IN THE HIGH COURT OF SWAZILAND

CRIM. APPEAL CASE NO. 20/08

In the matter between:

SIKELELA MATSENJWA	APPELLANT
VS	
REX	RESPONDENT
CORAM	MAPHALALA J MAMBA J
FOR APPELLANT FOR RESPONDENT	MR. P. DLAMINI MR. T. MASINA

JUDGEMENT

19th FEBRUARY, 2009

MAMBAJ

[1] By 10pm on the 27th May 2007, Nonceba or Nonceda Noqayi (hereinafter referred to as the complainant) was already in bed in her bedroom on the first floor of her house at Glen Village, in Pigg's Peak. Her maid and a seven year old boy were the only other persons in her house with her. As she lay in bed, she heard footsteps outside her house and then there were further footsteps

inside the house that appeared to be approaching her bedroom. She assumed that it was her maid going about her chores in the house. However, when the lights to the storeroom went on she became curious and called for the maid to find out what was happening. The door to her bedroom opened and she saw a person taking her black bag from her room. She again called for the maid and "enquired what the maid was doing". There was no response from her.

[2] When she got out of bed she saw a man in her bedroom who appeared to be hiding something under his cloths in his chest. The man ordered her to keep quiet failing which he would shoot her. She was shocked. The man spoke to her in English and she responded in isiZulu.

[3] The man who smelt of alcohol, demanded that she gives him her cellular telephone. After some resistance, equivocation and delaying tactics from her and the threats of violence from the man, she submitted to his demands and surrendered her LG Chocolate black mobile telephone to him. (This telephone it would appear was either owned or had been actually purchased for her by Lucky Thwala her boyfriend). Its serial number is 359105001965676.

[4] Having taken possession of the telephone, the man demanded money from the complainant. Again she prevaricated and her assailant menacingly accused her of thinking that she was smart or clever and angrily pursued his demands. She again gave in and handed over to him a sum of E500.00 that she had put aside as wages for her maid for that month. She retrieved this from her wardrobe. The E500.00 was not enough, he told her. He demanded for more money. She unsuccessfully tried to trick him into escorting her to the Bank to get more money from her account. He rummaged through the contents of her wardrobe, found a plastic bag, emptied it and got a sum of E70.00 from it.

[5] No doubt having satisfied himself that he had taken all the money that was in the house, the man threatened to rape the complainant and made it plain to her that he would not use a condom in doing so. When she plaintively protested, he offered her the choice of either being raped or being killed. She was standing on her bed and he ordered her to undress. He advanced towards her and she "jumped and banged the window in an attempt to alert her neighbours or passers-by of her plight. The man ran out of the house into the darkness of the night.

[6] The complainant said the Appellant was her assailant. She testified that she was able to recognize him through the street lights that came through or shone into her bedroom window and the light that were on in her storeroom.

[7] The Appellant who was unrepresented in the court a quo did not specifically put questions to the complainant denying that he is the culprit. However, in his own evidence in chief and to some extent under cross-examination, he denied being the robber. He also stated that he in unable to speak English and therefore could not have communicated his threats to the complainant in that language.

[8] After the robber ran out of the complainant's house, the complainant raised an alarm and her boyfriend Lucky Thwala and the security guards in the area came to her house. The Police were then called. When the complainant inspected her house, she observed that "the man took a black bag and some black shoes". This is obviously in addition to the money and cellular mobile telephone referred to above. I note here in parenthesis that the black bag and shoes were apparently found abandoned in the complainant's neighbourhood on the night of the robbery. The circumstances of their recovery were, however, not explained to the court.

[9] According to Samkeliso Clifford Simelane, Pw3, on the 28th May, 2007, just a day after the events described above, the Appellant brought to him

the mobile telephone referred to above to be recharged by him at his place of work. This witness stated that he took note of the person who brought the telephone to him because he had refused to have his name recorded on the slip that is issued on receiving the telephone for charging. The Appellant had insisted on not giving his name to this witness and had asked him to merely take note of his physical appearance. Later that day, the Appellant returned, paid for recharging the telephone and took it away.

[10] After the telephone had been collected from PW3, PW3 received a call from Lucky Thwala who reported that his mobile telephone as described above had been stolen. On the following day, the same telephone was this time brought to PW3 for recharging by PW2, Ncediso Mkhonta, who subsequently alerted Lucky Thwala and the Police about the presence of the telephone at his business and Mkhonta was taken in for questioning by the Police.

[11] Mkhonta testified that he had obtained the mobile telephone from the Appellant at about noon on the 29th May 2007. The Appellant had asked him to have it recharged for him as it had a flat battery. It is again not insignificant that the appellant did not deny or dispute the evidence of PW2 that he is the person that gave him the telephone for purposes of having its battery recharged.

