IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Appeal Case No. 05/2016

In the matter between:

SABELO KUNENE **Applicant**

And

REX **Respondent**

Neutral citation: Sabelo Kunene and Rex (05/2016) [2017] SZSC 42 (11 October 2017)

Coram: **RJ CLOETE JA, SB MAPHALALA JA AND JP ANNANDALE JA**

Heard: **09 October 2017**

Delivered: **11 October 2017**

Summary: *Appellant guilty of rape and murder - sentenced to 18 years and 20 years respectively with sentences to run concurrently – general rule relating to sentences to run consecutively – discretion of trial Judge – no exceptional circumstances found – not a single transaction - murder and rape not same or similar offences and each his own distinct elements – judgment of court a quo upheld.*

JUDGMENT

RJ CLOETE JA

FACTS

[1] The Appellant was found guilty in the High Court of Swaziland of the Rape (with aggravating circumstances) and the Murder of a 63 year old woman, Mgungu Harriet Maziya, which offences occurred on or about 12 May 2011 at the Mpaka area, Swaziland.

[2] The Appellant was sentenced to imprisonment for a period of twenty (20) years on the count of Murder and eighteen (18) years on the count of Rape, the Court *a quo* ordering that the two sentences run consecutively.

[3] The Appellant has appealed to this Court against his sentence only and the amended Notice of Appeal sets out the following grounds of appeal;

"1. In dealing with the *triad*, the Court a quo misdirected itself in law by not engaging in an exercise or an inquiry to properly investigate the competing aspects of the triad.

2. The Court *a quo* misdirected itself in law when meting out the sentence it did by failing to consider the youthfulness of the Appellant when he committed the offences.

3. The Court a quo erred in fact and in law by failing to order that the sentences meted out on the Appellant should run concurrently yet the offences were committed on the same date and same time.

4. The sentence imposed by the Court *a quo* is harsh and induces a sense of shock and is more punitive than rehabilitative".

[4] The Crown opposes the appeal of the Appellant and both parties filed Heads of Argument and substantial Bundles of Authorities.

ARGUMENT FOR THE APPELLANT

[5] Counsel for the Appellant stated in her Heads and before this Court that the Appellant only seeks to follow the ground of appeal relating to the two (2) sentences running concurrently as opposed to consecutively.

[6] In fact Counsel conceded that sentencing in a matter lies within the discretion of the Judicial Officer who presides over the matter and more importantly, specifically conceded that both the sentences handed down in respect of both the offences were within the acceptable range handed down by the Courts in Swaziland.

[7] She referred the Court to the Judgment of this Court in **Samkeliso Madati Tsela vs Rex (2010) [2011] SZSC 13 (31 May 2012)** in which Moore JA expounded on the doctrine of *res gestae* relating to sentences running consecutively and where he at Page 16 stated:

"The governing principle established by the authorities and by academic writers is that consecutive sentences are ordinarily permissible only if they relate to separate incidents or transactions. (Counsel relied on this portion only but it is necessary in my view to refer to the complete paragraph which further provides) **In determining whether offences are part of one incident or transaction the Court takes a broad view. <u>But a Judge retains a residual discretion, for good and sufficient reasons, to order consecutive sentences in appropriate cases. See Oliver v The Queen (The Bahamas) [2007] U.K. P.CP. Once a Court bears the above principles in mind and applies them correctly, an appeal Court will be slow to interfere with the sentence of the trial Court since the appropriate sentence lies primarily and principally within the direction of the trial Judge. An appropriate sentence will be upheld on appeal even though the appellate Court may have itself imposed a sentence of greater or less severity."</u>** (My underlining).

[8] She also referred the Court to **Sithembiso Simelane & Another v Rex, Supreme Court Case No. 02/11** where the Court relying on **Gare v The State (1990) B. L. R. 74 at Page 76** said that

"It is now well established that if the offences in respect of which an accused is convicted by a Court arose out of the same transaction, as a general rule, the sentences should be made concurrent…" and further on "**<u>It appears to me therefore that what will constitute exceptional circumstances that will influence a consecutive order of sentence will</u>**

depend on the peculiar facts and circumstance of each case… These exceptional circumstances include but are not limited to the following:

1. **Where the appropriate or maximum sentence for each offence would not protect the public from the offender for a sufficiently long time.**

2. **Where the aggregate terms of imprisonment is of such severity that it is wholly out of proportion to the gravity of the offences considered as a whole See Rex v Boeski (1979) 54 Cr App. Rep 519."** (My underlining).

