IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No.05/2012

In the matter between:

SIFISO NDWANDWE **APPELLANT**

V

REX **RESPONDENT**

Neutral citation: *Sifiso Ndwandwe v Rex (05/2012) [2012] SZSC 39 (30 November 2012)*

Coram: S.A. MOORE J.A. , DR S. TWUM J.A. ,

E.A. OTA J.A.

Heard: **8 NOVEMBER 2012**

Delivered: **30 NOVEMBER 2012**

Summary: **Consecutive and concurrent sentences when appropriate: Appellant was sentenced a quo to a cumulative sentence of 32 years for offences ranging from attempted robbery, and rape to unlawful possession of arms and ammunition:- appeal against the cumulative sentence of 27 years for two counts of rape: Cumulative sentence of 32 years ameliorated to 24 ½ years by consecutive and concurrent orders.**

OTA JA

[1] This is an appeal from the sentence of the High Court per **Hlophe J** pronounced on the 12th day of January 2012. The Appellant **Sifiso Ndwandwe** as accused, was indicted on 6 counts of offences namely Attempted Murder count one, Attempted Robbery Count two, Rape with aggravating factors counts three and four respectively, contravening Section 11 (1) as read with Section 11 (viii) of the Arms and Ammunition Act No. 24 of 1964 as amended count five and contravening Section 11 (ii) as read with Section 11 (viii) of the Arms and Ammunition Act No. 24 of 1964 as amended, count six

[2] It is on record that on the 8th of December 2011, in a detailed judgment, the learned judge a quo convicted the Appellant on all the charges as proffered save for the offence of attempted robbery as detailed in count 2, which was withdrawn before the Appellant's plea was taken. The court a quo pronounced it's sentence on the 12th of January 2012 in the following terms:-

"12.1 Count 1- Attempted Murder: On this count 1, after having taken account of all the circumstances of the matter, sentence the accused to five years imprisonment, with no portion therefore being suspended nor there an option of a fine. The case of **Sibusiso Kukuza Dlamini v Rex Criminal Case No, 39/2010, General M. Msibi v The King Criminal Appeal Case No. 26/2010 and Elvis Vusi Mazibuko and Another v Rex Criminal Case No, 16/98** is **(sic)** instructive in this regard.

12.1.2 Count 3 - Rape of the 16th February 2008. Taking into account all the circumstances of the matter I am of the considered view that a sentence of imprisonment for a period of 12 years would be appropriate and as such it is imposed taking into account the aggravating factors pleaded and proved by the crown which included an assault on her. The case of **Fanafana Nkosinathi Mabila v The King Criminal Appeal Case No. 5/2011** is instructive.

12.1.3 Count 4 – Rape of the 28th February 2008. The evidence has established that this particular crime was committed deliberately, callously and as a total affront to law and order. It was also attended by aggravating circumstances in the threats to kill the complainant read together with the inhuman treatment she was generally subjected to.

Consequently in my view a 15 years sentence of imprisonment is appropriate when taking into account the circumstances of the matter and is the one I impose. The case

of **Mandlenkosi Daniel Ndwandwe v Rex Criminal Appeal Case No. 39/201**1 is instructive in this regard.

12.1.4 Count 5 – Unlawful possession of a firearm without a valid licence in contravention of Section 11 (1) read with Section 11 (8) of the Arms and Ammunition Act, it is my considered view that a sentence of imprisonment for five years or a fine of E5,000-00 is appropriate, and I hereby impose it.

12.1.5 Count 6 – Unlawful possession of ammunition without a license or permit in contravention of Section 11 (2) of the Arms and Ammunition Act, my considered view is that a period of two (2) years imprisonment is appropriate. The accused has an option to pay fine of E2000-00 in the stead of imprisonment period referred to

12.2 Count (1) one, (5) five and (6) six are to run concurrently.

12.3 Counts 3 and 4 are to run consecutively between the two of them and with those mentioned in 12.2 above

12.4 The sentences are backdated to the date of the accused person's arrest".

[3] It is the foregoing sentence of the court *a quo* that elicited this appeal which the Appellant who is unrepresented by counsel, launched by way of a letter addressed to the Registrar of the Supreme Court, in the following language:-

> **"RE: APPLICATION FOR APPEAL CASE NO. 103/2009 GOAL NO. 1509/2011**
>
> I hereby humbly appeal for concurrence of my two sentences that were imposed upon me by Justice Nkululeko Hlophe at the High Court on the 14th December 2011 on two counts of rape. For one of them I was sentenced to 15 years in prison while for the other I was (sic) sentences were not concurred.
>
> I humbly accept my conviction on both counts but only appeal both sentences to be concurred. My main grounds for my appeal is that my 27 year sentences (sic)is to harsh and severe for me to bear. It induces a sense of shock. In due course I will submit to the Supreme Court the heads of argument for my appeal. Please acknowledge receipt of this appeal at your earliest convenience''.

