CRIM.APPEAL CASE NO.41/99

IN THE MATTER BETWEEN:

SIZA GANGADVU THWALA

VS

REX

CORAM **: MAPHALALA J.**
: MASUKU J.

For Appellant **: In Person**
For Respondent **: Mr M.T. Nsibande**

JUDGEMENT
18/11/99

The Appellant was charged and convicted of the crime of rape, it being alleged that in or about the 2nd June, 1998, and at or near Mantabeni, in Mbabane in the Hhohho District, the Appellant did wrongfully and unlawfully have unlawful sexual intercourse with one A, a female minor aged 10 years and incapable of consent in law.

The Crown further alleged aggravating circumstances, namely that at the time of the said rape, the complainant was a young child of ten (10) years. It was further alleged that prior to the said rape, the complainant was a virgin and had had no knowledge of sexual intercourse at all.

The learned Senior Magistrate, sitting at Mbabane, found him guilty of the said offence and sentenced him to nine (9) years imprisonment, in compliance with the provisions of Section 185 bis of the Criminal Procedure and Evidence Act, 1938, as amended.

The Appellant has noted an appeal against both conviction and sentence. I propose to deal firstly with the Appellant's attack of the conviction. The grounds of appeal against conviction are the following:-

1. That the learned Court erred in fact and in law when finding that the Appellant is guilty as charged, this is in the light of the Appellant's plea of not guilty.

2. The learned Court erred in fact and in law when rejecting the accused's story in as much as it could reasonably be true.

In this case, the Crown led the evidence of seven witnesses to prove its case. That evidence clearly linked the Appellant to the offence. The complainant (PW 1) recounted how she was walking to the grinding mill in the company of one B. They met the Appellant on the way, whom the complainant had seen previously and he informed her that her mother was calling her. PW1 then set to return home at which time the Appellant accosted her and proceeded to have sexual intercourse with her. She fully described the act of sexual intercourse not withstanding her tender age.

Her evidence, save the act of sexual intercourse, was confirmed by PW 3, who in particular, confirmed that the accused, whom she had seen previously met them and told them that the complainant's mother was calling her.

PW 2 was B, the complainant's grandmother. One of the children, who lived with her called Nkosingiphile informed her that he had been informed by PW 1 that a boy had done something bad to the complainant. PW 2 then inspected PW 1's genitals and traced some blood to her underwears and only took PW 1 to hospital the following day.

PW 7 was Dr Augustine Ezeogu of the Mbabane Government Hospital, who opined that the complainant had had recent sexual intercourse, evidenced by the absence of hymen. He further opined that the complainant had not previously experienced sexual intercourse as the examination was painful. Laboratory tests confirmed the presence of spermatozoa. The other witnesses were Police Officers, whose evidence is not material to this appeal.

The accused was, at the close of the Crown's case correctly put to his defence and for the first time alleged an alibi, stating that on the day in question, he was not at Mantabeni but was at Mhlambanyatsi. This story was never put to any of the Crown's witnesses. This story was correctly rejected as an afterthought by the learned Senior Magistrate.

Authority for the proposition that the defence case must be fully put to the Crown's witnesses is legion and failure to do so leads the Court to draw an adverse inference against the accused i.e. his evidence is an afterthought. See **S v P 1974 (1) SA 581 (RHODESIA A.D), R v DOMINIC MNGOMEZULU & 9 OTHERS Case NO. 94/90.**

For that reason, the accused's allegation was correctly rejected and could not be regarded as

reasonably possibly true. If indeed it was not an afterthought, it could and should have been put to the Crown's witnesses. The Crown's evidence against the accused was, save for a few minor blemishes, good and leaves one in no doubt that it was the accused who committed the offence in question.

In the result, there was no error on the part of the Court in returning a verdict of guilty. There was every reason to reach that inescapable conclusion based on the evidence. Appellants must know that the Court is not bound by an accused's plea of not guilty. The Court is at large to find an accused guilty of an offence notwithstanding a contrary plea. This will obviously be based on the evidence adduced. Furthermore, there is no basis, in view of my analysis of the evidence for alleging that the Appellant's case could be reasonably possibly true. I would thus dismiss the appeal against conviction.

