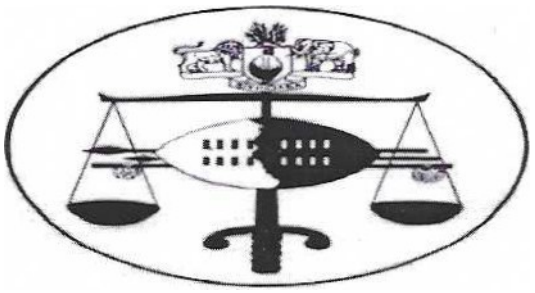

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE Case No. 39/2020

In the matter between:-

DUMISA MPENDULO VILANE Appellant

and

REX Respondent

Neutral citation. Dumisa Mpendulo Vilane v. Rex 39/2020 [20201 SZHC 146 (4th September 2021)

Coram: A. M. Lukhele A.J.

Heard: 31 st August 2021

Delivered: 14th September 2021

SUMMARY: CRIMINAL APPEAL — appeal against sentence on a charge ofcontravention ofSection 3 (1) as read with Section 3 (a) of The Sexual Offences and Domestic Violence Act 15/2018 _ Appellant contending that sentence offifteen years induces sense of shock — Held that the sentence imposed on the Appellant is not proper as it is within the range of sentences where violence has been used — Sentence of fifteen (15) years imprisonment set aside and substituted with one of nine (9) years imprisonment.

JUDGEMENT

14TH SEPTEMBER, 2021

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[1] The Appellant has appealed to this Court against sentence after having been convicted by The Principal Magistrate Court Manzini for contravening Section 3 (1), 3 (2), 3 (3) (c), 3 (b), (e) as read with Section 3 (a) of The Sexual Offences and Domestic Violence Act 15/2018. The Appellant was sentenced to an effective term of fifteen (15) years imprisonment, without an option of a fine by the court a quo.

[2] This appeal is against sentence only. No appeal has been filed against the conviction.

[3] At the trial, the Appellant, who was unrepresented, pleaded guilty to the offence when it was put to him. Evidence was

led to prove the commission of the offence. At the conclusion of the trial the Appellant was found guilty as charged.

[4] The grounds of appeal in this Court are inter alia that:

4.1. the sentence of fifteen (15) years induces a sense of shock on the basis that the Appellant was a first offender;

4.2. the Learned Magistrate erred in law and in fact in not embarking on an enquiry as the presence of extenuating circumstances in the peculiar circumstances of this case;

4.3. the Learned Magistrate erred in sentencing the Appellant to an effective term imprisonment.

5.1. The case against the Appellant was that on or about the year 2019 till January 2020, and at or near Jubela area, in the Manzini District, he wrongfully and unlawfully and intentionally had sexual intercourse with the Complainant, one Nonqaba Ginindza, a Liswati Female Juvenile aged 16 years, a girl below the age of 18 years, who in law was not capable of apprehending the nature of consent of a sexual acts.

5.2. Owing to the age of the Complainant, and the fact that no condom was used during the sexual acts; and the fact that the Complainant and the Accused person engaged in sexual acts several times, aggravating circumstances were alleged by The Crown in terms of Section 185 (bis) of the Criminal Procedure and Evidence Act 67 of 1936 (as amended).

[6] The Complainant, Nonqaba Ginindza, gave evidence for the Crown as the first witness. She testified that she was sixteen years old and was still of school going age and that she still stayed with her mother, Andile Khanyile, the second witness.

[7] Nonqaba Ginindza testified in the Court a quo that the Appellant was well known the Complainant as Appellant was her mother's boyfriend. The Appellant had a young child with Complainant's mother. The Appellant was a frequent visitor at the home where Complainant resided with her mother. She told the Court, during May, 2019 the Appellant proposed love to her and suggested that they establish a love relationship. The Complainant agreed to Appellant's advances and proposal, and they commenced a love relationship where they would frequently call and see each other behind her mother's back.

[81 The communication between the two culminated in the

Appellant and the Complainant engaging in sexual acts a number of times. The sexual relations were consensual. They were then caught on the fourth occasion by Complainant's mother, after the mother had become suspicious of the parties' frequent telephonic contacts, which the two had embarked on.

[9] Andile Khanyile (PW2), who was Complainant's mother, in evidence confirmed that the Complainant was her daughter and that she was sixteen years of age. She further confirmed that the Appellant was her boyfriend, and that they have a young child together. The Complainant confirmed that after she had given birth to the child, she started suspecting that the Appellant and the Complainant were in love relationship, as she noticed that there was frequent communication amongst them.

[10] She told the Court that on the fateful day the Complainant left for church in the evening and she followed the Complamant. At that time, she was together with her son. She and the son followed the Appellant and Complainant to their Church, where they found the Complainant and the Accused engaged in a sexual act.

