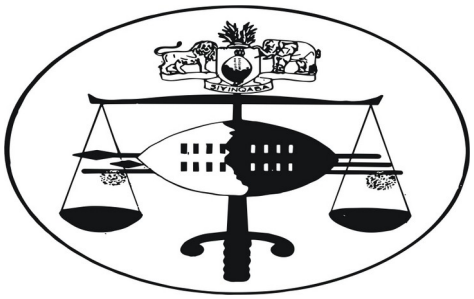

IN THE SUPREME COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE — Criminal Appeal No. 7 of 2007

In the matter between

MLAMULI OBI XABA

Vs

REX

CORAM	BANDA, CJ STEYN, JA ZIETSMAN, JA
For the Crown	Mr. S. Fakudze
For the Appellant	In Person

JUDGMENT

BANDA, CJ

[1] The appellant was convicted of rape by the High Court sitting at Mbabane. It was alleged that the appellant on or about 14th April 2006 at or near Magele area in

the Shiselweni Region he did intentionally have unlawful sexual intercourse with Ayanda Xaba, a female juvenile, who at the time, was thirteen (13) years old and was, in law, incapable of consenting to sexual intercourse.

[2] The appellant who originally pleaded not guilty changed his plea in the course of the trial to one of guilty and apologised to the Court for having misled the Court in what he had said on the previous day. He stated that he did not understand the indictment when it was put to him. He later changed again his position to one of challenging his admission of guilt. After hearing evidence from the complainant and the doctor, the learned judge in the High Court found that the charge had been proved beyond reasonable doubt and convicted the appellant accordingly. He now appeals to this Court against sentence only.

[3] In his heads which he filed in this Court he has raised the following points:

1) That he is a first offender;

2) That he did not intend to commit the offence because he had believed that the complainant was the young woman he had asked earlier in the day, to come to his

house.

3) That he was drunk when he committed the offence.

4) That he is remorseful for the offence he committed, and

5) That he has three minor children to provide for.

[4] The complainant clearly outlined the events of that afternoon and in some detail. She narrated how the appellant lured her into his house on the pretext that he would teach her games on his cellphone. She stated that she went to the appellant's house in the company of her friends Bongiwe Xaba and Nonhle Xaba but that on reaching the appellant's house the two other girls were chased away by the appellant. The appellant then locked his house and proceeded to rape the complainant. The complainant further told the Court that soon afterwards she heard knocking on the door and on the window and that she recognised the voices as those of Bongiwe's mother and her brother Wandile. They are all related and come from the same homestead. The complainant also stated that when she came out of the appellant's house she found Bongiwe's mother and Wandile outside and reported to them what the appellant had done to her. The matter

was later reported to the Police who quickly responded and took the complainant to Hlathikhulu Government Hospital where she was examined.

[5] The evidence of the doctor was that on examination of the complainant he found that the girl's hymen was not intact and that there was mild bleeding from her vagina which admitted two fingers. The doctor's conclusion was that rape was a distinct possibility.

[6] The appellant denied having sexually assaulted the complainant. His story was that he had earlier in the day met a girl with a baby and had arranged that she should come to his house in the evening. He contended that he thought it was with this girl, and not the complainant, that he had sex. He said that both the girl and complainant were of small build and it was not possible to know whether he was having sex with his girlfriend or with the complainant and that the beer he had taken earlier in the day had impaired his faculties. This is a story the learned trial judge had no difficulty in rejecting. It was a fantasy.

[7] We are satisfied and find that there was sufficient evidence to support the conviction against the appellant.

[8] The indictment against the appellant had alleged aggravating factors as is referred to in Section 185 bis of the Criminal Procedure and evidence Act. It was alleged that the complainant was a minor at the time of the offence and that she had not experienced any sexual intercourse before her encounter with the appellant. The complainant was greatly traumatised by the occurrence. And after a very detailed assessment of surrounding circumstances and review of decided cases and after referring to the triad principles,

the learned trial judge came to the view that a custodial sentence was proper in the circumstances and sentenced the appellant to a term of imprisonment of 15 years without an option of fine, backdated to the date the appellant was arrested.

[9] Rape is a very serious offence and is becoming very prevalent in the Kingdom and it is important that courts should impose meaningful sentences that will attempt to reduce the incidence of rape in the country. We adopt, in this judgment, the strong condemnation of the offence of rape that was made in the case of ***Sifiso Cornelius Ngcamphalala vs The King, Criminal Appeal No. 34/2003.*** The condemnation is in the

following terms:-

> *"Rape is a crime of diabolical nature which offends the sensibilities of every normal decent human being more particularly where the victim is of such a tender age as the one in the present case. There has become a national crisis in this Kingdom an instance of children of this age group being victims of rape are on the rise. The courts have in such cases the responsibility to mete out stiff sentences which will send clear and unambiguous messages that society is disgusted by such behaviour. The rape is a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. Women, more particularly small girls are entitled to the protection of these rights".*

We could not agree more with these sentiments.

[10] We find that the sentence of fifteen (15) years is not

wrong in principle nor can it be described as shockingly harsh nor does it induce a sense of shock. We can find no reason to interfere with it.

[11] The order of the Court is that there is no merit in the appeal against sentence and it is accordingly dismissed.

_____
R.A. BANDA, CJ

I agree

_____
J.H. STEYN, JA

I agree

_____
N.W. ZIETSMAN, JA

GIVEN IN OPEN COURT THIS 12th DAY OF NOVEMBER 2007