IN THE SUPREME COURT OF SWAZILAND

APPEAL CASE NO.5/2007

In the matter between:

M M

VS

REX

CORAM	BROWDE JA
	TEBBUTT JA
	RAMODIBEDI JA

FOR THE APPELLANT	ADV. M.M.L. MAZIYA
FOR THE RESPONDENT	MR.J.M. DLAMINI
	(WITH HI MR. M. SIMELANE)

JUDGMENT

Browde TA

The appellant was indicted in the High Court with the crime of incest. It was alleged that during the period 1999 to 2002 the appellant unlawfully had sexual intercourse with L G M, his daughter, then about 16 years old.

The appellant pleaded guilty before the Chief Justice and a statement of agreed facts was

handed into court in which the following appeared *inter alia*:

"1. The appellant had the unlawful sexual intercourse alleged in the indictment with his own daughter.

2. As a result of the incestuous relationship a child was born".

It was also stated that during the pregnancy the appellant forced the complainant to undergo a "street abortion" in Swaziland which failed and, in an effort to conceal his unlawful actions, to undergo an abortion procedure outside of this country.

The learned Chief Justice duly convicted the appellant and sentenced him to 10 years imprisonment backdated to the date of his arrest namely, 8th March 2004.

An appeal to this court was noted against both the conviction and sentence on two grounds namely:

"1. The learned Judge erred inlaw in dealing with the matter in as much as the Constitution Act No.l of 2005 does not empower a Chief Justice to sit alone in the High Court.

ALTERNATIVELY

2. The learned Judge erred in imposing a 10 year sentence which is grossly excessive and induces a sense of shock."

Advocate M.L.M. Maziya argued the appeal on behalf of the appellant. He submitted that Parts 1, 2 and 3 of Chapter Vll of the Constitution, read as a whole, do not empower the Chief Justice to sit alone in the High Court. He relied specifically on Sections 150 and 145

of the Constitution.

Section 150 provides as follows:

"Composition of the High Court

150 (1) There shall be a High Court of Judicature for Swaziland consisting of -

the Chief Justice, ex officio;

not less than four Justices of the High Court as maybe prescribed; and

such other Justices of the Superior Court of Judicature as the Chief Justice may, in writing, assign to sit as High Court Justices for any case or period.

(2) The High Court shall be duly constituted -

by a single Judge of the High Court;

by a single Judge of the High Court with assessors; or

by a single Judge of the superior courts with or without assessors.

A full bench of the High Court shall consist of three Justices of the Superior courts.

The Chief Justice shall always preside whenever sitting as a Justice of the High Court.

The Chief Justice shall designate in writing the most senior Justice of the High Court to be Principal Judge of the High Court to preside and exercise such functions as maybe stated in the designation.

There shall be such divisions of the High Court consisting of such number of Justices respectively as the Chief Justice may determine after consultation with the

Minister responsible for Justice and the President of the Swaziland Law Society."

Advocate Maziya's submission that the Chief Justice cannot sit alone appears to me to be categorically contradicted by the fact that the Chief Justice, in terms of Section 150(1)(a), is clearly a judge of the High Court. It is of no consequence, in my view, that that position is stated to be "ex officio". A judge is a judge whether ex officio or by usual appointment as is the case of the other justices of the High Court. Once that is accepted then Advocate Maziya's submission is faced by the seemingly insurmountable hurdle provided by Section 150(2) which unequivocally states that the High Court shall be duly constituted by a single Judge of the High Court.

The answer to that, so Advocate Maziya's argument went, is provided by Section 150(4) which states that the Chief Justice shall always "preside" whenever he sits as a Justice of the High Court. "Preside" he submitted presupposes the chairing of a panel of judges. There is some superficial justification for this last-mentioned submission to be found in the dictionary definition of the word "preside". For example, the Shorter Oxford English Dictionary defines it as "to occupy the chair or seat of authority in any assembly, or at the ordinary meetings of a society or company; to act as chairman or president".

What the submission overlooks, however, is that Section 150(c) follows immediately on and governs Section 150(3) which reads:

"(3) A full bench of the High Court shall consist of three Justices of the Superior courts".

It is in a full bench hearing that the Chief Justice is required by the Constitution to preside and the word cannot apply, of course, to when the Chief Justice sits alone.

It is a long-accepted canon of construction of a statute that the court should always avoid an

interpretation which would result in an absurdity see e.g. VENTER V REX 1907 TS 910 at 919; SHENKER V THE MASTER AND ANOTHER 1936 AD 136 and ROBERT MAGONGO VS THE KING APPEAL CASE NO.2472/99 (UNREPORTED).

