

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CRI/S/0002/2022

In the matter between

REX

CROWN

AND

MOEKETSI NDABE

ACCUSED

JUDGMENT

CORAM : M. G. HLAELE J

HEARD : 2nd June, 2022

DELIVERED : 16th June, 2022

Neutral Citation: Rex v Moeketsi Ndabe [2020] LSHC 121 CRIM (16th June, 2022)

SUMMARY:

Criminal law- Sentencing on Section 32(a)(vii) of the Sexual offences Act. mitigating factors on maximum sentence.

ANNOTATIONS:

Cases:

1. *R v Nkhacha CRI/S/14/2016[2008] LSHC*
2. *R v Thulo CRI/S/04/2013[2014] LSHC*
3. *S v C1996 (2) SACR 181*
4. *R v Fisher 29/3/89, NSWCC(A)*
5. *S v Vilakazi [2008] 4 All SA 396 (SCA);*
6. *R v Leteba CRI/S/001/2013[2014]LSHC*
7. *S v Malgas 2001 (1) SACR 469 (SCA) at C-D.*
8. *R v Lefu C of A (CRI) No.6 of 2011*

Articles:

Gumboh E "*Examining the Application of Deterrence in Sentencing in Malawi*" *PER / PELJ* 2017(20) - DOI <http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1167>

[1] This matter came before me for sentencing from the Magistrate court of Berea under *Section 32(a) (vii)* of the *Sexual Offences Act of 2003*. The charge sheet as appears in the record reads as follows;

The Accused is charged under *Sec 8(1)* of the *Sexual Offences Act* in that he unlawfully and intentionally committed a sexual

act upon one 'Makonelo Mapanya, a minor aged 14 years by inserting his penis into her vagina.¹

- [2]** The evidence that was led before the magistrate reveals that on the night in question the accused came home late at night and found the complainant and her 4-year-old brother at home. The complainant was lying down on the family couch asleep. The accused tried to insert his hand into the vagina of the minor. The complainant who was in a sleeping stupor removed his hand.

- [3]** After a while the accused told her to go and sleep in the bedroom. When she got to the bedroom she slept on the bed. It was then that the accused (her father), joined her on the bed. He forcefully opened her thighs and inserted his penis into her vagina. She tried to push him but he overpowered her. During the sexual assault he released his sperms on her thigh.

- [4]** After the sexual act she ran to the neighbors for help. Feeling unsafe she spent the night with the neighbors. In the morning, she reported the matter to the police and she also sought medical intervention. It is here that she was given a medial form which was attended to by a medical practitioner. During the

¹ The Charge Sheet

proceedings the Medical form was handed in as evidence and marked exhibit "A."

[5] Initially the Accused had pleaded not guilty. After the close of complainant's evidence, he withdrew the plea of not guilty to a plea of guilty. As a result, at the close of the case the magistrate made the following finding;

- Court[sic] has found that the accused is HIV positive and has gathered that he was aware of his HIV status before forcing himself onto a child. He informed the court that he had been using or been on HIV treatment as far back as 2013.
- When he had forceful sexual intercourse he was quite aware that he was going to infect the poor child but proceeded nonetheless to carry on his evil deeds.
- Court [sic] is therefore convinced that accused should be sentenced under *Section 32(a) (vii)* and thus committed to [sic] High Court for sentencing.

Section 32(a) (vii) reads as follows;

"A person who is convicted of an offence of a sexual nature shall, subject to the Provisions of *Section 31*, be liable;

(a) In a case of first conviction...

viii) Where a person is infected with the immunodeficiency virus and at the time of the commission of the offence the person had knowledge or reasonable suspicion of the infection, to the death penalty;”

Section 31 (2) provides;

“Where the appropriate penalty is beyond the ceiling of penal powers of the trial court, it shall, after conviction, send the case to the High Court for sentence.”

[6] It is for the following reasons that the matter has come before me.

Before sentencing, the parties were invited by this court to make representations in mitigation and aggravation of sentence. On the 2nd June 2022 the accused appeared before me to make representations in mitigating of his sentence. He was represented by counsel, advocate Nomngongo. The crown was represented by advocate Makamane for aggravating sentences.

MITIGATION:

[7] Advocate Nomngongo in mitigation relied on the case of *R v Nkhacha*² to persuade this court that some of the factors that the court has to consider when imposing a sentence are;

- i. whether the accused is a first offender.
- ii. Whether at the time of the offence the accused was intoxicated.
- iii. That the accused lacked motive.

During his addresses he abandoned relying on the lack of motive being a mitigating factor.

AGGRAVATION:

[8] The crown in turn relied on the case of *R v Thulo*³ where Hlajoane J cited *S v C*⁴ where the learned judge described rape as a fate far worse than total loss of life in these words,

“A rapist does not murder the victim he destroys her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and

² CRI/S/14/2016[2008] LSHC

³ CRI/S/04/2013[2014] LSHC

⁴ S v C 1996 (2) SACR 181 at 186

subjects her to mental torment for the rest of her life, a fate far worse than loss of life.

The crown went on to mention that sexual abuse also leaves the victim with stigmatization from society as opposed to the perpetrators. They described this as the “bizarre nature of sexual offences.”

