IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 20/2012

In the matter between:

NKOSANA PETROS DLAMINI **APPELLANT**

v

REX **RESPONDENT**

Neutral citation: Nkosana Petros Dlamini v Rex (20/12) [2012] SZSC45 (30 November 2012)

Coram: EBRAHIM J.A., MOORE J.A., and OTA J.A.

Heard: **6TH NOVEMBER 2012**

Delivered: **30TH NOVEMBER 2012**

Summary: **Rape of 2 year old girl with Aggravating Circumstances – Meaning of Aggravating Circumstances – Appeal against conviction and sentence dismissed – Conviction and lenient sentence of 14 years imprisonment affirmed.**

MOORE J.A.

INTRODUCTION

[1] The appellant was convicted by Annandale J of the offence of RAPE in that, upon or about the 24th February, 2010 and at or near Mahwalala he did intentionally have unlawful sexual intercourse with a female minor who at the time was 2 years old and in law incapable of consenting to sexual intercourse and did thereby commit the crime of RAPE. That rape was allegedly accompanied by aggravating circumstances as envisaged by section 185*bis* of the Criminal Procedure and Evidence Act 67/1938 as amended in that:

(a) The complainant was a minor of a tender age.
(b) The complainant was traumatized by this experience.
(c) The appellant exposed the complainant to sexually transmitted diseases and HIV/AIDS as he did not use a condom.

AGGRAVATING CIRCUMSTANCES

[2] Section 185*bis* (1) The Criminal Procedure and Evidence Act No. 67/1938 reads as follows under the rubric: "Sentence for rape etc."

"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 be suspended". (Emphasis added)

[3] There appears to be some uncertainty concerning the proper meaning of the expression *aggravating circumstances* as elements to be taken into account in fashioning an appropriate sentence fallowing a conviction. The sub-section does not define or specify what factors would elevate the offence from one of rape simpliciter to one of rape with aggravating circumstances. This means that the court must determine what factors would amount to aggravating circumstances within the meaning of the sub-section.

[4] The Concise Oxford Dictionary defines the word aggravate in this context as to "make worse". Black's Law Dictionary Eighth Edition defines aggravated in relation to a crime as "to make worse or more serious by circumstances such as violence, the presence of a deadly weapon, or intent to commit another crime." In the South African Criminal Law and Procedure Second Edition by Milton Vol. 2 at page 451 the editors tell us that it has become the approach of South African Courts not to impose the death sentence for rape unless the rape was accompanied by aggravating circumstances. They then list some of the factors which have been held to be relevant to the assessment of punishment for rape. These are:

(i) previous convictions for rape;

(ii) the degree of violence used;

(iii) whether physical or psychological injuries were inflicted and, if so, their severity;

(iv) the age and state of health of the complainant;

(v) her character;

(vi) premeditation.

[5] In cases reaching this Court the following seemingly neutral factors have been advanced as amounting to aggravating circumstances:

(i) The complainant is traumatized by this experience.

(ii) Accused persons exchange complainants during the commission of these offences

(iii) The accused was well known to the victim

(iv) The accused was a neighbor to the complainant

(v) The rape took place in a potato field.

(vi) The rape took place when the victim had gone to collect firewood from the forest.

(vii) 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.

(viii) He would further caution the complainant not to report the incident to anyone.

(ix) The complainant eventually reported the matter to her mother when she realized that the appellant was persistent with the sexual abuse.

(x) The medical report disclosed that the hymen of the complainant was intact but that there was marked hyperemia.

[6] The offence of rape is a member of the inglorious family of offences against the person. These range in order of seriousness from common assault or assault simpliciter to murder. There is a long list of crimes which are rendered more serious and, for that reason, attract more severe penalties if they are accompanied by aggravating circumstances. Examples are:

i. Aggravated assaults.

ii. Aggravated robberies.

iii. Sexual offences with accompanying aggravating circumstances.

