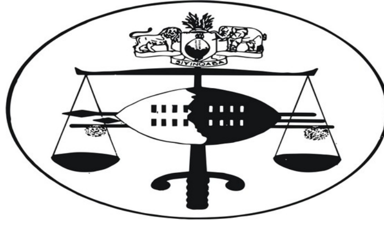

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 12/12

In the matter between:

MBUSO BLUE KHUMALO **APPELLANT**

AND

REX **RESPONDENT**

Neutral citation: *Mbuso Blue Khumalo v Rex (12/12) [2012] SZSC 21 (31 May 2012)*

CORAM: **DR. S. TWUM, JA**
M.C.B. MAPHALALA, JA
A.E. AGIM, JA

Heard : **11th May 2012**
Delivered : **31st May 2012**

Summary

Criminal Appeal – Rape - Appeal against conviction and twelve year sentence - aggravating circumstances in terms of section 185 bis of the Act established – section 5 (3) Appeal Court Act No. 74 of 1954 invoked – Appeal against conviction dismissed – sentence set aside and replaced with 18 year sentence.

JUDGMENT

M.C.B. MAPHALALA JA

[1] The appellant was convicted by the Simunye Magistrate's Court of Rape with aggravating circumstances as envisaged by section 185 bis of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended; the one factor was that the appellant did not use a condom and thereby putting the complainant at risk of contracting sexually transmitted diseases and infections. Furthermore, the appellant brutally assaulted the complainant and caused her grievous bodily harm prior to committing the offence.

[2] After convicting the appellant, the Magistrate's Court subsequently remitted the case to the High Court for sentencing pursuant to section 292 (1) of the Criminal Procedure and Evidence Act. The Magistrate was of the opinion that a greater punishment should be imposed for the offence, and, that she did not have the jurisdiction to impose the appropriate sentence in the circumstances of the case.

[3] The High Court enquired into the circumstances of the case and further considered the record in accordance with section 293 of the Criminal Procedure and Evidence Act; and, after satisfying itself of the guilt of the appellant, it sentenced him to twelve years imprisonment. The sentence was backdated to the date of his arrest.

[4] The appellant has appealed against both conviction and sentence on the grounds that he was "erroneously, wrongfully and unfairly" convicted and subsequently sentenced for the offence of rape. He pleaded his innocence and denied committing the offence for the following reasons: first, that the complainant is his girlfriend and the mother of his three year old child; secondly, that on the alleged day, he did not have sexual intercourse with the complainant because his manhood was dysfunctional. He further argued that on the day in question he found the complainant having sexual intercourse with another man.

[5] During the hearing of the appeal, the appellant who was now represented by Counsel submitted six Amended Grounds of Appeal: first, that the trial court and court *a quo* erred in law and in fact in finding that the offence of rape was proved beyond reasonable doubt; secondly, that the trial court and court *a quo* erred in finding that the assault was intended to induce the complainant to submit to the commission of the rape; thirdly, that the trial court as well as the court *a quo* erred in law and in fact in disregarding the appellant's defence that his penis was dysfunctional; fourthly, that the trial court and court *a quo* erred in law and in fact in finding that the appellant broke a window to gain entry to the house when the complainant used the same window to gain entry; fifthly, that the trial court and court *a quo* erred in law and in fact in disregarding the contradictory evidence of the Crown witnesses;

lastly, that the sentence of twelve years imprisonment induces a sense of shock taking into account the circumstances of the case, and in particular that the complainant is the mother of his three year old child.

[6] Notwithstanding the grounds of appeal, the appellant in paragraph 2 of his heads of argument concedes the following:

> "It will be submitted for the appellant that most of the Crown's evidence was not challenged. It is also clear from the record that the learned Magistrate and the High Court found that the appellant also failed to put his defence to the Crown witnesses. This therefore led to the conclusion that his assertion and/or story was an afterthought and liable to be disregarded in the circumstances of the case."

