IN THE SUPREME COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

CRIM. APPEAL NO. 4/08

In the matter between

SAM DUPONT **APPELLANT**

And

REX **RESPONDENT**

CORAM: **BANDA, C J**

RAMODIBEDI, JA

FOXCROFT, JA

HEARD: 7 MAY 2008

DELIVERED: 22 MAY 2008

JUDGMENT

SUMMARY

The appellant having been convicted of rape and sentenced to 13 years imprisonment — Appeal against sentence only — At the hearing of his appeal the appellant challenging his conviction as well — Rule 7 of the Court of Appeal Rules -Approach of the Court of Appeal - Sentence — Principles thereof - Section 5 (3) of the Court of Appeal Act 74/1954.

RAMODIBEDI, JA

[1] In what is undoubtedly one of the most nauseating cases involving sexual violence perpetrated against young girls in this country to date, the appellant faced a charge of rape in the Magistrate's Court for the district of Hhohho held at Mbabane. It was alleged that upon or about the months of May and June 2005, he unlawfully and intentionally had forceful sexual intercourse with one T K, a young girl of ten (10) years of age, without her consent.

[2] The appellant pleaded not guilty but was duly convicted as charged. The learned trial Magistrate committed him to the High Court for sentence in terms of Section 292 of the Criminal Procedure and Evidence Act 67/1938. In due course, the High Court sentenced him to 13 years imprisonment backdated to 6 July 2005, being the date on which he was first taken into custody.

[3] Although in his grounds of appeal the appellant challenged the sentence only, it is pertinent to record that in both his heads of argument and in oral argument before this Court he sought to challenge the conviction as well.

[4] Strictly speaking, an appellant is not entitled to rely, without leave of this Court, on a ground of appeal which is not raised in the notice of appeal. In this regard Rule 7 of the Court of Appeal Rules provides as follows:-

> *"7. The appellant shall not, without the leave of the Court of Appeal, urge or be heard in support of any ground of appeal not stated in his notice of appeal, but the Court of Appeal in deciding the appeal shall not be confined to the grounds so stated."*

[5] Bearing in mind, however, that the appellant was unrepresented, this Court adopted a flexible approach and allowed him to argue his case against conviction as well in the interests of justice. The Crown correctly, in my view, did not raise any objection to this approach. It must be stressed, however, that this case should not be treated as a licence for flagrant disregard of the Rules of this Court.

[6] Appellants appearing before this Court are warned that the Rules of

this Court were promulgated for a good cause, namely, to enable the Court to do justice in cases coming before it. Furthermore, the Rules are designed to ensure that only properly motivated grounds of appeal are brought for the consideration of the Court and also to ensure finality to litigation in the interests of justice. In the final analysis, these Rules are designed to discourage frivolous appeals, thus ensuring that the work of this Court is not clogged unnecessarily by busybodies who simply pursue unmeritorious appeals. These Rules must, therefore, be strictly observed.

[7] As sadly often happens in cases of this nature, the facts show that the complainant is an orphan. She lived with her grandmother, J M (PW2) and the appellant who was PW2's live-in lover. The three of them shared a single room with two beds only. The two lovers shared one of the beds. The complainant used the other one. This untenable situation was aggravated by the fact that PW2 routinely left for work at 0600 hours every morning and returned at 1700 hours in the afternoon. The appellant would remain behind with the complainant. He, too, would subsequently leave for work in Mbabane where he was employed as a tailor, returning in the evening.

[8] In her evidence, the complainant gave a harrowing account of her

sexual abuse by the appellant, covering the months May/June 2005. The record shows that he would routinely sexually attack the complainant by inserting his penis into her vagina. He would then make movements which the complainant described as "some up and down movements on top of me". She always cried in pain but to no avail. As the complainant put it, "he (the appellant) was busy jumping up and down on top of me and threatening to kill me if I ever told anybody about it". She testified that the appellant always abused her sexually except when PW2 was present.

