examination. He contended further that the court a quo had misdirected itself by failing to appreciate that after the cross examination of the complainant and the appellant's mitigation, the latter had only admitted to having sexual intercourse with the complainant as opposed to raping her. The last contention on the Notice Of Appeal was that the appellant had failed to appreciate that the appellant was an unrepresented lay accused, particularly in view of his alleged defence.

[9] This is the line that Mr L. Dlamini for the appellant sought to maintain and emphasize in his argument. He placed in fact much emphasis on his client having allegedly shown that the sexual intercourse between the two of them was consensual. The question is whether the contentions of the appellant are supported by the evidential material on record.

[10] It is clear that when in his Notice Of Appeal and argument in court, the appellant referred to the court a quo having erred in law and in fact by convicting the appellant ' on the single evidence of the complainant which

was not corroborated", he was contending that the Learned Magistrate had not applied or observed the cautionary rule. The current position on the application of the cautionary rule in sexual cases was commented on as follows by the Supreme Court per Zietman JA **in Sandile Shabangu V The King Criminal Appeal Case No. 15/07** at **page 5 (unreported)**:-

> *"It is correct that it is only the evidence of the complainant that implicates the appellant, and the question arose whether corroboration of the complainant's evidence implicating the accused is a requirement in such a case. The so called cautionary rule in respect of the evidence of complainants in sexual cases was dealt with fully in his judgement by the Judge in the court a quo. After referring to certain English and South African cases he came to the conclusion that the cautionary rule, as hitherto applied in the courts in Swaziland, "is outmoded, arbitrary, discriminatory of women and empirically false and should no longer be part of our law." (Emphasis added)*

[11] This outmoded, arbitrary, discriminatory and empirically false rule which had been applied in earlier cases of this court such as **R V Phazamisa Kunene, Review Case No. 198/1989, R V Valdermar Dengo, Review Case No. 843 of 1988; Sandile Dlamini V R Appeal Case No.19 of 1988** (all unreported) was expressed in the following words in **R.V.Mthimkhulu; Mzamo 1987 – 1995 (2) SLR.403 (HC)** by this court per Dunn J at page 404 of that Judgement:-

> *"The need for corroboration of a complainant's evidence in cases of rape has been dealt with in numerous decisions of the High Court. The Principal Magistrate's treatment of the evidence does not indicate that his attention was ever directed at the question of corroboration. His finding that the issue in the trial boiled down to being the word of the complainant against that of the accused clearly indicates the absence of corroboration of the complainant's evidence and the failure of the prosecution to prove the accused's guilt beyond (a) reasonable doubt.*

[12] This view, which was confirming a principle expressed in numerous local judgements as expressed in the foregoing paragraph and South African Judgements (the latter including those of **R V W 1949 (3) SA 772 (A)** and **RV Snyman 1968 (2) SA 582 (A)** was departed from in **S V Jackson 1998 (1) SACR 470 (SCA),** where the position was reconsidered by the South African Supreme Court Of Appeal which came to a conclusion that the cautionary rule was based on an irrational and outdated perception. It is said that this followed an analysis of comparable Modern Legal Systems such as that of Namibia, the United Kingdom, New Zealand and America. It expressed itself in the following manner on the relevant portion at page 476 of the Law Report:-

> *"In my view, the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the state to prove the guilt of an accused beyond a reasonable doubt –no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."*

[13] Confirming the current position of the Law of Swaziland with regard the cautionary rule in sexual cases, the court in **Sandile Shabangu V Rex Supra** at page 8, of the unreported Judgement; whilst referring to the conclusion reached by Mamba J in the High Court version of the same matter which is quoted in paragraph 10 above, the Supreme Court put the position as follows:-

> *"In the present case the trial Judge (Mamba J) adopted the reasoning in the Jackson case and came to the conclusion that the cautionary rule in sexual cases is outmoded and should no longer be part of the law of Swaziland. I agree. My conclusion is that the approach set out in the Jackson case is to be applied in Swaziland. The evidence in a particular case may call for a cautionary approach but there is no general cautionary rule applicable to the evidence of complainants in rape cases."*
> *(Emphasis are mine)*