[9] She further referred the Court to the matter of **Mandla Bhekithemba Matsebula v Rex Supreme Court Case No. 02/13** where the Court stated at Paragraph 20:

"But multiple sentences cannot be combined in a manner which renders the cumulative total sentence disturbingly inappropriate and unjust."

[10] She argued that the offences of Murder and Rape were committed in one transaction on one and the same victim and as such there were exceptional circumstances which warranted that the sentences run concurrently.

ARGUMENT OF THE CROWN

[11] I need to place on record that the Crown had originally filed Heads on 18 February 2017 which were subsequently withdrawn *in toto* when the matter came before this Court earlier and were replaced by fresh Heads of Argument by the substituted Counsel representing the Crown.

[12] By reference to the matter of **Elvis Mandlenkosi Dlamini v Rex Appeal Case No. 30/11** wherein the Court held **"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 sentence if there has been a material misdirection resulting in the miscarriage of justice. It is the duty of the Appellant to satisfy the appellate Court that the sentence is grossly harsh or excessive or that it induces a sense of shock as to warrant interfering in the interest of justice. A Court of Appeal will also interfere with a sentence where there is a striking disparity between the sentence which has been in fact passed by the trial Court and the sentence which the Court of Appeal would itself pass; this means the same as inducing a sense of shock. This principle has been**

applied consistently by this Court over many years and it serves as the yard stick for the determination of appeals before this Court."

[13] She further referred the Court to the matter of **Bhekizwe Motsa v Rex Criminal Appeal Case No. 37/2010** in which the Court held that **"Whether there was an improper exercise of discretion by the trial Judge. In case for example where the Court is passing sentence has exceeded its jurisdiction for a crime, or been influenced by facts which were not appropriate for consideration in relation to the sentence, a Court of Appeal would have power to interfere. But whereas here no such consideration enters into the matter it is not for the Court of Appeal to interfere with a sentence."**

[14] Further that the Court had considered all of the relevant circumstances including the triad. Paragraph 30 of the Judgment at 112 of the Record.

[15] That as conceded by the Counsel for the Appellant, the range of both sentences was appropriate in all respects.

[16] That the argument relating to the two offences being committed in one transaction was not correct and that there was no splitting of charges. It is clear that the elements of both crimes are vastly different with different requirements of proof to sustain guilty verdicts and as such to consider same as one for purposes of sentencing would not be in the interest of justice and it would effectively mean that one of the crimes is ignored even though an accused is tried and found guilty of both crimes. Importantly, it would constitute an unfair practice as it would effectively mean that the Appellant having committed two abhorrent crimes would receive the same sentence as an accused who committed only one of those crimes.

[17] The Botswana Penal Code Act No. 5 of 1998 provides that no other sentence will run concurrently with any sentence of rape.

[18] In the matter of **Senzo Nhlabatsi & Another v Rex, Criminal Appeal No. 20/2012** the Court refused to make a sentence of rape to run concurrently with the murder charge but rather reduced the sentence of rape on the basis that there were no aggravating circumstances. In the matter before us the Appellant was convicted of rape with aggravating circumstances. In my

view of all possible aggravating circumstances which could apply to the crime of rape, murder would be at the very top of the scale.

[19] Counsel prayed that the appeal be dismissed in its entirety and that the sentence of the Court *a quo* be upheld.

JUDGMENT

[20] Section 300 of the Criminal Procedure and Evidence Act empowers the Court to impose cumulative or concurrent sentences. It reads:

(1) "If a person is convicted at one trial of two or more different offences, or if a person under sentence or undergoing punishment for one offence is convicted of another offence, the Court may sentence him to such several punishments for such offences or for such last offence, as the case may be, as it is competent to impose.

(2) If such punishment consists of imprisonment the Court shall direct whether each sentence shall be served consecutively with the remaining sentence."

[21] As has been set out in numerous cases and decisions of this Court including the **Elvis Mandlenkosi Dlamini** matter referred to above, it is now trite law that the sentencing of accused persons lies within the discretion of the trial Judge and that this Court will only interfere with such sentence if there has been a material misdirection resulting in the miscarriage of justice.

[22] In my view, the offences of Rape and Murder cannot remotely be said to be one and the same for evidential purposes, are clearly separate and distinct offences, each having their own peculiar elements which the prosecution have to prove before a Court of Law and as such I do not deem it necessary to discuss the concept of *res gestae* for the reasons set out above. Most of the cases I have been referred to by Counsel relate to identical offences being perpetrated by an accused person and in those circumstances one could understand why consecutive sentences would be inappropriate. For example, on the same occasion a man stabbing two or more victims would certainly constitute a single event but by no stretch of the imagination could it be said that an elderly woman fighting for her life being brutally raped and then being murdered so that the perpetrator could not be identified, can ever be said to constitute a single offence.

