IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.6/02

In the matter between:

MANDLA N. MATSEBULA

VS

REX

CORAM LEON JP

STEYN JA

TEBBUTT JA

FOR THE CROWN MR. P. DLAMINI

FOR THE APPELLANT IN PERSON

JUDGMENT

Steyn JA:

The appellant was charged and convicted in the High Court on a charge of rape. The complainant was a young girl, 9 years of age, and as such incapable of consenting to sexual intercourse.

The Crown also alleged that the rape was attended by aggravating features; inter alia that the appellant had infected the complainant with a venereal disease and that she had been a virgin at the time he raped her.

The appellant pleaded not guilty and conducted his own defence. After evidence was led by the Crown and the defence, the appellant was found guilty as charged.

The trial Judge sentenced him to 12 years imprisonment. He specifically decreed as follows: "The sentence will not be backdated".

The appellant appeared in person before us. Although in his notice of appeal he challenged the correctness of his conviction, he tended to confine his argument to submissions concerning the severity of the sentence and more particularly the fact that the Judge had not backdated it.

The judgment of the court a quo succinctly summarised the evidence as follows:

"The Crown called a number of witnesses to prove its case. The evidence of the Crown is that on or about 14th February 2000, complainant was called by the accused person to his homestead. She complied. The accused caused the complainant to enter his sleeping hut. He instructed the complainant to remove her underwear and had sexual intercourse with her. Accused warned the complainant not to tell anyone, as he would assault her severely.

On the same day the complainant was searched for by her mother, PW1, Ester Makhubu. She did not find her until the next morning when she was discovered sleeping in a house under construction.
Two days or so later, the complainant was observed by PW1 to have a discharge emanating from her private parts. She asked her about the discharge. The complainant revealed that accused had had sexual intercourse with her.

PW1 reported the matter to members of the community police. Accused was approached and he admitted having committed the offence. The matter was reported to the police and the accused

was arrested. The complainant was taken to hospital where she was examined by Dr. Christopher Aish (PW4) who stated that the complainant was raped.

The accused person gave evidence under oath where he denied that he committed this offence. His evidence was that he was being implicated in this case by complainant's mother. Accused called a witness in his defence who told the court that accused admitted to him that he raped the complainant."

It is clear from the above summary of evidence that the appellant was correctly convicted. If there had been any doubt it was removed by the evidence of the appellant's own witness that the appellant had admitted to him that he had committed the offence.

The only issue that requires to be addressed is the propriety of the sentence. The appellant is a first offender, he is 36 years old. He is the only breadwinner in his family. He has two minor children one of whom is still only 7 years of age.

However, the crime of rape is per se a most serious offence. The risks of the transmission of a sexual disease, such as happened in this case is an additional factor increasing the traumatic impact on the complainant. Even more significantly, the prevalence of HIV/AIDS adds a particularly lethal component to the risk of a violation committed by an accused on an innocent complainant. The court was therefore perfectly entitled to impose a severe sentence on the appellant.

Certainly, in view of her tender years, the fact that the appellant infected the complainant with a sexually transmissible disease and that she was a virgin at the time, justified the court removing the appellant from society for a very lengthy period of time. The question

arises whether it should have backdated the sentence. As indicated above the court explicitly declined to do so.

Section 318 of the CRIMINAL PROCEDURE AND EVIDENCE ACT says the following in regard to the "Commencement of Sentences":

"Subject to Sections 300(3) and 313, a sentence of imprisonment shall take effect from and include the whole of the day on which it is pronounced, unless the court, on the same day on which sentence is passed, expressly orders that it shall take effect from some day prior to that on which it is pronounced".

Over the years this jurisdiction has developed a consistent practice that, where appropriate, sentences are backdated to the date of the arrest of an accused. No doubt the lengthy delays to which criminal trials are so often and so regrettably subject, have prompted the courts to backdate sentences so as to avoid the perhaps unanticipated prejudice of pre-conviction incarceration per incuriam not being taken into account by the sentencing Judge. The introduction of "Non-Bailable Offences" legislation has also no doubt compounded this problem for those affected by its provisions.

The salutary practice of back-dating sentences of imprisonment is endorsed. I say this, because in doing so a court ensures that an accused is not unfairly penalised because of lengthy periods of pre-trial incarceration. However, the legislature clearly and explicitly empowers a court to direct that the sentence of imprisonment it imposes on an accused should take effect from the day it is passed.

In the present case the trial Judge exercised his discretion not to backdate the sentence and must have appreciated that in so doing he wished the appellant to serve the full 12 years in addition to his pre-trial detention. Appellant was arrested on the 28th of February 2000

and was sentenced only on the 17th of October 2001 - some 19 and half months later. His "effective" period of imprisonment was therefore some 13 years and 7 and half months.

Bearing in mind the gravity of the offence and the aggravating features identified above, I would not interfere with this sentence. I would dismiss the appeal against the conviction and the sentence and confirm both.

J.H. STEYN

JUDGE APPEAL

I agree

R.N. LEON

JUDGE PRESIDENT

I agree

P.H. TEBBUTT

JUDGE OF APPEAL

Delivered in open court on this 15th day of November 2002.