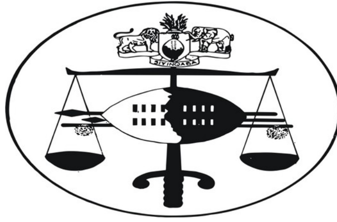

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No: 06/2012

In the appeal between:

BONGANI GECEVU MHLANGA **1st Appellant**

MKHOSI ZWANE **2nd Appellant**

and

REX **Respondent**

Neutral citation: *Bongani Gecevu Mhlanga & Another vs Rex 06/2012 SZSC 38 [2012] (30 November 2012)*

Coram: **EBRAHIM JA**
MOORE JA
OTA JA

Heard: **06TH NOVEMBER 2012**

Delivered: **30TH NOVEMBER 2012**

Summary: Criminal Appeal – Multiple convictions of rape and attempted rape of young girls aged between six and eleven years old. Convictions in order but aggregate sentences imposed on both appellants of fifty four years and forty nine years respectively excessive and reduced to twenty four years in respect of each appellant.

EBRAHIM J.A.

[1] The two appellants and a third accused were indicted to appear before the High Court in eighteen counts of rape. The third accused a brother of the second appellant died before the trial commenced, leaving the two appellants to face the allegations of rape.

[2] The offences they were alleged to have committed occurred between August 2002 to November 2002.

[3] Their victims were young girls aged between six years old and eleven years old. The two appellants were sixteen years old at the time of the commission of the offences. Their trial only commenced on the 7th September 2006. It is not clear why their trial commenced so late in the day.

[4] The first appellant was convicted of six counts of rape and two counts of attempted rape. The sentences imposed on him were ordered to run consecutively and backdated to 28th November 2002. He was therefore ordered to serve fifty four years imprisonment commencing from the 28th November 2002.

[5] The second appellant was convicted of seven counts of rape and sentenced to seven years imprisonment on each court with the sentences ordered to

run consecutively and backdated to 30th November 2002. The total sentence he was ordered to serve was forty nine years imprisonment.

[6] Both appellants have lodged an appeal against sentence only.

[7] This is understandable as the evidence against them was overwhelming.

[8] The learned judge a quo made the following findings:

> "[8] The following facts may be extrapolated from the evidence led by the Crown.
>
> 1. The rape victims were all minors between the age of six years and eleven years.
> 2. They were all students at Mahlandle Primary School in Matimatima area.
> 3. They were raped during the day on their way home from school.
> 4. They were warned not to report the incidents to any one and threatened with violence should they fail to heed this warning.
> 5. At all times material hereto, the accused lived at their mother's home, kaKhetsiwe and were known to some of the complainants.
> 6. The rape victims were examined by a medical doctor either in late November or early December 2002. These medical reports were handed in by counsel and the accused did not challenge the contents thereof.
> 7. Each rape victim lost her virginity as a result of the rape."

[9] It should be noted, however, that in respect of counts one and three the first appellant was convicted of attempted rape whereas the second appellant was not convicted of these offences. The end result was that the first appellant was convicted of two counts of attempted rape and six counts of rape. He was ordered to serve six years on each of the counts of attempted rape and seven years on each of the rape charges. The second appellant was ordered to serve seven years imprisonment on each of the seven counts of rape he was convicted of.

[10] In sentencing the appellants the learned judge a quo properly took the following facts into account:

> "[1] You have both been found guilty of very serious offences perpetrated on very young girls. As I stated in my judgment the youngest of these girls was 6 years and the oldest was 11 years and they were all virgins. When you defiled them, you did so with violence, at one stage you used dogs and at one stage a knife was used, and in most cases they were raped in a group whilst the others were watching what was being done to the other victim. I will take into account the fact that both of you are around 21 years now, so in about 2002 you must have been around 16 years old, so you were not that old. But at the same time whilst accepting that you were quite young, you played a major role plus the fact that you did this as a group; so there was this group influence amongst you that prevailed and persuaded you to do what you did to these young girls. But at 16 and 17 you are not a baby, you had grown up to know that what you were doing was unlawful. This was not just one isolated incident, it

occurred over a period from August to November, that is about a period of 3 months. So it was not just something that happened on the spur of the moment on one day and ended there. It went on as I have just said for over a period of 3 months and you almost considered it at that time of the day you would go out and waylay these young girls coming from school and molest them as you did.

