



**IN THE HIGH COURT OF ESWATINI**

**CASE NO. 159/2022**

**In the matter between:**

**THABISO HLATJWAKO**

**APPELLANT**

**AND**

**THE KING**

**RESPONDENT**

**NEUTRAL CITATION:**

**Thabiso Hlatjwako And The King**  
**(159/2022) [2022] SZHC 258 (22/11/2022)**

**CORUM:**

**BW MAGAGULA J**

**HEARD:**

**24/10/2022**

**DELIVERED:**

**22/11/2022**

*Summary: Criminal Appeal – Grounds of appeal not supported by evidence – evidence based on which the conviction was made unrelated to blood samples or*

*DNA - Appellant insists that he was refused the results which would have exculpated him. Insistence on DNA samples outrageous not supported by evidence adduced at the court a qou. – Principle on sentence restated - this court cannot interfere with the sentence of the trial court unless there has been a grave misdirection - Appeal dismissed.*

*Held – Insistence on non-existent DNA results a non-starter.*

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## **JUDGMENT**

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- [1] The Appellant is before this court on appeal, having been sentenced to 15 years imprisonment by Principal Magistrate Joe Gumedze at the Pigg's Peak Magistrate Court. This was subsequent to the Appellant having been found guilty of rape.
- [2] The Appellant submits that the Principal Magistrate ought to have been lenient when sentencing him to the 15 years. As such, the sentence is too much for him to bear. It is so harsh that it induces a sense of shock and trauma. The Appellant suggests that the sentence be reduced by at least 6 years to 9 years. He also argues that the sentence must be backdated. This court must

also deduct from his sentence, the time that he spent in custody before he was released on bail. The sentence must also include the time he spent in custody after conviction whilst awaiting sentencing. He submits that the time he spent in custody awaiting sentencing is 16 months.

- [3] The Crown is opposed to the appeal. The argument is that the Appellant has not shown how the sentence meted out by the Principal Magistrate is grossly harsh and how it induces a sense of shock. According to the Crown, the Appellant has simply made a lip service by submitting that it induces a sense of shock without adducing anything tangible to warrant interference with the sentence imposed by the trial court.
- [4] The Crown has also submitted that the trial court properly sentenced the Accused. The learned Principal Magistrate took into account the personal circumstances of the Appellant, the seriousness of the offence and also considered the interest of society when passing the sentence.
- [5] Miss F. Gumedze who represented the Crown, submitted forcefully that the offence which the Appellant was convicted for by the trial court is serious. Further, the law which is **Section 185 bis (1) of the Criminal Procedure and Evidence Act of 67/1938** actually imposes a minimum sentence when one is convicted of this offence, especially where the rape is

accompanied by aggravating factors, as it is in the matter before court.

[6] The learned Counsel then referred the court to the record where the aggravating factors are captured, on page 56. It was proved during the trial that the Appellant used force and violence when committing the rape. The record reflects that the Appellant assaulted the complainant with a stick on her back to the extent that she bled. He further assaulted her with a catapult in her eyes, which is a sensitive part of the body.

[7] The Crown further submitted that the *court a quo* was actually lenient when sentencing the Appellant, considering the complainants' age. Not only did the Appellant use force to induce her submission, but he also did not use protection when he carried out the heinous crime. By so doing, the Appellant exposed the victim to the risk of contracting sexually transmitted infections such as HIV.

[8] With regard to the Appellants' argument, that his sentence be reduced, the Crown argues that the Appellant is clearly misdirected by making such a submission. The record reflects that the Accused was arrested on the 2<sup>nd</sup> March 2016, the date is not in dispute. However, what the Accused has omitted to disclose in his submission is that he was subsequently admitted to bail on the 26<sup>th</sup> September 2016. He subsequently evaded trial for 3 years having for been warned to appear before court for

trial on the 28<sup>th</sup> August 2017. He did not come to court on that day, but only appeared before the court on the 11<sup>th</sup> March 2020, after having been arrested for murder.

[9] His bail was then subsequently revoked and he was remanded in custody. He was convicted and sentenced to 1 year imprisonment or E2 000-00 fine for the contempt of court. He was then kept in custody up until the 13<sup>th</sup> of October 2020, when judgment for the rape case was delivered.

[10] I now discern to analyze the Appellants' grounds of appeal and also consider the Crown's submissions to ascertain if there is merit in the appeal. The notice of appeal is dated 10<sup>th</sup> March 2021. He articulates his main grounds of appeal being that the sentence meted out by the learned Principal Magistrate is too much for him to bear. It induces a sense of shock and trauma. There are no details as to why the Appellant is of the view that the sentence of 15 years induces a sense of shock *visa vis* the charge he was convicted of.

[11] In the matter of **Elvis Mandlenkhosi Vs Rex (30/2011) [2013] SZC 06 (31/05/ 2013)** at paragraph 29 the court stated as follows regarding sentencing principles;

***“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 misdirection resulting in a miscarriage of justice. It is the duty of the Appellant to satisfy the Appellate court that the sentence is so grossly harsh or excessive or that it induces a sense of shock to warrant interference 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 was in fact passed 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 this court over many years and it serves as the yardstick for the determination of appeals brought before this court”.*

- [12] I take leaf from the above dicta, specifically where it states that the court of appeal will only interfere with the sentence of a trial court when there is a striking disparity between the sentence which was in-fact passed by the trial court and the sentence which the court of appeal would itself have passed. I have considered the guidelines as set out in the matter of **Mgubane Magagula Vs Rex**<sup>1</sup> when considering the range of sentencing, in light of the peculiar facts and circumstance before me. I am persuaded that the manner in which the Appellant committed the offence was accompanied by aggravating circumstances. I am in

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<sup>1</sup> Criminal Case No 32/2010 at para 20

total agreement with the observations made by the Principal Magistrate that the use of force in rape constitutes aggravating circumstances.

