IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Criminal Appeal Case No. 07/17

In the matter between:

BOY MCHUMANISI MKHATSHWA **Appellant**

And

THE KING **Respondent**

Neutral citation: Boy Mchumanisi Mkhatshwa vs The King *(70/2017 [SZSC] 46 [2019] (9th October, 2019)*

Coram: **S.B. MAPHALALA JA**
J.P. ANNANDALE JA
M.J. MANZINI AJA

Heard: **12 August, 2019**

Delivered: **9 October, 2019**

Summary: *Criminal Law – conviction on four (4) counts of rape – biological children – found guilty in respect of all four (4) counts by the court a quo – sentenced to serve an aggregate term of 54 years imprisonment – the sentences imposed*

in respect of the first and second counts were ordered to run concurrently - the sentence imposed in respect of the third and fourth counts to run consecutively – on appeal Appellant contends that the sentence was harsh and severe – on appeal this court finds the sentence imposed by the court a quo harsh – therefore varies the said sentence to the effect that 6 years of each of the sentences imposed in count 3 and count 4 be served concurrently with the cumulative sentence imposed in counts 1 and 2 thereof- total aggregate of sentence reduced from 54 years to 42 years.

JUDGMENT

S.B. MAPHALALA JA

The Appeal

[1] The appellant was indicted and convicted of four (4) counts of rape before the High Court and sentenced on the 22nd May, 2015 as follows:

Count1:	**Eighteen (18) years imprisonment without an option of a fine**
Count2:	**Eighteen (18) years imprisonment without an option of a fine**
Count3:	**Eighteen (18) years imprisonment without an option of a fine**
Count4:	**Eighteen (18) years imprisonment without an option of a fine**

[2] The sentences imposed in respect of the first and second count were ordered to run concurrently. The sentences imposed in respect of the third and fourth counts were ordered to run consecutively. This therefore meant the Appellant will serve an aggregate term of 54 years imprisonment.

The grounds of appeal

[3] On the 26th February, 2016 the Appellant himself wrote a letter to the Registrar of this Court making an application for appeal where he did not challenge his conviction but stated **"I humbly accept my conviction on all said counts but only appeal against the harshness of my 54 years sentence".**

[4] The Appellant thereafter instructed an attorney to represent him, being the offices of SB Motsa Attorneys who on the 31st January, 2019 filed a Notice to Amend Appeal on the following grounds:

> **By substituting his application and grounds for appeal dated 26th February, 2016 and replacing it with the following:**
>
> ***"The Appellant hereby notes an appeal against the cumulative sentence of 54 years metered against him by his Lordship MCB Maphalala on the 22nd May 2015, on the following grounds:***
>
> *2.1* ***The court a quo misdirected itself by confining itself only to the range of sentence in rape cases in isolation of the age of the accused and the effect of the cumulative sentence.***
>
> *2.2* ***The cumulative sentence is so severe that no reasonable Court would have imposed it. The severity of the cumulative sentence could not be ameliorated by the concurrent sentence of count 1 and 2."***

[5] On the 8th April, 2019 a further notice was filed being "Amended Notice of Appeal" from his attorney S.B. Motsa with the Registrar of this Court on the following grounds:

> ***"1.1 The court a quo misdirected itself by confining itself only to the range of sentence in rape cases in isolation of the age of the accused and the effect of the cumulative sentence.***
>
> ***1.2 The cumulative sentence is so severe that no reasonable court would have imposed it. The severity of the cumulative sentence could not be ameliorated by the concurrent sentence of count 1 and 2."***

[6] The above Application was duly granted by this court as it was not opposed by the Crown.

The background

[7] The Appellant (who was the accused in the court below) was charged with four counts of rape, and he pleaded not guilty to all counts. On the first count the Crown alleged that on the 29th January, 2012 at Mhlambeni area in the Manzini region, the accused intentionally and unlawfully had sexual intercourse with Sebenele Simphiwe Mkhatshwa, a female aged fourteen (14) years old, without her consent. On the second count he was charged with the crime of rape on one of her daughter Sanele Simpiwe Mkhatshwa, female aged fourteen (14) years without her consent. Similarly on count 3 the Appellant was charged of a similar crime on one of his daughter, one Bathobile Phumlile Mkhatswa and on the fourth count of a similar crime one of his daughter Takhona Mkhatshwa aged 13 years old.

[8] All four (4) counts are accompanied by aggravating factors as envisaged under section 185 bis of the Criminal Procedure and Evidence Act 67 of 1938 as Amended in the following respects. Firstly, the complainants in all the four counts are minor children of tender age. Secondly, the Appellant is the biological father of the complainants. Thirdly, the Appellant did not use a condom thus exposing the complainants to the risk of contracting sexually transmitted infectious including HIV/AIDS.

[9] The court below heard the evidence of all the complainants who were duly cross examined by the Appellant. Various other witnesses were called by the Crown. The Appellant himself gave evidence under oath disputing the evidence of the Crown witnesses.

