IN THE HIGH COURT OF SWAZILAND

Case no. 30/2009

In the matter between:-

GOMSH MILTON GAMEDZE **Appellant**

and

THE KING **Respondent**

Neutral citation: *Gomsh Milton Gamedze v The King* (30/09) [2013] SZHC258 (21st November 2013)

Coram: HLOPHE J

Summary:

Criminal Appeal against sentence imposed by the Magistrate sitting at Simunye –Appellant having been convicted of contravening section 3 (1) of the Girls and Women Protection Act 39 of 1920 as well as of incitement of complainant to commit an abortion –Appellant convicted of offences and sentenced to 6 years imprisonment, four (4)of which was suspended on certain

conditions on the first count as well as to 12 months imprisonment or alternatively to E1200.00 fine on the second count –Appellant appealing against sentence in the first count contending inter alia that same was irregular in so far as it did not give him an option of a fine and secondly on it being allegedly excessive and inducing a sense of shock –Respondent contends that sentence appropriate and no basis for Appeal Court to interfere –Principles as to when Court of Appeal interferes with sentence including Appeal Court's approach to sentence discussed –Appeal dismissed.

JUDGMENT

[1] The Appellant was convicted of two counts comprising the contravention of Section 3 (1) of the Girls and Women Protection Act 39 of 1920 on count 1 as well as for an incitement of the complainant to commit an abortion in count 2.

[2] The Appellant was, subsequent to the conviction aforesaid, sentenced in count 1, to six years imprisonment, four of which was suspended for an undisclosed period on condition he was not convicted of having committed an offence in which unlawful canal connection or sexual intercourse was an element, while in count 2 he was sentenced to twelve (12) months imprisonment or a fine of E1200.00. The sentences were otherwise ordered to run concurrently.

[3] There is something to mention at this stage with regards the sentence, which this Court does so *mero mutu*. This is the fact that the suspended

portion of the sentence in count 1 does not state for how long the suspended sentence was to remain hanging on the head of the Appellant as it surely cannot be indefinite. In fact section 313 (2) of the Criminal Procedure and Evidence Act 1938, provides as follows with which the sentence imposed by the Learned Magistrate is not in accord:-

> *"313 (2) If a person is convicted before the High Court or any Magistrate's Court of any offence other than one specified in the Third Schedule, it may pass sentence, but order that the operation of the whole or any part of such sentence be <u>suspended for a period not exceeding three years</u>, which period of suspension, in the absence of any order to the contrary, shall be computed in accordance with subsections (4) and (5) respectively."*

[4] It is therefore an irregularity for a Court not to spell out the period of suspension of a sentence. Under normal circumstances this would warrant that in the event the appeal was unsuccessful, it be referred back to the Magistrate who dealt with it for her to state the appropriate period for which the sentence was being suspended. This however, would be dependent on whether or not there is a difference on what that Court would do from this one. In this matter it is clear that the period of suspension cannot exceed three years which is a statutory limitation. Consequently that is the period I would impose and believe is the same

one the Learned Magistrate would impose as the extent of time for which the suspended portion of the sentence would remain in place.

[5] Otherwise the facts of the matter are mainly common course they being that on a certain day in January 2009, and whilst the complainant was from a certain Shop at Mlawula, she was allegedly grabbed by the Appellant who dragged her into a certain house where he went on to have sexual intercourse with her. During the said sexual encounter the Appellant had not used a condom.

[6] The sexual intercourse concerned resulted in the complainant falling pregnant. It was her first time having a sexual encounter with the Appellant. She conceived and or fell pregnant from this incident.The Appellant was to later incite the complainant and her mother, who was his employee, to cause the complainant to abort or terminate the pregnancy. He gave her E800.00 to facilitate this and the abortion was indeed carried out.

