IN THE HIGH COURT OF ESWATINI

JUDGEMENT

HELD AT MBABANE **CASE NO. 432/20**

In the matter between:

NORMAN MASWAZI MGABHI **APPELLANT**

And

THE KING **RESPONDENT**

Neutral Citation: ***Norman Maswazi Mgabhi v. The King (432/20) [2022] SZHC 07 (1st February 2022)***

Coram: **LANGWENYA J**

Heard: 2nd February 2021; 16 February 2021; 1 February 2022

Delivered: 1st February 2022

Summary: *Criminal Procedure-Appeal against sentence-appellant convicted of abduction and of maintaining a sexual relationship*

with a child-contravention of section 42 and section 37 of the Sexual Offences and Domestic Violence Act 2018-appellant sentenced to three years and two years for count 1 and count 2 respectively-

Criminal Procedure-appeal against sentence-trial court said to have not considered appellant's personal circumstances but paid lip service to same-the fact that trial court did not on the record dissect each of appellant's personal circumstances does not mean they were not considered-trial court was entitled, as it did, not to give equal weight or value to the different factors regarding the 'triad'-the principle of individualization was brought into play by the trial court-punishment is meted out with regards to the particular circumstances of the accused, the facts and circumstances under which the crime was committed and what sentence would best serve the interests of society-the purpose is thus to find a just and fair sentence that would not only serve the interests of the offender but also that of society.

No misdirection in sentencing at trial court-sentence cannot be interfered with on appeal-appeal dismissed.

JUDGEMENT

Introduction

[1] This is an appeal against sentence. The appellant was arraigned before the Big-Bend Magistrates' Court on two counts of contravening the Sexual

Offences and Domestic Violence Act 15/2018. On the first count, the appellant was charged with contravening section 42 of the Sexual Offences and Domestic Violence Act 15/2018. In that upon or about 5 April 2020 and at or near Goboyane area in the Lubombo district, the accused did wrongfully and unlawfully commit an act of abduction by taking Nonduduzo Mbhamali, a female minor aged fourteen (14) years out of the control of Jobe Mzungelezeni Mbhamali, the custodian of the said child with the intention of performing a sexual act or sexual violation with the said child and did thereby contravene the said Act.

[2] On the second count, the accused was charged with contravening section 37 of the Sexual Offences and Domestic Violence Act 15/2018. In that upon or about 5 April 2020 and at or near Goboyane area in the Lubombo district, the said accused did unlawfully maintain a sexual relationship with Nonduduzo Mbhamali, a female minor aged fourteen (14) years and thereby did contravene the said Act.

[3] The first count is one of abduction. The second count is maintaining a sexual relationship with a child.

[4] The appellant was sentenced to three years without the option of payment of a fine for the first count. He was sentenced to two years without the option of payment of a fine for the second count. The sentences were ordered to run consecutively in accordance with section 37(5) of the Sexual Offences and Domestic Violence Act of 2018.

[5] The appellant who was not represented during the trial in the court *a quo* pleaded guilty to both counts. The prosecution led evidence to prove commission of the offences charged.

[6] The appellant noted an appeal against conviction and sentence but subsequently abandoned his appeal on conviction.

[7] The present appeal is therefore against sentence only.

Appellant's grounds of appeal

[8] The appellant appeals against the judgement of the trial court on the following grounds:

1. The Court *a quo* erred both in fact and in law by failing to properly balance the *triad* when sentencing the appellant.
2. The sentence meted out on the appellant is harsh and induces a sense of shock
3. The Court *a quo* erred both in fact and in law by failing to order that the sentences meted out on the appellant should run concurrently.

Evidence led in the court *a quo*

[9] The complainant, a female child aged fourteen (14) years at the time testified that she was in a romantic relationship with the appellant-a man aged twenty-eight years at the time of the commission of the offences. It is the evidence of the complainant that her romantic relationship with the appellant started in September 2019. Complainant informed the court that she engaged in sexual intercourse with the appellant on two occasions during the subsistence of the romantic relationship. It is her evidence that they started having sexual intercourse on 15 February 2020. They used a condom.

[10] Complainant testified that on 5 April 2020 at about 2100 hours, she left her parental homestead without her parents' permission and went to appellant's house. On arrival at appellant's house she was let in by the appellant who

then locked the door. Later that night, complainant's father, cousin, brother and her friends came to appellant's house and knocked on the door. The door was only opened after a while. Police were called and they arrived and took the complainant and her father to the police station. They were told to return the following morning to record statements. At the time of the trial, the complainant was in Form 1 at Big-Bend High school.

