



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal No. 33/12

In the matter between

MSOMBULUKO MPHILA

Appellant

and

REX

Respondent

Neutral citation: Msombuluko Mphila v Rex (33/2012) [2012] SZSC 40
(30 November 2012)

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

Heard: 8 NOVEMBER 2012

Delivered: 30 NOVEMBER 2012

Summary:

Criminal law – Appellant convicted of the rape of his own daughter aged only 6 years old – Appeal against sentence of 20 years imprisonment – Appeal dismissed – Both conviction and sentence confirmed.

RAMODIBEDI CJ

- [1] The story which is about to unfold in this appeal is both abhorrent and disgusting to the core, to put it mildly. It is indeed hard to imagine a worse case which demonstrates dastardly child abuse by the biological father perpetrated against his own child than the present case does.
- [2] The appellant was convicted by the High Court (Maphalala PJ) of rape committed against his own innocent daughter aged only six (6) years old. He was sentenced to 20 years imprisonment. He has appealed to this Court against sentence only.
- [3] The facts show that on 26 November 2008, the appellant called the complainant to his house. She was in the company of her younger sister, Nduduzo. As soon as the complainant entered the house, the appellant closed the door, leaving the younger sister outside. He proceeded to rape the complainant. In her evidence, she gave graphic details of the ordeal and the pain she went through. When he was done with his sordid work, the appellant had the temerity to instruct the complainant not to tell anyone

about the incident. On the contrary, he callously instructed her to falsely implicate one Sgubhu Khumalo as the actual perpetrator. It emerged during his cross-examination of the complainant that he had also instructed her to say that she had been injured by a bucket. But as fate would have it, one Lindiwe Mpila (PW3) observed that the complainant was walking in an abnormal manner. This aroused her suspicion. She inspected the complainant's private parts. Thereafter, she immediately called the complainant's grandmother, Manyata Khumalo (PW2) who also observed blood on the complainant's private parts. The complainant ultimately reported to her elders that the appellant had raped her.

[4] Finally, the complainant was taken to Pigg's Peak Government Hospital for examination. Thereafter, the incident was reported to the police.

[5] Dr Elias Phiri (PW7) who examined the complainant testified that she had bruises on the labia majora and labia minora. Her hymen was damaged. There was also haemorrhage. The Doctor's opinion was that vaginal penetration had occurred. He also testified that it was unlikely that the injuries in question could have been caused by a bucket.

[6] The appellant gave evidence in his own defence. He denied that he raped the complainant. However, the trial court correctly, in my view, found him

guilty as charged. As indicated above, he now accepts the correctness of the conviction.

[7] This Court has stressed often enough that the question of sentence is a matter which lies pre-eminently within the discretion of the trial court. An appellate court is generally loath to interfere with such discretion in the absence of a material misdirection resulting in a miscarriage of justice. Authorities in this regard are now legion in this jurisdiction. It will be sufficient to cite the case of **R v Mazibuko, Criminal Appeal No. 46/2011**; (also reported on line under SAFLII case No. **[2012] SZSC 15** where some of the most recent authorities were collated.

[8] In sentencing the appellant to 20 years imprisonment the learned Judge *a quo* handed down a very balanced judgment. He duly considered the triad consisting of the offence, the offender and the interests of society. What weighed heavily with the learned Judge was the fact that the appellant had sexually attacked his own vulnerable daughter aged only 6 years old. He correctly considered that in so doing the appellant had violated the sacred nature of a father and daughter relationship in society. Finally, he endorsed the following apposite remarks of Ota J, as she then was, in **Rex v Bennet Tembe, Criminal Case No. 22/2011**:

*“My experience in life has shown me that fathers would employ desperate means to guard their daughters’ innocence. In my experience, I have seen fathers build high walls with formidable gates, I have seen fathers acquire vicious and mean looking dogs, and I have seen fathers procure shot guns, all in the bid to deter predators from preying on their girl child. But in your case **Bennet Tembe**, you became the villainous predator in your own home. A ravenous and dangerous wolf. You turned your little girl into an unwilling prey. You plundered her womanhood with reckless abandon, robbing her of her most prized treasure, her innocence, upon a whim and a caprice. You debased her self worth by your rude invasion of her privacy, personality and bodily integrity.*

*By your vile activity, you destroyed the trust and confidence the complainant had in you as her biological father. By reason of your privileged position as her biological father, yours was to shield, protect, love and cherish her, and not to subject her to this disgusting, incestuous act of dehumanization. I shudder to imagine the physical, emotional and psychological trauma, your reprehensible and despicable act of irresponsibility has cause[d] the complainant. **Bennet Tembe** you are a shame and a disgrace to fatherhood. You are an unfit parent. Do not ask me to release you*

to go back to the complainant, she is clearly better off without a reprobate like you.”

[9] It is further important to recall that in **Jonas Mkhathswa v Rex, Appeal Case No. 19/2007** this Court confirmed a sentence of 22 years imposed on the appellant for the rape of his 12 years old daughter.

[10] In light of these factors I am unable to find fault with the court *a quo*'s approach to sentence in the matter. The sentence of 20 years imprisonment was fully justified in the circumstances of the case. There is no misdirection shown to exist in the matter. It remains for this Court to express its profound horror at the alarming rate of crimes of rape committed against very young girls, particularly by close relatives. Appropriately stiff sentences must henceforth be the order of the day until this scourge is eradicated. Rapists have sufficiently been warned.

[11] In the result, the appeal is dismissed. Both conviction and sentence recorded by the court *a quo* are confirmed.

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**