[2] To show that you planned it, at one stage you had to dismount from a tree where you had waylaid these young girls and then pounced on them. At one stage you set dogs on them when they attempted to run away. I am sure even at your age, 16 and 17 in 2002 in that area where you lived at Mahlandle you were aware of the pandemic of HIV and AIDS. You do not seem to have taken any precaution to protect these innocent souls from contracting that pandemic. Not just against HIV/AIDS but against any other sexually transmitted disease. The girls that you molested were too young, I am not a psychologist and I do not know what effect that would have on them in their future lives as prospective wives. But the very fact of undressing someone, forcing someone into sexual intercourse, in the manner that you did is demeaning in the most extreme."

[11] I share these sentiments as espoused by the learned judge a quo. The difficulty I have however, is the aggregate sentence imposed on each of the appellants, that is, fifty four years in respect of the first appellant and a sentence of forty nine years on the second appellant. In my view the totality of these sentences cannot be justified.

[12] In the case of S V SHERMAN S-117-84 MCNALLY JA said:

> "How does one begin to measure the outer limits of sentence in a case of this magnitude? One may say that even murder with actual intent attracts a sentence of 16-18 years. One may ask – which sentence would be appropriate where a quarter of a million dollars is stolen and nothing is recovered? What sentence would be appropriate when five or six million dollars is involved? These considerations and comparisons suggest to me that a twenty year sentence for a crime of dishonesty unaccompanied by violence must be approaching the outer limit of what any court in this jurisdiction would impose for such a crime."

[13] This case was cited with approval in S V SIFUYA 2002(1) ZLR 437(H) where the accused pleaded guilty to four counts of armed robbery by a regional magistrate an was sentenced to a total of 34 years imprisonment of which 4 years was suspended. The sentence was reduced on appeal to 20 years, by making some of the sentences to run concurrently.

[14] In S V NYATHI 2003(1) ZLR 587 the accused was convicted of 10 counts of rape (of his daughter), the offence having been committed over a period of 18 months. The magistrate imposed a complex sentence which worked out at 30 years imprisonment. On review, NDOU J reduced the sentence to an effective 18 years, by treating some of the counts as one for sentence and then ordering that some of the sentences run concurrently.

[15] In S V CHITIYO 1987(1) ZLR 235(5) the accused was convicted of ten counts of armed robbery, theft, attempted armed robbery and kidnapping. He was sentenced on each count individually and portions of the total of 82 years were ordered to run concurrently, giving a total of 50 years. This was reduced on appeal (by DUMBUTSHIRA CJ, MCNALLY AND KORSAH JJA) to an effective overall sentence of 18 years. DUMBUTSHIRA CJ said at page 240:

> "A sentence of 50 years' imprisonment with labour is, in my judgment, objectionable, not because it is unjust or undeserved, but because it seems to me inhumane to keep a young man of 23 years of age in prison for so long."

[16] I have also had regard to what my brother MOORE JA stated in the case of THAPELO MOTOUTOU MOSIIWA V THE STATE [ZW6] 1 B.L.R. 214:

> "The matter of the appropriateness of sentences has plagued sentencers from the earliest times. Early sentences were characterized by their severity. Over the years however, humanitarian considerations have persuaded both legislators and judges to adopt a less drastic approach."

[17] The learned judge MOORE JA also drew attention to what TEBBUTT JP had to say in the case of TLHABIWA AND ANOTHER V THE STATE (2003) 2 BLR at 43-44 where in delivering the judgment of the Court of

Appeal expressed his approval of the sentiments of the judge in the court a quo in the following terms:

> "Dibotelo J said he found the total term of imprisonment of 15 years 'very severe and induces as sense of shock'. I agree. It is so excessively disparate to the offences – serious though they may be – as to amount to inhuman or degrading punishment. I feel that the appellant's total punishment should for the three offences, not total more than nine years. In coming to this view, I take into account the period spent by the appellant in custody prior to his sentence."

