IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Case No.09/2011

In the matter between:

SIKHUMBUZO MASINGA **APPELLANT**

v

REX **RESPONDENT**

Neutral citation: Sikhumbuzo Masinga v Rex (09/2011) [2012] SZHC 60 (30 November 2012)

Coram: M.M. RAMODIBEDI C.J., A.M. EBRAHIM JA, S.A. MOORE J.A., DR. S. TWUM J.A., P. LEVINSOHN J.A.

Heard: **1 NOVEMBER 2012**

Delivered: **30 NOVEMBER 2012**

Summary: **Rape committed by appellant when aged 15 years old – Appellant convicted and sentenced to nine years imprisonment as mandated by section 185*bis* of the Criminal Procedure and Evidence Act 67/1938 when he was 21 years old – Appeal against sentence – Prior to hearing of this appeal, Full Court of the High Court ruled that sections 185*bis* (1) and 313 (1) and (2) of the Criminal Procedure and Evidence Act as amended were inconsistent with sections 29 (2) read with sections 18 (2) and 38 (e) of the Constitution and therefore unconstitutional or invalid – Constitutional question having been raised by the appellant, the matter was removed from the roll in May 2012 – Appeal re-enrolled for the sitting of this Court in November 2012 before a panel of five judges – Supreme Court has**

unanimously declared that section 185*bis* (1) and section 313 (1) and (2) of the Criminal Procedure and Evidence Act No. 67/1938 insofar as they apply to juvenile offenders are NOT inconsistent with section 29 (2) read together with section 18 (3) of the Constitution of the Kingdom of Swaziland Act No. 001/2005 or at all – No misdirection by a trial court in fashioning appropriate sentence – Appeal against sentence dismissed – Mandatory minimum sentence of nine years imprisonment for rape with aggravating circumstances affirmed.

MOORE J.A.

INTRODUCTION

[1] When this appeal came before this Court on the 7th May last, it was removed from the roll and an order made that it be re-enrolled for the sitting of this Court in November 2012. That order was duly complied with and the matter is now before a full bench of this Court presided over by the learned Chief Justice. But before dealing with the appeal proper, it may be useful to trace the course of events in chronological sequence leading up to this hearing:

i. On the 16th October 2006, the appellant was indicted for the offence of rape committed when he was a 15 year old juvenile.

ii. In **R v Masinga** [2011] SZHC 6 No. 21/07 he was duly tried in the High Court for that offence and found guilty by M.C.B. Maphalala J. who sentenced him on the 14th February 2011 to the statutory minimum term of 9 years imprisonment as laid

down in section 185*bis* of the Criminal Procedure and Evidence Act 67/1938. The appellant was 21 years old when he was sentenced.

iii. On the 24th February 2011 the appellant noted an appeal against his sentence by Maphalala J on the grounds that:

(a) The Court erred in law by relying on section 185*bis* (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 when sentencing a juvenile offender as same is inconsistent with section 29 (2) read together with section 18 (2) of the Constitution of the Kingdom of Swaziland Act No.1 of 2005 in so far as juvenile justice is concerned.

(b) The sentence imposed is so hard as to induce a sense of shock in so far as it does not intend to subject the appellant to moderate chastisement for the purposes of correction.

iv. On the 29th April 2011 in **Masinga v The Director of Public Prosecutions and Others** [2011] SZHC 58 No. 21/07 The Full Court of the High Court N.J. Hlophe, E.A. Ota, and M.M. Sey JJJ made the following order:

"(a) It is declared that **sections 185*bis* (1), 313 (1)** and **(2)** of the **Criminal Procedure and Evidence Act ('CP & E') 1938 as amended,** in so far as they

apply to a convicted person who was below 18 years of age at the time of commission of the act that constitutes the offence, are inconsistent with **section 29 (2)** read with **sections 18 (2)** and **38 (e),** of the Constitution and therefore unconstitutional or invalid.

(b) The declaration of invalidity made above is with effect from the date of the Applicant's conviction, which is the 14th February 2011.

(c) The declaration of invalidity made in (i) above is suspended until Parliament passes the Child **Protection and Welfare Bill** or for a period of twelve months, whichever comes first.

