IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CASE NO. 20/19**

In the matter between:

SANDILE NJABULO SHABALALA

VS

REX

Neutral citation: *Sandile Njabulo Shabalala v Rex* (20/19) [2019] SZHC 50 (18 March 2019)

CORAM **MAMBA J**

HEARD: **18 MARCH 2019**

DELIVERED: **20 MARCH 2019**

[1] *Criminal law – Sentence – unless prescribed by statute is predominantly within the discretion of the sentencing court. Court on appeal can only interfere with such discretion where it has not been properly executed or there is an irregularity or misdirection that results in a failure of justice.*

[2] *Criminal law and procedure – on a charge of rape in contravention of Section 3 (1) of Act 15 of 2018. De facto consent by victim proven. Where victim is, however, below the age of 18 years, such consent ineffectual inasmuch as the victim due to her age, she is incapable of appreciating the nature of the sexual act.*

[1] The Appellant Sandile Njabulo Shabalala, an adult Swazi male person of Sibetsamoya appeared before the Shiselweni Principal Magistrate on 28 November 2018 on a charge of rape. The charge sheet alleged that he had on 24 November 2018 unlawfully and intentionally committed the offence by having sexual intercourse with a child, one Sanelisiwe Magagula who was at the time 17 years of age. The crown alleged that the said victim was a child at the relevant time; as defined in The Sexual Offences and Domestic Violence Act 15 of 2018 (hereinafter referred to as the Act).

[2] Before arraignment, the appellant was apprised of his rights to legal representation and he opted to conduct his own defence.

[3] The facts, in this case are largely or substantially common cause.

[4] On arraignment, the appellant pleaded guilty to the charge, which was that he had contravened the provisions of Section 3 (1) of the Act.

[5] The Crown tendered the evidence of the complainant in its quest to prove the commission of the offence. The victim of the crime testified that she was in love with the appellant and was 5 weeks pregnant with his child. Their love affair was about 11 months old. She again testified that she was born on 22 December 2000. A simple calculation of her age at the time of the commission of the offence, in November 2018, shows that she was 17 years and 11 months old.

[6] The victim also testified that on the day in question she had spent the night with the appellant at his home and the 2 of them had had sexual intercourse that night. She told the court further that she had gone to ask for money from the appellant to enable her to take a bus home after she had been kicked out of her step-father's home at Hlathikhulu by her own biological mother. This was after some misunderstanding between the two of them wherein the complainant had left home and gone to Hlathikhulu without the consent of her mother.

[7] At the time of the commission of the offence, the complainant was a form II pupil at Nkwene High School, on the outskirts of Hlathikhulu town.

[8] The appellant is 27 years old and is employed as a shop assistant in one of the Supermarkets at Hlathikhulu and earns a monthly salary of E1 600. He has 2 minor children whom he supports. His aged mother is another of his dependants.

[9] All the above facts, as already stated, are common cause. At the close of the case for the crown, the appellant was advised of his legal rights at that stage of the proceedings or trial and he opted to remain silent. Following the closure of the defence case and submissions by the crown and the defence respectively, the appellant was found guilty as charged. It emerged that he was a first offender and after due mitigation he was sentenced to undergo a period of 2 years of imprisonment.

[10] In passing the above sentence, the trial court noted, **inter alia**, that:

> 'This is a serious statutory offence [which] comes with stiff penalties for offenders. - - -. The accused is 27 years old, employed, but he went for a 17 year old school girl who is now said to be pregnant; that is detrimental to her future. Such conduct [by the appellant] is not acceptable to society and the law does not tolerate it:'

[11] In his appeal, the appellant complains that the sentence imposed by the Learned trial court is too harsh and induces a sense of shock. He argues further that because the crime was not accompanied by violence or any force or coercion and the fact that he pleaded guilty to the charge, he ought to have been granted an option to pay a fine. He emphasised that this should have been done in view of the fact that the sexual intercourse with the complainant was consensual and he, the accused, was a first offender.

[12] In terms of Section 2 (2) of the Act, unless the context otherwise requires, a child means a person under the age of eighteen years. Plainly, therefore, the victim was such a child at the commission of the offence inasmuch as she was 17 years and 11 months old at the time.

[13] Section 3 (2) of the Act defines rape as any unlawful sexual act with a person, whilst Section 3 (3) (c) provides that an unlawful sexual act is

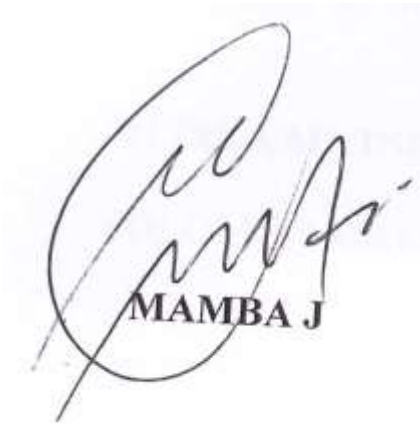
inter alia, committed where or in respect of a person who is in law incapable of appreciating the nature of the sexual act. Sub section (6) (e) of Section 3 completes the definition by stating that a person who is below the age of 18 years is, in law, incapable of appreciating the nature of the sexual act which causes penetration.

[14] Section 3 (8) of the Act lays down the maximum sentence or penalty that may be imposed following a conviction for a contravention of Section 3 (1) of the Act, in the absence of a finding of aggravating circumstances or factors. Section 3 (8) (b) provides that 'if the victim is or was between 14 years of age and 18 years of age at the time of the [commission] of the offence' the sentence may not exceed 20 years in the case of a first offender. This is the applicable penalty section in this case as the victim was aged between 14 years and 18 years; and the appellant was not a repeat offender.

[15] From the above analysis of the applicable law and the facts of the case, it is plain to me that the sentence of 2 years of imprisonment imposed by the court a quo falls within the legally permissible range or category. I know of no law in this jurisdiction, that or which enjoins a court to grant an option of a fine simply because the accused is a first offender. Certainly not the applicable provisions of the Act in this case.

[16] The Learned trial Magistrate did not pronounce herself on the existence or otherwise of aggravating factors in this case. I shall assume in favour of the appellant that there were no such factors found to exist and thus the imposition of the said penalty. The penalty meted out by the trial court is a mere one tenth (10^{th}) of the maximum sentence provided in the Act. Accepting that the sexual intercourse was de facto consensual, it was nonetheless de jure, unlawful – unlawful because the victim was incapable of giving such consent because she was; due to her age, incapable of appreciating the nature of the sexual act. Accepting once more that there was de facto consent in this case, the moral turpitude or blameworthiness attendant thereto is abated or lessened. I can not find any fault with the sentence of 2 years that was imposed in this case. There was no irregularity or misdirection by the court a quo that has been shown by the appellant herein.

[17] For the foregoing, there is no merit in this appeal and it is consequently dismissed.



For the Appellant :Mr K. Msibi

For the Crown : Mr M.S. Dlamini