

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 189/02

REX

VS

JETHRO MAGAGULA
WEDRICK MAPHALALA
SIFISO MAGAGULA .

CORAM

K.P. NKAMBULE -J

FOR CROWN FOR
APPLICANTS

JUDGEMENT 11/11/04

The Accused is facing an indictment of a total of seven counts. Accused No. 1 was initially charged with Wedrick Maphalala who has since died and Sifiso Magagula who is at large after he was released by the court in terms of Section 136 of the Criminal Procedure and Evidence Act. Before the Accused pleaded the prosecutor applied for the withdrawal of counts No. 4, 5 and 6. He further applied for separation of trials in so far as Accused No. 3 is concerned. All the applications were granted.

In count No. 1 it is alleged that Accused No. 1 is guilty of the crime of rape in that upon or about the 1st of April 2000 and at or near Motshane in the region of Hhohho the said accused, did intentionally have unlawful sexual intercourse with one Khosi Sophie Dlamini, without her consent and did thereby commit the crime of rape.

In count No. 2 it is alleged that A1 and A2 are guilty of the crime of robbery, in that upon or about 1st April 2000, and at or near Motshane area in the Hhohho District, the said Accused acting jointly and in furtherance of a common purpose did unlawfully and with intention of inducing submission by Khosi Sophie Dlamini and Olive Simelane, did take and steal from them certain property in Annexure A' their property or in their lawful possession and thus robbed them of same.

In count No. 3 it is alleged that they broke in the house there situate of July Dlamini at Ekupheleni and stole items in Annexure 'B' valued at E8,000-.

In count No. 7 Accused No. 1 is charged with contravening Section 11 (3) of the Arms and Ammunition Act of 1964 as amended, in that on the 6th day of February 2000 he was found in possession of essential components of a single barrel short gun serial No. 60990 without a valid permit or licence.

Accused No. 1 pleaded not guilty to all the counts. The crown then called PW1 Khosie Sophie Dlamini. This witness told the court that on the night of 1st April 2000 whilst asleep at her place of employment at Motshane in the homestead of Olive Simelane she heard Thobile her sister, screaming saying there were strangers in the house.

In the room in which she was sleeping PW1 was with Ntombi Mabuza. They woke up and locked their room. After some time they heard someone trying to open the door. He however failed to open. The person then ordered PW1 and Ntombi to open the door threatening that if they did not he would forcefully break the door and then deal with them. As PW1 proceeded to open the door the person outside forcefully opened the door from outside.

As the person entered the house PW1 was able to see him as the light from the passage which is adjacent to the door leading to their room was lit. Accused who was wearing a cap took it off when he was fumbling for the switch providing light to the room. PW1 was able to identify him because it was not her first time to see the Accused. According to PW1 she schooled with the Accused who was older than her. She had seen him around Motshane some few days earlier.

On entering the bedroom the person ordered them to lie down. He proceeded to search for money. He eventually got a sum of E150.00 PW1 had reserved as transport money for her child who was attending pre-sphool. At that point in time the complainant also heard another voice. This voice enquired if the radio was serviceable. Accused No. 1 then asked where the car keys were. In response PW1 told him that the keys were with the driver.

They both went out for some time. Accused No. 1 returned. He pulled the blanket from the back of PW1 who was sleeping facing the direction of Ntombi as they shared the bed. According to PW1 she heard accused inserting his penis into her vagina from the back. She tried to resist and as she was crying the Accused ordered her to stop making noise. As she resisted by closing her thighs tight the Accused hit her on the thighs

until she gave up. After ejaculating the Accused stood up and left the room.

Before leaving they took the following items with them:

- 1) 2 two in one blankets
- 2) 1 single ply blanket
- 3) 1 comforter
- 4) 1 duvet cover
- 5) 1 radio
- 6) 1 framed mirror
- 7) some candles and soap.

These items were later recovered by Mbabane police who called PW1 and PW2 to come and identify them at the police station.

PW2 Olive Simelane told the court that on the day in question she was woken up by her daughter who was raising an alarm saying there were strangers in the house. She woke up and found three people in the kitchen. One of them was carrying a gun. The three ordered them to go to the bedroom. The three followed PW2 and the girl to the bedroom saying they must produce money. They searched the room looking for money. They found some silver coins in a moneybag and took them. Thereafter they demanded the car keys.

They proceeded in other rooms looking for money. In one of the rooms there was a boy sleeping who had with him takings of the day from the shop. They took all the money.

