IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 258/2019**

In the matter between

NEWMAN SHIBA **APPELLANT**

AND

THE KING **RESPONDENT**

Neutral Citation: *NEWMAN SHIBA v THE KING (258/2019) [2023] SZHC 59 (23 MARCH, 2023)*

Coram : MASEKO J

Heard : 20/09/2019
27/01/2023
02/03/2023

Delivered : 23 MARCH, 2023

Preamble *: Criminal Procedure- Sentence whether harsh such that it induces a sense of shock- Whether the trial court considered the **triad** during sentencing- It is trite*

law that where there is a misdirection during the trial of the accused the appellate court has a legal duty and right to interfere with the sentence imposed by the trial court.

Held *: In casu the trial court did not fully consider the* ***triad*** *in sentencing the appellant to 15 years imprisonment without the option of a fine as this does not appear ex facie from the Record of Proceedings before the court a quo. In the circumstances this court interferes with the sentence imposed by the court a quo.*

JUDGMENT

[1] On the 15th June 2019, the Court *a quo* convicted the Appellant for contravention of Section 3 (1) of the Sexual Offences and Domestic Violence Act 15/2018.

[2] The Crown led the evidence of the complainant and one Thembisile Sibandze who has lived with the complainant since she was two (2) years old. The charge sheet describes the complainant as having been 15 years old when the offence was committed.

[3] PW1 is the Complainant and she testified that on the 15th April, 2019 she boarded a bus from Msengani area to Mfulamudze area, however,

the bus dropped her off at Gonco bus station where the conductor of the bus informed her that a car was going to come and fetch her. During the trial the Crown did not pursue this story about the car which was supposed to pick the complainant and did not fetch her until she was found by the Appellant around 2200hrs at night still sitting in the bus station waiting room. This in my view was the root cause of the events that followed.

[4] PW1 testified that the Appellant together with a male friend found her in the waiting room and then approached her and told her that it was late for her to be at that place at night and that she should go with them to put up at their home. She readily agreed to this suggestion and set for home with the boys carrying her luggage. She stated that on the way the other boy proceeded to his home whilst she remained with the Appellant and they proceeded to Appellant's home.

[5] PW1 testified that during their journey to Appellant's home she asked if the Appellant had a sister whom she could sleep with and the Appellant agreed and she derived some comfort from that. She

testified that when they arrived at Appellant's home he opened the house and ushered her inside and gave her a sealed yoghurt to eat and then Appellant left to secure the bucket she was carrying. He came back and found her sleeping and then asked her to do him a favour by having sexual intercourse with her. She protested that she was young and that they shouldn't do it but he touched her private parts and they eventually had sexual intercourse, and also warned her not to tell anyone about the sexual encounter.

[6] PW1 testified further that they slept together and that in the morning he asked for a sexual favour again, but it was not clear from her testimony in the Record of Proceedings whether there was a second sexual encounter or not. The Appellant eventually gave her warm water to bath and also asked her to finish the yoghurt she had eaten the previous evening and she did and then they left for the bus station.

[7] She testified further that the Appellant gave her E10.00 to board public transport and she had all her possessions with her i.e. the bucket full of guavas and her bag. She boarded a bus to Matsanjeni where she

dropped off and was eventually met by her aunt PW2 who was driving her car. Her aunt told her how worried they were as a family and eventually reported to Hluthi Police Station that she was missing. PW1 did not disclose to her aunt PW2 that she had been raped, or had had a sexual encounter with the Appellant. She concealed this to her aunt and only revealed same when they were at Hluthi Police Station. She was eventually taken to Matsanjeni Health Centre where she was examined by the Medical Doctor there, sexual intercourse was confirmed and further tests were conducted and she was also admitted for five (5) days.

[8] During cross-examination the Appellant who was unrepresented put to her that he had proposed love to her and she agreed and they went to his home where they had consensual intercourse, and also that she had informed him that she had finished schooling. PW1 denied that and insisted that he had forced her to have sexual intercourse with him.

[9] Appellant questioned her failure to report to her aunt (PW2) voluntarily and she responded that it was because of the threats he had made that she must not tell anyone.

[10] PW2 is the aunt to the complainant PW1 and her evidence corroborates PW1 in so far as she disappeared on the fateful night in question and how she eventually found her at Matsanjeni area in the morning of the following day, the 16th April, 2019. She explained that when she found PW1 at Matsanjeni she informed her that she (PW1) had spent the night at another lady's home. The Appellant did not cross-examine PW2 and the Crown closed its case.

[11] The Crown handed into Court PW1's Birth Certificate and the Medical Report from Matsanjeni Health Centre.

[12] The Appellant testified in his defence under oath and stated that he proposed love to PW1 and she agreed and then they went to his home where they slept and engaged in consensual intercourse. He testified that PW1 informed him that she had finished school and he assumed

that she was an adult. Nothing much turned out from the Crown's cross-examination of the Appellant.

[13] The Crown made its submissions and the Appellant also made his closing submissions. The Court *a quo* convicted the Appellant and sentenced him to fifteen (15) years imprisonment without the option of a fine.

