IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal case No: 15/2013

In the matter between:

NDUMISO PHESHEYA METHULA **APPELLANT**

VS

REX **RESPONDENT**

Neutral citation: *Ndumiso Phesheya Methula v Rex (15/2013) [2013] SZSC 17*
(9th December 2015)

CORAM: **M.C.B. MAPHALALA CJ,**
J.P. ANNANDALE, AJA,
M.D. MAMBA AJA.

Heard **25th November 2015**
Delivered **9th December 2015**

Summary

Criminal Appeal – appellant convicted in the court *a quo* of murder, rape, assault with intent to cause grievous bodily harm and assault common – appeal against both conviction and sentence in respect of the count of rape – the issue for determination is whether the court *a quo* misdirected itself in both conviction

and sentence – on conviction appellant contended that there was no evidence of sexual intercourse and consequently that the conviction should be set aside – held that the appellant was properly convicted of the offence, and, that the Crown proved the commission of the offence beyond reasonable doubt – held further that the court *a quo* misdirected itself on the sentence – section 5 (3) of the Court of Appeal Act No. 74 of 1954 invoked to increase sentence – held further that during the hearing of the appeal, the appellant was called upon to show cause why the sentence should not be increased – accordingly, the appeal on conviction and sentence is hereby dismissed – the sentence of ten years imposed by the court *a quo* is set aside and substituted with a sentence of twenty years imprisonment – sentence imposed to run concurrently with the other sentences imposed by the court *a quo*.

JUDGMENT

M.C.B. MAPHALALA, CJ

[1] The court *a quo* convicted the appellant of murder, rape, assault with intent to cause grievous bodily harm as well as assault common. The appellant was sentenced to fifteen years imprisonment in respect of the charge of murder, ten years in respect of rape, two years in respect of assault with intent to cause grievous bodily harm with an option of a fine of E2,000.00 (two thousand emalangeni); this sentence was suspended for

three years on condition that he is not convicted of a similar offence during the period of suspension. With regard to the charge of assault common, the appellant was sentenced to one year imprisonment with an option of a fine of E1 000.00 (one thousand emalangeni); this sentence was suspended for three years on condition that he is not convicted of a similar offence during the period of suspension.

[2] This is an appeal against both conviction and sentence imposed by the court *a quo* in respect of the offence of aggravated rape. Two grounds of appeal were advanced by the appellant: firstly, that there was no evidence of sexual intercourse against the complainant. Secondly, that the injuries sustained by the complainant when she was hit with an axe by the appellant do not prove that he committed the offence of rape. Thirdly, that the discovery of the appellant's takkies at the scene of crime could not link him with the offence of rape on the basis that he had left the takkies with his girlfriend who is the daughter of the complainant.

[3] The offence of rape for which the appellant was convicted is accompanied by aggravating factors as envisaged by section 185*bis* of the Criminal Procedure and Evidence Act 67/1938 as amended in the following respects: firstly, the appellant exposed the complainant to sexually transmitted infections and HIV/Aids since he did not use a

condom. Secondly, the appellant was a boyfriend to the complainant's daughter, and, he had the duty to protect the complainant. Thirdly, the complainant was old enough to be the mother of the appellant. Fourthly, the appellant humiliated the complainant by having sexual intercourse with her in front of her lover. Lastly, the accused assaulted the complainant and her lover with an axe during the commission of the offence.

[4] It is a trite principle of our law that in cases of rape the Crown bears the onus to prove beyond reasonable doubt the identity of the accused as the offender, the fact of sexual intercourse as well as lack of consent. See *Ndukuzempi Mlotsa v. Rex* Criminal Appeal Case No. 11/2014 at para 5; *Mandla Shongwe v. Rex* Criminal Appeal Case No. 21/2011 at para 16; *Mandlenkhosi Daniel Ndwandwe v. Rex* Criminal Appeal Case No. 39/ 2011 at para 8; *Mbuso Blue Khumalo v. Rex* Criminal Appeal Case No. 12/2012 at para 28.

[5] The complainant testified that on the 25th September 2009, she was sleeping in her house with her lover Bhoshosho Sipho Nhlabatsi when she noticed that a man was lying on top of her and having sexual intercourse with her. When she realised that the person was not her lover, she bit him on the left hand. In turn this person hit her with the back side

of an axe on the mouth injuring her teeth. Her evidence is corroborated by a medical report compiled by Dr Asha Gladge Waragis of Good Shepherd hospital. The doctor testified that upon a general examination of the complainant, she found two of her front incisor teeth loose and bleeding.

