IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **APPEAL NO. 17/08**

In the matter between:

ZAKHELE MATSEBULA **APPELLANT**

and

THE KING **RESPONDENT**

CORAM: ZIETSMAN JA
RAMODIBEDI JA
MAGID AJA

JUDGMENT

[1] The appellant was charged in the Magistrates Court with the offence of robbery. He was convicted and the matter was committed to the High Court for sentence in terms of section 292 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended. In the High Court Maphalala J imposed a sentence on the appellant of 10 years imprisonment which was backdated to 30 November 2007, which was the date of the appellant's arrest.

[2] The appellant has appealed to this court against both his conviction and his sentence.

[3] The record reveals that the appellant pleaded guilty when he first came before the court on 3 December 2007. The case was

adjourned to 10 December 2007 when the following exchange took place:

> ***"Court to the accused***
>
> **Q.** *Do you confirm your plea of guilty to the charge?*
> *A. I confirm my plea of guilty*".

The record also reveals (at page 11) that after the appellant had given his evidence-in-chief the Magistrate said:

> "*From what the accused has said, the Court changes the plea of guilty to that of not guilty*".

[4] Subsequently, however, in his judgment (page 21), the Magistrate said that the appellant "pleaded not guilty to the charge when it was put to him", This must have been an error probably typographical, because later in the judgment (at page 22) the Magistrate said:

> "*It was at this stage that the court felt it was proper to change the plea of guilty to that of not guilty*".

[5] I have gone into the question of the appellant's plea in some detail because, before us, in response to a question from the Court as to why he had pleaded guilty, he denied that he had ever done so in the Magistrates court and he persisted in that denial when we pointed out to him that the record showed that he had pleaded guilty and confirmed that plea.

[6] Notwithstanding his stance before us, we must, in the absence of a successful application to amend the record, accept the record as we find it. Moreover, it is inconceivable that the Magistrate, who prepared the record in manuscript, would have recorded his change of the appellant's plea to one of not guilty, if the appellant had not, as a fact, originally pleaded guilty.

[7] With that introduction I pass to consider the evidence led at the appellant's trial.

[8] The complainant's unchallenged evidence revealed that on 19 November, 2007 she had been severely assaulted by more than one person and that several items, which she identified, had been taken. She was unable to identify her attackers. A medical report which was handed in with the appellant's consent revealed that the complainant had suffered multiple bruises and several large lacerations to many parts of her anatomy.

[9] The relevant portion of the evidence of Detective Constable Musa Mabuza, the investigating officer, is the following:

(a) On 30 November 2007 he and other police officers went to the home of the appellant, who, after being duly warned in terms of the Judges' Rules handed over a black bag which contained most of the articles which had been stolen from the complainant in the course of the robbery.

(b)The appellant was wearing a bracelet which had belonged to the complainant.

(c)The appellant led the witness to the appellant's friend who was charging a Nokia cell-phone which had also been taken from the complainant in the course of the robbery.

(d)The appellant took the witness to seek one Jomo Mathabela (whose surname was wrongly reflected in the record as Matsebula i.e. the same as the appellant) who was not found. Unfortunately, the witness gave no reason for the attempt to find Jomo.

[10] The appellant's evidence -in-chief reads as follows:

"On the 19th November, 2007 I went to a certain homestead at Bahai to borrow a bush-knife. I wanted to cut some trees in the garden. I took the bush-knife to my house. One Jomo came and asked to change clothes. I gave him the clothes. In the afternoon of that day, I looked for the bush-knife and it was not where I had put it. At around 8 p.m. Jomo came and he was carrying a military bag. In the bag there were these Exhibits before Court. Jomo sold me the Nokia cellphone, I bought a starter pack. The police then came. The police found Exhibits. I led the police to the homestead where I was re-charging the

cell-phone. Jomo told me that the bag belonged to his girlfriend. I searched the bag and one of the cards was a driver's licence belonging to the complainant. I knew the complainant but I did nothing. I led the police to Mvakwelitshe to look for Jomo but we did not find him. The police assaulted me. I told the police that I was 18 years old yet I am 19 years old. I was then brought to this Court for a remand. That is all"

[11] It was on the basis of this evidence that the appellant's plea was changed to one of not guilty.

[12] In a singularly inept cross-examination, the prosecutor did not even ask the appellant why he had pleaded guilty if his evidence was true. The cross-examination reads as follows:

"Q: Did you tell the police that the cell-phone had been sold to you by Jomo?

A: I did not.

Q: Why did you not tell them?

A: It is because the police were assaulting me.

Q: The police told the Court that you were co-operative?

A: That is correct.

Q: You believe that Jomo was the owner of the cellphone?

A: He told me that he had been given the cell-phone by his girlfriend.

Q: The complainant was known to you?

A: Correct.

Q: You saw her driver's licence?

A: Correct.

Q: Why did you not go to complainant's house to tell her that you had seen her driver's licence?

A: I was arrested before I went to report

Q: How long did the bag remain in the house?

