IN THE HIGH COURT OF SWAZILAND

CRIMINAL APPEAL 16/2004

In the matter between:

REX

VS

CHRISTOPHER BOY MASUKU

CORAM	BROWDE JA
	STEYN JA
	TEBBUTT JA
FOR THE CROWN	MRS. S. WAMALA
FOR THE APPELLANT	IN PERSON

JUDGEMENT

Tebbutt JA

The appellant was convicted in the High Court of rape and sentenced to 18 years imprisonment. He now comes on appeal to this Court against both his conviction and sentence.

The charge against the appellant reads as follows:

"in that on various dates in the years 1995 to 9th and 14th October 1999 and at or near Mahlabaneni area in the district of Lubombo, the accused did intentionally have unlawful sexual intercourse with Sihle Masuku, a female aged twelve (12) years in 1999 and

incapable of giving consent; and the accused did thereby commit - the crime of rape.

The Crown also alleged that the rape was accompanied by aggravating circumstances as envisaged under Section 185(bis) of the CRIMINAL PROCEDURE AND EVIDENCE ACT NO.67 OF 1938 in that-

(a) "the sexual intercourse was repeated on different occasions over the years 1995 to 1999;
(b) the complainant was a minor;
(c) the accused (now appellant) abused a filial relationship over the complainant who was his step daughter".

The evidence before the trial court was that the appellant and the mother of the complainant (to whom I shall refer as "Sihle") had from before the birth of Sihle lived together as man and wife. They had not married. Sihle said she lived with them from the age of two. She testified that from the time she was eight years old i.e. from 1995 the appellant had been having intercourse with her when her mother was away from home. She had not reported this to anyone as she was afraid of the appellant. On the night of 9th October 1999 her mother was away from home attending a funeral when appellant again came to her bed and had intercourse with her. The next day she told a friend, Nelisiwe, about it. She also told her brother, who enquired from her as to why she was crying at the time, that the appellant was sleeping with her. He said she should go to stay at her grandmother's house. She did not do so immediately but a day or two later the headmaster of her school asked her what had happened to her.

She told him that the appellant was sleeping with her. The headmaster then called in the police who took a statement from her. It was after that that she first told her mother that the appellant had been sleeping with her since she was 8 years old. She asked Sihle why she had not told her of this before. Sihle said it was

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because the appellant had threatened her with violence if she did so. Sihle's brother corroborated her story, testifying that she had told him that the appellant was sleeping with her. His evidence was never challenged by the appellant. It was also never suggested by the appellant to either Sihle or her mother that they had trumped up the charge against him or that there was bad blood between them. However in his evidence and while under cross-examination he said that she, the mother and Sihle had trumped up the charge against him. He said he and the mother had a poor relationship because he had refused to marry her (a fact she had mentioned in reply to a question by the trial Judge). His reason for not doing so, he said, was because he suspected that she was being unfaithful to him with another man. This, too, was never suggested by the appellant to her.

The trial Court quite correctly rejected this defence. It had never been put to any of the Crown witnesses that they were seeking to frame him. In fact, their evidence, and particularly that of Sihle, that he had been having intercourse with her since 1995, was never really challenged by the appellant in cross examination. As the trial Court correctly found his averment that he was being framed by Sihle and her mother was an obvious afterthought and did not bear scrutiny. Sihle had reported to the police as a result of the headmaster's actions in calling them in and before her mother learnt of the allegations against the appellant.

The appellant, on appeal before this Court, took two further points. They are, firstly, that the doctor who examined him and Sihle had not explained his report to the Court. It is common cause that the doctor had left the country and his report was admitted in terms of Section 221 of the CRIMINAL PROCEDURE AND EVIDENCE ACT. However, in his report the doctor said that Sihle's hymen was torn and I quote:-

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"There is evidence of recent penetration into the vagina and very high possibility of previous sexual intercourse from STB organism in vaginal smear".

He added that it was "advisable" to get a urethral smear from all suspects. The appellant said that a smear was taken from him, but the evidence is that it was not. There was no obligation on the Crown to do so. The doctor merely give it as his opinion that it was "advisable" to do so. That this was not done insofar the appellant was concerned was not fatal to the Crown's case against the appellant. The rest of the evidence against him was overwhelming. His second point was that Sihle said he had raped her on 9th October 1999. The mother said it had occurred on 14th October 1999 when she was away from home. Nothing turns on these dates. The evidence was that the appellant had had intercourse with Sihle regularly and frequently from 1995 and that this had only come to light in October 1999.

The appellant was in my view, correctly convicted by the trial Court and his appeal against his conviction must be dismissed.

As to the sentence the trial Judge, Matsebula J, quite correctly drew attention to the prevalence of cases of abuse by adults of young children - often by those standing in family relationships to them. This Court is seized with a number of such cases in this session. The need for sentences of severity to stem this prevalence is manifest, particularly because of the possibility, in cases of rape, of the complainant becoming infected with the dreaded HIV/Aids virus. The devastating effect of this on the complainants and especially on children is all too well-known. The Courts of this Kingdom are aware of these factors and must use the one tool available to them to try and curb the ever-increasing incidence of rape in this country viz by the passing of sufficiently severe sentences to act as deterrents to would-be offenders of this sort.

The trial Court furthermore correctly pointed out the period over which the appellant had sexually abused Sihle viz four years and that he had done so when custody of Sihle had been entrusted to him by her mother who was appellant's live-in-lover. As the Judge said, "you turned out to be a predator and made the complainant your prey". She was raped in the sanctity of her home. She had nowhere to run for help. Her emotional scars are irreparable. I agree with the trial Judge that all these factors justify a severe sentence.,

Having said that, however, it seems to this Court that a sentence of 18 years is unduly harsh. This Court will not normally interfere with the sentencing discretion of the trial Judge unless he has misdirected himself in some way, (which is not the case here) or where there is a significant distinction between the sentence which this Court would have passed if it had been the trial Court and that which was in fact passed by the latter.

In casu, we think there is such a difference. In cases of a similar kind, i.e. where children of tender years have been raped, the sentences imposed by the High Court have in cases before us varied between 10 years and 14 years imprisonment, the latter sentence being imposed in cases where an accused conduct has been particularly reprehensible -such as an abuse of a trust relationship. The present case certainly falls within this category of repugnant offence. Such a sentence i.e. 14 years would therefore also give effect to the principle that offenders found guilty of an offence and whose moral guilt is similar should be treated similarly. Profound disparities can offend against the underlying principle of fairness. We feel that a sentence of 14 years on the appellant, who is a first offender, would have been sufficient to meet the criteria I have set out above. It would also be in conformity with

sentences in similar cases. We can therefore interfere with the trial Court's sentence of 18 years and reduce it to one of 14 years imprisonment backdated to 1 January 2000, as we now hereby do.

In the result the Court makes the following Order:

1. The appeal against the conviction is dismissed.
2. The appeal against the sentence succeeds to this extent that the sentence of 18 years imprisonment is reduced to one of 14 years imprisonment backdated to 1 January 2000

DELIVERED IN OPEN COURT THIS 15th DAY OF NOVEMBER 2004

P.H. TEBBUTT

Judge of Appeal

I agree J.BROWDE

Judge of Appeal

I agree J.H.STEYN

Judge of Appeal