IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **APPEAL CASE NO. 31/2017**

In the matter between:

BANELE MAMBA **Appellant**

Vs

REX **Respondent**

Neutral Citation: Banele Mamba vs Rex (31/2017) [2019] SZSC 42 (09 October, 2019)

Coram: R. J. CLOETE JA, J. P ANNANDALE JA, and M. J. MANZINI AJA

Heard: 21 August, 2019

Delivered: 09 October, 2019

Summary: *Criminal Law - Appellant convicted for rape and common assault – consecutive sentences of 18 years and 3 years, respectively, imposed by High Court – appeal against sentences only – sentences alleged to be severe - whether Court* a quo *considered triad – whether consecutive sentences should run concurrently - appellant failing to establish misdirection – appeal dismissed.*

JUDGMENT

M.J. Manzini, AJA

[1] Serving before us is an appeal from the High Court on a solitary ground against the sentence imposed by Mlangeni J. on the Appellant pursuant to his conviction by the Principal Magistrate, Mbabane, on two counts, one of rape with aggravating circumstances, and the other being common assault.

[2] The Appellant was tried and convicted by the Principal Magistrate, who then committed him to the High Court for sentencing in terms of Section 293 (3) of the Criminal Procedure and Evidence Act 67/1938 as amended.

[3] The trial and conviction of the Appellant emanated from charges preferred against him for unlawfully and intentionally having had sexual intercourse with a thirteen (13) year old minor, without her consent, and for having wrongfully, unlawfully and intentionally assaulted a fifteen (15) year old minor female.

[4] In meting out his sentence Mlangeni J. ordered as follows:

1. ***The Accused is sentenced to 18 years in prison without the option of a fine. The sentence is backdated to the 16th June 2017.***

2. ***In respect of count two the accused was convicted of the crime of common assault. The circumstances of this offence clearly show that it was an attempt to rape the child but she was lucky enough to outrun the prowler, who then took advantage of a young child who was also on her way to school.***

3. ***On this count Accused is sentenced to three (3) years in prison without the option of a fine.***

4. ***The sentences are to run consecutively.***

[5] The Appellant noted an appeal against the sentence meted out by the Judge *a quo,* in the following terms-

AD SENTENCE

"The Court* a quo *misdirected itself in law when considering the triad and the appropriate sentence, by failing to take into account that it was a common cause fact that the accused person was an illiterate lay accused person and that the rape was one incident, consequently, the sentence imposed induces a sense of shock"

[6] The appeal was enrolled and heard by this Court on the 23rd July, 2018. Although the Record did not include a transcript of the proceedings before Mlangeni J, both counsel for the Appellant and the Crown seemed to have been in agreement that it did not appear from his judgment that Section 293 (3) of the Criminal Procedure and Evidence Act was fully complied with by the Learned Judge *a quo*. At paragraph [11] this Court noted in its Judgment dated 21st November, 2018 that;-

"In particular, there is no record or transcript from which it is clear that the Court indeed enquired into the circumstances of the case, in the presence of the accused and whether it, after consideration of the record, satisfied itself of the accused's guilt. It is also void of any pre-sentence procedures. It is unknown if the prisoner was given an opportunity to mitigate by way of evidence, witness or* ex parte *address to the Court".

[7] On the above stated basis the matter was referred back to Mlangeni, J to ensure compliance with the prescripts of Section 293 (3) of the Criminal and Procedure and Evidence Act, and for him to state comprehensive reasons for sentence.

[8] On the 22nd February, 2019 Mlangeni J re-heard the matter, and after hearing the oral testimony of the Appellant determined that:

"12.1 The conviction by the Learned Magistrate on both counts was in order;

12.2 The respective sentences for rape and common assault are both condign. With regard to the common assault, I take into account the fact that the avowed intention of the accused was to rape the child".

[9] Effectively, Mlangeni J re-affirmed his earlier Order, and, the task at hand is to assess whether there was any misdirection on his part in doing so.

[10] **Appellant's Submissions**

In the Appellant's "Heads of Argument Pursuant to Provision of Reasons on Sentence" the Appellant contends that *"there is no Judge who can consider himself to have erred and ultimately change His decision"*. Furthermore, that *"logically, there is no way the sentence can be the same after the considerations as per the order of the above Honourable Court to the trial judge"*. The argument based on "logic" is repeated where the Appellant submitted that *"the sentence was imposed prior to consideration of the evidence in mitigation by the accused and as such the above Honourable Court is urged to interfere with it, more so because logic dictates that it ought to have changed"*.

[11] The Appellant urged us to refer to the initial Heads of Argument, as they bore his essential submissions on why this Court should interfere with the sentence. In those Heads of Argument prominence was given to Mlangeni J's failure to consider the "triad", an omission (if at all) that was largely addressed by the referral of the matter for re-consideration, as earlier indicated. In his oral address counsel for the Appellant argued that Mlangeni J had again failed to consider the personal circumstances of the Appellant, and on that basis this Court was entitled to interfere with the sentence meted out.

[12] Specifically, he argued that Mlangeni J ought to have taken into account that the Appellant was an illiterate person who lacked appreciation of what he was doing; was young at the time of the commission of the offences; was a first offender; and had pleaded guilty to the first count of rape.

