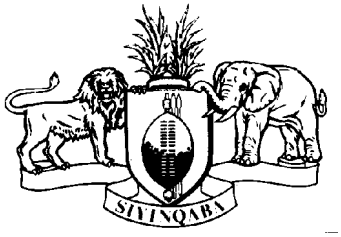

IN THE HIGH COURT OF SWAZILAND

CRIMINAL APPEAL NO. 34/99

IN THE MATTER BETWEEN:

DUNGUZELA MANZINI XABA
VS
REX

CORAM	**:**	**SAPIRE CJ**
		MATSEBULA J
		MAPHALALA J
FOR THE CROWN	**:**	**MRS. M. DLAMINI**
FOR THE ACCUSED	**:**	**MR. DUNSEITH**

JUDGMENT

The accused was charged with the offence under the provisions of the **GIRLS' AND WOMENS' PROTECTION ACT 39/1930 SECTION 3(1)** (erroneously referred to in the charge sheet as Section 3(11)). It being alleged that he did unlawfully and intentionally enticed and had sexual intercourse with a girl under the age of 16 to wit Tholakele Ngwenya a minor of 15 years of age and thus committed the above mentioned offence. The accused pleaded guilty when the charge was put. Evidence was led and the Crown proved that the ***actus reus*** did take place. The Magistrate duly sentenced the accused on 2nd November 1998 to an imprisonment for 6 years with effect from 1st October 1998 being the date on which he was first taken into custody.

On 23rd November 1998 the accused noted an appeal against both the conviction and sentence. Against the conviction the appellant states under paragraph 'A':

CONVICTION

(a) that the learned Magistrate erred in fact and in law in rejecting the appellant's story in as much it could be true and that the complainant admitted that she and the appellant were infact lovers and that this admission corroborated the appellant's story.

(b) The learned Magistrate erred in fact and in law in not considering the fact that physically complainant's appearance seemed to be one who was above the statutory age of 16 years.

(c) It was not disputed that the appellant and complainant were in fact lovers.

SENTENCE

1. The sentence of 6 years is severely harsh and it induces a sense of shock. The appellant asked that in the event the court confirmed it that it be reduced or suspended.
2. The appellant is a first offender and sole bread-winner of his family.

On 9th July 1999 the matter was placed before Sapire CJ on review under case no.43/99. The Honourable Chief Justice raised serious concerns whether the Crown had infact proved in the ***court a quo*** that the accused was aware or realized that the complainant was infact under the statutory age to have been unable to give the necessary consent.

The Chief Justice ordered that the matter be set down as an appeal and be argued by counsel on behalf of the appellant and the Crown.

Mr. Dunseith kindly agreed to appear on an ***amicus curiae*** basis and filed heads of arguments. On behalf of the Crown, Mrs. Dlamini appeared and also filed heads of arguments. This court is highly indebted to both counsel for the invaluable assistance.

According to the evidence led, notwithstanding the appellant's plea of guilty, he stated that he was not aware that the complainant was under the age of 16.

In view of the concern raised by the Honourable Chief Justice, the main consideration is whether ***mens rea*** is a requirement under the section the appellant was charged. If it is, the next question is whether the Crown had discharged its onus that the appellant had the necessary ***mens rea***.

Mr. Dunseith referred the court to a Republic of South Africa counterpart of a similar statute

which states in an unambiguous and very clear terms that the statutory prohibition is absolute and that an accused cannot escape liability on a basis of a ***bona fide*** belief that the complainant was above the age of 16 years of age. (See **R VS V 1957(3) SA633 OPD** and also **S VS ELS 1972(4) SA696 TPD 699-702.**

Under the Swaziland Section 3(1) of Act No.39/1920 the legislature did not deem it fit to state whether strict liability applies. Nor does the Swaziland statute indicates whether it is a defence if an accused is deceived by the complainant into believing that she was infact above the age of 16 at the time of the commission of the offence.

In the absence of a specific indication in the statute whether or not ***mens rea*** is a requirement, the general trend adopted and followed by most modern states in dealing with criminal trials is that every crime existing at common law requires that for its commission, a blameworthy state of mind on the part of the perpetrator should exist. This blameworthy state of mind is ***mens rea*** . Generally, courts are reluctant to interprete a piece of statute as dispensing with the requisite ***mens rea*** if the statute does not do so in words which are plain and unambiguous. (See **MAXWELL ON THE INTERPRETATION OF STATUTES 12TH EDITION BY P. ST. J LANGAN**) at page 123 cf **WILLIAMSON VS NORRIS 1889(1) QB 7** per Lord Russel of Killowen CJ @14.

Lord Goddard CJ in **BREND VS WOOD 1946(175) LT 306** where he had the following to say:-

> "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out ***mens rea*** *as a constituent part of the crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."*

I respectfully agree with the sentiments expressed above and in my view the learned Magistrate should have acquitted and discharged the appellant in this case.

J.M. MATSEBULA

JUDGE

I agree,

S.W. SAPIRE CJ

I agree,

S.B. MAPHALALA
JUDGE