IN THE HIGH COURT OF SWAZILAND

CRIMINAL APPEAL CASE NO. 62/06

In the matter between

MZWANDILE MAMBA **APPELLANT**

VS

REX

CORAM

MABUZA AND MAMBA JJ

FOR APPELLANT **IN PERSON P.**
FOR THE CROWN **DLAMINI**

JUDGEMENT 15th
May, 20O7

MAMBAJ,

[1] The appellant appeared before the Magistrate's Coim in Manzini on 5 counts.

[2] Count one alleged that he had on the 19TH day of AprIL 2005 raped Nomcebo

is said to have taken place at 1100 a.m. at Fairview North in Manzini. He pleaded not guilty to this charge but was eventually found guilty and sentenced to undergo a term of imprisonment for 7 years.

[3] Count two is a charge of assault with intent to cause grievous bodily harm. Again this offence occurred at the same time and same place and date. The allegation herein is that he wrongfully., unlawfully and intentionally assaulted Sibusiso Joseph Shabangu with an iron rod on the head with the intention to cause him grievous bodily harm. He •pleaded guilty to this charge and the presiding Magistrate, as he was entitled to do, entered a plea of not guilty on this count as well. The appellant was at the end convicted and sentenced to a term of three years of imprisonment without the option of a fine.

[4] In his appeal before us, the appellant complained bitterly about the entry of the plea of not guilty by the Magistrate in respect of count two. He argued that this was false and an irregularity which portrayed him as a dishonest man who did things only to deny them later. He conceded however that this plea entry did not prejudice him in the conduct of his trial in the court below. This being the case nothing further needs to-be said about it.

[5] On the third count he was charged with a contrateraon of section 24 (2) as read with section 24 (3) of the Criminal Procedure and Evidence Act, No. 67 of 1938 (hereinafter referred to as the CP&E). The allegation against him was that -he had wrongfully, unlawfully and intentionally failed to give his correct personal particulars to a Police officer. This charge was, however withdrawn by the crown before the appellant pleaded.

[6] Count four charged a contravention of "Section 48 (1) (a) of Act 40/1982 (escaping from lawfully [sic] custody). In that upon or about the 24/04/05 at about 1900 hours at Manzini Police Station in the Manzini District the said accused did wrongfully, unlawfully and intentionally escape from police lawful custody while awaiting trial prisoner no. ARR957/05, thus did commit the above cited crime." Despite his plea of not guilty he was found guilt}- by the presiding Magistrate and sentenced to a term of 12 months of imprisonment.

[7] Count five which is a charge of rape wherein the complainant is Ayanda Sikhosana, is not the subject of this appeal as the crown did not lead evidence thereon in the court a quo and the accused was acquitted. This appeal is therefore on counts one, two and four; these being the counts on which the appellant was convicted and sentenced. I now deal with the evidence on each of these counts and the appellant's grounds of appeal thereon.

[8] The crown led the evidence of Norncebo Nyoni in support of its allegations on count one. Norncebo is the complainant on this count-She testified that at all times material hereto she LIVED together with Ayanda Sikhosana at the homestead of Mr Ngwenya a; Fairview. She first met the appellant on the 9TH day of April 20O5 when he, the appellant came to their house at Fairview. On this day the appellant had indicated or shown his love for Ayanda who, however, scnumed his advances. The appellant had returned to her house the aollcwing day and had attempted to kiss Ayanda without her consent- Ayanda had again refused and prevented him from kissing her.

[9] Nine days later at about 1000 a.m. the complainant WENT TO the shop and on her way back met the accused. He was n the company of

someone called Mca. The appellant called her and referred to her as umshana, meaning niece. He greeted her and asked her to wait for him. He asked for her name and Nomcebo had deliberately misinformed him that her name was Nokuthula. The appellant according 10 the complainant proposed love to her and when she rejected his advances the appellant said he was only joking and in any event he could have sexual intercourse with her at any time he wanted to with or without her consent. The appellant told the complainant that he was the famous man known as Dibaba. (Notorious would probably be an apt description). -A certain man by the name of Mafela came along. At that time the appellant was holding the complainant. Mafela turned out to be the appellant's friend. The appellant is said to have told Mafela then that he "wanted to take the cleverness out of me [Nomcebo].'

