



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Case No.16/2012

In the matter between

MANDLA SIFISO MAZIYA

Appellant

and

REX

Respondent

Neutral citation:

Mandla Sifiso Maziya v Rex

(16/12) [2012] SZSC 35 (30 November 2012)

Coram:

S.A. MOORE JA, E.A. OTA JA and P.
LEVINSOHN JA.

Heard:

5 November 2012

Delivered:

30 November 2012

Summary:

**Appellant charged with rape with aggravating
circumstance – Only factors amounting to
aggravating circumstances to be taken into**

account against the appellant in fashioning the appropriate sentence – Trial judge not advising unrepresented appellant of his right to make a plea in mitigation – Material misdirection - Sentence of trial judge reduced from 15 years imprisonment to 11 years imprisonment.

LEVINSOHN J.A.

[1] The appellant a 27 year old man at the time was convicted by the court *a quo* of the rape of a 13 year old girl. He was sentenced to undergo 15 years imprisonment.

[2] He now appeals against his sentence. He avers in his heads of argument that the crime was not accompanied by aggravating circumstances and he lists 5 factors in support of this contention which I quote hereunder:

- “1. There is no evidence to show that the complainant was on diverse occasions raped.
2. The victim was not at any stage exposed to sexually transmitted infection such as HIV/Aids as presently I have tested at Matsapha VCT and proved to be negative as this episode happened only once.
3. Considering the age of the victim during the occurring (sic) of the offence, she was reaching her puberty stage. And she knew me, history dictates that at puberty stages victims sexually desire.

4. According to law the Complainant was young during the rape ordeal, but practically she was at her puberty stage.
5. The aggravating factors envisaged by the Criminal Procedure and evidence Act 67/1938 as amended were not fully covered.”

[3] The indictment presented against the appellant alleged that he had raped a girl aged 13 who is in law incapable of giving consent to sexual intercourse. Furthermore the Crown averred that the commission of the crime was accompanied by aggravating circumstances within the meaning of 185*bis* of the Criminal procedure and Evidence Act 67 of 1938 which are set forth as follows:

- “1. The complainant was very young at the time of the rape;
2. The accused raped the victim on diverse occasions;
3. The accused was well known to the victim;
4. The accused stood in an authoritative position over the complainant and he abused these powers held over her;

5. The accused exposed the complainant to the dangers of sexually transmitted infections such as HIV/AIDS as he did not use condoms at the time of the sexual abuse episodes.”

[4] On arraignment the accused pleaded guilty to the charge. He signed a statement of agreed facts acknowledging that he had had intercourse with a thirteen year old girl “who was in law incapable of consenting to sexual intercourse”. That statement went on to aver that the accused was a neighbour of the complainant and the rape would occur when the girl went into forest to collect wood.

[5] When the appeal was called before this Court, it was pointed out to counsel for the Crown that *ex facie*, in the record of the proceedings before the *court a quo*, there was no indication that the appellant was given an opportunity either to address the Court, or give evidence in mitigation of sentence. Section 294 (2) of the Criminal Procedure Act 1938 (as amended) provides that before passing sentence the court may receive such evidence as it thinks fit, to inform itself as to a proper sentence. It follows from this that at that stage of the proceedings the accused person should have been apprised of the fact that he had the right to present evidence on the issue of sentence. The fact that in the present case the appellant did not appear to have been afforded this opportunity in my view constitutes an irregularity.

[6] There is a further difficulty. The statement of agreed facts is extremely terse and is far from being a model of clarity. The allegedly aggravating circumstances in this case as disclosed in the statement of agreed facts are that:

- i. The appellant was a neighbor of the complainant.
- ii. The complainant would be raped by the appellant when she had gone to collect some fire wood from the forest.
- iii. The appellant would promise to give the complainant some money **after** the sexual encounter (singular) but he would eventually not give her the promised money.
- iv. He would further caution the complainant not to report the incident to anyone.
- v. The complainant eventually reported the matter to her mother when she realized that the appellant was persistent with the sexual abuse.
- vi. The medical report disclosed that the hymen of the complainant was intact but that there was marked hyperemia.
- vii. The complainant was a juvenile aged 13 years who was in law incapable of consenting to sexual intercourse.

[7] The indictment in this case alleged that “upon or about the month of December 2005, the said accused person did intentionally have unlawful sexual intercourse with a female minor of 13 years old.” It did not allege

that the appellant had raped the complainant on diverse dates, or that there was a single episode in which she was raped several times by the appellant. The only aggravating factor – that is to say a factor making the offence more serious - which emerges from the statement of agreed facts, is that the victim was a juvenile aged 13 years, who was in law incapable of consenting to sexual intercourse.

[8] It goes without saying that the statement of agreed facts must disclose at least a *prima facie* case establishing the offence with which the appellant has been charged in the indictment, together with a sufficiency of material disclosing a *prima facie* case establishing the particulars of aggravating circumstances leveled against the appellant.

[9] The learned judge correctly proceeded on the footing that aggravating circumstances were indeed established. Her failure to give the appellant an opportunity to make representations in mitigation is an irregularity as a result of which her order of sentence cannot be allowed to stand. This Court is now at large to award an appropriate sentence having regard to the facts and circumstances of this particular case, and having regard to the sentencing norms prevailing in the Kingdom at this time. In all the circumstances, the appellant is entitled to an amelioration of the sentence imposed. I propose that he be sentenced to 11 years imprisonment.

[10] The order of this court is as follows:

- i. The appeal against sentence is allowed.
- ii. The sentence of 15 years imprisonment is set aside.
- iii. The appellant is sentenced to 11 years imprisonment .

P. LEVINSOHN
JUSTICE OF APPEAL

I agree.

S.A. MOORE
JUSTICE OF APPEAL

I also agree.

E.A. OTA
JUSTICE OF APPEAL

COUNSEL:

For Appellant: In Person

For Respondent: Ms. L. Hlophe