Against sentence, the Appellant states that the sentence of nine (9) years is harsh and induces a sense of shock, in light of the fact that he is a first offender and was eighteen years and was attending school. *In casu*, it cannot be said that the sentence imposed induces a sense of shock as it is one prescribed by the Legislature in Section 185 *bis* (1) of the Criminal Procedure and Evidence Act. The Court must be seen to give effect to Legislative solicitudes.

The question for determination is whether the learned Senior Magistrate had jurisdiction to impose a nine year sentence in consonance with the provisions of Section 185 *bis* (1) in light of the fact that his jurisdiction is limited to imposing a sentence of not more than seven (7) years according to the provisions of the Magistrate Courts Act 66 of 1938.

Section 185 *bis* (1) provides as follows;-

> "*A person convicted of rape shall, if the Court finds aggravating circumstances to have been present, be liable to a minimum sentence of nine years without the option of a fine and no sentence or part thereof shall be suspended.*"

From the Legislative nomenclature, it is clear that this is a peremptory provision. This must however be viewed against the provisions of Section 2 of the Magistrates Court (Increase of Jurisdiction Notice) 1988, to determine whether this applies to all classes of Magistrates, including those whose jurisdiction to impose sentences is otherwise less or substantially less than nine years.

Section 73 (1) of the Magistrate's Court Act, 66 of 1938, arrogates the Minister for Justice, in consultation with the Chief Justice, with authority to increase the jurisdiction to be exercised in criminal cases by a Magistrate or Senior Magistrate appointed in terms of Section 4 of the Magistrate Courts Act. This is done by publishing a Notice in the Government Gazette.

By Legal Notice No.57 of 1988, (hereinafter called "the Notice") the then Minister for Justice, on the 6th June, 1988, issued a Notice in terms of Section 73 as aforesaid and which reads as follows in part;

"Increase of criminal Jurisdiction of senior magistrates.

2. Every Senior Magistrate shall, in respect of any criminal matter instituted on or after the coming into force of this Notice, have jurisdiction to impose a sentence of imprisonment not exceeding seven years or such fine as may, in accordance with law be imposed."

From the aforegoing it is clear that the extent of the jurisdiction of Magistrates was delegated by Parliament to the Minister for Justice, who must set the jurisdiction out in consultation with the Chief Justice. In terms of the Notice cited *ipsissima verba* above, the maximum criminal jurisdiction for Senior Magistrates is the imposition of a fine not exceeding seven years.

This question has arisen before, especially regarding the effect of Section 185 bis (1) on the power granted to the Minister by Section 73 of Act 66/1938. In determining whether Junior and Senior Magistrates have jurisdiction to impose the sentence set out in Section 185 *bis*, the learned Chief Justice has held that the said Magistrates may not impose the sentence in Section 185 *bis* because it exceeds the jurisdiction set out above.. In this regard, reference is made to the following case of **MESHACK TSHWEBE HADZEBE v REX CRIM.APP. NO.67/98** (per Sapire C.J. and Matsebula J.)

I associate myself with the learned Chief Justice's view for the reasons that follow herein below. Firstly, the provisions of Section 185 *bis* must not be considered *in vacuo.* The key word in my view is "Court", occurring in the first line, which according to the provisions of Section 2, the Interpretation Section of the Criminal Procedure and Evidence Act, 67/1938, means

> *"In relation to any matter dealt with under a particular provision of this Act, means the judicial authority which under this Act* ***or any other law has jurisdiction in respect of that matter****" (my emphasis).*

In terms of the provision of the Notice as aforesaid, "the Court", would mean, in respect of passing the sentence prescribed in Section 185, the Principal Magistrate's Court, whose maximum sentence is fifteen years and has jurisdiction therefore. The same cannot be said of the Senior Magistrates, who are, in terms of the Notice precluded from imposing the sentence set out in Section 185 *bis*.