A: For a week.

Q: Why did you not report to the police within that week?

A: I did not search the bag at first.

Q: The police told the Court that you gave him all these Exhibits?

A: That is correct.

Q: I put it to you that you are the one who robbed the complainant?

A: That is false."

[13] The appellant did not put any questions to Mabuza arising out of the alleged assaults on him by the police. I am inclined to excuse a youthful, unsophisticated, rural, uneducated boy (he went only as far as standard 4) for that failure.

[14] Although the appellant sought the leave of the trial Court to call as a witness the friend to whom he had handed the cell-phone for re-charging (whose evidence was of little assistance to the defence or the Crown) he did not apply to call Jomo, who, if his version is true, must have been involved in the robbery.

[15] Mr. Maseko, for the Crown, argued that it had been proved beyond a reasonable doubt that the appellant had participated in the robbery. In support of his submission he referred to the following facts:

1. the appellant's plea of guilty.
2. the appellant's having been found in possession of the articles stolen from the complainant within a relatively short time of the robbery, and, indeed, on the appellant's own evidence, actually having been in such possession on the very date of the robbery.

(c)the appellant's failure to cross-examine any of the Crown witnesses; (d)the appellant's failure to attempt to call Jomo as a witness; and (e)the fact that when the appellant was convicted and was asked what he wished to say in mitigation of sentence, he said, *inter alia,* "I have learnt a lesson"

[17] I do not believe the appellant's denial that he pleaded guilty. That denial is completely at odds with the facts set out in paragraphs 3 to 6, supra. But, having regard to his statement in his notice of appeal that he should have been "charged with receiving stolen property" it is not beyond the bounds of probability that he spotted the error in the Magistrate's judgment (referred to in paragraph 4, supra) and, before us, took an

opportunistic advantage of the error.

[17] I have already dealt (in paragraph 13, supra) with the appellant's failure to cross-examine Mabuza. The same reasoning excuses, in my view, his failure to cross-examine the other witnesses. But in any event, none of them gave any evidence which incriminated the appellant in any way.

[18] For similar reasons, I do not regard his failure to attempt to call Jomo as anything other than neutral; particularly because it was open to the Crown to call Jomo, or if such was the case, to lead evidence that he did not exist.

[19] To say, as an accused first offender, that "I have learnt a lesson" is not an unequivocal admission of guilt. It is at least equally capable of meaning "I won't let myself get into a position in future in which I may find myself accused of an offence which I did not commit".

[20] His possession of the articles stolen from the complainant is a strong factor against the appellant. Indeed, on his own evidence, it is clear that on the evening of 19th November 2007 (the date of the robbery) he knew he was in possession of articles of which at least some emanated from the complainant, who was known to him. On the other hand, the complainant was unable to identify any of her assailants. Moreover, the appellant

sought to take Mabuza to where he said Jomo lived immediately after he was arrested. One can only assume that he did so, (for Mabuza did not say and the appellant was never asked) having told Mabuza that Jomo was the guilty party. On that not unreasonable assumption, it is evident that the appellant's story has been consistent throughout.

[21] In all the circumstances, it is my view that there is a strong suspicion that the appellant was among those who perpetrated the robbery. But suspicion, even a very strong suspicion, does not amount to proof beyond a reasonable doubt. There is no onus on the accused to prove his defence. If the Crown seeks a conviction, it must prove that the defence is false beyond all reasonable doubt, and that, in my view, the Crown has failed to do. The conviction of robbery cannot therefore stand.

[22] In my opinion, however, the appellant's own evidence convicts him of receiving stolen property, knowing it to have been stolen. He knew, at least, that the driver's licence he found in the bag belonged to the complainant (who was known to him) and hence he must have known, or at least foreseen, that she was the owner of all the articles contained in the "military bag" brought by Jomo. That includes the cell-phone which, according to him, he purchased from Jomo.

[23] If his conviction of robbery is to be replaced with a

conviction of receiving stolen property knowing it to have been stolen, the appellant's sentence must be reduced. Giving due consideration to everything the appellant said in mitigation both in the Magistrates Court and in the Court *a quo,* it seems to me that a sentence of 5 years' imprisonment will meet the case. It will, of course, be back-dated to the date of his arrest.

[24] In the result, therefore, the appeal of the appellant is upheld and his conviction and sentence are set aside and replaced with the following order:

(l)The accused is convicted of receiving the undermentioned stolen property knowing it to have been stolen:

3. *Nokia 6822 valued at El 500.00*
4. *Black handbag valued at E500.00*
5. *Brown purse valued at El 50.00*
6. *Black wallet valued at El 99.00*
7. *Silver bracelet valued at E2000.00*
8. *Filofax black in colour valued at El 50.00*

Total value E5000.00

(2)The accused is sentenced to a term of 5 years' imprisonment, back-dated to 30 November 2007.

P.A.M. MAGID

ACTING JUSTICE OF APPEAL

I agree

N.W. ZIETSMAN

JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI

JUSTICE OF APPEAL