(d) Pending the passing of the **Child Protection and Welfare Bill, section 185*bis* (1)** of the **CP & E** is to be read as though it provides as follows:

'A person, who at the time of commission of the offence is 18 years of age or above, convicted of rape shall, if the Court finds aggravating circumstances to have been present, be liable to a minimum sentence of nine years without the option of a fine and no sentence or part thereof shall be suspended.'

(e) Pending the passing of the **Child Protection and Welfare Bill,** the words ‘other than one specified in the third schedule’ in **section 313 (1)** and **(2)** of the **CP & E** are severed, in so far as a person was below the age of 18 at the time of commission of the act that constitutes the offence, **Sections 313 (1)** and **(2)** of the **CP & E** are to be read as though they provide as follows:

‘(1) If a person, is convicted before the High Court or any magistrate’s court of any offence, the court may in its discretion postpone for a period not exceeding three years the passing of sentence and release the offender on one or more conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as it may order to be inserted in recognisances to appear at the expiry of such period, and if at the end of such period the offender has observed all the conditions of such recognisances, it may discharge him without passing any sentence.

(2) If a person is convicted before the High Court or any magistrate’s court of any offence, it may pass sentence but order that the operation of the whole or any part of such sentence be suspended

for a period not exceeding three years, which period of suspension, in the absence of any order to the contrary, shall be computed in accordance with subsections (4) and (5) respectively.”

(f) The interim orders in (iv) and (v) above, are with effect from the date of the Applicant’s conviction, to wit, the 14th February, 2011.

(g) Should Parliament fail to pass the **Child Protection and Welfare Bill** within the period of suspension, the declaration of invalidity in paragraph (1) will come into effect unless an order for the extension of same was sought and granted before the expiry of the suspension.

(h) The Applicant is granted costs against the 2nd Respondent.”

iv. On the 31st May 2012 in **Masinga v R** [2012] SZSC 14 No. 9/2011 this Court ordered the removal of the appeal from the roll for May 2012 and its re-enrolment for the current sitting of the court in November 2012.

THE CONSTITUTION OF SWAZILAND

[2] The Constitution of Swaziland is the end product of years of deliberation on the part of all of the major stakeholders and represents the consensus at which the framers eventually arrived. One of the primary objectives was that the Constitution would be reflective of the ethos prevailing in contemporary Swaziland and for the foreseeable future. Deliberate choices were studiously made from among the many alternatives which were carefully considered.

[3] Some of the objectives of the Constitution relevant to the present appeal were expressed in the preamble and spelt out in the body of the Constitution itself. These are:

i. The progressive development of the Swazi society.
ii. The promotion of the fundamental rights and freedoms of ALL citizens.
iii. The courts being the ultimate interpreters of the Constitution.
iv. The promotion of the happiness and welfare of ALL people.

[4] The rights of the child have been enshrined in section 29 of the Constitution. Section 29 (2) declares that: “A child shall not be subjected to **abuse** or torture or other cruel inhuman and degrading treatment or punishment

subject to lawful and moderate chastisement for the purposes of correction." The constitutional provision which allows for lawful and moderate chastisement does not justify the mistreatment of children. It is to be carefully noted that the Constitution sanctions only such chastisement as falls within the ambit of section 29 (2). Thus, to be constitutional, chastisement of a child must be;

i. Lawful, and
ii. Moderate, and
iii. For purposes of correction.

[5] All three of the above elements must be present if chastisement is to satisfy the constitutional provisions. The sub-section gives no details as to how chastisement must be carried out within its ambit. However, the Constitution clearly does not allow for lawless chastisement in whatever form, or for immoderate chastisement, whether arising from its nature or degree, or which inflicts unacceptable injuries upon the child, or with an unsuitable instrument, or beyond the capacity of the child to endure the chastisement meted out. Equally, chastisement must not be inflicted for purposes other than lawful correction such as the vengeful and intemperate gratification of anger or resentment towards the child.

[6] The suggestion of the appellant that lawful and moderate chastisement for the purpose of correction is an appropriate penalty for rape with aggravating circumstances must be emphatically rejected.

