IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No. 109/15

In the matter between:

DANIEL MKHETHWA DLAMINI **Appellant**

And

DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

Neutral citation: *Daniel Mkhethwa Dlamini Vs Director of Public Prosecutions (315/15) 2015 SZHC 146(08th September2015)*

Coram: Hlophe J

For Applicant: Mr. M. Z. Mkhwanazi

For Respondent: Mr. A. Makhanya

Date Heard: 15 July 2015

Date Handed Down: 08 September 2015

JUDGMENT

[1] The Appellant brought an urgent application seeking an order of this court admitting him to bail pending an appeal he had noted against both his conviction and sentence. Due to the developments that later came about in the matter, I have chosen to refer to the parties as Appellant and Respondents and not applicant and respondent. It suffices to say the parties agreed eventually that the court deals with the appeal itself instead of the bail application.

[2] The application was a sequel to a case whereupon the Appellant, a man said to be above 64 years of age, was convicted of indecent assault on a child or a girl of five years and sentenced to 5 years imprisonment without the option of a fine nor a part of his said sentence being suspended, by the Principle Magistrate sitting in Manzini.

[3] The record of proceedings together with the judgment reveal the facts of the matter before the court *a quo* as set out herein below in summary form.

That on a certain day the Appellant who stayed in the same homestead as the one at which the complainant stayed, called the latter, at the time a girl of about 5 years of age, who was playing outside in the yard with other children, into his room, whereat it is common cause he caused her to lie on her back on his bed after which he committed a nefarious act in terms of which he licked her private part, having removed her panties.

[4] The complainant's colleagues who had seen her being called into the room, peeped through the window and saw what was happening. This seems to have disturbed the Appellant from continuing with what he was doing. The Appellant is alleged to have then given the complainant some money, (about E6.00) and asked her not to tell anyone about what had happened. In fact he also went on to threaten her with death if she dared to reveal what had happened to her to anyone.

[5] The Appellant was eventually arrested, charged with indecent assault, tried and convicted of the said offence. It is common cause that after having been found guilty of indecent assault and duly sentenced to 5 years imprisonment, the Appellant through his current attorneys, instituted an application under a certificate of urgency and asked for an order releasing him on bail pending appeal. It is important to mention that before making the application to this court; the Appellant says he had

moved a similar application before the Magistrate's court where the Magistrate, he says, directed him to move such an application before this court, hence this application. I can only comment that if it happened as alleged, such does not seem to have been the proper procedure as the proper one is that the Magistrate himself or herself should have dealt with the application for such bail, only for this court to deal with it on an Appellate basis should the need arise, given that the judgment being challenged was that of the magistrate's court which has jurisdiction in law to control its own processes. I however saw no reason why this court could not deal with the matter in view of the fact it concerned liberty and was not going to engender prejudice to anyone in its view.

[6] In support of the application, the Appellant contended that there were prospects of success in his appeal, because of his age as well as allegedly because, there were contradictions and inconsistencies in the evidence of the crown witnesses particularly the evidence that there was a knock at the window of his room and whether or not the door was closed at the time. He further contended that there were contradictions or inconsistencies on the description of the clothes worn by the complainant as well as or whether he was taken to a hospital at any stage and what her position on the Applicant's bed was.

[7] I must say I noted even prior to hearing the otherside that the Applicant did not have a strong case when considering that the position put forth by the crown witness was actually supported by the testimony of the complainant which means such testimony was corroborated in law together with the fact that the contradictions were not really borne out by the record and where they were, they were not material at all.

[8] It is important to mention that as the hearing date of the bail pending appeal neared or came closer; the Applicant filed an amended notice of appeal which indicated that the conviction was no longer being appealed against but only the sentence was. The amendment contended that it was erroneous for the court a quo to have sentenced applicant to five years imprisonment without either the option of a fine or a portion of the sentence being suspended.

[9] Although no papers had been filed by the crown in opposition it was agreed between the crown and the defence that although the matter had come to this court as a bail application pending appeal, this court could as well deal with the appeal itself now that the record of proceedings from the court *a quo* was already before it. It was agreed that in view of the

position taken by both the defence and the crown, the issues in the matter were fairly crisp necessitating that this court comes up with a decision on the appeal itself as opposed to hearing the application for bail pending appeal. I must say I accepted this position as I felt the interests of justice would best be served by adopting this approach. As mentioned above, it is for this reason the parties are now referred to in the manner they are herein as well as why this court ended up not deciding whether or not the Appellant was entitled to bail

[10] At the commencement of the hearing of the matter before me, it was agreed that the appeal against conviction was no longer being pursued, but only that against sentence was. On the sentence, it was the view of both the defence and crown counsel that as it stood same sounded harsh and that it needed to be reduced to one as may be considered appropriate by this court. Having taken the position they had taken both counsel saw no need to argue the matter. It merits mention to say that even as they had this agreement, none of them could refer this court to any decided cases on what the sentencing trend is in such matters. To this extent, their decision was in my view based more on their whims rather than on established principles. This meant I had to be cautious and apply myself fully to the matter.