[12] I have referred earlier in this judgment to the non disclosure of how the black bag and shoes stolen from the complainant's house were recovered and also to the evidence of the complainant that she saw a person take her black bag from her bedroom and later saw a man who confronted her in her bedroom on that fateful night. The man who confronted her in the house and threatened to rape or kill her is, according to her evidence, the person who robbed her of her money and mobile telephone. That person, she said, was the Appellant. She told the court that there was sufficient light in her bedroom, where she was confronted by the robber, to enable her to have a clear view of her attacker. The light emanated from two

sources; the street lights outside her bedroom window and the lights from her storeroom. Whilst there is no evidence in the court record of how long the encounter between the complainant and the robber lasted and how close apart the two were in her bedroom, judging from the events as narrated by the complainant, the confrontation must have lasted well over five minutes. The robber and his victim were in the same bedroom and at one point very close to each other such that the complainant could tell that the robber had been drinking alcohol from the smell of his breath.

[13] From the above evidence and the direct evidence that it is the Appellant that handed over the relevant mobile telephone to PW2 and PW3 for recharging just a day after the robbery, the learned trial magistrate was, in my judgement justified in holding that the crown had established the guilt of the Appellant beyond any reasonable doubt on this count. It has to be remembered further that the Appellant refused to have his name taken down when he handed the telephone to PW3 for recharging its battery. He did not want to be openly associated with the telephone. He told PW3 to take note of his physical appearance. His mere refusal to give his name to this witness naturally put this witness on the alert and to have a closer look at him. He was afraid. He was guilty. I would therefore dismiss the Appeal on the first count.

[14] In so doing I am, however, not satisfied beyond a reasonable doubt that it is the Appellant who stole the complainant's bag and shoes. It is reasonably possible that there was a second person in the complainant's house at the relevant time who either acting independently or jointly or in the furtherance of a common or shared purpose with the Appellant, made away with these items. By reasonable doubt I mean, in the words of Shaw CJ in

COMMONWEALTH v WEBSTER (1850) 5 CUSHING 295 AT 320,

> "...the condition of mind that exists when the jurors can not say that they feel an abiding conviction, a moral certainty, of the truth of the charge. For it is not sufficient for prosecutor to establish a probability, even though a strong one according to the doctrine of chances: He must establish the fact to a moral

> certainty - a certainty that combines the understanding, satisfies the reason, and directs the judgement. But were the law to go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether."

[15] There are two further issues that deserve mention or consideration on this count. The first relates to the charge itself. A charge of housebreaking with intent to steal and theft was preferred against the Appellant. The evidence of the complainant, which I believe was in the possession of the crown when drawing or drafting the charge sheet, clearly shows or proves a case of robbery and attempted rape, although the evidence on the latter may not be that strong. The complainant was threatened to part with her telephone and money and she submitted to these threats and her property was stolen in the process. That, in my book, is robbery. The Appellant must count himself lucky that he was not charged with the more serious offence of robbery and I have no doubt that if he had been so charged, he would not have received the sentence of two years imprisonment he was sentenced to on the charge of house breaking with intent to steal and theft.

[16] The second issue relates to the actual serial number of the telephone exhibited in court. The typed record, which was certified as correct by the relevant clerk of court reflects two differing numbers. The difference is only in the last but one digit. At one point the record has that digit or figure as a 7 and at another point as a 2. I have perused a Photostat copy of the original handwritten court record and it would appear to me that the controversial digit or figure is a 7. It is not your traditional 7. I admit, that this may have misled the typist. The 7 is not made of two straight lines; a horizontal top line and a not so perpendicular straight and longer line. It is made of an almost single curve with a straight line cutting across it at an angle of 45°. It is not uncommon though.

[17] I have already referred to the sentence meted out to the Appellant on the first count. He complains that it is too harsh and he should, as a first offender have been given an option of a fine. I accept that the value of the property stolen; the cellular telephone and the sum of E570.00 is relatively

not big. This consideration pales in significance though when considered with the other aggravating factors herein. These include the fact that the complainant was attacked in her own bedroom at night, she was threatened with rape and death. Every man's house is his or her castle. Once you are in your house you get and you ought to get a sense of being in a safe and secure environment. An attack or invasion of that environment brings with it the feeling and sense of helplessness and hopelessness that the home is no longer secured. That should not be allowed to pervade our society. Persons should feel safe within the sanctuary of their own homes and those who violate these rights or expectations of our society must be left in no doubt by our courts that they shall not be treated with kid gloves.

[18] The remark by the trial court that "the accused committed a crime of attempted rape on a vulnerable person, a female" is not entirely correct. There was clearly an attempt to rape the complainant but the Appellant was not charged or convicted of that crime. Having said that though, it can not be argued that the magistrate had to ignore this fact in passing sentence. The threats were there and had to be considered in passing sentence.