The interpretation contended for by Advocate Maziya would, in my view, lead to the absurd situation in which the Chief Justice, although he is a Justice of the High Court, would not be in a position, as all the other Justices are, of sitting alone to hear a criminal case. This would lead to a mind-boggling curtailment of the activities expected of the Chief Justice in this country, not to mention the increased burden which would fall upon the other Justices in their efforts to deal with the heavy load of criminal cases which are dealt with in the High Court.

It is unlikely in the extreme that this was intended by the drafters of the Constitution and this consideration too, is against the interpretation contended for by Mr. Maziya. (See S.A. TRANSPORT SERVICES V OLGA AND ANOTHER 1986(2) SA 684 (A) at 697 and Magongo (supra) per Tebbutt JA at page 5). What the motive might have been for the drafters of the Constitution to preclude the Chief Justice from sitting alone, is difficult to imagine. The only suggestion has been that if the Chief Justice were to sit alone in a criminal case in the High Court it could, if an appeal is brought against his judgment to the Supreme Court, lead to a serious anomaly. Although the Chief Justice is the President of the Supreme Court he obviously could not sit in that appeal, but would his fellow judges on the Supreme Court who would sit in it not experience some embarrassment were they to come to the conclusion that they should uphold the appeal?

The answer simply is that there would be no such embarrassment. The judges of the Appeal Court are and will always be lawyers of long experience. Section 154 which governs the

appointment of judges reads as follows:

"Qualification for appointment to the superior courts

154.(1) A person shall not be appointed as a Justice of a superior court unless that person is a person of high moral character and integrity and in the case of an appointment to-

(a) the Supreme Court,

(i) that person is or has been a legal practitioner, barrister or advocate of not less than fifteen years practice in Swaziland or any part of the Commonwealth or the Republic of Ireland; or

(ii) that person is, or has served as, a Judge of the High Court of Swaziland or Judge of a superior court of unlimited jurisdiction in civil and criminal matters in any part of the Commonwealth or the Republic of Ireland for a period of not less than seven years; or,

(Hi) that person is, or has served as, such legal practitioner, barrister or advocate as mentioned in paragraph (a) (i), and as such Judge as mentioned in paragraph (a) (ii) for a combined period of that practice and service of not less than fifteen years;

(b) the High Court,

(i) that person is or has been a legal practitioner, barrister or advocate of not less than ten years practice in Swaziland or any part of the Commonwealth or the Republic of Ireland; or

(ii) that person is, or has served as, a Judge of a superior court of unlimited jurisdiction in civil and criminal matters in any part of the Commonwealth or the Republic of Ireland for a period of not less than five years; or

(Hi) that person is, or has served as, such legal practitioner, barrister or advocate as referred to in paragraph (b) (i) and as such Judge as referred to in paragraph (b) (ii) for a combined period of

such practice and service of not less than ten years".

No lawyer who has the qualifications necessary to be appointed to the High Court or the Supreme Court would consider it a personal reflection on him/her were another court to differ from his/her views - and particularly if the differing views are those of a higher court. That is an intrinsic part of the traditions relating to the hierarchy of courts and underlies the concept of the independence of the judiciary. The suggestion of an anomaly is, therefore, without foundation.

Mr. Maseko, who appeared in the appeal on behalf of the Crown, argued in limine that the point regarding the power of the Chief Justice to sit alone should have been taken in the Court of first instance, and as it was not, it cannot be argued on appeal.

I am inclined to agree, however, with Mr. Maziya's reply to that submission in which he argued that it was no different from a point taken on appeal that, for example, goes to the jurisdiction exercised by the court a quo when it had no jurisdiction to hear the case at all. Those proceedings, he submitted, would be a nullity, and this could not be affected by the failure to take the point in the court a quo.

It is, however, not necessary to decide that issue since, as I have made it clear, I have come to the conclusion that there is no substance in the first ground of appeal.

With reference to the alternative ground of appeal, namely, that the sentence induces a sense of shock by its severity I need only say this. The only shock that I experience emanates from the conduct of the appellant. To abuse his own child by having sexual intercourse with her

over an extended period and then, when she falls pregnant by him, to force her to subject herself to procedures designed to abort the child, is a heinous offence which merits no sympathy for the miscreant. In imposing the sentence he did, the learned Chief Justice took into account such mitigating circumstances as there are, namely, that the appellant is a first offender, that he suffers from chest pains and that he pleaded guilty which is indicative of some remorse. There was no misdirection on the part of the learned Judge and the sentence of 10 years does not, in my judgment, induce a sense of shock.

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. RAMODIBEDI

Judge of Appeal

DELIVERED IN ON OPEN COURT ON THIS 14 DAY OF NOVBEMBER 2007.