[14] The Appellant has appealed against the sentence only, his argument being that the sentence was severe in that the Court *a quo* did not apply the **triad**. For ease of reference, I hereby outline the grounds of appeal herein below:

> *1. The Court a quo erred both in law and in fact by failing to balance the three (3) competing aspects of the triad when issuing the sentence. The Court a quo did not pay attention to the personal circumstances of the Appellant but over-emphasized the interests of society.*
>
> *2. The sentence imposed by the Court a quo is harsh and induces a sense of shock, especially when one*

considers that it was not alleged that the rape offence was accompanied with aggravating circumstances.

ANALYSIS OF THE EVIDENCE:

[15] The Appellant conducted his own defence before the Court *a quo*. He did not challenge the Medical Report, which presents some questionable following findings:

(i) Examination was easy, which means the complainant was not a virgin.

(ii) The Doctor's report that the "findings consistent with effected vaginal penetration . . ." The complainant testified that she washed herself with warm water before she left the Appellant's home. How much integrity can be placed on the medical report where the doctor states that the complainant blames herself for this occurrence?

The Doctor should have been called by the Crown to testify on his/her findings more particularly because the Appellant was unrepresented and bearing in mind the severity of the

sentences in SODV Act cases. It is very important in such cases to determine whether complainants below the legal age are sexually active or not. In casu it appears from the Doctor's findings that PW1 was not experiencing her first sexual encounter. In such cases the Crown must clearly ventilate this particularly in undefended cases to prevent people like the Appellant from suffering or carrying sins of other people before him.

(iii) The complainant's private parts accommodate two fingers.

(iv) There was no discharge.

(v) There was no haemorrhage.

[16] The complainant herself did not report the sexual intercourse on her own free will to her aunt PW2. She told her aunt that she had spent the night at the homestead of a certain lady. Even though she tried to cover this weakness in her testimony by alleging that the Appellant threatened her and forced himself on her, it is crystal clear from her evidence that she was a willing partner and only resorted to making

the Appellant a scapegoat when the circumstances became unfavourable to her.

[17] In such cases it is the duty of the Court adjudicating on such sensitive matters where a lengthy term of imprisonment is possible to ensure that all possible avenues favourable to the Crown and favourable to the Accused persons are explored. In *casu*, the Crown was under a legal duty to call the doctor to testify on his/her findings as this would also assist the Court *a quo* and this Appellate Court to fully understand and appreciate the circumstances of the complainant. I am alive to the fact that whether the complainant is a virgin or not as long as she is below the age in terms of the law, the offence is proven. However, it is the issues I raised above that should always play in the mind of the trial Court when it considers the sentence it has to deliver.

[18] The sentence must be commensurate with the offence committed and supported by the circumstances of that case. In *casu*, the Appellant was sentenced to 15 years imprisonment as if he had committed the offence under extremely aggravated circumstances visited with

violence, yet this is not the position. Even the fact that the offence was committed at the homestead of the Appellant is an indication that in his mind he believed he was engaging in sexual intercourse with an adult, bearing in mind that she did not say to him that she was fourteen years but only said she was young.

[19] The Crown did not lead medical evidence to prove that the complainant was of an unstable mind. The doctor who examined her only recommended psychological support because she blamed herself for the occurrence. It is important that the conduct of the accused person before and during the commission of the offence be taken into account during sentencing in such cases in particular where long term imprisonment is to be imposed.

[20] The age of the Appellant in *casu* plays a pivotal role in these proceedings. He was twenty-three (23) years old when this offence was committed. This is a very tender age indeed, and the sentence imposed is harsh and shocking in the circumstances. As I said earlier, this was not an encounter visited with violence of any sort, even the

charge sheet itself does not allege aggravating circumstances in terms of Section 185 *bis* of the Criminal Procedure and Evidence Act 67/1938 as amended. The merits of this case are in my view not supportive of the sentence imposed by the Court *a quo*. This in my view is a misdirection by the trial Court entitling this Court sitting as an Appellate Court to interfere with the sentence imposed by the trial Court.

[21] I am alive to the fact that offences of this nature are prevalent and it is the very reason why the SODV Act was enacted to deal with this scourge, but be that as it may, Courts still have a duty to ensure that accused persons are convicted properly and sentenced properly according to their peculiar circumstances. It is trite law that such case is judged on its merits.

