



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 93/2013

In the matter between:

REX

VS

FANALAKHE SIFISO XABA

Neutral citation: *Rex vs Fanalakhe Sifiso Xaba (93/2013) [2014] SZHC 219*
(22nd September 2014)

Coram:

M.C.B. MAPHALALA, J

Summary

Criminal Law – Rape – accused charged with rape accompanied by aggravating circumstances as envisaged under section 185bis of the Criminal Procedure and Evidence Act No. 67 of 1938 – accused further charged with attempted murder – held that the Crown has proved beyond reasonable doubt both offences as charged.

JUDGMENT
22nd SEPTEMBER 2014

[1] The accused is charged on two counts of Rape and Attempted Murder. On the first count of Rape the Crown alleges that on the 18th April 2012 at Gundvwini area in the Manzini region, the accused intentionally and unlawfully had sexual intercourse with Lindelwa Mngometulu, a female minor of fifteen years without her consent. This offence is accompanied by aggravating circumstances as envisaged under section 185bis of the Criminal Procedure and Evidence Act 67 /1938 as amended on the basis that the accused used a bushknife to injure the victim, the accused is an uncle to the complainant and thus abused his authority, the accused did not use a condom and thus exposing the victim to the risk of contracting sexually transmitted infections including HIV/Aids. The accused pleaded not guilty to the charge.

On the second count of attempt murder, the Crown alleges that on the 18th April 2012 at Gundvwini area in the Manzini region the accused unlawfully and with intent to kill assaulted Lindelwa Mngomezulu. The accused pleaded not guilty to the charge.

[2] PW1 Mayibongwe Khumalo testified that the complainant arrived at his homestead on the 18th April 2012. She was shaking, injured and bloodstained. She asked PW1 to drive her to Sidvokodvo Police Station. She further told PW1 that she also wanted to go to hospital. She told PW1

that she did not want to be taken to her parental homestead because she feared that the accused would kill her. PW1 drove the complainant to the police station in the company of a neighbour Musa Shongwe. PW1 is also a neighbour to the complainant. They handed her to the police. PW1 maintained his evidence under cross-examination.

- [3] PW2 Lindelwa Mngomezulu is the complainant. She resides at her parental homestead with her paternal grandmother as well as the accused; her mother has died and her father works at Ubombo Illovo Sugar Company in Big Bend. She was born on the 1st January 1996.

She testified that on the 18th April 2012, she went to the local Dipping Tank together with the accused to dip cattle. Thereafter, he asked her to accompany him to the nearest forest to collect logs which he had cut. The complainant was walking in front and the accused was walking from behind. When they reached a bushy area, the accused hit her hard on the back of her head using the blunt side of the bushknife.

- [4] The accused proceeded to insult her, undress her and raped her. Thereafter, he placed her in a nearby pithole of two (2) metres deep thinking that she was dead. He placed leaves on top of the pithole and covered her. The accused left her in the forest.

They had left home with the accused between 8 am and 9 am and travelled for less than a kilometre to the bush. The time was about 11 am when she woke up, moved out of the pithole, and crawled with her knees to the homestead of PW1; she found him with his grandmother. She asked PW1 to drive her to Sidvokodvo Police Station. The police inturn transported her to Raleigh Fitkin Memorial Hospital. Two medical doctors examined her, and, she was admitted to the hospital for two weeks. She was injured next to her left ear, neck, both knees as well as the left hand. Save for the injuries on the knees which were caused by crawling, the injuries were caused by the bushknife.

- [5] The complainant further told the Court that the accused didn't use a condom when he had forceful intercourse with her, and, that she did not consent to the sexual intercourse. The accused is a younger brother to her father. She was sixteen years of age when the offence was committed.

She was shown pictures of the injuries she had sustained when the accused hacked her with a bushknife; she cried hysterically when she was shown the photographs. Under cross-examination, the accused did not challenge her evidence but he merely asked the complainant if anybody had seen them when they went to the bush.