[4] I am prepared to condone the sheer inelegance and incoherence of this notice of appeal in appreciation of the fact that the Appellant is a layman. He is unlearned and uneducated in the nitty gritty of the law

and thus completely clueless as to the phraseology, ingredients and particulars of a process initiating an appeal.

[5] Having stated as above, I must observe that no matter how badly drafted the notice of appeal is, it conveys one message, which is that the Apellant is not challenging his conviction. He is also not disputing the sentence by the court *a quo* for each count of rape. His grouse is against the order of that court for the sentences imposed in those two counts to run consecutively. He says that the aggregate of the sentence which is 27 years is too harsh and severe for him too bear and induces a sense of shock.

[6] It appears to me from a careful study of the sentences imposed *a quo*, that quite apart from the 27 years aggregate sentence for the offence of rape which the Appellant complains about, the total cumulative sentence imposed for the offences for which the Appellant stood trial *a quo* is 32 years. It is this total cumulative sentence of 32 years that must weigh in the mind of the court in coming to a just decision in this case.

[7] Since this appeal resonates around the sentence of the court *a quo* and the power of this court to disturb same, I should at this juncture contextualize the said sentence *vis a vis* the concept that underpines the sentencing procedure.

[8] The lower court has wide ranging powers to impose sentences. In deciding how to exercise this power in a specific case, the court exercises a discretion which involves making various choices from various possibilities, which of course will inform the measure or quantity of the sentence to be meted out. The court in determining the appropriate sentence is expected to operate within the limits prescribed by law and also act in concert with established guidelines laid down by superior courts. The basic requirement set by law, is that this discretion must be exercised judicially and judiciously upon facts and circumstances placed before the court.

[9] In the case of **Bhekizwe Motsa v Rex Appeal Case No. 37/2010**, this court per **Agim JA**, considered what a judicial and judicious exercise of the sentencing discretion entails and held as follows, in paragraphs 6 and 14:-

" 6---- An exercise of discretion is judicial if it is in accordance with the law and it is judicious if it is based on the facts before the court and the result is borne out by those facts. An exercise of discretion that is not judicial and judicious cannot be a proper or correct exercise of discretion.

14 The exercise of sentencing discretion must be a rational process in the sense that it must be based on the facts before the court and must show the purpose the sentence is meant to achieve. The court must be conscious and deliberate in its choice of punishment and the records of the court must show the legal reasoning behind the sentence. The legal reasoning will reflect the application of particular principles and the result it is expected to achieve. The choice of applicable principles and the sentence will depend on the peculiar facts and needs of each case. The choice will involve a consideration of the nature and circumstances of the crime, the interest of the society and the personal circumstances of the accused other mitigating factors and often times a selection between or application of conflicting objectives or principles of punishment".

[10] In a nutshell and in plain language, what the court was stressing in **Bhekizwe Motsa v Rex (supra)** is that the law enjoins a sentencer to consider the triad of offences. The court recognized this age long principle with its lengthly lineage, in paragraph 13 of that decision where the following appears:-

" 13 The consideration of the court accords with the guide on what is an appropriate punishment laid by the **South African Court of Appeal per Holmes JA in S v Rabie (1975) A SA 85.5 (A) at 862 (9)** that is *"punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances"*. This statement was quoted with approval by the Court of Appeal of Swaziland in **Musa Kenneth Nzima v Rex** unreported decision in **Criminal Appeal No. 21/2007** delivered on the 14th November 2007)---. The Swaziland Court of Appeal per **Ramodibedi JA** (as he then was) in **Sam Dupoint v The King (Criminal Appeal No. 4/2008**) held that " *In sentencing the Appellant to 13 years imprisonment, the learned judge a quo took into account the triad, consisting of the crime, the effender and the interests of the society as laid down in* ***S v Zinn 1969 (2) SA 537 (A)***. *Furthermore, the court properly took into account the prevalence of crimes of sexual offences against young children in this jurisdiction. These are relevant considerations''.*

[11] Now, though **Section 5 (3)** of **the Court of Appeal Act No. 74 of 1954** empowers this Court to

" ---if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss this appeal'',

it is however the judicial accord across national borders that the Court of Appeal will not lightly interfere with a sentence imposed by the trial court.

[12] This position of jurisprudence is in difference to the fact that sentence is a matter which is pre-eminently in the preserve of the lower court, and an appellate court will be loathe to interfere with same. It is the trial court that has the discretion to impose a proper sentence. Principles derived from judicial precedent however regulate the powers of the appellate court on an appeal against sentence, which includes that the mere fact that the appellate court would have imposed a lighter sentence if the punishment were within its discretion is not in itself sufficient reason for the court to intervene.

