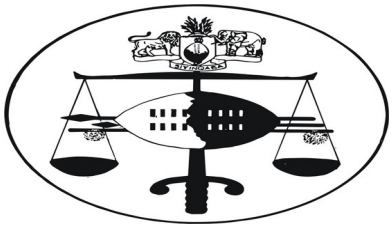

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 43/11

In the matter between:

MELUSI MASEKO **APPELLANT**

AND

REX **RESPONDENT**

Neutral citation: *Melusi Maseko v Rex (43/11) [2012] SZSC 11 (31 May 2012)*

CORAM: **A.M. EBRAHIM, JA**
S.A. MOORE, JA
M.C.B. MAPHALALA, JA

Heard **:** **4th May 2012**
Delivered **:** **31st May 2012**

Summary

Criminal Appeal – Conviction for the rape of fifteen year old girl – appeal against conviction and sentence dismissed – existence of aggravating circumstances not proved by the Crown beyond reasonable doubt – no misdirection by the Trial Court – sentence not grossly excessive or harsh.

JUDGMENT

M.C.B. MAPHALALA JA

[1] The appellant was convicted in the court a quo with the crime of Rape and sentenced to nine years imprisonment. The Crown had alleged that the offence is accompanied by aggravating circumstances in accordance with section 185 bis of the Criminal Procedure and Evidence Act no. 67 of 1938. The Crown had alleged that the appellant had infected the complainant with a sexually transmitted disease; however, it failed to prove this allegation beyond reasonable doubt.

[2] The Appellant was tried and convicted by the Nhlangano Magistrate's Court and subsequently committed to the High Court for sentence in terms of section 292 (1) of the Criminal Procedure and Evidence Act; the underlying reason for the committal was that the Magistrate's Court did not have jurisdiction to impose the appropriate sentence in view of the gravity of the offence.

[3] The court *a quo,* upon being satisfied that the conviction by the trial magistrate was proper in accordance with section 293 of the Criminal Procedure and Evidence Act, imposed a sentence of nine years imprisonment backdated to the date of his arrest. The appeal is both on conviction and sentence.

[4] In his grounds of appeal the appellant argued that he was innocent of the crime of rape for which he was convicted. He further argued that the evidence of the Crown witnesses was contradictory; and, that the medical report proved that he did not commit the offence of rape.

[5] However, the evidence of the Crown proves the commission of the offence and the Crown witnesses are not contradictory as alleged but corroborated one another. A sister to the complainant Celiwe Kunene testified that she knows the appellant and they stayed in the same area.

[6] She told the court that on the 30th January 2010 she was walking home from Gege with the complainant and Ntombifuthi Kunene. As they passed the homestead of the appellant, he called the complainant and asked her to take a cellphone; and the complainant remained behind as requested by the appellant. They proceeded with their journey until they arrived at home; this was before sunset and the sun was still shining. In the evening their father asked for the complainant, and, they told him that they left her behind with the appellant who had called her to take a cellphone.

[7] The complainant's mother Jabu Khumalo told the court that she knows the appellant, and that his home was in the same area and not far from

her home. She further told the court that the appellant often came to her homestead to recharge his cellphone battery.

[8] She further told the court that on the night of the 30th January 2010, the complainant arrived home crying and told her that the appellant had raped her next to his home in a maize field; the complainant further told her that the appellant physically assaulted her before the rape. She corroborated the evidence of Celiwe Kunene that they were walking with Ntombifuthi Kunene and the complainant when the appellant called her to take a cellphone to recharge the battery. She reported the incident to her brother in-law Bhutana Kunene and later she phoned the police who arrived and took the complainant with her to the scene of crime; and later to Mankayane Government Hospital for examination by a doctor. She noticed scratch marks on her neck.

[9] During the criminal trial she identified a pink panty and a white skirt which the complainant was wearing on the day she was raped by the appellant. The panty appeared to be soiled around the vaginal area. The white skirt was dirty with a dark spot on the lower part.

[10] The complainant testified that she knew the appellant and that his home is in the same area as her home. She corroborated the evidence of Celiwe Kunene and her mother in all the material respects. She further

told the court that when the appellant reached her, he suddenly changed the subject of the discussion and told her that she was in love with him; when she denied this, he hit her with an open hand on her cheek. She shouted for help, he grabbed her and throttled her; the other two girls had left since they were driving donkeys. He pulled her by hand into a maize field below the footpath. He ordered her to sit down, and, she complied. Thereafter, he ordered her to remove her panty, but she did not comply.

[11] He removed her panty and proceeded to rape her. She explained that the appellant forced her to lie down on her back; then he removed his trouser and underwear and had unlawful sexual intercourse with her. She told him that she would report at home what he was doing to her; his response was that whoever had a problem would come to him.

[12] When he had finished, she put on her panty and went home. She reported to her mother what the appellant had done to her; and her mother subsequently phoned the police who came and took her to the scene of crime and later to Mankayane Government Hospital for examination by a doctor.

[13] During cross-examination, she told the court that she never consented to the sexual intercourse with the appellant. She further told the court that

the appellant did not wear a condom when he raped her; and that she had never had sexual intercourse prior to this incident. She also told the court that she was still aggrieved by the rape incident and that she was angry and crying when reporting the incident to her mother. When drafting the charge sheet, the Crown failed to state that the appellant did not use a condom when committing the offence; this would have constituted an aggravating circumstance in accordance with section 185 bis of the Criminal Procedure and Evidence Act, namely, exposing the complainant to sexually transmitted diseases and infections. Similarly, the Crown could have alleged that the complainant was a virgin when the offence was committed; this would have constituted aggravated circumstances as well.