[10] For purposes of this appeal the Appellant is not challenging his conviction as stated above in paragraph [3] of this judgment. The Appellant has no issue with the conviction but only that the sentences imposed by the court *a quo* induces a sense of shock.

The arguments

For the Appellant

[11] The nub of the Appellant's contention is that the cumulative sentence of 54 years in respect of the four counts of rape renders the sentence so harsh and severe that no reasonable court would have imposed it. That Appellant is not challenging the severity of each of the sentences. What Appellant is saying is that the 18 years sentence in each count is within the range of sentences for aggravated rape, but that the aggregate sentence could not be ameliorated by only ordering that the sentences of first and second counts are to run concurrently.

[12] In support of the above contention the attorney for the Appellant cited a number of decided cases by this court and elsewhere including the Supreme Court cases of **Sifiso Ndwandwe vs Rex Criminal Appeal Case No. 5/2012, Mduduzi Sithole vs The King Appeal Case No. 3/1982, Vusimuzi Lucky Sigudla vs Rex Criminal Appeal Case no. 1/11** and **Matsotso vs Rex (1962 – 1969) SLR 36.7.**

[13] The Appellant has no issue with the sentence imposed by the court *a quo* on each separate count but that the trial court ought to have also considered the effect of the total cumulative sentence over and above the consideration of the range of sentences in aggravated rapes.

[14] The attorney for the Appellant then cited the case of **Sifiso Ndwandwe vs Rex (supra)** which found a cumulative sentence of 27 years on two counts of rape to be inappropriate and reduced it to 19½by ordering part of it to run concurrently. Further this court was referred to the case of **Vusimizi Lucky Sigudla vs Rex (supra)** which found a cumulative sentence of 26 years for two counts of rape (count 3 and count 4) to be inappropriate and reduced it to 19 years ordering part of the sentence to run concurrently. That *in casu* looking at the sentences in count 3 and 4 with an aggregate of 36 years is striking disparity with the sentence imposed by the lower court and the previous sentences of the Appeal Court as referred to above.

[15] Further it is contended for the Appellant that sentencing of a 49 years old man to a cumulative sentence of 54 years in effect means that the Appellant will not ever come out of prison as the sentence takes all of his remaining life span.

[16] The final submission for the Appellant is that the court *a quo* imposed an improper sentence which was so severe that no reasonable court would have imposed it. That this court is empowered by section 5(3) of the Court of Appeal Act No. 74/1954 to

quash the sentence passed at the trial and pass such other sentence warranted in law in substitution therefore as it thinks ought to have been passed.

For the Crown

[17] On the other hand the Crown contends at paragraph 7 of the Heads of Arguments of Crown Counsel that in *casu* the three (3) complainants are biological daughters of the Appellant. The trial court correctly ordered sentences to run consecutively where the offences related to separate incidents and were committed on different dates against different complainants save for the fact that all these children were biological daughters of the Appellant. That the offences related to the same complainant the trial court ordered the sentence to run concurrently.

[18] Crown Counsel listed an array of almost similar cases decided by the High Court which were confirmed by the Supreme Court involving appellants who were convicted of raping their biological daughters as the following:

1. **Ntando Dlamini vs Rex Appeal Case No. 14/15** the Supreme Court confirmed a sentence of 20 years imprisonment. In that case the Appellant had raped his biological daughter who was 14 years old.

2. **Jonas Mkhatshwa vs Rex Appeal Case No. 19/2007** the Supreme Court confirmed a sentence of 22 years imprisonment. In that case the Appellant had raped his biological daughter who was 12 years old.

3. **Msombuluko Mpila vs Rex Criminal Appeal 33/2012** the Supreme Court confirmed a sentence of 20 years imprisonment. In that case the Appellant had raped his biological daughter who was 6 years old.

[19] In support of its position the Crown cited the case of **Msombuluko Mpila vs Rex (supra)** at paragraph 10 to the following:

> ***"It remains for this court to express its profound horror at the alarming rate of crimes of rape committed against very young girls, particularly by close relatives. Appropriately stiff sentences must henceforth be the order of the day until this scourge is eradicted. Rapists have sufficiently been warned."***

[20] Furthermore the Crown contends that with regard to the sentence there is no misdirection resulting in a failure of justice that has been shown to exist citing the case of **Mandlenkosi Daniel Ndwandwe and The King Criminal Appeal Case No. 39/11** (unreported) where **M.C.B. Maphalala JA** (as he then was) to the following:

> ***"...the prevalence of aggravated rape on both women and children calls for deterrent sentences beyond the range currently imposed by this court."***

[21] The Crown further filed supplementary Heads of Arguments mainly on the effect of the cumulative nature of the sentence. The Crown cited the Supreme Court case of **Sifiso Ndwandwe vs Rex (supra).**

The analysis and conclusions and thereon

[22] It is abundantly clear from the above exposition of the Appellant and the Crown submissions that the issue for decision by this court is quite narrow.

