IN THE HIGH COURT OFSWAZILAND

HELD AT MBABANE CRIM. APP.

NO.22/09

In the matter between:

WONDER VUSUMUZI SHABANGU Appellant

And

REX Respondent

Date of hearing: 12 August, 2009.

Date of judgment: 27 August, 2009.

CORAM: MASUKU J.

MABUZA J.

Appellant in person
Ms. Attorney N. Lukhele for the Respondent

JUDGMENT

MASUKU J.

[1] Under what circumstances may an appellate Court interfere with the exercise of the sentencing discretion exercised by a trial Court in a criminal trial properly before it? This is the primary question requiring an answer from this Court in the present appeal.

[2] Wonder Vusumuzi Shabangu, to whom I shall henceforth refer as "the Appellant", stands convicted by the Principal Magistrate of the Shiselweni District of two counts of rape. As his just desert, the Court *a quo* found that a sentence of seven (7) years' imprisonment on each count was condign. Both sentences were ordered to run consecutively. The Appellant is satisfied with the certitude of guilt returned by the trial Court.

[3] His gripe, however, is with the sentences imposed, particularly that they were ordered to run

consecutively. He accordingly prays that this Court should, as many other appellants in his position are wont to say, "concur" the two sentences. This, in prison parlance, is understood, as one has now learnt, to mean that the Court is being requested to order the sentences to run concurrently as opposed to consecutively, as the learned Principal Magistrate ordered. Is there any merit in this appeal?

[4] A good starting point to ultimately returning the answer, is the charge sheet. The Appellant was alleged to have raped two women, namely P N, an adult female of 28 years. This offence was alleged to have occurred on 9 September, 2006 at Nsingizini area in the Shiselweni District. On the second count, he was alleged to have raped B S, an adult female, 64 years of age at kaMziki area in the Shiselweni District on 24 September, 2006. He was, notwithstanding his plea of not guilty, found guilty of rape on both counts after a fully blown trial in which

a good number of witnesses were called by the Crown.

[5] It must be mentioned at this nascent stage of the judgment, as was explained to the Appellant during the hearing of the appeal, that sentencing is primarily the domain of the trial Court and that an appellate Court does not lightly or readily interfere with the exercise of that discretion. There are more or less circumscribed and recognized grounds at law and upon which an appellate Court may properly interfere with the exercise of the sentencing discretion by the trial Court.

[6] One of the most compelling and comprehensive exposition of the circumstances in which an appellate Court may properly interfere, was handed down by Maritz A.J.A in the Namibian Supreme Court

judgment of S y *Alexander* (SA 5/99 [2003]. There the learned Judge of appeal said:

> "Precisely what the comparative weight thereof should be when measured against the factors advanced in mitigation and what emphasis should be given to them as part of the interrelated components of *Zinn's* oft-applied *triad* in designing a fitting sentence to meet the objectives of punishment, falls pre-eminently within the sentencing discretion of the trial Court. Steeped in the atmosphere of the case, exposed to the emotions and demeanour of victims and perpetrators alike, alert to local circumstances such as prevalence and the community's legitimate interests in a fair and just judicial response to the crimes in question, the trial Judge is normally better positioned to tailor a fitting sentence than a Court of Appeal which has but a transcript of the matter. For these reasons, a Court sitting on appeal will accord the trial Court a significant degree of appreciation in the exercise of its sentencing discretion. It will not interfere with the sentence imposed on insignificant grounds or merely because it would have imposed a different sentence had it been the Court of first instance. It will only do so if it is satisfied that the trial Judge has failed to exercise his or her

sentencing discretion judicially or properly. . . Given the exigencies of the practice and multiplicity of circumstances unique to each case, there may not be a *numerous clausus* of specific instances exhaustively defining when a trial Court has acted injudiciously or improperly, but, reduced to its bare essence, the measure is clear: The test is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. . . By judicial precedent, the Courts have expounded thereon and justified interference on appeal if a trial Court has committed a misdirection of fact or law which by its nature, degree or seriousness is such that it shows that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. . .; if the sentence is manifestly inappropriate given the gravity of the offence and induces a sense of shock. . . or a patent and disturbing disparity exists between the sentence that was imposed and the sentence that the Court of Appeal would have imposed if it had been the Court of first instance; . . . if there has been an overemphasis of one of the sentencing interests at the expense of another. . . or if there has been such excessive devotion to further a particular sentencing objective that the others are obscured."

[7] It will be clear from reading the above excerpt that the learned acting Judge of Appeal was writing in connection with a case coming before the Supreme Court on appeal from the High Court in exercise of its original jurisdiction. It is for that reason that the learned Judge of Appeal made reference to Judges of the lower Court in his erudite judgment. At the conceptual level, though, there is no difference in approach to sentencing, whether the judicial officer sits on the Magisterial Bench or at the High Court. The principles and approach to sentencing, as stated above, apply with equal force to both and without distinction.

