IN THE SUPREME COURT OF SWAZILAND
HELD AT MBABANE

APPEAL NO.32/2010

In the matter between

MGUBANE MAGAGULA	**APPELLANT**
AND	
THE KING	**RESPONDENT**
CORAM :	**FOXCROFT J.A.,**
	MOORE J.A
	FARLAM J.A
FOR APPELLANT :	**IN PERSON**
FOR RESPONDENT:	**MS. LOMVULA HLOPHE**
HEARD :	**02 NOVEMBER 2010**
DELIVERED :	**30 NOVEMBER 2010**

Summary: Rape of girl 10 years old - whether sentence imposed by the High Court excessive - sentence of 18 years imprisonment confirmed — no part of sentence for the offence of Rape may be suspended - Criminal Law and Procedure: Act 67/1988: The Criminal Procedure and Evidence Act Section 313 and Third Schedule.

JUDGMENT_____

MOORE JA

OPENING

[1] One sunny day in the month of July 2007 a little girl of approximately 10 years of age was at the communal tap for washing in her home village in the company of siblings who were younger than she was. The accused, who is also from her area, and whom she knew and evidently respected as an adult, greeted the children who responded reciprocally. The accused then invited his victim to a nearby forest. He did not tell her what was going to be done in the forest. He then got rid of the younger children by telling them to take his bicycle to their parents' home. They did as they were bidden leaving the appellant and the hapless complainant alone together.

[2] The appellant wasted no time. He gave the child E 2.00 and then pulled her by the arm to the nearby forest. When the young girl cried, he silenced her by hitting her with his open hand on the face. In the cover of the forest, he laid her on the ground and removed her panties. She cried and stood up. But he laid her on the ground again facing up. He then inserted his penis into her vagina.

[3] When the appellant had finished, his victim stood up traumatized and crying. Three boys who happened to be passing heard her cries and rushed to the sylvan scene of her defilement. The appellant had not yet managed to make his getaway. She told the boys that the appellant had raped her. These

public spirited young men acted commendably. They apprehended the author of the reprehensible conduct of which they had been informed. Then one Michael Dlamini who also came upon the scene telephoned the police using his cell phone. Presently, the victim's mother as well as the police arrived. His captors handed the offending appellant over to the law officers. The victim was taken to Mkhuzweni Health Centre where she was examined by a doctor. She had not consented to sexual intercourse.

THE TRIAL

[4] The appellant pleaded guilty to the common law offence of rape for which he was charged. The magistrate then examined the complainant with a view to ascertaining whether she understood the nature and implications of taking an oath. Having done so, he determined that he would allow her to give evidence unsworn. She then did so.

[5] The magistrate conducted the trial even handedly allowing both the prosecution and the appellant to put their respective cases. The appellant is recorded as representing himself in person up to the point where the magistrate postponed the case for judgment. It is thereafter recorded in the judgment of the magistrate that Mr. V. Kunene had mitigated on behalf of the appellant as follows:

> "(i) Accused is a first offender;
> (ii) Accused is married and has five children;
> (iii) His children are going to suffer if he is sentenced to a long custodial sentence;

(iii) The accused was drunk when he committed the offence;

(iv) He pleaded guilty to the offence;

(v) He did not waste the court's time;

(vi) He cooperated with the police.

The record reflected that the appellant had indeed not wasted the court's **time** by **aimless cross examination** of the prosecution witnesses.

[6] The plea that the appellant was drunk now necessitates critical assessment. As I understand it, the plea of drunkenness implies that alcohol had impaired the self control of the accused. The appellant in this case however, did not act rashly on impetuously. He had clearly devised beforehand, a sinister strategy to facilitate his nefarious purpose. He enticed the complainant into the forest. He offered her E 2.00 evidently to purchase her acquiescence and her silence. He sent her siblings home with his bicycle - believing no doubt that they would welcome the opportunity to ride it and consume time - so as to get them off the scene. He had made careful and sober preparations to have his way with the complainant.

