IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 07/16

In the appeal between:

BENNET TEMBE **APPLICANT**

AND

REX **RESPONDENT**

Neutral citation: *Bennet Tembe vs Rex (07/2016) [2016] SZSC 20 (29th May, 2017)*

CORAM: **M.C.B. MAPHALALA, CJ**
DR B. J. ODOKI, JA
S. P. DLAMINI, JA
M. J. DLAMINI, JA
R. CLOETE, JA

Heard : 08th March, 2017

Delivered : 29th May, 2017

Summary

Review application in terms of Section 148 (2) of the Constitution – applicant convicted of rape by the High Court and sentenced to

twenty years imprisonment – applicant lodged appeal on both conviction and sentence before the Supreme Court on appeal – appeal dismissed on both conviction and sentence – general principles applicable to review applications under Section 148(2) of the Constitution considered;

Held that the applicant has failed to establish grounds upon which the court could exercise its review jurisdiction in terms of the Constitution;

Accordingly, the application is dismissed.

JUDGMENT

[1] The applicant was convicted of the offence of rape by the High Court on the 25th October 2011. The offence was accompanied by aggravating factors as envisaged under Section 185 bis of the Criminal Procedure and Evidence Act No. 67/1938 as amended on the following grounds; firstly, the complainant was a minor child of a tender age of five years; secondly, the applicant stood in *loco parentis* as he is the natural father of the complainant; thirdly, prior to the sexual abuse, the complainant was sexually

inactive; and, fourthly, the accused exposed the complainant to sexually transmitted infections including HIV/AIDS as he did not use a condom.

Subsequently, the applicant was convicted of the offence of rape with aggravating factors, and sentenced to twenty years imprisonment.

[2] It is common cause that the complainant is the natural daughter of the applicant. At the time of commission of the offence, the complainant was five years of age and legally incapable of consenting to sexual intercourse.

[3] The complainant testified as PW1, and, she was assisted by an intermediary, Nelisiwe Fakudze, a trained Child Counsellor ; and, the intermediary was a nurse by profession and stationed at the paediatric ward of the Mbabane Government Hospital.

[4] The complainant testified that when the offence was committed, she was living with the applicant in a one-room apartment at Moneni Township in Manzini, they shared a bed with the applicant. She told the court that the applicant had sexually abused her on two separate occasions during the night; she reported the incident to her aunt, and, she was taken to hospital where she was examined by a doctor. She maintained her evidence under cross-examination. She further told the court that during her ordeal, the applicant had ordered her to keep quiet.

[5] Nkhomotabo Mkhatshwa testified as PW2. She told the court that the complainant had told her that the applicant had sexually abused her. PW2 in turn called PW3, Phephile Mkhonta, and, they questioned the complainant; she confirmed the sexual abuse. PW3 reported the incident to the complainant's aunt.

It is common cause that PW2 and PW3 were leasing apartments at the homestead of Thuli Mdluli at Moneni Township in

Manzini together with the applicant and PW1; and, they knew each other. The applicant did not cross-examine PW2; however, PW3 was cross-examined but she maintained her evidence.

[6] PW4 is Sergeant Dectective Thandiwe Dlamini, a Police Officer under the Domestic Violence, Child Protection and Sexual Offences Unit. She was the investigating officer in this matter. She had received information about the matter on the 9th February 2010. Together with Thuli Mdluli, the owner of the homestead at Moneni Township, they took the complainant to the Raleigh Fitkin Memorial Hospital in Manzini where she was examined by Dr Mbuvah.

[7] PW4 testified that she could not continue with her investigation for about eight months because she had to attend a police training course. She resumed her investigations on the 23rd November 2010 after she had completed her training course. Subsequently, she arrested and charged the applicant for the offence of rape after recording statements with PW1, PW2,

PW3 as well as Cebsile and Thuli Mdluli; in addition, she had obtained the medical report of the examination of the complainant. She maintained her evidence under cross-examination, and, she further explained that the delay in arresting the applicant was caused by her absence when she attended the training course.