[13] The appellate court will only be entitled to interfere where the lower court has not exercised its discretion judicially and judiciously or there has been an improper exercise of that discretion, which will be the case in the following circumstances:-

1. Where the trial court misdirects itself e.g by failing to consider relevant factors or taking into consideration irrelevant factors in the sentencing process. See **Rands 1978 (4) SA 304 (A) Matsotso v Rex (1962-1969) SLR 36.7 Bhekizwe Motsa v Rex (supra).** The misdirection must be of such a nature, degree and seriousness that it vitiates the trial courts decision. A mere misdirection will not suffice to warrant interference from an appellate court.

2. Where the sentence is vitiated by an irregularity and it appears to an appellate court that a failure of justice has been occasioned from such irregularity or defect. For instance, where a lower court exceeded its sentencing jurisdiction or imposed a sentence which was not legally permissible for a crime see **Matsotso v Rex (supra).**

3. Where the sentence is so severe that no reasonable court would have imposed it. Over the years, the inquiry of the appellate court under this head has witnessed some evolution. In the earlier cases the inquiry was whether the sentence appealed against induced *"a sense of shock"*. Then this metamorphosized into an inquiry as to whether the impugned sentence was *"startling inappropriate"* or

disturbingly inappropriate" or whether there was a "*striking disparity*" in the sentence imposed by the lower court and that which would have been imposed by an appellate court. As the court stated in the case of **Mduduzi Sithole v The King Appeal Case No. 3/1987 pages 8-9**

> " sometimes the phrase striking disparity has been displaced by the phrases "*startlingly inappropriate*" or "*disturbingly inappropriate*". These expressions all really mean the same thing they are, one might say expressions of what used to be classified under the phrase "*a sense of shock*"

[14] Having adumberated upon the foregoing principles in some detail, let us now have recourse to how **Hlophe J** approached the issue of sentence to see whether there was an improper exercise of discretion by him warranting interference with the sentences imposed *a quo*.

[15] The sentence of the court a quo appears on pages 84-91 of the record and it is convenient for me to detail the relevant portions in extenso. They are as follows:-

> "3 I have therefore taken into account and in his favour that the accused is a first offender and that he is a relatively young man. I have also construed it in his favour that at some stage the complainant in the

Counts relating to rape --- was once a girlfriend of the accused, and that she for some strange reason did not want to take the court into her confidence in this regard. For the reason that will follow when I deal with the crimes themselves herein below, I must not be understood to be suggesting that the brutal and barbaric conduct of the accused can ever be countenanced or justified. In fact I am far from that and it has to be understood that having someone as a girlfriend does not justify forced sexual intercourse and that having sexual intercourse with her under those circumstances amounts to rape. The accused also informed me that he was responsible for two minor children of his as well as his mother and asked me to take these factors into account and thus mete out a lenient sentence against him, These issues I have taken into account.

(4) Whatever leniency I can afford the accused, I should not loose sight of the fact that the accused has been convicted of very serious offences. These offences were committed with callousness and a cold heart which requires that harsher than-normal sentences have to be passed in each one of the counts so as to send a proper message against the accused. It is in fact true that the evidence points to the accused as one who had total disregard for the law and orderly behavior and which had become a manace to society, which is why I am convinced he deserves to be put away from the law abiding members of society for a long time.

(5) How else can one see this other than in his commission of Counts (1) one and Count (4) four. As the matrix shows, on the 16th February 2008 he callously raped the complainant and was reported to the police and was still being sought in connection therewith, when he

on the 27th February 2008, shot at **Sifundvo Dlamini** who had not provoked him at all. It shall be remembered when he raped her in this Count the evidence indicates he did not only ignore the attempts by **Vuka Hlongwane** to prevent him from doing so, but also the advice and intervention by his own friend known as **Mtsenyane Khumalo.**

(6) Otherwise the accused did not end there but went on to break into the house she was staying with her friends, threatening her with death at the barrel of a gun, and took her with him at night to Mlondozi river where he forcefully repeatedly raped her. This particular rape was therefore carried out in the most cold hearted manner but was carried out in the spirit of a boast so as to trivialize the law and erode its dignity. It is for this reason that the sentence I pass should be able to convey a proper message to other would be offenders which could attempt the same thing.

(7) It is here that I find it hard to believe that the accused really means it when he talks of a lenient sentence citing his being responsible for his children and his mother. In my view it was necessary for him to consider these factors even before he committed the offences concerned. However, within acceptable limits his sentence ought to be tempered with mercy as that is what punishment requires for a judicial officer in my position.

(8) Otherwise it is a fact that the offences of which the accused has been found guilty of are prevalent in our society today which necessitates again that sentences in counts like this one send a proper message to other would be offenders. It is a fact that the unlawful possession of

firearms had led to many instances of loss of life or to instances where the victims have had to suffer permanent disability as a result. Rapes now occur almost on a daily basis let alone where violence is also being used to force the poor victims to succumb as was the case herein.

(9) Speaking on what I have observed, I must say I did not observe any incidence where remorse was expressed visibly on the part of the accused during the trial and sentencing stages of the matter''.

