



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal case No: 11/2014

In the matter between:

NDUKUZEMPI MLOTSA

VS

REX

Neutral citation: *Ndukuzempi Mlotsa v. Rex (11/2014) [2014] SZSC49 (03 December 2014)*

Coram: **M.M. RAMODIBEDI CJ**
A.M. EBRAHIM JA
M.C.B. MAPHALALA JA

HEARD : **05 NOVEMBER 2014**
DELIVERED : **03 DECEMBER 2014**

Summary

Criminal Appeal – Rape – appeal against sentence – principles governing appeals on sentence considered – held that the trial court did not misdirect itself when imposing the sentence of eighteen years, and, that the sentence imposed did not result in a failure of justice – held further that in convictions of rape with aggravating circumstances, the range of sentences in this jurisdiction lies between eleven and eighteen years imprisonment – held further that in rape convictions involving children, it is permissible for the court to impose a sentence in excess of the accepted range of sentences – appeal accordingly dismissed.

JUDGMENT

M.C.B. MAPHALALA JA

- [1] The appellant was convicted of rape with aggravating circumstances on the 4th September 2012, and, he was sentenced to eighteen years imprisonment.
- [2] It is common cause that when the accused was arraigned before the trial court, his rights to legal representation were fully explained, and, he opted to represent himself in court. He pleaded guilty to the offence of rape when the charge was put to him, and, the Crown accepted the plea; hence, a statement of agreed facts was prepared and signed by both the appellant and Crown Counsel appearing in the matter. The appellant admitted in the statement that he had sexual intercourse with the complainant on three different occasions: firstly, when she was sent by her brother Petros to ask for sugar from the appellant; secondly, when she was sent by her father to bring the appellant's jersey; and, thirdly, when she was sent by her father to ask for tobacco from the appellant.

- [3] The appellant further admitted in the statement that the complainant was a minor aged eleven years when he committed the offence, that the complainant was in law incapable of consenting to sexual intercourse, that he did not use a condom thus exposing the complainant to the risk of contracting sexually transmitted infections and HIV/Aids, that he stood in loco-parentis relationship with the complainant, that he inflicted a lifelong trauma on the complainant, and, that he broke the virginity of the complainant.
- [4] The Crown submitted the complainant's birth certificate in the court *a quo* to prove her age. It also handed in a medical report. Both documents were admitted in evidence by consent. The medical report showed that the hymen was not intact, and, that the complainant had been sexually abused several times.
- [5] The conviction of the appellant was in the circumstances appropriate on the basis that the Crown had proved the commission of the offence by the appellant beyond reasonable doubt. It is a trite principle of our law that in a case of rape, the Crown has to prove beyond reasonable doubt the identity of the accused as the offender, the fact of sexual intercourse as well as lack of consent. See the appeal case of *Mandla Shongwe v Rex*, Criminal Appeal No. 21/2011 at para 16.

[6] It is apparent from the evidence that the identity of the appellant as the offender is not in dispute. Similarly, the fact of sexual intercourse is not in dispute. Furthermore, the complainant did not consent to the sexual intercourse, and, the appellant admitted that fact as much. It is well-settled in our law that a girl under the age of twelve years cannot give consent to sexual intercourse, and, even if she consents, sexual intercourse with her according to our law constitutes the offence of rape.

See the cases of *R v Z* 1960 (1) SA 739 (A) at 742; *Mandlenkosi Daniel Ndwandwe v Rex*, Criminal Appeal No. 30 /2011 at para 9; *Mandla Shongwe v Rex* (supra) at para 19.

[7] Accordingly, the appellant has been well-advised not to challenge his conviction in the circumstances. He is only appealing the sentence of eighteen years imposed by the trial judge. He contends that the sentence is too harsh and severe to the extent that it induces a sense of shock and trauma. He further contends that the sentence is more punitive in nature and certainly not rehabilitative. Similarly, he contends that he is currently seventy-three years of age, and, that he would die in prison and not complete his sentence particularly because he is sickly. He implores the court to reduce his sentence by six years. When addressing the court, it was

apparent that the appellant was not sure of his age; however, the bench was convinced that he is an old man in his seventies.

- [8] It is trite law that the imposition of sentence lies within the discretion of the trial court, and, that an appellate court will only interfere with such a sentence if there has been a material misdirection resulting in a failure or a miscarriage of justice. The appellant bears the onus to satisfy the court that the sentence is harsh and excessive to the extent that it induces a sense of shock. Similarly, the appellant bears the onus to satisfy the court that there has been a material misdirection by the trial court resulting in a failure of justice which in turn warrants interference by the appellate court in the interests of justice. This court has followed and applied this principle in determining appeals on sentence for a very long time over many years.

See the cases of *Mbuso Likhwa Dlamini v Rex*, Criminal Appeal No. 18/2011 and *Sifiso Zwane v Rex*, Criminal Appeal No. 5/2005.

The grounds of appeal filed by the appellant do not disclose any material misdirection by the trial court which has resulted in a failure of justice; hence, this appeal has no merit and it ought to be dismissed.

[9] Section 185bis of the Criminal Procedure and Evidence Act 67/1938 as amended prescribes a minimum sentence of nine years without an option of a fine in convictions of aggravated rape. This section further precludes the court from imposing a suspended sentence to such an offender.

Similarly, section 313 (2) of the Criminal Procedure and Evidence Act precludes the court from suspending a sentence in respect of persons convicted of offences listed in the Third Schedule of the Act; these offences include Murder, Rape, Robbery and any conspiracy, incitement or attempt to commit the said offences.

[10] It is now settled in this court that the range of sentences for aggravated rape lies between eleven and eighteen years as confirmed by this court in the case of *Mgubane Magagula v Rex*, Criminal Appeal No. 32/2010. At para 20, His Lordship *Justice Stanley Moore* had this to say:

“[20] From Tables A and B set out in paragraphs [16] and [17] above, 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.”

[11] The trial court also considered the triad when imposing the sentence, that is, the seriousness and prevalence of the offence, the interests of society as well as the personal circumstances of the appellant. In addition the trial court backdated the appellant’s sentence to the date of his arrest on the 25th November 2010.

[12] In the circumstances the appeal on sentence is dismissed.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree:

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree:

A.M. EBRAHIM
JUSTICE OF APPEAL

APPELLANT IN PERSON

FOR RESPONDENT: Principal Crown Counsel Lomvula Hlophe

DELIVERED IN OPEN COURT ON 3 DECEMBER 2014