IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal case No: 31/2014

In the matter between:

NKOSINATHI SIBANDZE **APPELLANT**

VS

REX **RESPONDENT**

Neutral citation: *Nkosinathi Sibandze v Rex (31/2014) [2014] SZSC19 (9th December 2015)*

CORAM: **M.C.B. MAPHALALA CJ,**
J.P. ANNANDALE, AJA,
M.D. MAMBA AJA.

Heard **26th November 2015**
Delivered **9th December 2015**

Summary

Criminal Appeal – aggravated rape – appeal against both conviction and sentence – essential elements of the offence considered – appellant contends that sexual intercourse has not been proved in the absence of penetration – held that the Crown has proved the commission of the offence beyond reasonable doubt – held further that a slight penetration suffices for the fact of sexual intercourse – principles governing appeals on sentence considered – appellant contending that the sentence is excessive and induces a sense of shock –

held further that the sentence imposed should be within the range of sentences for the offence of aggravated rape – accordingly, the appeal on conviction is dismissed – the appeal on sentence is upheld – the sentence of twenty years imprisonment is set aside and substituted with a sentence of fifteen years imprisonment.

JUDGMENT

M.C.B. MAPHALALA, CJ

[1] The appellant was convicted of aggravated rape and sentenced to twenty years imprisonment on the 17th July 2014. Twelve months of the sentence were deducted to take account of the period of his arrest.

[2] The appellant is appealing both conviction and sentence; with regard to the conviction, he raised three grounds of appeal: Firstly, that the Crown has failed to prove penetration beyond reasonable doubt; and, that the bruise sustained by the complainant is not evidence of penetration. The appellant's contention is that the bruise might have been caused by Makhosazana Lushaba who examined the complainant after the incident.

The second ground of appeal is that the trial court failed to treat the evidence of the complainant with caution on the basis that she was merely six years of age at the time of commission of the offence, and, that the offence had occurred ten years from the date of trial. His contention is that the evidence of young children should be treated with caution; furthermore, he contended that the complainant might have forgotten everything that happened since the incident had occurred ten years ago. The third ground of appeal is that the sentence imposed by the trial court is excessive and induces a sense of shock; however, the appellant does not explain the basis of this ground of appeal.

[3] The appellant contends that the Crown failed to prove that sexual intercourse had taken place; and, that there was no evidence of penetration. The other two requirements of the offence are not disputed. However, the appellant concedes that penetration is generally established if the male organ is in the slightest degree within the female organ. To that extent he contends that the bruise sustained by the complainant could have been caused by Makhosazana Lushaba who examined the complainant. This argument cannot be sustained on the basis that the mere examination of the female organ does not entail the use of force which is necessary to inflict an injury; hence, no injuries could be sustained by the mere examining of the female genitals.

[4] It is trite law that in rape cases the Crown bears the onus to prove beyond reasonable doubt the identity of the accused as the offender, the fact of sexual intercourse as well as the lack of consent: see *Mandlenkosi Daniel Ndwandwe v. Rex* Criminal Appeal case No. 12/2012 at para 28; *Mandla Shongwe v. Rex* Criminal Appeal Case No. 21/2011 at para 16; and *Ndukuzempi Mlotsa v. Rex* Criminal Appeal No. 11/2014 at para 5.

[5] The evidence of the complainant is that she was called by the accused to his house where he offered to give her food; the complainant went to the accused's house but she declined the to eat the food. Thereafter, he locked the door and ordered her to sit on the bed and remove her underwear. The complainant did not comply with the appellant's order; hence, the appellant proceeded to remove her underwear, undressed himself and inserted his penis into her vagina. She told the court *a quo* that the appellant had pushed and inserted his penis forcefully into her vagina, and, that it was painful. He was on top of the complainant for a long time having sexual intercourse with her. He ejaculated semen on her vagina and wiped it with a towel. Thereafter, he told her to dress up and go home.

[6] It is not disputed that the appellant reported the incident to her mother timeously. Her mother in turn reported the incident to the complainant's

grandmother. The complainant was inspected and examined by Makhosazana Lushaba before the matter was reported to the police. Thereafter, she was taken to Hlatikulu Government Hospital where she was examined by Dr Munamato Mirira who subsequently compiled a report of his findings.

[7] The complainant told the court *a quo* that she knows a condom, and, that the appellant did not use it when he committed the offence. She confirmed that she did not shout for help during the commission of the offence because she was afraid of the appellant. She told the court *a quo* that she knew the appellant very well, and, that he visited her homestead regularly; in addition, they were neighbours. She disputed the evidence of the appellant that she could not recall everything that happened since the incident had occurred ten years ago. On the contrary she told the court *a quo* that she remembered everything that happened because the sexual assault this was a bad incident which she could not forget.