[7] The Appellant was eventually charged with the contravention of Section 3 (1) of the Girls and Women Protection Act 39/1920 and with the incitement of the complainant to commit abortion. For the sake of clarity, Section 3 (1) of the Girls and Women Protection Act makes it an offence for anyone to have sexual intercourse with a girl below the age of 16 years. He pleaded guilty to both counts with evidence being led only as regards count 1 and none being led with regards count two (2). It merits mention that these charges are on the face of them very

serious with a concern being raised with regards the charge preferred against the Appellant in count 1 when considering the evidence before Court. Clearly from the evidence displayed on record, it seems clear that there was rape *qua* rape as opposed to that of the violation of the Girls and Women Protection Act. I say this because the evidence shows the Appellant grabbing the complainant, dragging her into a certain house and then going on to have sexual intercourse with her without her consent. Under normal circumstances this depicts rape properly so-called. Other than suggesting she was his girlfriend, which on its own is not supported by any evidence as she denies it and would not entitle him to forcefully have sexual intercourse with her firstly under common law rape and secondly under the Girls and Women prohibits sexual intercourse with a girl below the age of 16 years which is what the complainant was in this matter, there is no indicator such sexual intercourse was consensual.

[8] I can only mention this aspect of the matter in passing given that the preferment of what charges in a given setting is a discretionary matter for the crown. It suffices to say that the Appellant should consider himself as having been very lucky for the charges eventually preferred against him when considering the sentencing trend of this Court in matters of rape with aggravating factors as sentence therein ranges between eleven(11) and eighteen (18) years.

[9] See the judgment on sentence in the case of ***Rex v Mzilikazi Mnciniseli Maseko, Criminal Case No.108/2009***. Otherwise despite the fact that

the Appellant had pleaded guilty to all the counts and had been sentenced in the manner stated above, the Appellant noted an appeal against the sentence. The grounds of appeal as covered in the Notice of Appeal were couched as follows:-

1. *The Learned Magistrate erred in fact and in law by not affording the Appellant an opportunity to pay a fine yet the Appellant is a first offender.*

2. *The Learned Magistrate erred both in fact and in law by imposing a heavy sentence which induces a sense of shock notwithstanding that Appellant is a first offender.*

3. *The Learned Magistrate erred both in fact and in law by not affording Appellant's legal representative an opportunity to mitigate on behalf of Appellant.*

4. *The Learned Magistrate erred both in fact and in law by not taking into account Appellant's personal circumstances (Appellant's interests) before meting out a proper sentence.*

[10] Because of its relevance to the circumstances of this matter, it needs to be mentioned that soon after his arrest, the Appellant had been admitted to bail. Even after he was convicted of the above offences, the Appellant, notwithstanding he had pleaded guilty to the charges concerned, which from the evidence seemed to be serious and to have been on what I would call, the highest part of the scale of wrong doing,

applied and was granted bail pending appeal. It would appear that the bail pending appeal procedure is being abused if one considers that in this matter bail was granted notwithstanding the Appellant having pleaded guilty and there clearly not having been established any prospects of success in the matter. It is important to note that bail pending appeal or review should be considered very closely and be granted in circumstances where the interests of justice warrant it particularly where not only the Appellant is not a flight risk but also where there are prospects of success in the appeal. See in this regard the case of ***S v Williams 1981 (1) SA 1170 (CA)*** and ***Thembela Andrew Similane vs Rex High Court Criminal Case No.234/2002*** (unreported)

[11] Among the applicable bail terms was that he reports to the Simunye Police Station three times a week starting on the 26th June 2009 between the hours of 9.00am and 1500 hours, until the appeal is disposed of. When the matter was mentioned before me for appeal hearing on the 10th October 2012, I was told same could not be proceeded with because his attorney of Record, identified as Mr. Sabelo Dlamini had withdrawn from being such. I was informed also that the Appellant was nowhere to be found as his whereabouts were unknown.

[12] I wondered how that could be if one of his conditions for release on bail pending appeal was that he reports to the Simunye Police three times a week. I was informed by counsel for the crown that it appeared the Appellant was no longer complying with his bail conditions which required that he reports to the Simunye Police in the manner stated

above pending disposal of his then pending appeal. In fat I was informed that the Appellant had last reported on the 8th November 2010 without any variation of his bail terms having been ordered by the Court that granted him bail pending appeal in the first place.