[7] Paragraphs [21] – [22] describe fully the offence of rape with aggravating circumstances and the attendant suffering which it unleashes upon its victims. It is for these reasons that both the framers of the Constitution and the legislators of this Kingdom have provided both in the Constitution itself, and in statutes, provisions which ensure that citizens of this Kingdom enjoy the plenitude of rights spelt out in the Constitution: as well as the assurance that all persons – whether adults or children – will suffer the sanctions imposed by law for the violation of all rights enshrined in the Constitution, including the rights of the child.

[8] It is of note that **abuse** is the first of the atrocities proscribed by section 29 (2) of the Constitution. All definitions of the word abuse list sexual abuse as a particularly pernicious form of abuse. If therefore, the protections afforded by the Constitution are to be meaningful and effective, they must of necessity be buttressed by an appropriate regime of sanctions designed to

protect children from sexual abuse as well as to punish in an appropriate manner those persons who have violated the rights of the child through sexual abuse. As will emerge in the course of this judgment, the mandatory minimum sentence of nine years imprisonment without the option of a fine, no part of which may be suspended, is not only a measured and rational punishment for a juvenile who has committed the unquestionably serious offence of rape with aggravating circumstances, but it is also not unconstitutional when viewed in comparison with penalties which have been pronounced by superior courts as falling within the ambit of constitutionality in sister common law and commonwealth jurisdictions where the social, economic and statutory environment mirror those of the Kingdom of Swaziland.

THE APPEAL AGAINST SENTENCE

[9] The appellant's heads of argument refer, disingenuously, to the appellant as a child as distinct from an adult. He submits that a child is a person below the age of 18 years. This half truth, like all deliberate half truths, is decidedly misleading. It relies for its validity upon the dictum of the full court of the High Court in **Masinga v Director of Public Prosecutions** where that court, citing the definition in Article 1 of the Convention of the

Rights of the Child as "a human being below the age of 18 years", transposes that definition to the meaning of the word "child" as it appears in section 29 (2) of the Constitution although that court correctly states that the Convention of the Rights of the child has "not yet been enacted locally as an Act of Parliament, and is not part of the laws of the Kingdom".

[10] The appellant's submission that the word child must be interpreted to include without more, ALL persons below the age of 18 years ignores the reality that offence creating laws of mature democratic common law jurisdictions have segmented the totality of childhood into broad bands of tender years, mid childhood or the juvenile state, and late childhood. These sub-divisions reflect in a common sense way, the reality that as a child ages and matures, he or she develops an increasing awareness of the difference between right and wrong and is, in the eyes of the law, charged with a growing responsibility for his or her actions as he or she advances towards full adulthood. Thus, the laws of Swaziland recognize the status of juvenile, and of juvenile adult, as sub-divisions of the status of childhood.

[11] Evidently cognizant of the above truth, the full court of the High Court recognized that courts had a duty to consider both the child's legal

responsibility as well as "the child's moral culpability in imposing sentence." Clearly, the more mature child - the juvenile or the juvenile adult - would bear a greater moral, or legal responsibility than a child of tender years. A court dealing with a child offender who is unusually wicked or precocious will be justified in taking those factors into account in fashioning an appropriate sentence within the prevailing statutory regime and sentencing norms.

[12] Be that as it may, the facts and circumstances of the instant case call for a determination of the question whether the relevant date for consideration by a sentencing court is the date of the commission of the offence or the date of sentence. That question was authoritatively answered by Ramodibedi J.A. in the Court of Appeal of Lesotho in **Mohale and Another v R** LAC (2005 – 2006) 196 at page 205 A - G in this way:

> "Although the primary rule in the construction of statutes is that the language of the Legislature should be given its ordinary meaning, this rule is itself subject to exceptions. One such exception is that, where the language of the Legislature leads to absurdity so glaring that it could never have been contemplated by the Legislature, then the court is justified in departing from such meaning. See **R v Venter** 1907 TS 910; **Shenker v The Master and Another** 1936 AD 136. I am

therefore satisfied that a construction that accords with common sense is called for in this matter.

