IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No. 75/2014

In the matter between:

SIPHO DLAMINI **Appellant**

And

THE KING **Respondent**

Neutral citation: *Sipho Dlamini Vs The King (75/2014) 2015 SZHC 156 (01st October 2015)*

Coram: Hlophe J

For Applicant: In Person

For Respondent: Mr. Nxumalo

Date Heard: 15th July 2015

Date Handed Down: 01st October 2015

JUDGMENT

[1] The Appellant was convicted of rape by the Manzini Magistrate's Court on the 29th June 2011 and sentenced to 13 years imprisonment. Whilst representing himself he noted an appeal to this court against the sentence imposed on him by the learned Magistrate, contending it was too harsh. Given that he represented himself, I took him to mean that the sentence was such that no reasonable court could have imposed it which is also understood to mean that same is so harsh that is induces a sense of shock.

[2] The record of proceedings reveals that the Appellant made an appearance before the Manzini Magistrates court on charges of Rape it being alleged that he had, from the 13th February 2009 to sometime in 2011, whilst at Ngcoseni area in the Manzini District, committed the offence of rape by intentionally having sexual intercourse with one Temantungwa Ndlangamandla without her consent. The charges are further qualified as they are described as being attended by aggravating factors such as the victim's age and the fact that the accused was in *loco parentis* to the said victim. The Appellant pleaded guilty to the charge. Three witnesses were led by the crown in proving the case against the accused, now the Appellant.

[3] The evidence itself revealed in summary form; that between the period 13th February 2009 and sometime in 2011 she had been forced by the Appellant to engage with him in acts of forced sexual intercourse. This allegedly started when she was 9 years, she having been born on the 19th December 2000. These encounters between the two allegedly started off when the Appellant, who looked after cattle at the homestead where she stayed together with her grandparents and her aunt, broke into the room in which she slept through the window and thereat proposed for love from her allegedly telling her he wanted to be her only lover, a proposal she said she rejected. Similar encounters she alleged, occurred in the subsequent days.

[4] At some stage and upon having noted that his tactics thus far were not bearing the desired fruit, the Appellant allegedly changed tact and pretended to be feeling so much for her so that on a given date he influenced her not to accept instructions from her aunt because he alleged she was being abused and that her aunt was rather the one to perform those tasks. After his having made these overtures to her, he would object to her being allowed to go and visit her father during school holidays in town where he was working.

[5] Her said encounters of forced sexual intercourse were when on a certain day the Appellant having obtained or acquired a TV set, lured her into his room to watch it. It was at this place and time that he allegedly ordered her to sit on his lap wherefrom, she alleged he ordered her to undress, showed her a sharp object (intjumentji) he had made into a spear from wood and threatened to stab and kill her with same should she resist. He also allegedly told her that if she dared to tell anyone about the incident, he would kill her and kill himself as well after he would have allegedly written a letter to direct they be buried together in the same grave. It was during this encounter that she said he went on to have sexual intercourse with her which she described as his having inserted his private part into her private part. This encounter she said was painful and had caused her to cry.

[6] The other encounters she testified followed on the same lines as this one and were also punctuated by threats she was to be killed with the sharpened wooden object if she ever told anyone about this or resist the act being done on her. She confirmed there were several of these encounters.

[7] These came to the fore or were exposed when, during the school vacation in 2011, she was allowed to visit her father in the Mankayane town. The evidence reveals that when the time to go back home arrived after her visiting her father, she refused to do so and rejected all manner of persuasion to do so. Her father testified to having requested her to disclose to him why it was so, promising to allow her to stay on with him if she disclosed to him her problem.

[8] It is then that she disclosed that the Appellant to whom she referred to as her uncle, had forcefully committed various sexual acts on her where he had allegedly had sexual intercourse with her without her consent, after he had allegedly threatened her.

[9] This disclosure led to the reporting of the matter to the police including her eventually being taken to a doctor for a medical checkup. He was eventually charged, and tried. Although he had denied having had sexual intercourse with her despite his initial plea of guilty when the charges were put to him, the Appellant, who then admitted to having proposed for love from her, was found guilty of the offence of rape, after sufficient evidence was led in my view proving the offence.

[10] This being a matter for appeal, I cannot find any fault in the court a quo coming to the decision it did in this regard. This I say because it is very clear that the Appellant never realistically disputed the evidence led against him which was overwhelming and was not surprising as it was in line with his plea of guilty to the charges. He therefore failed to put his case to the complainant and could not deny having committed the various acts of sexual intercourse revealed by the evidence as having been committed by him on the complainant. This evidence was further corroborated by the evidence that the complainant had informed her aunt immediately about the said incidents who however failed to take the appropriate action. The confirmation of the sexual act as having taken place by medical examination also corroborated the complainant's version. I say this because the medical report was never quibbled or disputed by the Appellant. Furthermore it should be recalled that the Appellant had pleaded guilty during the trial. I therefore agree that the conviction of the Appellant was clearly unassailable.

[11] The legal position is settled that for a conviction on rape to be sustained, there has to be proof of the sexual intercourse as a fact, the lack of consent and the fact that the act complained of was committed by the Appellant. This latter element is often referred to as that of the identity of

the accused. The case of ***Rex Vs Valdema Dengo Review Case No. 843/88*** and that of ***Rex Vs Mfanzile Mphicile Mndzebele Criminal Trial No. 213/07*** as well as ***Rex Vs Mfanyana Sibiya Case No. 54/2010*** are authoritative in this regard.

[12] There can be no doubt from the facts of the present matter that all the above elements of the offence of rape were proved beyond a reasonable doubt. Firstly there was no dispute as regards the question of identity when considering that the Appellant was well known to the complainant as they stayed together in the same homestead where the complainant referred to the Appellant as her uncle.