[7] Black's Law Dictionary affords a rich source of the meaning of aggravating circumstances and related definitions:

i. Aggravated in relation to a crime – “made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime”.

ii. Aggravated assault – “criminal assault accompanied by circumstances that make it more severe such as the intent to cause serious bodily injury especially by using a deadly weapon”.

iii. Aggravate battery – “battery accompanied by circumstances that make it more severe, such as the use of a deadly weapon or the fact that the battery resulted in serious bodily harm.”

iv. Aggravated kidnapping – “kidnapping accompanied by some aggravating factor such as a demand for ransom or injury to the victim.”

v. Aggravated robbery – “robbery committed by a person who either carries a dangerous weapon or inflicts bodily harm on someone during the robbery.”

vi. Aggravated sodomy – “criminal sodomy that involves force or results in serious bodily injury to the victim in addition to mental injury and emotional distress.”

[8] Black’s Dictionary does not define aggravated rape but the definition of aggravated sodomy as defined in vi above can be applied by analogy to the offence of rape with aggravating circumstances because of the sexual nature

of both offences. Indeed, in many common law jurisdictions nowadays, the traditional offences of rape, sodomy, and buggery are now prosecuted by statute under the umbrella offence of rape.

[9] The English Theft Act 1968 provides a useful example where the offence creating statute itself provides examples of the aggravating circumstances proscribed in the Act which creates the offence of Aggravated Burglary. Section 10 reads:

> "A person is guilty of aggravated burglary if he commits any burglary and at the time has with him any firearm or imitation firearm, any weapon of offence, or any explosive; and for the purpose –
>
> (a) 'firearm' includes an air gun or air pistol, and 'imitation firearm' means anything which has the appearance of being a firearm, whether capable of being discharged or not; and
>
> (b) 'weapon of offence' means any article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use; and
>
> (c) 'explosive' means any article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him for that purpose.

A person guilty of aggravated burglary shall on conviction on indictment be liable to imprisonment for life"

[10] It is evident from the above excerpt from The English Theft Act that the particulars of aggravation are clearly spelt out in section 10 so that a person charged knows exactly what the allegations against him are. These may be listed as:

i. Possession of a firearm or imitation firearm, or
ii. Any weapon of offence, or
iii. Any explosive

[11] What is more, the meanings of the terms amounting to aggravation are clearly spelt out by the statutory definitions of the expressions used in the section.

[12] The statutory definitions contained in the English Theft Act afford an example of the kind of particulars which ought to be provided to a person charged with rape with aggravating circumstances. In addition, the definitions cited from the Oxford Dictionary and Black's Law Dictionary strongly suggest that aggravating circumstances in relation to the offence of

rape include circumstances which make the offence more severe in its commission and consequences, and would exclude circumstances which do not make the offence itself worse, but are merely incidental to the commission of the offence or to the setting where it takes place.

[13] Viewed in this way, aggravating circumstances would evidently include:

i. The use of a weapon, or other instrument to threaten or injure the victim.
ii. The application of physical force to the victim over and above the degree of physical contact involved in the act of unlawful intercourse, such as beating, strangling, or causing injuries to the victim by means other than the use of a weapon.
iii. The rape of a young person. The younger the victim, the greater the degree of aggravation.
iv. Rape by more than one offender – the so-called gang rape.
v. Rape without a condom exposing the victim to HIV infection or other sexually transmitted diseases.
vi. Multiple rapes such as where the victim is raped repeatedly in one episode for example by being kidnapped and raped repeatedly during the night.
vii. Where the victim is manifestly pregnant.
viii. Where the rape is accompanied by robbery.

ix. Where the victim is an elderly or disabled person or mentally incompetent.

x. Where the rape involves the abuse of authority such as rape by a parent or guardian, school teacher or similar authority figure.

xi. Where there is admissible expert evidence that the victim has suffered severe emotional or psychological trauma.

The above list is not exhaustive.

[14] The appellant was dissatisfied with both his conviction and with his sentence of fourteen years imprisonment. He accordingly appealed upon the following grounds:

i. The prosecution witnesses were untruthful.

ii. The court admitted and acted upon hearsay evidence.

iii. PW1 was also accused of committing the offence. His guilt or innocence should have been determined by a court of law rather than by his being beaten for that purpose.

iv. The trial judge failed to exercise caution before accepting the evidence of PW1 and PW2 who were both young children. That exercise was particularly necessary in the case of PW1who should have been treated as a co-accused or at the very least as a suspect concocting a false story implicating the appellant, and for the purpose of diverting blame away from himself.

v. The medical report should not have been admitted into evidence. It was a forgery.

vi. The sentence of 14 years imprisonment is excessive.