It follows from these considerations that the correct interpretation of s 26 (1) of the Children's Act, in my judgment, is that if at the date of sentence the accused has attained the age of 18 years, it is within the court's discretion to impose whatever sentence it deems appropriate in the circumstances. Put differently, the relevant age for consideration for the purposes of s 26 (1) is the age on the date of sentence.

It remains for me to say that A2's youthfulness is not definitive of the matter in the circumstances of this case. It must be considered in conjunction with other factors. Besides the serious nature of the offence committed, it will be noted that the trial court found as a fact that appellants lacked remorse. Once again, this finding is not challenged on appeal. What is more, there is evidence that after brutally murdering the deceased, A2 was seen casually wiping off blood from his knife on the grass. In my view, if evidence of extreme callousness be required, this is it. It is revolting behavior which needs to be corrected by imposing an appropriate sentence as reflected hereunder."

[13] In the Botswana case of **Oodira v The State** [2006] 1 BLR 225 (CA) the principle articulated by Ramodibedi was endorsed and applied by Tebbutt J.P. with the concurrence of Akiwumi and Grosskoff JJA. In Botswana, a

juvenile is defined in the Children's Act as "a person who has attained the age of 14 years of age". The judgment makes clear that a juvenile is triable in a juvenile court – evidently for relatively minor offences – where, upon conviction, he is dealt with by the adoption of reformative and rehabilitative measures. **S v Molaudi & Others** 1988 BLR 214 (CA) confirms that "there is not provision in the section entitling the court to impose a period of imprisonment". Where, however, the juvenile is tried in the High Court, that court can impose a sentence of imprisonment. The Botswana Court of Appeal recognized the power of the Attorney General to send a case to the High Court for trial where he considered that this was required by the serious nature and circumstances of the case.

[14] The deciding factors in determining whether a juvenile is tried in a juvenile court where the atmosphere and procedures, as well as the sentencing regime, are all designed to spare the juvenile the rigors of adult courts, are the age of the juvenile, his antecedents if any, and most importantly, the gravity of the offence with which he is charged. It is hardly surprising therefore that when a juvenile is accused of committing serious offences such as murder, rape, and aggravated woundings or robberies, which, by their very nature are reprehensible offences carrying long terms of

imprisonment - in many cases without the option of a fine - that the juvenile is tried in the high court where he is liable to face imprisonment, or even execution in some states, upon conviction.

[15] Echoing the sentiments expressed by Ramodibedi J.A. in **Mohale** above, Tebbutt J.P. declared that "I am of the view that the crucial determination is the age of a young person at the date of his sentence rather than the date of the commission of the crime". Based upon these highly persuasive dicta of the highest courts in Lesotho and Botswana, and upon the undoubtedly sound principles which motivated those courts, M.C.B. Maphalala J was unquestionably correct when he sentenced the then adult appellant to the minimum term of imprisonment mandated by law. In doing so, he took into account the fact that the appellant was aged fifteen years – and thus a juvenile - when he committed the offence and that, through no fault of his own, he had suffered the anxiety of having his case pending for several years. The judge's benign sentence of the statutory minimum of nine years imprisonment for the offence of rape with aggravating circumstances cannot be faulted. It follows therefore that there is no merit in this ground of appeal which must accordingly fail.

MANDATORY MINIMUM SENTENCES

[16] In the Botswana case of **S v Matlho** [2008] BWCA 36 (1 January 2008) the issue in the appeal was whether section 132 (5) of the Penal Code (CAP 8: 01) violated the Constitution of Botswana and was consequently invalid. Section 142 (5) provides that:

> "Any person convicted and sentenced for the offence of rape shall not have the sentence imposed run concurrently with any other sentence, whether the other sentence be for the offence of rape or any other offences."

Tebbutt J.P. then cited other examples of mandatory minimum sentences ordained by the Botswana Legislature. These are:

> "Section 142 (1) provides for a mandatory minimum sentence of 10 years imprisonment for a conviction on a charge of rape. Where the act of rape is attended by violence resulting in injury, section142 (2) provides for a mandatory minimum sentence of 15 years imprisonment. Section 142 (4) provides that any person convicted under section 142 (1) or 142 (2), who is tested positive for HIV (he is obliged to undergo such a test in terms of Section 142 (3)), the minimum mandatory sentence that must be imposed is 15 years imprisonment, if the person was unaware of being HIV positive, and 20 years imprisonment where it is proved on a balance of probabilities

that he was so aware. In all instances, the maximum sentence is one of life imprisonment.

