



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 41/2011

In the matter between:

MGEGEMBA BENJAMIN DLAMINI

Appellant

Vs

REX

Respondent

Neutral citation: *Mgegemba Benjamin Dlamini vs Rex (41/2011) [2015] [SZSC 17]*
(29 July 2015)

Coram: **S.B. MAPHALALA AJA, J.P. ANNANDALE AJA and**
Q.M. MABUZA AJA

Heard: 2nd July 2015

Delivered: 29th July 2015

Summary: **Criminal Procedure – appeal against sentence – the Appellant was convicted and sentenced to 12 years imprisonment without an option of a fine backdated to 29 June, 2010 – the Appellant appeals to this court for his sentence to be partly suspended – the provisions of section 185 (bis) of the Criminal Procedure and Evidence Act No. 68 of 1938 prohibit that practice – therefore this court declines the appeal and it is dismissed forthwith.**

JUDGMENT

MAPHALALA AJA

- [1] The appellant appeals against the sentence only.
- [2] Appellant was convicted by the court *a quo* and sentenced to 12 years imprisonment without an option of a fine and the sentence was backdated to 29 June, 2010. The Appellant now appeals to this court for suspension of part of his sentence.
- [3] The Appellant was charged with the crime of Rape in that upon or about the 6th November 2006 and at a or near Mavukutfu area in the Shiselweni Region, the said accused person did intentionally had unlawful sexual intercourse with Tengetile Manana a minor of 13 years without her consent and did thereby commit the crime of Rape.
- [4] Further, the Crown contended that the Rape was accompanied by aggravating factors as envisaged by section 185 (bis) of the Criminal Procedure and Evidence Act No. 67/1938 in that:

- (a) The accused broke into the complainants house and raped her in the sanctity of her home;**
- (b) The accused harassed complainant and her siblings before raping her threatening to stab them to death;**
- (c) The accused raped complainant in full view of her siblings thus subjected her to secondary trauma and humiliation;**
- (d) The accused was known to complainant and her family as a neighbour and family friend thus abusing the trust held by the family including complainant of him;**
- (e) At the time of rape the complainant was a minor aged thirteen (13) years old.**

[5] The Appellant pleaded guilty to the common law offence of rape for which he was charged. The Crown in the court *a quo* led evidence *aliunde*. Thereafter the Appellant was convicted for the crime of rape. The Appellant then advanced factors in mitigating of sentence being:

- (i) Accused is a first offender;**
- (ii) Accused is married and has five children;**
- (iii) His children are going to be affected if he is sentenced to a long custodial sentence;**
- (iv) The Accused was drunk when he committed the offence;**
- (v) He pleaded guilty to the offence;**
- (vi) He did not waste the court's time; and**
- (vii) He co-operated with the police.**

[6] The Appellant was then sentenced to a term of imprisonment of 12 years without the option of a fine and the sentence was backdated to 29 June, 2010.

[7] On the 23 January, 2015 the Appellant wrote to the Registrar of this court, filing his appeal in the following terms:

I hereby humbly appeal for the suspension of five (5) years of my twelve (12) years sentence that was imposed on me by Judge Mbutfo Mamba in the High Court of Swaziland on the 29th June 2010 on a rape offence.

Twelve years is too harsh and severe for me to bear. In due course I will submit to the Supreme Court my heads of argument for my appeal.

I humbly implore you to process my appeal at your earliest convenient time.

[8] The appeal was then enrolled before this court on the 2 July, 2015 where the Appellant advanced his arguments and for the Crown Miss L. Hlophe filed Heads of Arguments on the point.

[9] The point of the appeal is whether this court can suspend part of the sentence.

[10] According to the Crown, citing the provisions of section 195 *bis* (i) of the Criminal Procedure and Evidence Act of 67 or 1938 as amended **“A person convicted of Rape shall, if the court finds aggravating circumstances to have been present, be liable to a minimum sentence of 9 years without the option of a fine and no sentence or part thereof shall be suspended”**.

[11] It is abundantly clear therefor that due to the above section of the Criminal Procedure and Evidence Act it would be unlawful for this court to order that such a sentence be suspended.

[12] In the result, the Appellant’s pleas are clearly prohibited by a statute and therefore I rule in these circumstances that the appeal for a partial suspension of sentence fails, and it is so ordered.

S.B. MAPHALALA AJA

I AGEE

J.P. ANNANDALE AJA

I AGREE

Q.M. MABUZA AJA

For the Appellant : In Person

For the Respondent : Miss L. Hlophe
(DPP's Chambers)