[13] As regards the question of the fact of the sexual intercourse, not only was the evidence of the complainant corroborated by the evidence of the medical examination, as expressed in the medical report confirming that there had been interference with her private parts, there had also been no disputing the evidence as led by the complainant in this regard. In their book titled; **South African Criminal Law and Procedure, 2nd Edition, Juta, 1982 at page 440**, the writers, PM Hunt and Others, put the position as follows in this regard:-

"there must be penetration, but it suffices if the male organ is in the slightest degree within the female body".

[14] A child of 9 years is in law incapable of consenting to sexual intercourse. This position has been articulated in various judgments of this court and the Supreme Court. In ***Rex vs Mfanyana Sibiya, Case No. 54/2010,*** I quoted with approval an excerpt from the case of R v Z 1959 (1) SA 739 (A) at 742 E-D expressed in the following terms on that issue:-

"According to our practice a girl under the age of 12 years cannot give consent to sexual intercourse. Even if she consents, sexual intercourse with her according to our law is rape".

[15] As concerns the question of sentence, the Appellant was sentenced to 13 years imprisonment. The Appellant's appeal was actually against this sentence, which he initially claimed was so severe that it induced a sense of shock. I must say that the position of our law as regards the question of sentence is very clear. It is that sentence is a matter for the discretion of the trial court. The court of appeal will therefore only interfere where such sentence is vitiated by an irregularity or a misdirection or where same is so harsh such that no reasonable court would have imposed it, which is to say, in the usual language, that such a sentence is so harsh that

it induces a sense of shock. See in this regard ***S v Bolus and Another 1966 (4) SA*** as well as ***Daniel Mkhethwa Dlamini vs Rex Criminal Case No. 109/2015.***

[16] In the present matter there was no contention or even indication that such a sentence was vitiated by an irregularity or a misdirection which only leaves the contention that same was so harsh that it induces a sense of shock. According to established authority, a sentence is so harsh as to induce a sense of shock if there was a striking disparity between it and that which the Appellate court would have imposed in a matter ***S v Bolus and Another (Supra).***

[17] The sentencing trend of this court in matters of rape involving minor children is now settled. It ranges between 11 and 18 years. In this regard the case of ***Rex v Mgubane Magagula Criminal Appeal No. 32/2010*** and that of ***Melusi Maseko v Rex Criminal Case No. 43/11*** is in point. There is therefore no doubt that the sentence imposed on the Appellant was on the lower part of the sentencing scale, which makes it difficult for this court to interfere therewith. In ***Sikhumbuzo Mazibuko v Rex Case No. 46/2011***, the Supreme Court confirmed a 16 year sentence imposed on an

accused person who had been convicted of raping an 11 year old girl. Of interest in this case was the except extracted from the case of ***Sam DuPont v Rex Criminal Appeal Case No. 4/08*** which is expressed in the following words which I find to be apposite to this matter as a girl of 9 years, like in the present one, had been raped:-

> **"It remains for me to emphasize that the courts have a fundamental duty to protect society against the scourge of sexual assaults perpetrated against young children in particular. As this court pointed out in Makwakwa's case (Supra) the courts should mark their abhorrence of the prevalent sexual attacks on young children as a deterrent. This they can do by imposing appropriately stiff sentences. Indeed in *Moses Gija Dlamini V Rex (Supra)*, this court had no difficulty in confirming a sentence of 20 years imprisonment for the rape of a (9) nine year old girl. Sexual offences against young children have, therefore, sufficiently been warned".**

[18] The above reveals the evidential material on record together with the legal position the Appellant had to contend with at the hearing of his appeal against only his sentence. It was therefore not surprising when at the hearing of the matter the Appellant, in an amazing expression of candidature told this court that he did not want to waste the court's time

defending the indefensible or disputing the indisputable. He said he had correctly been convicted and even the sentence itself he could not say was not legally correct. All he was now asking for having learnt his lesson was mercy from the court which he pleaded the court could ably express by at least reducing to whatever extent his sentence particularly now that he had realized his wrong doing.

[19] I must say that outside law, I had found the Appellant's plea for mercy really moving and candid, particularly having realized that there was no other way by which the Appellant could express his having learnt his lesson and also no doubt his having reformed, than in him being able to express such candour. Like I said the sentence in this matter was or is at the lowest scale of the current sentencing trend by this court in such matters. Whilst I may have been moved to reduce it had it been say above 15 years, I unfortunately cannot reduce it if it was fixed at the scale it was placed at. I cannot do so without exhibiting misplaced pity which previous judgments of this court have warned against.

[20] When I consider part XX of the Criminal Procedure and Evidence Act (Section 329) of 1938 as amended, it becomes clear that it is opened to the Appellant to ask for pardon through the Royal Prerogative of Mercy, in terms of which His Majesty The King is empowered to commute sentences imposed by the courts or to pardon in whole a convicted offender when considering the plea made by the Appellant for a reduction of sentence coupled with the candour accompanying it. This can be achieved through following the provisions of Section 329 of the Criminal Procedure And Evidence Act.

[21] Unless and until the Appellant applies in terms of the said Section and is granted the commutation or pardon of his sentence, I can do no more at this point than to confirm the sentence as imposed by the court *a quo* as I have not been given any grounds which in law would entitle this court to interfere with the sentence imposed by the court *a quo*. Consequently I have come to the conclusion that the Appellant's appeal cannot succeed and that same should be dismissed, which I hereby do.

N. J. HLOPHE
JUDGE - HIGH COURT