Certain minimum mandatory sentences are also prescribed for convictions on other offences. For example, section 292 (2) of the Penal Code provides for a mandatory minimum sentence for armed robbery of 10 years imprisonment and there are also minimum mandatory sentences for offences under the Motor Vehicle Theft Act (Cap.09:04) and under the Stock Theft Act (Cap. 09:01)."

[17] A comprehensive, extensive, and detailed survey and a critical analysis of the approach of courts in other democratic countries to legislative enactments prescribing minimum mandatory sentences considering whether it was apposite for such an approach also to be applicable to Botswana was undertaken by the Botswana Court of Appeal in the case of **Moatshe v The State; Motshwari and Another v The State** 2004 1BLR (1) (CA) which were heard together.

[18] Tebbutt J.P. writing for the full bench of the Botswana Court of Appeal made reference to the Botswana case of **Moatshe v The State** where one of the issues for determination was whether the mandatory minimum sentences were valid or whether they were in contravention of the Constitution and, in particular, section 95 thereof. This is how the unanimous full bench of the

Botswana Court of Appeal - which included Moore and Twum JJA of this Court – resolved that issue:

> "Referring then to examples collected by Ackermann, J in the South African Constitutional Court in **S v Dodo** [2001] ZACC 16; 2001 (3) SA 382 CC of the approach in the United States of America, Canada, Australia, New Zealand, India, Tanzania and Kenya, the Court concluded that the imposition of mandatory minimum sentences by the legislature was a legitimate function of the legislature in a modern democracy, and had been recognized as such in other liberal democracies. This Court then held that *the enactment of mandatory minimum sentences was justifiable where the public interest required it, such as to curb the incidence of increasingly prevalent crimes. It accordingly found that in Botswana, too, the enactment of mandatory minimum sentences was not unconstitutional."*

[19] By parity of reasoning, this Court holds that the minimum sentence of nine years imprisonment without the option of a fine, where no sentence or part thereof shall be suspended as prescribed in section 185*bis* (1) of the Criminal Procedure and Evidence Act is not inconsistent with sections 29 (2) read with sections 18 (2) and 38 (e) of the Constitution, or at all.

[20] In **Oodira v The State** (supra) the appellant, who was under the age of 18 years when he committed the serious offence of armed robbery, was sentenced to 10 years imprisonment by the principal magistrate, in addition to lesser sentences ranging from one year to four years imprisonment on other counts, to run concurrently with the ten years on the armed robbery count. Upon appeal, the order of the magistrate imposing strokes was set aside: but the Court of Appeal affirmed his sentence of 10 years imprisonment upon the robbery charge.

OFFENCES OF RAPE

[21] Judges in every common law jurisdiction in the world have eloquently, emphatically an unequivocally condemned the perpetrators of rape in the strongest possible terms. In **R v Magagula** [2010] SZSC 46 swazilii.org the frequency and seriousness of the horror, the atrocity, and the monstrosity of rape were derided by me with the concurrence of Foxcroft and Farlam JJA in the following terms:

> "[13] It is clear from the above section that the legislature, even in 1986, when section 185*bis* was added to Act 67 of 1938, regarded aggravated rape as sufficiently serious as to attract a minimum sentence of nine years imprisonment. As can be seen in Table A set

out in paragraph 16 infra, largely because of the distressing increase in the frequency of rape and related offences, courts in this Kingdom have resorted to sentences of expanding severity in their unflagging attempts to curb these attacks upon women, and to protect them from the baleful attention of sexual predators – especially pedophiles such as the appellant in this case.

[14] Rape is perhaps the ultimate invasion of human privacy. I use the adjective human because modern legislatures have expanded the definition of rape to include the unlawful penetration of any bodily orifice of a victim of either gender by any part of the body of the perpetrator or with an object or instrument for sexual gratification. Rape has had an inglorious history stemming from the fabled rape of the Sabine women to today's horrific and wilfully genocidal impregnation of women with the exterminating intent of extirpating or debasing their ethnic, national or religious identities.

