



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Criminal Appeal case No: 11/2013

In the matter between:

**BONGANE LEKWAYI GUMEDZE**

**APPELLANT**

**VS**

**REX**

**RESPONDENT**

Neutral citation: *Bongane Lekwayi Gumedze v Rex (11/2013) [2013] SZSC 12*  
(29<sup>th</sup> July 2015)

**CORAM:** M.C.B. MAPHALALA ACJ,  
M.D. MAMBA AJA,  
S.A. NKOSI AJA.

**Heard** 13<sup>th</sup> July 2015  
**Delivered** 29<sup>th</sup> July 2015

**Summary**

**Criminal Appeal –rape – appellant convicted of aggravated rape and sentenced to eighteen years imprisonment by the court *a quo* – general principles applicable to sentencing as well as the range of sentences applicable in this jurisdiction – on appeal held that the court *a quo* did not misdirect itself when imposing the sentence – held further that the sentence imposed by the court *a quo* was within the accepted range of sentences for the offence in the circumstances – appeal accordingly dismissed .**

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**JUDGMENT**

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**M.C.B. MAPHALALA, ACJ**

- [1] The appellant was convicted of rape with aggravated circumstances in April 2012, and, he was sentenced to eighteen years imprisonment by the court *a quo*. The complainant in the matter is Nosipho Tsabedze, a female minor who was aged seventeen months at the time of commission of the offence; and, she was in law incapable of consenting to sexual intercourse.
- [2] The aggravating circumstances were three-fold: Firstly, the accused was an adult male of eighteen years old and the complainant looked upon him for protection. Secondly, the complainant was a seventeen months old virgin. Thirdly, the accused did not use a condom and consequently put the complainant in danger of contracting sexually transmitted diseases including HIV/Aids.
- [3] The appellant is not challenging his conviction for the offence but his sentence of eighteen years. He contends that the sentence imposed by the court *a quo* is harsh and severe to the extent that it induces a sense of shock and trauma. He has implored this Court to reduce the sentence to thirteen years imprisonment. However, he has failed to outline the legal basis for challenging the sentence save to reiterate the mitigating personal circumstances which he presented to the court *a quo* prior to sentencing.

[4] The appellant committed the offence on the 6<sup>th</sup> February, 2005 when he was eighteen years of age, and, he was convicted of the offence in April 2012 when he was twenty-five years of age. It is apparent from the evidence that the court *a quo* considered the personal circumstances of the appellant prior to sentencing. In paragraph 2 of the judgment on sentence, His Lordship Justice Stanley Maphalala had this to say:

**“2. The court heard factors in mitigation of sentence by the accused. Firstly, the accused told the court that he lived alone at his home as both his parents are now deceased. Secondly, that he is now twenty-four years old and was eighteen years old when he committed the offence. Thirdly, that he has a three year old child with his girlfriend. Fourthly, that he attended school up to standard five. Fifthly, that he was placed in custody on the 29<sup>th</sup> October 2011. The accused pleaded to the court to exercise mercy in his personal circumstances.”**

[5] The court *a quo* further considered the triad when imposing sentence, that is, the personal circumstances of the appellant, the seriousness of the offence as well as the interests of the society. At paragraph 3 of the judgment on sentence, His Lordship had this to say:

**“3. At this stage of the proceedings, three competing interests arise for the proper balance by the court. These are referred to in legal parlance as a triad. In the case of *S v Zinn* 1969 (2) SA 537 (AD) at 540, the following was enunciated:**

**‘What has to be considered is the triad consisting of the crime, the offender and the interests of the society.’ ”**

[6] His Lordship Justice M.C.B. Maphalala JA, as he then was, in the case of *Elvis Mandlenkosi Dlamini v Rex* Criminal Appeal No. 30/2011 at para 29 had this to say:

