IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CRIMINAL CASE NO.302/2010

In the matter between:

REX

VS

BHEKI MICHAEL NKAMBULE

CORAM: OTA, J

FOR THE CROWN: S. DLAMINI

ACCUSED: IN PERSON

JUDGMENT

OTA, J

[1] The Accused **Bheki Michael Nkambule** was arraigned before the Magistrates Court charged with rape. The crown alleged that upon or about the 24th day of June 2009, at or near Makhewu area, the Accused person did wrongfully, unlawfully and intentionally have unlawful sexual intercourse with **L M,** without her consent and did thereby commit the crime of rape. Accused pleaded not guilty to the charge, even though the record reveals that he later changed his plea

to that of guilty. Suffice it to say that a trial was conducted in which the crown paraded a total of 6 witnesses in proof of the offence . The Accused also testified on oath in his defence and called no witnesses. In its judgment the Court a quo convicted the Accused of rape committed under aggravating circumstances. Thereafter the Court a quo remitted this case to this Court for sentencing in terms of Section 292 (1) of The Criminal Procedure and Evidence Act 67 of 1938 as amended. (CP & E)

[2] Before proceeding to sentence in this case I find a need to observe that I have carefully considered the evidence tendered a quo, and I am convinced that the Court a quo properly convicted the Accused person of the offence of rape. The Accused was positively identified by the Complainant as being her attacker. Even though the day of the rape incidence was the first day that the Complainant met up with the Accused, the record demonstrates that the Complainant was able to positively describe the Accused and identify him by his wearing apparel as well as a vivid description of the house where the Accused dragged her into and proceeded to rape her. Her vivid description of the Accused's wearing apparel caused PW4 **Ntombikayise Lukhele** to

immediately identify them as belonging to the Accused. Her description of the house where the rape incidence occurred also fit the description of the Accused's house as confirmed by PW5 **Sibongile Nkambule,** the Accused's aunt in her evidence.

[3] Besides, the Accused himself admitted in his defence that he was the one who had sexual intercourse with the Complainant on the day in question, even though he alleged that the sexual intercourse was consensual. I will come to these matters anon.

[4] Furthermore, the fact of sexual intercourse was also proved by the crown beyond a reasonable doubt a quo. Apart from the fact that the Accused himself admitted having sexual intercourse with the Complainant on the day of the incidence thus corroborating the Complainant's evidence on this wise, ext A which is the Medical Report of the Medical Examination conducted on the Complainant, at the Good Shepard Hospital a day after the rape incidence, demonstrates the fact of said sexual intercourse beyond a reasonable doubt. It is also replete from the record that the Complainant did not consent to the said sexual intercourse. Her evidence was that the Accused proposed love

to her but she refused. Accused then lured her to his homestead under pretensions of going to get a vehicle therefrom to take her home. That upon getting to the homestead there was no vehicle in sight, that the Accused then dragged her into his home where he proceeded to forcefully undress her and have sexual intercourse with her against her will. Even though the Accused sought in his defence to demonstrate that the Complainant consented to the sexual intercourse because they had a subsisting love relationship, I am however of the firm view that the Court a quo was right to reject this line of defence. I say so because the Accused failed to put this line of defence to any of the crown witnesses especially the Complainant, inspite of the fact that the essence of cross examination was fully explained to the Accused as is apparent from the record. The first time this line of defence came to light was during the Accused's testimony. It is trite that where an Accused person fails to put his case to the crown witnesses under cross examination that the Court is entitled to treat such a defence as an after thought and to disregard it. It is by reason of the totality of the foregoing that I find that the Court a quo properly found that the Accused committed the offence of Rape.

[4] My point of divergence however lies in the conviction of the Accused for Rape under aggravating factors, by the Court a quo. I say this because the record demonstrates that in remitting this case to this Court for sentencing the Court a quo proceeded as though on the premises that it's conviction of the Accused was for Rape with aggravating factors as envisaged by Section 185 *bis* (1) of the CP & E. This is clearly decipherable from the reasons for committal of the Accused at the High Court for sentencing dated 18/10/2010 and signed by the trial Magistrate, **Sindisile Zwane,** which I find a need to reproduce hereunder in extenso for avoidance of doubts in this judgment. It states thus

"*18/10/2010*

REASONS FOR COMMITTAL AT THE HIGH COURT FOR SENTENCING

The Accused person was convicted of rape and the Court made findings that aggravating circumstances were present when the offence was committed as follows:-

a) The Accused person did not use a condom thus exposing the victim to sexually transmitted diseases such as HIV and AIDS

b) The victim was a young vulnerable girl aged 17 years old, who at the time of the commission of the offence was doing Grade IV at Primary School.

Section 185 bis (1) of the Criminal Procedure and Evidence Act no 67 of 1938 provides that

> **" *A person convicted of rape shall, if the Court finds aggravating circumstance to have been present, be liable to a minimum sentence of nine (9) years without an option of a fine and no sentence or part thereof shall be suspended* [99].**

[5] In this case aggravating circumstances existed and I am of the opinion that a greater punishment should be inflicted for the offence. However or unfortunately I do not have the power or jurisdiction to impose a sentence above two (2) year.

