IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No: 17/10

In the matter between

MVIMBI MDLULI **APPELLANT**

And

REX **RESPONDENT**

Neutral citation: *Mvimbi Mdluli v Rex (17/10*) [2014] SZHC 27 (12 March 2014)

Coram: **M. S. SIMELANE, J**

Heard: **5 March 2014**

Delivered: **12 March 2014**

Summary: **Criminal procedure: appeal against both conviction and sentence of the Appellant for the offences of indecent assault and rape respectively; no material misdirection found; appeal dismissed.**

Judgment

SIMELANE J

BACKGROUND

[1] The Appellant who was unrepresented at trial but whose constitutional rights were fully explained to him was arraigned on two counts of the offence of Rape before the Manzini Magistrates Court per His Worship D. Khumalo Principal Magistrate. On the first count it is alleged that the Appellant upon or about the month of February 2005 to October 2008 and at or near Ngwazini area in the Manzini District the Appellant did unlawfully and intentionally have sexual intercourse with Nokulunga Mdluli a female minor aged 9 years without her consent.

[2] Similarly, on the second count it is alleged that the Appellant upon or about September 2008 to October 2008 and at or near Ngwazini area in the Manzini District did wrongfully, unlawfully and intentionally have sexual intercourse with Nokukhanya Mdluli a female minor aged 8 years without her consent.

[3] It is pertinent to mention that the indictment further gave notice that both counts of Rape were attended by aggravating circumstances in terms of section 185 *bis* (1) of the Criminal Procedure and Evidence Act 67 of 1938, as amended (CP&E), in the following respects:

> **"(1) Both victims were of tender ages 9 years (count 1) and 8 years (count 2).**
>
> **(2) The Appellant did not use any contraceptive measures when he committed the offence thus exposing the Complainants to the risk of contracting sexually transmitted diseases.**
>
> **(3) The Appellant is an uncle to the Complainants, thus being a relative he has broken the trust that a child has to have to a father."**

[4] When the Appellant was arraigned for trial, he pleaded not guilty to both counts. A full blown trial followed. Suffice it to say that at the end of the trial, he was found guilty of Indecent Assault on the first count and guilty of Rape on the second count. He was sentenced to five (5) years imprisonment without the option of a fine on the first count and sentenced to ten (10) years imprisonment without the option of a fine on the second count. The sentences were ordered to run concurrently and were backdated to the Appellant's date of arrest and incarceration.

THE APPEAL

[5] Discontented with his conviction and sentence, the Appellant has now approached this Court for redress by way of an appeal. In his grounds of appeal the Appellant challenged both his conviction and the sentence as follows:-

> **"1. In count one, the doctor's report puts clearly that there was no evidence of penetration (sexual abuse). The Prosecutor changes (sic) the charge to indecent assault without my concern (sic). I was sentenced to 5 years without an option of a fine.**
>
> **2. In count two, there was too much fabrication during the Court proceedings. The evidence of the witnesses for the Crown was unclear and uncredible. There is no truth in their submission; I was disappointed when the Crown submits (sic) that it has proved its case beyond any reasonable doubt which the Court (sic) satisfied that the Crown has succeeded to prove its case against me. Found guilty as charge (sic) and sentenced to ten years. "**

AD CONVICTION

[6] The question here is did the trial magistrate commit any material misdirection that resulted in a miscarriage of justice? Having carefully considered the evidence I do not see any misdirection on the part of the trial Court. The evidence led in the Court *a quo* by the Crown established the identity of the Appellant beyond reasonable doubt. The Appellant was very much known to the Complainants since he is their uncle. He was resident near their homestead. The offence was

committed during the day. With respect to count 2 the offence was committed repeatedly. There was therefore no question of a mistaken identity.

[7] On the question of sexual intercourse the evidence in the Court *a quo* shows that the Appellant called the Complainant (PW1) to his house. PW 1 told the Court that on the first incident she was coming from school proceeding to her parental homestead with Nokukhanya Mdluli who is the Complainant in the second Count and Thabani Seyama when the appellant called her to the main homestead. She told the Court that she was sent by the Appellant to get a dish and the Appellant followed her to the kitchen and eventually took the dish.

[8] The Appellant then told the Complainant to go to the bedroom, she complied and the appellant followed her. The evidence is that he instructed the Complainant to undress and to lie on his bed and the Complainant did as directed. It is further PW1's evidence that the Appellant thereafter removed his trousers and inserted his penis into her vagina. He moved his body whilst on top of the Complainant and did not stop even when Complainant told him that he was hurting her.

