



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 374*
(22nd October 2014)

Coram:

M.C.B. MAPHALALA, J

Summary

Criminal Law – Sentence – accused convicted of rape accompanied by aggravating circumstances as envisaged under section 185*bis* of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended – accused further convicted of attempted murder – the Court after considering the triad sentenced the accused to eighteen years imprisonment for rape and ten years for attempted murder – held that the sentence on the first count of rape will run concurrently with the sentence in the second count of attempted murder – sentences backdated to the date of arrest.

JUDGMENT
22nd OCTOBER 2014

- [1] It is common cause that the accused was convicted of rape by aggravating circumstances on the 22nd September 2014. He was also convicted of the second count of attempted murder. In mitigation of sentence the accused contended that he was a first offender, and, that he was single with one minor child to support. In school he went as far as Grade IV. He is not gainfully employed.
- [2] The Crown made submissions on aggravation of sentence and urged the Court to impose deterrent sentences in respect of the seriousness of the matter. In particular the Crown noted that the first count of rape was accompanied by aggravating factors as envisaged by section 185*bis* of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended in the following respects; firstly, that the accused hacked the complainant with a bushknife after raping her to the extent that she sustained serious injuries and fell unconscious. The complainant had threatened to report the accused to the police, and, the accused decided to hack her with the bushknife with the intention to kill her. When she was unconscious, the accused thought that she was dead, and, she buried her in a shallow grave which was two metres deep and covered her with leaves. It is apparent from the evidence that the scene of crime was in the thick forest. Thereafter, he abandoned her and went his way.

[3] The second aggravating factor is that the accused is an uncle to the complainant, and, they share a close relationship. The accused is a younger brother to the complainant's father, and, they reside in the same homestead. Lastly, the accused did not use a condom, and, thus exposing the complainant to sexually transmitted diseases including HIV/Aids.

[4] In arriving at the appropriate sentence, I will take account of the triad, that is, the personal circumstances of the accused, the interests of society as well as the seriousness and prevalence of the offences of rape and attempted murder in this jurisdiction.

[5] Section 185*bis* of the Criminal Procedure and Evidence Act 67/1938 as amended is applicable in this case because the accused was convicted of rape with aggravating circumstances. It provides the following:

“185*bis*. (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.”

[6] Section 313 (2) of the Criminal Procedure and Evidence Act is applicable in this case on the basis that the offence of rape is listed in the Third Schedule and precludes the Court from suspending a sentence of

imprisonment imposed by a court upon an accused convicted of such an offence. The section provides the following:

“313. (2) If a person is convicted before the High Court or any magistrate’s court of any offence other than one specified in the Third Schedule, it may pass sentence, but order that the operation of the whole or any part of such sentence be suspended for a period not exceeding three years, which period of suspension, in the absence of any order to the contrary, shall be computed in accordance with subsections (4) and (5) respectively.”

[7] The accused is a first offender, relatively young, semi-illiterate, single with a minor child to support and is unemployed. However, these mitigating factors cannot outweigh the seriousness and prevalence of the offence of rape with aggravating circumstances. Society requires that in such cases the courts should show disdain and revulsion at the commission of such crime by imposing appropriate deterrent sentences. It is now settled in this jurisdiction that the range of sentences for aggravated rape lies between eleven and eighteen years imprisonment without an option of a fine depending on the circumstances of each particular case.

His Lordship Justice Moore JA in the case of *Mgubane Magagula v. Rex* Criminal Appeal No. 32/2010 at para 20 had this to say:

“20. . . . it would appear that the appropriate range of sentences for the offence of aggravated rape in this Kingdom now lies between 11 and 18 years imprisonment, which is the mid range between 7 and 22 years adjusted upwards or downwards, depending upon the peculiar facts and circumstances of each particular case. The tables also reveal that this Court has treated the rape of a child as a particularly serious aggravating factor, warranting a sentence at or even above the upper echelons of the range.”

Accordingly, the Supreme Court confirmed an eighteen year old sentence imposed by the High Court on the basis that the conviction for rape was accompanied by aggravating factors. The court further took into account the fact that the sentence imposed by the court *a quo* was within the range of the sentences imposed by the Supreme Court for such offences within this jurisdiction.

[8] In the case of *Rex v. Bongwa Mcondisi Dlamini* Criminal Case No. 102/2008, I had occasion to deal with sentencing in a case of Attempted Murder. At para 68-72, I had this to say:

“68. I have taken into consideration the Triad in the preceding paragraphs; however, I would like to state that the range of sentences in cases of Attempted Murder is three years for the less serious cases up to ten years for the more serious cases.

69. In the case of *Siboniso Sandile Mabuza v. Rex* Criminal Appeal No. 1/2007, the Supreme Court of Swaziland confirmed a sentence of three years in respect of each of the two counts of Attempted Murder; and, the appellant had to serve a total of six years imprisonment.
70. In the case of *Mduduzi Mkhwanazi v. Rex* Criminal Appeal No. 3/2006, the Supreme Court confirmed a sentence of seven years imprisonment for Attempted Murder.
71. In the case of *Delisa Tsela v. Rex* Criminal Appeal No. 11/2010 the Supreme Court of Swaziland confirmed a sentence of seven years imprisonment with two years suspended for three years on condition that the appellant was not convicted of an offence involving violence during the period of suspension. With due respect, section 313 of the Criminal Procedure and Evidence Act precludes a suspended sentence in offences mentioned in the Third Schedule: Murder, Rape and Robbery and any conspiracy, incitement or attempt to commit any of these offences cannot be a subject of a suspended sentence.
72. In the case of *Gerald Mvemve Valthof v. Rex* Criminal Appeal No. 5/2010, the Supreme Court reduced a sentence of Attempted Murder from fifteen years to ten years imprisonment. Certainly this was a serious case of Attempted Murder where the appellant had attempted to kill his wife. In addition he was convicted of the murder of his two children; however, I will not deal with this aspect.”

[9] Section 313 of the Criminal Procedure and Evidence Act No. 67/1938 as amended is relevant for the purpose of sentencing; and, it precludes this court from imposing a suspended sentence in respect of offences listed in the Third Schedule of the Act being Murder, Rape, Robbery and any conspiracy, incitement or attempt to commit these offences. Section 313 provides the following:

“313. (1) If a person is convicted before the High Court or any magistrate’s court of any offence other than one specified in the Third Schedule, the court may in its discretion postpone for a period not exceeding three years the passing of sentence and release the offender on one or more conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as it may order to be inserted in recognisances to appear at the expiry of such period, and if at the end of such period the offender has observed all the conditions of such recognisances, it may discharge him without passing any sentence.”

[10] Accordingly the following order is made:

11.1 The accused is sentenced to eighteen years imprisonment in respect of the first count of rape with aggravating circumstances.

11.2 The accused is sentenced to ten years imprisonment in respect of the second count of attempted murder.

11.3 The sentence in the first count will run concurrently with the sentence in the second count.

11.4 The sentences in respect of both counts will be backdated to the date of his arrest on the 18th April 2012.

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

For Crown

Principal Crown Counsel Lomvula Hlophe

Accused in person