[14] It follows that I cannot agree with Mr Dlamini for the appellant that it was wrong for the Principal Magistrate to have convicted the appellant without

the evidence of the complainant having been corroborated or in its being the evidence of a single witness by the complainant. It is something else though whether the evidence in the matter did call for a cautionary approach, an aspect I shall have to revert to later on in this Judgement. In so far as Mr Dlamini sought to suggest that the version of the complainant's testimony should have been corroborated and that because it was not, there should not have been a conviction, that is no longer a correct expression of the position of our law and it should therefore be rejected.

[15] As indicated above, the appellant contended as well that the court a quo failed to appreciate that he had, when giving his testimony alleged that the sexual inter course between the two of them was consented to. Whilst it is true the appellant is shown on record to have said so, it is clear that if the matter was a properly handled one, there would be very little if any value to attach to this contention. This is because this assertion was not confirming or referring to a defence that had been put to crown witnesses but had only been mentioned for the first time when the appellant was giving his testimony.

[16] The fate of such testimony is well known in our law and it is called an afterthought. It thus falls to be rejected. The rejection of such testimony is based on the requirement that an accused person is duty bound to put his case, including his defence, to the crown witnesses during their cross examination failing which any "new" defence or testimony as raised in the defence case is viewed as an afterthought. This has been confirmed in numerous judgements of our courts including that of **Dominic Mngomezulu and Eleven Others Vs The King Appeal Case No. 96/94**.

[17] For the reasons that follow herein below, it may not be appropriate in my view to apply this rule in its wholistic form against the appellant in the circumstances of this matter, which is to say when the matter is taken in its proper context. As a starting point, the appellant, who was a lay accused person had no legal representation. It is obvious that he ordinarily would not know when to ask what question, particularly the meaning and effect of an afterthought.

[18] In the present matter, I note that other than a broad assertion to the effect that rights to representation were explained, there is no specific entry in the

record to the effect that the appellant was advised that he was required to put his defence to crown witnesses and that if he failed to do so and attempted to reveal a defence in his testimony when such defence had not been put to the crown witnesses, such would become an afterthought, and it would fall to be rejected. I say this because of what I find below to be flaws in the matter occasioned by the appellant's not being represented, when it cannot be shown that a sufficient explanation of the above stated rights was given to him. This point becomes even more magnified as one deals with the appellant's third ground of appeal which is stated in the following paragraphs.

[19] This third point on the Notice Of Appeal was that the court a quo had failed to appreciate that the appellant was an unrepresented lay accused person. In my view this short coming may not have shown itself better than it did on the question of the consent or otherwise to the sexual intercourse by the complainant. It is not in dispute that when the sexual intercourse was embarked upon, the appellant had put on a condom which got torn in the process of the sexual intercourse. Whereas the complainant told the court that she was kicking to indicate her disapproval to the sexual intercourse as the appellant grabbed her, closed her mouth and went on to put on the

condom, there was no evidence on how all this happened at the same time including her failure to scream in these circumstances. There was no illustration for instance on this alleged closing of the month as the condom was being put on which is very difficult to imagine. There was no probing on this area by either the accused or by the court, just as there does not appear to have been any assistance in probing on this area by the court.