> *Hence the need to commit an Accused person at the High Court for an appropriate sentence as provided for by Section 292 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938*".

[6] Whilst agreeing with the learned trial Magistrate that her jurisdiction is too low to accommodate the seriousness of the offence of rape, I do not however agree with her that the sentence that should be meted out in this case should be in terms of Section 185 *bis* (1) of the CP & E. I say this inspite of the fact that it is proved that the Accused did not employ the use of a condom in the rape enterprise, and it is now judicially settled that the failure to use a condom in the incidence of rape thereby exposing the victim to the risk of sexually transmitted diseases and infections, is an aggravating factor in terms

of Section 185 *bis* of the CP & E. **See Mgubane Magagula V The King, Appeal No. 32/2010**

[7] I however find that the crown cannot in *casu,* be availed of this aggravating factor in terms of section 185 of the CP & E or the other aggravating factor allegedly found by the Court a quo. Whilst not disputing the fact that a Court in sentencing is always required to weigh in the scale of Justice, both aggravating and mitigating factors, however for a Court to proceed to sentence in terms of Section 185 *bis* (1) of the CP & E, it is the Judicial consensus that not only is the crown required to notify the Accused in the charge sheet that they are proceeding in terms of Section 185 *bis* of the CP & E, but also that any factor sought to be proved by the crown as an aggravating factor, must form a part of the charge sheet.

[8] Therefore, the emergence of the Practice where aggravating factors are listed by the crown in a rider to the charge sheet. This is a sound practice which affords the Accused person the requisite notice of the case which the crown has against him. This practice was

applauded by Dunn J, in the Case of **Rex Vs Gamedze 1987 - 1995, SLR (4) 330 at 333** in the following words

> " —*whilst no duty is placed on the crown to make reference to Section 185 bis by Act No. 6 of 1986, proper practice and fairness to an Accused dictate that he should be made aware at the time of the plea that the crown intends seeking the application of the section. This is particularly so in cases of unrepresented Accused persons*"

[9] This position of our jurisprudence was backed up by the Supreme Court in the case of **Fanafana Nkosinathe Maliba V The King Criminal Appeal Case No. 5/2011, at para 13,** as follows

> " — *An accused person must be informed of the case against him or her to an extent sufficient to enable him or her to properly meet the allegations sought to be proved by the crown. The crown has in the present case listed its allegations in a rider. It is in my view essential that such allegations are listed in all such cases, but I consider that it is desirable that the lawgiver should consider the amendment of Section 185 bis in the Criminal Procedure and Evidence Act to provide for proper notice to an Accused person of the allegations which the crown wishes to prove to establish "aggravating circumstances".*

[10] In *casu* the Accused is charged with Rape simpliciter. The charge sheet did not notify the Accused that the crown wished to proceed in terms of Section 185 *bis* of the CP & E, nor is there any Rider to the charge sheet listing the aggravating factors which the Court a quo now proposes to this Court as the premises for a sentence in terms of Section 185 *bis* (1) of the CP & E. I will thus reject this proposition by the Court a quo on this wise and proceed to sentence in terms of the offence of Rape simpliciter.

[11] In mitigation before this Court on the 4th of August 2011, Accused begged for leniency. He said he is orphaned and has both his own children as well as his younger siblings to take care of. He asked for a sentence that is reformatory rather than punitive.

[12] In passing sentence on you I am enjoined by law to consider your personal circumstances, the seriousness of the offence, the interest of the society as well as the peculiar circumstances of the crime.

[13] I have thus considered your personal circumstances, especially the fact that you are a first offender and that you are remorseful. I must say that you have my sympathy. However whilst expressing my sympathy, I am quick to point out to you **Bheki Michael Nkambule,** that the offence you committed is a serious one. It is a violent, foul and nasty offence. It's seriousness is compounded by it's prevalence in the Kingdom, thus the stern stance adopted by the Courts in this Kingdom in the recent times against this offence in a bid to curb it's prevalence.

[14] The Complainant was on her way back from a school activity when you, with ill intentions lured her to your homestead where you proceeded to ravish her womanhood without her consent. You invaded her privacy and bodily integrity with impunity by your enterprise, thereby debasing her womanhood.

[15] I must say that having carefully considered the triad, that your personal circumstances must submit to the interests of the

Complainant and that of the society. In the circumstances I find a sentence of 7 years deserving of the offence committed, to serve as a deterrent to other males who are even now plotting an on-slaught upon unsuspecting females. Sentence backdated to the 20th of July 2009, the date of arrest of the Accused. It is so ordered. Right of Appeal and Review explained.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE 11 DAY OF ..Augustt….2011

OTA J.

JUDGE OF THE HIGH COURT