BACKGROUND

[15] PW1 aged eleven and PW2 aged nine years of age respectively were playing upon a swing in the yard where they lived with their guardians. Suddenly, they heard the sound of a child's voice coming from a house in the same yard, which was being used as a storeroom at the time. As PW1 describes it, that child was crying. That child's name appears in the record, but I will not repeat it here since I think that her identity should be protected in the light of the sordid experiences she suffered on the day in question. I will therefore refer to her only as the child from this point on. PW2 testified that he heard the child screaming "you are hurting me Nkosana."

[16] These two young boys were at once struck with the curiosity which is an integral part of the personality of all children, as well as by a desire to render some assistance to the child who was screaming in the storeroom house. PW1 described what happened next in this way:

"We went to check in the house and we found Nkosana lifting up his trouser, we saw the child's trouser below her knees and she was seated on the sofa. When we entered the house we lifted up the child's trouser. Then Nkosana went to report to my grandmother saying I was the one raping the child".

[17] The version of PW2 reads:

"We were playing swing then I heard the child screaming, you are hurting me. Then I said to Siboniso did you hear that, and he responded that he heard it. I suggested that we go and peep through and we found Nkosana dressing up and the child's trouser was above her knees.

CC : When you say you then told Siboniso that you must peep, where did you peep?

PW2 : In one of the store rooms. I then went to the child and dressed her up the trouser.

CC : Where were you when you dressed up the child?

PW2 : I was inside the house".

ACSD: I am here before the court just because I was lifting up my trousers.

PW2 : She said you were hurting her. We heard the child crying saying you are hurting me Nkosana."

[18] A close reading of these two accounts reveals that, essentially, both witnesses were saying virtually the same thing even though there were minor differences in points of detail. Experience has shown that such differences are to be expected in the accounts of truthful and credible witnesses recollecting an event seen and heard by them. Indeed, the greater the similarity in the stories told by several witnesses both in detail as well as in the words of their respective narratives, the greater the likelihood of those stories being concoctions.

[19] Annandale J examined the testimony of these child witnesses with the greatest care and caution. He tested the inherent plausibility and probability of their evidence and, weighing them against the background of the appellant's charge of its falsehood, and warning himself of the dangers of an uncritical acceptance of the evidence of young children, came to the sound conclusion that their testimony was not only credible, but was capable of negating, and did in fact negate, the artful and cunning stratagem employed by the appellant of falsely alleging that PW1 had raped the child when he,

the appellant, had been literally caught with his pants down in the presence of the hapless child who was sitting on the sofa with her pants also down when the curious boys entered the storeroom and foiled the continuation of his abuse of the child.

THE MEDICAL EVIDENCE

[20] The child was examined by Dr. Mwala at 21:15 hours or 9:15 p.m. on the date of the rape at the Mbabane Government Hospital. A vaginal swab and urine were taken. Against the rubric "Remarks", in his medical report, Dr. Mwala noted: "Bruised Vulva and Whitish Discharge Consistent with Alleged Circumstances". Form B, "Report On Examination in A Case of Alleged Rape or Other Sexual Offences", was duly completed in relation to the child. The critical findings relevant to the charge of rape which compounded the Remarks referred to above were:

i. Hymen Absent
ii. Discharge Whitish
iii. Examination Painful

[21] Dr. Mwala's opinion was "Clinical Findings Consistent with Alleged Circumstances".

[22] Dr. Joshua Jarikai Bana was based at the Mbabane Government Hospital when he gave his evidence. He had been there for five years. He had obtained Bachelor of Medicine and Bachelor of Surgery degrees from the University of Zimbabwe. He described the regular procedures which were followed at the hospital in cases where rape had been alleged. Completed medical reports are handed to the Police. Dr. Bana testified that he had been shown a form, which had been provisionally admitted in evidence, which had been completed by Dr. Mwala a Zambian national who had left the Government Hospital and whose whereabouts were unknown. He had left this Kingdom some time previously. Dr. Bana did not know exactly when. He had worked closely with Dr. Mwala in the performance of their duties. He could therefore recognize a medical report prepared by Dr. Mwala. Exhibit B in this case was such a report.