[6] PW3 Malobane Simelane is a community police residing at Gundvwini area. He testified that on the 18th April 2012, he received a telephone report that the complainant had been raped. He set out for her homestead, and, along the way, he met members of the community, the police as well as community police walking to the scene of crime; and, the accused was walking in front. When they reached the bush, the accused pointed at the scene of crime; the complainant's panty was lying on the scene. The accused further pointed at a pithole where he had placed the complainant after the commission of the offence thinking that she was dead. The accused further led the police to his parental homestead where he retrieved the bushknife used in the commission of the offence, and, he gave it to the police. He further handed to the police the clothing which he was wearing during the commission of the offence. PW3 maintained his evidence under cross-examination.

[7] PW4 Constable Machawe Eugene Tsabedze is a police officer who was stationed at Sidvokodvo Police Station when the two offences were committed. He was on duty when PW1 brought the complainant at the police station on the 18th April 2012. She was injured and unable to walk properly. He assisted her to alight from the motor vehicle. PW4 together with another police officer transported her to the Raleigh Fitkin Memorial

hospital. Along the way the complainant narrated to them what had happened to her. They left her at the hospital for treatment.

On their return at the police station another motor vehicle arrived transporting the accused. They introduced themselves to the accused and further told him that they were investigating an offence of rape and assault. They explained his rights to remain silent as well as legal representation.

[8] The accused led them to the scene of crime; however, they cautioned him that he was not obliged to show them anything but that whatever he showed them would be used in court as evidence. He led them to a very thick bush which was the scene of crime as well as a pithole where he had placed and covered the complainant with leaves. The deceased's panty was found on the scene, and, the accused confirmed that the panty belonged to the complainant. The police from the Scenes of Crime Unit took photographs of the scene.

[9] Thereafter, the accused led the police to his homestead. Again the accused was cautioned of his legal rights to silence and to legal representation. The accused retrieved a bushknife and handed it to the police as an exhibit together with clothes he had worn on the day of the commission of the offence. The clothes were bloodstained. The police from the Scenes of

Crime Unit took pictures of the bushknife, the bloodstained clothes as well as the homestead. Members of the community as well as community police were in attendance. The accused did not cross-examine PW4 or dispute his evidence.

[10] PW5 Constable Lindikhaya Matimba of Sidvokodvo Police Station testified that on the 19th April 2012, he was instructed by the Police Desk Officer to escort the accused to the Manzini Magistrate's Court to record a confession before Magistrate Mazibuko. He introduced the accused to the Magistrate and then went out of the office. The condition of the accused was normal and the accused never raised any objection to recording the statement. After a while PW5 was called by the Court Interpreter to escort the accused back to the police station. PW5 confirmed that he could not hear what was said in the Magistrate's office because he was waiting a distance from the office. The accused did not cross-examine PW5 or dispute his evidence.

[11] PW6 Dr. Jabu Mavundla, Senior Medical Officer based at the Raleigh Fitkin Memorial Hospital in Manzini, is one of the medical doctors who examined the complainant; the other one is Dr. Mbuva, a Zimbabwean gynaecologist who has since left the country. PW6 did the initial examination of the complainant on the 18th April 2012. She testified that when the complainant was brought for examination, she was dirty and

soiled, with bruises on both knees, abrasions on her fingers and swollen mandible; and that she was complaining of pain on the whole body. No fractures were sustained. Her conclusion was that the injuries were due to an alleged assault and rape. She referred the complainant to Dr. Mbuva, a gynaecologist.

PW6 further submitted a medical report that was prepared by Dr. Mbuva. According to this report, the hymen had freshly been torn, the perineum soiled, examination painful, finger examination not possible and the uterus not bulky; vaginal smears were also taken. Dr. Mbuva concluded that there was evidence of sexual intercourse and assault. The accused declined to cross-examine PW6, and, he did not dispute the evidence of PW6.

