IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No.09/2011

In the matter between:

SIKHUMBUZO MASINGA **APPELLANT**

v

REX **RESPONDENT**

Neutral citation:	Sikhumbuzo Masinga v Rex (09/2011) [2011] SZHC 14 (May 2012)
Coram:	A.M. EBRAHIM JA, S.A. MOORE JA and S. TWUM JA.
Heard:	**7 MAY 2012**
Delivered:	**31 MAY 2012**
Summary:	**Rape - 15 year old appellant sentenced to nine years imprisonment as mandated by section 185 (bis) of the Criminal Procedure and Evidence Act 67/1938 - Appeal against sentence - Prior to hearing of this appeal Full Court of the High Court ruled that sections 185 (bis) (1) and 313 (1) and (2) of the Criminal Procedure and**

Evidence Act as amended were inconsistent with sections 29 (2) read with sections 18 (2) and 38 (e) of the Constitution and therefore unconstitutional or invalid - Constitutional question having been raised by the appellant, the matter is removed from the current roll - Ordered that appeal be re-enrolled for the sitting of this Court in November 2012 before a panel of five judges.

MOORE J.A.

INTRODUCTION

[1] This is a most unfortunate case. The appellant was fifteen years or thereabouts when he committed several offences of statutory rape between August 2005 and January 2006. The victim of these offences was a member of an extended family of four girls and the appellant who shared a single bedroom. It was within these cramped sleeping arrangements that the appellant got up to 'mischief' upon the sleeping complainant without disturbing the other girls. Pained, frightened and unsure exactly how to handle the situation, the twelve year old nevertheless found the courage to report her ordeal to other family members.

[2] The appellant was confronted. He admitted his misdeeds. The authorities were notified and he was eventually charged with the crime of RAPE. The indictment particularizes that:

> "Upon diverse dates during the year 2005 and 2006 and at or near Sitsatsaweni area in the Lubombo Region, the said accused person did intentionally have unlawful sexual intercourse with one DELISILE MATSENJWA a female minor of 12 years old, who in law is incapable of giving consent to sexual intercourse and did thereby commit the crime of RAPE.
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> PLEASE TAKE NOTE that the crime is accompanied by aggravating factors as envisaged by Section 185 (bis) of Criminal Procedure and Evidence Act 67/1938 in the following manner:
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> 1. The complainant was of a tender age;
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> 2. The accused sexually abused the complainant on diverse occasions;
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> 3. The accused exposed the complainant to sexually transmitted infections such as HIV/AIDS as he did not use a condom all times of sexual abuse.

[3] The record says nothing about what happened in court except for what can be gleaned from the judgment of the trial judge. It is from that source, and from the summary of evidence, medical report, statement of agreed facts, the judgment and committal warrant, that this court was able to make some determination about the nature of the case and about the manner in which cases of this kind ought to be dealt with. Though it would appear from the statement of agreed facts that the appellant was represented by counsel, this court now has no way of knowing what representations he made on the appellant's behalf or of what submissions he may have advanced to the trial court about the offences, the offender, and about the state of the current law under which the trial judge found that he had no option but to impose the mandatory penalty of nine years imprisonment upon the appellant who was fifteen years old and thus a juvenile when he committed the undoubtedly serious offence for which he was charged in the indictment.

[4] The statement of agreed facts reads:

WHEREAS the accused is indicted for the crime of RAPE with aggravating factors in that upon diverse dates during the period of the years 2005 and 2006 and at or near Sitsatsaweni area in the Lubombo Region the said accused did intentionally have unlawful sexual intercourse with DELISILE MATSENJWA, a female minor of twelve (12) years, who in law is incapable of giving consent to sexual intercourse.

THE ACCUSED pleads guilty to the offence of RAPE with aggravating factors as set out in the indictment and the Crown accepts the plea.

AND NOW, The accused admits that:

1. On diverse dates and on three occasions during the period of the years 2005 and 2006, he had unlawful sexual intercourse with DILISILE MATSENJWA.

2. DELISILE MATSENJWA was a minor below the age of sixteen (16) years who in law was incapable of giving consent to sexual intercourse during the three occasions the accused had unlawful sexual intercourse.

3. The unlawful sexual intercourse with the said DELISILE MATSENJWA is accompanied by aggravating circumstances in that:

a) DELISILE MATSENJWA, the complainant, was of a tender age.

b) The accused sexually abused DELISILE MATSENJWA, the complainant, more than once and on diverse occasions.