[13] Having formulated the view that the actions of the Appellant were making a mockery of the criminal justice system, particularly in view of the fact that despite his having pleaded guilty to the charges he had managed to avoid serving his sentence together with the fact that his actions of being out of reach had violated and remained in violation of the terms granting him bail and thus severing the ties of connection between him and the state, I issued a warrant of his arrest and called on him to show cause why his bail could not be withdrawn as he forfeits the bail deposit he had paid, whilst continuing to serve his sentence as he awaits determination of his appeal. The withdrawal by his Attorney of Record, either by design or mere coincident ensured that he remains completely out of reach whilst his conviction and sentence was conveniently rendered in effective. This in my view is not how the law should be treated if it is to attract confidence from members of the public.

[14] On the 14th November 2012, the Appellant was eventually arrested and produced before Court in line with the Order I had issued on the 10th October 2012. An enquiry was conducted in terms of which the Appellant could not show cause why his bail could not be withdrawn together with a forfeiture of his bail deposit. All he could say was that

he had lost his job and failed to address the question why such loss would prevent his reporting to the Simunye Police and why he had not applied to Court to properly very his bail terms or conditions. Consequently, I was left with no option but to withdraw the Appellant's bail resulting in him being taken back to custody to serve his sentence whilst awaiting the hearing of his appeal.

[15] On the 3rd December 2012, the Appellant's appeal proceeded before me. It is regretted judgment could not be as expedient as one would have loved it to be, owing to a combination of factors including that the Court had too many matters to deal with taken together with the fact that the Court's Secretary had to take a long three months leave and has just returned. In his submission the Appellant maintained that the Learned Magistrate should have given him the option of a fine and that the said Court had erred in imposing what he termed a heavy sentence which he said induced a sense of shock, irrespective of his being a first offender. He contended his attorney had also not been given an opportunity to mitigate before sentence was imposed. He contended as well that the Learned Magistrate erred both in law and in fact by not taking into account his personal circumstances. He then prayed that he be ordered to pay a fine instead of a custodial sentence.

[16] I must mention that other than these general contentions, no particulars were supplied each such contention. The crown on the other hand, whilst represented by Mr. Nxumalo, prepared Heads of Argument where their argument was stated and also motivated orally in Court. On

the overall it was disputed that the Court had erred in not imposing a fine. It was submitted the Learned Magistrate had acted in accord with section 238 of the Criminal Procedure and Evidence Act 1938, which allowed him to impose a custodial sentence where evidence proving the commission of the offence was led and the Magistrate had correctly exercised the discretion she had.

[17] It was disputed that the sentence induced a sense of shock. The offence it was submitted was a serious one which was prevalent over and above its being on the rise in the country. It was argued that despite the offences being serious, the Appellant had a higher portion of the sentence of six years suspended as he was to serve only two years of that. Furthermore the sentences for the two offences were made to run concurrently which further meant that he was effectively to serve only two years of the total seven years he had been ordered to serve.

[18] It was denied that the Learned Magistratae had not given Appellant an opportunity to mitigate. Indeed, it was argued, the record did indicate that the Appellant's counsel had chosen not to say anything in mitigation, despite being invited to do so and no dispute was raised with that portion of the record.

[19] It was further denied that the Learned Magistrate did not take into account the personal circumstances of the Appellant. Those that had been adduced in Court were taken into account such as the accused's

being a first offender. Otherwise no other personal circumstances were adduced and counsel had chosen not to say more.

[20] Speaking for my own, it is clear that the Appellant's appeal is against sentence. It is now a settled position of our law that sentencing is predominantly a matter that remains in the discretion of the trial Court. This being the case the Appeal Court only interferes with sentence in very rare circumstances and particularly where there is a misdirection or where it is wrong in principle which often manifests itself in the said sentence being illegal or where it is excessive or where it induces a sense of shock. See in this regard the case of ***Sifiso Zwane v Rex Supreme Court Case No. 05/08*** and that of ***Jonah Tembe v Rex Supreme Court Case No. 18/08***.

[21] In the ***Sifiso Zwane v Rex Case*** (supra) the position was expressed in the following words:-

> *"As this court repeatedly stated, the imposition of sentence lies primarily within the discretion of the trial court. A court of Appeal is generally loathe to interfere with the trial court's exercise of judicial discretion unless there is a misdirection resulting in a miscarriage of justice."*

[22] On the other hand in ***Jonah Tembe v Rex*** (supra) the following which confirms what is stated above, was said by the Supreme Court:-

"This court (as a Court of Appeal) can only interfere with the sentence if it is wrong in principle or if it is manifestly excessive or if it comes with a sense of shock."

