IN THE HIGH COURT OF SWAZILAND

Case no. 100/2013

In the matter between:-

MANCOBA DLAMINI **Appellant**

and

REX **Respondent**

Neutral citation: *Mancoba Dlamini v Rex* (100/13) [2013] SZHC259 (21st November 2013)

Coram: HLOPHE J

Date Heard: 08/10/2013

Date Delivered: 21/11/2013

Summary:

Appeal against sentence imposed by the Magistrate sitting in Manzini – Appellant convicted of violating the Girls and Women Protection Act 39 of 1920 –Appellant sentenced to four (4) years imprisonment without an option of a fine –When Appellate Court can interfere with a sentence imposed by a lower Court –Whether such considerations are in existence in the present

matter –This Court of the view that in the circumstances of the present matter sentence imposed does induce a sense of shock –Court intervenes by suspending a portion of the sentence.

JUDGMENT

[1] On the 23rd August 2012, the Appellant was convicted of contravening Section 3 (1) of the Girls and Women Protection Act 39 of 1920 and sentenced to four years imprisonment without the option of a fine.

[2] Although the Appellant had pleaded guilty to the said charges, he was unhappy with the sentence imposed by the Court *a quo* and decided to note an appeal against the said sentence. His contention was that the sentence imposed by the Court *a quo* was excessive and allegedly induced a sense of shock in the circumstances of the matter. He also contended that the Court *a quo* erred in not affording the Appellant an opportunity to pay a fine.

[3] The appeal is opposed by the crown who have file Heads of Argument disclosing their grounds for opposition of the appeal sought. I must say owing to the fact that the Appellant is representing himself, no Heads of Argument were filed on his behalf. I nonetheless allowed the appeal to go ahead after the matter was initially postponed to enable him attend Court together with affording him an opportunity to prepare for the hearing.

[4] The relevant facts in the matter are mainly common cause; they being that on or around the 13th August 2012, the Appellant and the complainant, who were lovers, left the latter's home to a certain destination. It is in dispute as to who proposed they go there. The complainant said it was at Appellant's instance whilst he said it was at hers. It was upon arrival at the said destination which turned out to be a bush that the two of them engaged in sexual intercourse. Of course the two of them, it is not in dispute, were what they called themselves lovers.

[5] There is a bit of a dispute on what really happened resulting in their having sexual intercourse on this particular day. Whereas she said that the Appellant ordered her to undress, lie down and have sexual intercourse with him, he was quick to put it to her under cross – examination, even though he was not represented legally with the record of proceedings itself not indicating whether or not he had been advised of his rights including how he was expected to conduct his own defence as well as being advised of what type of questions he was to put to the witnesses of the crown; that she is the one who had suggested to him that since her mother was not around at the time, she having gone to church, they go and have sexual intercourse.

[6] It is a fact that the Learned Magistrate, perhaps owing to the fact that he had pleaded guilty to the charges, had not enquired into this dispute and had in fact not decided on which one of the two versions he was to accept, as I believe it had to have a bearing on the sentence.

[7] Being that as it may it was not in dispute that the Appellant was around 19 years of age whilst she was 13 years. It is also not in dispute that they at the time had had two or three other consensual sexual encounters between the two of them.

[8] It is important not to lose sight of the fact that the gravamen of the offence in question – that is the contravention of Section 3 (1) of the Girls and Women Protection Act – is to protect girls below the age of 16 years from indulging in sexual intercourse. Having noted this however, I have no doubt that in such cases it would be difficult perhaps at times even unconscionable, for a Court to impose some sort of a one "sentence fits all", as each case must turn on its own peculiar circumstances.

[9] According to his case before me, the Appellant submitted that the sentence imposed on him was excessive and that it induced a sense of shock. He said in his submission, he should have been given an option of a fine or even a wholly suspended sentence.