[16] It is on record that after the foregoing exposition the court *a quo* went further to observe that rape offences attract sentences of between 11 and 18 years.

[17] From the totality of the foregoing, I cannot fault the individual sentences of 5,12,15,5 and 2 years imposed by the court a quo for the different counts of offences. I say this because the court very carefully considered the triad i.e the personal circumstances of the Appellant, the seriousness of the offence and the interest of the society. These sentences were meant to reflect the seriousness of the offences committed and serve as a deterrent measure. The offence of rape in particular and as rightly observed by the court a quo were committed in very dire and violent circumstances and with impunity.

Moreover, the sentences of 12 and 15 years respectively imposed for the offence of rape fall within the appropriate range of sentencing evolved by this court for the offence of aggravated rape in the case of **Mgubane Magagula v Rex Criminal Appeal No. 32/2010** and are also justified by the circumstances of the offence which includes its ubiquity in the Kingdom as was noted by the court *a quo*.

[18] Having stated as above, the question here is whether the facts and circumstances of this case as canvassed by the trial judge justify the cumulative sentence of 32 years imposed as a result of the consecutive order of sentences?

[19] Now Section 300 (i) (ii) of the Criminal Procedure and Evidence Act 67/1938, as amended, provides as follows:-

(i) "If a person is convicted at one trial of two or more different offences, or if a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to such several punishments for such offences or for such last offence, as the case may be, as it is competent to impose.

(ii) If such punishment consists of imprisonment the court shall direct whether each sentence shall be served consecutively with the remaining sentences''.

[20] Therefore, the law permits the court to pass concurrent or consecutive sentences in appropriate cases. The discretion to pass a consecutive sentence is however exercised within certain parameters, which is that as a general rule consecutive sentences are ordered where the offences do not form an integral part of the same transaction. This is in the sense that they were committed on different dates, in different circumstances and are of a wholly different character see **R v Berry (1976) 63 Criminal Appeal Rep 44, Samkeliso Madati Tsela v Rex Appeal Case No. 20/10, Dlamini v Rex.** Where the offences were committed in the same transaction, it has been held to be unjust and wrong in law to order the sentence of an accused to run consecutively see **Anowole v The State (1965) I ACC NLR 100, Willie John v The State (1966) ALL WLR 211.**

[21] In the case of **Samkeliso Madati Tsela v Rex (supra) Moore JA** discussed the foregoing proposition in relation to the doctrine of res gestae, and stated as follows:-

"34. The Doctrine of Res gestae has been much maligned by both judicial officers of every level and by academic writers of the highest repute. Nevertheless, its utility has been recognized as providing the justification for the reception of evidence on the grounds of relevance and contemporaneity which might otherwise have fallen foul of one of the several exclusionary rules of evidence which have been developed in order to help ensure that a trial is conducted in a manner that is fair to all the parties concerned.

35. The editors of Cross on Evidence Fourth Edition posit at page 502 that:

" Unlike most of the principles of the law of evidence, the doctrine of the res gestae is inclusionary --- the assertion that an item of evidence forms part of the res gestae roughly means that it is relevant on account of its contemporaneity with the matters under investigation. It is part of the story''.

At page 517, the authors recite that:

" facts are sometimes allowed to be proved on the footing that they form part of the res gestae. In the context too the phrase seems merely to denote relevance on account of contemporaneity. We saw, however, in Chapter XIV, that it had a further implication in that evidence of facts forming part of the same transaction as that under inquiry may be excluded if it does no more than show that someone is disposed to commit crimes or civil wrongs in general, or even crimes or civil wrongs of the kind into which the court is inquiring Contemporaneity, continuity or the fact that a

number of incidents are closely connected with each other gives the evidence an added relevance which renders it admissible inspite of its prejudicial tendencies''.

36. The doctrine of Res Gestae, and particularly its contemporaneity element, has also been employed by courts in determining whether the course of events grounding several counts in an indictment are so closely inter-related in terms of time and surrounding circumstances as to form integral parts of a single transaction warranting the imposition of concurrent sentences, or so disparate and unrelated or segmented as to justify the imposition of consecutive sentences which, from their very nature, are more punitive and severe. The application of the res gestae principles lend additional justification for treating the events grounding the two counts as being so homogenous and inter related as to render the imposition of consecutive sentences wholly inappropriate.

(4) In **S v Nkhumeleni 1986 (30 SLR 102 at page 105 B Van Der Spuy AJ** stated the law correctly when he wrote ***" if in the course of an attack an accused stabs various persons, separate charges of assault could be laid in respect of each such person''.*** Delivering the judgment of the Venda Supreme Court upon which **Klopper ACJ** also sat upon review, **Van Der Spuy AJ** dealt with the matter of sentence for the two separate offences which the court was considering in this way at page 105 1 to 106 A

> " The second accused was sentenced to nine months imprisonment on Count I and to a fine of R60 (Sixty Rands) failing which imprisonment for a further 30 days imprisonment on Count 2. Since the two offences were closely related in time and in place and were really part of the same res gestae, I am of opinion that, whatever sentence was imposed in respect of the second Count, it should run concurrently with the sentence on the first Count. In fact I am of opinion that it was unnecessary to impose a separate fine of R60 and I find that an appropriate sentence on Count 2 could have been 30 days imprisonment without the option of a fine but that that imprisonment should run concurrently with the sentence on Count I''.

