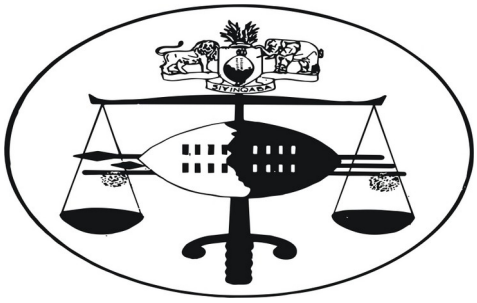

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE CRIMINAL APPEAL NO. 22/07

In the matter between:

CELINKHOSI MABELESA APPELLANT

and

REX RESPONDENT

CORAM : BROWDE JA
TEBBUTT JA
RAMODIBEDI JA

HEARD : 1 NOVEMBER 2007
DELIVERED : 14 NOVEMBER 2007

JUDGMENT

SUMMARY

Rape – Principal Magistrate convicting appellant on two counts of rape and sentencing him to 7 years imprisonment on each count – Sentences ordered to run concurrently – Automatic review by High Court – Irregular proceedings – Review Judge confirming conviction but ordering the trial magistrate to commit appellant to High Court for sentence in terms of section 292 (1) of the Criminal Law and Procedure Act 67/1938 – No such committal made – The High Court Judge taking it upon himself to retry the appellant – Thereafter setting aside the sentence imposed by the trial Magistrate and imposing a sentence of 15 years

imprisonment on each count – Sentences ordered to run consecutively thus effectively imposing a sentence of 30 years imprisonment – On appeal the High Court proceedings declared a nullity – The judgment of the trial magistrate restored.

RAMODIBEDI JA

[1] This appeal is regrettably replete with a series of fundamental errors as I shall shortly endeavour to show.

[2] The appellant was charged before the Principal Magistrate Gama sitting at Malkerns with two counts of rape. It was alleged in count 1 that on 17 October 2004 and at or near Mafini Location, Malkerns

area in the Manzini region the appellant did wrongfully, unlawfully and intentionally have sexual intercourse with Nokuthula Nomvula Khoza, a female of 15 years of age without her consent and did thereby commit the crime of rape.

Similarly, it was alleged in count 2 that on 2 May 2004 and at or near Emseleni, Malkerns area in the Manzini region, the appellant did wrongfully, unlawfully and intentionally have sexual intercourse twice with Lungile Shandu, a female aged 16 years of age, without her consent and did thereby commit the crime of rape.

[3] The appellant pleaded guilty to these charges and was duly convicted on his own plea. He was sentenced to seven (7) years imprisonment on each count. The sentences were, however, ordered to run concurrently.

[4] On some date which neither appears on the record nor in the judgment of Ebersohn J, the learned Judge, sitting with Mamba J, dealt with the matter on "automatic review." Ebersohn J produced a judgment which was concurred in by Mamba J. In a nutshell, the learned Judge was of the view that the sentences imposed by the Magistrate's Court were "shockingly inappropriate" and that "much more severe sentences ought to have been imposed". The following order was then made:-

> *"1. The convictions of the accused on the two counts of rape are confirmed upon review.*
>
> 2. *The sentences imposed by the Principal Magistrate on the accused are set aside upon review and the Principal Magistrate is ordered to commit the accused in custody to the High Court for sentence on the two convictions of rape and the Crown is ordered to adduce the evidence of the two complainants and the other corroborating*

witnesses for such sentencing purposes.

3. *The Principal Magistrate, when referring the matter to the High Court, must inform the accused that he has a right to adduce evidence in mitigation before the High Court and that he may also call witnesses, whose names he must disclose to the Principal Magistrate and/or the investigating officer as soon as possible, to testify on his behalf in mitigation and the investigating officer must ensure that those witnesses are present at the High Court when the matter is heard."*

[5] Thereafter, on 18 September 2006, Ebersohn J proceeded to sentence the appellant to 15 years imprisonment on each count. He ordered that the sentences should run consecutively, thus effectively imposing a sentence of 30 years imprisonment.