[11] Upon noticing that they had been seen, the Appellant bolted out of the Church's premises and disappeared, leaving the Complainant behind. When the witness enquired from the Complainant what she was doing with the Appellant, the

that she
Complainant told her was in love with the Appellant and she admitted that they had engaged on sexual relations more than one occasion.

[12] The Complainant's mother stated that at this time she was still in on going love relationship with the Appellant. She stated their child was then about a year old at the time. This witness reported this matter to the police who preferred charges against the Appellant.

13] The Complainant was taken to hospital where she was examined and a medical report prepared by the Doctor at Raleigh Fitkin Memorial Hospital. The Appellant was subsequently charged.

[14] In a nutshell this in an account of the evidence led by the Crown at the trial. At the close of the Crown's case the Appellant did not give evidence, after his rights had been explained to him in terms of Section 174 of the CP&E Act 1938 (as amended), he elected to remain silent and also called no witness.

[15] The Appellant was found guilty as charged. As this was a sexual offence, I have observed that the Court a quo properly

warned itself of the dangers inherent in convicting on the evidence before it. In casu, the evidence was corroborated firstly by the medical evidence that was not disputed, and the evidence of the Complainant's mother and son confirmed who found the Appellant and the Complainant having sexual relations. In fact, the Complainant admitted such evidence to her mother.

[16] Having stated the foregoing, I am satisfied that Appellant was properly convicted of the offence for which he had been charged. He indeed, admitted his guilt. Evidence was also led to prove the commission of the offence. I confirm the conviction.

[17] Turning now to deal with the appeal on sentence, the Appellant contends that the sentence of fifteen years imprisonment induces a sense of shock on account of his age which is 25 years. The Appellant also complains that the Learned Magistrate erred in finding no "extenuating circumstances and also erred in imposing a custodial sentence of imprisonment.

[18] In Nkosinathi Sibandze v Rex (31/2014) [2014] Maphalala MCB Chief Justice, had occasion to state the applicable principles in matters of this nature on sentence and he stated that: -

that she

"29. It is trite law imposition of sentence lies within the discretion of the trial court, and, that the Appellate court will only interfere with such a sentence if there has been a material misdirection

resulting in a miscarriage of justice. It is the duty of the Appellant to satisfy the Appellate Court that the sentence is so grossly harsh or excessive or that it induces a sense of shock as to warrant interference in the interests of justice. A Court of Appeal will not interfere with a sentence where there is a striking disparity between the sentence with was in fact passed by the trial Court and the sentence which the court of appeal would itself have passed; this means the same thing as a sentence which induces a sense of shock. The principle has been followed and applied consistently by this Court over many years and, it serves as the yardstick for the determination of appeals brought before this Court"

The Chief Justice continued to state that:

"These principles have been endorsed in a plethora of other cases that have come before out Courts recently for instance Musa Bhondi NkambuZe v. Rex Criminal

Case No. 6/2009; Nkosinathi Bright Thomo v. Rex

Criminal Appeal No. 12/2012; Mbuso Likhwa

DZamini v. Rex Criminal Case 18/2011; Sifiso Zwane v. Rex Criminal Case No. 5/2005; Benjamin

MhZanga v. Rex Criminal Appeal Case No. 12/2007; Vusi Muzi LukheZe vs. Rex Criminal Appeal No. 23/2004."

[19] Similarly, on the issue of sentence in Sibusiso Makhoshikoshi DZamini v. Rex — Criminal Case No. 36/2020 Paragraph 11 -Ramodibedi Chief Justice (as he then was) at Paragraph 1 1 stated that: -

"11. This Court has repeatedly stressed that the imposition of sentence is a matter which lies within the discretion of the trial Court. An Appellate Court will ordinarily not interfere with sentence imposed by a trial court in the absence of a material misdirection resulting in a miscarriage of justice. This principle is now so well-established in this jurisdiction that it is hardly necessary to cite any authority.„

[20] In the present case, the Principal Magistrate found that there were aggravating circumstances and it gave due weight to such aggravating circumstances, in that the Appellant abused the relationship he had with the Complainant to have sexual relations with her. For that reason, it deemed fit to impose a custodial sentence.

[21 J In casu I am also satisfied offence is sufficiently serious that a custodial sentence is called for and appropriate.

(Refer: Sibusiso Makhoshi-koshi Dlamini (supra)).

[22] Hannah Chief Justice (as he then was) in Rex vs. Hlatshwayo 1985 — 1995 SLR — Page 389 opined that: -

"Cases such as this undoubtedly present a dilemma to the Court. On the one hand rape is viewed as a most serious offence almost inevitably attracting a substantial term of imprisonment. On the other hand, young first offenders should, whenever possible, be kept out of prison. All the Courts can properly do is to weigh very carefully the facts of each case and come to the conclusion on those facts."

