IN THE SUPREME COURT OF APPEAL OF SWAZILAND

JUDGMENT

Appeal Case No.43/2012

In the matter between:-

MFUNDISWA TEMBE **Appellant**

and

REX **Respondent**

Neutral citation: *Fundiswa Tembe v Rex* (43/2012) [2013] SZSC 15 (31 May 2013)

Coram: **M. M. RAMODIBEDI CJ**
DR. S. TWUM JA
B.J. ODOKI JA

Heard: **7 May 2013**

Delivered: **31 May 2013**

inal Law and Procedure – Rape – Appeal nst sentence of 22 years imprisonment – ellant aged 18 years at time of commission of offence – Court to consider youthfulness and immaturity of offender – Infection of the complainant with HIV/AIDS as aggravating factor – Failure of prosecution to prove infection caused by the appellant – Appeal Court may interfere with trial Court's discretion in scrutinizing sentencing only where discretion is not exercised judiciously or upon wrong principles – Sentence reduced to 15 years imprisonment.

JUDGMENT

ODOKI J.A.

[1] This is an appeal against a sentence of twenty two yearsô imprisonment imposed by the court ***a quo*** for the offence of rape of which the appellant was convicted.

Background to the case

[2] The appellant was charged with the offence of rape. It was alleged by the prosecution that in February 2007 the appellant raped the complainant. The aggravating factors alleged on the indictment were

had sexual intercourse with a thirteen year old
, that the accused traumatized the complainant,
ed the complainant with HIV/AIDS, and lastly that the appellant infected the complainant with genital warts.

[3] The facts accepted by the trial court were that the complainant and the appellant were cousins and stayed in the same homestead but different houses. The complainant stayed with two young children and her grandfather who used to return home at night drunk. Her father had died and her mother had abandoned her.

[4] Sometime in 2006, while the complainant was asleep, she noticed that the appellant was lying on top of her and was trying to undress her. She asked him what he was doing and he told her he was looking for a cat since he had a problem with rats. The appellant warned her not to tell anyone about the incident otherwise he would kill her. She did not tell anyone about the incident.

[5] Again in February 2007 the complainant was woken up by the appellant who was on top of her and was having sexual intercourse with her. She pushed him away but he resisted. She raised an alarm but nobody came to her rescue. The appellant threatened to kill her if she disclosed the incident to any person. The complainant claimed that this was the first time she had had sexual intercourse. The appellant did not use a condom and she was found with a white fluid in her private parts. She stated that the accused subsequently raped her twice on various occasions without using a condom, and repeated the threats to kill her if

ts to any person. Accordingly she did not report

[6] After some months the complainant noticed warts in her private parts and she reported the matter to her grandmother who in turn informed her aunt who asked her how she had been infected with the sexually transmitted disease, and she told her that she had been infected by the appellant. The family later reported the matter to Big Bend Police Station and the police took her to Good Shepherd Hospital. She was examined by a doctor who found that she had been infected with vaginal warts and she was HIV/AIDS positive. The appellant ran away from home but was subsequently arrested and charged with the offence.

[7] The appellant denied the offence but the trial court believed the evidence of the prosecution and rejected the appellantôs defence and convicted the appellant as charged and sentenced him to imprisonment for twenty two years. Hence his appeal.

[8] In his notice of appeal, the appellant stated,

> ñ*I hereby appeal for reduction of seven (7) years of my 22 years sentence that was imposed upon me by Justice Bheki Maphalala at the High Court in September 2012 for a rape offence. I pleaded not guilty to the said rape charge. However, I humbly accept my conviction but only appeal against the harshness and severity of my 22 years sentence.*

*of appeal is that my 22 years sentence is too for me to bear.*ò

The arguments of the parties

[9] In his heads of argument the appellant admitted that he slept with the complainant without her consent, but denied totally that he infected her with genital warts and HIV/AIDS. He submitted that the prosecution should have applied for him to be tested for both the genital warts and HIV/AIDS to confirm whether he had actually had such sexual diseases or not. He stressed that he does not have HIV/AIDS or genital warts and therefore he could not have infected the complainant with such sexual diseases. He implored this court to order that he be tested for HIV/AIDS and genital warts to establish his claim that he was telling the truth.

[10] Secondly, the appellant argued that he was a first offender and prior to the commission of the offence he was a law abiding and peaceï loving citizen.

[11] Thirdly, he contended that he was young and immature when he committed the offence as he was only eighteen years old. He pointed out that he did not want to use his youthfulness as an excuse for committing the offence or to escape harsh punishment, but he took full responsibility for the crime he committed and was remorseful. He prayed that his appeal be allowed and the sentence be reduced.

ned counsel for the Crown, argued that the issue imary discretion of the trial court and that an y interfere with the sentence in exceptional circumstances. He relied on the decisions of this Court in the cases of **Bhekizwe Motsa vs Rex Criminal Appeal Case No. 37/2010**, and **Eric Makwakwa vs Rex, Criminal Appeal Case No.2/2006**. He contended that in the present case the Court must determine whether there was a misdirection in the court **a quo** when it imposed a sentence of 22 years imprisonment.