[15] Succeeding generations of judges in every jurisdiction, including the judges of this Kingdom, have inveighed against the barbarity of rape. They have condemned in the strongest terms its brutality and savagery, its affront to the dignity and worth of its victims, its dehumanizing reduction of women to the status of mere objects for the unrequited gratification of the basest sexual passions of rampant males, and the long term havoc which the trauma of rape is capable of wreaking upon the emotional and psychological health and well-being of the victims of ravishment. It is for these reasons, and because of the disturbing frequency of the abominable offence of rape

> in this Kingdom, that persons convicted of this heinous crime must expect to receive condign sentences from trial courts."

[22] In **S v Matlho** (supra) Tebbutt J.P expressed his abhorrence of the pestilential offence of rape in this way:

> "It is notorious that the incidence of rape has over the years increased alarmingly in Botswana. Reports of incidents of rape often, sadly, involving young women and even infant children appear regularly in the press and those whose business lies in the courts, including the members of this Bench, know from the number of cases coming before them, of the prevalence of the offence. It has been said again and again that rape is a heinous offence. By its very nature, it involves a measure of violence by the perpetrator on the victim. Sometimes that violence can be severe, resulting in injuries to the victim. In some cases the injuries can be extensive. In all cases, the offence is a violation of the personality of the victim. It is an invasion of her dignity and of the sanctity of her body. The offence itself is inevitably traumatic to the victim and can have drastic resultant consequences often giving rise to psychotic changes in the victim such as depression, loss of confidence and withdrawal from society. The effects can be even more disastrous for, with the prevalence of HIV and AIDS, victims can be infected with these life-threatening diseases or other sexually transmitted ones.

The public of Botswana cannot but be disturbed by the prevalence of rape and other crimes of a sexual nature, all of which offend against the morality of the society of this country. Indeed, they clearly have been and continue to be. The public has democratically elected its representatives to the legislature. The legislature is the repository of the knowledge of what is occurring in the country it governs. As this Court said in **Moatshe** (at 9E-F):

'It is aware of (a) the prevalence of certain offences; of (b) the increase in the prevalence of those offences; (c) the dismay of the law-abiding citizens in regard to (a) and (b); of (d) the abhorrence of its citizens of the result of (a) and (b); and of (e) the insistence on the part of society that appropriate deterrent steps be taken to curb the incidence of such offences and their increase and to protect the interests and rights of its law-abiding citizens. It is aware of the necessity to take those steps so as to prevent the structure of its society from being undermined by those who commit such offences and to ensure that law-abiding citizens do not take the law into their own hands – a situation that can result in anarchy.'

There is no doubt that it was because of the prevalence of rape cases and the increase in the number of those offences that the legislature in 1998 enacted the amendments to the Penal Code which then put on the Statute Book the mandatory minimum sentence provisions contained in Section 142. They are severe but they were obviously designed to attempt to curb the increasing prevalence of the offences and in particular, to deter those suffering from the HIV virus from

doing so. It is the duty of the courts to see that the purpose of the legislature is implemented. It is appropriate to refer again, as the Court did in **Moatshe**, to what was said by Lord Bingham in the Privy Council in **Patrick Reyes v The Queen** (2002) AC 235 at para 25:

'In a modern liberal democracy it is ordinarily the task of the democratically elected legislature to decide what conduct should be treated as criminal, so as to attract penal consequences; and to decide what kind of measure of punishment such conduct should attract or be liable to attract. The prevention of crime, often very serious crime, is a matter of acute concern in many countries around the world; and prescribing the bounds of punishment is an important task of those elected to represent the people. The ordinary task of the courts is to give full and fair effect to the penal laws which the legislature has enacted. This is sometimes described as deference shown by the courts to the will of the democratically elected legislature. But it is perhaps more aptly described as the basic constitutional duty of the courts which, in relation to enacted law, is to interpret and apply it.'