[7] The appellant in his heads of argument justifies his failure to challenge the Crown's evidence and further put his defence in the following respect: first, that it was his first time to appear before a court of law; secondly, that the trial court did not assist him during the trial. Contrary to these assertions by the appellant, the record shows that the trial court explained the rights of the appellant in full both in respect of legal representation, testing the veracity of Crown witnesses by cross-examination and putting across his defence to them. The appellant was not only afforded an opportunity to cross-examine the crown witnesses but he was given the opportunity to testify in his defence and further call defence witnesses.

[8] The Crown led the evidence of four witnesses. The complainant Nontsikelelo Nomcebo Simelane aged twenty years testified that on the 30th July 2010 she was at SEDCO shops at Vuvulane and the time was just before midnight; she was in the company of Mbuso Dlamini, Mbabane Dlamini, Mcebo Khumalo and Matiti drinking alcohol inside a bar at SEDCO. She told the court that they had spent five hours at the bar drinking.

[9] The appellant who is the father of her child Thandokuhle Khumalo asked to talk to her outside the bar and she obliged. She told the court that she was no longer his girlfriend and that their relationship ended in December 2009.

[10] The appellant asked her to accompany him to his homestead and when she refused, he slapped her once with an open hand. She told the court that when this incident occurred, there were many other people in the vicinity including Mbabane Dlamini.

[11] The appellant took off her shoes but later gave them to her; he also demanded her cellphone. Mbuso Dlamini, Mbabane Dlamini, and Jabulane Nkambule intervened and advised him to stop assaulting her; when the bar closed, she walked home, and the appellant followed her from behind and found her along the way. He started talking to her and

when her cellphone rang, he grabbed it. When they entered the gate at home, he again physically assaulted her with an open hand; she ran away leaving her shoes behind.

[12] The complainant testified that it was not the first time that the appellant had accompanied her home after their relationship had ended, and, that the last time he did this was in June 2010. She explained that his motive was to ask for a "love back".

[13] She told the court that the people at home including her grandmother witnessed her assault by the appellant. They shouted at him, telling him to stop, but he threatened to assault her grandmother. She entered the main house and saw him through a window picking up a stone and further removing her clothes from the washing line. She went outside to check what he was doing. He threw the clothes on the ground and started assaulting her again. She shouted for help and nobody rescued her; she eventually escaped and entered the boys' house through a window. He followed her, damaged a window and entered the house; he pushed away the wardrobe which the complainant had used to prevent him from entering through the window. He continued to assault her inside the house; she called the police emergency hotline number where she reported the assault. Again the appellant assaulted her several times for calling the police.

[14] He took her from the floor and threw her on the bed, and then touched her breasts and bums. He forced her to lie on the bed facing upwards; and, he removed her pants and underwear. When she complained at what he was doing, he threatened to assault her again. She conceded that she did not resist because he threatened to assault and kill her.

[15] After he had undressed his trousers and underwear he opened her thighs; and she tried to close them but he opened them and proceeded to have sexual intercourse with her. He continued until he ejaculated inside her vagina. She denied consenting to sexual intercourse with the appellant. She conceded that before 30th June 2010 they had consensual sexual intercourse with the appellant. She further told the court that she did not respond when the appellant had sexual intercourse with her on the 30th July 2010 because she had not consented.

[16] The appellant did not leave the house after committing the offence but slept in the house. He left early in the morning through the same window. She reported the incident to her grandmother Gcinaphi Simelane at 0500 hours. He did not use a condom. During the course of the day on the 31st July 2010 she also reported the incident to the police, and, they took her to hospital where she was examined by a doctor and subsequently admitted as an in-patient for seven days.

[17] The evidence adduced by the complainant is inconsistent with consent to sexual intercourse. During cross-examination the appellant raised a defence that he could not have committed the offence because his manhood was dysfunctional those days and incapable of an erection; this was denied by the complainant who insisted that the appellant had sexual intercourse with her.

[18] She told the court that she noticed that his penis was dysfunctional in June 2009 when their relationship was still good; and, that before 30th June 2010, the appellant had informed her that his penis was functional and that it was cured in August 2009. She also told the court that on the 30th June 2010 they had consensual sexual intercourse and his manhood was functional.