[23] The test in determining whether the sentence imposed by the Court *a quo* was excessive or induced a sense of shock, is for the Appeal Court to consider whether there would be a great disparity between the sentence it would itself impose having considered all the circumstances of the matter including those of the accused, and the one imposed by the lower court. If it would be markedly different that imposed by the Court *a quo* then that sentence would indeed be inducing a sense of shock and the Appeal Court would be entitled to interfere with it. If however, the difference would not be much, then the sentence imposed by the Court *a quo* would have to stand.

[24] In R v Ndusha Themba Zwane 1970-76 SLR 106 at 108 D-F, this Court per Nathan CJ, put the position as follows:-

"…an accepted test is whether the sentence induces a sense of shock, that to say if there is a striking disparity between the sentence passed and that which the Appeal Court would have imposed.

In S V Anderson 1964 (3) SA 494 (A) at page 495 G-H, it was said by Rumpf JA that; "the Court of Appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will

determine what it thinks the proper sentence ought to be. If the difference between that sentence and the sentence actually imposed is so great that an inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of Appeal will alter the sentence. If there is not that degree of difference, the sentence will not be interfered with."

The cases of ***Colisile Mkhonta v Rex Case No. 86/2011 at page 4 paragraph 10*** and that of ***S V De Jaager and Another 1965 (2) SA 616 at 629***, are also instructive.

[25] On this principle, and having considered all the circumstances of the matter including the person of the Appellant I am convinced that the sentence I would have imposed would have been much higher than the one imposed by the Court *a quo* as I take the offences committed to be deserving of a sentence on the highest part of the sentencing scale.

[26] In short not only do I not see any misdirection as well as failure to accept that the sentence in question induces a sense of shock, I am convinced that the sentence erred on the part of leniency when considering the fact that the complainant is not shown as having any prior relationship with the Appellant who was only her mother's employer. The fact that he is shown as having forced himself on her, grabbed and dragged her into the house where he then raped her is indicative of the offence as rape proper and even one that is aggravated at that. It worsened his case that he had not used a condom at the time

and further that she had fallen pregnant. It complicates it even further that he then took advantage of the girl and her mother's poverty to influence them that she should abort and going on to pay for the exercise. It is not surprising then that she followed up and committed the abortion as incited by the Appellant.

[27] Once again I would say the Appellant should consider himself lucky, that the crown did not file a cross appeal as surely this Court would have most likely been obliged to review his sentence upwards.

[28] Even on the grounds of opposing the appeal as raised by Mr. Nxumalo and as recorded above, I agree with them in their entirety. It is unthinkable that a matter, whose facts are not in dispute like the present one and which clearly established the case set out herein above would ever attract a fine. The Appellant was lucky enough to have the crimes for which he was convicted a suspension of the major portion of the sentence as happened in his case.

[29] I have already stated why this case does not induce a sense of shock. The test as indicated above is whether there would have been a large disparity between the sentence I was to impose if I was hearing the matter vis –a –vis the one imposed by the Court *a quo*. I have already stated I would have given a much higher sentence as opposed to a lower one.

[30] There is otherwise no merit on the grounds that the Court a quo failed to afford Appellant's counsel an opportunity to address it. He was there and he should have asked for such an opportunity particularly because he is recorded as having chosen not to take the said opportunity despite being given same, and he has not placed any contrary material before Court in this regard.

[31] The same thing applies to the personal circumstances which the Court *a quo* allegedly failed to take into account. The Appellant did not contend that he adduced before Court the mitigation factors which the Court had to take into account nor are those not considered by the Court after having been placed before it stated. I am convinced and accept that the Court *a quo* took into account all the personal circumstances of the accused placed before it.

[32] I have therefore come to the conclusion that, the Appellant's appeal cannot succeed and it is hereby dismissed.

Delivered in open Court on this……..day of November 2013.

N. J. HLOPHE
JUDGE – HIGH COURT

For the Appellant: In Person
For the Respondent: Mr. M. Nxumalo