

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

**CASE No. 384/10**

In the matter between:

**REX**

**VS**

**SANDILE MTSETFWA**

**CORAM: SEY J.**

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

**FOR THE ACCUSED: IN PERSON**

**JUDGMENT ON SENTENCE**

**18 JULY 2011**

**SEYJ.**

[1] On the 4<sup>th</sup> day of February, 2011, the accused named herein was convicted by the Senior Magistrate in Piggs Peak Magistrate's Court for the offence of rape.

[2] The accused pleaded not guilty and at the conclusion of the trial in which the accused was not represented, and in which he gave evidence upon oath, the Magistrate found him guilty of the crime of rape with aggravating circumstances.

[3] The Magistrate having found the accused deserving of greater punishment than he was empowered to inflict has accordingly invoked the provisions of Section 292 (1) of the Criminal Procedure and Evidence Act 67 of 1938 as amended and committed the accused to the High Court for sentencing.

[4] However, before arriving at my sentence, I deem it necessary at this stage to comment on the charge which was put to the accused. It reads as follows:

"The accused person is charged with the offence of Rape. In that upon or about 04.08.2010, and at or near Buhleni area in the Hhohho region, the said accused person, an adult male, did intentionally have unlawful sexual intercourse with one N M and incapable in law of consenting to sexual intercourse and did thereby commit the said crime of Rape,

(underlining mine)

**Take further notice that this rape is accompanied by aggravating circumstances as envisaged by Section 185 bis of the Criminal Procedure & Evidence Act 67/1938 in that:**

At the commission of the offence the accused did not use a condom thereby putting the complainant at risk of contracting sexual transmitted diseases and infections."

[5] It is apparent from the above charge which was put to the accused that the age of the complainant has not been stated. However, it is in evidence from the testimony of PW3 Siphiwe Mhlanga, who is the complainant's mother, that the complainant was born in the year 1992. Also, Exhibit A, which is the medical report, reflects the "apparent age" of the complainant as "14." Since the prosecution has alleged that the offence of rape took place on the 4 day of August 2010, it follows that, at the time of the commission of the offence, the complainant was well above the age of 12. Therefore, the issue of being incapable in law of consenting to sexual intercourse did not arise.

[6] Nonetheless, I am of the considered view that the omission in failing to state the age of the complainant on the charge sheet has not vitiated or occasioned any miscarriage of justice and I find that the accused was rightly convicted of the offence of rape with aggravating circumstances.

[7] In mitigation the accused pleaded for leniency and he stated that he is still young and he would like to pursue his studies. He also told the Court that he lives with his aged grandmother whom he looks after.

[8] In fashioning the appropriate sentence for the offence for which the accused has been convicted I am mandated as the sentencing Judge to consider, inter alia, the following factors:

the circumstances of the offence

the circumstances of the offender

the public interest See the case of **Mfanasibile Gule v The King Criminal Appeal No. 03/2011.**

[9] It is the seriousness of the offence of rape, particularly one with aggravating circumstances, that warrants the imposition by the Courts of a minimum mandatory sentence of nine years without the option of a fine under Section 185 bis of the Criminal Procedure and Evidence Act 67/1938 as amended.

[10] In the case of **Paul Dlamini v R 1982 6 SLR** part 2 at 411, **Hannah CJ**

had this to say:

" 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.

(b) the physical consequences of rape are of differing severity, including the fear of venereal disease or pregnancy.

(c) rape is also particularly unpleasant because it involves such intimate proximity between the offender and the victim.

(d) rape involves abuse of an act which can be a fundamental means of expressing love for another, to which considerable value is attached."

[11] In passing sentence in this present case, I have taken into consideration the pronouncements of **Hannah C J** as outlined above. I have also considered all the mitigating factors put forward by the accused. However, I am of the view that the offence committed by the accused was a very serious one in that the accused Sandile Mtsetfwa chose to rape a school girl in the

forest and the said offence of rape was accompanied by aggravating circumstances.

[12] In the circumstances, I am of the firm view that I should mete out a sentence on the accused that would send out a strong signal to other would be offenders. The accused is hereby sentenced to 12 years imprisonment without the option of a fine.

The said sentence is backdated to the date of the arrest of the accused on 06/08/2010.

It is hereby so ordered.

M.M. SEY (MRS)

JUDGE OF THE HIGH COURT

