

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Review Case No. 1/2007

REX

Vs

SIPHO LUCKY FAKUDZE

Coram: S.B. MAPHALALA - J

For the Crown: MISS Q. ZWANE

For the Accused: IN PERSON

REASONS FOR SENTENCE

13th March 2008

[1] The accused appeared before the Principal Magistrate H.J. Khumalo in the Piggs Peak Magistrates Court charged with the crime of rape. In that on or about the 9th May 2004, and at or near Nkhaba in the Hhohho Region, the accused did wrongfully and intentionally have sexual intercourse with N F, a female minor who was at that time 12 years without her consent thus did thereby commit the crime of rape. The Crown further alleges that the crime is accompanied by aggravating circumstances as envisaged by Section 185 bis of the Criminal Procedure and Evidence Act No. 67 of 1938 (as amended) in that:-

- (a) The accused is the complainant's father and stood in *loco parentis* over her at the time of commission of the offence;

- (b) At the time of the commission of the offence, the complainant was a minor of 12 years;
- (c) The accused did not use a condom thus exposed her to the risk of contracting HIV/Aids; and
- (d) The accused infected the complainant with a sexually transmitted infection.

[2] On the second count he was charged and convicted of the crime of incest with the same complainant in count one who is his daughter.

[3] In terms of Section 292 (1) of the Criminal Procedure and Evidence Act of 1938 the learned Principal Magistrate committed the accused to the High Court for sentence.

The learned Magistrate stated in his judgment that **"looking at the seriousness of the offence and its prevalence the court is of the opinion that you deserve greater punishment that exceeds the jurisdiction of this court.** Indeed, on the 5th March 2008, the accused appeared before me for this purpose where I heard factors in mitigation of sentence by the accused.

[4] The accused stated the following factors in mitigation of sentence:

- (i) He is a sickly person suffering from asthma;
- (ii) He has three minor children;
- (iii) He told the court that he is now a "born again" and has confessed

his sins.

(iv) He urged the court to backdate the sentence.

[5] At this stage of the proceedings, the court has to pass an appropriate sentence. Three competing interests arise for the proper balance by the court. These are referred to in legal parlance as the **triad**. The nature of the crime, the interest of society and the interest of the accused. According to Holmes JA in the case of **S vs Rabie 1975 (4) S.A. 855 (A) at 862 G:**

"Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances".

"Despite their antiquity these wise remarks contain much that is relevant to contemporary circumstances (they were referred to, with approval, in *S vs Zinn 1969 (2) S.A. 537 (A)* at 541) **"a judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and the pressures of society which contributes to criminality ..."**

[6] The above is the legal approach I ought to adopt *in casu*.

[7] The accused person in the present case is the natural father of a 12year old girl. In the Supreme Court judgment in the case of *Rex vs Christopher Boy Masuku - Criminal Appeal Case No. 16/2004 Tebbutt JA* delivering the judgment of the court

on a similar case as the present case stated the following:

"In cases of a similar kind, i.e. where children of tender years have been raped, the sentences imposed by the High Court have in cases before us varied between 10 years and 14 years imprisonment, the latter sentence being imposed in cases where an accused conduct has been particularly reprehensible - such as an abuse of a trust relationship. The present case certainly falls within this category to repugnant offence. Such a sentence i.e 14 years would therefore also give effect to the principle that offenders found guilty of an offence and whose moral guilt is similar should be treated similarly. Profound disparities can offend against the underlying principle of fairness. We feel that a sentence of 14 years on the Appellant, who is a first offender, would have been sufficient to meet the criteria I have set out above. It would also be in conformity with sentences in similar cases. We can therefore interfere with the trial court's sentence of 18 years and reduce it to one of 14 years imprisonment backdated 1st January 2000, as we now hereby do".

[8] In another recent Supreme Court judgment in *Rex vs Jeremiah Shongwe - Criminal Appeal case No. 6/2003* the same Judge stated the following at page 3 of the unreported judgment; and I quote:

"In sentencing the Appellant the trial Judge rightly mentioned the increase of this type of offence, *viz* the rape of young girls by adult men and said the message should go out that the courts will be very severe on this type of behaviour. I agree entirely. His lying attempts to deny his participation shows that he had no remorse for what he did. The nature of the offence justified the sentence of 10 years imposed on him. Indeed, he is lucky it was not more severe".

[9] See also the Supreme Court cases of *Thumbela P. Mhlanga - Appeal Case No. 26/2003*, *Rex vs Kenneth Maseko - Appeal Case No. 7/2004*; *Nicholas Magagula vs Rex - Appeal Case No. 13/2004* and that of *Lawrence Phuphutha Manana -*

Criminal Appeal Case No. 733/2004 on the range of sentences to be imposed in cases of rape.

[9] I have considered the above-cited legal principles as well as the cases by the Supreme Court of Swaziland and I have come to the considered view that the facts in the present case have taken a different sheen from the ordinary run-of-the-mill cases of rape. In the instant case a father has raped his own daughter putting this case in a different plane. For these reasons I have come to the view that a sentence of 18 years imprisonment will serve the justice of the case. The unfortunate girl will never recover from the trauma of being raped by her own father. She will always carry this stigma with her for the rest of her days. It is indeed a chilling state of affairs.

[10] In the result, for the afore-going reasons the accused is sentenced to 18 years imprisonment the two counts treated as one for purposes of sentence backdated to the date of arrest.

S.B. MAPHALALA

JUDGE