[6] The complainant further testified that she wrestled with her attacker over the axe until he ran away leaving his right takkie behind at the scene. During the struggle over the axe, the complainant raised an alarm prompting her lover to wake up from his sleep. However, her lover could not assist her as his hands were tied together by her assailant with a shoe lace. When the assailant had run away, she was able to untie her lover; and, he ran after the assailant who hurled stones at him.

[7] The second ground of appeal advanced by the appellant cannot be sustained on the basis that the Crown had proved beyond reasonable doubt that the takkies found at the scene belonged to the appellant; and, that he had left them when he ran away after committing the offence. The takkies were positively identified by his girlfriend Happy Maziya as belonging to the appellant. Prior to committing the offence, the appellant had used a shoe lace to tie the hands of Bhoshosho Sipho Nhlabatsi

together so that he could not disturb him when he committed the offence.

[8] After being arrested by the police, the appellant came to the complainant's homestead in the company of the police. He pointed out the left takkie which he had left behind the house when he was running away from the scene after committing the offence. The complainant's lover further identified the takkies during the trial as those which the appellant had been wearing on the day of commission of the offence. It is not disputed that Bhoshosho Nhlabatsi had met the appellant earlier that day at the complainant's homestead when the appellant was in the company of Happy Maziya; he was wearing the same takkies.

[9] The appellant had also met Bhoshosho Nhlabatsi during the lunch hour on the day in question, and, he was still wearing the same takkies. The appellant had arrived at the complainant's homestead carrying his lunch food. The two men were sitting together when the appellant was eating his food. The appellant's girlfriend and the complainant were not at home at the time. When the appellant had finished eating his food, he left the homestead.

[10] The evidence of the complainant was corroborated by Bhoshosho Sipho Nhlabatsi, Happy Maziya as well as Dr Asha Gladge of Good Shepherd Hospital. The doctor testified that the complainant's upper teeth were loose and bleeding when she examined the complainant. The doctor's evidence was also corroborated by Constable George Dlamini. He testified that on the 26th September 2009, the complainant laid a criminal charge of rape at the Siteki Police Station. Constable George Dlamini further testified that the complainant had handed the right takkie which had been left at the scene by her assailant. He recorded a statement from the complainant and later took her to Good Shepherd Hospital where she was examined by a doctor.

[11] Similarly, the ground of appeal challenging the fact of sexual intercourse cannot be sustained. The evidence of the complainant that she was raped on the night in question was not challenged. Similarly, the evidence that she bit the assailant or that she was hit with an axe when she resisted the offence has not been challenged. In addition the appellant did not deny hitting Bhoshosho Nhlabatsi with an axe. Furthermore, the takkies found at the scene were positively identified by Happy Maziya as well as Bhoshosho Nhlabatsi as belonging to the appellant.

[12] The appellant pointed out to the police the left takkie which he admitted belonged to him. The evidence shows that the takkies were left at the scene of crime by the appellant when he was running away from the scene of crime. His girlfriend Happy Maziya denied that the appellant's takkies were in her possession at the time of commission of the offence. She disputed the allegation by the appellant that she had taken the takkies together with his clothes from his apartment for safekeeping prior to the commission of the offence. Incidentally, the appellant admitted under cross-examination that the takkies belong to him but he contradicted himself how the takkies came to be at the scene of crime. Happy Maziya and Bhoshosho Nhlabatsi testified that the appellant was wearing the takkies on the day in question. In the circumstances the explanation given by the appellant cannot stand.

[13] The appellant has also appealed the sentence of ten years imposed by the court *a quo*; however, he does not state the basis of appeal on sentence. In the case of *Elvis Mandlenkosi Dlamini v. Rex* Criminal Appeal case No. 30/2011 at para 29, I had occasion to say the following with regard to appeals on sentence:

"29. It is trite law that the imposition of sentence lies within the discretion of the trial Court, and, that an appellate court will only interfere with such a sentence if there has been a material misdirection resulting in a miscarriage of justice. It is the duty of the appellant to satisfy the appellate court that the sentence is so grossly harsh or excessive or that it induces a sense of shock as to warrant interference in the interests of justice. A court of appeal will also interfere with a sentence where there is a striking disparity between the sentence which was in fact passed by the trial court and the sentence which the Court of Appeal would itself have passed; this means the same thing as a sentence which induces a sense of shock. This principle has been followed and applied consistently by this Court over many years, and, it serves as the yardstick for the determination of appeals brought before this Court."