AND NOW it is agreed that:

4. The Medical Examination report compiled by the Medical Officer at Good Shepherd Hospital on the 2nd February 2006 be admitted to form part of the evidence in this matter.

5. The accused had unlawful intercourse with DELISILE MATSENJWA whilst inside a bedroom he shared with her and three other minor girls who were present and asleep on the occasions he committed the offence and the complainant did not raise any alarm when such took place.

6. The complainant related to PW2, TSANDZILE MAGAGULA that the accused was having intercourse with her. The duo then reported the matter to PW4, FIKILE DLAMINI who was their guardian and also the accused person's step

grandmother. The children, including the accused stayed with PW4 at her homestead and this is where the rape took place.

7. The complainant fled and went to her aunt's place after hearing other pupils talking about her ordeal at school. She related the sexual abuse to her as well as she did to PW4. The following day, after spending the night at her aunt LOMTHANTAZO MASINA'S place, the matter was reported to the police and she was subsequently taken for medical examination at Good Shepherd Hospital in Siteki

8. The accused was fifteen (15) years old when he committed the said offence.

9. The accused is remorseful for his actions and at the time the crime was committed he was of tender age.

10. The accused was sharing a room with 4 girls and was the only boy in the room.

11. The accused was charged on the 6th February 2006 but not incarcerated. On the 27th February 2006 he appeared in court and was released to the custody of his aunt.

DATED AT MBABANE this 29th day of September 2010.

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COUNSEL FOR CROWN COUNSEL FOR ACCUSED

SENTENCE

[5] In arriving at what he considered to be the appropriate sentence the trial judge first satisfied himself that notwithstanding the appellant's guilty plea, there was a sufficiency of evidence in the agreed statement of facts to support not only the charge of rape, but also of material which transformed the offence into one where aggravating circumstances were present so as to warrant the imposition of the mandatory minimum sentence of nine years imprisonment without the option of a fine and to preclude the suspension of that sentence or of any part of it as prescribed by section 185 bis (1) of the Criminal Law and Procedure Act 67/1938.

[6] M.C.B. Maphalala J was undoubtedly alive to the fact that he had before him a mere boy who at the time of the commission of the

offence was only fifteen years old. That boy was a juvenile under the provision of section 2 of the Reformatories Act 82/1921. The trial judge regarded that tender age as a powerful factor militating against the imposition of a lengthy custodial sentence in the context of the instant case. Such a sentence would be less than optimal if it had to be served in an adult prison rather than in a facility specially designed for the detention of juvenile offenders. His Lordship expressed his concern, which this Court shares, in this way at paragraph [13] of his judgment:

> "[13] It will not be in the interests of justice to send the accused to prison for a long period of time because of his personal circumstances as stated above; particularly, his age of fifteen years when the offence was committed. I will sentence the accused to nine years imprisonment."

[7] The judge's disquiet at sending a boy of fifteen years to prison for a long period of time was manifest. He found, perhaps to his chagrin, that his judicial discretion was fettered by the following statutory provisions:

i. Section 185 bis (1) of the Criminal Procedure and Evidence Act, 1938.

ii. Section 313 of the Criminal Procedure and Evidence Act, 1938 together with the Third schedule thereto

iii. The Criminal Procedure and Evidence Act, 1938 section 296 (2) and the Proviso thereto under which a child over the age of fifteen years may be sentenced to imprisonment.

[8] Under the prevailing statutory regime, a judge could have explored the possibility of ordering the appellant to be detained at a juvenile or juvenile adult reformatory or an industrial school subject to the Reformatories Act no. 82 of 1921. The court *a quo* did not however make any reference to section 64 (2) (d) of the Prison Act 40/1964 which allows for the classification of prisons and prisoners into categories and their separation accordingly. That sub-section provided the basis for the classification of Malkerns Juvenile Industrial School, date of commencement: 6th June, 1975, and its declaration as a prison under Legal Notice No. 55 of 1972 where persons between the ages of 13 and 21 years may be detained.

[9] The Reformatories Act 82/1921 is intituled "An Act to enable the courts to punish juvenile adult offenders by ordering their detention in reformatories, to provide for the detention of such persons and for matters incidental thereto." Section 2 is the interpretation section. It defines "juvenile" as meaning any person under the age of sixteen years, and any person under the age of eighteen years whose classification as a juvenile adult has been expressly sanctioned by the Minister." Subsection (1) of Section 3 provides that:

> "if any juvenile is convicted of an offence punishable with imprisonment, the court may order him to be sent to a juvenile reformatory to be detained for not less than two years and not more than five years, or in the alternative may sentence him to imprisonment."