[9] On the second day, the Appellant again called the Complainant to his house. The Appellant attempted to sexually assault her but she cried out. Thereafter, the Appellant stopped the process and gave her E5.00. The Complainant reported the ordeal to Thabani (PW2) and her father was eventually told. She was thereafter taken to the hospital for medical examination.

[10] PW 2 who is aged fourteen (14) years corroborated PW1's evidence that one Sunday PW 1 was called by the Appellant to his house and the Appellant closed the door upon PW 1's entry into the house. He also told the Court that he heard PW 1 crying in the house on two occasions before she came out carrying E5.00. He told the Court that PW 1 reported to him that the Appellant sexually assaulted her. When the Appellant was cross-examined he made a bare denial of the Crown's evidence that he closed the door and that PW 1 cried out.

[11] On count 2, PW 3 the Complainant Nokukhanya Mdluli told the Court that whilst coming from fetching water she was called by the Appellant who sent her to go and collect salt from his house. Her evidence is that she proceeded to Appellant's house and that as she entered the house the Appellant also entered and closed the door. The Appellant then took her to his bedroom placed her on his bed after removing her panty. The Appellant removed his trouser and underwear. He thereafter inserted his penis into her vagina. It is this witness's evidence that the Appellant made some movements whilst on top of her. After the Appellant had finished what he was doing he gave the Complainant E5.00 and told her never to report the matter to anyone failing which he would kill her.

[12] This witness further testified that the Appellant again sexually assaulted her in his house. He gave the Complainant E20.00 on the second occasion. According to her some blood came out of her vagina as a result of the sexual assault. It is the Complainant's

evidence that she reported the incident to Thabani (PW 2), her mother and her father. She was then taken to the hospital where she was examined by a doctor.

[13] PW4, Nokukhanya's mother told the Court that PW3 reported to her how she was raped by the Accused on two different occasions. She confirmed that after reporting the matter to the police, PW3 was taken to the doctor for medical examination

[14] Still on the question of sexual intercourse, the two medical reports came out with two different findings. The medical report in respect of PW3 in count 2 revealed that the hymen had been torn and the doctor's opinion was that sexual penetration had taken place. Regarding PW1, as per count 1 the medical report does not show physical sexual penetration. The evidence of PW 1 is however echoed by PW2, that PW 1 was indeed called by the Appellant into his house. PW2 confirmed that the Appellant closed the door after PW1 had entered the house. PW2 confirmed that he heard PW 1 crying whilst inside the house. The Appellant did not give any explanation why PW1 cried whilst inside his house with him and why he had to close the door.

[15] The Appellant in his defence stated that the Complainants were schooled but he did not give any reason why he would say they were schooled and who schooled them. He did not tell the Court why the children would fabricate such serious allegations against him.

[16] Having looked at the defence that the Appellant adduced in the Court *a quo,* I am of the opinion that the Court *a quo* was correct to have rejected it. As observed by the Court *a quo* all the Appellant did was to admit that he gave the Complainants some money and did not give reasons for giving them the money. This goes to confirm that he gave the children the money in an endeavour to silence them from reporting the matter to their parents. He dismally failed to dispute the evidence of the Complainants.

[17] Furthermore, the question of lack of consent was also proved by the Crown beyond reasonable doubt. PW 4 testified about the age of PW 3. She told the Court that PW 3 was aged 8 years old at the time the offence was committed. She is a competent witness in law to testify to the age of PW 3 being her biological mother.

[18] The learned editors **Hoffman and Zeffert in The South African Law of Evidence (1990) (4th ed) page 149**, state:

> **"Proof of age may be furnished by a birth certificate or by the evidence of the mother or someone else who was present at the birth."**

See **Rex V Themba Magagula Criminal Trial No: 368/2009 para [33]-[34].** I thus accept the evidence of PW 4 on the age of PW 3.

[19] The question of the age of PW1 was correctly gathered by the Court *a quo* from the indictment which stated her age as 9 years as well as the trial magistrate's observations of the Complainant's stature during the trial as reflected in the challenged decision. The age of PW 1 was not challenged by the Accused. It is proved therefore that the Complainants PW 1 and PW 3 were aged nine (9) and eight (8) years respectively when the offences were committed. They were therefore incapable of consenting to sexual intercourse because the Roman Dutch Common Law which is the law applicable in Swaziland states that a child below twelve (12) years is incapable of consenting to sexual intercourse and even if she consents sexual intercourse with her is rape. This position of the law was stated in the case of **R V Z 1960 (1) SA 739 at 742 D-E** as follows:-

