

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE No. 282/11

In the matter between:

REX

VS

SIBONISO MAGAGULA

**CORAM:
FOR THE CROWN**

**SEY J.
MS I. H. ODHE**

JUDGMENT ON SENTENCE

11th AUGUST 2011

SEY J.

[[1] On the 9th day of March, 2011, the accused named herein was convicted by the Senior Magistrate in Piggs Peak Magistrate's Court of three counts of rape with aggravating circumstances.

[2] The Magistrate having found the accused deserving of greater punishment than he was empowered to inflict has accordingly invoked the provisions of Section 292 (1) of the Criminal Procedure and Evidence Act 67 of 1938 as amended and committed the accused to the High Court for sentencing.

[3] This case has now been brought before this Court for sentencing. In mitigation the accused pleaded for leniency and he told the Court that he was only 15 years old when he was arrested. He also pleaded with the Court to backdate his sentence on the grounds that he has been remanded into custody since 2007.

[4] For the purpose of sentencing, I have placed reliance on the recent decision of the Supreme Court of Swaziland in **Mfanasibile Gule v The King Criminal Appeal No. 03/2011**.

In that case, His Lordship Moore JA opined as follows:

"In fashioning the appropriate sentence for the offence for which the Appellant was convicted it was the duty of the sentencing Judge to consider: the circumstances of the offence the circumstances of the offender the public interest the mitigating and aggravating factors applicable to the offence arising out of all of the material before her; The law and practice relating to sentencing in Swaziland The sentencing guidelines, norms and trends obtaining in contemporary Swaziland as disclosed in the most recent decisions and pronouncements of the Supreme Court and, where appropriate, those of the High Court."

[5] Section 185 (bis) (1) of the Criminal Procedure and Evidence Act 67/1938 enjoins a Court that has convicted a person of

rape with aggravating factors to sentence him to a minimum of 9 years imprisonment without an option of a fine.

[6] In this Kingdom the Courts have treated the rape of a child as a particularly serious aggravating factor warranting very stiff sentences. A case in point is that of **Mgubane Magagula v The King Criminal Appeal No. 32/2010** where the Supreme Court, inter alia, observed that:

"It would appear that the appropriate range of sentences for the offence of aggravated rape in this Kingdom now lies between 11 and 18 years imprisonment - which is the mid range between 7 and 22 years - adjusted upwards or downwards, depending upon the peculiar facts and circumstances of each particular case.

The tables also reveal that this Court has treated the rape of a child as a particularly serious aggravating

factor, warranting a sentence at or even above the upper echelons of the range. "

[7] However, it is imperative that a difference must be made between a child offender and an adult in judging what is appropriate in each case. I am also mindful of the fact that it is the age of the accused at the time of commission of the offence that should be taken into account. In this instant case, the accused was aged 15 at the time of commission of the offence. He was therefore a child for all intents and purposes. **Section 29 (2) of the Constitution of the Kingdom of Swaziland Act No. 001 of 2005** prohibits the subjection of children to abuse, torture or other inhuman and degrading treatment or punishment. The subsection further advocates that any punishment imposed on a child should be "subject to lawful and moderate chastisement for purposes of correction."

[8] In the case of **Centre for Child Law v Minister of Justice and Constitutional Development and Two others CCT 98/2008 (2009) ZACC 18** at **paragraphs 26-28**, the Court pronounced that:

"The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more restricted, than those of adults.....

These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders and most vitally, they are generally more capable of rehabilitation than adults. These are the premises on which the Constitution requires the Courts and Parliament to differentiate child

offenders from adults. Hence we afford children some leeway of hope and possibility."

[9] It is generally accepted that there are, however, degrees of maturity and that the younger the juvenile, the less mature he or she is likely to be. See **Mabuza and Others v S 174/01 (2007) ZACA, 110** where the Supreme Court of South Africa per **Cachalia JA** opined thus:

"Youthfulness almost always affects the moral culpability of juvenile accused. This is because young people often do not possess the maturity of adults and are therefore not in a position to assess the consequences of their actions. They are also susceptible to peer pressure and to adult influence and are susceptible when proper parental guidance is lacking..... Judicial policy has thus

appreciated that juvenile delinquency does not

inevitably lead to adult criminality and is often a phase of adult development. The degree of maturity must always be carefully investigated in assessing a juvenile's moral culpability for the purpose of sentencing."

[10] Judging from the totality of the evidence adduced in the Court a quo in this present case, it is clear to me that the accused has been convicted of a very serious crime. I have also taken into consideration the fact that the aggravating factors were that the victims were young children and furthermore, the accused had not used a condom, thus putting them at risk of contracting sexually transmitted diseases and infections.

[11] Another noteworthy factor is the way and manner in which the accused attacked all his three victims. Suffice it to say that the modus operandi of the accused depicts him as nothing but a

serial rapist who should be put away for a long time. Nonetheless, and particularly, in the light of all the foregoing pronouncements pertaining to sentencing of juvenile offenders, I find that there is a need for this Court to exercise caution and to temper justice with mercy.

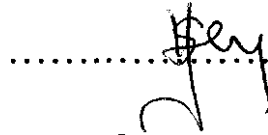
[12] In the circumstances, Siboniso Magagula, you are hereby sentenced as follows:

Count 1: 6 years imprisonment without the option of a fine.

Count 2: 6 years imprisonment without the option of a fine.

Count 3: 6 years imprisonment without the option of a fine.

The said sentences are hereby ordered to run concurrently and they are backdated to 4th June, 2007 which was the date the accused was arrested.

A handwritten signature in black ink, appearing to read 'M.M. Sey', is written over a horizontal dotted line. The signature is cursive and somewhat stylized.

MM. SEY(MRS)

JUDGE OF THE HIGH COURT