[8] The complainant maintained her evidence under cross-examination. She further disputed the evidence of the appellant that he was not at home on the day of the incident; and, she insisted that he was at home and had committed the offence. She also disputed the allegation by the appellant

that he was being falsely implicated in the commission of the offence because he was not in good terms with the complainant's mother. She told the court *a quo* that her evidence was based on the offence committed by the appellant against her, and, that her evidence had nothing to do with the relationship between her mother and the appellant.

[9] The evidence of the complainant was corroborated by Nonhlanhla Zikalala, who is the mother of the complainant as well Detective Sergeant Nxumalo and Dr Munamato Mirira. Sergeant Nxumalo recorded a statement from the complainant; thereafter, she led him to the appellant's house where she pointed out a blue underwear which the appellant was wearing during the incident. She further pointed out a scotch towel which was used to wipe off the semen from the complainant's vagina. She was later taken to hospital by the police for medical examination. The appellant was subsequently arrested and charged with rape after being cautioned of his rights to silence and legal representation.

[10] Dr Munamato Mirira, a medical doctor based at Hlatikulu Government hospital examined the complainant at the instance of the police on the 7th August 2004; the complainant was six years of age at the time. His finding was that there was a bruise on the left side of her labia minora.

He concluded that it was likely that penetration had been attempted. He maintained his evidence under cross-examination and further denied that his finding was based on the history taken from the complainant. Similarly, he maintained that his finding was based on laboratory results. He reiterated that the complainant's vagina was bruised on the labia minora at the 3 o'clock position. However, he conceded, under cross-examination, that he was not certain what object had caused the bruise on the complainant's vagina.

[11] It is apparent from the evidence that the appellant had sexual intercourse with the complainant without her consent. The evidence does establish penetration beyond reasonable doubt. What occurred may not be penetration in the medical sense; however, it is well-settled in our law that the slightest penetration of the vagina suffices for purposes of the offence of rape. Legally, it suffices if the male organ is in the slightest degree within the woman's genitals. It is not necessary that the hymen should be ruptured or that the semen should be emitted even where pregnancy has resulted pursuant to the emission of the semen. See *Mbuso Blue Khumalo v. Rex* Criminal Appeal case No. 12/2012 at para 31.

[12] The complainant was six years of age at the time of commission of the offence. It is trite law that a girl under the age of twelve years cannot give consent to sexual intercourse, and, even if she consents, sexual intercourse with her according to our law constitutes the offence of rape. See R. v. Z 1960 (1) SA 759 (A) at 742; *Mandlenkosi Daniel Ndwandwe v. Rex* Criminal Appeal Case No. 39/2011 para 9; *Mandla Shongwe v. Rex* Criminal Appeal Case No. 21/2011 at para 19 and *Ndukuzempi Mlotsa v. Rex* Criminal Appeal Case No. 11/2014 at para 6.

[13] The complainant testified that she could not shout for help during the commission of the offence because she was scared of the appellant. Her failure to do so does not constitute consent. In the case of *R. v. Swiggelaar* 1950 (1) PH H61 (A) at pages 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 realises is useless."**

[14] The defence by the appellant that there was a likelihood that the bruise sustained by the complainant could have been caused by the inspection of her vagina by Makhosazana Lushaba is not supported by the evidence. During cross-examination in the court *a quo*, the appellant failed to put to the complainant and her mother Nonhlanhla Zikalala that the bruise was caused by the inspection of her vagina. Similarly, there is no evidence that the inspection requires the use of force which would necessarily result in the injury sustained. In the circumstances the defence advanced by the appellant during his evidence in-chief constitutes an afterthought and ought to be rejected.

[15] It is a trite principle of our law that the defence case should be put to the prosecution witnesses otherwise the defence evidence would be considered as an afterthought if disclosed for the first time during the accused's evidence in-chief. See *Rex v. Mbedzi* Criminal Case No. 236/2009 at para 223 (HC); *Sonnyboy Sibusiso Vilakati v. Rex* Criminal Appeal Case No. 35/2011 at pp 4 and 5 as well as *Elvis Mandlenkosi Dlamini v. Rex* Criminal Appeal case No. 30/2011 at para 22 and 23.