[23] I have considered the circumstances of this case and the interest of society and that of the Appellant and I am of the view that the term of 15 years effective imprisonment is on the high side. There is merit in the call of leniency by the Appellant.

[24] The evidence show that the offence was not one accompanied by violence. The sexual intercourse was indeed with the consent of the Complainant. The Appellant and the

that she
Complainant were in a love relationship. In my view the Learned Magistrate did not sufficiently consider these factors. This constitutes a misdirection.

[25] In this case the sentence imposed by the trial Court is fifteen (15) years imprisonment. In my view such a sentence would be one reserved for the worst and most persistent offenders. In the case of a man of twenty- five years of age and a girl of sixteen years, who was willing participant a fifteen-year sentence is far too great a penalty. The sentence passed might have been appropriate for a conviction of an offence of rape. No doubt the sentence imposed takes the Appellant as a hardened criminal, yet he is a first offender,

[26] In S v. Kumalo 1973 (3) SA 697 AD at 698 "Holmes J.A stated that: -

"Punishment must fit the criminal as well as the crime, be fair to

society and be blended with a measure of mercy according to the circumstances; See R v. Sparks and Another; 1972 (3) SA 396 (AA) at P410H, and R v. Berger and Another 1936 AD 334 at P341 per Bexers JA. The last of these four elernents of justice is sornetimes

overlooked."

In every appeal against sentence the enquiry is whether there was an improper exercise ofjudicial discretion i e ,,whether the sentence is vitiated by irregularity or

misdirection or strikingly disproportionate from what the Appellante tribunal considers appropriate. Se S v De Jager and Another 1965 (2) AS S16 AD at p629 B"

[27] In the circumstances of the present case an appropriate sentence that fits the offence and the Appellant and the interest of society, is in my view one that will allow the Appellant a chance to reform and give him a second chance in life while punishing him for the offence he has committed.

[28] In the case of Sandisiwe Masandi Magagula — Criminal Case No. 105/2019 at Page 11 Para 27, Maseko J. stated that: -

"The Court appreciates that the trial Court has the ultimate authority to impose a sentence which it feels is befitting in the circumstances of the case, and that this Court, sitting as an Appellant Court cannot interfere with that authority unless it can be shown that the trial Court committed a misdirection resulting in a miscarriage of justice. I will quickly point out that one such obvious miscarriage of justice in casu, is the imposition of a severe sentence of eight (8) years imprisonment without an option of a fine in these peculiar circurnstances of the case. "

[29] In the cited case Maseko J, interfered with the sentence imposed by the Court a quo and imposed sentence of one

year Imprisonment with the option of a fine on the Appellant.

[30] In the present appeal the Appellant pleaded guilty to the offence. The evidence showed that the relationship was consensual between the Appellant and the Complainant. These circumstances no doubt lessens the moral blamelessness of the Appellant and such should be reflected in the sentence meted out to him.

[31] In the circumstances of this case the trial Court was duty bound to give due consideration of the above factors in coming to an appropriate sentence. No doubt the sentence of fifteen years imprisonment imposed by the trial Court on the Appellant in the circumstances of the present case was excessive and warrants this Court to interfere with such a sentence.

[32] The circumstances of the present case do not warrant a sentence that is in the range of sentences imposed for aggravated rape. Weighing all the other relevant considerations, namely: -

(i) that the Appellant is a first offender;

(ii) he was aged twenty years at the commission of the offence;

(iii) the sexual acts were consensual between the Complainant and the Appellant, and;

(iv) the Crown's Plea to me that I should not to interfere with the sentence of the Court a quo;

(v) as well as the "triad";

I accordingly interfere with the sentence imposed by the Court a quo and pass one that in my view takes care of the circumstances of the Appellant, is in the interest of justice and that meets the particular circumstances this Case.

[33]. It is my view that a sentence that in the interest of justice is one that will be a sufficient deterrent to the Appellant, and while showing mercy and also acting as an incentive to future good conduct to the Appellant. The sentence will be one of nine (9) years imprisonment.

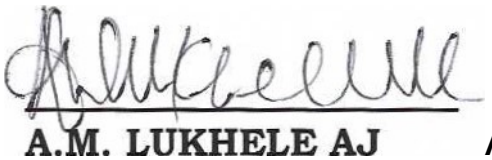
[34]. Accordingly, I make the following order,

1. The appeal on sentence is allowed.

2. The sentence of fifteen years imprisonment imposed by the Court a quo on the 7th January

2020, is set aside and substituted with a sentence of nine (9) years imprisonment.

3. The period of imprisonment already spent in custody by the Appellant shall be taken into account in determining the total period of his imprisonment.



A.M. LUKHELE AJ A.

. LUKHELE AJ

HIGH COURT OF ESWATINI

For: Appellant	Attorney Linda Dlamini Linda Dlamini & Associates
For: Respondent	Crown Counsel – Ms. Nqobile Mhlanga For Director of Public Prosecutions.