[18] My learned brother MOORE JA also in the MOSIIWA case (supra) drew attention in paragraphs 28 to 32 to the case of MOGATLA V STATE (2001) 1 BLR 192 where he stated:

> "28. …The *appellant* had been sentenced to a *total* of 29 years imprisonment to commence on 23rd March 2000 which was the date of his *conviction*. The gross figure of 29 years consisted of three components:
>
> (i) Count 1 (rape) 15 years imprisonment
>
> (ii) Count 2 (grievous harm) 7 years imprisonment
>
> (iii) Count 3 (grievous harm) 7 years imprisonment
>
> By ordering these sentences to run consecutively, the sentencing judge had *effectively* imposed a *nett* term of imprisonment.
>
> 29. Delivering the judgment of the Court of *Appeal*, Korsah JA wrote at page 203F:

‘Section 142 of the Penal Code as *amended* by Section 3 of the Act No.5 of 1998, provides that:

‘Where an act of rape is attended by violence resulting in injury to the victim, the person convicted of the act of rape shall be sentenced to a minimum term of 15 years’ imprisonment or to a maximum of the life imprisonment with or without corporal punishment.’

30. It *will* be noticed that in two of the three counts, upon *which* the *appellant in* **Mogatla** was convicted, the legislature, expressing abhorrence of the *relevant offences, had provided for* mandatory minimum terms below which sentences are not *allowed to* go.

31. In the **Mogatla** case, the scales were already loaded against the *appellant*. He had against him, two mandatory penalty strikes of *fifteen and* seven respectively-already twenty-two years so far. The legislature had already deprived him of concurrent penalty relief by the *operation of section 142(5)* of the Penal Code as amended by Act No.5 of 1998, which provided:

“Any person convicted and sentenced for the offence of rape shall not have the sentence imposed run concurrently with any other sentence whether the other sentence be for the offence of rape or any other offence.”

The question which the sentencing *court* then had before it was whether the sentences in respect of the second and *third* counts of causing grievous harm contrary to section 230(1)

of the Penal Code (as amended by Act No.*13 of 1993)* should run consecutively or concurrently.

32. Faced *with* the statutory *minima* amounting to a totality of twenty-two years, the appellant's punishment was further aggravated by the order that the sentences under those two counts run consecutively. This is how Korsah JA at page 204 D reacted to the unenviable situation of the appellant:

'The sentencing Acting High Court Judge ordered the sentences to run consecutively, resulting in a globular term of 29 years' imprisonment. We were all dismayed by the severity of the cumulative term of imprisonment imposed by the sentencing court. It was clear to us that even in murder cases, where life is tragically lost, if there are circumstances of extenuation, the sentences imposes range between 10 and 25 years, depending on the surrounding circumstances."

[19] The Court of Appeal in Botswana in the **Mogatla** case (supra) concluded in the words of KORSAH JA "the globular sentence of 29 years' imprisonment was manifestly excessive."

[20] In my view the sentiments expressed in the Zimbabwean and Botswana cases cited above apply with equal force to the jurisdiction of the courts in Swaziland.

[21] I am not unmindful of what my brother MOORE JA stated in the case of MGUBANE MAGAGULA V THE KING NO.32/2010 from page 10

onwards of the cyclostyled judgment in paragraph 12 to paragraph 15 where he said:

> "However, the Criminal Law and Procedure Act 67 of 1938 Section 185 bis lays down the sentence for rape etc in these terms.
>
> > 'A person 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 suspended.'
>
> 13. It is clear from the above section that the legislature, even in 1986, when section 185 bis was added to Act 67 of 1938, regarded aggravated rape as sufficiently serious as to attract a minimum sentence of nine years imprisonment. As can be seen in Table A set out in paragraph 16 *infra*, largely because of the distressing increase in the frequency of rape and related offences, courts in this Kingdom have resorted to sentences of expanding severity in their unflagging attempts to curb these attacks upon women, and to protect them from the baleful attention of sexual predators – especially pedophiles such as the appellant in this case.
>
> 14. Rape is perhaps the ultimate invasion of human privacy. I use the adjective human because modern legislatures have expanded the definition of rape to include the unlawful penetration of any bodily orifice of a victim of either gender by any part of the body of the perpetrator or with an object or instrument for sexual gratification. Rape has had an inglorious history stemming from the fabled rape of the Sabine women to today's horrific and willfully genocidal impregnation of women with the exterminating intent of

extirpating or debasing their ethnic, national or religious identities.