[13] Learned counsel further submitted that this Court has viewed the offence of rape as one of the most serious offences. He cited the case of **Mbuzo Blue Khumalo vs Rex, Case No. 12/2012** where a twelve year sentence was increased to eighteen years. He also relied on the decision of this Court in the case of **Ngubane Magagula vs Rex Case No. 32/2010** to support his contention.

[14] Counsel had earlier in his heads of arguments submitted that the 22 year sentence on the charge of rape did not induce a sense of shock where the victim had been infected with genital warts and HIV/AIDS. He had contended that the appellant had destroyed the future of the victim to have a healthy and happy life. He also had maintained that this case was an example of non ï usage of condom which posed a potential danger to the victim. It had been his submission that in the present case the infection of HIV/AIDS was a more aggravating factor than mere non ï usage of a condom.

urt pointed out to counsel the argument of the ot medically examined to prove whether he had IDS, and his denial that he did not have those sexually transmitted diseases, learned counsel conceded that the prosecution had not proved that it was the appellant who infected the complained with those sexually transmitted diseases. He admitted that the medical report was scanty and he was therefore not supporting the finding that the appellant infected the complainant with the sexually transmitted diseases. He also agreed with the appellant that his youthfulness should have been considered since as a teenager he was immature. Learned counsel submitted that any reduction in the sentence should be within the ranges the courts have imposed for similar offences.

Consideration of the law and the submissions

[16] The principles governing the jurisdiction of this Court in considering sentences on appeal are now well established. Since sentencing is a matter primarily in the discretion of the trial court, this Court will generally not interfere with the sentence unless there is a material misdirection resulting into a miscarriage of justice.

[17] These sentencing principles have been established in several cases. In **Mbekizwe Motsa vs Rex** (supra), this Court restated (per E. A. Agim JA, sitting with Ramodibedi CJ and Moore JA) the following principle laid down by this Court in Masuku v R (1977-1978) SLR 86:

an appeal is a hearing in the absence of a
n or failure to have regard to some relevant
ourt of appeal does not lightly interfere with a competent sentence passed by a trial court. The criteria ordinarily employed by an appeal court in deciding whether or not to allow a sentence of imprisonment have often been stated, inter alia, by this court in Thwala vs R 1970 -176 SLR 363."

[18] In Thwala case (supra) this Court defined the scope of the jurisdiction of the Court in sentencing on appeal and emphasized that this court will not interfere with the sentence unless there is a striking disparity between the sentence which the court of appeal would itself have passed. It stated,

> *"Sitting as a court of appeal, the ambit of the court's jurisdiction is relatively restricted. This is because the question of sentence, the appropriateness of it, what particular sentence should be passed, is the responsibility of the trial court. On appeal it is clearly established that in the absence of a misdirection or irregularity a court of appeal will only interfere if, as it is sometimes expressed, there is a striking disparity between the sentence which the court of appeal itself would have passed. Sometimes the phrase striking disparity has been described by the phrases "startlingly inappropriate" or "disturbingly inappropriate". These expressions all really mean the same thing, they are one might say expressions of what used to be classified as under the phrase "a sense of shock."*

was an improper exercise of discretion by the own in the case of **Bhekizwe Motsa v Rex** (supra) quoting the Lesotho case of **Matsotso v R (1962 -1969) LLR 367** where it was stated.

> ñ*In cases for example where a court in passing sentence has exceeded its jurisdiction or imposed a sentence which was not legally permissible for a crime or been influenced by facts which were not appropriate for consideration in relation to the sentence, a court of appeal could have power to interfere. But where as here no such considerations enter into the matter it is not for a court of appeal to interfere with a sentence. Before so doing a court of appeal would have to be satisfied that a proper judicial discretion was not exercised by the court in passing sentence. In our opinion this is not so here. The sentence passed cannot be described as unreasonable or out of proportion to the gravity of the offence."*

[20] In sentencing the appellant the trial judge in the court **a quo** stated,

> ñ*[24] In the case of* ***Ngubane Magagula v Rex Criminal Appeal Case No. 32/2010****, the Supreme Court accepted the principles that the appropriate range of sentences for rape cases in previous decisions in this county lie between eleven and eighteen years imprisonment. However the present case is distinguishable on the basis that in the*

se the complainant was infected with both
rts and HIV/AIDS. In the Ngubane case, the
was on the failure of the accused to use a condom and thus putting the complainant at risk of contracting sexually transmitted diseases. This makes the case more serious, hence, it calls for a more severe sentence.