[10] I agree with Miss Matsebula's contention that sentencing is primarily a matter in the discretion of the trial Court. The Appellate Court only interferes with it in very rare and limited instances. In fact according to existing authority it will only be interfered with in instances where there has been a misdirection resulting in the miscarriage of Justice or where the sentence itself is vitiated by an illegality. Indeed in ***Sifiso Zwane v***

Rex Supreme Court Case No. 05/2008 the position was put in the following words:-

> *"As this Court has repeatedly stated, the imposition of sentence lies primarily within the discretion of the trial Court. A Court of Appeal is generally loathe to interfere with the trial Court's exercise of its judicial discretion unless there is a misdirection resulting in a miscarriage of justice."*

[11] A sentencing Court misdirects itself among other instances where its sentence is wrong in principle or if it is manifestly excessive or where it induces a sense of shock as was put in the case of Jonah Tembe v Rex Criminal Appeal Case No. 18/2008:-

> *"This Court (as a Court of Appeal) can only interfere with the sentence if it is wrong in principle or if it is manifestly excessive or if it comes with a sense of shock."*

[12] The test on whether an imposed sentence is excessive or induces a sense of shock is a consideration whether there was to be a great or striking disparity between the sentence imposed by the Court *a quo* and the one the Appellate Court would itself have imposed after a careful consideration of all the circumstances of the matter including the person of the accused. Authority is abound that if the Appeal Court would be of the view it would have passed not so different a sentence, then the sentence must stand. If on the other hand it would have imposed a

markedly low sentence, then the sentence should be interfered with. See in this regard ***Rex v Ndusha Themba Zwane 1970-76 SLR 106*** and that of ***Colisile Mkhonta v Rex High Court Criminal Appeal Case No. 86/2011***.

[13] In the matter at hand it is a fact that the complainant and the Appellant were lovers who had already indulged in several consensual acts of sexual intercourse, the accused had not reported these instances to her parents and I am sure she would not have reported this incident as well had she not been cornered and asked by her mother where she had been.

[14] It had been contended by the complainant that the Appellant was the one to have initiated the sexual encounter. This he disputed however suggesting it was the other way round and the Court *a quo* failed to determine this issue. It shall be remembered that it is the duty of the crown to prove all the relevant aspects of a criminal case beyond a reasonable doubt as the accused has no duty to prove his innocence. Besides there is a doubt whether from the conduct of the complainant it can realistically be said that the accused was the only one to blame.

[15] The Appellant was himself a minor at19 years. There is no evidence that it had been determined if he knew the age of the complainant or even if he was aware she was thirteen years at the time. This age consideration in my view emphasizes that whereas a custodial sentence should be considered in such matters, it would also be appropriate in my view to consider suspending a portion of the sentence.

[16] I do not believe that the circumstances of this matter would indicate a case on the higher part of the scale of wrong doing, when considering the actions of all the parties involved together with the conduct of the Appellant. I am convinced there is a major disparity between the sentence imposed by the Court *a quo* and the one I was going to impose in a similar setting against a young men in a consensual sexual relationship with a girl in complainant's situation.

[17] I am therefore of the considered view that the sentence imposed by the Court a quo can be said to be excessive in the circumstances of this matter and that it calls for an interference with, by this Court. I can only point out that during the hearing of the appeal Miss Matsebula did concede that viewed against the backdrop of the circumstances of this matter, the sentence by the Court *a quo*, which did not consider at least suspending a portion of the sentence was excessive.

[18] Consequently, I am of the view that a sentence of four years, half of which would be suspended for a period of three years on condition that the accused does not commit a similar one within the period of suspension would be more appropriate in these circumstances. This being the case, I make the following order:-

1. The Appellant's appeal succeeds to the extent set out in this order.

2. The sentence imposed by the Learned Magistrate be and is hereby set aside and is substituted with the following.

2.1 The accused is sentenced to four (4) years imprisonment.

2.2 Half of the said sentence is suspended for a period of three years on condition that the accused is not convicted of a similar offence within the period of suspension.

3. The custodial sentence against the accused shall take effect from the date of his arrest or shall take into account the period spent by him in custody.

Delivered in open Court on this……day of November 2013.

N. J. HLOPHE
JUDGE – HIGH COURT

For the Crown: Miss E. Matsebula

For the Accused: In person