[23] Which then raises the question as to whether the presiding Judge in the Court *a quo* can be said to have misdirected himself or exercised improper discretion or passed a sentence which induced a sense of shock or that the sentence was in striking disparity with a sentence which this Court would have passed.

[24] With respect, the answer must simply be no. The learned trial Judge, as is apparent from the Judgment, clearly dealt with the issues concerned as follows:

1. At Paragraph 29 he clearly stated that the Appellant was intoxicated and that this constituted an extenuating circumstance. Further that the Appellant was a relatively young man in his twenties and that this implied immaturity and as such an extenuating circumstance. Further, that the Appellant came from a very poor background and resided in a one roomed house with his family and he had to drop out of school because of poverty and again this constituted an extenuating circumstance. He also referred to the **Mandla Bhekithemba Matsebula** matter referred to above.

2. At Paragraph 30 he further specifically stated that he would take into account the triad, that is, the personal circumstances of the accused, the seriousness of the offence as well as the interest of society. However, the Court was cognisant of the aggravating factors in the matter in that, *inter alia*, **"The accused did not only rape the deceased but he proceeded to inflict a fatal wound in order to achieve his objective."**

3. It would be remiss of me not to repeat the contents of Paragraph 31 of the Judgment in full as follows:

"What the accused did to the deceased was very cruel and insensitive. He did not only deprive the deceased of her life unnecessarily but he invaded her privacy and dignity by raping her. The crime of rape is not only wicked, evil and selfish, but it is reprehensible, humiliating, degrading and constitutes a brutal invasion of the right to dignity of the woman. It is common cause that women are generally weak and defenceless; and, this Court recognises its constitutional obligation to protect the rights of women against pervasive, cruel and ruthless men who have no regard for the rights of other human beings. The deceased was

> **attacked, raped and killed in the sanctity of her home. <u>The brutal and heinous conduct of the accused outweighs his personal circumstances, and, society demands that such conduct should be visited by harsh and deterrent sentences.</u> It is common cause that the killing and raping of women in this country has drastically increased to immeasurable proportions, and, there is an urgent need to curb such a scourge."** (My underlining)

[25] Accordingly, there are questions which need to be answered. Did the trial Judge apply his mind fully to all of the mitigating circumstances of the Appellant and the answer is clearly yes? Were there any exceptional circumstances referred to in the **Sithembiso Simelane & Another** matter referred to above which would have militated that the sentences should run concurrently and the answer is clearly no, on the contrary, as found by the trial Judge the brutal conduct of the Appellant outweighed his personal circumstances and that the demands of society are paramount. Were the sentences passed in respect of both offences reasonable and within the range of sentences passed by this Court in many matters and the answer must be yes. Are there any misdirections by the trial Court or improper exercise of discretion referred to in the **Tsela** and **Elvis Dlamini** matters {supra} which would point towards interference in the sentence by this Court and the

answer would again be no. Does the sentence induce a sense of shock given the brutality and the fact that two separate abhorrent crimes were committed and the answer must be no? Would this court have imposed the same sentence given the facts and evidence and the answer must be yes.

[26] In fact, in addition to the duty of this Court to see to the protection of society and the public at large, it has to instil confidence in the criminal justice system with the public, the family of the deceased as well as those distressed by the audacity and the horror of the crimes of this nature.

[27] We read daily in the newspapers and other media of ongoing perpetration of sexual and physical violence against women and children in Swaziland. The time has come for the Courts and the powers that be to have a clear strategy in dealing with this widespread scourge, failing which we would all have failed in our tasks.

[28] I fully identify with the remarks of the learned Judge in the Court a quo referred to at paragraph 3 on page 12 above and accordingly as such in my view accordingly the sentences handed down by the Court *a quo* were not only appropriate but entirely necessary and justified and this Court will not in any way interfere with that Judgment.

In the result:

1. The appeal by the Appellant is dismissed;

2. The Judgment of the Court *a quo* is upheld in all respects.

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RJ CLOETE JA

I agree _____

SB MAPHALALA JA

I agree _____

JP ANNANDALE JA

For the Appellant **:** Ms. P. Dlamini

For the Respondent **:** Ms. E. Matsebula