[25] In arriving at a proper sentence, I will consider the triad, that is the personal circumstances of the accused, the interests of society as well as the seriousness of the offence. Undoubtedly the accused is a young man of twenty three years of age, and at the time of the commission of the offence, he was eighteen years of age. However the seriousness of the offence as well as the interests of society far outweigh the personal circumstances of the accused. The increase in rape cases in this community is a cause for concern with victims as young as three years, in most of these cases. The perpetrators do not use a condom and expose the victims to sexually transmitted diseases as well as HIV/AIDS.

[26] Having considered all the circumstances of the case, I sentence the accused to twenty two years."

[21] It is well established that when sentencing an offender the court takes into account the age of the accused at the time when he committed the offence and not when sentence was passed. See **Mahlambi v R 1977-1978 SLR 98 (HC)** and **Mbeki Masuku & Another v the King Case NO. 22/2010**. In Mbeki Masukuôs case, (supra) this Court stated, that a

ould **prima facie** be regarded as immature. The
:

> *"[13] Although as was pointed out by Rumpff CJ in S. V. Lehnberg 1975[4] SA 553 AD at 561 there are degrees of immaturity in the case of teenagers, nevertheless children of that age are immature and lacking in experience of life. (See also S.V. Van Rooi 1976 (2) SA 580(AD). Children of that age are also more likely to act on the spur of the moment without premeditation."*

[22] Immaturity has been held to be one of the extenuating circumstances in cases of homicide. In **Thebe v R Lesotho Appeal Cases 1985-1989 page 33**, the Court observed,

> ñ*The main factor that was urged on us as constituting an extenuating circumstance was the youth of the appellant at the time when the offence were committed, he was three months short of his twentieth birthday. While it is correct that youth is in itself not to be regarded as an extenuating circumstance, the approach of the Southern African Courts over the past decade is that teenagers ought generally to be regarded as being immature and therefore entitled to extenuation unless the circumstances of the case are of such a nature that the court feels obliged to impose a death sentence. (S.V. Lehnberg) 1975 (4) SA 553 (A). S. V. Van Rooi 1976 (2) SA 580 (A). In our view, this approach should be adopted in this country also."*

t in that case the court **a quo** took into account
ant but failed to appreciate it sufficiently. This
nce of immaturity and not evidence to support the conclusion that the offence of the appellant was committed purely for ñinherent wickedness.ò The court upheld the appeal against sentence and set it aside. It substituted a sentence of 20 years imprisonment.

[24] In the present case, the appellant was aged eighteen years at the time of the commission of the offence and twenty three when he was sentenced. Although the appellant was eighteen years old he was still in range of teenagers and generally lacking in maturity. Like many teenagers he was capable of acting on the spur of the moment without taking into account the consequences of his action. It is proper to observe that young people of that age are experimental and adventurous. That is why youthful age of an offender should be a strong mitigating factor to give allowance to their inexperience in life.

[25] In my view the trial judge in the court **a quo** did not give adequate consideration to the youthfulness and immaturity of the appellant which was a strong mitigating factor in his favour.

[26] The trial judge also took into account the allegation that the appellant infected the complainant with HIV/AIDS which he considered as an aggravating factor. However, as the appellant argued he was not medically examined to prove that he was infected with genital warts and HIV/AIDS. Although the medical report was admitted by consent it did not establish who had infected the complainant with the sexually transmitted diseases. The doctor stated that the complainant had been

ild sexual abuse.ò The doctor did not testify in
established who had been responsible for the
use.ò

[27] In my opinion where it is alleged that an accused has infected the complainant with HIV/AIDS or any other sexually transmitted diseases, it is incumbent upon the prosecution to cause the appellant to be medically examined to establish his HIV/AIDS status. It was a gross omission in the present case. The learned Crown counsel was right in conceding this serious omission in the prosecution case.

[28] Therefore the learned trial judge in the court **a quo** was not justified in taking the allegation of infection of the complainant by the appellant with the sexually transmitted diseases as having been established and therefore as justifying its consideration as an aggravating factor.

[29] Accordingly, the learned trial judge in the court **a quo** did not give the consideration to the youthfulness and immaturity of the appellant, and erred in taking into account the allegation that the appellant had infected the complainant with genital warts and HIV/AIDS. Had the trial judge given due consideration to the above factors he would have imposed a lesser sentence against the appellant than the one he imposed.

[30] The sentence imposed against the appellant was beyond the normal range of the sentences in cases of this nature and was therefore too harsh and severe as to amount to a miscarriage of justice.

[31] In the result, this appeal is allowed. The sentence of twenty two years imposed against the appellant is set aside. A sentence of fifteen years imprisonment is substituted.

B. J.ODOKI
JUSTICE OF APPEAL

I agree:

M. M. RAMODIBEDI
CHIEF JUSTICE

I agree:

DR. S. TWUM
JUSTICE OF APPEAL

For the Appellant: In person

For the Respondent: Mr. S. Magagula