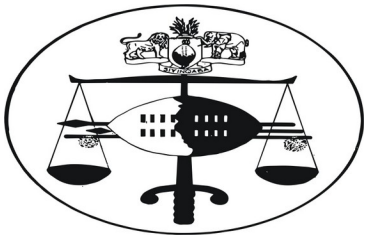

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 31/12

In the matter between

MANDLA MAXWELL GADLELA **Appellant**

and

REX **Respondent**

Neutral citation: *Mandla Maxwell Gadlela v Rex* (31/12) [2012] SZSC 42 (30 November 2012)

Coram: EBRAHIM JA, DR TWUM JA and LEVINSOHN JA.

Heard: **7 November 2012**

Delivered: **30 November 2012**

Summary: Criminal Law and Procedure, rape of 11 year old minor; appellant pleads guilty; conviction on own plea and sentenced to 18 years imprisonment; appeal to this court for reduction in sentence; practice direction.

DR S. TWUM

[1] This is an appeal from the judgment of Ota J. sitting at the High Court, Mbabane whereby she convicted the appellant on his own plea of guilty to a charge of rape of a minor of 11 years old. She sentenced him to 18 years imprisonment. The sentence was back-dated to 12th April 2011, the date of the appellant's lawful pre-trial incarceration.

[2] The facts of this sordid saga are that the appellant waylaid the complainant on her way to collect grasshoppers, grabbed her, took her to his room and forcibly had sexual intercourse with her under threat of death. The matter was subsequently reported to the police and the complainant was taken to be examined by a medical officer, who confirmed that she had been ravished.

[3] The appellant was put before court and charged with the offence of rape. In an Agreed Statement of Facts, the appellant admitted among others the following:-

(i) The complainant was a minor, aged 11 years, when he raped her.

(ii) The appellant did not use a condom when he had sexual intercourse with complainant.

He pleaded guilty to the charge and was convicted on his own plea.

[4] The appellant put in a plea in mitigation of sentence which was considered by the learned trial judge. She did not mince her words in condemning the insatiable lust of men in this Kingdom to rape both grown-up women and even, minors. She said rape debased the dignity of the women raped and left them with physical and mental scars and trauma. She said generally, rapist are so callous that when they are ravishing women they do not spare a thought for them that they could be infected with HIV/AIDS and other sexually transmitted diseases which could lead to their premature deaths when an inexpensive condom could obviate this scourge.

[5] In my view, these are proper matters that may be taken into consideration when a court is considering what would be an appropriate sentence in a charge of rape. I have carefully considered the concerns articulated by the learned trial judge before she passed sentence on the appellant. I only wish to add that an appellate court may properly ignore the litany of matters which are told a sentencing judge (or for that matter, the appellate court itself) either by counsel in court (from the bar) or by the appellant, in person, (from the dock,) for reduction in sentence unless there is legal proof of any of them. Speaking for myself, I must say, I am only nominally persuaded by so-called “Heads of Argument” written from prisons or even by lawyers on behalf of appellants, which commence with alleged “feeling of remorse”, followed immediately by lamentations that the terms of

imprisonment are too harsh and severe for them to bear. Then follows a plea for leniency. Let the message go out loud and clear to such appellants and perhaps, their "prison lawyers". There is no rule of law that a sentence for rape should not exceed 10 years. Where the rape is accompanied by aggravating circumstances, the minimum term is 9 years. This court will not be over-reached by those crocodile tears.

[6] A sentencing judge exercises a judicial discretion when he/she is passing sentence. A judicial discretion is not exercised capriciously. Rather, its exercise must be based on principles evolved and settled by the final courts of the land. One such principle is that sentencing is predominantly within the domain of the trial court who saw and heard the witnesses who testified before it. It is that court which had the opportunity to observe their demeanor, ie how they answered questions, particularly, under cross-examination. It is therefore for that court to decide on the evidence and the personal performance of the witnesses which of them to believe as witnesses of truth. Therefore, unless there is evidence that the trial judge was biased or otherwise acted unlawfully or illegally or that the trial itself was characterized by procedural irregularities, or that the trial court exceeded its jurisdiction or that the sentence was startlingly or disproportionately inappropriate, an appellate court would not set aside a sentence passed by the trial court even if the appellate court would probably

have given a lesser sentence than that passed by the trial court. Perhaps I should add that where a sentence is overly too low, the appellate court has power under section 5 (3) of the Court of Appeal Act, to set it aside and impose an appropriate sentence.

[7] In law, the choices are always clearly espoused. If a person chooses to throw all caution to the wind in order that he may gratify his animal instincts for a transient moment in exchange for a long prison sentence, it is his choice and he must then take his earned deserts with stoic equanimity. On the evidence the trial court was entitled to pass the sentence it passed on the appellant. I will dismiss the appeal as unmeritorous. It is accordingly dismissed.

The sentence of Ota J is hereby affirmed

DR. SETH TWUM
JUSTICE OF APPEAL

I agree.

A.M. EBRAHIM
JUSTICE OF APPEAL

I also agree.

P. LEVINSOHN
JUSTICE OF APPEAL

COUNSEL:

For Appellant:	**In Person**
For Crown:	**Ms. L. Hlophe**