

THE HIGH COURT OF SWAZILAND

REX

Vs

ERIC MAKWAKWA

Criminal Case No. 117/2003

Coram: S.B. MAPHALALA - J

For the Crown: MRS M. DLAMINI (Acting Director of Public Prosecutions)

For the Defence: IN PERSON

SENTENCE

(18/03/2005)

[1] The accused person has been convicted of the rape of a 4 year old girl where the court found that the Crown has proved aggravating circumstances, namely (a) accused being an adult male of about 65 years old stood in a loco parentis relationship with complainant. That is, complainant looked upon accused to protect her; (b) accused raped complainant while she was discharging duties at the instruction of accused and hence abused society's mores that children should obey adults; (c) complainant was of a veiy tender age at that time; and (d) accused failed to use protective measures before raping complainant hence putting complainant to a risk of contracting venereal diseases including HIV/Aids.

[2] The accused person when invited to address the court in mitigation of sentence again gave a rambling address not at all connected with the issue before court but wanted to-reopen the case before conviction. However, what I

was able to decipher from his address is that his wife is now deceased and so are his children. What is also evident is that the accused person is an elderly man of about 65 years. He has been in custody since the 13<sup>th</sup> January 2003.

[3] According to the author DP Van Der Merwe in his textbook titled "Sentencing" Service 6, Juia at 5.26 maturity would tend to increase the subjective blameworthiness of an offender since "he is old enough to know better". Besides the insight that comes with age, he should also be able to resist temptation better than a younger, more impulsive type of offender. With increasing age the situation is reversed, however, as one nears the "second childhood" the behaviour of some elderly people may become less responsible, often a result of physical or mental illness. Their sensitivity to punishment usually also increases, since a fine might rest heavily upon the shoulders of a pensioner and a sick person might not survive a spell in gaol.

[4] 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 society and the interest of the accused. According to Holmes JA in the case of S vs Rabie 1975 (4) S.A. 855 (4) 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 ..."

[5] The above is the legal approach I ought to adopt in casu.

[6] The accused person in the present case perpetrated an aggravated rape of a 4-year-old girl. In a recent Court of Appeal judgment in the case of Rex vs Christopher Boy Masuku - Criminal Appeal No. 16/2004 Tebbutt JA delivering the judgment of the court on a similar case as the present stated the following

"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 to 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 1<sup>st</sup> January 2000, as we now hereby do".

[7] In another recent Court of Appeal judgment in Rex vs Jeremiah Shongwe -Appeal Case No. 6/2003 the same Judge stated the following at page 3 of the unreported judgment; and I quote:

"In sentencing the Appellant the trial Judge rightly mentioned the increase of this type of offence, viz the rape of young girls by adult men and said that the message should go out that the courts will be very severe on this type of behaviour. I agree entirely. His lying attempts to deny his participation shows that he had no remorse for what he did. The nature of the offence justified the sentence of 10 years imposed on him. Indeed he is lucky it was not more severe".

[8] Steyn J A also in a recent Court of Appeal Case No. 6/2004 that of Rex vs Mfanzile Mkhwanazi said the

following at page 6 of the unreported judgment:

"The sentence of 12 years appears to us to fairly reflect the abhorrence with which the courts of this Kingdom view the crime of rape of young girls and is in no sense out of line with that imposed by other courts whose judgments came before us during this session. See in this regard the comments of this court in the case of S v Masuku - Appeal Case No. 16/2004 delivered contemporaneously with this judgment".

[9] I agree in toto with the sentiments expressed by Their Lordships in the cases cited above and I hold that the ratio decidendi propounded in those cases is applicable on the facts of the present case. I refer also to the Court of Appeal cases of Thumbela P. Mhlanga - Appeal Case No. 26/2003; Rex vs Kenneth Maseko - Appeal Case No. 7/2004; Nicholas Magagula vs Rex - Appeal Case No. 13/2004 and that of Lawrence Phuphutha Manana - Criminal Appeal Case No. 733/2004 on the range of sentences to be imposed on cases of rape.

[10] Having considered all the factors in the triad I have come to the conclusion that in the present case the interest of the accused will have to be subservient to the interest of the society. Young children are entitled to their play and it is not for scavengers like you to pounce on. They need to be protected. The only protection against your sort is to impose sentences to discourage others who might be lurking in the dark aspiring to satisfy their lust on young children. The accused person in the present case stood in a loco parentis relationship with complainant. That is, complainant looked upon accused to protect her. Accused raped complainant while she was discharging duties at the instruction of accused and hence abused society's mores that children should obey adults and accused failed to use protective measures before raping complainant hence putting complainant to a risk of contracting venereal diseases including HIV/Aids. In fact, the child contracted gonorrhoea as a result of this sexual encounter.

[11] In the circumstances of this case, it is my considered view that a sentence of 12 years will be appropriate and will send the right message to would-be offenders.

[12] In the result, the accused person is sentenced to 12 years imprisonment without the option of a fine backdated to the 13<sup>th</sup> January 2003.

S.B. MAPHALALA

JUDGE