[8] Dr Farayi Mbuvah corroborated the evidence of the other Crown witnesses that he examined the complainant on the 15th February 2010 on allegations of sexual abuse, and, that he subsequently compiled a report which was admitted in court as part of his evidence. The medical examination found that the complainant was not sexually inactive; her breasts together with her labia minoria as well as the hymen were normal: her vestibule had extensive bruises; and, this led to a medical conclusion that there was attempted penetration.

[9] The applicant testified in his defence under oath. He denied committing the offence. He conceded that he was the biological

father of the complainant, and, that they were living together in the one-room apartment; however, he denied that they were sharing a bed. He admitted that he was living in separation with his wife; however, he failed to explain why his own daughter could fabricate such a serious allegation against him. The complainant was a credible and reliable witness, and, there is no reason to doubt her evidence.

[10] The Crown was able to prove the commission of the offence beyond reasonable doubt. It is well-settled in our law that in rape cases the Crown bears the onus of proving beyond reasonable doubt the identity of the accused as the offender, the fact of sexual intercourse as well as the lack of consent.[1]

[11] In this matter, the identity of the applicant as the offender is not in dispute on the basis that the complainant is the biological daughter of the applicant; and, she knows him very well. Furthermore, the evidence of the complainant is corroborated by

[1]1. Nkosinathi Sibandze v Rex Criminal Appeal Case No. 31/2014 at para 4; Mandlenkosi Daniel Ndwandwe v Rex Criminal Appeal Case No. 12/2012 at para 28; Mandla Shongwe v Rex Criminal Appeal Case No. 21/2011 at para 16; Ndukuzempi Mlotsa v Rex Criminal Appeal Case No. 11/2014 at para 5 as well as Mbuso Blue Khumalo v Rex Criminal Appeal Case No. 12/2012 at para 28.

the medical evidence which clearly shows that there was attempted penetration of the vagina, and, the vestibule was severely bruised.

[12] It is trite law that the Crown should prove penetration beyond reasonable doubt; however, the slightest penetration of the vagina suffices to prove the fact of sexual intercourse in a rape case. It suffices if the male organ is in the slightest degree within the woman's genitals. According to our law, it is not necessary that the hymen should be ruptured even where pregnancy has resulted pursuant to the emission of the semen.[2]

[13] Similarly, in our law a girl under the age of twelve years old cannot consent to sexual intercourse, even if she does consent, sexual intercourse with her constitutes the offence of rape.[3] It is common cause that the complainant was at the time of commission of the offence aged five years old; hence, she could not give consent to sexual intercourse.

[2]2. Mbuso Blue Khumalo v Rex (supra) at para 3, and Mandla Shongwe v Rex (supra) at para 18.
[3]3. Nkosinathi Sibandze v Res (supra) at para 12, Ndukuzempi Mlotsa v Rex (supra) at para 6, Mandla Shongwe v Rex (supra) at para 19, Mandlenkosi Daniel Ndwandwe v Rex (supra) at para 9.

[14] The applicant ordered the complainant to keep quiet when he sexually abused her, and, she had to comply as she feared him. It is well-settled in our law that if a man intimidates a woman as to induce her to abandon resistance and submit to sexual intercourse to which she is unwilling, he commits the offence of rape.[4]

[15] The applicant was sentenced to twenty years imprisonment on the basis that the charge of rape was accompanied by aggravated circumstances as envisaged under Section 185 bis of the Criminal Procedure and Evidence Act 67/1938 as amended. That section provides the following:

> "185 bis. (1) **A person convicted of rape shall, if the Court finds aggravating circumstances to have been present, be liable to a minimum sentence of 9 (nine) years without the option of a fine and no sentence or part thereof shall be suspended".**

[4]4. R v Swiggelaar 1950 (1) PH H61 at PP 110-111 and Nkosinathi Sibandze v Rex (supra) at para 13

[16] The trial court was correct in finding that aggravating circumstances existed; hence, the court was bound to impose a custodial sentence. In addition the Criminal Procedure and Evidence Act[5] precludes the court from suspending a sentence in respect of a person 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 these offences.

[17] His Lordship Justice M.C.B. Maphalala in Elvis Mandlenkosi Dlamini v Rex[6] restated the general principles of law governing appeals on sentence:

> ***"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***

[5]5. Section 313 (2)
[6]6. (supra) at para 21

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 passes 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 the court over many years, and, it serves as the yardstick for the determination of appeals brought before this court.