15. Succeeding generations of judges in every jurisdiction, including the judges of this Kingdom, have inveighed against the barbarity of rape. They have condemned in the strongest terms its brutality and savagery, its dehumanizing reduction of women to the status of mere objects for the unrequited gratification of the basest sexual passions of rampant males, and the long term havoc which the trauma of rape is capable of wreaking upon the emotional and psychological health and well-being of victims of ravishment. It is for these reasons, and because of the disturbing frequency of the abominable offence of rape in this Kingdom, that persons convicted of this heinous crime must expect to receive condign sentences from trial courts."

[22] In the same case MOORE JA referred to two tables which he had prepared for that case at paragraph [20] of that judgment:

He said:

> "From Tables A and B set out in paragraphs [16] and [17] above, it would appear that the appropriate range of sentences for the offence of aggravated rape in this Kingdom now lies between 11 and 18 years imprisonment – which is the mid range between 7 and 22 years – adjusted upwards or downwards, depending upon the peculiar facts and circumstances of each particular case. *The tables also reveal that this Court has treated the rape of a child as a particularly serious aggravating factor, warranting a sentence at or even above the upper echelons of the range."* (Emphasis added)

[23] I respectfully associate myself with these sentiments.

[24] This Court in considering whether or not to direct that the sentences run concurrently or consecutively ought to have regard to the total cumulative sentences. See SIFISO NDWANDWE V REX (05/2012) [2012] SZSC 39 (30 NOVEMBER 2012)

[25] I am of the firm view that the totality of the aggregate sentences imposed on the appellants in this case are manifestly excessive. I associate myself with the views of TEBBUTT JP as expressed in the TLHABIWA case (supra). "It is so excessively disparate to the offences – serious though they may be – as to amount to inhuman or degrading punishment." I also respectfully share the views of KORSAH JA in the MOGATLA case (supra).

[24] I would therefore vary the order of the court aquo and substitute the following.

[25] As regards Appellant BONGANI GECEVU MHLANGA:

"COUNT 1:
SIX (6) IMPRISONMENT

COUNT 2:
SEVEN (7) IMPRISONMENT

COUNT 3:
SIX (6) IMPRISONMENT

COUNT 5:
SEVEN (7) IMPRISONMENT

COUNT 9:
SEVEN (7) IMPRISONMENT

COUNT 11:
SEVEN (7) IMPRISONMENT

COUNT 14:
SEVEN (7) IMPRISONMENT

COUNT 17:
SEVEN (7) IMPRISONMENT"

The sentences on counts 2, 5 and 7 are to run concurrently with the sentences on counts 11, 14 and 17. The sentence on count one is to run concurrently with the sentence on count 3 of which 3 years imprisonment of the sentence is to run concurrently with the sentences on counts 2, 5, 7, 11, 14 and 17.

The sentences are backdated to 28th November 2002. The total aggregate sentence imposed on the Appellant is therefore 24 years imprisonment.

[26] As regards to Appellant MKHOSI ZWANE:

"COUNT 6:
SEVEN (7) IMPRISONMENT

COUNT 9:
SEVEN (7) IMPRISONMENT

COUNT 11:
SEVEN (7) IMPRISONMENT

COUNT 13:
SEVEN (7) IMPRISONMENT
COUNT 14:
SEVEN (7) IMPRISONMENT

COUNT 16:
SEVEN (7) IMPRISONMENT

COUNT 17:
SEVEN (7) IMPRISONMENT

Sentences to run consecutively and are backdated to 30th November 2002."

The sentences on counts 6, 7 and 9 are to run concurrently with the sentences on counts 13, 14 and 16, of the sentence of 7 years imposed on count 17, 4 years is to run concurrently with the sentences imposed on counts 6, 7, and 9, 13, 14 and 16.

The sentences are backdated to 30th November 2002. The total aggregate sentence imposed on the 2nd Appellant is therefore 24 years imprisonment.

[27] In the result, the first Appellant is sentenced to a total of 24 years imprisonment and the second Appellant is sentenced to a total of 24 years imprisonment.

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A.M. EBRAHIM
JUSTICE OF APPEAL

I AGREE : ____________________________
S.A. MOORE
JUSTICE OF APPEAL

I AGREE :

____

E.A. OTA
JUSTICE OF APPEAL

FOR APPELLANTS : IN PERSON

FOR RESPONDENT : P. DLAMINI