See the cases of *Musa Bhondi Nkambule v. Rex* Criminal Appeal Case No. 6/2009; *Nkosinathi Bright Thomo v. Rex* Criminal Appeal Case No.12/2012; *Mbuso Likhwa Dlamini v. Rex* Criminal Appeal Case No. 18/2011; *Sifiso Zwane v. Rex* Criminal Appeal Case No. 5/2005; *Benjamin Mhlanga v. Rex* Criminal Appeal Case No. 12/2007; and, *Vusi Muzi Lukhele v. Rex* Criminal Appeal Case No. 23/2004.

[14] The appellant is charged with aggravated rape. Section 185*bis* (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended deals with the offence of aggravated rape, and, it provides the following:

> **"185*bis* (1) 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 an option of a fine and no sentence or part thereof shall be suspended".**

[15] Another relevant legislative provision in this appeal is section 313 (2) of the Criminal Procedure and Evidence Act which precludes courts from suspending a sentence in respect of persons convicted of offences listed in the Third Schedule; these offences are murder, rape, robbery and any conspiracy, incitement or attempt to commit these offences.

Section 313 provides the following:

> **"313. (2) If a person is convicted before the High Court or any Magistrate's Court of any offence other than one specified in the Third Schedule, 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."**

[16] It is well-settled in this jurisdiction that the range of sentences for aggravated rape lies between eleven and eighteen years imprisonment.

See the case of *Mgubane Magagula v. Rex* Criminal Appeal Case No. 32/2010. However, this Court has exceeded the range of sentences for aggravated rape in serious cases such as instances where the victim is very young or where violence is used during the commission of the offence. In the case of *Moses Gija Dlamini v. Rex* Criminal Appeal Case No. 7/2007, this Court confirmed a sentence of twenty years imprisonment for aggravated rape of a nine year old girl.

[17] During the hearing of the appeal, this Court invited the appellant to show cause why the ten year sentence imposed by the trial court should not be increased. In response the appellant reiterated his ground of appeal that there was no evidence of sexual intercourse against the complainant in terms of the medical report compiled by Dr Asha Gladge of Good Shepherd Hospital. However, this did not address the question posed to the appellant why the sentence should not be increased in the circumstances of this particular case.

[18] The aggravating factors accompanying the offence are of a serious nature and calls for an increase in the sentence. To that extent the court *a quo* misdirected itself as to the sentence. The prevalence of the offence of aggravated rape on both women and children may, in serious cases, calls for deterrent sentences beyond the range currently imposed by this Court.

[19] The offence of aggravated rape exposes the victims not only to the risk of sexually transmitted diseases including HIV/Aids but it has a lasting effect to the victims in respect of the trauma, shock, torture, loss of dignity as well as the inhuman and degrading treatment to which the victims of rape are exposed.

[20] This Court cannot overlook the fact that the appellant hit the complainant with an axe during the commission of the offence. It is not disputed that the complainant had woken up to a man lying on top of her and having sexual intercourse with her. Initially she thought that the man was his lover Bhoshosho Nhlabatsi. However, the complainant had resisted continued sexual intercourse with the appellant after discovering that he was not his lover; she bit the appellant forcing him to stop what he was doing. This angered the appellant who then assaulted the complainant with an axe and injuring her upper teeth.

[21] Accordingly, section 5 (3) of the Court of Appeal Act No. 74 of 1954 is hereby invoked; and, it provides the following:

"5. (3) On appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial court and pass such other sentence warranted in law (whether more or less severe) in substitution therefore as it thinks ought to have been passed, and in any other case shall dismiss the appeal."

[22] The following order is made:

(a) The appeal on both conviction and sentence is dismissed.

(b) The sentence imposed by the court *a quo* is set aside and substituted with a sentence of twenty years imprisonment.

(c) The sentence imposed herein shall run concurrently with the other sentences of murder, assault with intent to cause grievous bodily harm as well as assault common.

(d) The sentence imposed shall commence on the 27th September 2009, being the date of arrest.

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M.C.B. MAPHALALA
CHIEF JUSTICE

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I agree: J.P. ANNANDALE
ACTING JUSTICE OF APPEAL

I agree: M.D. MAMBA

ACTING JUSTICE OF APPEAL

For Respondent: Senior Crown Counsel Phila Dlamini
Appellant in Person

DELIVERED IN OPEN COURT ON 9th DECEMBER 2015