[8] I now have to consider the facts as found by the trial Magistrate and on which the conviction was predicated. As the Appellant accepted the conviction without equivocation and which conviction I may mention was merited, there is little reason to consider these facts at any great length. On the first count, the Appellant raped

a married woman who was walking on her way in broad daylight, with her baby on her back, minding her business. He assaulted her and threatened to stab her if she did not give in to his advances. She ultimately succumbed.

[9] Such an ordeal, for a married woman, in particular, is serious and may have far-reaching implications. Not only did the Appellant not respect the complainant's person, bodily integrity and will, but he exhibited signs of condescension and spite on her husband as well. Incidences like these may, in other circumstances, bring untold suffering and serve to contaminate what is otherwise a peaceable and amiable spirit in a stable marriage.

[10] The second count was committed in even more serious circumstances. The complainant was the mother to the Appellant's lover. She was a venerable woman of 64 years, who knew the Appellant well as he grew up in the neighbourhood. That notwithstanding, and in spite of her age, the Appellant had the temerity to rape her but not before he had assaulted her to drive the message home that he was serious about his nefarious nocturnal mission. What is particularly astounding is that the complainant was raped at night in the very sanctity of her bedroom, in her own homestead. The Appellant, it would seem, was in a mean mood.

[11] Not only did the Appellant violate the complainant's home by intruding into it, breaking the door to the complainant's bedroom in the process, but he proceeded to violate her bodily integrity as well. To rape a woman of the stature and position of the complainant on the second count is

certainly unpardonable and shows some reprobate traits in the Appellant that must be exorcised.

[12] I have no doubt in my mind, having regard to the above factors that the sentences imposed on the Appellant were not only condign but also merited. In point of fact, the second count was of a more aggravated nature for the reasons pointed out above. A stiffer sentence, would not, in my view, have been out of order. It does not appear to me, having regard to the entire record and the judgment on sentence that the learned Magistrate may have exercised the sentencing discretion reposed in her improperly at all. If anything, as indicated above, she may be accused of having erred in her sentence, on the side of leniency on the second count.

[13] In his oral address, the Appellant implored this Court to interfere with the sentence. He harped monotonously upon his own personal circumstances, including the young age of his children, whom he stated are now orphaned as their mother passed on. He also told the Court that he is a sickly person who is reliant on medication for continued survival and that he has

learnt his lesson and is ready to be re-integrated into the society he has wronged.

[14] All the above factors have, in my view, one common thread -they do not meet muster in so far as the entitlement of this Court to interfere with the sentencing discretion of the Magistrate's Court is concerned. They simply fall way below the threshold, regard had to the *Alexander* case quoted above. The issues relating to the children, sad as it is that they may suffer alienation from their father, one fact that cannot be denied or wished away is that it is as a result of the father's actions and not anyone else's that the alienation and its related consequences must necessarily eventuate.

[15] The nature and gravity of the Appellant's malady is unknown and there is no medical evidence to substantiate his assertions. Even if there was, his health condition is a matter that may properly lie within the jurisdiction of other bodies like the Prerogative of Mercy committee, to attend to in terms of the law. There is simply no justification, in my view for this Court to interfere with the sentence

imposed, the Appellant's personal circumstances notwithstanding. The Court must properly balance the other competing interests as well.

[16] The incidence of rape in this country has long reached alarming proportions. Evidence pointing to this inexorable conclusion is the disturbing regularity with which this and other lower Courts are called upon to deal with rape cases, a good number of which relate to young children. It is now up to the Courts to step up the sentencing regime perchance society may be given the much needed respite from this menace and scourge. This respite would hopefully allow women and young girls in this country to be secure, resting in the knowledge that they are free to walk about and conduct their business at any place and hour without the ever-nagging fear that their bodily integrity and security of person may be violated by marauding miscreants.

[17] In the case of *R v Majaha Msibi and Another* Crim. Case No.73 of 1998, I had occasion to comment on the offence of rape in the following manner at p 2:

> "Rape is an innately degrading and dehumanizing crime, the effects of which can hardly be quantified. It violently robs the victim of her self-esteem, self-worth and confidence. It constitutes a flagrant violation of the woman's femininity and relegates her to an object, devoid of feeling and entirely lacking in her God-given right to say 'No!'"

[18] Having regard to all the circumstances of this case, I am of the considered opinion that the trial Court exercised its sentencing discretion properly. In this regard, it is also my view that the decision to order the sentences to run consecutively was eminently called for and warranted, given the fact that these counts, both of which involved violence to the victims, were committed on different days but within a period of three weeks of each other. The Appellant was indeed daring, judging by his actions.

[19] In the premises, I issue the following Order:

18.1 The appeal against the sentences imposed on the Appellant by the trial Court be and is hereby dismissed. The said sentences be and are hereby confirmed.

Lastly, the Appellant is advised, if he is minded to appeal to the Supreme Court against this judgment, to apply in writing, within a period of fourteen (14) days from the date hereof, to this Court for a certificate of leave to appeal.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 27th DAY OF AUGUST, 2009.

T. S. MASUKU

JUDGE

I agree.

Q**.M. MABUZA**

JUDGE

Appellant in Person

Directorate of Public Prosecutions for the Respondent