[22] In the light of the foregoing, I reiterate that generally a consecutive order of sentences will not be made where the offences form an integral part of a transaction or incident. It is also a settled principle of law however, that a sentencer can depart from the foregoing general position where exceptional circumstances exist which would warrant him to do so. Case law has identified some of these exceptional circumstances as including but are not limited to the following:-

1) Where the appropriate or maximum sentence for each offence would not protect the public from the offender for a sufficiently long time.

2) Where at the time of passing the sentences the offender is already serving another sentence of imprisonment the sentencer may order that the sentence now being imposed should run "*consecutively*" to the total period of imprisonment to which he is already subject. The reason for this is to avoid the new sentence running concurrently to the first sentence if the offender is already serving a consecutive sentence.

3) As a general rule, consecutive sentences should not be such as to result in an aggregate term that is wholly out of proportion to the gravity of the offences, considered as a whole **See Rex v Boeski (1970) 54 Cr App Rep 519. Thapelo Motoutou Mosiiwa v The State Criminal Appeal No. 24/05.** Therefore where the aggregate sentence is not out of proportion and justifies the circumstances of the offence, the court can depart from the general rule and order consecutive sentences.

[23] It follows from the above that a judge retains good and sufficient reasons to order consecutive sentences in appropriate cases.

[24] Let me now proceed to juxtapose the peculiar facts and circumstances of this case against the foregoing parameters to ascertain if they vindicate the Appellants vociferous contentions that the consecutive order of sentence totalling 27 years in Counts 3 and 4 is too harsh and severe for him to bear and induces a sense of shock.

[25] It is apposite for me at this juncture for a proper consideration of the issue at hand to regurgitate the evidence led a quo by **Busisiwe Masuku (PW2)**, the complainant in these two counts of offences, which was exhaustively canvassed and analysed by **Hlophe J** in paragraphs 20, 21, 23 and 25 of the judgment he rendered on the 8th of December 2012. Those paragraphs are as follows:-

"[20] ----On this aspect of the matter the evidence of **Busisiwe Masuku PW 7** as regards the fire arm becomes pertinent. She informed the court that on the night of the 28 February 2008 she was forced at gun point to go with the accused who took her to Mlondozi river where they spent the rest of that night and the following day. This she says

was against her will and was done by the accused after he had forced his way into their house through a broken window.

[21] Whilst at the river concerned she was raped twice by the accused who did so on the night of the 28th February 2008 as well as during the day on the 29th February 2008. She was being forced into the sexual intercourse through the use of the pistol in question------. The accused told her to kill him and herself afterwards, an instruction which she defied resulting in the accused ordering her to say her last prayers on a rock as be meant to kill her there and then. He however changed his word after which they both proceeded to Anthony's house in the evening of the 29th February where they were meant to spend the night---

[23] Further to the evidence of PW7, **Busisiwe Masuku**, mentioned above which relates to count four the other aspect of her evidence related to count three and was to the effect that on or about the 16th February 2008, and whilst in the company of her friends who included **Lwazi, Mxolisi and Vuka** and with whom she was walking towards Ngwenya Border gate from Mgwemabala Bar, they were followed by the accused and one friend of his called *"Mtsenyane"* Khumalo who eventually caught up with them. She said the accused pulled her from her friends and assaulted her such that she fell down. **Vuka Hlongwane** tried to come to her rescue but was himself assaulted by the accused who thereafter dragged her into the nearby forest. Notwithstanding being warned against his conduct by among others his own friend Mtsenyane he carried on dragging the complainant into the bush where he allegedly ordered her to undress and from there he went on to have sexual intercourse

with her which she described as his inserting his manhood into her private part whilst she had initially refused to comply with his order he had allegedly stabled her on her thigh with a screw driver. Thereafter he ordered her to go with him to Anthony's place where he slept on the bed. It was after he had passed out that she managed to escape and went to report her ordeal to her mother who was selling wares at Ngwenya Border Gate. The matter was eventually reported to the police from where she was eventually taken to the Mbabane Government Hospital where at she was attended to by **Doctor K.A. Bedgo.**

[25] As regards the incidents of rape which allegedly occurred on the night of the 28th February 2008 and during the day on the 29th February 2008 which are set out in paragraph 21 above, the evidence reveals that the complainant in this court was taken to the police station at the time of the accused's arrest where she was interviewed by among others Sergeant Nomsa Zondo who happened to have interviewed her in relation to the ordeal of the 16th February 2008. She was eventually taken to Mbabane Government Hospital on the 1st March 2008 at or around 0130 hours that morning"

[26] What immediately comes to my mind in the face of the foregoing exposition is that the said offences of rape do not form an integral part of the same transaction.