[19] The issue of sentence is predominantly a matter within the discretion of the trial court. This court, as an appellate court can only interfere with the sentencing discretion of the trial court if it finds that the court misdirected itself or ignored a fact or issue which it should have considered in the passing of sentence, or if the sentence imposed is such that this court would not have imposed it or it induces a sense of shock, or that there is vast disparity between this sentence and that which this court could have imposed. I cannot find any of the above features in this appeal.

[20] I turn to examine the Appeal on the second count, that of escaping from lawful custody in Contravention of section 43(1) of the Criminal Procedure and Evidence Act 67 of 1938.

[21] The evidence on this count is that after his arrest the Appellant was transported in a Police Motor Vehicle and was left in the Motor

Vehicle near Vuyavuya Bar whilst the Police chased after other suspects. The Appellant had both his hands handcuffed behind his back. He left the police vehicle in that condition and had his friend, Thabo Maseko remove the handcuffs from him by cutting them off with an electric grinder. He then disposed of this pair of handcuffs by throwing them into a pit latrine. He was arrested about two weeks later in Vuvulane. His defence was that he did not unlawfully escape from lawful custody but was allowed to go by the investigating officer. This was denied by the Police.

[22] There is no merit whatsoever in the Appellant's assertion herein. The evidence is overwhelming that he escaped without the knowledge or consent or connivance of any of the police officers who had arrested and had him under their custody. If he was actually released to go home, it is inexplicable that he would have been allowed to go home with the handcuffs on. I would dismiss his appeal on this count as well.

[23] The Appellant has also complained that the sentence of two years of imprisonment imposed on him on this charge is too harsh for a first offender. The sentence for a contravention of section 43(1) of the Act is a term of imprisonment not exceeding two years. The sentence meted out to the Appellant is within that permissible range. I repeat what I have said in paragraph 19 concerning the sentencing powers of the court a quo on the one hand and this court on the other. I find no misdirection by the court below and I would therefore dismiss this Appeal on sentence as well on this court.

[24] After sentencing the appellant on the two counts referred to above, the learned trial Magistrate went on to order the Appellant to pay compensation in the sum of E1000-00 to the Government of the Kingdom of Swaziland failing which to undergo a term of imprisonment for ten (10) months. This is in respect of the handcuffs that the Appellant destroyed and dumped into a pit latrine. I have to record that initially the order for compensation for the destroyed handcuffs was made by the court on the 8th August, 2007 after Thabo Maseko informed the court that he had destroyed the handcuffs on the instructions of the Appellant. On hearing this, it would appear that the trial magistrate was enraged because he immediately, without the Appellant being heard on the matter, issued the following order:

> "Accused is ordered to pay the handcuffs at a cost of two pairs of handcuffs. Bail is withdrawn pending the refund of the handcuffs."

On two further occasions when the Appellant applied to be admitted to bail the court curtly told him

> "pay for the handcuffs first."

[25] This was a gross violation of the rules of procedure by the learned magistrate. First, there was no application by the crown on behalf of the Government for the compensation ordered by the Court. Secondly, there was no basis for ordering double compensation for the damaged handcuffs. Only one pair had been damaged. Thirdly, the Magistrate had no power to withdraw the bail granted to the Appellant in the manner he did. The Appellant ought to have been heard before such a decision, adverse to him could be taken. Fourthly, assuming that the conviction for escaping was on an offence that had resulted in the damage or destruction of the handcuffs, at the conclusion of the trial, the learned trial Magistrate had no power to mero motu order the Appellant to pay the compensation. Fifthly, the value of the handcuffs had not been established by evidence and the E1000.00 was a figure arbitrarily determined by the trial Magistrate.

[26] Section 321(1) of the Criminal Procedure and Evidence Act 67 of 1938 states that:

> "If any person has been convicted of an offence which has caused personal injury to some other person, or damage to or loss of property belonging to some other person, the court trying the case may, after recording the conviction and upon an application made by or on behalf of the injured party, forthwith award him compensation for such injury, damage or loss." (The underlining and emphasis is mine). Subsection 2 provides that the court may refer to the proceedings or hear further evidence in order to ascertain the value or amount of compensation or such amount may be agreed between the Accused and the person entitled to such compensation. None of the above factors were present before the court a quo to enable it to order compensation and the amount or value of the said compensation.

[27] For the above reasons I would set aside the order for compensation and the accompanying sentence of ten months imprisonment.

[28] In the result the following order is made :

(a) The Appeal on conviction and sentence is dismissed on both counts.

(b) The order for compensation and the sentence of ten (10) months of imprisonment is set aside.

MAMBA J

I agree

MAPHALALA J