[20] Whilst it can be understood that she could not scream if her mouth was closed, it is however unclear at what stage the condom was put including why she would not scream as same was being put on and how she remained pinned down as the condom was possibly being put on. It seems to me that the whole of the sexual intercourse encounter should have been subjected to a thorough probing if not by the accused himself, then through the court itself given his being unrepresented. This probing should have extended to ascertaining why the complainant would not immediately report to her mother or her uncle that she had been raped by the appellant who was known to her instead of allegedly reporting the incident to the police in the morning including the truthfulness of her assertion in this regard. I agree with Mr Dlamini that this was the matter where the words of the court in **S V Mutimhodyo 1973 (1) RLR 76(A) at 80 A –C** as referred to by **AM**

Ebrahim JA in Dallas Busani Dlamini And Another V The Commissioner of Police Civil Appeal Case No.39/2014 at **page 8**, ring true:-

> *"I want to repeat again what this court has said on a number of occasions that when an accused is unrepresented and when he is not very well educated, not the sort of man who is likely to understand clearly all the intricacies of court procedure, it is very wrong for a trial court to hold against such an accused the mistakes he might make such as failure to cross examine; to hold against him for instance, that he has not cross examined on a particular issue because one would have expected a skilled lawyer to have done so. It is the court's duty to assist unrepresented accused of this description in their defence and not to take technical points against them because of mistakes the accused might make in procedure."*

[21] Whilst it may be true that the appellant pleaded guilty before the court a quo, and went on not to put forward a defence to the crown witnesses and that when he attempted to do so he put no more than an afterthought which in

law had to be rejected; it seems to me that these were not sufficient for the conviction of the accused person in the circumstances of the matter, particularly when juxtta posed against the lack of clarity on how the sexual intercourse could have been forced in the circumstances where a condom had to be put on in the circumstances described if indeed she was being forced. This latter consideration becomes even stronger when considered against the likelihood that the complainant and the appellant were boyfriend and girlfriend at the time. Her failure to immediately report to her parents in these circumstances and only to report to the police in the morning fuels the strong suspicion against her.

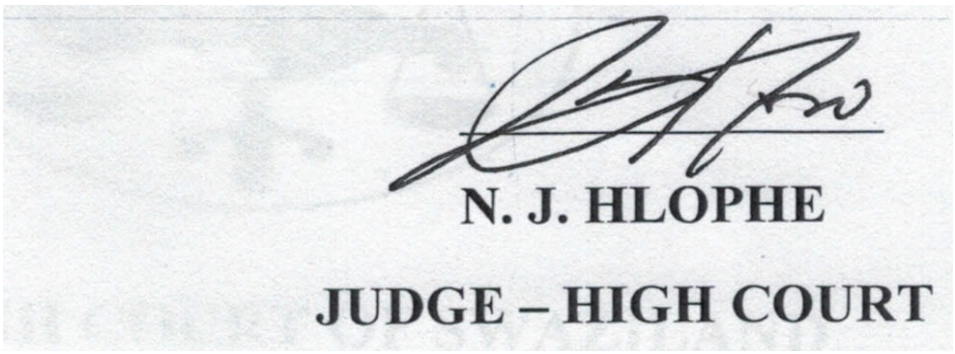
[22] It seems to me that the fairest thing to do in the circumstances with the result that a probably innocent accused does not end up in custody with a possibly lengthy sentence when the evidence of a less than candid complainant has been considered in her favour, would be to refer the matter to retrial possibly not by the same Learned Principal Magistrate to protect her from a conflicting position.

[23] For the record, the conclusion I have come to, has no impact on what the requirements of the sustenance of a rape charge are in our law; which are the identity of the accused; the fact of the sexual intercourse and the lack of consent to it. It may not be in dispute that the accused person had sexual intercourse with the complaint, the only issue being that it is unclear because of the lack of proper probing on how the sexual intercourse occurred including if it can be said that it discounts consent. In my view justice can only be done with a thorough probing having been carried out in this area to prevent an innocent accused person being sent to prison for a long time.

[24] Accordingly I will make the following order;

1. The conviction and sentence imposed against the Appellant be and are hereby set aside.

2. The matter is referred to a trial to begin *de novo* before such Court as the Director of Public Prosecutions acting together with the structures within the Judiciary as are entitled by law to make such decisions may decide in the interests of justice, taking into account the disqualification of the Principal Magistrate who heard it from again doing so.



N. J. HLOPHE

JUDGE – HIGH COURT