[19] The medical report was admitted in evidence by consent, and the appellant stated that the doctor should not be called to give evidence because the contents as read in court were clear. According to the report, the condition of the clothing taken as exhibit, that is, the skirt and panty were soiled, blood-stained and torn; that there was evidence of physical assault: bruises and abrasions in her body including upper lips, both elbows, both priorbital areas and that the soft tissue injuries were consistent with blunt trauma within the last twenty-four hours.

[20] According to the medical report, the vestibule was bruised, hymen broken, four fingers entry into the vagina, and, examination easy, the fourchette torn, and there was an abnormal yellow discharge. According to the doctor, there was evidence of recent forced vaginal penetration; and, that the bruised vestibule showed signs of recent forced vaginal penetration. The doctor also opined that the complainant is sexually active with evidence of multiple vaginal penetrations; and that there was no fresh tears of the hymen. The medical report also confirmed that the complainant was physically assaulted in the last twenty-four hours.

[21] Gcinaphi Simelane told the court that on the 30th July 2010 at about midnight she heard the complainant crying and asking for help. The complainant asked her to open the door, and, she sent Mcondisi Nxumalo to open the door. She entered the house and went to her room. After twelve to fifteen minutes, she heard the complainant asking for help as she was being assaulted outside the main house. She peeped through a window and was able to identify her assailant as the appellant because the lights were on; she knew him as the father of the complainant's child. He was pulling her by her clothes and assaulting her; and, she told him to stop the assault but he continued.

[22] In the morning on the 31st July 2010 at about 0400 hours she met the appellant and the complainant next to a house within the homestead,

and, she asked him what he was doing to her as she noted that her face was swollen; in reply he said he wanted to take her to hospital. However, he never did that. The incident was reported to the police who took her to hospital where she was admitted as an in-patient for six days.

[23] She confirmed that in 2009 and 2010 the complainant had told her that her relationship with the appellant was terminated.

[24] The investigating officer in the case Constable Mkhonzi Lukhele told the court that on the 31st July 2010 whilst she was on duty, she received a call from the complainant who was reporting a rape and assault incident; he went with another police officer Constable Khumalo to the residence of the complainant. They found her in a bad state; and, they took her to hospital where she was admitted. Thereafter, they arrested the appellant.

[25] In his evidence in-chief, the appellant told the court that they were drinking alcohol together with the complainant and his friends at a bar; and that subsequently, he found the complainant having sexual intercourse with Mbuso Dlamini inside a toilet. He admitted that he assaulted her with an open hand, kicks and fists several times; and, that

when the bar closed, he went with her to her homestead. He further admitted assaulting her on their arrival at her homestead.

[26] However, it is worth mentioning that during cross-examination, the appellant did not put to the complainant that he found her having sexual intercourse with Mbuso Dlamini in the toilet and that this was the reason he assaulted her. The complainant denied sexual intercourse with Mbuso Dlamini and told the court that the appellant assaulted her for refusing to go with him to his homestead. This was again not disputed by the appellant.

[27] In addition the appellant did not put to the police investigator that he assaulted her for having sexual intercourse in the toilet with Mbuso Dlamini. His witnesses did not assist him in this regard. Furthermore, his witnesses placed emphasis on the alleged existence of a relationship between the appellant and the complainant which she denied; and, this does not assist him on the offence charged. When asked by the prosecution why the complainant did not subsequently withdraw the charge against him if their relationship was still good, he failed to offer a possible explanation.

[28] In a rape case the prosecution bears the onus of proving beyond reasonable doubt three essential requirements of the offence, namely, the

identity of the accused, the fact of sexual intercourse as well as the lack of consent. See cases of *Mandlenkosi Daniel Ndwandwe v. Rex* Criminal Appeal No. 39/2011 at para 8; *Mandla Shongwe v. Rex* Criminal Appeal No. 21/ 2011 at para 16.

[29] The identity of the appellant as the offender is not in issue. The appellant is known to the complainant; he is not only his ex-girlfriend but they have a minor child.

[30] The court *a quo* correctly found that the appellant had sexual intercourse with the complainant without her consent. The evidence further shows that the appellant regained the functionality of his manhood in August 2009; and that on the 30th June 2010 they had consensual sexual intercourse and his manhood was functional. The evidence also shows that on the day in question his manhood was functional.