The Courts must, therefore, not shrink from imposing the prescribed sentences. As was pointed out in **Moatshe** the Penal code in Section 292 (1) envisaged a maximum sentence of 20 years for robbery. That sentence has never occasioned any disapproval from the general public of Botswana, nor have any of the mandatory minimum sentences for motor vehicle or stock theft received any public disapproval. Moreover, the courts of Botswana have over years

imposed harsh sentences on violent offenders where such sentences have been warranted. It is those norms to which this Court can have regard in objectively exercising its value judgment in deciding whether or not to apply the provisions of section 300 (2) of the Criminal Procedure and Evidence Act."

The above sentiments apply with equal force and validity *mutatis mutandis* to the Kingdom of Swaziland.

THE DETENTION OF JUVENILES

[23] As has already been pointed out in paragraph [4] above, there are cases where juveniles have exhibited a marked propensity for deviant behavior and have been convicted of serious crimes warranting their separation from society for the protection of society, and also for the purpose of affording the offender the benefit of detention in a structured and institutional environment. In **Mohale and Another v R** (supra) Ramodibedi JP expressed the undesirability, in the Lesotho context, of juveniles being detained in adult prisons. This approach was followed with approval in the **Oodira v S** case (supra).

[24] The Swaziland legislature, equally conscious of the undesirability of confining convicted juveniles in adult prisons, has established both a statutory regime as well as the physical amenities for the detention of deviant juveniles in institutions purpose-built and specially designed for the corrective management of juvenile offenders. Under the Reformatories Act No. 82/1921:

> "juvenile" includes any person under the age of sixteen years;
> "juvenile adult" includes any person who is between sixteen and twenty-one years.

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[25] It follows that the appellant was a juvenile within the meaning of Reformatories Act when he committed the admittedly serious offence of rape with aggravating circumstances. In **Masinga v Rex** [2011] SZHC swazilii.org, this Court discussed the options open to the judge who had convicted a juvenile for an offence which was sufficiently serious to warrant imprisonment, and who was still a juvenile at the time of sentence. Paragraphs [8] – [11] read:

> "[8] Under the prevailing statutory regime, a judge could have explored the possibility of ordering the appellant to be detained at a

juvenile or juvenile adult reformatory or an industrial school subject to the Reformatories Act No. 82 of 1921. The court *a quo* did not however make any reference to section 64 (2) (d) of the Prison Act 40/1964 which allows for the classification of prisons and prisoners into categories and their separation accordingly. That sub-section provided the basis for the classification of Malkerns Juvenile Industrial School, date of commencement: 6th June, 1975, and its declaration as a prison under Legal Notice No. 55 of 1972 where persons between the ages of 13 and 21 years may be detained.

[9] The Reformatories Act 82/1921 is entitled "An Act to enable the courts to punish juvenile adult offenders by ordering their detention in reformatories, to provide for the detention of such persons and for matters incidental thereto." Section 2 is the interpretation section. It defines "juvenile" as meaning any person under the age of sixteen years, and any person under the age of eighteen years whose classification as a juvenile adult has been expressly sanctioned by the Minister." Subsection (1) of Section 3 provides that:

"if any juvenile is convicted of an offence punishable with imprisonment, the court may order him to be sent to a juvenile reformatory to be detained for not less than two years and not more than five years, or in the alternative may sentence him to imprisonment."

[10] The classification of Malkerns Juvenile Industrial School

(under section 64 (2) (a) of the Act)
Date of commencement: 6th June, 1975

reads as follows:

"Whereas the Malkerns Juvenile Industrial School has been duly declared a prison under Legal Notice No. 55 of 1972, the Minister for Justice in exercise of the powers conferred on him by the above-named Act is pleased -

(a) to direct that the said school shall rank as a juvenile reformatory and as a juvenile adult reformatory for the purposes of the Reformatories Act No. 82 of 1921 at which persons between the ages of 13 and 21 years may be detained:

Provided that such period of detention shall be for not less than two years and not more than five years:

And provided that in the case of a juvenile (as opposed to a juvenile adult) as defined in the Reformatories Act No. 82 of 1921 the period of detention shall expire not later than the date on which he attains the age of eighteen years:

And provided further that no person who has previously served any period of imprisonment may be detained at such school.

(b) to repeal Legal Notice No. 10 of 1970."

