IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No. 44/2011

In the matter between

FRIDAY MAGAGULA **Appellant**

and

REX **Respondent**

Neutral citation:	Friday Magagula *v Rex (44*/2011) [2012] SZSC 9 (31 May 2012)
Coram:	RAMODIBEDI CJ, M.C.B. MAPHALALA JA, and AGIM JA
Heard:	**07 MAY 2012**
Delivered:	**31 MAY 2012**
Summary:	**Criminal law – Appellant convicted of the rape of his own young niece, a 6 year old child – The High Court sentencing him to 18 years imprisonment –**

Appeal against sentence – Principles thereof – Appeal dismissed.

RAMODIBEDI CJ

[1] The appellant has appealed to this Court against a sentence of 18 years imprisonment which was imposed upon him by the High Court for the rape of his own young niece, a 6 year old child called Avela Magagula, who was his brother's daughter. This followed his conviction by the Magistrate's Court which subsequently committed him to the High Court for sentence in terms of s 292 (1) of the Criminal Procedure and Evidence Act 67/1938. The Magistrate's court did so because it felt that it had not sufficient jurisdiction to impose the sentence that the gravity of the offence called for.

[2] Although the appellant pleaded not guilty to the charge, it soon became apparent in the course of the trial that he simply had no defence. The evidence of the complainant disclosed that she lived in the same homestead as the appellant. Sometime in 2009, he took her to the maize fields where he caused her to lie on branches which he had cut from a tree for that purpose. He then brazenly proceeded to have unlawful sexual intercourse with her, after which he promised to buy her chips. He instructed her not to tell anyone about her ordeal. But she did. She reported the rape to her

aunt, Sibongile, who took her to the hospital for examination. Ultimately, the appellant was arrested and duly prosecuted.

[3] The complainant's medical report confirmed that there was evidence of recent penetration. Her hymen was bruised and torn. The examination was recorded as *"painful."* Shockingly, there was also evidence of sexually transmitted infection.

[4] Now, the imposition of sentence, as this Court has repeatedly held, is a matter which lies within the discretion of the trial court. An appellate court will generally refrain from interfering in the absence of a misdirection resulting in a miscarriage or failure of justice. But, it is important to remember, too, that this Court has additional power in terms of s 5 (3) of the Court of Appeal Act 74/1954 to pass such appropriate sentence as it thinks is warranted in law, whether more or less severe in substitution for the sentence passed by the trial court. See, for example, Sam Dupont v Rex, Criminal Appeal No. 4/08; Jonah Tembe v Rex, Criminal Appeal No. 18/2008; Vusumuzi Lucky Sigudla v Rex, Criminal Appeal No. 01/2011, reported on line in [2011] SZSC 24.

[5] In passing sentence the High Court (Ota J) commendably took into account the triad consisting of the offence, the offender and the interests of society.

She sought guidance from two decisions of this Court, namely Mgubane Magagula v Rex, Appeal No. 32/2010 and Sam Dupont v Rex (supra).

[6] In the Magagula case (supra) the appellant had been sentenced by the High Court to 18 years imprisonment for the rape of a young girl aged 10 years. In confirming the sentence on appeal this Court, per Moore JA, laid down the following salutary guidelines at para [20] of the judgment:-

> *"[20]… 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."*

[7] Indeed I, myself, had occasion to add my own voice in the Sam Dupont case (supra) at para [15] in the following terms:-

> *"[15] It remains for me to emphasise that the courts have a fundamental duty to protect society against the scourge of sexual assaults perpetrated against young children in particular. As this Court pointed out in Makwakwa's case (supra), the courts should mark their abhorrence of the prevalent sexual attacks on young*

children as a deterrent. This, they can do by imposing appropriately stiff sentences. Indeed in Moses Gija Dlamini v Rex (supra), this Court had no difficulty in confirming a sentence of 20 years imprisonment for the rape of a nine (9) year old girl. Sexual offenders against young children have, therefore, sufficiently been warned."

[8] In balancing the triad referred to in paragraph [5] above, the learned Judge *a quo* was of the view that there existed aggravating factors in the matter. In this regard she took into account the fact that the appellant had violated an innocent and defenceless 6 year old child. He had breached the trust the child had in him. He had failed to use a condom. He had infected the child with a sexually transmitted disease. The learned Judge also noted the prevalence of rapes perpetrated against young girls in this Kingdom. In my view, these are relevant considerations. The learned Judge did not misdirect herself in any way.

[9] The sentence of 18 years imprisonment imposed upon the appellant was undoubtedly heavy, but it was, in my view, entirely warranted in the circumstances of the case. See Maponi Ngubane v Rex, Criminal Appeal Case No. 6/06. It will be seen for that matter that in Vusumuzi Lucky Sigudla v Rex (supra) this Court reduced an effective sentence of 26 years imprisonment for rape to 20 years imprisonment. Admittedly, that was a

more serious case of rape than the present matter. The appellant had been convicted on two counts of rape of two young girls aged 6 years and 4 years respectively and sentenced to 13 years imprisonment on each count. The High Court had ordered the sentences to run consecutively, thus effectively sentencing the appellant to 26 years imprisonment.

[10] It follows from these considerations that the appeal cannot succeed. It is accordingly dismissed.

_____

M.M. RAMODIBEDI

CHIEF JUSTICE

I agree

_____

M.C.B. MAPHALALA

JUSTICE OF APPEAL

I agree

_____

E.A. AGIM

JUSTICE OF APPEAL

For Appellant : **In Person**

For Respondent : **Miss. L. Hlophe**