[23] Having read into the record, so to speak, the findings of Dr. Mwala as recorded in Exhibit B, Dr. Bana then identified the findings of Dr. Mwala which in his, Dr. Bana's expert medical opinion, amounted to evidence of penetration, and satisfied that element of the offence of rape. These were:

i. Bruised vulva.

ii. Whitish vulval discharge consistent with the allegation of rape.

iii. The absence of the hymen.

iv. The painful examination of the child on a scale ranging (Easy – Painful).

[24] In Dr. Bana's opinion the absence of the hymen meant that there was penetration. For good measure, Dr. Bana swore that the birth of a female person without a hymen was unknown to medical science. At the prompting of Annandale J, who was clearly bent on ensuring that the appellant was afforded every possible opportunity to challenge the prosecution's case and to advance his own case, the appellant sought clarification from the doctor about the tearing or partial tearing of the hymen of a young child into whose vagina a penis had been inserted. Having given an elaborate explanation to the appellant concerning the admissibility of the medical report, and appropriate answers to his many questions, the dialogue below speaks for itself at page 120 of the record:

"JUDGE : You have no objection with the report to be received as evidence?

ACCUSED : I don't have a problem".

[25] The judge then admitted exhibit B, which had previously been provisionally admitted, under the provisions of section 221 of the Criminal Procedure and Evidence Act. In the light of the foregoing paragraphs under this heading, the ground of appeal that the report of the medical examination conducted by Dr. Mwala was inadmissible, is entirely devoid of merit and accordingly fails.

CONSENT

[26] The law is that a two year old child is incapable of giving consent to sexual intercourse. But the appellant's defence appears to have merged the question of consent into that of the credibility of the principal witnesses for the prosecution linking the appellant to the act of intercourse. That evidence, given by PW1 and PW2, has been recited in paragraphs [14] – [16] above. Upon its face, and reading it in cold print, it appears to be no more than the unvarnished recollection by these two young boys of what they had seen with their own eyes and heard with their own ears that day. As one reads it, the aura of truth rises from the pages leaving no doubt about its accuracy and truthfulness.

[27] The trial judge correctly rejected the appellant's version that PW1, being the real culprit, those two pre-adolescent boys spontaneously and falsely reported that they had caught the appellant and the child in the storeroom as they testified. He also give cogent reasons for rejecting as highly implausible and improbable and beyond reasonable doubt false, the cunning but highly incredible and baseless charge against the unfortunate PW1 who suffered a beating at the hands of his guardian as a means of establishing his innocence. That beating was totally unwarranted as both boys gave a highly cogent and credible account of what they had seen and heard.

[28] Before evaluating the evidence in his ex tempore judgment, the trial judge reminded himself that the appellant had not only pleaded not guilty, but had persisted in protesting his innocence to the very end. He bore in mind that the appellant was unrepresented by counsel and that a court should be "cautious of not erring in its judgment to possibly convict an innocent person". I pause here to observe that the assistance given by Annandale J to the unrepresented appellant – without descending into the arena – was so elaborate that it came perilously close to breaching the borders of fulsomeness.

[29] Nobody saw the appellant penetrating the child. However the boys' testimony which the trial judge rightly accepted, described a scenario, which, coupled with the medical evidence, placed the prosecution into a situation from which they could persuasively submit that penetration by the appellant had been proved beyond a reasonable doubt because of the unique combination of circumstances pointing inexorably towards the guilt of the appellant as the person who penetrated the child without her consent. These circumstances were:

i. PW1 heard the cry of the child coming from the storeroom.
ii. PW2 heard the child screaming, "you are hurting me Nkosana".
iii. PW1 and PW2 entered the house storeroom where they caught the appellant in a most compromising position.
iv. The appellant was caught lifting up his trousers.
v. The child's trousers were down to her knees and she was sitting upon a sofa.
vi. PW1 and PW2 assisted the child to lift up her trousers.
vii. The quick witted appellant immediately seized PW1 and alleged that it was PW1 who had raped the child.
viii. Both PW1 and PW2 strongly refuted the appellant's allegation that PW1 had raped the child.
ix. The unfortunate PW1 suffered beatings designed to reveal if he had indeed raped the child. But despite being beaten he maintained his innocence.