[27] I say this because even though the two counts relate to the same complainant, they do not however form a part of the same res gestae. They are not so closely inter-related in terms of time, place and surrounding circumstances as to form an integral part of a single transaction. Rather they relate to separate incidents and transactions.

[28] The evidence as detailed in paragraph [25] above reveals that the offence in count 3 occurred in the following sequence:-

- on the 16th of February 2008
- Whilst complainant was in the company of her friends walking towards Ngwenya Boarder gate from Ngwemabala Bar.
- The Appellant who was in the company of his friend called *'Mtsenyane'* confronted complainant and assaulted her.
- The Appellant dragged her into the nearby forest, where notwithstanding warnings from others, about his conduct, he proceeded to rape her.
- Thereafter the Appellant ordered her to go with him to Anthony's place where they slept on the bed.
- It was after the Appellant passed out that she escaped.

- She went to her mother who was selling wares at Ngwenya Boarder Gate to report the matter.

- The matter was eventually reported to the police.

- The complaint was taken to the Mbabane Government Hospital where she was examined by **Doctor K. A Bedgo**.

[29] On the other hand the rape in count 4 on the evidence occurred

- On the 28th February 2008

- The Appellant broke into the house in which complainant was sleeping with her friends at night.

- The Appellant forcefully took her to Mlondozi river at gun point.

- The Appellant repeatedly raped her at the Mlondozi river between the 28th and 29th of February 2008.

- The Appellant also threatened to kill her there and then with his pistol.

- On the evening of the 29th February they both proceeded to Anthony's house where they meant to spend the night.

- During the sleep the Appellant hid the firearm under the bed where it was retrieved during the arrest.

- The Complainant was taken to the police station at the time of the Appellants arrest and interviewed there.

- She was taken to the Mbabane Government Hospital on 1st March 2008 where she was examined by **Doctor Mhlanga**

[30] It is an obvious fact therefore that the two offences although of the same nature, however, concern transations which are completely unrelated in terms of time, place and circumstances and therefore do not form an integral part of the same transaction.

[31] In order to drive this issue home, I deem a consideration of the facts in the case of **Samkeliso Mdati Tsela v Rex (supra),** germane.

[32] In that case the Appellant was convicted for the Murder of the deceased and the attempted murder of his wife. In arriving at the conclusion that concurrent sentences were more appropriate for the offences committed, this court chronicled the relevant facts of the two transactions in paragraphs 19 and 20 of that decision as follows:-

"(i) Deceased (murdered) and wife Margaret (assaulted) were together at the cleasing ceremony.

(ii) They entered the house and drank traditional brew together.

(iii) Hostilities commenced at 10.00am

(iv) Appellant struck deceased on the temple. The blow caused his death at 6.1.2008 – one week later

(v) Appellant struck deceased with a "*baton*" using both hands to hoist the heavy beam above his head before lowering it onto the skull of the deceased.

(vi) Wife checked on husband after he had fallen upon being clobbered by Appellant.

(vii) Appellant assaulted wife of deceased with a knobkerrie after she had asked him why he would kill the father of her children.

(viii) Wife went to the hospital with husband.

(ix) Wife followed husband to Tsela homestead.

(x) PW5 the father of the appellant dispossessed appellant of knobkerrie.

(xi) PW 5 took knobkerrie to his homestead.

(xii) Deceased apparently conscious – sitting before he was taken to hospital

(xiii) There were many people both inside and outside the house who held the appellant as his father took the knobkerrie.

(xiv) In answer to the court the appellant admitted that after the shock of hitting the deceased so that he fell, he struck the wife of the deceased at the back of the head with the knobkerrie. His contention is that he did so while trying to wrestle it from her after she had allegedly struck him over the head with it.

(20) The sworn testimony of the appellant is the clearest evidence of the continuity of the transaction or train of events linking the acts of the appellant which caused the death of the deceased and grounded his conviction for an aggravated assault. He swore that he moved away from the deceased as he fell and stood about 10 meters from the spot. He said that as he was moving away from the deceased, the wife of the deceased **Margaret Maseko** then approached him carrying a knobkerrie which belonged to him and asking what he was doing to her husband. His version is that after the wife of the deceased had so addressed him, she then hit him with the knobkerrie. It was then, said he, that she was also hit''.