[10] The classification of Malkerns Juvenile Industrial School

> (under section 64 (2) (a) of the Act)
>
> Date of commencement: 6th June, 1975

reads as follows:

> "Whereas the Malkerns Juvenile Industrial School has been duly declared a prison under Legal Notice No. 55 of 1972, the

Minister for Justice in exercise of the powers conferred on him by the above-named Act is pleased -

(a) to direct that the said school shall rank as a juvenile reformatory and as a juvenile adult reformatory for the purposes of the Reformatories Act No. 82 of 1921 at which persons between the ages of 13 and 21 years may be detained:

Provided that such period of detention shall be for not less than two years and not more than five years:

And provided that in the case of a juvenile (as opposed to a juvenile adult) as defined in the Reformatories Act No. 82 of 1921 the period of detention shall expire not later than the date on which he attains the age of eighteen years:

And provided further that no person who has previously served any period of imprisonment may be detained at such school.

(b) to repeal Legal Notice No. 10 of 1970."

[11] It would appear that if the provisions of the Reformatories Act, are read together with those relating to the Malkerns Juvenile Industrial School, it would have been open to the trial judge to have ordered that the appellant be detained at the Industrial School until he attained the age of eighteen years, and that the remainder of his nine year sentence

be served at a prison as defined in section 2 of the Prisons Act, 1964 which means:

"a place declared to be a prison under this Act or deemed by it to be a prison and shall include -

(a) any place or premises (including an institution) to which prisoners may be sent from a prison for the purpose of imprisonment, detention, training, medical attention or otherwise; and

(b) all offices and quarters used in connexion with the prison;"

[12] When this matter was called in this Court on the morning of the 7th May 2011, Counsel for the appellant sought and was granted leave to present to the Court and to Counsel for the Crown copies of his Heads of Argument which were literally hot off the printer. A reading of the four page Heads of Argument revealed that reference was being made to and reliance placed upon.

i. Section 29 (2) of the Constitution Act No. 001 of 2005
ii. Section 18 (2) of the Constitution.
iii. Section 38 (e) of the Constitution.

iv. Section 185 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938.

v. Section 185 bis (1) of the Criminal Procedure and Evidence Act.

[13] A number of authorities were also cited but no book of authorities was available for use by the court and by counsel for the Crown. With the consent of both counsel, the matter was then adjourned to 2.30 p.m. so that counsel for the appellant could make copies of the cited authorities available to the court and to counsel for the Crown.

[14] Members of the court remained in chambers during the luncheon recess during which the promised authorities were delivered to each member of court. But even with a recourse to high speed reading, the authorities numbering 106, 54, and 16 pages respectively could not be sufficiently digested for the hearing to proceed. What is more, counsel for the crown found himself with no time or opportunity to present amended Heads of Argument of his own.

[15] Even from a quick perusal of the material presented to the court so late in the day by counsel for the appellant, it soon became clear that

he was making a number of submissions with far reaching implications which were deserving of the studied and serious attention of this Court.

[16] It now appears that:

i. On the 14th February 2011, in case no. 21/07 HC M.C.B. Maphalala J sentenced the appellant to nine years imprisonment for the offence of rape which was aggravated by the factors set out in the indictment. He did so by applying the provisions of section 185 (bis) of the Criminal Procedure and Evidence Act no. 67/1938.

ii. On the 29th April 2011 under the same case No. 21/07 HC a full bench of the High Court - N.J. Hlophe J presiding, E.A. Otta J, and M.M.Sey J made the following order:

i. It is declared that **sections 185 (bis) (1). 313 (1)** and **(2)** of the **Criminal Procedure and Evidence Act ('CP & E') 1938 as amended,** in so far as they apply to a convicted person who was below 18 years of age at the time of commission of the act that constitutes the offence, are inconsistent with **section 29 (2)** read with **sections 18 (2)** and

38 (e), of the Constitution and therefore unconstitutional or invalid.

ii. The declaration of invalidity made above is with effect from the date of the Applicant's conviction, which is the 14th February 2011.

iii. The declaration of invalidity made in (i) above is suspended until Parliament passes the **Child Protection and Welfare Bill** or for a period of twelve months, whichever comes first.

iv. Pending the passing of the **Child Protection and Welfare Bill, section 185 (bis) (1)** of the CP & E is to be read as though it provides as follows:

