IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 194/11**

In the matter between:

THE KING

VS

MBUSO BLUE KHUMALO

CORAM: **OTA, J**

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

ACCUSED IN PERSON

JUDGMENT

OTA, J

[1] The accused person Mbuso Blue Khumalo is charged with the offence of Rape. The crown alleged that on or about the 30th of July 2010, and at or near Vuvulane Area in the Lubombo District, the said accused person did intentionally have unlawful sexual intercourse with N S a Swazi female adult aged twenty (20) years without her consent and did thereby commit the crime of rape.

[2] The crown further alleged that the rape is accompanied by aggravating circumstances as envisaged by Section 185 bis of the Criminal Procedure and Evidence Act 67 of 1938, as amended, (CP & E) in that.

1) At the Commission of the rape, the accused did not use a condom thereby putting the complainant at risk of contacting sexually transmitted diseases and infections.

2) The accused person heavily assaulted the victim and caused grievous harm to her.

[3] The accused pleaded not guilty to the charge, whereupon the crown called 4 witnesses in proof of its case. At the close of the crown's case, the accused testified on oath and called 4 other witnesses. In it's judgment, the court a quo convicted the accused for the offence as charged. Thereafter, the court remitted the file to this court for sentencing pursuant to Section 292 (1) of the CP & E.

[4] Before proceeding to sentence, I am obliged by law vide Section 293 (3) of the CP&E to first ascertain for myself if the conviction of the accused a quo was proper. In my view this duty is heightened in this case in the face of the allegations made by the accused person in mitigation before this court on the 26th of June 2011, to the effect that his manhood was disfunctional at the material time of this incidence, a fact which he communicated to the court a quo.

[5] It is an obvious fact from the record that the identity of the accused person is not in issue. The accused himself admitted following the complainant from the SEDCO Bar to her parental homestead on the day in question where he proceeded to assault her. The accused also by his own showing in defence, admitted climbing through the window into the room where the complainant slept on the day of the incidence. He also admitted sleeping in the same room with the complainant even though he says that they slept on two different beds. Even though the accused alleges that his manhood was disfunctional and he did not rape the complainant as alleged this line of defence in my view cannot stand. I say this because ext A, medical report of the medical examination conducted on the complainant, a day after the rape

incidence demonstrates that the complainants vestibule showed signs of recent forced vaginal penetration. It shows that the vestibule was bruised and the Fourchette torn.

[6] The medical report ext A to my mind corroborates the fact of sexual intercourse. There is prove by the accused's own showing that he slept with the complainant alone in the same room all through the night until the early hours of the following morning. This evidence to my mind is prove beyond a reasonable doubt that it was the accused that raped the complainant, irrespective of the accused's allegations that his manhood was disfunctional. The accused sought to set up a defence to this fact of sexual intercourse via the allegation that he assaulted the complainant because he caught her and his friend one Mbuso Dlamini, having sex in a toilet at the SEDCO Bar on the day of the incidence. To my mind this line of defence has no legs to stand upon. I say this because the accused failed to put this line of defence to either the complainant or the other crown witnesses. It was imperative to my mind for the accused to put this line of defence to the complainant under cross examination, in the face of the complainant's evidence in

chief that the accused assaulted her on the night in question because she had refused to leave the bar with the accused to his homestead. Even though accused did ask PW2 Gcinaphi Simelane, under cross examination whether complainant did not tell her that he found her and the said Mbuso Dlamini in the toilet of the Bar on the night in question, the accused however failed to precisely put this line of defence to PW2. The first time that this line of defence of the alleged sexual intercourse with the said Mbuso Dlamini came to the fore was during the accused's own testimony in chief in defence. It is a trite principle of law, that failure by an accused person to put his case to the crown witnesses entitles the court to treat such defence as an after thought and to disregard it see **Rex v Zimele Samson Magagula Criminal Case No. 371/08, The King v Sonnyboy Sibusiso Vilakati Case No. 140/2010.**