[11] Given that I had not considered both the record of proceedings, which had just been filed and was still in manuscript form together with the judgment, I asked that I be allowed time to read through both the record and the reasons for the conviction and sentence so that I could properly asses the matter.

[12] Although it became clear that no violence was used, I was convinced after my having read the record and the court *a quo's* judgment that the matter was a serious one. It involved sexual abuse of a girl child of about five years old at the time by an elderly man of over sixty four years of age. The Appellant also stood in *loco parentis* to the complainant. Although the complainant may not have been violated to the same extent as perhaps would happen in a consummated rape, I was not convinced the sentence was on the face of it not so harsh so as to induce a sense of shock. The violation to her was very serious nonetheless, considering her age and the permanent detrimental effect it had on her life going forward. Furtherstill the appropriate disparity in a rape and indecent assault sentences involving complainants of the same age had no doubt been taken into account. The practice on sentencing, in matters of rape of children of that age by an elderly man of Appellant's standing in society and to the child is known to be around 15 years imprisonment. I find it

difficult to accept that 5 years imprisonment for the commission of the offence in question by an elderly person who was in *loco parentis* on a child of that age can ever be said to be so harsh as to induce a sense of shock.

[13] The position of our law is settled that sentencing is a matter reserved for the discretion of the trial court. It is not a matter to be interfered with except in rare and special circumstances as in a case where it was irregular and had been so harsh so as to induce a sense of shock. A sentence induces a sense of shock if it resembles a striking disparity between the one the Appellate court would have imposed and that imposed by the trial court. In ***R V Ndusha Themba Zwane 1970-76 SLR 165,*** the legal position on an appeal or review of a sentence was expressed in the following words, which was an excerpt from the case of ***S V Bolus and Another 1966 (4) SA 575 (A)***:-

> **"It is well settled that punishment is a matter for the discretion of the trial court and that a court of appeal cannot interfere unless such discretion was not exercised judicially".**

[14] Clarifying on when a discretion can be said to have been exercised judicially, the following was said in ***S V De Jager and Another 1965 (2) SA 6161 (A)*** particularly at page 629:-

> **"It is the trial court which has the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed".**

[15] I am therefore of the firm view that my being asked to interfere with the sentence is not supported by any of the known element of a failure by a sentencing court to act judicially which as indicated in the foregoing excerpt, are an irregularity, a misdirection or a sentence so severe that no reasonable court could have imposed it, which in short is that it was severe that it induced a sense of shock. From the record I have been shown neither an irregularity nor misdirection. Although it was expressly stated that the sentence was harsh, I cannot agree such an assertion is supported by the facts, circumstances of the matter and previous judgment and the law in general. It is not the type of sentence I would say has a striking disparity to the one this court would give if not would be obliged to give taking into account all the circumstances of the matter. Certainly if it can ever be regarded as harsh, I cannot say it is so harsh as

to induce a sense of shock when viewed against the peculiar circumstances of the matter taken together with the sentencing trend by our court in related matters.

[16] I hold a strong view that there is no basis in law to interfere with the sentence in this matter. It in my view took into account all the tenats of sentencing as borne out by the trial and in particular deterrence as the offence concerned is clearly aborminable, with society not expecting to such again which enjoins the courts to deal harshly with such matters.

[17] Lastly I must mention that a lot was said in the papers about the sentence having not given an option of a fine nor allowing for a portion of it to be suspended. Firstly I do not think it would be proper for a sentence in a matter as serious as this one to advocate for a portion of it to be suspended or for it to allow a fine. It being related to rape of an aggravated nature, it seems to me that a custodial sentence is appropriate.

[18] I have therefore come to the conclusion that notwithstanding the views expressed by both the crown and defence counsels, I cannot agree that there was anything wrong with the sentence as imposed by the court a quo, which means that the Appellant's appeal cannot succeed.

[19] Accordingly I make the following order:-

i) The Applicant's appeal be and is hereby dismissed.

N. J. HLOPHE
JUDGE - HIGH COURT