**“29. 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 miscarriage of justice. It is the duty of the appellant to satisfy the Appellate Court that the sentence is so grossly harsh or excessive or that it induces a sense of shock as to warrant interference in the interests of justice. A Court of Appeal will also interfere with a sentence where there is a striking disparity between the sentence which was in fact passed by the trial court and the sentence which the Court of Appeal would itself have passed; this means the same thing as a sentence which induces a sense of shock. This principle has been followed and applied consistently by this Court over many years and it serves as the yardstick for the determination of appeals brought before this Court.”**

See the cases of *Musa Bhondi Nkambule v. Rex* Criminal Appeal No. 6/2009; *Nkosinathi Bright Thomo v. Rex* Criminal Appeal No.12/2012; *Mbuso Likhwa Dlamini v. Rex* Criminal Appeal No. 18/2011; *Sifiso Zwane v. Rex* Criminal Appeal No. 5/2005; *Benjamin Mhlanga v. Rex* Criminal Appeal No. 12/2007; *Vusi Muzi Lukhele v. Rex* Criminal Appeal No. 23/2004.

[7] After a careful consideration of the evidence, it is apparent that the court *a quo* did not misdirect itself when imposing the sentence of eighteen years on the appellant. As stated in the preceding paragraphs, the court *a quo* considered the triad before imposing the sentence as well as the fact that the offence is accompanied by aggravating circumstances.

[8] Section 185bis of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended specifies a minimum sentence upon conviction in cases of aggravated rape, and, it provides the following:

**“185bis. (1) 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.”**

[9] Section 313 of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended precludes the courts from imposing suspended sentences in respect of offences mentioned in the Third Schedule, which are murder, rape, robbery and any conspiracy, incitement or attempt to commit any of these offences. The section provides the following:

**“313. (1) If a person is convicted before the High Court or any Magistrate’s Court of any offence other than one specified in the Third Schedule, the court may in its discretion postpone for a period not exceeding three years the passing of sentence and release the offender on one or more conditions (whether as to compensation to be made by the offender for damage or**

pecuniary loss, good conduct or otherwise) as it may order to be inserted in recognisances to appear at the expiry of such period, and if at the end of such period the offender has observed all the conditions of such recognisances, it may discharge him without passing any sentence.

- (2) If a person is convicted before the High Court or any Magistrate's Court of any offence other than one specified in the Third Schedule, it may pass sentence, but order that the operation of the whole or any part of such sentence be suspended for a period not exceeding three years, which period of suspension, in the absence of any order to the contrary, shall be computed in accordance with subsections (4) and (5) respectively.
- (3) Such order shall be subject to such conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as the court may specify therein.
- (4) The period during which any order for the suspension of a part of a sentence, made under subsection (2) and affecting a sentence of imprisonment shall run, shall commence on the date upon which the person convicted was lawfully discharged from prison in respect of the unsuspended portion of such sentence, or if not then discharged because such person has to undergo any other sentence of imprisonment, such period shall commence upon the date upon which such person was lawfully discharged from prison in respect of such other sentence and if any portion of such other sentence is itself suspended, the periods of suspension of all such sentences shall, in the absence of any order to the contrary, run consecutively in the same order as the sentences.
- (5) The period during which any order for the suspension of the whole of a sentence of imprisonment shall run, shall if the convicted person is-

**(a) not serving another sentence, commence from the date from which the sentence wholly suspended was expressed as taking effect, or took effect; and**

**(b) serving another sentence commence from the date of expiry of such sentence including any period thereof which may be subject to an order of suspension.**

**(6) If during the period of suspension of the whole of a sentence the convicted person is sentenced to imprisonment, the portion then remaining of the sentence wholly suspended shall be deemed to be consecutive to the sentence of imprisonment subsequently awarded.**

**(7) If the offender has, during the period of suspension of any sentence under this section, observed all the conditions specified in the order, the suspended sentence shall not be enforced. (Amended P.37/1957.)”**

[10] His Lordship Justice Stanley Moore JA in the case of *Mgubane Magagula v Rex* Criminal Appeal No. 32/2010, after considering several cases of this Court found that the range of sentences for aggravated rape in this jurisdiction lies between eleven and eighteen years imprisonment. During the criminal trial in the instant matter, the Crown proved the commission of the offence beyond reasonable doubt; hence, the appellant is not appealing against his conviction. The sentence imposed on the appellant is justified considering the brutal, vicious and cruel nature of the assault inflicted upon an infant of seventeen months, rupturing her hymen and tearing apart her perineum causing severe bleeding.