[7] More to this is that this line of defence runs contrary to the evidence of the witnesses called by the accused in support of his case. I say this because if the evidence of the accused were to be believed he started assaulting the complainant right from the SEDCO Bar both

in the toilet and outside the bar, upon discovering the alleged intercourse with Mbuso Dlamini and that it was at this point that they left the bar. However, his witnesses DW1 and DW2 who were both present at the SEDCO Bar with the accused and the complainant at the material time of this incidence told the court that they know that the accused and complainant were still in love because they were generally kissing and fondling each other at the bar that night. DW2 categorically told the court that the accused and complainant were in a good mood when they left the bar. This piece of evidence is clearly inconsistent with the accused's account that he assaulted the complainant right at the bar before they left. I say this because the incidence of assault should have by all intents and purposes imposed an atmosphere of acrimony between the accused and the complainant and thus runs contrary to the "*good mood*" testified to by DW2. In the light of the totality of the foregoing this line of defence advanced by the accused stands disregarded and the court a quo was right to my mind to disregard it.

[9] There is no doubt that at some point in time the accused's manhood was disfunctional. This fact is clearly admitted by the complainant in her evidence. It was also complainants evidence that the accused at some point after they had broken up informed her that the problem with his lack of erection had been solved. The complainant in the same vein insisted that the accused's manhood had regained functionality and was erect on the day of the incidence and that it was the accused who used his erect manhood to rape her. I also noticed that under cross examination of the complainant the accused laboured to demonstrate that he and the complainants had been sleeping together in the days proceeding this incidence. I have found that ext A establishes the fact of sexual intercourse beyond a reasonable doubt. To my mind the overwhelming evidence which I have already demonstrated in this judgment showing that it was the accused that had sexual intercourse with the complainant on the day of this incidence, rendered the necessity of any further medical enquiry or examination directed at the extent of the functionality of the accused's manhood otiose, in the circumstances. There is no doubt in my mind from the evidence tendered a quo that the accused's

manhood had regained functionality by the time of the incidence and that the accused raped the complainant.

[10] Furthermore, the lack of consent to the sexual intercourse was also proved beyond a reasonable doubt before the court a quo. The complainants evidence was that the accused started assaulting her upon her refusal to follow him to his homestead that night. Even though the accused alleges that the assault was as a result of the fact that he found the complainant having intercourse with one Mbuso Dlamini in the toilet of the bar that night, I have already disregarded this line of defence by the accused as an after thought. It is in the circumstances an obvious fact that the assault commenced in the wake of the complainant's refusal to go to the accused's homestead with him that night. The record shows that the accused followed the complainant to her homestead and brutally assaulted her that night. Ext A, the medical report demonstrates bruises and abrasions in the following parts of the complainant's anatomy.

"*Both priorbital areas, forehead, back, both knees, both elbows, upper lip*"

The doctors remarks on ext A are as follows:-

"*Soft tissue injuries consistent with blunt trauma within the last 24 hours*"

[11] The complainant further testified that the accused forcefully gained entrance through the window into the house in which she spent the night by pushing away the wardrobe that she had placed against the window to prevent him from gaining entrance into the house. Complainant told the court a quo that after the accused gained entrance into the house, he forcefully removed her clothes and when she resisted he threatened to assault and kill her. That the accused then proceeded to have sexual intercourse with her without her consent. The accused himself admitted assaulting the complainant repeatedly on the day in question. Since, I have already found that the accused had sexual intercourse with the complainant on the day of the

incidence, it is in my view beyond dispute that the accused forced the complainant into submission to the sexual intercourse by assaulting her. Accused labored through his own evidence and that of his witnesses to demonstrate that he and complainant were still in love at the material time of this incidence. I must say that in my view, the accused labored in vain. I say so because even if the court were to accept that the accused and complainant were still in love at the time of the incidence, this fact does not in my view legalise the unlawful sexual intercourse which the accused had with the complainant on that day. This is so because the mere fact that a man and woman are in love does not give the man an unfettered right to force himself on the woman without her consent. Therefore to my mind, whether the accused and complainant were still in love or in a relationship at the time of this incidence is immaterial in the face of the forced sexual intercourse, without the complainants consent.