[31] P.M.A. Hunt in his book entitled, South African Criminal Law and Procedure, 2nd edition, Juta Publishers, 1982 at page 440, the learned authors state the following with regard to the act of sexual intercourse:

> "There must be penetration, but it suffices if the male organ is in the slightest degree within the female's body. It is not necessary that the hymen should be ruptured, and in any case it is unnecessary that the semen should be emitted. But if there is no penetration, there is no rape even though semen is emitted and pregnancy results."

[32] The medical report admitted in evidence by consent further proves that there was penetration of the complainant's vagina. The doctor further made a finding that the bruised vestibule shows signs of recent forced vaginal penetration.

[33] The court *a quo* further found correctly that the complainant did not consent to the sexual intercourse. It is apparent from the evidence that the appellant started the physical assault upon the complainant when she refused to accompany him to his homestead. The evidence by the appellant that the reason for assaulting her was because he found her having sexual intercourse with Mbuso Dlamini in a toilet cannot stand because that was never put to the complainant during cross-examination.

[34] The brutal attack by the appellant upon the complainant continued unabated even at her homestead. When she ran away to the boys' house, he pursued her and further smashed a window to gain entry into the house. He assaulted her repeatedly inside the house. He threw her on the bed, undressed her and had sexual intercourse with her. When she tried to resist, he threatened to assault and kill her. The appellant does not deny the assault. It is very clear in the circumstances that the assault was intended to induce submission to the unlawful sexual intercourse.

[35] In the case of *R. v. Swiggelaar* 1950 (1) PH H61 (A) at 110 – 111 the court said:

> "If a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realizes is useless."

[36] The Swiggler's case above reflects our law because the essence of the crime of rape is that the complainant has not consented to the sexual intercourse that took place. The absence of physical resistance by the complainant does not amount to consent; the reality is that the submission may have been induced by threats of violence, fear or duress or incapacity to consent. The woman's consent must be real and given prior to the sexual intercourse.

[37] The appellant further alleged that the complainant was his girlfriend which is denied by the complainant. Our law is clear that even your wife or girlfriend must consent to sexual intercourse. Jonathan Burchell in his book "Principles of Criminal Law", third edition, Juta Publishers in 2005 at page 705 states clearly that in the past intercourse without consent was not unlawful where it took place between husband and wife. It was said that a woman irrevocably consents to her husband's

exercise of his conjugal rights when he gets married. However, this is no longer the Law. For sexual intercourse to be lawful, the woman should consent.

[38] The appellant further appealed against the sentence of twelve years imposed by the trial court. The record reflects that when sentencing the appellant the court *a quo* took into account the triad, that is, his personal circumstances, the seriousness of the offence as well as the interests of society.

[39] The appellant has been convicted of rape with aggravating factors. Section 185 bis (1) of the Criminal Procedure and Evidence Act no. 67 of 1938 provides the following:

> "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 an option of a fine and no sentence or part thereof shall be suspended."

[40] The imposition of sentence lies within the discretion of the trial court, and an appellate court will only interfere with such a sentence if there has been a material misdirection resulting in a miscarriage of justice. The appellant has a duty to satisfy the court that the sentence is so grossly harsh or excessive or that it induces a sense of shock as to warrant interference in the interests of justice: see the cases of *Benjamin*

Mhlanga v. Rex Criminal Appeal No. 12/2007 and Vusi Musi Lukhele and Another v. Rex Criminal Appeal No. 23 /2004; Mandlenkosi Daniel Ndwandwe v. Rex Criminal Appeal No. 39/2011 ad Mandla Shongwe v. Rex Criminal Appeal No. 21/2011

[41] *His Lordship Justice Stanley Moore JA* in the case of *Mgubane Magagula v. Rex* Criminal Appeal No. 32/2010 found that the range of sentences for aggravated rape lies between eleven and eighteen years imprisonment. In the present case the Crown has succeeded in proving the existence of aggravating circumstances. Firstly, that the appellant had sexual intercourse with the complainant without a condom. By so doing he put the complainant at risk of contracting sexually transmitted diseases and infections. Furthermore, the evidence shows that the appellant brutally assaulted the complainant consistently and repeatedly over a long period of time. She was subsequently admitted in hospital for six days; the appellant has also admitted the assault.

