

IN THE HIGH COURT OF SWAZILAND

REX

VS

DOCTOR VICTOR MKHABELA

Cri. Case no. B18/98

Coram

S.W. Sapire, CJ

JUDGMENT ON REVIEW

(26/05/99)

This matter originally came before the late Mr. Justice Dunn. The accused was charged with rape and his case took place before a Junior Magistrate having jurisdiction normally to pass a sentence of imprisonment not exceeding two years. The Magistrate found the accused guilty and sentenced him to 9 years imprisonment. The late Judge Dunn enquired of her why she considered she had jurisdiction to impose such a sentence. Her reply was that she imposed a 9 years sentence because of the powers given to the Magistrates Court by Section 158 bis(l) of the Criminal Procedure and Evidence Amendment Act No. 6/1986 which requires the imposition of the minimum sentence of nine years without the option of a fine where the accused is found guilty of rape, should the court find aggravating circumstances to exist. The Section states that court shall impose such a sentence.

Similar matters have arisen in the past and continue to arise. It has been repeatedly stated from this bench that the effect of the section quoted is not to increase the jurisdiction of Junior Magistrates. The effect of the Section is that if the prosecution alleges that aggravating circumstances do exist these must be stated in the charge sheet and the matter must come before a Magistrate having jurisdiction to impose a minimum sentence. At present this only applies to Principal Magistrates. The Director of Public Prosecutions may of course decide to prosecute the case in the High Court. There are many cases in which this would be advisable and preferable. In the instant case the Magistrate did not have the jurisdiction to impose the sentence she did and she should not have found aggravating circumstances as these were not alleged in the charge sheet.

Accordingly the sentence imposed on count 1 is set aside and substituted by a sentence of two years imprisonment which is the maximum the magistrate could have imposed.

This result is most unsatisfactory as the accused person certainly deserved a much more severe sentence but this does not alter the fact that the Magistrate did not have the jurisdiction to impose the required sentence. It is not possible to reopen the case and to remit the same to a Magistrate having proper jurisdiction.

S. W. SAPIRE CJ