[13] The victim was assaulted with a stick, she was dragged from the safety of a home where she was, by the Appellant and his friends. They walked a distance before they reached a forest, along the way she was humiliated and made a mockery of.

[14] When I read the record I learned that her only sin was that she had previously rejected a love proposal from the Appellant. This must have bruised the ego of the Appellant to the extent that he harboured anger towards the complainant. It is not apparently clear from his defence as to why the Appellant felt entitled as a matter of right that the Complainant should have accepted his love proposal at all cost.

[15] It is high time that the rights of women and girls to be prioritized and respected in our society. It cannot be, that in this day and age in a modern and civilized society like ours there are still men out there, that feel entitled as of right, that women must accept their love proposals at all costs. If they do not accept, then they have committed an offence which deserves violence or punishment. That is an archaic, absurd and primitive mentality. As a society we must eradicate and disabuse ourselves of such.

[16] It is therefore my observation that the sentence of 15 years imposed by the learned Principal Magistrate fell within the acceptable range. The appeal court in the **Mgubane decision** stated it to be between 7 and 22 years, adjusted upwards or downwards. When considering that the Principal Magistrate meted out 15 years, it was within the acceptable horizon, he actually adjusted it downwards.

[17] This court can actually increase a sentence by a trial court, where the facts pinpoint that it was below the acceptable threshold. In light of the facts and circumstances of the matter at hand, I actually considered to increase the sentence upwards. However, I loathed to do so having been engulfed by the mercy which I am enjoined to blend every case with. For that reason, I will not increase the sentence imposed by the Principal Magistrate. I will leave it at 15 years. Although I seriously considered to increase it, in light of the egregious conduct of the Appellant. The manner in which he committed the heinous crime of rape against a girl who was at the prime of her youth. The trauma of her experience at the hands of the Appellant may affect her for a long time, even beyond the time that the Appellant will spend in jail.

[18] The Appellant further argues that the Principal Magistrate erred in not subtracting from his sentence the time he spent in custody before he was released on bail and also the time that he spent in custody after being convicted, awaiting sentencing.



[19] The Appellant in his heads of arguments has also argued that the Principal Magistrate erred by refusing him a right to have his witnesses come before court during the trial to testify about the existing factors of his charge and also to give evidence on what really happened.

[20] The Appellant argued further that, the learned Principal Magistrate grossly erred in denying him the opportunity to have his witnesses brought before court to give evidence which he knows could have made the court to consider charging his rape charge to a lesser one and as such the trial court was going to be lenient when imposing the sentence or even discharge him.

[21] I have taken time to peruse the record, and I have in the process observed the following;

21.1 On the 26<sup>th</sup> August 2020 the Accused was before court and the interpreter was Miss Ndlangamandla. The record reflects that the following rights were explained to the Accused at the close of the Crown's case and were fully explained to be as follows;

21.2 Right to give evidence that are oath and subject to cross examination by Crown.

22.3 Right to give evidence that are unsworn evidence and not subjected to cross examination by Crown whose evidential weight would be the law.

22.4 Right to remain silent and the court may decide the case based on the evidence adduced.

22.5 Right to call witnesses in his defence.

[22] The record reflects that on the first day of trial the Accused submitted that he understood his rights and he further submitted that he had a terrible headache on that day. He then applied that the matter must be postponed and it was so postponed by the learned Magistrate.

[23] The court remanded him in custody until the 28<sup>th</sup> September 2020 for continuation.

[24] On the subsequent court appearance, despite that the court had already advised him of his rights on the previous court appearance being the 26<sup>th</sup> August 2017, the Principal Magistrate in his wisdom and discretion advised the clerk to re-state the legal rights to the Accused.

[25] On that date, the Accused did not apply to the court to have his witnesses subpoenaed if he had any. He actually did not indicate that he had witnesses that he wanted to call. What he submitted

before court was that he would like to have the DNA results first. It appears from the record that there was dialogue between the Accused and the court, where it transpired that there were no DNA blood samples that were taken either from the Complainant or from the Appellant himself, who was the Accused before the trial court. Therefore, there were no DNA results that were available.

[26] It then follows that the Accused's application for DNA results was unjustified. There were no DNA test that were done in the first place.

[27] The evidence that had been adduced by the Crown which the *court a quo* relied on, did not include results of any DNA test. The record reflects that the Accused confirmed that he understood the explanation regarding the absence of the DNA tests. In as much he was not satisfied with the state's failure to take blood samples from the complainant, after having said so, he specifically stated that he will not call witnesses to his defence and he elected to give his own evidence under oath.

[28] I am therefore satisfied that the Appellants' grounds for appeal to the effect that he was deprived of an opportunity to call witnesses is without merit. I reject it with the contempt it deserves.

[29] Addressing the issue of backdating of the sentence. In as much as I have dealt with this issue earlier on in my judgment, the Crown has conceded that the sentence can only be backdated for 6 months, being the time he spent in lawful custody for the rape trial.

[30] I will accordingly only backdate the 15 years sentence with 6 months only. Otherwise, I am not inclined to interfere with the sentence of the Principal Magistrate, save to backdate it with the 6 months as conceded by the Crown. The order is that the appeal succeeds only to the extent of the sentence being backdated for 6 months. It means that the sentence of the Principal Magistrate will only be reduced by 6 months, to 14 years 6 months.

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**B.W. MAGAGULA**  
**JUDGE OF THE HIGH COURT**

*For Appellant: (In Person)*

*For Crown: Miss F. Gamedze (The DPP'S Chambers)*