> 'A person, who at the time of commission of the offence is 18 years of age or above, convicted of rape shall, if the Court finds aggravating circumstances to have been present, be liable to a minimum sentence of nine years without the option of a fine and no sentence or part thereof shall be suspended.'

v. Pending the passing of the **Child Protection and Welfare Bill,** the words 'other than one specified

in the third schedule' in **section 313 (1)** and **(2)** of the **CP & E** are severed, in so far as a person was below the age of 18 at the time of commission of the act that constitutes the offence, Sections 313 (1) and (2) of the CP & E are to be read as though they provide as follows:

> '(1) If a person, is convicted before the High Court or any magistrate's court of any offence, the court may in its discretion postpone for a period not exceeding three years the passing of sentence and release the offender on one or more conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as it may order to be inserted in recognisances to appear at the expiry of such period, and if at the end of such period the offender has observed all the conditions of such recognisances, it may discharge him without passing any sentence.

(2) If a person is convicted before the High Court or any magistrate's court of any offence, it may pass sentence, but order that the operation of the whole or any part of such sentence be suspended for a period not exceeding three

years, which period of suspension, in the absence of any order to the contrary, shall be computed in accordance with **subsections (4)** and **(5)** respectively."

vi. The interim orders in (iv) and (v) above, are with effect from the date of the Applicant's conviction, to wit, the 14th of February, 2011.

vii. Should Parliament fail to pass the **Child Protection and Welfare Bill** within the period of suspension, the declaration of invalidity in paragraph (1) will come into effect unless an order for the extension of same was sought and granted before the expiry of the suspension.

viii. The Applicant is granted costs against the 2nd Respondent.

[17] The High Court, sailing perilously close to the waters which are properly navigable only by the legislature, then went on to make what it called RECOMMENDATIONS for the next eleven pages. In my respectful view, those are matters which may well lie in the province of law reform commissioners, or which may be the subject matter of academic writing and debate. But, bearing in mind the well

established doctrine of the separation of powers, unless an issue has been raised for determination in litigation before it, the High Court should hold its peace and, subject to permissible obiter dicta within their proper compass, render judgment only on the issues before it.

[18] As matters now stand, the constitutionality of statutory provisions relevant to this appeal have been ruled upon by the full court of the High Court. That ruling may well have a bearing on the instant appeal. In these circumstances, the prudent course would appear to be that the matter should be removed from the current roll, and re-enrolled for hearing by a full bench of the Supreme Court during its sitting in November 2012.

[19] It may be rewarding to be reminded at this juncture that in **Attorney-General v Aphane** [2010] SZSC 32 28 May 2010 Swazilii.org both the Attorney General as well as counsel for the respondent agreed that there was need to correct what both parties regarded as unconstitutional elements contained in section 16 (3) of the Deeds Registry Act 1998. The judge of the High Court sought to purge the

legislation of its unconstitutionality by a process of **"severing"** and **"reading in**". The relevant portion of the order of this Court reads:

> "(ii) The order of the High Court is set aside;
>
> (iii) Section 16 (3) of the Deeds Registry Act 37 of 1968 is hereby declared to be inconsistent with sections 20 and 28 of the Constitution and it is therefore invalid.
>
> (iv) The declaration of invalidity made in (iii) above is suspended for a period of twelve months from the date of this order to enable Parliament to pass such legislation as it may deem fit to correct the invalidity in section 16 (3) of the Deeds Registry Act 37 of 1968.
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> (v) Pending the enactment of legislation by Parliament, the Registrar of Deeds is authorized to register immovable property, bonds and other real rights in the joint names of husbands and wives married to each other in community of property.
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> (vi) Should Parliament fail to remedy the unconstitutionality in the section declared to be inconsistent with the Constitution in terms of paragraph (iii) above within the period referred to in paragraph (iv) above, the Appellant is granted leave to approach the Court on the present

record, supplemented by such affidavits as may be necessary to seek such further order as the circumstances may require.

(vii) The respondent be awarded costs on the ordinary scale both in this Court as well as in the court below.

[20] The *rationes decidendi* in the **Aphane** case may have some bearing on the instant appeal and is therefore worthy of the attention of all parties concerned.

ORDER

i. This appeal is to be removed from the current roll
ii. This appeal is to be re-enrolled for the sitting of this Court in November 2012.

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S.A. MOORE
JUSTICE OF APPEAL

I agree

_____
A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

_____
S. TWUM
JUSTICE OF APPEAL

For the Appellant : Mr. Dlamini

For the Crown : Mr. Fakudze