IN THE HIGH COURT OF SWAZILAND

Rape: Sentence

In the matter between:

REX

vs.

TEMPLE MOSES LULANE

CORAM:	ACTING CHIEF JUSTICE, D. COHEN AND JUDGE D. LUKHELE
FOR THE ACCUSED:	MR. P. SHILUBANE
FOR THE CROWN	MR. KRUPAVARAM
Review Order No. 22/1980	District of LUBOMBO (Big Bend)
On the 30th May, 1980	Review Case No. 67/80

JUDGMENT ON REVIEW

COHEN, A. C. J.:

In this matter the Magistrate at Big Bend convicted the accused on a charge of having contravened Section 3(l) of the Girls and Women's Protection Act No. 39/1920 in that he had sexual intercourse with a girl, Bester Matsenjwa, under the age of 16 years. The evidence showed that she was only eleven years old.

A girl under the age of 12 years is legally incapable of consenting to sexual intercourse and there is an irrefutable presumption to that effect. (See Hunt, S.A. Criminal Law and Procedure Volune II pages 406-407). Apart therefore, from the uncontradicted evidence of the complainant which showed that she was in fact not a consenting party, it is difficult to appreciate why the accused was not charged with the crime of rape. Nevertheless he was not so charged and the punishment meted out to him, as Mr. Shilubane, who appeared for the accused at the request of the Court stressed, must therefore

be based on the statutory contravention and not as if he had been convicted of the more serious crime of rape. However, the Court cannot ignore the presence of these features which make the offence one of rape, and in particular the factual absence of consent.

The Magistrate on the 5th December 1979 sentenced the accused to 12 months imprisonment. On the record of the proceedings reaching the High Court, the Chief Justice requested the Magistrate to give his reasons for what appeared to be a too lenient sentence. These have been forthcoming and the matter was thereafter set down to hear argument on the adequacy or otherwise of the sentence imposed.

Under Section 3(1) of the Act the penalty for a contravention is fixed at imprisonment not exceeding 6 years with or without whipping not exceeding twenty four lashes and with or without a fine not exceeding one thousand rand in addition to such imprisonment and lashes. It is obvious that the legislature regards this type of offence as extremely serious.

The accused did not give evidence nor even make a statement in reply to the Crown evidence. It appears that he is closely related to the complainant who called him "Father", and it was his duty in accordance with Swazi tradition to protect her instead of molesting her and even trying to corrupt her morals by offering her 10 cents. According to the evidence he behaved in a most callous manner towards her. She was obviously deeply distressed at what had been done to her and it is difficult to assess the possible psychological effect on her.

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In his reasons the Magistrate stated that he was influenced by the fact that the medical evidence indicated that the hymen had not been ruptured. That fact does not however mean that full sexual intercourse had not taken place. It is not an infrequent happening that in sexual intercourse, even with the female's consent, the hymen is not ruptured, and in the present matter the complainant's evidence clearly established the act. Not only did the accused not deny this but there was other evidence of the presence of semen in her private parts to support her.

The Magistrate's other reason advanced for what he has now conceded was possibly too light a sentence is that the accused appeared to be a "young ignorant and unsophisticated rural boy of 23 years". The accused was seen by the Court and certainly did not appear to it to be a "boy", but on the contrary a normal looking, well developed young adult. The fact that he comes from a rural area is to my mind quite irrelevant and not a mitigating factor. There is not one law for the "country folk" and another for the city dwellers. Young persons living in the country are surely not to be regarded as knowing little about the facts of life and that to corrupt any young children is a serious moral as well as legal offence.

In my view the sentence in this case should be considerably increased. In spite of my personal views as to the desirability or efficacy of corporal punishment, in the light of the legislature's itude to this type of crime and the surrounding circumstances under which it was committed I have given serious consideration to augmenting the punishment by adding the infliction of strokes on the accused.

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As, however, the accused has already commenced his imprisonment and as the offence took place nearly 6 months ago, I decided against doing so. While the conviction is confirmed the sentenced imposed by the Magistrate is replaced by one of three years imprisonment.

(D. COHEN)

ACTING CHIEF JUSTICE

I agree.

(D. LUKHELE)

JUDGE OF THE HIGH COURT

MBABANE.

2nd June, 1980