[33] This court concluded as follows in paragraph 32

"(32) --- As the analysis of the course of this transaction illustrates these happenings flowed along a continuous and unbroken sequence of events beginning with the attack upon the

husband in Count I, and ending with assault upon the wife in Count 2. The continuum of events in this case is reminiscent of that in **Dlamini v Rex at paragraph (25)** where I expressed the judgment of the court in these words:

> " The sentences were ordered to run concurrently'' as in this case, "the evidence showed that the two offences were inextricably linked in terms of the locality, time, protagnists and importantly that they were committed with one common intent. See for example **S v Brophy and Another 2007 (2) SACR 56 paragraph 14.** In the case before us, the possession by the appellant of the two firearms and ammunition, were inseparable in anyway from the commission of the crime of attempted murder''.

[34] This is however not such a case. As I have already noted in this judgment, the court a quo still had the residual discretion to order concurrent sentences even though the offences do not form an integral part of the same transaction, that is if the circumstances demanded same.

[35] Even though Hlophe J did not specifically weigh the aggregate term of 27 years imprisonment for the rape offences *vis a vis* the

circumstances of this case, he however detailed the gravity of the offences committed in his sentencing process.

[36] This notwithstanding, it appears to me that the cumulative sentence of 32 years imposed a quo is indeed startlingly inappropriate. In coming to this conclusion I have had to do a comparative study of this case and other cases both in the Kingdom and in contemporary jurisdictions.

[37] My first port of call was the Botswana Court of Appeal case of **Thapelo Motoutou Mosiiwa v The State (supra)**. In that case the Appellant had been tried *a quo* for offences ranging from house breaking and stealing to murder. After his conviction, the court a quo took into consideration 10 previous convictions for burglary, house breaking and theft, bar breaking and theft, unlawful possession of Dagga, escaping from lawful custody and robbery as well as the gravity of the offence for which the Appellant was convicted. The court *a quo* thereafter sentenced the Appellant to consecutive sentences which cumulatively amounted to 20 years imprisonment. In setting aside the consecutive order and substituting it with a

concurrent order that came to an aggregate sentence of 15 years, **Moore JA** made the following trenchant remarks in paragraph [23] of that decision:

> "23 It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentencer's message should be crystal clear so that the full effect of deterrent sentences may be realized, and that the public may be satisfied that the court has taken adequate measures within the law to protect them of serious offenders. By the same token, a sentence should not be of such severity as to be out of all proportion to the offence, or to be manifestly excessive, or to break the offender, or to produce in the minds of the public a feeling that he has been unfairly treated''.

[38] Similarly, in the case of **Thebe Dinsti v The state CLH LB-00034-07,** the Appellant was sentenced *a quo* to a term of 2 years imprisonment for the offence of escaping from lawful custody. The trial court ordered the 2 year sentence to run consecutively with other sentences which the Appellant was already serving for offences which included office breaking, burglary, stealing from a dwelling house, theft as well as a previous offence of escaping from lawful custody. This brought the sentences to an effective term of 27 ½ years

imprisonment imposed on the Appellant by various courts. The appellate court set aside the consecutive order of sentence in some of the offences, thus reducing the Appellants cumulative sentence from 27 ½ years to 24 ½ years. This, the court stated in paragraph (6) of that decision was to "*alleviate the aggregate term of 27 ½ years*".

[39] Then bringing this matter squarely to our door step is the recent decision of this court per **Ramodibedi CJ** with **Ebrahim JA** and **Moore JA** concurring, in the case of **Vusumuzi Lucky Sigudla v Rex Criminal Appeal No.01/2011.** In that case the Appellant was indicted in the High Court on two counts of the rape of two young girls aged 6 years and 4 year respectively. He was convicted and sentenced to a cumulative sentence of 26 years. He appealed against both his sentence and conviction. This court confirmed both conviction and sentence, dismissed the appeal but ordered part of the sentence to run concurrently in order to ameliorate the harshness of the cumulative sentence of 26 years imprisonment imposed by the High Court. Consequently, the trial court's order that the sentences in both counts should run consecutively was set aside and replaced with a sentence which reads as follows:-

" Six (6) years of the thirteen (13) years imprisonment on the appellant in respect of his convition on Count 2 are ordered to run concurrently with the sentence of thirteen (13) years imprisonment on Count I''.

[41] The cumulative sentence was thus reduced from 26 years to 19 years.

[42] It is worthy of not that in **Vusumuzi Lucky Sigudla (supra) Ramodibedi CJ,** reiterated the age long campaign on uniformity in sentencing which transcends across jurisdictions when he stated as follows:

"[22] As long ago as 11 October 2002 and faced with a similar problem of disparate sentences, I had occasion to state the following in the Court of Appeal of Lesotho in **Rex v Lebina And Another 2000-2004 LAC 464 CA at paragraph [62]**

" Although no two cases can ever be exactly the same, it is salutary for courts to strive for a measure of uniformity in sentencing (wherever) this can reasonably and justly be done. Otherwise the kind of disparity in sentencing as demonstrated by the *court a quo* in this case will no doubt bring the whole justice system into disrepute''.

