IN THE SUPREME COURT OF SWAZILAND

Criminal Appeal Case No. 14/2015

In the matter between:

NTANDO DLAMINI **Appellant**

vs

REX **Respondent**

Neutral citation: *Ntando Dlamini v Rex (14/2015) [2015] SZSC 18 (9 December 2015)*

Coram: **S.B. MAPHALALA AJA, M.D. MAMBA AJA and N.J. HLOPHE AJA**

Heard: 19 November 2015

Delivered: 09 December 2015

[1] *Criminal Law – Sentence – conviction for rape with aggravating circumstances or factors as envisaged in section 185 bis of the Criminal Procedure and Evidence Act 67 of 1938 – Court to impose minimum sentence of nine years of imprisonment and no portion or part thereof may be suspended.*

[2] *Criminal Law – Appeal on sentence – convicted of rape with aggravating factors. Crime committed over period of time. Rape survivor being the appellant's biological daughter and giving birth to appellant's child.*

[3] Criminal law and Procedure – Appeal – Sentence matter predominantly within the jurisdiction of the trial court. Appeal court can only interfere where there has been a material misdirection, resulting in a failure of justice, failure to exercise discretion properly or at all or where disparity in sentence imposed and that which Appeal Court would have imposed is sufficiently wide to warrant such interference – no such ground for interference established on appeal. Appeal dismissed.

JUDGMENT

MAMBA AJA

[1] The appellant, a 36 year old male, was convicted by the High Court on 22 October 2014 of the crime of rape. He was eventually sentenced by the same court on 30 April 2015 to a term of 20 years of imprisonment. The rape survivor was his biological daughter and was a minor at the material time.

[2] In sentencing the appellant, the court held that the offence for which the appellant was convicted was accompanied by aggravating factors or features as defined in section 185 bis of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). The said section provides that where the court convicts a person of rape and comes to the conclusion that aggravating circumstances are present in connection with the commission of that offence, the court shall impose a minimum sentence of nine (9) years of imprisonment without an option of a fine and no part or portion thereof shall be suspended.

[3] The appellant has not taken issue with his conviction or the findings by the court *a quo* that the offence for which he was convicted was accompanied by aggravating circumstances or features. He has appealed against the sentence of 20 years of imprisonment that was imposed on him.

[4] In his heads of argument dated 04 November, 2015 and indeed in his submissions made before this court on 19 November 2015, the appellant states that:

> '… I fully recognise the gravity of the offence I committed and therefore I take full responsibility of the commission of the offence in question. What I did deserves punishment. However, it is my humble request that the punishment to be imposed upon me should not be purely vengeful and punitive but mainly corrective, rehabilitative, restorative and reintegrated.'

He also states that he is sorry for what he did and he demonstrated this by being cooperative with the police in the course of their investigations of the offence against him. Finally, he submitted that this court must reduce his sentence by five years.

[5] In sentencing the appellant the trial judge stated the following:

‘[5] She told the court that there were two houses at her parental home, one used by her parents and a one-roomed house used by herself. She testified that her father used to come to her house at night when she was asleep; he would get into her bed, undress her and rape her. When she threatened to tell her stepmother, he would intimidate her and further threaten to beat her. The door to her house could not be locked, and, she had on several occasions asked him to repair the door-lock but to no avail. He would come to her house at night because he knew that the door could not be locked. She told the court that he raped her on five different occasions, and, that she never consented to the sexual encounters.

[6] PW1 further told the court that she finally reported the sexual abuse to her paternal grandmother who in turn alerted her stepmother as well as her uncle’s wife Lomathemba Mamba. Her paternal grandmother is Hlalaphi Fakudze. By that time she was pregnant, and, her grandmother noticed that she was pregnant. PW1 told her that the accused had impregnated her. She was taken to Thulwani Clinic by her stepmother where it was confirmed that she was pregnant.

> At the time she was schooling at Mdumezulu Primary school.'

The learned judge *a quo* then referred to the following cases by this court; *Mbuso Blue Khumalo v Rex, Crim App. 12/2012, Jonas Mkhatshwa v Rex Crim. App. 19/2007 and Mgubane Magagula v Rex Crim App. 32/2010* and came to the conclusion that in cases such as the one under consideration, this court had held that a sentence of 20 years of imprisonment was merited. These cases indeed bear testimony to this assertion by the court.

[6] In *Elvis Mandlenkhosi Dlamini v R, (30/2011), [2013] SZSC 06 (31 May 2013)* this court stated as follows:

> '[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 following cases where this principle has been applied:

- *Musa Bhondi Nkambule v Rex* Criminal Appeal No. 6/2009
- *Nkosinathi Bright Thomo v Rex* Criminal Appeal No.12/2012
- *Mbuso Likhwa Dlamini v Rex* Criminal Appeal No. 18/2011
- *Sifiso Zwane v Rex* Criminal Appeal No. 5/2005
- *Benjamin Mhlanga v. Rex* Criminal Appeal No. 12/2007
- *Vusi Muzi Lukhele v Rex* Criminal Appeal No. 23/2004

…

[31] Similarly, *Moore JA* in the Botswana Court of Appeal in the case of *Mosiiwa v The State* (2006) 1 B.L.R. 214 at p.219 made the following caution which the judge in the Court *a quo* seems to have heeded:

"It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentence's message should be crystal so that the full effect of deterrent sentences may be realized, and that the public may be satisfied that the Court has taken adequate measures within the law to protect them of serious offences. By the same token, a sentence should not be out of all proportion to the offence, or to be manifestly excessive, or to break the offender, or to produce in the minds of the public the feeling that he has been unfairly and harshly treated."

[32] In *S.v. Rabie* 1975 (4) S.A. 855 (AD) at p. 866 *Holmes JA* had this to say:

"A judicial officer should not approach punishment in a spirit of anger because being human, that will make it difficult for him to achieve that delicate balance between

the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."

And in *Mgubane (supra)* Moore JA had this to say:

'[46] Rape is perhaps the ultimate invasion of human privacy… succeeding generations of judges in every jurisdiction, including the judges of this kingdom, have weighed 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 dehumanising 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 its victims. 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.'

I agree, entirely with these sentiments.

[7] In the present appeal, the appellant repeatedly raped his own biological daughter. This occurred over a long period of time, resulting in the birth of a child. The end result is that both mother and child have been fathered by the same man. What an abomination, monstrous wickedness and beastly outcome! But of course the mother and baby are blameless for this utterly shameful, horrible and chaotic situation. The appellant, and only him is to blame. The complainant was only 14 years old when she gave birth to this child. Her rape ordeal in the hands of her own father, the appellant shall remain indelibly engraved or carved in her mind and life.

[8] From the above analysis of the evidence and the applicable law within this jurisdiction, I am firmly of the considered view that taking into account all the circumstances of this case – including the appellant's plea for mercy, even at this late stage – that this appeal must fail and is hereby dismissed.

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M.D. MAMBA AJA

I agree.

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S.B. MAPHALALA AJA

I also agree.

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N.J. HLOPHE AJA

For the Appellant: In Person

For the respondent: Ms. L. Hlophe