[7] In *Mbuso Sipho Dlamini v the King Criminal Appeal No. 34/2010 Unreported,* I gave guidance, with the concurrence of Ramodibedi CJ and Ebrahim JA, concerning the weight which must now be afforded by sentencing judges and magistrates to pleas of voluntary drunkenness as a mitigating factor:

> "*His remorse has come at much too late a stage. His consideration of the dangers inherent in the voluntary and excessive consumption of alcohol should have been done before he took his first sip. The subjects of this kingdom must not be made to suffer the loss of their lives because of persons such as the appellant's continuing abuse of alcohol, which is a powerful and mind affecting stimulant and intoxicant. He who continues to abuse alcohol to such an extent that the control of his voluntary actions is impaired and then commits serious crimes, must face the full penal consequences of his conduct. Voluntary drunkenness as a mitigating factor in cases such as this has lost its efficacy. The judge a quo was fully justified in affording it but little weight as a mitigating factor in the circumstances of this case.*"

That dictum applies *mutatis mutandis,* with equal force, to the circumstances of this case.

[8] The appellant gave no particulars of his cooperation with the police. Nor could he have given any. Theirs was an overwhelming case. By the time the officers arrived upon the scene, the appellant had already been arrested by public spirited citizens who caught him virtually red- handed in the presence of his distressed and crying victim.

THE APPEAL

[9] By letter to the Registrar dated 13th June 2009,, the appellant humbly appealed against what he called the harshness of his 18 years sentence

imposed by Maphalala J. He submitted Heads of Argument by letter dated November 1 2010 supplementing the grounds set out in paragraph 5 *supra.* He described himself as the sole bread winner for 6 dependent children and urged the Court to suspend part of his sentence. That, however, was an unavailing plea since this Court made clear in *Sandile Shabangu v The King Criminal Appeal No. 15/07* that it was an error to suspend part of a sentence for the offence of rape. This is how the law was authoritatively set down by Zietsman JA at page 10 of the computer judgment.

> "*The sentence passed by the judge* ***a quo*** *does however raise a problem. He sentenced the appellant to 15 years' imprisonment 3 years of which were conditionally suspended. It is clear from section 313 of the* ***CRIMINAL PROCEDURE AND EVIDENCE ACT (NO. 67 OF 1938),*** *read with the Third Schedule to the Act, that where an accused person is convicted of rape no part of the sentence may be suspended. We are satisfied that 15 years' imprisonment for the offence is not an unduly harsh sentence, but that the rider to the sentence conditionally suspending 3 years of. the 15 years must be set aside.*"

THE SENTENCE

[10] It fell first to Senior Magistrate H.J Kumalo to consider the matter of the appropriate sentence for what, upon the face of it, was a serious case of rape of a ten year old child. In addition to the facts of the case, bad as they were, the magistrate had before him the unsworn statement of the appellant in court: "I did rape the child but I did not intend to rape her. I am sorry for what I did. I made a mistake. That is all." He also considered the factors in

mitigation set out in paragraph 5 *supra.* The revulsion felt by the magistrate was manifest. Nevertheless he assessed the situation without allowing his disgust to lure him into hyperbole. He expressed his disapprobation of the appellant's conduct in measured terms at pages 17-18 of the record. This is what he said:

> *"Accused has been convicted of a serious offence. Accused raped an innocent child. Accused is an adult he has his own wife. . There* was.no *reason to rape the Complainant. There are many women of his equal who would be more than willing to have sex with him.*
>
> *The complainant was a young child. What the accused did to her might affect her for the rest of her life. It is the duty of the courts to protect women especially the young ones from people like the accused, in the opinion of the court, the accused has to be removed from society for a long time.*
>
> *In the opinion of the court, accused deserves a greater sentence than his court has power to inflict. The accused is therefore committed to the High Court for sentence in terms of section 292(1) of the Criminal procedure and evidence Act 67 of 1938 (as amended).*"

[11] The magistrate was correct to refer the appellant to the availability of mature and willing sexual partners. Even the birds and the beasts of the field savour the delicate arts of courtship, and delight in such graces as elaborate dances together, caresses and song, the sharing of food, and the

exchange of gifts. Their noble wooing is the very antithesis to the appellant's detestable molestation and abuse of a young and vulnerable child.