[26] It would appear that if the provisions of the Reformatories Act, are read together with those relating to the Malkerns Juvenile Industrial School, it would have been open to the trial judge to have ordered that the appellant be detained at the Industrial School until he attained the age of eighteen years, and that the remainder of his nine year sentence be served at a prison as defined in section 2 of the Prisons Act, 1964 which means:

> "a place declared to be a prison under this Act or deemed by it to be a prison and shall include –
>
> (a) any place or premises (including an institution) to which prisoners may be sent from a prison for the purpose of imprisonment, detention, training, medical attention or otherwise; and
>
> (b) all offices and quarters used in connection with the prison."

[27] For the sake of clarity, it must be pointed out that M.C.B Maphalala J was, strictly speaking, not required to consider the options discussed above because, by the time the offender came up for sentence, he was already 21 years of age, and beyond the reach of the reformative regime specifically designed for the detention of juveniles. The sentences of nine years

imprisonment imposed by him falls towards the lower end of the range which lies between eleven and eighteen years adjustable upwards or downwards laid down by this Court in **R v Magagula** [2010] SZSC 46 Swazilii.org.

[28] That learned judge was therefore correct to deal with the convicted rapist as an adult offender and to sentence him to prison.

CONCLUSION

[29] The challenge to the constitutionality of the provisions discussed in this judgment has come at an inopportune moment when this Kingdom is witnessing an alarming profusion of offenses of rape – and more disturbingly the rape of young children – which have become rampant over the past several years and which show no discernible sign of abating. The situation is further compounded by the notorious fact that offences of rape which reach the Supreme Court represent only a miniscule proportion of the rapes which actually take place.

[30] The judgment of the full court of the High Court showed commendable solicitude for the adult appellant who had committed the serious offence of

repeated rapes when he was a 15 year old juvenile. It will appear however, that the attention of that court was hardly directed, if at all, to the rights of the 12 year old girl – an even younger juvenile – who had been repeatedly violated by the appellant.

[31] Far too often, emphasis is placed upon constitutional rights only, and not upon the corresponding constitutional duties and obligations concomitant to such rights. The rights of a 15 year old juvenile offender who rapes a 12 year old juvenile child, must be balanced against the right of that child to her joyous laughter and play, as distinct from the agonies of rape, to say nothing of her constitutional right to freedom from sexual abuse.

[32] The public at large is not an uninterested bystander in all this. There has been mounting public disquiet about the rapes perpetrated by the notorious Mr. David Simelane who was prosecuted to conviction, and by the terrible and frightening Scarface who, having terrorized the public for several months on end with a rampage of brutal rapes, eventually met his end while attempting to evade apprehension and prosecution.

[33] This noble Swazi society is entitled to watch its children develop in an atmosphere of calm and security, through their adolescence, and into their adulthood without them bearing the scars caused by the trauma of rape.

[34] Balancing all of the rights, duties, obligations, and interests concerned, this Court entertains no doubt but that the moderate minimum penalty provided for in respect of the offence of rape with aggravating circumstances is no more than is reasonably necessary in a democratic society for the protection of the victims of rape and of the public in general.

ORDER

i. The order of the Full Court of the High Court made in **Masinga v The Director of Public Prosecutions and Others** No. 21/07; [2011] SZSC58 swazilii.org at pages 92 – 95, paragraph 107 (i) – (viii) generated by computer is hereby set aside.

ii. Section 185*bis* (1) of the Criminal Procedure and Evidence Act No. 67/1938 when invoked in sentencing a juvenile offender is not inconsistent with section 29 (2) read together with section 18 (2) of the Constitution of the Kingdom of Swaziland Act No. 001 of 2005 or at all.

iii. The appeal against sentence is dismissed.

iv. The order of the court ***a quo*** sentencing the appellant to nine years imprisonment is affirmed.

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S.A. MOORE
JUSTICE OF APPEAL

I agree

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M.M. RAMODIBEDI
JUSTICE OF APPEAL

I agree

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A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

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DR. S. TWUM
JUSTICE OF APPEAL

I agree

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P. LEVINSOHN
JUSTICE OF APPEAL

For the Appellant : Mr. M.S. Dlamini

For the Crown : Mr. S. Fakudze