For this reason, the crown submitted that the accused should be given maximum sentence.

SENTENCING:

[9] Some of the factors that this court takes into consideration in sentencing this accused are that the court *aquo* had found that the accused was HIV positive. It also made a finding that he had been aware of his status ever since he had been on treatment as far back as 2003. He therefore was aware of the possibility of infecting the complainant but proceeded with the sexual act nonetheless. As such the court was convinced that the proper sentencing was under *Sec 32 (a) (vii)* and the matter should be referred to this court for sentencing.

LEGAL PRINCIPLES ON SENTENCING:

I proceed to make an analysis of the sentencing.

Sentencing is one of the most difficult aspects of a criminal trial, not least because of the competing interests that are at play. A crucial task that a court is faced with is determining the purpose to be served by a sentence; that is, whether the sentence should aim at deterrence, retribution, community protection or rehabilitation.⁵ The court should also caution itself not to deliver what Ramodibedi J termed an “angry” judgment.⁶ Moreso where the crime in case rouses a sense of moral indignation of society.

[10] In this case, the accused invaded the dignity and privacy of the complainant. The complainant’s life has henceforth been changed tremendously by the incident. It is difficult for this court to turn a blind eye to the fact that a child of 14 years old was sexually assaulted by her step-father whom she trusted. As has been said earlier herein, sexual assault and penetration without consent is a humiliating and traumatic experience which violates the dignity and privacy of the victim.

[11] The traumatic effects of sexual acts on children have been the subject matter of courts worldwide and courts sing in unison that sentencing of these sexual offenders should not be lenient, but

⁵ Gumboh E "Examining the Application of Deterrence in Sentencing in Malawi" *PER / PELJ* 2017(20) - DOI <http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1167>

⁶ R v Lefu C of A (CRI) No.6 of 2011

should suit the draconic nature of the offence. In the case of *R v Fisher*⁷ the court had this to say:

“This court has said time and time again that sexual assaults upon young children, especially by those who stand in a position of trust to them, must be severely punished, and that those who engage in this evil conduct must go to gaol for a long period of time, not only to punish them, but also in an endeavour to deter others who might have similar inclinations ...”

[12] Offences involving acts of significant sexual exploitation against children are almost without exception met with salutary penalties. Sexual offences involving children involve the presumption of harm. The effects are continuing and are likely to be long-lasting. Moreover, the legislature has by promulgating the *Sexual Offences Act 2003*, provided for increased penalties in respect of such offences. It is an area in which the need to protect children from exploitation and to deter others from acting in a similar fashion assume particular significance.

[14] The significant and long term consequences of serious sexual abuse perpetrated on a young person are now better understood by the courts than they once were. These crimes are extremely serious. They involve a shocking breach of trust. That trust

⁷ 29/3/89, NSWCCA) at 6

emanated from the accused's position as the complainant's step-father.

[15] In the medical report (exhibit A) the medical professional has confirmed the mental and psychological impact of this sexual act by the accused on the complainant. The medical report states;

“Victim shows signs of distress and seems to be scared of male figures due to the incident done to her. She is in need of psychosocial support. She is also provided with prophylaxis.”

[16] In sentencing this particular accused, I am largely guided by the principles that were espoused by the Supreme Court of Appeal in the South African case of *S v Vilakazi*⁸ which have been consistently applied in this jurisdiction. These were well articulated by Majara J in the case of *R v Leteba*⁹ where she noted that these types of actions have devastating effects on the young children who make up the highest percentage of victim of sexual offending. In this regard the learned judge stated: -

“It is also quite disturbing that the accused herein is a relative of the very young child. As it has repeatedly been stated in previous similar cases, the child looked up to him

⁸ *S v Vilakazi* (576/07) [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) (3 September 2008)

⁹ CRI/S/001/2013[2014]LSHC

as a protector rather than the villain. It is indeed a sad fact that instead of diminishing, this phenomenon is gaining momentum and has become so wide spread that it now forms part of the daily news reports not only in Lesotho but in other countries as well. It is a grave cause for serious concern and certainly needs to be discouraged at all costs. One way is by the Courts marking their displeasure by imposing serious punishments that properly reflect the gravity thereof.”

Are there mitigating factors?

In *S v Malgas*¹⁰ it was found that mitigating factors are to be taken into account to determine whether there are substantial and compelling circumstances present and the prescribed sentences should not be deviated from for flimsy reasons.

I have had occasion to consider the mitigating factors submitted by accused’s counsel as stated above. I find them adequate only in so far as the death or life sentence is concerned.

[17] The appropriate sentence under the circumstances of this case will be:

¹⁰ *S v Malgas* 2001 (1) SACR 469 (SCA) at C-D.

- Accused is sentenced to a period of thirty-five (35) years imprisonment.
- Regard being had to the fact that the accused has remained in custody awaiting sentencing by this court, for a period of two (2) years, nine (9) months to date, the sentence herein imposed should run from the 8th August 2019.

M. G. HLAELE
JUDGE

For Crown : Adv. W. T. Makamane
For Accused : Adv. K. Nomngcongo