[12] I am entirely in sympathy with the sentiments of the magistrate. I also agree with his judgment that his sentencing powers were inadequate in the circumstances of the appalling case before him. His jurisdiction as Senior Magistrate is limited by the Magistrates Courts (Increase Of Jurisdiction) Notice, 1988 (Under Section 73) which gives every Senior Magistrate jurisdiction to impose a sentence of imprisonment not exceeding seven years.

> However, the Criminal Law and Procedure Act 67 of 1938 Section 185bis lays down the sentence for Rape etc in these terms.
>
> > "*A person 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.*"

[13] It is clear from the above section that the legislature, even in 1986, when section 185bis 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 willfully 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- 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.

[16] I am extremely grateful to Ms. L. Hlophe Prosecuting Counsel who, in response to a request from the Court, produced a number of recent

judgments of this Court from which I have managed to prepare two tables showing sentences upheld by this court juxtaposed with one another, from which an emerging range of sentences may be observed.

Table A

Table A

NAME OF CASE	AGE OF VICTIM	TERM OF IMPRISONMENT	DATE OF SENTENCE
Cr. Appeal No. 7/2009 Sabelo Nathi Malaza V The King	Adult	7 years	20.11.2009
Cr. Appeal No.3/2009 Bongani Khumalo V The King	Adult	15years	18.05.2009
Cr. Appeal No.07/2007 Mlamuli Obi Xaba V The King	13 years	15 years	12.11.2007

NAME OF CASE	AGE OF VICTIM	TERM OF IMPRISONMENT	DATE OF SENTENCE
Cr. Appeal No. 19/2007 Jonas Mkhatshwa **v** The King	12 years	22 years	12.11.2007
Cr. Appeal.No.20/2007 Malungisa Dlamini **v** The King	9 years	16 years	11.2007
Cr. Appeal No. 15/2007 Sandile Shabangu	13 years	15 years	2007
Cr. Appeal No.733/04 Lawrence Phuphutha **v** The King	Adult	15 years	26.11. 2004
Cr. Appeal No. 26/2003 Thumbela P. Mhlanga V The King	10 years	14years	18.11.2004

[17] Table A discloses a range of sentences sanctioned by this Court over a period of six years from 2004 to 2009. They rise from a low of 7 years to a high of 22 years imprisonment. In *Sabelo Nathi Malaza v The King Criminal*

Appeal No. 7/ 09, where the victim was an adult, Foxcroft J.A. remarked that "the punishment imposed was, if anything, on the lenient side". His Lordship also opined that "the appellant was fortunate in receiving a sentence of only seven years in this case." At the other end of the spectrum, in *Jonas Mkhatshwa v The King Criminal Appeal No. 19/07* where the victim was a 12 year old girl, Steyn J.A. noted that "the sentence of 22 years is a most severe one." Thus, this Court upheld a sentence of 7 years where fortune favoured the appellant, as well as one of 22 years which was most severe.

TABLE B

NUMBER OF YEARS IMPRISONMENT	**TIMES IMPOSED**
7	1
10	1
12	1
13	1
14	2
15	5
16	1
20	1
22	1
TOTAL = 203	**14**
Average number of years per sentence	**14.5 years-**

Table B shows that a sentence of 15 years was imposed in 5 of the 14 cases considered. A sentence of 14 years was imposed in 2 cases. Thus, sentences ranging between 14 and 15 years were imposed in half of the cases reviewed. It also illustrates that the mean of the 14 sentences in the study was 14.5 years.