[10] The appellant further asked if the complainant would lay a charge against him if he raped her to which the complainant responded in the affirmative. The appellant is alleged to have told her that he lived in the forest and the police had failed to apprehend hira and they were still looking for him. He then told the complainant tha: he wanted to fix her up. She apologized, probably for saying she would report him to the police. Appellant said he had been sexually aroused and the apology was of no use. He then kicked her on her back and marched her to a certain house, at Similo's home. He did this after mstructmg one Alfonso to take the complainant's groceries to her house.

[11] At Similo's house, the appellant caused the complainant to enter the house against her will. This incident was. according to the complainant witnessed by a Mozambican man who occupied ore of the adjoining rooms. In the house the complainant was pushed onto the bed by the appellant, ordered to undress and then raped-

[12] Whilst the rape was going on Mafela entered the house and witnessed the rape. Later, one Makhekhe also came into the house and found the appellant raping the complainant. When the appellant finished raping the complainant he insulted her, told her to put on her clothes and leave the house. She complied and went to her house where she found Ayanda. She was crying and she reported to Ayanda that the appellant had raped her.

[13] Whilst making the report to Ayanda the appellant came into the -house and asked them what they were talking about. He insulted them both and boastfully said he had had sexual intercourse with both of them. At that time Thuli, who appears to have been the owner of the room, entered but immediately went out and was followed by the appellant. There was then an argument between the appellant and the other people who were near Mthembu's house. These included Mr Shabangu the complainant in count two. One of the things that the appellant said during that conversation was that Mozambicans were interfering in the private lives of members of the Swazi nation and reporting private issues to the police. At that stage the appellant moved to a certain spot away from the people with whom he was arguing, picked up an iron rod and assaulted Mr Shabangu with it. The appellant left the scene and went to Similo's house. The complainant came closer and found Mr Shabangu bleeding. He had been injured on the head.

[14] The appellant returned to Mthembu's house and boasted about how he had assaulted Mr Shabangu. He called himself a criminal or rogue.

[15] As the appellant was boasting about what he had done to Mr Shabangu the Police approached and some of the appellant's friends who were at the scene alerted him about the presence of the police.. He then ran away. Both the rape and the assault were reported to the police and

both complainants,

[16] The appellant did not in cross-examining Nomcebo deny having raped her. The appellant in his evidence in chief merely said "the rape offence never occurred." He admitted though that he had met Nomcebo at the house in question on the 18th day of April 20O5 and had had a quarrel with Mr Sibusiso Shabangu resulting in him assaulting the complainant in self defence.

[17] The crown alleges that both offences occurred on the 19th day of April 2005. I do not think it matters one way or the other whether these offences were committed on either of the two dates. It is significant though that the events testified to by both the crown witnesses and the appellant occurred on or about the time alleged in the charge sheet. But in view of the clear evidence of Mr Shabangu about the date, I hold that it was on the 19th April 2005.

[18] The crown also led the evidence of the complainant on count two, Sibusiso Shabangu who gave evidence as PW2. He confirmed that the incident occurred on the 19th April 2005 at the home of Carlos Mthembu at Fairview. He said he could remember clearly that the incident occurred on the 19th day of April because he had been watching the King's Birthday celebration on television when suddenly the door to the house in which he was in opened and someone who later turned out to be the appellant hit him three times on the head with an iron rod (It is, I think, a notorious fact in this jurisdiction that King Mswati 1ll's birthday celebrations are held on the 19* April each year)). Shabangu caught the iron rod and there was a struggle over it. The appellant retreated backwards, fell down got up and ran away. He inecurried later and jeeringly asked him how he felt on being assaulted era the head The

[redacted]

appellant told him that he had assaulted him for preventing him from having sexual intercourse with Thuli Shongwe, the owner of the house. The appellant demanded to have the iron rod back and threatened to vandalise the house and assault everybody therein. Tne iron rod was given back to him and he left the scene threatening further violence on them for having reported the matter to the police.

