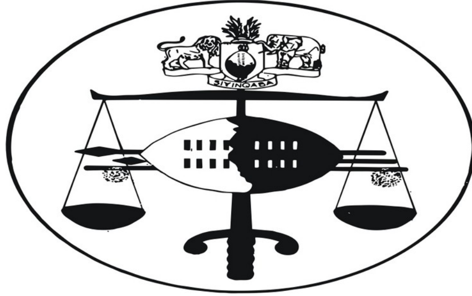

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No. 46/2011

In the matter between

SIKHUMBUZO MAZIBUKO **Appellant**

and

REX **Respondent**

Neutral citation: Sikhumbuzo Mazibuko *v Rex (46*/2011) [2012] SZSC 15 (31 May 2012)

Coram: RAMODIBEDI CJ, EBRAHIM JA, and M.C.B. MAPHALALA JA

Heard: **10 MAY 2012**

Delivered: **31 MAY 2012**

Summary: **Criminal law – The appellant sentenced by the High Court to 16 years imprisonment for raping his own niece aged 11 years – Appeal against sentence – Principles thereof – Appeal dismissed.**

RAMODIBEDI CJ

[1] This appeal arises from a conviction of rape recorded by the Magistrate's Court against the appellant and his subsequent sentence of 16 years imprisonment imposed by the High Court acting in terms of s 292 (1) of the Criminal Procedure and Evidence Act 67/1938. The appellant has appealed against sentence only. He complains that the sentence is too severe and harsh and that "it induces a sense of shock and trauma."

[2] The facts follow an increasingly common pattern in this jurisdiction, namely, crimes of the rape of young girls committed by close family members. And so it happened on a certain night during the month of August 2010. The complainant in this case, Siphesihle Dlamini, a young girl aged 11years, who was the appellant's own niece, was left alone in a one-room house with her younger siblings. As sadly often happens with poor homesteads, the children ordinarily shared the house with their parents as well as the appellant himself. During the night, whilst they were sleeping, the appellant knocked at the door. They opened the door for him. He entered and then proceeded to sleep on a sleeping mat on the other side

of the room from where the children were sleeping. Whilst the children were deep in sleep, the appellant pounced. The complainant says that she felt a person climb on top of her. It was the appellant, who then proceeded to have unlawful sexual intercourse with her without her consent. He did not use a condom. The incident was eventually reported to the police.

[3] The evidence of Doctor Solomon Rangaria Madzogo (PW3), who examined the complainant, showed that she was crying and depressed. There was evidence that she had been penetrated. Her hymen was no longer intact. She had a viginal discharge.

[4] Before sentencing the appellant the High Court duly satisfied itself that his conviction was proper beyond any reasonable doubt. I agree. After all, there is no appeal against conviction.

[5] This Court has stated time and again that sentence is a matter which pre-eminently lies at the discretion of the trial court. Generally, this Court will not interfere unless there is a material misdirection which has resulted in a miscarriage of justice. It is instructive to remember, however, again as this Court has often repeated, that the Court has additional power in terms of s 5 (3) of the Court of Appeal Act 74/1954 to pass such appropriate sentence as it thinks is warranted in law, whether more or less severe, in substitution for

the sentence passed by the trial court. See, for example, Sam Dupont v Rex, Criminal Appeal No. 4/08; Jonah Tembe v Rex, Criminal Appeal No. 18/2008; Vusumuzi Lucky Sigudla v Rex, Criminal Appeal No. 01/2011, reported on line in [2011] SZSC 24.

[6] In passing sentence, the High Court duly considered the triad consisting of the offence, the offender and the interests of society. The Court specifically recorded that the appellant had its "sympathy" because of his personal circumstances.

[7] As it was enjoined to do, however, the High Court properly, in my view, took into account the existence of aggravating factors in the matter. These were the seriousness of the offence, the fact that the appellant breached the trust reposed in him by the complainant as her uncle and the prevalence of crimes of rape committed against young children in this jurisdiction. In particular, the court *a quo* relied on the following remarks of this Court in the Sam Dupont case at para [15] of the judgment:-

> *"[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 Gija 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."

[8] Similarly, the learned Judge *a quo* properly, in my view, followed the guidelines laid down by this Court in Mgubane Magagula v The King, Appeal No. 32/2010 to the effect that the rape of a young child should be treated as a particularly serious aggravating factor, warranting a sentence above the upper echelons of the appropriate range of sentences of 11 to 18 years imprisonment. I can find no fault with the court *a quo's* approach and the sentence it imposed in the circumstances.

[9] It follows that the appeal has no merit. It is accordingly dismissed.

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree ___________________________

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree ___________________________

M.C.B. MAPHALALA
JUSTICE OF APPEAL

For Appellant : In Person

For Respondent : Miss. L. Hlophe