[11] When the appellant was given a chance to cross examine the complainant he stated that he had no questions because the complainant had told the truth.

[12] The Crown led the evidence of complainant's mother. She told the court that the complainant is fourteen years old and handed to court complainant's birth certificate. She testified that on 5 April 2020 at around 2000 hours when she and her husband were preparing to retire for the night, she heard her younger children calling out for Nonduduzo- the complainant. She went to her children's bedroom and was told by her younger children that they did not know where the complainant had disappeared to. She searched for the complainant to no avail. She reported the matter to her husband.

[13] Complainant's mother informed her husband that during the day, the complainant had gone out with two of her friends-Nokusa and Hloniphile. When the friends were asked about complainant's where abouts they stated they did not know where she had disappeared to. It was the evidence of complainant's mother that her husband once admonished the appellant to stop the relationship he had with the complainant because the latter was still young. This discussion was held with the appellant a month before he was reported to the police regarding the charges he now faces.

[14] Complainant's parents had not given permission to the appellant or anyone to take the complainant from their care. The appellant is known to the family of the complainant as a guest in their church.

[15] The medical report was read into the court record and interpreted in siSwati for appellant's benefit. The medical report reflected that the complainant was sexually active.

Appellant's grounds of appeal discussed

[16] It was argued on behalf of the appellant that the trial court did not properly balance the three competing aspects of the *triad* when it considered the proper sentence to be meted out on the appellant. It was contended that the trial court only paid lip service to the *triad* by simply stating that it has considered the personal circumstances of the accused. The trial court did not state what the personal circumstances were nor did it say if those factors had any mitigating effect to the sentence it imposed-so the argument went. It was submitted further that the trial court over emphasized the other two aspects of the triad and under-emphasized the personal circumstances of the appellant.

[17] In my view, there is no merit in appellant's assertion that the trial court disregarded his personal circumstances. In mitigation of sentence, the appellant is said to have apologized for his conduct and pledged to teach other would-be offenders not to be in romantic relationships with children. The appellant also pleaded for leniency. He told the court he was in dire economic straits and that if it was open to giving him an option of a fine, such fine should be of a reasonable amount. The appellant informed the

court that he had two minor children that he supports. He also supports members of his extended family.

[18] The magistrate, in his well-reasoned and cogent judgment, took into account the personal circumstances of the accused in tandem with the seriousness of the crimes charged as well as the interests of society. The fact that he does not say how he dissected each one of the personal factors of the accused does not imply he did not take same into account.

[19] It is trite that equal weight or value need not be given to the different factors of the triad and of objectives of punishment. Depending on the facts before the trial court, the situation may arise where the one requires more emphasis at the expense of the others. This is called the principle of individualization where punishment is meted out with regards to the particular circumstances of the accused, the facts and circumstances under which the crime was committed and what sentence would best serve the interests of society. The purpose being to find a just and fair sentence that would not only serve the interests of the offender but also that of society. In *casu* the learned magistrate, correctly in my view, emphasized the seriousness of the offence and the interests of society at the expense of the personal circumstances of the appellant.

[20] Appellant argued that the cumulative sentence of five years meted out to him is too harsh. I disagree. The sentence is consistent with one that this court, sitting in its appellate jurisdiction would have imposed.

Import of Section 37 and 42 of Sexual Offences and Domestic Violence Act

[21] The complainant testified that she was in a romantic relationship with the appellant and that they twice had protected sexual intercourse during the subsistence of the relationship. When given a chance to cross examine the complainant, the appellant stated that he had no questions and that the complainant had told the court the truth. Put differently, the appellant conceded that he maintained a sexual relationship with a child. Needless to say, appellant's conduct is unlawful in terms of section 37 of the Sexual Offences and Domestic Violence Act. Section 37 of the Sexual Offences and Domestic Violence Act states as follows:

> **Maintaining a sexual relationship with a child**
>
> **'[37] (1) A person who maintains a sexual relationship with a child commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding twenty years(my emphasis).**
>
> **(2) For an adult to be convicted of the offence of maintaining a sexual relationship with a child, the presiding officer shall be satisfied beyond reasonable doubt that the evidence establishes that a sexual relationship with the child existed.**
>
> **(3) Notwithstanding anything to the contrary contained in this Act or any other law, in respect of unlawful sexual acts involving a sexual relationship with a child-**
>
> **(a) the prosecution shall not be required by the Court, law or any person to allege the particulars of any one sexual act that would be necessary if the act were charged as a separate offence: and**
>
> **(b) the presiding officer shall not be required by law to be satisfied of the particulars of any one sexual act that it would have to be satisfied or if the act were charged as a separate offence.**
>
> **(4) An adult may be charged not only with the offence of maintaining a sexual relationship with a child but also with one or more other offences contained in this Part or in Parts II or IV and Part VI to VII alleged to have been committed by the adult in relation to the child in the course of the alleged sexual relationship (my emphasis).**

(5) If the adult is convicted of both the offence of maintaining a sexual relationship with a child and another offence or offences as mentioned in subsection (4), the Court convicting that person shall not order that the sentences be served concurrently'(my emphasis).