[9] It is convenient to digress there for a moment and point out that, while washing the complainant on one of the days, PW2 observed that the complainant had developed sores "from the vagina right up to her abdomen and thighs". In her apparent naivety, PW2 administered a traditional concoction to the complainant. The complainant's condition did not improve. One T K (PW3), a Health Motivator for the area in question, also examined the complainant. She observed sores covering her stomach "right into her vagina and around it." Similar observations were made by T N (PW6), a teacher in first aid. I should add that the complainant's condition was duly confirmed by the medical report, annexure "B", which was handed in by consent at the trial. This report further confirmed that the complainant's hymen was broken. The

examination of her vagina was very painful and "a high" vaginal swab was also taken from her. All of these factors undoubtedly provided corroborative proof that the complainant had had sexual intercourse.

[10] Reverting to the complainant's evidence, she testified that she was ultimately "rescue[d]" by one P M (PW5) who caught the appellant in *flagrante delicto* on top of her. He was brazenly having sexual intercourse with her. In her evidence, PW5 corroborated the complainant on this material issue. This, as she said, was on 23 June 2005. PW5 had been attracted by the complainant's cries. She had then burst into the room and witnessed the sexual abuse of the complainant by the appellant. Crucially, she testified that it was not the first time she heard the complainant's cries. She had been crying for the whole week. Indeed G S (PW4), a next door neighbour, corroborated PW5 on the question of the regular cries of the complainant, including the particular day in question, namely, 23 June 2005. On that day, PW4 overheard the complainant crying out loudly: "It is painful, I don't want inyandzaleyo."

[11] In the light of this overwhelming evidence against him, the appellant elected to make an unsworn statement after his rights had fully been explained to him. Quite clearly, an unsworn statement carries little

weight for the simple reason that its truth cannot be tested by cross-examination.

[12] Perhaps not surprisingly in the circumstances, in his unsworn statement the appellant did not challenge the version of the Crown witnesses that he raped the complainant. There was a formidable body of evidence against him. In a nutshell, the Crown succeeded in proving its case against the appellant beyond reasonable doubt. He was thus correctly found guilty of rape. I turn then to sentence.

[13] It is now well-settled that the imposition of sentence is a matter which pre-eminently lies within the discretion of the trial court. An appellate court is generally loath to interfere with the trial court's exercise of a discretion in the absence of a misdirection resulting in a failure of justice. See for example **Eric Makwakwa v Rex** - **Criminal Appeal No. 2/06; Moses Giia Dlamini v Rex** - **Criminal Appeal No. 4/07; Mlamuli Obi Xaba v Rex** - **Criminal Appeal No. 7/07; Mandla Vilakati v Rex - Criminal Appeal No. 18/07.**

[14] In sentencing the appellant to 13 years imprisonment, the learned Judge *a quo* correctly took into account the *triad* consisting of the crime, the offender and the interests of society as laid down in **S v Zinn 1969**

(2) SA 537 (A). Furthermore, the court properly took into account the prevalence of crimes of sexual offences against young children in this jurisdiction. These are relevant considerations. There can, therefore, be no valid criticism to be made of the trial court's approach in the matter. No misdirection has been shown to exist.

[15] It remains for me to emphasise that the courts have a fundamental duty to protect society against the scourge of sexual assaults perpetrated against young children in particular. As this Court pointed out in **Makwakwa's** case *(supra),* the courts should mark their abhorrence of the prevalent sexual attacks on young children as a deterrent. This, they can do by imposing appropriately stiff sentences. Indeed in **Moses Giia Dlamini v Rex** *(supra),* this Court had no difficulty in confirming a sentence of 20 years imprisonment for the rape of a nine (9) year old girl. Sexual offenders against young children have, therefore, sufficiently been warned.

[16] Finally, it is a matter of grave concern to this Court that despite his brutal sexual attack upon the complainant, committed over a long period of time, the appellant showed no remorse at all. He pleaded not guilty and persisted in his denial of the offence throughout. He continued this attitude before this Court. In these circumstances, it seems clear to me

that the appellant does not inspire any confidence that he will reform. Probabilities are that he will repeat the offence. Therein lies the danger.

[16] For the aforegoing reasons, it follows that there is no merit in this appeal. It is accordingly dismissed. Both conviction and sentence against the appellant are hereby confirmed.

M.M. RAMODIBEDI

JUSTICE OF APPEAL

I agree

R.A. BANDA

CHIEF JUSTICE

I agree

J.G. FOXCROFT

JUSTICE OF APPEAL

For the Appellant: In person

For the Respondent: MISS L.HLOPHE