[22] In the case of ***Rex v Sipho Lucky Fakudze, Review Case No.1/2007***, S.B. Maphalala J. (as he then was) stated the following when dealing with the appropriateness of the sentence in criminal matters, and I quote from paragraph 5 of His Lordship's judgment where he adopted

the approach of Holmes JA in the landmark Case of ***S v Rabie 1975 (4) SA 855 (A) at 862 G:*** This is what S.B. Maphalala J. (as he then was) stated:

> [5] ***At this stage of the proceedings, the Court has to pass an appropriate sentence. Three competing interests arise for the proper balance by the Court. These are referred in legal parlance as the triad. The nature of the crime, the interests of society and the interest of the accused. According to Holmes JA in the case of S v Rabie 1975 (4) SA 855 (A) at 862 G:***
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> ***'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. Despite their antiquity these wise remarks contain much that is relevant to contemporary circumstances (they were referred to, with approval, in S v Zinn 1969 (2) SA 537 (A) at 541) 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 the interest of society which his task and the object 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 human and compassionate understanding of human frailties and the pressures of society which contribute to criminality .***
>
> **. .**"

[23] I have carefully perused the reasons for sentence as articulated by the trial Court. The triad was not fully considered during the sentencing, only the interests of society, and the crime itself were considered by the Court *a quo*. There is no analysis of the interest of the Appellant, for example, his tender age (23 years at the time of commission of the offence) and the manner and circumstances under which the offence was committed. These should have been considered by the trial Court during sentencing, they cannot be avoided. It is trite law that the

interests of the accused are also considered during sentencing because this is the next stage in the criminal trial where the trial Court has to ensure that fairness and appropriateness of the sentence is fully implemented. The failure by the Court *a quo* in *casu* to deal with Appellant's personal circumstances *ex facie* the record and the failure to consider the manner and circumstances of this case results in a misdirection entitling this Court to interfere with the sentence. Where a trial Court has convicted an accused person, it has a legal duty to apply the **triad** in its consideration of the appropriate sentence which it seeks to impose, and these reasons must all appear *ex facie* on the Record of Proceedings.

[24] In the case of ***Bongani Lekwayi Gumedze v Rex (11/2013) [2013] SZSC 12 (29 July, 2015)*** M.C.B. Maphalala ACJ (as he then was) stated the following when dealing with the appropriateness of the sentence at paragraph 6 and 12 respectively, and I quote:

> *[6]* ***His Lordship Justice M.C.B. Maphalala, as he then was, in the case of Elvis Mandlenkhosi Dlamini v***

Rex Criminal Appeal No. 30/2011 para 29 had this to say:

It is trite law that the imposition of sentence lies within the discretion of the trial Court, and, that an Appellate Court will only interfere with such sentence if there has been a material misdirection resulting in a miscarriage of justice. It is the duty of the Appellant to satisfy the Appellate Court that the sentence is so grossly harsh or excessive or that it induces a sense of shock as to warrant interference in the interests of justice. A Court of Appeal will also interfere with a sentence where there is a striking disparity between the sentence which was in fact passed by the trial Court and the sentence which the Court of Appeal would itself have passed; this means the same thing as a sentence which induces a sense of shock. This principle has been followed and applied consistently by this Court over many years and it serves as the yardstick for the determination of appeals brought before this Court."

[12] *This Court, as the final Court of Appeal should strive at uniformity in sentences for criminal convictions considering the facts and particular circumstances of each case. In the Mbuso Blue Khumalo (supra) at para 45, this Court considered its previous decisions with a view to show consistency in sentencing for aggravated rape:*

In the case of Mandlenkhosi Daniel Zwane v Rex Criminal Appeal No.39/2011, this Court confirmed an eighteen year sentence for aggravated rape. In the case of Sifiso Cornelius Ngcamphalala Criminal Appeal No. 34/2003, this Court confirmed a fifteen year sentence for aggravated rape. Similarly, in the case of Albert Khumalo v The King Criminal Appeal No.55/2003, this Court confirmed a fifteen year sentence for aggravated rape; this was the same case in the appeal of Mlamuli Obi Xaba v Rex Criminal Appeal No.32/2010, a sentence of eighteen years for aggravating rape was confirmed. In Moses Gija Dlamini v Rex Criminal

Appeal No.4/2007, this court confirmed a twenty year sentence for aggravated rape."

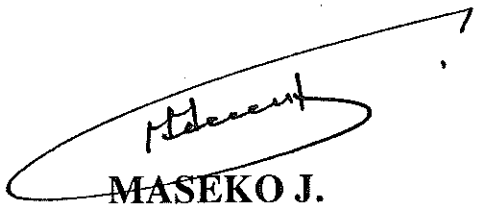
[25] I have referred to the above citations from the judgment of M.C.B. Maphalala ACJ, as he then was, to demonstrate the important point raised by Appellant's Counsel Ms. N. Ndlangamandla that the rape was not accompanied with aggravating circumstances and also importantly that the Crown did not allege the existence of aggravating circumstances in the charge sheet to warrant the Court a quo to impose a sentence above 9 (nine) years imprisonment. This case demonstrates that the sentence of fifteen (15) years imposed in *casu* is grossly harsh and certainly a sentence that should have resulted from an aggravated rape, which is not the case in *casu*.

[26] In the circumstances I am of the considered view that there is merit in the appeal against sentence, and I accordingly hand down this order:

1. The Appeal against the sentence of fifteen (15) years imprisonment is hereby upheld.

2. The sentence of fifteen (15) years imprisonment without the option of a fine is hereby set aside and substituted with a sentence of four (4) years imprisonment without the option of a fine backdated to the date of his arrest.

So Ordered!



MASEKO J.

FOR THE APPLICANT: N. NDLANGAMANDLA

FOR THE RESPONDENT: B. FAKUDZE