[23] I say so because the Appellant is not challenging the severity of each sentence. The Appellant is saying the 18 years imprisonment of each count is within the range of

sentence for aggravated rape, but that the aggregate sentence could not be sufficiently ameliorated by ordering the first and second counts to run concurrently.

[24] The question faced by this court is whether an appellate court could interfere with the sentence by the lower court in these circumstances. A similar question arose for determination in this court in the case of **Sifiso Ndwandwe Appeal Case No. 5.2012** where **E.A Ota JA** sitting with **S.A. Moore JA** and **Dr S. Twum** had this to say:

> ***".....if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more of less severe) in substitution therefor as it thinks ought to have passed, and in any other case shall dismiss this appeal."***

[25] The Learned Justices in the above cited case at page 13 stated that the Appellate Court will only be entitled to interfere where the lower court has not exercised its discretion judicially and judiciously or there has been an improper exercise of that discretion, which will be the case in the following circumstances:

> **"1. Where the trial Court misdirected itself e.g by failing to consider relevant factors or taking into consideration irrelevant factors in the sentencing process. See Rands 1978 (4), Matsotso vs Rex (1962- 1969) SLR 36.7. The misdirection must be of such a nature, degree and seriousness that it vitiates the trial court decision. A mere misdirection will not suffice to warrant interference from an appellate Court.**
>
> **2. Where the sentence is vitiated by an irregularity and it appears to an appellate Court that a failure of justice has been occasioned from such irregularity or defect. For instance, where a lower Court exceeded its sentencing jurisdiction or imposed a sentence which was not legally permissible for a crime see Matsotso vs Rex (supra).**

3. **Where the sentence is so severe that no reasonable court would have imposed it. Over the years, the inquiry of the appellate Court under this head has witnessed some evolution. In the earlier cases the inquiry was whether the sentence appealed against induced "a sense of shock". Then this metamorphosed into an inquiry as to whether the impugned sentence was "startling inappropriate" or "disturbingly inappropriate" or "striking disparity" in the sentence imposed by the lower court and that which would have been imposed by an appellate Court. As the court stated in the case of Mduduzi Sithole vs The King Case No. 3/1987 page 8 – 9**

> **"sometimes the phrase: "striking disparity" has been displaced by the phrased "startling inappropriate" or "disturbingly inappropriate". These expressions all really mean the same thing they are, one might say expression of what used to be classified under phrase "a sense of shock."**

[26] I am in respectful agreement with the above *dictum* by the Learned Judges in that case and would hold that items 1 and 2 are not applicable in the present case. It is only item 3 which is applicable to the facts and arguments by the Appellant. This being that where the sentence is so severe that no reasonable court would have imposed it. In the present case we are all in agreement that the aggregate sentence imposed by the court *a quo* was overly severe in the circumstances. The court *a quo* ought to have considered also the effect of the total cumulative sentence over and above the consideration of the range of sentences in aggravated rapes. In this respect this court in the case of **Sifiso Ndwandwe vs Rex (supra)** found a cumulative sentence of 27 years for two counts of rape to be inappropriate and reduced it to 19½ by ordering part of it to run concurrently.

[27] Further this court in the case of **Vusimuzi Lucky Sigudla vs Rex (supra)** found a cumulative sentence of 26 years for two counts of rape (counts 3 and 4) to be inappropriate and reduced it to 19 years by ordering part of the sentence to run concurrently. It appears to me that the Appellant's Counsel is correct in his arguments that surely in the present case looking at sentences in count 3 and 4 which is an aggregate of 36 years this is a striking disparity in the sentence imposed by the lower court and previous sentences of this court as referred above.

[28] Therefore, on appeal we issue the following orders:

1. **The sentences imposed by the court a quo in respect of each count being 1, 2, 3, and 4 to be eighteen years imprisonment is confirmed.**

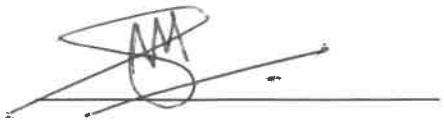
2. **The concurrent serving of sentences in respect of counts 1 and 2 as ordered by the High Court is confirmed on appeal.**

3. **The consecutive serving of sentences in counts 3 and 4 as ordered by the court *a quo* is set a side and replaced with the following:**

   "It is ordered that 6 years of each sentence imposed in count 3 and 4 shall be served concurrently with the cumulative sentence imposed in count 1 and 2."

4. **The period of two years and three months spent in custody will be taken into account in computing the period of imprisonment.**

5. **The Appellant is accordingly ordered to serve a total aggregate sentence of 42 years.**

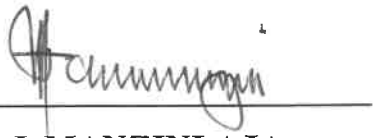


S.B. MAPHALALA JA

I AGREE

J.P. ANNANDALE JA

I ALSO AGREE



M.J. MANZINI AJA

For the Appellant: Mr S.B. Motsa
(SB Motsa Attorneys)

For the Respondent: N. Hlophe
Crown Counsel
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