[11] The case of *Mbuso Blue Khumalo v Rex* Criminal Appeal No. 12/2012 is another case of brutal, cruel and vicious attack upon a seventeen year old girl. Following the precedent laid down in the Mgubane case (*supra*), this Court sentenced the appellant to eighteen years imprisonment. His Lordship Justice M.C.B. Maphalala JA, as he then was, delivering the unanimous judgment of the Supreme Court had this to say at paragraphs 42 and 44 of the judgment:

**“42. In light of the brutal assault on the complainant, as well as his failure to use a condom, it is my considered view that the trial court misdirected itself on the twelve year sentence in light of the appropriate range of sentences of this nature in this jurisdiction. The sentence imposed by the trial court is too lenient when considering the facts and circumstances of the case. Such a lenient sentence will send a wrong message to those men who continue to sexually abuse innocent and defenceless women and children. This court has a Constitutional duty to protect the fundamental rights and freedoms of all including women and children. The prevalence of the crime of rape in this country continues to be a great source of concern, and this Court is obliged to effect deterrent measures as the final court in the land.**

....

**44. I invoke section 5 (3) of the Court of Appeal Act, mindful of the principle of our law that sentence is pre-eminently a matter within the discretion of the trial court. However, this Court has a Constitutional duty to protect society against the scourge of sexual onslaught committed against defenceless women and children by selfish sex predators who have no regard for the fundamental right to dignity. This jurisdiction is fraught with rape victims as young**



**as three years of age. If this trend continues, the fundamental rights entrenched in the Constitution would count for nothing. The continued prevalence of the crime of rape is an indictment to this Court as the highest court in the land to take a decisive action in the fight to restore the dignity of women by imposing appropriate deterrent sentences to rape offenders.”**

[12] This Court as the final Court of appeal should strive at uniformity in sentences for criminal convictions considering the facts and particular circumstances of each case. In the *Mbuso Blue Khumalo* case (supra) at paragraph 45, this Court considered its previous decisions with a view to show consistency in sentences for aggravated rape:

**“45. In the case of *Mandlenkosi Daniel Zwane v. Rex* Criminal Appeal No. 39/2011, this Court confirmed an eighteen year sentence for aggravated rape. In the case of *Sifiso Cornelius Ngcamphalala* Criminal Appeal No. 34/2003 this Court confirmed a fifteen year sentence for aggravated rape. Similarly, in the case of *Albert Khumalo v. the King* Criminal Appeal No. 55/2003 this Court confirmed a fifteen year sentence for aggravated rape; this was the same case in the appeal of *Mlamuli Obi Xaba v. Rex* Criminal Appeal No. 7/2007. In the case of *Mgubane Magagula v. the King* Criminal Appeal No. 32/ 2010 a sentence of eighteen years for aggravating rape was confirmed. In *Moses Gija Dlamini v. Rex* Criminal Appeal No. 4/2007 this Court confirmed a twenty year sentence for aggravated rape.”**

[13] Accordingly, the following order is made:

- (1) The appeal against sentence is dismissed.
- (2) The sentence of eighteen years imprisonment imposed by the court *a quo* is confirmed.

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M.C.B. MAPHALALA  
ACTING CHIEF JUSTICE

I agree:

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M.D. MAMBA  
ACTING JUSTICE OF APPEAL

I agree:

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S.A. NKOSI  
ACTING JUSTICE OF APPEAL

For Respondent:

Senior Crown Counsel Macebo Nxumalo

Appellant in Person

**DELIVERED IN OPEN COURT ON 29<sup>th</sup> JULY 2015**