

IN THE HIGH COURT OF SWAZILAND HELD AT MBABANE

In the matter of:

REX

versus

MASHAYANE FLIAS MABUZA

Review Order No.15/1980

District of MANZINI (Manzini)

Mbabane on 31 March 1980

Review Case No. 48/1980

JUDGMENT ON REVIEW

Nathan, C.J. :

The Accused in this case was charged with contravening Sec.3(1) of the Girls and Women's Protection Act No. 39 of 1920. He was convicted and sentenced by the Magistrate to three years imprisonment of which one year was conditionally suspended for three years. The matter was submitted to this Court on review and it was then pointed out that the magistrate in imposing the sentence which he did had exceeded his maximum jurisdiction of two years' imprisonment. The Magistrate has accordingly requested this Court to deal with the matter on review as if the case had been remitted for sentence in terms of Sec.293(1) of Act 67 of 1938. This we shall do. Mr. v. Dlamini was assigned to argue the case on behalf of the Accused and the Court is grateful to him for his assistance.

I do not think it is necessary for me to deal with the facts in detail. Suffice it to say that there are various aggravating features in the case, to such an extent, indeed, that my brother Cohen J. and I have given serious consideration to the question whether the sentence imposed by the Magistrate is adequate in the circumstances. The Accused might well have been charged with and convicted of rape. Whilst it would not be proper to sentence him as if he had been so

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convicted, the Court is entitled to take into account the circumstances surrounding the offence. Furthermore the legislature has provided a very heavy-penalty for a contravention of Sec.3(1) of Act 39 of 1920 - imprisonment not exceeding 6 years with or without whipping not exceeding 24 lashes and with or without a fine not exceeding R1,000 in addition to such imprisonment and lashes.

On the other hand there are certain factors which operate in favour of the Accused. He is a first offender; and the evidence reveals that although other people in the homestead of the Accused remonstrated with him in regard to his conduct they did not take a very serious view thereof, made no real attempt to get him to desist from his conduct, did not summon assistance or report to the authorities and would have been content to allow the matter to rest had the complainant been in love with the Accused. There is further the possibility on the medical evidence that the complainant was not a virgin.

In all the circumstances it does not appear to us that this Court, sitting as a Court of review and not of first instance, should increase the sentence above that imposed by the Magistrate. In arriving at this decision we also take into account that previous sentences imposed by this Court for this offence, or approved by it on review, have not on the whole been in excess of that sentence. I sound the warning, however, that if this offence continues to be prevalent in future it may well be visited with heavier sentences.

The conviction is confirmed and the Accused is sentenced to 3 years imprisonment with effect from the date of the original sentence, 3rd March 1980,

of which one year is suspended for 3 years on condition that the Accused is not convicted of rape, indecent assault or any contravention of Act 39 of 1920 committed during the period of suspension.

(C. J. M. NATHAN)

CHIEF JUSTICE

I agree.

(D. COHEN)

JUDGE