[14] The medical report of the complainant was admitted in evidence by consent in terms of section 221 of the Criminal Procedure and Evidence Act. The doctor observed that there was evidence of sexual encounter as seen by the hyperaemia of the vestibule and fourchette, and, that sperms were found in the specimen taken. The hymen was absent and only one finger could be inserted into the vagina; the examination was painful as a result of an infection. The report further alluded to the existence of foul smelling in her private parts.

[15] The medical report does not say that the complainant had a sexually transmitted disease. The court *a quo* correctly found that the infection to the complainant must have been caused by the injuries and bruises to the vestibule and fourchette as a result of the forced sexual intercourse resulting in the hyperaemia, that is, the accumulation foul smelling blood in her private parts leading to the infection. The defence advanced by the appellant based on his medical report marked exhibit B cannot succeed as a defence to the offence on the basis that her medical report marked exhibit A does not say that the complainant had a sexually transmitted disease. It is for the same reason that the trial court correctly found that the Crown had failed to prove aggravating circumstances.

[16] The police investigating officer Thandazile Sihlongonyane confirmed that the complainant's mother reported the commission of the offence to the police. She further told the court that during the interview with the complainant, she looked traumatised and had some scratch marks on her neck. She further told the court that the complainant took her to the scene of crime where she had been raped; thereafter, the complainant was taken to Mankayane Government Hospital where she was examined and treated. The complainant gave her a white skirt which had some dirt and a pink panty as exhibits. Thereafter, on the 14th February 2010, she arrested the appellant and subsequently charged him for the offence.

[17] The Trial Court correctly found that the Crown had proved the commission of the offence beyond reasonable doubt. The evidence of the complainant, her mother Jabu Nxumalo, her sister Celiwe Kunene, the police investigating officer Thandazile Sihlongonyane as well as the Medical Report are corroborative in this regard.

[18] It is trite law that in rape cases the Crown bears the onus of proving beyond reasonable doubt the identity of the accused, the fact of the sexual intercourse and the lack of consent by the complainant. In certain cases the evidence of the complainant must be corroborated in order to prevent a failure of justice. See the case of *Mandla Shongwe and Rex* Criminal Appeal No. 21/11 (unreported). Corroboration in rape cases is not strictly required in this jurisdiction. However, the evidence in a particular case may call for a cautionary approach.

- See for example, *S. v. J* 1988 (i) SACR 470 (SCA), *Roy Ndabazabantu Mabuza v. Rex* Criminal Appeal No. 35 of 2002 (unreported) and *Themba Donald Dlamini v. the King* Criminal Appeal No. 14/1998 (unreported).

[19] The court *a quo* was correct in finding that the complainant did not consent to sexual intercourse with the appellant. The appellant assaulted the complainant, then pulled her to a nearby maize field where he

forcefully removed her underwear and had unlawful sexual intercourse with her. The evidence of her mother that she arrived home crying because of the sexual assault further shows lack of consent.

[20] The Crown has also established the identity of the accused beyond reasonable doubt. The complainant resides in the same neighbourhood as the appellant, and both had known each other for quite some time.

[21] In light of the aforegoing, the appellant was properly convicted. The Crown proved beyond reasonable doubt the commission of the offence.

[22] I now turn to deal with the issue of sentence. The appellant was sentenced to nine years imprisonment. It is my considered view that the appeal on sentence is without any merit considering the accepted range of sentences in this jurisdiction for rape cases.

[23] This court has repeatedly stated that sentence is pre-eminently a matter within the discretion of a trial court. An appellate court will not generally interfere unless there is a material misdirection resulting in a miscarriage of justice or that the sentence was wrong in principle or that it was shockingly harsh or that it is a sentence which induces a sense of shock. The appellant has not shown the existence of such a misdirection

in this case. See the case of *Sam Du Pont v. Rex* Criminal Appeal No. 8 of 2008 and *Jonah Tembe v. Rex* Criminal Appeal No. 18 of 2008.

[24] On the contrary, the record shows that the trial court properly took into account the triad, that is the personal circumstances of the appellant, the seriousness and gravity of the offence as well as the interests of society. This court should mark its abhorrence of the prevalence of the crime of rape; and, this calls for the imposition of appropriate deterrent sentences.

[25] This court has accepted that the appropriate range of sentences for rape lies between eleven and eighteen years. See the case of *Mgubane Magagula v. Rex* Criminal Appeal No. 32/2010. *His Lordship Justice Stanley Moore* who delivered the unanimous judgement of the court stated that this range which is the mid-range between seven and twenty two years could be adjusted upwards or downwards depending upon the peculiar facts and circumstances of each particular case.

[26] Accordingly the appeal against conviction and sentence is dismissed.

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M.C.B. MAPHALALA

JUSTICE OF APPEAL

I agree: A.M. EBRAHIM
JUSTICE OF APPEAL

I agree: S.A. MOORE
JUSTICE OF APPEAL

FOR APPELLANT IN PERSON

FOR RESPONDENT S. FAKUDZE

DELIVERED IN OPEN COURT ON 31st MAY 2012.