x. The court ***a quo*** accepted the credibility of PW1 and PW2. It rightly rejected the evidence of the appellant. However, it did not convict him on the weakness of his case. It based the conviction upon being satisfied that the prosecution had proved its case beyond a reasonable doubt.

xi. The child's mother testified that, following the incident the child experienced pain in urinating.

xii. The medical evidence established beyond reasonable doubt that the child had been penetrated.

xiii. The circumstantial evidence pointed unerringly to the appellant being the perpetrator of the outrage upon the innocent child.

xiv. The judge ***a quo*** was fully justified, upon the totality of the material before him, in holding that the rape of the child had been carried out by the appellant.

xv. The decision in xiv above is further reinforced by the judge's finding on the evidence that the accused before the court was the only person bearing the name Nkosana, and that there was no other person similarly named who was in anyway involved in the events associated with this case.

SENTENCE

[32] The appellant complained that his sentence of 14 years imprisonment was unduly severe and that it should be set aside. In mild and moderate language, the trial judge described:

i. The circumstances and nature of the case,
ii. Its impact upon the young complainant and her family,
iii. The depravity of mind that had instigated the commission of such a serious offence.
iv. His constraining himself against meeting out justice and punishment in a spirit of anger
v. That society could not condone the rape of a two year old child by a grown man.
vi. The prevalence of molestation of young children.
vii. The necessity for the courts to reflect in their sentences the revulsion of society at the commission of crimes such as the instant one.
viii. The balance which must be maintained between mercy and undue leniency.
ix. The necessity to impose a sentence which is seen to be just by right thinking members of society.
x. The personal circumstances of the appellant: his having a wife and children, his lack of literacy.
xi. The anxiety which he would suffer during the period of his incarceration when he would be unable to attend to his personal affairs.
xii. His previous good character.
xiii. His lack of remorse.
xiv. The need to protect society from the appellant and like-minded persons.
xv. The back dating of his sentence to the date of his arrest.

[33] Quaffing deeply from the goblet of mercy, and expanding the compassion welling up in his heart almost to the bursting point, Annandale J sentenced the appellant to a term of fourteen years imprisonment which, though being within the appropriate range of the judge's sentencing powers, allowed the appellant to escape a much more severe penalty which lay well within the judge's sentencing competence, for what can only be described as a shocking episode of child abuse by a man who showed no remorse before the court ***a quo***, and displayed to the very end before this court, a misplaced sense of grievance, while caring not one iota for the young child whose life he had probably scared for the rest of her existence.

[34] No misdirection by Annandale J having been established, and the sentence being lenient in the circumstances, this Court will not disturb an award which lay well within the ambit of the sentencing court's undoubted discretion. In the event the sentence of 14 years imprisonment is affirmed and the appeal against sentence is accordingly dismissed.

[35] It has been repeatedly stated that sentencing essentially lies within the discretion of the sentencing court properly exercised. However, the time

appears to have come for a ratcheting upwards of the sentences for rape – particularly the rape of young children – in the light of the disturbing numbers and frequency of such cases reaching this court.

CONCLUSION

[30] The incidents of rape reaching the courts of very young children have reached pandemic proportions. In an appeal heard at this session, three sixteen year olds thought that it was fine sport for them to waylay girl children on their way home from school and gang rape them in the presence of one another. What is particularly disturbing in that case is the fact that the very first attack upon these children was reported to their parents in the month of August 2002. Yet, the ravishing of these children continued unabated until November of that year and an indictment was preferred only on the 10th July 2003.

[31] It is not the function of this court to apportion blame for the delay in apprehending the miscreants in that case. But attention can properly be drawn to those disturbing events so that the community at large and the police can cooperate in their efforts to prevent a repetition of events such as have been just described.

ORDER

i. The conviction and sentence of the trial court are hereby affirmed.

ii. The appeals against conviction and sentence are hereby dismissed.

____

S.A. MOORE
JUSTICE OF APPEAL

I agree

____

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

____

E.A. OTA
JUSTICE OF APPEAL

For the Appellant : In Person

For the Crown : Miss Lomvula Hlophe