IN THE HIGH COURT OF SWAZILAND

CRIM. APPEAL CASE NO. 27/98

In the matter between

SITHEMBISO DISCO SIMELANE	APPELLANT
And THE KING	ESPONDENT
Coram	MATSEBULAJ MAPHALALA J
For the Appellant	IN PERSON
For the Crown	MISS M. LANGWENYA

JUDGEMENT

(28/07/99)

Maphalala J:

The appellant to whom I shall continue to refer to as the accused appeared with one other before Senior Magistrate at Mbabane charged with three counts as follows:

Count 1 - Accused no, 1 (appellant) was charged with the offence of rape.

Count 2 - Accused no. 1 (appellant) was charged with the offence of house breaking with intent to steal and theft.

Count 3 - Accused no. 1 and the other accused were jointly charged with the offence of house breaking with intent to steal and theft.

The other accused person charged with the accused person in this appeal did not lodge any appeal, as he was found not. guilty and acquitted at the close of evidence. The

two accused persons in the court a quo were not represented. They pleaded not guilty to the charges. At the conclusion of the trial as 1 have already mentioned accused no. 2 was found not guilty and discharged in respect of count 3 being the only charge he was facing. The accused was convicted as follows:

Count 1 - eleven (11) years of imprisonment without the option of a fine. Count 2 - twelve (12) months of imprisonment

Count 3 — twelve (12) months of imprisonment count two and three were to run concurrently with count one with effect from the 21st January 1997.

The accused noted an appeal on the 28th August 1997 against both the conviction and sentence meted out by the learned magistrate in the court a quo.

The accused grounds of appeal against conviction and sentence runs ipsissima verba as follows:

a) The court erred in fact and in law when finding that the appellant is guilty per charge, this is in the light of the appellant's plea of not guilty.
b) The learned magistrate erred in fact and in law when accepting the evidence of the complainant in as much as it could be true, it was lack of collaboration (sic) as the witness confess being schooled by the police to implicate me.
c) The learned court erred in fact and in law when rejecting the evidence of the appellant. The

appellant's story was true and it was collaborated (sic) by accused two (2),

d) The report from the doctor does not at all say the complainant was raped by appellant.

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e) No proper identification parade. It was not at all conducted by the investigating officer.

SENTENCE

The sentence upon the appellant is severely harsh and it leads to a sense of shock. May the court have mercy if conviction is confirmed and suspend a portion of the sentence. Appellant is a breadwinner of his children.

In so far as the evidence of the commission of the offence is concerned, the crown led sufficient evidence to establish this. The accused was seen by the complainant and PW2 entering the dwelling house in which the complainant was forced to have unlawful sexual intercourse. The accused was identified by the complainant and PW2 as the "neighbourhood boy" who had on numerous other occasions been seen by the complaint at the shop where he came to buy paraffin.

On the night of the 16th January 1997, at eMnyamatsini area the accused broke into the house of the complainant at night. The room being lit, the complainant was able to recognize the accused. The evidence of PW1 on rape is corroborated by PW2 Cindy Matsebula. After the assailant had left, PW2 noticed that certain items were missing from the kitchen these items are described in count two of the charge. The items were subsequently recovered from the accused by the police and identified by PW2 as her items which had been in her use prior to the theft. There were two pots and a kettle. In respect of count 3 the accused was found in possession of a blanket, underwear and a bag that was identified by PW2 as her property. The explanation given by the accused in respect of Count 2 and 3 were found not to be reasonably possibly true by the learned Senior Magistrate and I agree with his conclusion in this regard. His explanation that the pots were sold to him at the spur of the moment by some Mozambican man he could not locate, militates against a reasonable explanation of an innocent purchaser for value.

The fact that an identification parade was not conducted does not vitiate the identification based on recognition. The complainant saw the accused on the following day after the incidence of rape and she made a report of that to the people who gave chase to the accused.

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Further another aspect of the case is that the accused in his evidence-in-chief in the court a quo did not mention that he was burnt and could not have been in the position to have committed the rape and also he does not talk about the rape but deals with the pots and other things.

In the circumstances the conviction by the learned Senior Magistrate on all the counts was proper in view of the overwhelming evidence against the accused and it is allowed to stand.

Now turning to the question of sentence the crown rightly conceded that since the prosecution in the court a quo did not allege aggravating circumstances in the charge sheet in respect of the rape charge in accordance with Section 185 bis of the Criminal Procedure and Evidence Act (as amended) the accused cannot be treated under that section for purposes of sentence. I agree with the crown in this regard. This court sitting as a Court of Appeal cannot increase the sentence in view of the fact that the accused was not appraised of the issue of aggravating circumstances at the commencement of trial in the court a quo. Any interference by the court would be prejudicial to the accused in that he needed to know exactly what was the nature of the crime he was facing. He must consider himself lucky that this is so because the rape committed on the complainant was of a gruesome nature. She was raped in front of her own mother and was threatened with a knife and a screwdriver. I agree with the crown that the learned Senior Magistrate should not have entered a sentence greater than his jurisdiction, which is 7years. This is in accordance with section 2 of the Magistrate Court Act No. 66 of 1938 (as amended) which stipulates the jurisdiction of a Senior Magistrate as 7 years.

In the result, the sentence in count one is altered to 7 years imprisonment without the option of a fine.

The sentences imposed by the learned Senior Magistrate in counts two and three are confirmed. Count two and three to run concurrently with count one with effect from the 21st January 1997.

S. B. MAPHALALA

JUDGE

I agree

J. MATSEBULA

JUDGE