[6] The appellant has appealed against the sentences imposed upon him by the High Court. In his grounds of appeal he puts his complaint in these terms, inter alia:-

"But to my great surprise and disappointment in September 2006 I was summoned by the High Court to appear before it while I was serving 14 years sentence that I had been given by the Principal Magistrate. The High Court set aside the two (2) 7 years sentences that I had been serving and retried me. Then it sentenced me to 15 years in prison for each count and ordered the two 15 years sentences which amounted to 30 years to run consecutively".

[7] It should be noted at this stage that, after hearing submissions in the matter, on 1 November 2007, we restored the judgment of the learned Principal Magistrate and intimated that reasons would follow.

These are the reasons.

[8] The learned Judge a quo seems to have attempted to invoke the provisions of section 292 (1) of the Criminal Law and Procedure Act 67/1938. It is no doubt for that reason that he then "ordered" the learned trial Magistrate to commit the appellant to the High Court for sentence. It should here be stressed that the only way in which the matter could properly have come before the learned Judge was if the trial Magistrate had committed the appellant to the High Court for sentence under section 292 (1). This section reads:-

> ***"292. (1) If on the trial by a magistrate's court any person is convicted of an offence, the court, on obtaining information about his character and antecedents, is of opinion that they are***

such that a greater punishment should be inflicted for the offence than it has the power to inflict, such court may, for reasons to be recorded in writing on the record of the case, instead of dealing with him in any other manner, commit him in custody to the High Court for sentence."

[9] In terms of section 292 (1) it is not the opinion of a review Judge that matters but it is the opinion of the trial Magistrate who is enjoined to decide whether a greater punishment should be inflicted than he/she has the power to inflict. The learned Judge acted completely erroneously in ordering the appellant to be brought before him as he did.

[10] Moreover, there is nothing on record to

show that the learned trial Magistrate complied with the "order" in question. There is no warrant on record committing the appellant to the High Court for sentence. Furthermore, there are no written reasons recorded by the learned Magistrate for any such committal as envisaged by section 292 (1). The question which immediately arises then is: how did this matter land before the learned Judge a quo? There is simply no answer to this question. The conclusion is, therefore, inescapable that it was, with respect, procedurally improper for the learned Judge to deal with the matter in the circumstances. He had no jurisdiction to sentence the appellant without a prior committal by the High Court for that purpose.

[11] There is, with respect, a further procedural impropriety committed by the

learned Judge a quo. Mr. Simelane for the Crown informed us that there was a retrial before the learned Judge. Counsel is undoubtedly correct. The appellant's warrant of committal to gaol filed of record confirms that on 18 September 2006, the High Court "convicted" him of rape on two counts and sentenced him to 15 years imprisonment on each count. Sentences were ordered to run consecutively.

[12] Astonishingly, the appellant's conviction by the learned Judge was despite the fact that the same Judge had already confirmed his conviction as fully set out in paragraph [4] above. What this then means is that the appellant was exposed to double jeorpady by being tried twice for the same offences, contrary to the principles of autrefois convict as well as functus officio.

[13] On the aforegoing considerations, I have come to the inescapable conclusion that, there having been no proper committal for sentence, the proceedings before the court a quo were a nullity. Accordingly, the only logical order to make in the circumstances is to restore the judgment of the learned trial Magistrate. Mr. Simelane for the Crown has very fairly and properly conceded this point. Interestingly, the appellant himself supports this proposition. In this regard, he seeks the following relief in his grounds of appeal:-

> ***"Therefore I humbly appeal to the honourable Court of Appeal to set aside the two 15 years sentences that the High Court imposed on me and uphold the two 7 years sentences the***

Principal Magistrate initially imposed on me."

[14] In conclusion, the following order is accordingly made:-

(1) ***The appeal is upheld.***

(2) ***The proceedings before Ebersohn J on sentence are declared a nullity.***

(3) The sentences imposed by Ebersohn J on the appellant are set aside.

(4) The sentences of seven (7) years imprisonment imposed by the trial Principal Magistrate on the appellant on each count are restored.

(5) Such sentences to run concurrently with effect from 18 October 2004.

M.M. RAMODIBEDI
JUSTICE OF APPEAL

I agree

J. BROWDE
JUSTICE OF APPEAL

I agree

P.H. TEBBUTT
JUSTICE OF APPEAL

For Appellant : In person
For Respondent : Mr. M. Simelane