



THE HIGH COURT OF SWAZILAND REX

Vs

NDUDUZO DUBE Criminal

Case No. 26/2000

S.B. MAPHALALA- J MR.

FAKUDZE In person

Coram

For the Crown For
the Accused

JUDGMENT ON SENTENCE

(08/04/2004)

The accused has been convicted of the rape of a girl of 8 years. It was proved that the said rape was attendant by aggravating circumstances as envisaged under Section 185 *bis* of the Criminal Procedure and Evidence Act, 1938. It has been proved, firstly that at the time of the commission of this crime, complainant was a female child of eight years and; secondly, that at the time of the commission of this crime complainant was a virgin.

At this stage of the proceedings, the court has to pass an appropriate sentence. Three competing interests arise for the proper balance by the court. These are referred to in legal parlance as the *triad*. The nature of the crime, the interest of the society and the

interest of the accused. According to Holmes JA in the case of *S v Rabie 1975 (4) S.A. 855 (A) at 862(G):* '

"Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances".

Despite their antiquity these wise remarks contain much that is relevant to contemporary circumstances (they were referred to, with approval, in *S vs Zinn 1969 (2) S.A. 537 (A) at 541*) "a judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and the pressures of society which contributes to criminality ..."

The above is the legal approach I ought to adopt in *casu*.

The accused person in the present case when he committed this offence was a juvenile of 16 years. The Social Welfare Report of the accused stated the following:

"His father's whereabouts according to him is not known except that he still alive somewhere in Nginamadolo. He also claims that his paternal mother Martha Makhanya who is unemployed sells vegetables at Piggs Peak market. However he only knows that she stays at Mlembe but he does not know the whereabouts at Mlembe.

Due to financial problems he had to scott for employment as a result he ended up staying at Stefano's homestead in return, the member's of Stefano's homestead used to pay his school fees. Nduduzo used to stay with his uncle Annah Kaunda who is mother to Sitiwe Mnisi the complainant who was raped. Since Annah's husband is employed in the Republic of South Africa Annah made sexual advances to the minor Nduduzo who was afraid of her, as she was older than him, but however he ended up giving in having sex with her.

Thus when looking at his home background it is clear that he has never lived with both his parents who could have played a great role in socializing him (moulding him) to adopt to the expected morals values within society. However the accused showed remorse to what he did because he pleaded guilty as charged in a way it shows that he did not commit the crime intentionally.

*■ I personally visited the accused before the case continued in the High Court. After interviewing him I observed that he told the police who investigated the truth as he also told me the truth that he committed the crime on the said date. But however he blamed his uncle (sic) Annah Kaunda for having taught him how to sleep with a woman as a result he ended up committing the crime. I also observed that he is still in his senses because he remembers all the events as they occurred. This is so because the evidence he gave in court corresponds with the evidence he told me.

I think the court has proved beyond reasonable doubt that the accused did commit the crime on the said date and he also pleaded guilty as charged, thus I recommend that the honourable court find him guilty as charged. However I am asking the court to be lenient when passing the sentence since he is the first offender, besides, he was still a juvenile when he committed the crime and he also pleaded guilty as charged. He also wishes to go back to school. Another reason is that he was also sexually abused by her uncle (sic), which might have led the juvenile to commit the crime.

Since the community must be protected from people who abuse women sexually, the accused must be removed from society and placed at a Juvenile Correctional School (Mdotshane) where he can learn some skills such as carpentry, metal work. Such skills can help him at a later stage because he can be self-employed, as there will be that stigma that he was once a prisoner as many employment agencies do not employ people who have served a sentence in prison. Besides, taking him to prison might affect him psychologically as he also suffered sexual abuse at the hands of her uncle (sic).

I must state at this juncture that I appreciated the role played by the Social Welfare Officer who stood in *loco parentis* for the accused in this case. He prepared a thorough report as seen in the above-cited excerpts. Not only that, he also participated actively during the proceedings of the case by cross-examining witnesses for the accused person.

The accused person himself made submissions in mitigation of sentence where he told the court that he was remorseful for what he did and stated that he was prepared to pay his dues to society for his actions.

It was led in evidence that the accused was a victim of sexual abuse by his aunt, a certain Annah Kaunda, who is mother to Sitiwc Mnisi the complainant who was raped. However, this does not completely exonerate him from the crime as to some

4

limited extent he could exercise his free will. The crime he committed is a very serious one where an 8-year-old girl who was a virgin at the time was raped. This case is accompanied by aggravating circumstances. In law I am obliged to mete out an appropriate sentence.

The accused is a first offender. He was still a juvenile when he committed the crime and he also pleaded guilty to the charge.

I agree with the conclusion by the Social Welfare Officer that **"since the community must be protected from people who abuse women, sexually, the accused must be removed from society and placed at a Juvenile Correctional School (Mdutshane) where he can learn some skills..."**

In the premise I take the view that a sentence of 9 years would be appropriate in this case; and it is so ordered.

The accused to serve his sentence at a juvenile correctional school as provided for by the law and that such sentence be backdated to the date of arrest being, the 6th February 2000.


S.B. MAPHALALA
JUDGE