[12] In the light of the totality of the foregoing 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.

[13] **Judgment on Sentence**

In mitigation a quo, the accused begged for leniency. Before this court on the 26th of June 2011, the accused again begged for leniency. He asked the court not to impose a sentence that would bring shock to his life and that will mentally disturb him. He said he has three children, the third one being with the complainant whom he had an affair with. He said that he and the complainant are still in love therefore the complainant used to visit him at the Big Bend Prisons. He said his parents passed away, and he was brought up by his great grandfather.

[14] In response Mr. Fakudze for the crown submitted that the evidence shows that the accused had regained the functionality of his manhood at the time of the incidence. That the complainant was not only raped but was brutally assaulted and was admitted for a full 7 days, in the hospital, as a result of injuries inflicted upon her by the accused. He called for a punitive sentence to discourage men who

have children with women from thinking that they own such women, thus the assault and battery in this case.

[15] In passing sentence I have warned myself of the oft quoted dictum of **Holmes JA in the case of S v Rabie 1975 (4) S.A 855 (A),** where he stated that:-

"*Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances*"

[16] I also deem it expedient to regurgitate the dictum of **Tebbutt JA in the case of Nzokozo M. Dlamini and Another v The Crown Criminal Appeal 10/2001,** where he declared thus

> "*The seriousness of their crimes, their moral blameworthiness and their lack of remorse or regret justify lengthy sentences of imprisonment. Society would require of this court that it marks it's severe disapproval of this type of behaviour by heavy sentences of incarceration. Its sentences must also serve as a*

deterrent not only to the appellants to abstain from similar behaviours in the future, but to others who may have like-minded schemes in contemplation........."

[17] In passing sentence upon you I have therefore considered your personal circumstances, demonstrated in your plea in mitigation. I have considered the fact the you are a first offender, and that you are remorseful. I have considered the fact that you have three children one which is the product of a love affair with the complainant.

[18] However, having considered your circumstances, I am still firmly convinced that the time is nigh for the courts to mete out severe sentences which will operate to curb this very violent and serious offence, by way of a deterrence to others, in the face of it's ubiquity in the Kingdom. I apprehend that it is this self same interest that engendered parliament to advocate a minimum mandatory sentence of 9 years imprisonment for the offence of rape where aggravating factors are found to be present, vide section 185 bis (1) of the CP & E. Inspite of the punitive language of section 185 bis (1), the prevalence

of this offence in the Kingdom has heightened rather than diminished. It is this factor that compelled the Supreme Court in the case **of Mgubane Magagula v The King Appeal No. 32/2010,** to peg the appropriate range of sentence for this offence at between 11 and 18 years.

[19] Mbuso Blue Khumalo, the fact that you had a love relationship with the complainant resulting in the production of a child, however did not give you the unbridled right to sexually and physically assault the complainant in the way and manner you did at the time of this incidence. The complainant still had the right to consent to or refuse sexual intercourse with you. The act of brutality and savagery you unleashed on the complainant was an affront to her dignity and worth as a woman. Your activities have the ill consequence of not only dehumanizing her but also traumatizing her emotional and psychological health. The brutal assault which you orchestrated on the complainant to have your illicit way with her is clearly an aggravating factor. Furthermore at the time of the commission of the offence you did not use a condom thereby exposing

the complainant to the risk of sexually contracted diseases and infections.

[20] Mbuso Blue Khumalo, having carefully considered the triad, I am of the firm view that upon the facts and circumstances of this case, your personal interests must submit to the interests of the complainant and the society. On these premises, I deem a sentence of 12 years fitting for the offence committed to serve as a deterrent to others. Sentence backdated to the 31st of July 2010, the date accused was arrested. It is so ordered. Right of Appeal and Review explained.

DELIVERED IN OPEN COURT IN MBABANE ON THIS DAY THE 21st......................DAY OF July.....................2011

OTA J.

JUDGE OF THE HIGH COURT