(6) In this section, 'sexual relationship' means a relationship that involves more than one sexual at with a child over any period of time.'

[22] What is apparent from the wording of subsection (4) read with subsection (5) is that if an accused person is charged with more than one count from Part V (this part), Part II, Part VI and VII and he/she is subsequently convicted of both or all counts, the sentences cannot be made to be served concurrently. In this case, and in accordance with the provisions referred to herein, the trial court ordered the sentences to run consecutively. There is no misdirection here; the trial court applied the law to the letter.

[23] Section 42 of the Sexual Offences and Domestic Violence Act states as follows:

Abduction

[42] (1) For the purposes of this section abduction means unlawfully taking a child out of the control of the custodian of that child or a person in charge of that child-

(a) with the intention of performing a sexual act or sexual violation with that child;

(b) for the purpose of harmful rituals or sacrifices; or

(C) for any other unlawful purpose.

(2) A person who commits an act of abduction as defined in this section commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding fifteen years (my emphasis).

[24] With regards to count one, the appellant was sentenced to imprisonment for a period of three years without the option of payment of a fine. On count two, the appellant was sentenced to a term of imprisonment of two years without the option of a fine. The law provides that the contravention of sections 42 and 37 of the Sexual Offences and Domestic Violence Act

attract punishment of imprisonment for a period not exceeding fifteen years and twenty years respectively. Section 42(1)(a) and Section 37(1) admit of no alternative punishment such as a fine because they are couched in peremptory language.

[25] The court record of the trial court reflects that the learned magistrate considered the *triad* before he sentenced the appellant. In sentencing the appellant, the learned magistrate stated as follows:

> **'I have also considered the personal circumstances of the accused person as stated in his plea on mitigation of sentence as adduced and further that he exhibits remorse. I have also considered the relationship between the complainant-victim and accused. I have considered the age difference between the accused person and the girl child.**
>
> **I am mindful that the sentence imposed should fit the offender as well as the crime and be fair to society, and be blended with a measure of mercy in accordance to the circumstances. A number of factors are considered in the passing of sentence. These factors although not (sic) exhaustible, have been summarized as comprising a triad. This triad approach considers the nature of the crime, the personal circumstances of the accused and the interest of society. In considering the triad, as articulately enunciated in S v Banda & Others 1991 (2) SA 352 (B), the court has a duty to strike a balance on the three contending interests, with not one taking preference over the other. The three factors have to be evenly balanced.'**

Guideline on sentencing for appellate court

[26] Whilst the court in sentencing must be cognizant of the accused's personal circumstances, the sentence must equally reflect the need for appropriate severity and general deterrence.

[27] In sentencing the court must apply, harmonize and balance interests of society in the offence, the nature and extent of the offence committed against the personal circumstances of the convict.

[28] In the present matter, the learned magistrate determined that the interest of society and the gravity of the offences outweighed the personal circumstances of the convict.

[29] Although it is desirable to sentence an accused on each count and order the sentences to run concurrently in order to ameliorate the cumulative effects of the sentences imposed, this case is different. It is different because the legislature has expressly stated that sentences based on the contravention of sections 37 and 42 of the Sexual Offences and Domestic Violence Act shall not be made to run concurrently.

[30] It is settled that punishment falls within the ambit of the discretion of the trial court and that an appellate court should not readily interfere unless there is good cause shown. There will be good cause where the sentence is vitiated by irregularity or misdirection or where the sentence imposed is disturbingly inappropriate and induced a sense of shock. To come to such a conclusion, the court must be satisfied that the sentencing court did not exercise its discretion regarding sentence judicially[1].

[31] For reasons stated in this judgment, there is no justification to interfere with the sentence passed by the Court *a quo*.

[32] In the result, the appeal is dismissed.

M. S. LANGWENYA

JUDGE OF THE HIGH COURT

[1] *S v Rabie* 1975 (4) SA 855(A); *S v Ivanisevic & Another* 1967 (4) SA 572(A) at 575F-G.

For the Appellant:	**Ms N. Ndlangamandla**
For the Respondents:	**Mr B. Ngwenya.**