[23] Similarly, in the Court of Appeal of Botswana in **Sekoto v The State 2007 (1) BLR 392 (CA) at 395-396**, I had occasion to stress the principle of uniformity of sentences (**Grosskopt and Lord Coulsfied JJA Concurring) in these terms:-**

> " It is a matter of regret that we have to comment on the apparent lack of uniformity of sentences in this jurisdiction. The practice of imposing disparate sentences for substantially and similarly circumstanced accused persons is cause for concern. If allowed to continue, it could soon bring the whole criminal justice system in this country into disrepute. --- It is as well to remember that in Philaye v The State (supra) this court highlighted the principle of uniformity of sentences. Indeed this is a salutary principle which is followed in many jurisdictions I should not, however, be understood to convey that it is permissible to ignore peculiar circumstances of each individual case. It will indeed readily be recognized after all that no two cases can ever be exactly the same. Substantial similarity is all that one can hope to look for''.

[43] After the foregoing remarks, **Ramodibedi CJ** in paragraph (25) of the decision ante, acknowledged the potency of the decision of this court in the case of **Mgubane Magagula v The King Appeal No. 32/2010**, *vis a vis* the above proposition in the following language:

"(25) In a scholarly judgment written by Moore JA and concurred in by **Foxcroft and Farlam JJA** in **Mgubane Magagula v The King** this court produced an astonishing list of disparate sentences in rape cases in this jurisdiction. In that case the court confirmed a sentence of 18 years imprisonment for rape committed against a girl of 10 years of age. At that stage as the court noted, the highest sentence for rape confirmed by this court was 22 years imprisonment recorded in **Jonas Mkhatshwa v The King Criminial Appeal No. 19/07.** The lowest sentence in turn was 7 years imprisonment recorded in **Sabelo Nathi Malazi v Rex Criminal Appeal No. 7/2009''.**

[44] The decision in **Mgubane Magagula v The King (supra)** was a laudable effort by this court to strike a balance at some uniformity in aggravated rape cases and thus eradicate the hitherto irrationally disparate sentences that were the order of the day. The court evolved an appropriate range of sentencing of 11 to 18 years which serves as a bench mark and has been persistently followed by the different hierarchy of courts in the Kingdom. The cases are legion. One such case is the case of **Mandlenkosi Daniel Ndwandwe v The King (supra).** In that case the Appellant was convicted for the offence of

aggravated rape of a 9 year old girl. The Appellant was on ARV treatment at the material time of the offence. Medical evidence proved that both the Appellant and the Complainant tested HIV positive. The court a quo imposed a sentence of 18 years which was confirmed on appeal.

[45] It is worthy of note that in paragraph (15) of the foregoing decision **MCB Maphalala JA** *with* ***Ebrahim and Farlam JJA*** *concurring*, made the following observation which I respectfully align with .

> "(15) --- Having said this, I am convinced that the prevalence of aggravated rape on both women and children calls for deterrent sentences beyond the range currently imposed by this court. This is particularly necessary in an era where society is faced with incurable sexually transmitted diseases including HIV/AIDS, however, this is by no means down-playing the effects of the trauma, shock, loss of dignity, torture, inhuman and degrading treatment to which the victims of rape are subjected''.

Conclusion

[46] In the final analysis, there is no doubt that the gravity of the offences committed weighed heavily in the mind of the court in meting out sentences a quo. That is why I cannot subscribe to the Appellant's proposition that the sentences imposed for the rape offences be directed to run concurrently.

[47] It appears to me however, that even though the Appellant is a hardened criminal who persisted in committing offences with impunity and opprobrium for the law, the court a quo in considering whether or not to direct that the sentences run concurrently or consecutively ought to have had regard to the total cumulative sentences. The individual sentences as I have already determined were correct and appropriate. There is however a necessity to ameliorate the situation in which the cumulative sentence of 32 years places the Appellant.

[48] In the result, in order to ameliorate the harshness of the cumulative sentence of 32 years imposed, I make the following orders:-

1. The order of the court a quo in paragraph 12.3 (page 90) that the sentences imposed in **Counts (I) one, 5 (five) and (6) six are to run concurrently** is upheld.

2. The order of the court a quo in paragraph 12.3 (page 90) that the sentences in **"Counts 3 and 4 are to run consecutively between the two of them and with those mentioned in 12.2 above'',** is hereby set aside. In its place I substitute the following order.

“12.3 The 12 (twelve) year sentence imposed in count 3 and half of the 15 (fifteen) year sentence imposed in count 4, are to run concurrently between themselves and consecutively with those mentioned in 12.2 above’’.

Summary

[49] The Appellant is therefore to serve an aggregate of 24 ½ years imprisonment.

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E. A. OTA
JUSTICE OF APPEAL

_____

I agree

S. A. MOORE
JUSTICE OF APPEAL

_____

I agree

DR S. TWUM
JUSTICE OF APPEAL

For the Respondents : L. Hlophe
(Crown Counsel)

Appellant in Person