After the thugs were gone PW2 went to the bedroom where PW1 was sleeping. She reported that Accused No. 1, whom she knew very well,

raped her. They then tried to connect the telephone wires which had been cut by the thugs and phoned the police. Police came in the morning and took statements.

After some weeks they were called to the police station to come and identify the missing items. They did identify some of the items.

PW3 Ntombi Mabuza corroborates PW1 and PW2 in material respect. This witness also told the court that he knew the Accused before. She further said she was able to identify the Accused as a result of the light which came from the passage. This witness further stated that whilst the Accused was searching for money he recognised PW1 and enquired if she was staying at the homestead.

According to this witness after Accused and his friend had completed the search for money they went away. After some time Accused returned alone. He switched off the lights. They could, however hear his voice whilst he was speaking. As he switched off the light PW3 heard PW1 crying. At the time the Accused had entered the bed in which they were sleeping. He entered from the back of PW1 who was sleeping facing PW3.

PW3 told the court that she heard the movement of the bed reminiscent to movement made by people having sexual intercourse. After some time the movement stopped and the Accused got out of the bed. PW1 reported to PW3 that the Accused had raped her.

PW4, Mfanimpela Mavuso, told the court that during the year 2000 he stayed at Mnyokane. On the relevant time he was under arrest and in custody of Mbabane Police. In furtherance of their investigations police went to his house at Mnyokane. He accompanied the police. On arrival there the police conducted a search and found items he did not know.

According to this witness he had left Sifiso Magagula, Accused No. 3. The police took the items as they fitted the description of the items taken at Motshane regarding count No. 1 and No. 2.

Regarding count No. 3, the crown called PW5, July Dlamini. This witness told the court that on the day in question he left his homestead together with his children and went to church. On his return he found that his house had been broken into. The following items were missing:

- 8) One T/V set
- 9) One firearm
- 10) One radio

He then called the police who came and took a statement. On the following day he went searching for his items around the area. He found his T/V set just below his homestead. On the 10th April 2000 police came to fetch him so that he could come and identify some items which had been recovered. On arrival at the police station he identified his gun and the Hi-fi set.

2418 Sergeant J. Gumedze was introduced as an expert witness. He told the court that whilst on duty 2553 Detective constable Mamba brought a short gun for testing and that after testing the gun he concluded that it was not serviceable as it failed to discharge a bullet. The serial number of the gun was 60990, a single barrel short gun.

PW7, Sam Magwegwe Mamba, told the court that he knew the Accused who rented a room at his parental home at Ngwenya at the time of the incident. According to PW7 Accused came to him and offered to sell him the radio which is the subject matter in count No. 3. PW7 told the

Accused that he did not have money. The accused enquired if he could find any person who could buy the radio. PW7 told him that there was someone who could buy it but was working at Oshoek Border gate in the Republic of South Africa side.

PW7 went to fetch the buyer who looked at the radio and liked it. The buyer in the company of PW7 went to Mbabane and withdrew money. They gave the money to Accused and took possession of the radio. After a few weeks the Accused came in the company of police and demanded to be shown the person who bought the radio. PW7 led the police and the Accused to the buyer of the radio.

PW8, 3692 Detective Constable Dlamini, told the court that whilst investigating a case of theft, they had the suspect one Mfanimpela Mavuso. They proceeded to the suspect's place of residence at Mnyokane in furtherance of their investigations. He was in the company of 2353 Detective Constable Mamba and 3704 Detective Constable Malinga.

On arrival in the house they found Sifiso Magagula. On searching they found a watch which had the inscription "O.M. Simelane". There was a double decker radio and some items which fitted the description of items stolen from Mrs. Olive Simelane's house (complainant in count No. 2).

On the 5th April they proceeded to a Mamba homestead at Ngwenya. This is the homestead where Accused rented a room. The Accused led the police to one Gobizandla Mamba (PW7). This witness led the police to the person who bought the hi-fi set which was stolen from complainant in count No. 3.

According to PW8 the Accused further led them to Mafutha area in Motshane where he produced a single barrel gun which was stolen from complainant on count No. 3.

From the accused's house police recovered the blanket which was identified by the complainants on count No. 2 Olive Simelane and Khosi Sophie Dlamini.

