IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **CRIMINAL APPEAL NO. 3/08**

In the matter between:

ELLIOT MAMBA

VS REX

CORAM **TEBBUTT, JA**
ZIETSMAN, JA
ANNANDALE, AJA

FOR THE CROWN **M. SIMELANE**

APPELLANT IN PERSON

JUDGMENT

[1] TEBBUTT JA

The appellant in this mater is largely the author of his own misfortune. He was charged before the magistrate at Big Bend with eight counts of which two were for robbery, one was for attempted robbery, one for armed robbery and one for rape. He pleaded guilty to the charge of armed robbery and was found guilty on the charge of rape, on the charge of attempted robbery and on one count of robbery. He was found not guilty and acquitted on the other counts. All the offences were alleged to have taken place during May, June and July of 2004 in the Lubombo region.

[2] Having found the appellant guilty on the four counts, the Magistrate considered that the appropriate sentences on the appellant would exceed his sentencing jurisdiction and, therefore, referred the case to the High Court to sentence the appellant. Banda CJ then sentenced the appellant to 15 years imprisonment on the armed robbery charge, to 10 years imprisonment on the count of rape, to three years imprisonment on the charge of attempted robbery, and to five years imprisonment on the count of robbery and ordered the last three sentences to run concurrently with the 15 years imprisonment on the armed robbery count.

[3] The appellant now comes on appeal to this Court. In his original notice of appeal the appellant stated that he was appealing against his conviction on the rape count and "the 15 years sentence" on that count. In this he was clearly incorrect. He was sentenced to 15 years imprisonment on the armed robbery charge, not on the rape count. On the latter his sentence was 10 years imprisonment.

[4] When the appeal came to be heard in this Court the appellant said he was withdrawing his original notice of appeal as it was incorrect and substituting for it a new notice of appeal in which he appealed against his sentence of 15 years imprisonment on the armed robbery charge only. He did not seek to pursue his appeal against his conviction on the rape count, nor was he challenging his convictions and sentences on any of the other counts.

[5] He was wise not to do so. On all the counts he was positively identified by the complainants as their assailant who, on each occasion, had threatened them with a pistol before robbing them of their money or, in one case, attempting to do so. In the latter case he actually shot the complainant, wounding him under his right arm.

[6] Why I say the appellant was the author of his own misfortune is that, following an unsuccessful bid to ask the Magistrate to recuse himself, the appellant refused to participate in the trial proceedings and when urged by the Magistrate to reconsider his attitude, he shouted at the Magistrate, had to be restrained when he twice walked out of Court and created such a disturbance that the Magistrate was obliged to conduct the trial in his absence in terms of *Sections 172 (1) and (2) of the Criminal Procedure and Evidence Act of 1938.* Despite being warned of the dangers in failing to participate in his trial *(see SV Mokoa 1985 (1) SA 350 (0))* the appellant remained incalcitrant. The result was that the evidence of the crown witnesses was largely unchallenged. The appellant's convictions are accordingly left undisturbed.

[7] On the sentences imposed, all of them were, in my view, condign ones and no fault can be found with the 10 years imprisonment imposed for the rape or with the three years and two years imprisonment imposed for attempted robbery and robbery. Indeed, having regard to the fact that the appellant shot at and wounded the complainant in the attempted robbery charge, three years is a most lenient one.

[8] In his new appeal against the sentence of 15 years for armed robbery trie appellant asks that it be suspended. He says that he was a first offender and not "a hard core criminal"; that he is remorseful about what he did and had pleaded guilty; and that he is terminally ill and does not receive the proper medication for his illness in prison.

[9] However, the offence, as Banda CJ pointed out, is a most serious one. The complainant was held up at gun point and hijacked of her Toyota 3 litre light delivery van valued at E200.000.00, of E20,000 cash and various items of clothing, making a total of E241,269.00. The vehicle was never recovered. Additionally, the appellant was, during the three months period in question, engaged in what can only be described as a crime spree. While he says he is not a "hard core criminal" he was certainly well on his way to becoming one. I agree with the learned Chief Justice that the appellant is a danger to society. Moreover, trie crimes which he committed *viz* rape, robbery and armed robbery, especially the latter, are increasing in frequency and are all gross violations of the safety and security and of the rights of the public, warranting severe sentences on those who see fit to commit them.

[10] Sentencing always lies within the discretion of the trial court and a court of appeal will be slow to interfere with the exercise of that discretion unless the trial court has misdirected itself or the sentence imposed is excessive in the sense that it varies substantially from the one this court would have imposed; in other words, it creates a sense of a shock. The present sentence does not. On the contrary, it is in my view a completely appropriate one. He has, however, asked for it to be backdated to the date of his arrest *viz* 22 October 2004. This will be granted.

[11]In so far as the appellant's illness is concerned he produced to the Court a medical certificate which he asked to be treated as confidential. The appellant's complaint as set out in that certificate does not appear to the Court to be either life threatening or a terminal one. It would not warrant this Court suspending the appellant's sentence either wholly or in part.

[12] The Court is, however, sympathetic to the appellant's need to obtain the requisite medication for it and, if it is presently unable to be provided within the prison, the Court would urge the relevant prison authorities to make the necessary arrangements to procure it for him.

[13] In the result, therefore, the appeal fails and the convictions and sentences which were ordered to be served concurrently are confirmed, save that the sentences are backdated to 22 October 2004.

[14]The Court requests the relevant prison authorities to ensure that the appellant is supplied with the requisite medication for the complaint from which he suffers and, if necessary, to procure it from pharmacies or sources outside the prison.

P.H. TEBBUTT
JUDGE OF APPEAL

I AGREE

N.W. ZIETSMAN
JUDGE OF APPEAL

I AGREE

J.P. ANNANDALE
ACTING JUDGE OF APPEAL

DELIVERED IN OPEN COURT AT MBABANE THIS 22ND DAY OF MAY 2008