IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CRIM.APP.NO.16/80

In the Appeal of:

BOY MFANUZILE NDWANDWA (Appellant)

vs.

REGEM (Respondent)

CORAM: C. J. M. NATHAN, C.J.

D. COHEN, J.

FOR APPELLANT: FOR RESPONDENT:

JUDGMENT

(Delivered on September 1980)

Nathan, C.J. :

The appellant was convicted of abduction and was sentenced on 30th July 1980 to imprisonment for twelve months. He appeals against the severity of the sentence.

The so-called complainant (I say "so-called because in an abduction case the real complainants are the parents or guardians of the minor girl) is a girl aged 16 years and the appellant is a young man aged 20 years. He is a first offender, and unmarried. The evidence discloses that the complainant voluntarily absented herself from her parents' home and from school and went to stay with the appellant at his parental home for some two weeks. During this time they had sexual intercourse on several occasions. As a result the complainant has been dismissed from school and, according to the Magistrate, she is unlikely to be admitted to school again. It is presumably this circumstance that influenced the Magistrate to impose the heavy sentence that he did.

It is clear that the appellant was correctly convicted of abduction; but it remains to consider the appropriateness of the sentence that the Magistrate passed. In the judgment in R. v. M. M. Ndwandwe, Review Order 19/1979 (17th August 1979) I pointed out that abduction is a serious offence which calls for more than a wholly suspended sentence. I, however, referred to the case of R. v. Mafilazuba, 1944 S.R.134, in which it was said.

"On a conviction of abduction where the girl is nearly of full age and a freely consenting party, a fine is an adequate punishment .... It is an offence which varies greatly in degree .... In cases in which imprisonment without the option of a fine has been held to be appropriate there have always been especially reprehensible features. Each case must be considered on its own merits, with full regard for the age of both parties, their relationship to each other, and to the parents and all other surrounding circumstances."

I also referred to the case of R. v. Strydom, 1957(2) S.A.480(T), in which Dowling J. said at p. 480 H.

"Prosecutions for the abduction of women not of tender years and of nearly full age are not common, and in the cases where prosecution has taken place I have not been able to find any case where a prison sentence, without the option of a fine, has been imposed."

In the present case the complainant is only 16, and she can therefore hardly be said to be "nearly of full age", to use the phrase in Mafilazubals case, supra. There is also the schooling aspect of the matter. But these are the only circumstances which in any way tend towards the reprehensible, and the Magistrate appears to have had no regard to the personal circumstances of the appellant. The Appellant points out in his notice of appeal that a prison sentence will render him a more dangerous criminal and

will have little reformatory effect. I think there is force in this submission. He also says that he has to support his six brothers and sisters. He said in mitigation that he was unemployed. How he does this if he is unemployed is not clear; but in argument he said he was in fact in the Army. However that may be I have no doubt that the sentence imposed by the Magistrate is so severe as to call for correction. I would only add that insofar as the complainant's value in the marriage market may have been diminished - it does not appear whether she was a virgin or not - her parents may have a civil remedy by way of a claim for damages.

The proper sentence to be imposed gives rise to some difficulty in view of the fact that the Appellant has already served some six weeks of his sentence. A fine in the circumstances is not appropriate, apart from the difficulty the Appellant might have in paying a fine. The Court has come to the conclusion that in the circumstances of the present case an appropriate punishment would be imprisonment for three months with effect from 30th July, 1980, the date of the original sentence, of which six weeks will be suspended for three years on condition that the Appellant is not convicted of any offence of which sexual intercourse with a minor is an element, committed during the period of suspension.

The conviction is upheld but the sentence is altered as set out in the preceding paragraph hereof.

Signed:.....

(C. J. M. NATHAN)

CHIEF JUSTICE

I agree.

Signed:.....

(D. COHEN)

JUDGE