THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CRI. APPEAL NO. 30/2008

In the matter between

THUBHOBHO MTSETFWA

vs

REX

Coram BANDA, CJ

MAMBA, J

For the Appellant In Person

For the Crown Mr. M. Simelane

JUDGMENT

BANDA, CJ

[1] The appellant was, after a full trial, convicted of rape by the Magistrate Court sitting at Manzini. He was sentenced to a term of imprisonment of seven (7) years.

[2] The appellant Notice of Appeal indicated that he was only appealing against sentence. It further indicated that he was praying to this court to impose a sentence of a fine instead of the custodial sentence which the court *a quo* imposed on him. However when the appellant argued his appeal he also raised the issue of his conviction.

[3] The appellant contended that his intention had always been to appeal against his conviction and sentence and that his friend in prison whom he had requested to formulate his

Notice of Appeal had made a mistake to state that he was only appealing against sentence.

[4] The appellant has contended that the Crown had not proved the case against him because the evidence of the two prosecution witnesses called was contradictory. He suggested that the two witnesses, who are sisters, had conspired to fabricate the story against him. He argued that if the story was true the witnesses should have reported the allegation against the appellant to an independent witness who is a community police and a neighbour to them. This failure to call the community police was, in the appellant's view, an indication that the story of the prosecution witness was not true. The appellant also contended that the prosecution witnesses had also failed to produce the blanket on which he allegedly committed the offence and the bucket in which PW2 had relieved herself.

[5] The appellant further informed the court that attempts had been made to reconcile with the complainant and that the latter had indicated her intention to withdraw the charges during the visits the two witnesses had made to him in prison. He said that he has eight children seven of them are school going children who are now suffering as a result of his imprisonment.

[6] Mr. Simelane who appeared for the respondent submitted that the prosecution had proved its case against the appellant beyond reasonable doubt. He has argued that the appellant story is of recent creation which had never been put to the prosecution witnesses. There was a duty on the appellant to put his story to the prosecution witnesses to give them the opportunity to comment on it. Mr. Simelane contended that

it was not necessary for the prosecution to call as a witness the community police or to produce the blanket and the bucket as exhibits in the case.

[7] I have carefully reviewed the evidence which was called at the trial and I have also considered the submissions which the appellant has made in this appeal and I am satisfied that there was sufficient and indeed overwhelming evidence against the appellant. He was a person who was well known to the witnesses and there was light in the house. There was no possibility of mistaken identity of the accused.

[8] The offence was committed in humiliating circumstances. He had ordered both witnesses to take off their clothes and proceeded to rape the complainant in the presence of her sister. No protective devise was used when the complainant was raped. He had used threats to assault the complainant with a knobkerrie which he kept nearby. This was a serious offence of rape and an option of a fine was not available to such serious offences. A sentence is always a matter which is in the discretion of the trial court. This is an appellate court and can only interfere with a sentence if it was wrong in principle, was manifestly harsh or that it induces a sense of shock. A sentence of seven (7) years imprisonment was not, having regard to all the attendant circumstances, wrong in principle, manifestly harsh nor does it induce any sense of shock.

[9] Accordingly I find that the appellant was properly convicted and a sentence of seven years was well merited. I would dismiss this appeal as devoid of any merit. The conviction and sentence are hereby confirmed.

Pronounced in open court this 20/08/09 August 2009.

BANDA CJ

I agree

MAMBA J