[42] In light of the brutal assault on the complainant, as well as his failure to use a condom, it is my considered view that the trial court misdirected itself on the twelve year sentence in light of the appropriate range of sentences of this nature in this jurisdiction. The sentence imposed by the trial court is too lenient when considering the facts and circumstances of the case. Such a lenient sentence will send a wrong

message to those men who continue to sexually abuse innocent and defenceless women and children. This court has a Constitutional duty to protect the fundamental rights and freedoms of all including women and children. The prevalence of the crime of rape in this country continues to be a great source of concern, and this court is obliged to effect deterrent measures as the final court in the land.

[43] It is very important for this court to strive at uniformity in sentences of rape bearing in mind the facts and particular circumstances of each case. This court is enjoined by section (5) (3) of the Court of Appeal Act No. 74 of 1954 to pass such appropriate sentences as it thinks are warranted by law. This section provides the following:

> "5. (3) On appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefore as it thinks ought to have been passed, and in any other case shall dismiss the appeal."

[44] I invoke section 5 (3) of the Court of Appeal Act, mindful of the principle of our law that sentence is pre-eminently a matter within the discretion of the trial court. However, this court has a Constitutional duty to protect society against the scourge of sexual onslaught committed against defenceless women and children by selfish sex

predators who have no regard for the fundamental right to dignity. This jurisdiction is fraught with rape victims as young as three years of age. If this trend continues, the fundamental rights entrenched in the Constitution would count for nothing. The continued prevalence of the crime of rape is an indictment to this court as the highest court in the land to take a decisive action in the fight to restore the dignity of women by imposing appropriate deterrent sentences to rape offenders.

[45] In the case of *Mandlankosi Daniel Zwane v. Rex* Criminal Appeal No. 39/2011, this court confirmed an eighteen year sentence for aggravated rape. In the case of *Sifiso Cornelius Ngcamphalala* Criminal Appeal No. 34/2003 this court confirmed a fifteen year sentence for aggravated rape. Similarly in the case of *Albert Khumalo v. the King* Criminal Appeal No. 55/2003 this court confirmed a fifteen year sentence for aggravated rape; this was the same case in the appeal of *Mlamuli Obi Xaba v. Rex* Criminal Appeal No. 7/2007. In the case of *Mgubane Magagula v. the King* Criminal Appeal No. 32/ 2010 a sentence of eighteen years for aggravating rape was confirmed. In *Moses Gija Dlamini v. Rex* Criminal Appeal No. 4/2007 this court confirmed a twenty year sentence for aggravated rape.

[46] *His Lordship Justice Stanley Moore JA* in the case of *Mgubane Magagula v. Rex* Criminal Case No. 32/2010 (unreported) at paragraph 14 and 15 stated the following:

> "Rape is perhaps the ultimate invasion of human privacy…. Succeeding generations of judges in every jurisdiction, including the judges of this Kingdom, have weighed against the barbarity of rape. They have condemned in the strongest terms its brutality and savagery, its affront to the dignity and worth of its victims, its dehumanizing reduction of women to the status of mere objects for the unrequited gratification of the basest sexual passions of rampant males, and the long term havoc which the trauma of rape is capable of wreaking upon the emotional and psychological health and well being of its victims. It is for these reasons, and because of the disturbing frequency of the abominable offence of rape in this Kingdom that persons convicted of this heinous crime must expect to receive condign sentences from trial courts."

[47] Accordingly the following order is made:

(i) The appeal against conviction is dismissed.

(ii) The sentence of twelve years imprisonment ordered by the trial Court is set aside and replaced with a sentence of eighteen years imprisonment.

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M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree: DR. S. TWUM

JUSTICE OF APPEAL

I agree: A.E. AGIM

JUSTICE OF APPEAL

FOR APPELLANT Mr. O. Nzima

FOR RESPONDENT Mr. S. Fakudze

DELIVERED IN OPEN COURT ON 31st MAY 2012.