IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

In the matter between:

JANGO LONTOS MKHAVELA

VS

REX

CRIM. APPEAL NO. 3/2009

APPELLANT

RESPONDENT

CORAM

MAPHALALA PJ MAMBA J

FOR APPELLANT

IN PERSON

FOR RESPONDENT

MR M. SIMELANE

JUDGEMENT 20th August, 2009

[1] The Appellant, a 25 year old Mozambican male, appeared before the then acting Principal Magistrate Mr D. Khumalo in Manzini facing a total of four

counts. On the first two counts it was alleged that he had, in November 2007, raped two young girls who were 8 years old.

[2] The third count was one of indecent assault which was committed on a 4 year old child, again in November 2007. This crime was apparently committed on the same day and at the same place as the two crimes I have referred to in the preceding paragraph. All three victims lived together in the same homestead as the Appellant.

[3] The 4th count related to an infringement or contravention of the s14(2) of the Immigration Act 17 of 1982 (as amended), it being alleged that the Appellant, who was not a citizen of Swaziland, had at the relevant time entered and remained in Swaziland without the proper documents permitting him to do so.

[4] The Appellant was arrested and taken into custody by the police on the 19th November, 2007 and he made his first court appearance two days thereafter. He remained in custody as an awaiting trial prisoner until the conclusion of his trial on 17th October 2008 when he was convicted and sentenced on all the four counts referred to above.

[5] He was sentenced to a term of ten (10) years of imprisonment on each of the two counts of rape and these sentences were ordered to run concurrently with effect from the date of his first appearance in court, that is to say, 21st November 2007. A term of five years of imprisonment was imposed in respect of the third count. On the last count the Appellant was sentenced to pay a fine of E500.00, failing which to undergo **a** term of **imprisonment for** six (6) months. The learned Magistrate noted that:

> "**Only sentences on counts** 1 and 3 **will run** consecutively."

The effect of this is that the rest of the sentences do not run concurrently; resulting in the Appellant serving an effective custodial sentence of fifteen (15) years.

[6] The Appellant has appealed against the above **cumulative** sentence and states that:

> **"I humbly accept [the] convictions but only appeal against the harshness** and **severity of my 15 year sentence and for its back-dating."**

He also submitted that at least a period of seven (7) years of the sentence should be suspended.

[7] Rape is, in terms of section 313 of the Criminal Procedure and Evidence Act 67 of 1938, a third schedule offence, and therefore no portion or part of a sentence in respect thereof may be suspended. That is, however, not the same with the crime of Indecent Assault.

[8] I have referred above to the respective ages of the sexual assault-victims herein and the fact that the Appellant was 25 years old when he committed these abhorrent crimes on them. These sexual assaults were perpetrated by the Appellant on his defenseless victims over a period of time and came to an end when their *au pair* discovered it and the Appellant got arrested.

[9] It has been said over and over in this court and the Supreme Court of Appeal that sentencing is pre-eminently a matter within the discretion of the trial court. This court as an appellate court, may only interfere with the exercise of that discretion if it has been shown that it

was improperly **exercised** or that the sentence meted out by the court below is so harsh that it induces a sense of shock or that it is so hugely different **from** that which this court could have imposed, or that the court committed a misdirection or irregularity that is so gross that it warrants this court to intervene **and** consider **the** issue of sentence afresh. I am unable to find any such **matter** in this **appeal.**

[10] It is common cause that when the Appellant made his first appearance in court on the 21st November, 2007 he had already spent two days in police custody. His sentence should therefore have been back-dated to the date of his arrest and incarceration, that being the 19th November, 2007 in accordance with the long and salutary rule of practice within this jurisdiction. In the case of **R v BENSON MASINA AND ANOTHER, 1987-1995 (1) SLR 391, HANNAH CJ** (as he then was) stated as follows:

> **"the fact of the matter is that they spent 64 days in custody prior to their conviction and that was a factor which they were entitled to have taken into consideration either by reduction in their sentence or by back-dating their sentence. The loss of liberty be it for 4 days or 64 days is necessarily** a punishment"

See also the cases referred to in THULANI **SIPHO MOTSA & 2 Others, Criminal Appeal 30 of 2006** (judgement delivered on the 4th August, 2006) (unreported). This rule of practice is also captured and its enforcement echoed in article 16 (9) of the Constitution which provides that:

> "(9) **Where** a **person is convicted** and **sentenced** to a term of imprisonment for an **offence, any period that person has spent in lawful custody in respect of** that offence before **the completion of the trial of that person shall bs teken** int^ **account in imposing the term of imprisonment."**

[11] For the foregoing reasons, I would dismiss the Appeal against sentence but order that the sentence on count one be back-dated to the 19th November 2007 instead of the 21st November 2007.

MAMBA J

I AGREE

MAPHALALA PJ