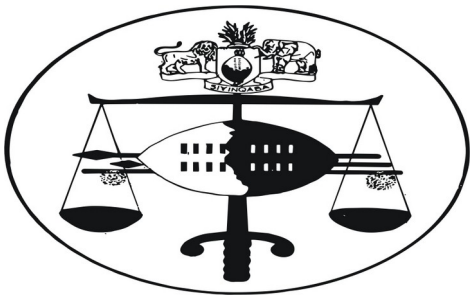

IN THE SUPREME COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Criminal Appeal No. 4/2007

In the matter between

MOSES GIJA DLAMINI

V

REX

Coram BANDA, CJ
STEYN. JA
ZIETSMAN, JA

For the Crown Mr. N. Lukhele
For the Appellant In Person

JUDGMENT

BANDA, CJ

[1] The appellant was originally charged on two counts of rape but was only convicted on one count by the Magistrate's Court sitting at Manzini. It was alleged that the appellant on or about the month of April in

2005 at or near Bhekinkhosi in the Manzini District did wrongfully, unlawfully and intentionally have sexual intercourse with Simangele Ntombemhlophe Mdluli a female minor of 12 years of age without her consent. After a full trial the appellant was duly convicted.

[2] After conviction and before sentence the learned trial Magistrate took the view, that this was a proper case which should be remitted to the High Court for sentence. The indictment had alleged aggravating factors in terms of the provisions of Section 185 bis of the Criminal Procedure and Evidence Act. It was alleged that the complainant was a young girl of 12 years and that at the time the appellant sexually assaulted her, she was only nine (9) years of age. It was further alleged that the appellant did not use a condom each time he sexually assaulted the young girl.

[3] The learned judge in the High Court carefully reviewed the facts adduced in the trial court. She was also able to elicit more information from the appellant by putting questions to him. Among the facts that were placed before the trial court was the revelation, through a medical report, that the complainant was found to be HIV positive. There was no evidence, however, to indicate who was responsible for the complainant's HIV

status.

[4] The appellant is an adult male of 45 years old and he has six children. His wife, who had been sickly for a long period, died just before he was arrested. He stated that his wife died as a result of her mental illness. He was a family friend of the complainant's father.

[5] In the Notice of Appeal which the appellant's counsel filed with this Court before they withdrew from representing him, noted an appeal against both conviction and sentence. The grounds of appeal were given as follows:-

> (1)The court of first instance being the Manzini Magistrate Court which conviction was confirmed by the High Court of Swaziland erred in law and in fact in convicting the appellant on the charge of rape in as much as the crown has failed to prove the charge beyond reasonable doubt.
>
> (2)The court *a quo* erred in law and fact in rejecting the evidence of the appellant as his evidence has not shown to be false beyond reasonable doubt.

(3)The sentence of twenty years is harsh and raises a sense of shock.

[6] We have considered the evidence adduced at the trial, and there can be no doubt whatsoever, that the appellant was properly convicted. There was sufficient, indeed, overwhelming evidence against him. There is the evidence, which he accepts, that he went to the complainant's school and fetched her on the pretext that her father had wanted her to go home. He denied sexually assaulting the complainant and he maintained his protestations of innocence in this court. But the complainant gave a detailed account on how the appellant had raped her on a number of occasions. The trial court found the evidence of the complainant credible and that she had given her evidence firmly. We are satisfied that the prosecution proved the case against the appellant beyond reasonable doubt.

[7] The sentence of any court is always a matter in the discretion of the sentencing court. An appellate court will only interfere with the sentence if there was a misdirection or that the sentence was wrong in principle or that it was shockingly harsh and is a sentence which

induces a sense of shock. In imposing the sentence the learned judge in the High Court referred to the absence of the use of a condom when the appellant sexually assaulted the complainant. While it is true that the indictment alleged absence of the use of a condom as an aggravating factor, there was no evidence called to support that allegation. It was, therefore, a misdirection by the learned judge to consider absence of a condom as an aggravating factor. But we do not find that the misdirection greatly motivated the judge in the sentence she imposed. We are satisfied and find that the learned judge properly directed her mind to the relevant factors in considering the sentence which was finally imposed. She referred to the fact that the sexual assault had continued over a period of time as evidenced by the medical report; that the complainant was a young girl and that the appellant was a family friend who had abused the trust which the complainant had reposed in him as a member of the family. The learned judge also took into account the fact that the offence of rape was prevalent in the country and that it was necessary to impose a sentence that would send a salutary message to the public.

[8] We are, therefore, satisfied that a sentence of twenty (20) years, (backdated to 20 June 2005), though severe,

cannot, in our judgment, be described as shockingly harsh nor is it a sentence which induces a sense of shock. The conviction and sentence are confirmed.

[9] The order of the Court is that the appeal against conviction and sentence is dismissed.

Delivered in open court this...12th day of November, 2007

_____
R.A. BANDA, CJ

I agree

_____
J.H. STEYN, JA

I agree

_____
N.W. ZIETSMAN, JA