In the case of *Elvis Mandlenkosi Dlamini v. Rex* Criminal Appeal Case No. 30/2011 at para 22 and 23; I had occasion to state the law as follows:

> **"22. It is a trite principle of our law that the defence case should be put to the prosecution witnesses otherwise the defence evidence would be considered as an afterthought if disclosed for the first time during the accused's evidence in-chief."**

[16] The importance of putting the defence case to the prosecution witnesses is to enable the court to see and hear the reaction of the witnesses to the defence advanced by the accused. The Crown witnesses should be cross-examined on the specific defence and respond fully to all questions put forward by the defence counsel. This assists the court in weighing up the evidence presented and reach its decision. Failure to put the defence case to prosecution witnesses is fatal to the defence case. Such evidence is considered an afterthought, and, it is inadmissible.

See *S. v. P.* 1974 (1 SA 581 (RAD) at 582 and *Mandlenkosi Ndwandwe v. Rex* (supra) at para 15.

[17] The appellant has invited this Court to reject the evidence of the complainant on the basis of the cautionary rule which was applicable in sexual offences particularly young children. However, this rule is no

longer part of our law. See the case of *Sandile Shabangu v. Rex* Criminal Appeal No. 15/2007 at pages 8 and 9.

[18] I will now deal with the appeal against sentence. In the case of *Elvis Mandlenkosi Dlamini v. Rex* Criminal Appeal case No. 30/2011 at para 29 of the judgment, I had occasion to deal with the principles of law applicable to appeals on sentence:

> **"29. It is trite law that the imposition of sentence lies within the discretion of the trial court, and, that an appellate court will only interfere with such a sentence if there has been a material misdirection resulting in a miscarriage of justice. It is the duty of the appellant to satisfy the Appellate 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. A court of appeal will also interfere with a sentence where there is a striking disparity between the sentence which was in fact passed by the trial court and the sentence which the court of appeal would itself have passed; this means the same thing as a sentence which induces a sense of shock. This principle has been followed and applied consistently**

by this Court over many years, and, it serves as the yardstick for the determination of appeals brought before this Court."

Also see the cases of *Musa Bhondi Nkambule v. Rex* Criminal Appeal No. 6/2009; *Nkosinathi Bright Thomo v. Rex* Criminal Appeal No.12/2012; *Mbuso Likhwa Dlamini v. Rex* Criminal Appeal No. 18/2011; *Sifiso Zwane v. Rex* Criminal Appeal No. 5/2005; *Benjamin Mhlanga v. Rex* Criminal Appeal No. 12/2007; *Vusi Muzi Lukhele v. Rex* Criminal Appeal No. 23/2004."

[19] The appellant is convicted of aggravated rape, and, in terms of section 185bis (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended, a person convicted of that offence is liable to a minimum sentence of nine years imprisonment without an option of a fine, and, the sentence imposed cannot be suspended.

[20] Similarly, in terms of section 313 (2) of the Criminal Procedure and Evidence Act, a court is precluded from suspending a sentence in respect of a person convicted of offences listed in the Third Schedule of the Criminal Procedure and Evidence Act. These offences are murder, rape,

robbery and any conspiracy, incitement or attempt to commit these offences. From the foregoing it is apparent that a person convicted of aggravated rape cannot be sentenced to less than nine years imprisonment, and, the sentence cannot be suspended.

[21] It is well-settled in this jurisdiction that the range of sentences for aggravated rape lies between eleven and eighteen years imprisonment; however, this Court has exceeded the sentence of eighteen years imprisonment in serious cases of aggravated rape such as cases where violence is used or where the complainant is a very young girl. The list of serious cases in this regard is not exhaustive.

See the case of *Mgubane Magagula v. Rex* Criminal Appeal Case No. 32/2010. In the case of *Moses Gija Dlamini v. Rex* Criminal Appeal Case No. 4/2007, this Court confirmed a sentence of twenty years for aggravated rape.

[22] Having considered the evidence before me, the court *a quo* did not misdirect itself on sentence. The circumstances of this case do not warrant a sentence which is above the range of sentences imposed for aggravated rape.

[22] Accordingly, the following order is made:

(a) The appeal against conviction is dismissed.

(b) The appeal on sentence is upheld.

(c) The sentence of twenty years imprisonment imposed by the court *a quo* is set aside and substituted with a sentence of fifteen years imprisonment.

(d) The period of twelve months spent by the appellant in custody shall be taken into account in determining the period of his imprisonment.

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M.C.B. MAPHALALA

CHIEF JUSTICE

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I agree: J.P. ANNANDALE

ACTING JUSTICE OF APPEAL

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I agree: M.D. MAMBA

ACTING JUSTICE OF APPEAL

For Respondent: Principal Crown Counsel Lomvula Hlophe

For Appellant: Attorney Justice Mzizi

DELIVERED IN OPEN COURT ON 9th DECEMBER 2015