[18] In all of the cases in the survey, this Court declared repeatedly that the appropriate sentence had to be tailored to suit the facts and circumstances of the particular case being considered. It also restated the well established principle that this court would interfere with the sentence of an inferior court only if the sentence violated the tenets of sentencing to an extent warranting the intervention of this court. A typical dictum in this regard is that of Steyn J.A. in *Mkhatshwa* where he wrote in his unreported computer judgment:

> "*whilst we would probably not have passed a sentence as severe as 22 years, we do not, for the reasons set out above, feel we should interfere.*"

THE APPROPRIATE RANGE

[19] *In Thumbela P. Mhlanga v Rex Criminal Appeal No. 26/2003, Unreported* Steyn J A at page 2 of his computer judgment declared:

"*We have in several judgments during this session confirmed sentences for rape of children varying from 10 to 15 years imprisonment.*"

That dictum was expressed on the 18th of November 2004. Since then, however, despite repeated condemnations of the offence of rape by this Court, the prevalence of this offence has persisted unabated. In *Sam Dupont v Rex Criminal Appeal No. 4/2008 Unreported,* Ramodibedi CJ observed in that case at paragraph [14] of the computer judgment:

"*The court properly took into account the prevalence of crimes of sexual offences against young children in this jurisdiction.*"

[20] From Tables A and B set out in paragraphs [16] arid 17] above, 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.

[21] Having been remitted to the High Court by the magistrate, the matter eventually engaged the attention of Principal Judge Maphalala. In addition to all the material upon the record, the learned Judge also had before him factors in mitigation of sentence from the bar. The appellant disclosed that:

(i) He was 40 years old;

(ii) He has a wife with (five) children;

(iii) He was an occasional cane cutter and he asked the court to be lenient because he did not intend to do what he did.

The aggravating factors upon the record were:

(i) The victim was a minor of very tender age;

(ii) At the time of the commission of the offence the accused did not use a condom thereby putting the complainant at risk of contracting sexually transmitted diseases especially HIV/ Aids.

[22] The Judge next tasked himself with bearing in mind -by reference to a view attributed to Sir Winston Churchill - that he should temper justice with mercy. He also considered the following cases from which he sought guidance on the range of sentences to be imposed in cases of aggravated rape: *Thumbela P. Mhlanga Criminal Appeal Case No. 26/2003; Rex v Kenneth Maseko Criminal Appeal Case No. 7/2004; Nicholas Magagula v Rex Criminal Appeal Case No. 13/2004; Lawrence Phuphutha Manana Criminal Appeal Case No. 73/2004.*

[23] His Lordship then addressed the appellant thus:

> "*Having considered all the factors in- the* ***triad*** *I have come to the conclusion that in the present case the interest of the accused will have to he subservient to the interest of the society.*

Young children are entitled to their play and it is not for scavengers like you to pounce on. They need to be protected. The only protection against your sort is to impose sentences to discourage others who might be lurking in the dark aspiring to satisfy their lust on young children. Accused failed to use protective measures before raping complainant hence putting complainant to a risk of contracting venereal diseases including HIV/Aids.

In the circumstances of this case, it is my considered view that a sentence of 18 years will be appropriate and will send the right message to would-be offenders. The sentence is backdated to the date of arrest of the accused."

The eminently appropriate award of Maphalala PJ. was pitched at 18 years imprisonment which sits at the upper end of the range disclosed by Tables A and B. There was ample material upon the record justifying the judicious and judicial exercise of his sentencing discretion which did not violate any principle of sentencing and which, accordingly must not be disturbed.

[24] The appellant asked the trial judge to take his unsworn statement in court as evidence of contrition. That statement reads in part: "*I did rape the child hut I did not intend to rape her. I made a mistake*". It is reminiscent of the explanation given by the little boy who was caught with his hand in the cookie jar. "I don't know how my hand got in there." The court a quo was fully justified as dismissing that statement as being of trifling weight as a mitigating factor.

[25] The appeal is, therefore, for the reasons set out in this judgment, entirely devoid of merit and accordingly fails.

ORDER

[26] It is ordered that:

1. The appeal is dismissed.
2. The sentence of 18 years imprisonment is confirmed.

S.A. MOORE
JUSTICE OF APPEAL

I agree

J.G. FOXCROFT
JUSTICE OF APPEAL

I agree

I.G.FARLAM
JUSTICE OF APPEAL

Delivered in the open court on this 30th day of November 2010.