



IN THE HIGH COURT OF SWAZILAND

JUDGMENT ON SENTENCE

Criminal Case No: 190/05

In the matter between

REX

Versus

NKOSINATHI SIBANDZE

ACCUSED

Neutral citation: *Rex v Nkosinathi Sibandze (190/05)* [2014] SZHC 172
(25 July 2014)

Coram: M. S. SIMELANE J

Heard: 17 July 2014

Delivered: 25 July 2014

Summary: Criminal Procedure – Accused convicted of Rape with aggravating factors – Complainant aged six (6) years old at the commission of offence – sentenced to Twenty (20) years imprisonment.

Judgment

SIMELANE J

- [1] The Accused was convicted by this Court on 17 July 2014 for the offence of Rape.
- [2] In passing sentence, I am obligated by law to consider the triad, that is the seriousness of the offence, the interest of the society, the personal interest of the Accused and the peculiar circumstances of the case. These factors were explored by the Supreme Court in the case of **Mfanasibili Gule v The King Criminal Appeal Case No. 2/2011**.
- [3] More to the foregoing is that, the Court in passing sentence is expected to blend in a measure of mercy according to the circumstances. In the case of **S v Harrison 1970 (3) SA 684 (A) at 686 Addleson J** demonstrated this trite principle of the law in the following language:-

“Justice must be done, but mercy, not a sledge – hammer is its concomitant.”

- [4] In honour of the above trite principle of the law, I have considered the fact that the Accused is a first offender, I have also considered your plea in mitigation *ante*. I have considered that you are a family man with one wife and five (5) children. I have also considered that you are responsible for your late sister's two (2) children. In your mitigation you submitted further that you are employed as a Security Guard and are the sole breadwinner in your family. You also applied for a suspended sentence.
- [5] The Crown represented by Ms L. Hlophe argued *au contrae* that the Accused has been convicted of a very serious offence and submitted that the Court should impose a stiff sentence that will be a sound message to would be offenders.
- [6] Having carefully considered all the factors *ante*, I however deem it expedient to point out that the offence committed by the Accused is a very serious one. It is for that reason that Parliament deemed it fit to advocate a minimum mandatory sentence of nine (9) years for Rape where aggravating factors are found as envisaged under Section 185 (1) of the Criminal Procedure and Evidence Act 67/1938.
- [7] The mood of the society to the offence committed by the Accused was buttressed by the Supreme Court per **Moore JA** in the case of **Mgubane Magagula v The King Criminal Appeal Case No. 32/2010** speaking the mind of the Court pegged the appropriate range

of sentence for the offence of rape with aggravating factors to be between 11 – 18 years.

- [8] The Accused sexually molested a very young girl aged six (6) years. The Accused did not use a condom when he raped the Complainant, thereby exposing her to the risk of contracting sexually transmitted diseases like HIV/AIDS. These are the aggravating factors that I find in this offence.
- [9] The nefarious activity orchestrated by the Accused on the Complainant damaged the Complainant physically, psychologically and emotionally.
- [10] Furthermore, in an endeavour to curb this demon, **Ramodibedi JA** (as he then was) declared as follows in the case of **Sam Du Point v Rex The King Criminal Appeal Case No. 4/08 para. 15.**

“It remains for me to emphasise that the courts have a fundamental duty to protect society against the scourge of sexual assaults perpetrated against young children in particular. As this court pointed out in Makwakwa’s case (supra) the courts should mark their abhorrence of the prevalent sexual attacks of young children, as a deterrent. This they can do by imposing appropriately stiff sentences. Indeed in Moses Gija Dlamini v Rex (supra), this court had no difficulty in confirming a sentence of 20 years imprisonment for the rape of a nine (9) year old girl. Sexual offenders against young girls have therefore, sufficiently been warned.”

[11] Having carefully considered the triad I find that an appropriate sentence will be as follows:-

- (1) Twenty (20) years imprisonment.
- (2) Twelve (12) months of the sentence shall be deducted to reflect the period of Accused's arrest and incarceration before his release on bail.

[12] Rights of Appeal explained to the Accused.

M. S. SIMELANE J.
JUDGE OF THE HIGH COURT

For the Crown: Ms. L. Hlophe

For the Accused: Mr. S. B. Motsa