IN THE SUPREME COURT OF APPEAL OF SWAZILAND

In the matter between

CRIM. APPEAL NO. 19/2008

SIPHO LUCKY FAKUDZE **APPELLANT**

Vs

REX **RESPONDENT**

CORAM: BANDA, CJ

FOXCROFT, JA

EBR A HIM, JA

For the Appellant: **IN PERSON**

For the Respondent: **MS Q. ZWANE**

HEARD ON: 5th NOVEMBER 2008

DELIVERED ON: 19 NOVEMBER 2008

JUDGMENT

FOXCROFT, JA

On 20 August 2004, the day after his arrest, the appellant was charged with the rape on 9 May 2004 of N F. It was alleged that this twelve year old child was "incapable in law of consenting to sexual intercourse", and further alleged that the crime was accompanied by aggravating circumstances as envisaged under Section 185 (bis) of the Criminal Procedure and Evidence Act No. 67/1938, as amended in that:

> "(a) The accused is the complainant's father and stood in *loco parentis* over her at the time of the commission of the offence;
>
> (b) At the time of the commission of the offence, the complainant was a minor of 12 years old;
>
> (c) The accused did not use a protective device i.e. condom using (sic) the rape and thus exposed complainant to the risk of contracting the HIV/AIDS virus;
>
> (d) The accused infected the complainant with a sexually transmitted infection".

The appellant was also charged with the crime of incest, it being alleged that the accused was "by blood relationship father of the said N F."

The appeal is against conviction and sentence.

The accused was remanded in custody on many occasions and eventually appeared on trial in the Children's court at the High Court, on 10 October 2005. He pleaded not guilty to both counts.

When the complainant was called to give evidence she explained that the accused was not her father but her uncle (babe lomncane).

Her natural father was separated from her mother, and working at Matsapha Prison.

In answer to the Court, the complainant added that the accused and her father are brothers "and I think my father is older."

PW5 N F confirmed that he was a prison warder at Matsapha, that the complainant was his daughter, and that the accused is his younger brother.

The complainant testified in regard to the occasions upon which her uncle had raped her, and the accused's threat to kill her if she told anyone about this. In an extensive cross-examination by the accused, largely on irrelevant matters, he did not specifically deny her

allegations of rape or threats to kill her but certainly created the impression that he had not committed the offence. When the accused appeared in person on appeal he maintained that he had specifically denied these allegations during his cross-examination of the complainant. He added, upon enquiry, that the complainant had persisted, in answering his alleged denial, that he had raped her. He seemed to be suggesting that the record was defective, and that he was somehow prejudiced by the absence of this question and answer from the record before this Court.

There is no merit in this argument. Even if he had indeed put this question, the complainant did not agree with him, but, on his own submission before us, persisted in her accusations against him.

In his own evidence the accused denied the allegations of rape maintaining that he knew nothing of the matter. He was found guilty of rape and incest and committed to the High Court for sentencing.

In those proceedings, Maphalala J described the appellant as the natural father of the complainant and referred to REX V CHRISTOPHER BOY MASUKU, CRIMINAL APPEAL CASE NO.

16/2004. In that case, Tebbutt, JA referred to the range of sentences

normally imposed by the High Court for offences of this nature, sentences tending to vary between 10 to 14 years imprisonment, adding that 14 years would be appropriate,

> *"Where an accused's conduct has been particularly reprehensible — such as an abuse of a trust relationship".*

In going beyond the range of sentences imposed for this type of offence, the learned sentencing Judge decided that this matter differed from the "ordinary run of the mill cases of rape".

He added that:

> *"In the instant case a father has raped his own daughter putting this case in a different plane. For these reasons I have come to the view that a sentence of 18 years imprisonment will serve the justice of the case. The unfortunate girl will never recover from the trauma of being raped by her own father. She will always carry this stigma with her for the rest of her days. "*

Treating the two counts of rape and incest as one for purposes of sentence, he imposed a sentence of 18 years imprisonment.

The appellant did not provide any written heads of argument, and in arguing against the conviction, confined himself to the suggestion, already referred to above, that the record did not accurately reflect his alleged challenge to the complainant during cross-examination.

There is, in my view, no merit in this argument and no substance in the attack upon the conviction for rape.