[12] PW7 Pretty Nxumalo is a Court Interpreter employed by the Judicial Service Commission and based at the Mbabane Magistrate's Court; in 2012 she was based at the Manzini Magistrate's Court. She testified that on the 19th April 2012, the police brought the accused to court and he wanted to record a confession with the Magistrate. The police who had come with the accused left him in the office with her as well as the Magistrate. The accused recorded a statement; he spoke in Siswati and PW7 translated his statement into English. The statement was subsequently signed by the

Magistrate, the accused and PW7. The accused declined to cross-examine PW7, and, he did not dispute her evidence.

[13] PW8 is Magistrate Mazibuko, the Judicial Officer who recorded the accused's statement; he is based at the Manzini Magistrate's Court. He confirmed that on the 19th April 2012, the accused was brought to his office by Constable Matimba to record a confession. The police officer was accompanied by the Court Interpreter, Pretty Nxumalo. Constable Matimba subsequently left his office and waited for the accused a short distance away from the Magistrate's office. The door was closed and nobody was within sight of hearing.

PW8 explained to the accused that he was a Judicial Officer, and, that he was not obliged to say anything unless he wishes to do so but that whatever he said would be recorded in writing and might be used in evidence at his trial. He further explained to the accused that he had nothing to fear and that he could speak openly and with complete frankness.

The accused told PW8 that he was not induced by police threats or promises to make the statement. He further told PW8 that he was not physically assaulted by the police during his incarceration, and that he had not sustained any injuries, bruises or wounds at the instance of the police.

Most importantly, the accused told PW8 that he was making the statement of his free volition after the police had explained to him that he could make the statement if he so wished. The statement was duly signed by the Magistrate, the accused as well as the Court Interpreter.

[14] The accused in his evidence in-chief confirmed that on the 18th April 2012, he asked the complainant to accompany him to the nearest forest to cut logs; he was carrying a bushknife. When they reached the forest, he was tempted by the devil to rape her; he pounced on her and demanded that she undress so that he could have sexual intercourse with her, but she resisted. He was able to overcome her and had sexual intercourse with her against her will.

Thereafter, the complainant threatened to report him to the police; in response, the accused hacked her with the bushknife twice on the right shoulder as well as on the knees. He left her at the scene bleeding and went home. Community police subsequently arrested him and handed him over to the Sidvokodvo Police Station. When confronted by the police, he had denied raping the complainant; however, when the police disclosed to him that the complainant was now in hospital, he admitted raping the complainant. He further admitted leading the police to his parental homestead where he handed his bloodstained clothing to the police.

[15] It is apparent from the confession that the accused did not disclose that after the rape, he had placed the complainant in a pithole and covered her with leaves thinking that she was dead. Furthermore, he did not disclose that he had led the police to the scene of crime where her panty was found. The accused declined to cross-examine PW8 and he did not dispute her evidence.

[16] PW9 Sergeant Lawrence Dlamini was the Desk Officer in-charge of Criminal Investigation Division at Sidvokodvo Police Station. He was leading the investigation team in this case. He testified that on the 18th April 2012, the accused was arrested by the police with the assistance of the Community Police. He introduced himself to the accused and further cautioned him with his rights to silence as well as to legal representation. In view of what the accused told him, he suggested that he could make a statement before a Magistrate; however, he cautioned him that he was not obliged to do so and that if he decides to record the statement, it may be used as evidence in court. On the 19th April 2012, he directed Constable Matimba to escort the accused to the Manzini Magistrate's Court to record the confession. Incidentally the accused declined to cross-examine PW9.

[17] PW9 further presented to court photographs showing the injuries sustained by the complainant; the photographs further showed the scene of crime.