[18] His Lordship MCB Maphalala in Nkosinathi Sibandze v Rex[7] had this to say with regard to sentences applicable to aggravated rape:-

[7]7. (supra) at 21

"21. It is well-settled in this jurisdiction that the range of sentences for aggravated rape lies between eleven and eighteen year's imprisonment; however, this court has exceeded the sentence of eighteen years imprisonment in serious cases of aggravated rape such as cases where violence is used or where the complainant is a very young girl. The list of serious cases in this regard is not exhaustive."

[19] In the case of Ndukuzempi Mlotsa v Rex[8] Justice MCB Maphalala JA, as he then was, had this to say:

"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 Case No. 32/2010. At para 20 His Lordship Justice Stanley Moore had this to say:

[8]8. (supra) at para 10

"20. ... it would appear that the appropriate range of sentences for the offence of aggravated rape in this Kingdom now lies between eleven and eighteen years imprisonment, which is the mid-range between seven and twenty two years adjusted upwards or downwards depending upon the peculiar facts and circumstances of each particular case.

… This court has treated the rape of a child as a particularly serious aggravating factor, warranting a sentence at or even above the upper echelon of the range."

[20] In Mandla Shongwe v Rex[9] His Lordship Justice M.C.B. Maphalala JA, as he then was, dismissing an appeal on sentence in a case of aggravating rape concluded his judgment as follows:

[9]9. (supra) at para 14 and 15

"25. This court is inundated with many appeals of aggravated rape of women and children some of whom are as young as three years. Women and young children are brutally raped because they are defenceless; this is a matter of grave concern to this court. The time has come for this court to impose sentences that will act as a deterrent to the prevalent sexual assault on women and children. It is against this background that this court in the case of Moses Gija Dlamini v Rex Criminal Appeal Case No. 7/2007 confirmed a sentence of twenty years imprisonment for an aggravated rape of a nine year old girl. To that end the Crown is urged and advised to file cross-appeals where necessary with a view to assist the court impose appropriate sentences with a view to curb the rape cancer."

[21] His Lordship Justice Stanley Moore JA dismissing an appeal in a case of aggravated rape in the case of Mgubane Magagula v Rex[10] had this to say:

> ***"14. Rape is perhaps the ultimate invasion of human privacy. I use the adjective human because modern legislatures have expanded the definition of rape to include the unlawful penetration of any bodily orifice of a victim of either gender by any part of the body of the perpetrator or with an object or instrument for sexual gratification. Rape has had an inglorious history stemming from fabled rape of the Sabine women to today's horrific and wilful genocidal impregnation of women with the exterminating intent of extirpating or debasing their ethnic, national or religious identities.***
>
> ***15. Succeeding generations of judges in every jurisdiction, including the judges of this Kingdom, have***

[10]10. (supra) at para 19

inveighed against the barbarity of rape. They have condemned in the strongest terms its brutality and savagery, its affront to the dignity and worth of its victims, its dehumanizing reduction of women to the status of mere objects for the unrequited gratification of the basest sexual passions for rampant males, and the long term havoc which the trauma of rape is capable of wreaking upon the emotional and psychological health and

well-being of women."

[22] It is common cause that in November 2011 the applicant lodged an appeal against both conviction and sentence; however, he did not set out the grounds of appeal. The applicant merely said that he was erroneously, wrongfully and unfairly convicted and sentenced. The Supreme Court on appeal did make this observation[11]:

[11]11. Bennet Tembe v Rex Criminal Appeal Case No. 18/2012 para 29

"29. No specific grounds of appeal were noted or argued against the sentence. When prompted during the hearing, the appellant was also unable to indicate any irregularity or mistake in arriving at the imposed sentence. Nor could he advance any reason why it would induce a sense of

shock or that it was startingly inappropriate or that this court would have imposed a sentence disparate of what was handed down in the trial court."

[23] The Supreme Court on appeal was correct in dismissing the appeal. The trial Judge cannot be faulted in convicting the applicant and sentencing him to twenty years imprisonment; he did not misdirect himself in his judgment.

