IN THE SUPREME COURT OF SWAZILAND

APPEAL CASE NO.20/07

In the matter between:

MALUNGISA DLAMINI

VS

REX

CORAM	**BROWDEJA**
	TEBBUTTJA
	RAMODIBEDIJA

FOR THE APPELLANT	**IN PERSON**
FOR THE RESPONDENT	**MR. S. MDLULI**

JUDGMENT

Browde JA

The appellant was indicted in the Magistrate Court, Manzini on a charge of rape. It was alleged by the Crown that on or about 19th August 2005 he had unlawful intercourse with a seven year old girl by the name of S S.

The case was heard in Manzini by Magistrate Simelane who convicted the appellant and referred the case to the High Court for sentencing. In the High Court Justice Mabuza sentenced him to 16 years imprisonment.

This appeal was argued before us by the appellant in person contending that he should have been acquitted in the court a quo. He also contended that the sentence is so harsh for his age that it induces a sense of shock. If the appellant is to be believed he is now 20 years old and was, therefore, about 18 years when the offence was committed.

The witness (PW1) T N N stated in evidence that the complainant who is her stepchild was born in June 1996, which means she was about 9 years old on the day of the alleged rape.

The evidence of PW1 was clear. She stated that she noticed that the complainant was walking peculiarly and she learned, on questioning the complainant, that the appellant, who was well-known to the witness and the complainant, had taken her into a forest in the Bhiyeni area and, after removing her panties, had inserted his penis into her vagina. The complainant herself gave evidence to that effect which evidence, quite correctly in my view, was accepted in toto by the Magistrate. The cross-examination directed at the two Crown witnesses was ineffectual and it was not surprising that the medical practitioner who examined the complainant soon after the complaint was made to PW1 found symptoms which were corroborative of their evidence. I refer to Dr. Dube's

statement that he found evidence of sexual abuse, namely, a torn hymen which indicated penetration by an "object" coupled with bruising and infection.

The appellant's evidence, which did not impress the Magistrate was designed to establish an alibi. He stated under oath that on the day in question he was in the company of Nhanhla Msibi (DW2) at a traditional wedding. He said they had left his own home at 11.30am on Friday and returned around 9pm on Sunday. The appellant called as a witness DW2, who stated that he was in the company of the appellant but that they left home at 12 noon on the Saturday and returned from the wedding at 7pm the same day. This evidence destroyed the would-be alibi since the crime was alleged to have taken place on the Friday. The Magistrate's rejection of the appellant's evidence was in my view fully justified and the conviction was based on unassailable grounds.

At the conclusion of the trial and the appellant's plea in mitigation the Magistrate as I referred to above forwarded the matter to the High Court for sentencing in terms of Practice Directive 2/2006.

After reading the evidence Mabuza J, before whom the case was brought for sentencing, heard the appellant's address in mitigation. In coming to the conclusion that she should impose a sentence of 16 years imprisonment the learned judge said:-

"The crime of rape is an evil menace to society and must be aggressively stamped out. The merciless infliction of pain on one so young shows that you are a sadist. All you wanted was to satisfy your sexual desires. You are afraid to pick on your size and age to propose love to her and thereafter request sexual favours. The court is going to put you away for a long time so that you can ponder about the life you have destroyed and hopefully find repentance in jail

The expressions used by the learned judge may seem to be somewhat exaggerated but in the circumstances of the case they are not entirely unwarranted. The rape was a brutal one and the threat that if the young victim told anyone about it he would kill her (which was the evidence of the complainant) was calculated to instil in a girl of her age a genuine fear for her life, quite apart from the physical and psychological trauma which she must have suffered. In the circumstances, while the sentence is undoubtedly a very heavy one, it is not so harsh as to warrant interference by this Court. The abuse of children and women generally must be eradicated from civilized society and to that end Mabuza J's indignation is understandable.

The appeal is dismissed and the conviction and sentence are confirmed.

J. BROWDE '

Judge of Appeal

I AGREE F.H. TEBBUTT

Judge of Appeal

I AGREE M.M. RAMDD1BEDI

Judge of Appeal

DELIVERED IN AN OPEN COURT ON THIS ***14*** OF NOVEMBER 2007.