[19] The appellant was well known to Norncebo, the complainant on count one. The appellant himself admits that he was at the relevant place at the relevant time and interacted with amongst others Norncebo. He did not under cross-examination deny that he raped her. The appellant merely contended himself with saying the rape did not occur. This was in his evidence in chief. The evidence of Nomcebo is substantially corroborated by the evidence of FW7 Similo Dlamini who witnessed the appellant leave a house at her homestead with a girl who was crying. The appellant also insulted this girl and boasted that he had raped her. There was also the evidence of PW8, Doctor Bokoma Bukiki who examined Nomcebo at the request of the Police on the 19 April 2005. His conclusion based on the presence of spermatozoa was that Nomcebo had recently had sexual intercourse.

[20] The Magistrate who had the advantage of seeing and listening to the witnesses and the appellant as they testified before hzm. believed the evidence of the crown witnesses and rejected the appellant's bare denial. I can find no reason to disagree with his findings on the issue of credibility and findings of fact.

[21] The complainant on count one gave evidence in a straight forward manner. The appellant did not cross-examine her denying the rape. The Magistrate was in my view entitled to reach the margistrate that he reached; finding the appellant guilty as charged on court one. The

sentence of seven years for such an offence is in my view not inappropriate. If it errs at all. it errs on leniency.

[22] The appeal on both conviction and sentence on this count must in my view be dismissed.

[23] The undisputed evidence by Mr Shabangu is that he was assaulted on the head by the appellant. The appellant says he assaulted Mr Shabangu in self defence after Mr Shabangu had slapped him in the iace. On his own showing the appellant testified that after Shabangu assaulted him, he, the appellant had moved away and obtained the iron rod with which he had later assaulted Mr Shabangu. When he assaulted Mr Shabangu he was not being attacked by Mr Shabangu. In any event the trial Magistrate, rightly in my view, rejected the appellant's testimony that Mr Shabangu assaulted him. The assault on Mr Shabangu was unprovoked. It was unlawful and intended to cause him grievous bodily harm.

[24] The appellant was correctiy convicted on count TWO. His appeal on this count must therefore fail. The sentence of three years of imprisonment imposed by the Magistrate does not indicate any misdirection by the court a quo and this court can not in the absence of any misdirection or irregularity interfere with it-

[25] The Magistrate noted that he was convicting the appellant in respect of count four, but when he imposed the sentence he erroneously stated that the sentence was in respect of count three. This is obviously an error as count three was withdrawn before a plea was taken -

{26] There is, however, another issue which this court raised with the crown at the commencement of this appeal, namely the statute that is alleged to have been contravened by the appellant on count four.

[27] I have not been able to find Act 40 of 1982 and neither was counsel for the crown been able to furnish such Act to us. looking at the allegations stated on this count I have a strong suspicion that the crown intended or wanted to charge the appellant for a contravention of section 48 (1) (a) of Act 40 of 1964. This is the Prisons Act hereinafter referred •to as the Act). Section 48 (1) (a) provides that;

> " A prisoner shall be guilty of an offence and liable, on conviction, to imprisonment not exceeding two years which shall commence after the expiry of any other sentence which he was serving at the time of his offence if he -
> (a) escapes, or attempts to escape, from prison or other lawful custody."

On the face of it this would seem to cover the crown's case alleged on count four. However, a closer look at the Act indicates otherwise. The Act defines a prisoner as "a person, whether convicted or not- under detention in a Prison" and a Prison is defined as " a place declared to be a prison under this Act or deemed by it to be a prison-.

[28] From the above definitions, it is clear that the appellant was neither a Prisoner nor a person kept under detention in a prison.. He was, according to the charge sheet, kept in a police eel at a Police Station. A Police Station or Police Cell is not a prison. Therefore the appel<u>a</u>nt could not have been competently charged or convicted for a contravetion of Section 48 (1) (a) of the Act.