Before the crown counsel closed his-case he made an application in terms of Section 22 (1) of the Criminal Procedure and Evidence Act as amended to hand into court a medical report regarding count No. 1. The Accused objected to the handing in of the medical report and asked that the doctor be brought so that he could cross-examine him. The crown counsel had a difficulty in that as the doctor who was an expatriate had returned to his country of origin. The court ruled in the Accused's favour.

In his defence the Accused told the court that he never went to the homestead of Olive Simelane and was nowhere near the scene of crime. He told the court that he was not the person who was seen by both PW1 and PW3 on the night in question. He further told the court that the crown failed to medically prove that penetration did take place regarding count No. 1.

Regarding the items which were found in his room at Ngwenya and later identified by PW2 and PW1 as those stolen during the night of rape and robbery, the Accused said the blanket belonged to him and that the black bag was not found in his possession.

Regarding count No. 3 the Accused told the court that the radio belonged to Wedrick Maphalala (A2). He said he was asked by A2 to sell the radio on his behalf.

Regarding count No. 7 the charge sheet states that the offence was communicated at Mnyokane. However, there is no evidence supporting this allegation. After careful consideration I come to the conclusion that the crown has not been able to prove its case beyond reasonable doubt. Accused is found not guilty. He is acquitted and discharged.

On count No. 1 and No. 2 there is overwhelming evidence that A1 and his friends broke and entered PW2's house. They were seen by both PW1 and PW3. These two witnesses knew Accused very well. Accused was PW1's schoolmate. She could not have mistaken him for someone else. She had earlier told the court that she had recently seen the Accused around the area.

Regarding count No. 1 the Accused challenged the fact that the crown did not lead medical evidence. It was the Accused who refused that the medical report be handed in. He was within his rights to do so. Of course in rape cases medical evidence should always be led or a report handed in by consent wherever that is possible. However, failure to lead medical evidence does not, in my opinion, mean that such failure renders the case of the crown fatal to a conviction.

There is no rule in our law which states that a court cannot convict in the absence of corroborative evidence of penetration. After having said that I must also mention that it is incumbent upon courts to always exercise caution because of the nature of such cases. However, in the absence of corroboration of the actual penetration there may be direct

and circumstantial evidence which cumulatively points in that direction and in that direction only.

The evidence of PW3 was substantially similar to that of complainant on count No. 1. She was in the house when the Accused broke the door to their bedroom and entered. She saw the Accused when he forcefully opened the door and tried to find the switch to light the bedroom. PW3 told the court that as the Accused fumbled for the switch he took off his cap, and as the light from the passage which was adjacent to the door of the bedroom was on she could see all that was happening. As the Accused was searching for money he was talking to both PW1 and PW3.

On his return for the second time they immediately recognised his voice. Again PW3 corroborates PW1 in material respect. PW3 said as the Accused came in they recognised him through his voice. This was 10 minutes after the first attack. This witness told the court that she heard PW1 crying. Thereafter she heard movements reminiscent of people making sexual intercourse. Clearly this witness could hear the movement of the bed as PW1 was in the same bed with PW3.

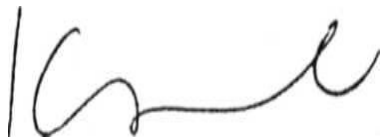
This evidence again is consistent with the evidence of PW1 and inconsistent of the denial on the part of Accused. Although there was no medical evidence to support that of complainant on count No. 1, my opinion is that complainant's evidence was supported in the direct and circumstantial evidence of PW3. I therefore regard the evidence of PW1 and PW3 as true on both count No. 1 and count No. 2, and that of Accused as false beyond reasonable doubt. It therefore follows that the Accused is found guilty on count No.1 and No. 2.

Regarding count No. 3, the Accused asked PW7 to get him the buyer of the radio which was finally found in the possession of a certain South

African police officer with the help of both the Accused and PW7. The Accused told the court that he was asked by one Wedrick Maphalala, who is now late, to sell the radio on his behalf.

However, according to PW7, Accused told him that the radio belonged to both of them and that they were paid by a certain gentleman for services rendered. Clearly if the Accused was truthful he could not tell a lot of stories. It is clear that he was trying to shift the blame to the deceased. He has therefore, failed to reasonably explain how he was found in possession of recently stolen items. The only inference that this court can draw is that he broke and entered into the hotise of July Dlamini and stole the items. He is found guilty as charged on count No. 3.

In summary therefore, the Accused is found guilty of rape in count No. 1; guilty of robbery in count No. 2; guilty of house breaking and theft in count No. 3. He is found not guilty on count No. 7.



JUDGE