[24] The Supreme Court on appeal made a finding that the appellant was unable to indicate any irregularity or mistake committed by the trial court in arriving at the imposed sentence. The applicant has since filed a review application challenging the decision of

the Supreme Court on appeal. However, the applicant has not set out the basis of the review; he merely reiterated that he was erroneously, wrongfully and unfairly convicted and sentenced.

[25] The review jurisdiction of the Supreme Court finds provision in Section 148 (2) and (3) of the Constitution which provides the following:

> **"148. (1) The Supreme Court has supervisory jurisdiction over all the Courts of Judicature and over any adjudicating authority and may, in the discharge of that jurisdiction issue orders and directions for the purposes of enforcing or securing the enforcement of its supervisory power,**
>
> **(2) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of the court.**

(3) In the exercise of its review jurisdiction, the Supreme Court shall sit as a full bench.

[26] His Lordship Justice M.J. Dlamini AJA, as he then was, in President Street Properties (Pty) Ltd v Maxwell Uchechukwu and Two Others[12] delivering a unanimous judgment of the full bench of this court had this to say;

"26. In its appellate jurisdiction the role of this Supreme Court is to prevent injustice arising from the normal operation of the adjudicative system; and in its newly endowed review jurisdiction, this court has the purpose of preventing or ameliorating injustice arising from the operation of the rules regulating finality in litigation whether or not attributable to its own adjudication as the Supreme Court. Either way, the ultimate purpose and role of this court is to avoid in practical situations gross injustice to litigants in exceptional circumstances beyond

[12]12. Civil Appeal Case No. 11/2014 para 26, 27 and 28

ordinary adjucative contemplation. This exceptional jurisdiction must, when properly employed, be conducive to and productive of a higher sense and degree or quality of justice. Thus, faced with a situation of manifest injustice, irremediable by normal court processes, this court cannot sit back or rest on its laurels and disclaim all responsibility on the argument that it is functus officio or that the matter is res judicata or that finality in litigation stops it from further investigation. Surely, the quest for superior justice among fallible is a never ending pursuit for our courts of justice, in particular, the apex court with the advantage of being the court of the last resort.

[27] His Lordship Justice Dr. Odoki JA in African Echo (Pty) Ltd t/a Times of Swaziland and Two Others v Inkhosatana Gelane Zwane[13] delivering a full bench of this court held as follows:

[13]13. Civil Appeal Case No. 77/2013 at para 16 and 18

"16. ***It is trite law that the Supreme Court has jurisdiction to review any of its decisions given by it as provided by Section 148(2) of the Constitution …***

18. ***Although neither Parliament nor the court has prescribed the grounds or conditions upon which the review may be conducted, the Supreme Court has held in several decisions that it is competent to exercise its review powers which are based historically on its inherent powers to remedy gross and manifest miscarriage of justice."***

[28] Section 148(2) of the Constitution acknowledges and provides for the inherent powers of the Supreme Court to remedy gross and manifest miscarriage of justice in its earlier judgment. The review powers under Section 148(2) of the Constitution can only be exercised and invoked in exceptional circumstances for the purpose of preventing and correcting a gross and manifest miscarriage of justice. This remedy is undoubtedly an exception

to the legal principles of res judicata and functus officio. From a reading of Section 148(2), it is apparent that only a single review was envisaged by the Constitution, and, that a subsequent review should only be lodged upon leave of this court having been sought and granted otherwise this would amount to an abuse of the court process.

[29] It is common cause that the applicant has not set out grounds upon which this court should invoke its review jurisdiction. It was incumbent upon the applicant to establish on a balance of probabilities the existence of gross and manifest miscarriage of justice which requires this court to correct.

[30] Accordingly, the Court makes the following order:

(a) The application for review under Section 148 (2) of

the Constitution is hereby dismissed.

M.C.B. MAPHALALA CJ

DR. B.J. ODOKI, JA

S.P. DLAMINI, JA

M.J. DLAMINI, JA

R. CLOETE, JA

Applicant: in person

For Respondent: Principal Crown Counsel, Lomvula Hlophe