> **"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."**

[20] Inspite of the fact of the elements of the offence of rape clearly shown by the Complainants in both counts, the Court *a quo* however found the Appellant guilty of indecent assault in count 1and convicted him for that offence. His reason was that the medical certificate showed no evidence of penetration. I will not trouble myself on whether the Court *a quo* was right or wrong on its findings as there is no cross-appeal by the Crown on this issue, except to note that the Court could in terms of Section 185 (1) of the CP&E return a competent verdict

for the crime of indecent assault as an alternative for the offence of rape. To avoid any doubts Section 185 (1) of the CP&E provides as follows:-

> **"Any person charged with rape may be found guilty of assault with intent to commit rape; or of indecent assault; or of assault with intent to do grievous bodily harm; or of assault or of the statutory offence of unlawful carnal knowledge of, or committing any immoral or indecent acts with, a girl of or under the specified age; or of the statutory offence of having or attempting to have unlawful carnal connection with a female idiot or imbecile under circumstances which do not amount to rape, or an attempt to commit rape, or of committing or attempting to commit any immoral or indecent act with such female, if such be the facts proved." See Fana Nathi Dlamini V Rex Criminal Appeal No. 99/2011 para [8].**

[21] It is thus clear from the above that it was the Court that made the finding of guilty on indecent assault based on the evidence adduced before Court not that it was the Prosecutor that changed the charge to indecent assault.

[22] From the totality of the foregoing it is my opinion that the trial magistrate did not commit any misdirection on the convictions in Counts 1 and 2 respectively. The Appellant was properly convicted. The appeal against his conviction on both Counts fails.

AD SENTENCE

[23] On the issue of sentence it is the established position of our law that an Appeal Court should be slow in interfering with the sentencing discretion of the trial Court except where there is a material misdirection or irregularity resulting in the miscarriage of justice or where the Appellate Court would have imposed a different sentence from that imposed by the trial Court or where the sentence imposed is so severe that it induces a sense of shock. This would only be where the Court views the sentence to be so disappropriate to the facts and circumstances of the case as to be unreasonable. The above shows that the sentencing discretion is to be exercised judicially and judiciously and upon the facts and circumstances of the case. To achieve this the Court requires the sentencer to consider the triad of circumstances consisting of the offence, the offender and the interests of society.

[24] The question here is: from the reasons given by the trial magistrate when imposing sentence can this Court say that he judicially and judiciously exercised his sentencing discretion.?

[25] From the assailed judgment this is how the Court *a quo* approached the issue of sentence:-

"In passing sentence the Court takes into account that the Accused is a first offender. He has a child to maintain and he is old.

The Court also considers the seriousness of the offences and their prevalence in the society. The Accused person sexually assaulted very small children. He is related to them and they viewed him as a parent.

The Court considers its responsibility to strike a balance between the interest of the Accused person and those of the society."

[26] From the reasons for the sentence imposed, it is clear that the Court *a quo* considered the personal circumstances of the Appellant, the seriousness of the offences and the interests of the society before he imposed the sentence of five (5) years imprisonment for Indecent Assault in count 1 and ten (10) years imprisonment for rape in count 2.

[27] I do not think that the sentence of five (5) years imprisonment for the offence of Indecent Assault in the circumstances of this case is severe as the Appellant is related to the Complainant. The Complainant was a young girl of nine (9) year when this offence was committed. In view of the prevalence of such offences in our society it is my considered view that the learned principal Magistrate's sentence cannot be faulted.

[28] Similarly, the Appeal against the sentence of 10 years imprisonment imposed in the second count of rape also fails for the same reasons, save to stress that the sentencing policy of Courts in Swaziland on aggravated rape, especially the rape of minors is no longer in doubt. The bench mark authority is the case of **Mgubane Magagula Vs Rex Criminal Appeal No. 32/2010,** wherein **Moore JA** prescribed the appropriate range of sentence which is 11 – 18 years, for this offence.

[29] Speaking about the same policy, **Ramodibedi JA** (as he then was) in the case of **Sam Du Pont Vs Rex Criminal Appeal No. 4/2008 paragraph 15** made the following apposite remarks:-

> **"[15] It remains for me to emphasise 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 twenty (20) years imprisonment for the rape of a nine (9) year old girl. Sexual offenders against young children have therefore, sufficiently been warned."**

[30] It is clear therefore that the sentence of ten (10) years in count 2 is justified.

CONCLUSION

[31] For the aforegoing stated reasons it follows that there is no merit in this Appeal. It is accordingly dismissed. The conviction and sentence of the Appellant on both counts are hereby confirmed. As correctly ordered by the Court *a quo* the sentences are to run concurrently and are backdated to 22 October 2008 the date of the Appellant's arrest and incarceration.

M. S. SIMELANE

JUDGE OF THE HIGH COURT

Appellant : In Person

Respondent : Mr. S. Dlamini