IN THE HIGH COURT OF SWAZILAND

In the matter of Case No.345/81.

REX

vs

Paulos Sipho Bhanda

Review Order No. 17/81 District of Shiselweni

Mbabane 11.12.1981 Review Case No. 299/81.

JUDGMENT ON REVIEW

NATHAN C.J.

The Accused in this case was charged with incest, alternatively with rape. He was convicted on the alternative charge and was sentenced to imprisonment for 18 months. He was also warned that on a future conviction he would be declared a habitual criminal.

The matter came before me on review and I directed that the case should be set down for argument with a view to an increase in the sentence imposed, and that pro deo counsel should be appointed to represent the Accused. Mr. Shilubane has argued the case on behalf of the Accused; and the Court is grateful to him for his services.

This was a bad case of rape. The Accused is a sort of cousin of the Complainant. He overpowered the complainant causing her to urinate and defecate and had full intercourse with her. According to the witness Girlie Masangu he alleged after his arrest that it was intercourse with the consent of the Complainant but this is denied by the Chief's Runner who said, however, that the Accused had admitted the rape.

The Magistrate correctly convicted the Accused. But the sentence he imposed is in my opinion quite inadequate. The Accused has a previous conviction in 1975, for theft for which he was sentenced to a fine of E10 or 1 month's imprisonment, and conviction for Culpable Homicide in 1978 for which he was sentenced to 5 years imprisonment. The original charge in that case had been murder.

The Magistrate says in his reasons for judgment that he considered committing the Accused to the High Court for sentence exceeding the 4 year limit of the Magistrates' jurisdiction. Thereafter, however, the Magistrate appears to have been unduly influenced by the protestations of the Accused in a plea for leniency. According to the record the Accused begged and said he wanted to reform. The Magistrate in his reasons says "The Court a quo had to reconsider the position when the Accused, apart from his plea for leniency showed a real contriteness of heart. This sort of repentance was actually demonstrated." The Magistrate does not indicate the nature of the "real contriteness" and the demonstrating of repentance. He goes on to say "From the behaviour of the Accused I fathomed that he did not realise the actual implications and as such had been careless in all the aspect of his life. I had the occasion of rendering a lengthy advice to him and warned him of the real danger involved in the direction in which his life was taking. He appeared now to have seen things in their right perspective. It was for this reason especially, that I decided that he should be helped as much as possible not to mix up any longer than it is necessary with hardened criminals. In the circumstances, as I saw them, a short and sharp sentence will do the trick, and after which to return to join decent society to start reforming.

He has now seen the light of good thinking. After all the essence of punishment is largely to reform; otherwise it becomes counter-effective and productive.

Candidly, if I did not see and if it did not appear to the Court that the Accused had seen the light of good reasoning through the advice and warnings given to him, I would have committed him to the High Court for sentence in view, especially, of his last criminal record in 1978.

The Magistrate concludes by saying "I have no objection to the High Court intervening in the circumstances of this case, as it sees fit," Without commenting further on this permission, it appears to me to "be a tacit admission "by the Magistrate that his sentence may have "been too low.

I am constrained to disagree with most of what the Magistrate has stated in his reasons for judgment. The consideration of association with hardened criminals loses its cogency in the light of the Accused's previous conviction and sentence. Moreover any damage to the Accused through such association will be as complete on an 18 month's sentence as on a more lengthy sentence.

The Magistrate, as I have already indicated, allowed himself to "be unduly influenced "by the Accused's protestations of contrition. He appears to have had no regard to the actual circumstances of the rape, nor to the relationship "between the Accused and the Complainant. I can see no justification of what the Magistrate calls a short sharp sentence.

Furthermore he takes no account of the well known fact that rape cases during the past few years have substantially increased in number, nor of the fact that this Court, for at least the past three years, has been imposing heavy sentences for rape and recording its disapproval of the unduly light sentences that were

imposed by the Magistrate's Courts. Reference may be made to the case of R v T.M. Lulane, Review Order 22 of 1980, 30th May 1980, in which the Court increased a sentence of 12 months, under Section 3(1) of the Girls and Women's Protection Act No, 39/1920, for sexual intercourse with a child of 11, to 3 years imprisonment. The Court even considered the imposition of a whipping as well. The offence in that ease was, as was pointed out in the judgment, de jure rape.

The average sentence for rape at present imposed in the High Court is imprisonment for four years.

I should point out that the warning that the Accused is liable to be declared an habitual criminal was in my opinion not called for. This warning is given in the case of hardened criminals; and I da not consider that two previous convictions, for which the punishment in one of them was a fine of only E10 or 1 months' imprisonment places an Accused in that, category.

Having regard to the fact that contrition is an element to be taken into account, although not to the extent that the Magistrate did, this Court is of the opinion that a fitting sentence will be imprisonment for 3 years.

The conviction is confirmed; but the sentence is increased to imprisonment for 3 years, with effect from 12th October, 1981, the date of the original sentence. The warning in regard to declaration as an habitual criminal is deleted.

C. J. M. NATHAN

CHIEF JUSTICE.

WILL A.J.

I agree.