In my view therefore, in order to give effect to the meaning of Section 185 *bis*(1), one must not lose sight of the provisions of Section 2, relating to the interpretation of "Court" or "the Court". It therefore becomes imperative in this case to have recourse to jurisdiction in respect of that matter under any other law, namely the Magistrate Courts Act, which fixes the maximum sentences to be imposed by Senior Magistrates.
Put differently, the question becomes, whether Senior Magistrates have jurisdiction in terms

of the Magistrate's Court Act to impose the sentence but for the provisions of Section 185 *bis*(1). If the answer is in the negative, then the Senior Magistrate does not have jurisdiction to impose the sentence prescribed by Section 185 bis as aforesaid.

Secondly, there is a maxim which seeks to avoid construction that leads to collision with other provisions, namely "*generalia specialibus non derogant*". This maxim was applied by **VISCOUNT HALDANE IN R v BRIDGE (1890) 24 Q.B.D 609, QUOTED BY MAXWELL ON "THE INTERPRETATION OF STATUTES" 12TH EDITION, 1980, AT page 196,** where the following excerpt appears:

> *"We are bound...to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an*
>
> *earlier statute has directed its attention to an individual case and has made provisions for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had provided for individually, unless an intention to do so is specially declared. 'A merely general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to."*

This excerpt in my view correctly sums up the position in this matter. The special Act which deals with the jurisdiction of Magistrate in respect of sentencing is the Magistrate Court Act of 1938, which fixes the jurisdiction of Senior Magistrates at seven years. Parliament, in 1986 amended the Criminal Procedure and Evidence Act and stated in general terms that in cases of rape with attendant aggravating circumstances, the Court shall impose a minimum sentence of nine years.

There is no *inducium* in the Legislative nomenclature to indicate that it was the intention of the Legislature to specially declare that all classes of Magistrates, including those, who under the Magistrates Act, had no jurisdiction to pass a sentence of nine years were specifically arrogated that power by the provisions of Section 185 *(bis* (1). To hold so would do violence to the expressed intention of the Legislature.

Certain policy considerations were taken into account in apportioning different jurisdiction in respect of sentences to different classes of Magistrates. Only specific Parliamentary language overriding the earlier apportionment would lead the Court to adopt the position that the provisions of Section 185 bis (1) apply to all Magistrates, irrespective of rank. Such Parliamentary intention to give jurisdiction to all Magistrates irrespective of rank is evident in the provisions of The Stock Theft Act No.5 of 1982. Section 19 thereof provides as follows;-

> *"Notwithstanding anything in any other law a Magistrate's Court of First Class shall have jurisdiction to impose upon a person convicted of an offence*
>
> *in respect of which the penalty is prescribed in section 18 (1) any penalty in accordance with that Section and to order the payment of any compensation under section 20".*

The provisions of Section 185 *bis* (1) are a far cry regard being had to the language used therein compared with what appears herein above. To elevate the provisions of Section 185 *bis* (1) to the same position as the provisions Section 19 would amount to dislocating the expressed intention of Parliament and would occasion serious violence thereto.

Mr Nsibande's attractive and spirited argument that by enacting Section 185 bis (1), Parliament intended only in rape cases with aggravating circumstances to empower all Magistrates to mete out the mandatory minimum sentence cannot stand in view of the aforegoing.

In the circumstances, the Appellant's appeal against sentence is successful to the extent that the learned Senior Magistrate did not have jurisdiction to impose a sentence of nine years as he did. The proper sentence would have been seven (7) years which he is entitled to mete out as aforesaid.

In the result, I propose that the appeal against conviction be and is hereby dismissed. The appeal against sentence succeeds to the extent that the sentence of nine years is altered to seven years imprisonment.

T.S. MASUKU

JUDGE

I agree

S.B. MAPHALALA
JUDGE