

THE HIGH COURT OF SWAZILAND

REX

Vs

COLANI KWE SHABANGU

Criminal Case No. 93/2004

Coram

S.B. MAPHALALA - J

For the Crown

MR. P. DLAMINI

For the Defence

MR. Z. MAGAGULA

SENTENCE

(2nd May 2006)

[1] The accused person has been found guilty of the crime of rape of one T M, female minor aged 7 years. The court further found that the said rape was attended by aggravating circumstances in that i) the complainant was a minor of 7 years and a virgin at the time of the rape ii) the accused did not use a sexual protective device when he engaged an unlawfully sexual intercourse with the minor (e.g. he did not use a condom) therefore putting the complainant at risk of contracting venereal diseases including HIV/Aids and iii) he cut the complainant with a sharp object at the perineum before raping her. At this juncture in the proceedings the court is called upon to mete out an appropriate sentence in the circumstances of the case.

[2] The court, in imposing sentence must have due regard to the facts of the case, and in addition thereto, must apply certain well-established legal principles relating to the extent and magnitude of punishment, an awesome responsibility is thereby vested in the court.

[3] In ancient history retaliation and physical abuse were utilised to punish an offender for his crimes. With the advance of society, and its humanistic values, a movement developed to redress the wrongs of the past in this regard. Ancient principles of punishment have been considerably ameliorated and indeed save for a few countries have been jettisoned in favour of a more human and just approach towards the question of punishment (see *S v Banda and others (4) 1989 - 1990 B.L.R.* at page 289 and the cases cited thereat).

[4] Holmes JA in *Svs Rabie 1975 (4) S.A. 855 at 862 G* summed up, in general and with admirable brevity, as follows, and I quote:

"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".

[5] In the same case Corbett JA, after agreeing with the reasons given by Holmes JA stated at 865 G - 866, *inter alia*,

"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 in interest of society which his task and 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 humane and compassionate understanding of human frailties and the pressures of society which contributes to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in light of all the circumstances of the particular case".

[6] What must also be considered is the *triad* consisting of the crime, the offender and the interest of society (see *S vs Zinn 1969 (2) S.A. 537 (A) at 540 G* and *S vs Scheepers 1977 (2) S.A. 154 (A)* see also *S vs Somo 1980 (3) S.A. 143 (T) at 145 E* -

[7] In considering **the offender**, due regard must be had *inter alia* to the following:

- i) His/her age and background;
- ii) Level of education, attainment and position in society;
- iii) Family circumstances, whether married or not and the question of dependants;
- iv) Motive in committing the offence, whether for personal gain or for reasons of avarice, or being actuated by some moral or laudable objective;
- v) Whether the offender stood to gain by the offence;
- vi) The effect of punishment on the offender, and more particularly if a sentence of imprisonment is imposed;
- vii) The prospects of reformation and correction, and becoming a useful member of society;
- viii) The presence or absence of remorse or contrition;
- ix) Whether instead of imprisonment an alternative method of punishment would be appropriate in the circumstances;

- x) A perceptive understanding of the accused's human frailties as effected by the circumstances surrounding the commission of the offence in question and a balancing of those frailties against the evil of the offender's deed.

[8] The above list is not exhaustive, but I believe that it contains pragmatic tests for the truth of the assertion of considerations the position of the offender.

[9] **The crime.** In passing sentence the trial court must take into account the moral and ethical nature of the crime, and the gravity of the offence.

[10] **The interest of the community.** The feelings and requirements of the community, the protection of society against the accused and other potential offenders must be considered, as well as the maintenance of peace and tranquility in the land needs to be taken into account.

[11] The nature of the crime is of considerable importance. It may be of such significance or so far reaching that imprisonment is the only adequate punishment (see *S vs Maarman 1976 (3) S.A. 510 (A)*; *S vs Holder 1979 (2) S.A. 70 (A)* at 77 - 8).

[12] The above legal principles govern the imposition of punishment in this jurisdiction.

[13] *Mr. Magagula* for the accused person has advanced a number of factors in mitigation of sentence in the present case as follows:

- i) The accused person has been in custody since the 22nd February 2002, and therefore he has been in custody for 4 years and 2 months.
- ii) Accused person is a first offender.
- iii) When accused person was arrested for this offence he was 18 years old.
- iv) The accused person went to school up to Standard III.
- v) On the facts of this case Counsel submitted that a period of 5 years imprisonment would be appropriate in this case.

[14] I have considered the above-cited factors in mitigation of sentence against what has been said above in paragraph [7] and have considered i), ii), iv), vi), vii) and xi) *supra*. This is a very serious offence in which a young child has been abused in this way. Such cases are in the

increase in this jurisdiction where young girls are molested in this way by older men. It is therefore the duty of this court to impose sentences which will reflect society's expectation. On the facts of this case I have come to the considered view that a sentence of 12 years imprisonment would suit the justice of the case. I find also that the aggravating factors as reflected in the indictment have been proved by the Crown.

[15] In the result, for the afore-going reasons the accused is sentenced to 12 years imprisonment backdated to the 22nd February 2002.

S.B. MAPHALALA

JUDGE