[13] Counsel for the Appellant also submitted that considering the range of appropriate sentences for rape convictions which have been set by, and consistently applied by this Court, an appropriate sentence ought to have been around fifteen (15) years

imprisonment, a slightly higher number than the nine (9) to eleven (11) years mentioned in the Heads of Argument. Lastly, he argued that the sentences imposed in respect of both counts ought to have been ordered to run concurrently, as the commission of the offences constituted one transaction.

Submissions by the Crown

[14] The Crown submitted that the sentences meted out by Mlangeni J were neither shockingly excessive nor inappropriate so as to warrant interference by this Court. It was argued that the Court *a quo* had considered the triad as evidenced by paragraphs 7, 8 and 9 of the Judgment on sentence. Furthermore, the Crown submitted that the Appellant was convicted of aggravated rape, as he had waylaid the complainants and had used a bush knife to instill fear in them. That in the circumstances, there was no misdirection resulting in a failure of justice. Lastly, it was argued that the offences in respect of both counts were committed separately, and against different complainants, and, as a result, could not be treated as one transaction.

Analysis and findings of this Court

[15] The principles underpinning an appellate Court's power to interfere with a trial court's discretion on matters of sentencing an accused person upon conviction are well settled, and this Court will be guided accordingly. In ***Ndukuzempi Mlotsa v. Rex (11/2014 [2014] SZSC 49 (03 December 2014)*** M.C.B. Maphalala JA (as he then was) succinctly stated the legal position in the following terms:

> ***"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 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".

[16] The reasons furnished by Mlangeni J in his Order of the 22nd February, 2019 clearly establish that he considered the triad of sentencing factors, as he was enjoined to do so. At paragraphs [8] and [9] thereof he considered the personal circumstances of the Appellant; the gravity of the offences committed by the Appellant; and the interests of society. At paragraph [6] he recorded that the Appellant apologized for committing the offences. I cannot find any misdirection in the manner that he dealt with each of the three components of the triad, and consequently, no basis exists to interfere with his judgment.

[17] Neither do the consecutive sentences of eighteen (18) years on count 1 (rape) and three (3) on count 2 (common assault), which aggregate to twenty-one years (21) imprisonment, without anything more, warrant interference. Almost a decade ago the range of sentences for aggravated rape was stated by this Court to lie between eleven and eighteen years (see ***Magubane Magagula v Rex Criminal Appeal Case No. 32/2010***). However, prior to and post this particular judgment, this Court has confirmed sentences in excess of eighteen years. In this regard see ***Moses Gija Dlamini v Rex, Criminal Appeal No. 4/2007***, where a sentence of

twenty (20) years imprisonment was confirmed; ***Jonas Mkhatshwa v Rex, Appeal case no. 19/2007)***, where a sentence of twenty two (22) years imprisonment was confirmed; ***Bennet Tembe v Rex (07/2016 [2016] SZSC 20 (29th May, 2017)*** where a sentence of twenty two (22) years imprisonment was confirmed on Review).

[18] Therefore, the argument that the cumulative sentences in respect of both counts will result in the Appellant serving a sentence of twenty one (21) years imprisonment, in and of itself, is not a basis for interfering with the judgment of Mlangeni J. In ***Sifiso Ndwandwe v Rex (05 [2012] SZSC 39 (30 November 2012)*** this Court stated the following principle:

> ***"As a general rule, consecutive sentences should not be such as to result in an aggregate term that is wholly out of proportion to the gravity of offences, considered as a whole; See Rex v Boeski (1970) 54 Cr, App Rep 519, Thapelo Motouton Mosiiwa v The State, Criminal Appeal No, 24/05. Therefore where the aggregate sentence is not out of proportion and justifies the circumstances of the offence, the Court can depart from the general rule and order consecutive sentences"***.

[19] In the matter at hand, I am unable to find anything out of proportion with the aggregate sentence of twenty one (21) years imprisonment imposed by the Court *a quo,* bearing in mind that sentences of up to twenty two (22) years of imprisonment have been confirmed by this Court. This view holds, notwithstanding that the Appellant pleaded guilty to the first count of rape.

[20] It also bears mention that due to the prevalence of rape cases, more often accompanied by violence, in this Kingdom, the Courts should not be shackled by the range of sentences stated almost a decade ago in the ***Magubane Magagula v Rex*** case *(supra)*. Clearly, sentences in the upper echelon of this range, that is, eighteen (18) years, are proving to be ineffective, and the Courts should be moving towards increasing it, as a deterrence to would-be offenders. This Court must play its role in combating this scourge by imposing stiffer prison sentences in excess of the established range.

[21] In the circumstances, I am not persuaded that the appeal should succeed. The following Order is hereby made:

21.1 The appeal is dismissed and the Order of the High Court is hereby confirmed

M. J. MANZINI
ACTING JUSTICE OF APPEAL

I agree

R. J. CLOETE
JUSTICE OF APPEAL

I also agree

J. P. ANNANDALE JA
JUSTICE OF APPEAL

For the Appellant : L. Dlamini

For Respondent : M. Dlamini