ISAAKVANWYK

IN THE HIGH COURT OF SWAZILAND

LUCKY ISAAC VAN WYK

V THE KING

Criminal Appeal Case No. 31/98

Coram	S.W. Sapire, CJ
	S.B. Maphalala, J
For Appellant	Self
For Crown	Mr. M. Nsibandze

Judgment

(24/08/98)

The appellant was charged in the Magistrate Court in the District of Hhohho, held at Mbabane on two counts. One of Rape and the other incest

The particulars alleged are that during the period from 1992 to 1996 he on diverse occasions had wrongful sexual intercourse with his daughter a female juvenile aged about 12.

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The Appellant was found guilty on both counts, the record reading

"Accused found guilty on both counts as charged, i.e. of contravening the Girls and Women's Protection Act 20 of 1939 on count one"

This we understand to mean that the magistrate did not consider there to is sufficient evidence to support a conviction for rape, but that the evidence was sufficient to have required the Magistrate to convict the Appellant of contravening the statutory provisions referred to.

It is desirable that where a conviction on an alternative competent verdict is possible, the accused person, especially if he is undefended, should be fully informed of this possibility, so that he understands and appreciates the full import of the accusation he faces.

S v Velela, 1979(4) SA 581 (C)

The Act in question creates a number of offences. The magistrate did not indicate during the hearing of evidence, or even in his verdict, that a conviction on a competent alternative verdict was under consideration or which particular section was applicable, and in terms of which he was acting in finding the accused guilty. Nor did he give any reasons for not convicting on the main count of rape.

There is much to be said for the view that the accused should have been found guilty of rape as charged. The evidence discloses that he misled his daughter or tricked her into having intercourse with him over

that period. The evidence is clear that he overcame her resistance to this unnatural act by quoting to her a verse of the bible which he says supports his view that to sleep with one's minor daughter is permissible and indeed recommended in some circumstances. The translation of the verse into Siswati is too say the least confusing as this interpretation finds no parallel in the English version. We are satisfied that no interpretation of a scriptural text can justify the gross sexual abuse to which the appellant admits

Whatever the position may be as I say he was found guilty of the statutory offence and there is no appeal against that conviction.

Count 2 relates to incest. This offence was properly joined as a charge and does not amount to improper splitting as this ingredient of this offence is that the person with whom the sexual act is committed must be related to the accused within a certain degree of consanguinity

On this charge he was also found guilty.

The accused was allowed to make his argument as far as sentence is concerned and he explained that he has a large family of 9 children who will be prejudiced by his being jailed. He was arrested for this offence on the 9th October 1996. The Magistrate imposed a sentence of 9 years imprisonment with effect from the 9th October 1996

without the option of a fine. Both counts were to be taken as one for the purpose of sentence.

This sentence is incompetent and incorrect on two counts. In the first place the Magistrate has no jurisdiction to impose a sentence of as long as nine years and the maximum sentence provided for in the relevant act is six years.

Secondly it was incorrect and contrary to the practice which has been laid down time and time again that one cannot take more than one count into consideration for the purpose of sentence where one is a statutory offence and one is a common law offence. In view of these misdirections we are at liberty to set aside the sentence and to impose a sentence which we consider appropriate on both counts.

Whatever the appellant's private views may be regarding the right to abuse the child it is a Taw of this country that such behaviour is regarded as abomination. The prevalence of child abuse is often remarked upon and unless the courts impose heavy sentences in these cases of child abuse, the prevalence of this offence will not be reduced and there is no hope of stamping it out. The offence was committed over a long period and eventually the child herself got pregnant and has given birth to an illegitimate child.

We consider that in respect of the offence of having intercourse with a child under the age of 16 the sentence of six years being the maximum provided for is not inappropriate. As far as the incest is concerned this too is a serious offence meriting imprisonment for three years.

The sentence imposed by the Magistrate is therefore set aside and on count 1 the appellant is sentenced to six years imprisonment and the sentence is deemed to have commenced on the 9th of October, 1996.

As far as the second count is concerned the accused will be sentenced to three years imprisonment which is similarly backdated to the date of his arrest. The sentences will run consecutively.

S.W. SAPIRE CHIEF JUSTICE

I agree with the Chief Justice and wish to say that it is difficult to resist the conclusion that what the appellant did to his own daughter is so exceptional that words like "sexual abuse" are not enough to describe it. I agree with the Chief Justice that the sentence imposed is a proper one.

S.B. MAPHALALA

JUDGE