The conviction on a charge of incest was more troubling and Ms Zwane, who appeared for the Crown, was asked whether charges of rape and incest based on a single event on 9 May 2004 did not amount to a splitting of charges. She conceded, rightly in my view, that the charge of rape with aggravating circumstances, covered the same ground as the charge of incest, since one of the aggravating circumstances listed was rape by a close relative. The charge sheet wrongly referred to the accused as the complainant's father in *loco parentis.* The evidence showed that the accused was the uncle (father's brother) of the complainant, but that would not have affected the aggravated nature of the rape.

Of course, incest was committed at the same moment as the rape, since

the accused was the complainant's uncle.

The history of the rule of practice against splitting of charges in South Africa may be traced back to a *dictum* in R V MARINUS, 5 S.C. 349, in 1887. The rule was fully considered in S V GROBLER, 1966 (1) S.A. 507 (A.D.) where Wessels, JA said at p 523B:

"Having regard to the genesis of the rule (which could in my opinion be more aptly described as rule of practice against the duplication of convictions) I am of the opinion that it was designed to prevent a duplication of convictions in a trial where the whole of the criminal conduct imputed to the accused constitutes in substance only one offence which could have been properly embodied in one all-embracing charge and where such duplication results in prejudice to the accused. The prejudice could firstly, be of the kind dealt with in Marinus' case, but is not necessarily limited to that form of prejudice. At the present time numerous statutory provisions, including those provisions of Act 56 of 1955 to which I have already referred, affect the jurisdiction of courts (both inferior and superior) in regard to the imposition of punishment. In certain circumstances the form of the punishment is dependent on the number of previous convictions which are proved at the trial of an accused. In that sense, too, prejudice may result to an accused, unless the rule in question is applied, because a subsequent

conviction might, e.g. render him liable to one or other form of compulsory punishment by reason of the number of previous convictions proved against him. The rule ought, therefore, to be applied in all criminal trials where the circumstances warrant its application."

In S.A. CRIMINAL LAW AND PROCEDURE VOL. 5 by LANSDOWN AND CAMPBELL at 226, the matter is fully dealt with and the equitable objections to splitting of charges listed, and at p 231, the following appears:

> *"Where one act or series of acts constitutes at the same time offences of different species, as, for example, when an act of carnal intercourse is committed in circumstances which amount to both incest and rape, the proper course, it is submitted, is either to charge only one of the offences, or to charge both alternatively".*
>
> **See: R v T, 1940 CPD 14**
>
> **R v Van Zyl, 1949 (2) SA 948 (C)**

Although there appears to be no statutory bar to splitting, as there is in Section 336 of the Criminal Procedure Act of 1977 in South Africa, the rule of practice is a sound one and ought to be applied on this jurisdiction in appropriate cases.

The present facts are admirably suited to the implementation of the principle. One act resulted in two crimes almost identical in nature. The blood relationship required for the offence of incest was the only difference between it and the rape which had occurred simultaneously. Moreover, the element of a blood relationship was already contained, as an alleged aggravating circumstance, in the rape charge.

For some reason which is not apparent but might be the result of the incorrect wording of Count One in the amended Charge Sheet, and misleading wording of Count Two, Maphalala, J erred in referring to the rape of the complainant by her own natural father, and holding that the appellant should be punished more severely because of that fact.

This was a misdirection which allows this Court to impose a more appropriate sentence. I have no doubt that the sentence which is to be substituted is the sentence which Maphalala, J would have imposed had he not erred in finding that the appellant had raped his natural daughter.

As for the alleged aggravating circumstances, accompanying the rape charge, the breach of trust and tender age of the complainant were properly established. The evidence about the failure to use a condom is tenuous and that of the infection of the complainant with a sexually

transmitted disease was not established. The attending doctor testified that he had examined the complainant and sent a specimen to a laboratory to test for any sexually transmitted disease. He did not have these results with him, and there is no evidence before us of any such disease.

However, the aggravating factors of breach of trust by her uncle and the youth of the complainant were sufficient to justify the finding reached by the Magistrate that aggravating circumstances were present.

Accordingly, the appeal against the conviction on Count Two (incest) succeeds for the reasons set out above, and the conviction and sentence are set aside. The appeal against Count One (rape) is dismissed.

The sentence of 18 years imprisonment imposed on the rape charge is set aside and the appellant is sentenced to 14 years imprisonment backdated to 19 August 2004, the date of the appellant's arrest.

J.G. FOXCROFT
JUDGE OF APPEAL

I agree

R. A. BANDA

CHIEF JUSTICE

I agree

A.M. EBRAHIM

JUDGE OF APPEAL