PW9 explained that the police from the Scenes of Crime Unit who took photographs of the scene was attending a course outside the country in South Africa. The accused did not object to the admission of the photographs in evidence and, they were marked Exhibits 1 – 9 and 12. The bloodstained clothing worn by the accused on the day of commission of the offence were admitted in evidence and marked exhibit 10. The photographs showing the scene were marked exhibits 9, 11 and 13. Exhibit 14 is the complainant's panty and shoes, exhibit 15 is a photograph showing the accused pointing at the scene, exhibit 16 is a photograph showing the bushknife and exhibit 17 shows the accused's parental homestead.

[18] The accused declined to give evidence in his defence or call witnesses to give evidence on his behalf. Similarly, he declined to make closing arguments for his acquittal.

The Crown has proved the commission of both offences beyond reasonable doubt, and, the accused did not challenge the evidence of the Crown at all. In addition the accused recorded a confession which was made freely and voluntarily, and, the accused did not challenge the confession.

[19] Section 226 (1) of the Criminal Procedure and Evidence Act 67/1938 as amended provides the following:

“226. Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible in evidence against such person:

Provided that such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto. . . .”

Section 238 (2) provides as follows:

“Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons by reason of any confession of such offence proved to have been made by him, although such confession is not confirmed by any other evidence:

Provided that such offence has, by competent evidence, other than such confession, been proved to have been actually committed.”

[20] It is trite law that in rape cases the Crown has to prove beyond a reasonable doubt the identity of the accused, the fact of sexual intercourse as well as

the lack of consent. See the Supreme Court case of *Mandlenkosi v. Rex* Criminal Appeal No. 39/2011 at para 8.

The accused is related to the complainant; hence, his identity is not in dispute. The fact of sexual intercourse is not disputed by the accused; he admitted in his evidence in-chief that he had sexual intercourse with the complainant without her consent. The medical report also shows that sexual intercourse had taken place, and, that the hymen had freshly been torn; this means that the complainant was a virgin prior to the unlawful sexual intercourse. Accordingly, the accused is convicted of rape.

[21] The indictment further states that the offence of rape is accompanied by aggravating circumstances as envisaged under section 185bis of the Criminal Procedure and Evidence Act No. 67/1938 as amended on the following basis: firstly, that the accused used a bushknife to injure the complainant; secondly, the accused is an uncle to the complainant and that he abused his authority over her; and, thirdly, that the accused did not use a condom and thus exposing the complainant to the risk of sexually transmitted infections including HIV/Aids.

Section 185bis (1) of the Criminal Procedure and Evidence Act 67/1938 provides the following:

“185bis (1) A person convicted of rape shall, if the Court finds aggravating circumstances to have been present, be liable to a minimum sentence of nine years without the option of a fine and no sentence or part thereof shall be suspended.”

[22] The accused is also charged with Attempted Murder. It is common cause that the confession made by the accused covers both counts of rape and attempted murder. In addition the Crown led evidence of nine witnesses; and, the defence did not dispute their evidence that he hacked the complainant with a bushknife and that she sustained multiple injuries. Similarly, in his evidence in-chief the accused admitted that he hacked the complainant with a bushknife after she had threatened to report him to the police. He further placed the complainant in a pithole after the hacking, thinking she was dead. He covered her with leaves. Notwithstanding knowledge of the serious injuries sustained by the complainant, the accused did not assist her to access medical treatment; he left her for dead in the bush.

[23] It is well-settled that in order to support a conviction of attempted murder, there need not be a purpose to kill proved, it is sufficient if there is an appreciation that there is some risk to life involved in the action contemplated coupled with recklessness as to whether or not the risk is fulfilled in death.

See the cases of *Rex v. Huebsch* 1953 (2) SA 561 (A) at 567

Henwood Thornton v. Rex 1987 – 1995 SLR 271 (CA) at 273

It is apparent from the evidence that when the accused hacked the complainant with a bushknife, he appreciated the risk of life involved coupled with recklessness as to whether or not the risk is fulfilled in death. Accordingly, the accused is also convicted of attempted murder.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Crown

Accused in person

Senior Crown Counsel Lomvula Hlophe