(29] The crown sought to remedy this error by urging the court to find the appellant guilty of having contravened Section 43 (1) of the CP&E, which provides that " Any person who has been arrested and is in lawful custody but has not yet been lodged in any prison, gaol, police cell, or lock-up, and who escapes or attempts to escape from such custody shall be guilty of an offence and liable on conviction to imprisonment not exceeding two years." Again it is plain to me that this Section does not cover the situation •under consideration.The Section governs persons who escape or attempt to escape from lawful custody before they are lodged in any prison or jail or police cell or lock-up.The appellant, according to the charge sheet had already been incarcerated or lodged in a police cell and he attempted to escape from that cell.

[30] The crux of the charge under count four is that the appellant escaped from the police cells in Manzini Police Station, after having been lawfully lodged therein. The evidence led was that the appellant together with other persons who had been arrested and lodged with him in the cells within the police station, were taken out of the cells for them to use the toilet and when the appellant was due to be taken back to his cell, he bolted but was finally captured before he could leave the police station premises. It took two police officers to overcome and recapture him and lodge him back into the cell. He did not succeed- His attempts were foiled.

[31] In terms of Section 194 of the CP&E, "In other cases not hereinbefore specified, if the commission of the offence with which the accused 5s charged as defined in the statutory enactment or statutory regulation creating the offence, or as set forth in the indictment or summoms, includes the

commission of any other offence, the accused person may be convicted of any offence so included which is proved, although the whole offence charged is not proved."

Escaping from lawful custody is not one of those cases specified in any of the sections preceding section 194 of the CP&E. See **R v MOKOENA, 1982-1986 (2) SLR 515 at 519-520 and R v ATTERBURY, 1945 EDL 11.** .[32] Commenting on the common law crime of escaping from lawful custody JRL MILTON (assisted by NM FULLER) in his work **SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE (VoL HE) at 222-223**

states that

"Although there is ample common-law authority that it is an offence to escape from a prison or other place of lawful detention, for some time it was not settled whether an escape from any other type of custody was an offence. However, in R v Msuida, Wessels J. (as he then was) took the view that no distinction could be drawn between escapes from prison and escapes from other types of custody, on the ground that _

' The essence of the offence does not lie in the fact that the escaped prisoner was surrounded by walls or bv a fence, but in the fact that he escaped from lawful custody. Accordingly the learned Judge held (Mason and Curlewis JJ. concurring) that, at common law, ' to escape from lawful custody, **however** you have got into that lawful custody, is a crime.' The essential elements of the offence are: (i) an escape (ii) from lawful custody (ii) *mens rea.*"

[33] All the essential elements of the crime stipulated in the charge sheet and the evidence that was led in the court a quo did establish the crime of attempting to escape from lawful custody under the common law. The citation of the statutory offence and wrong statute, did not, in my view prejudice the appellant in his defence. The trial court ought to have found him guilty of an attempt to escape from lawful custody under the common law. That is the verdict I would return.

[34] Having found that the court a quo was in error in returning the -verdict it did on this count, this court is at large to consider the issue of sentence afresh. In all the circumstances of this case I think a sentence of six months' imprisonment would meet the justice of this case.

[35] Counsel for the crown has, properly in my view, conceded that the learned magistrate should have backdated the sentence to the date on which the appellant was arrested; i.e. the 23rd day of April 2005.

[36] In summary, the appeal on both conviction and sentence in respect of count one and count two are dismissed. Both convictions and sentences are confirmed. The sentence of seven years' imprisonment imposed on count one is ordered to run with effect front the 23rd day of April 2005, being the date on which the appellant was taken into custody. The sentence of three years' imprisonment imposed on count two is to run, as ordered by the court a cue, consecutively to that on count one. [37] On count four, the appeal succeeds in part. The verdict of guilty of the statutory offence of escaping from lawful custody is set aside and substituted with a verdict of guilty of an attempt :o escape from lawful custody (under the common law). The appelant is sentenced to a term of