IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL APPEAL NO. 2/2008

In the matter between:

AMBROSE VUSI GINA

VERSUS

REX

CORAM:	**TEBBUTT, JA**
	ZIETSMAN, JA
	ANNANDALE , AJA
APPELLANT	**IN PERSON**
FOR RESPONDENT	**MS Q. ZWANE**

JUDGMENT 22nd MAY 2008

[1] The appellant was convicted of the crime of rape in the Magistrate's Court and was referred to the High Court for sentence, where ten years imprisonment was imposed. He now comes on appeal before this court, challenging both his conviction and sentence.

His grounds of appeal are stated thus:

> "*I was wrongly and unfairly convicted and sentenced. I should have been acquitted and discharged of the rape offence because I did not commit it as it was alleged. I am sincerely innocent of the offence in question. I am more than 100 percent (certain) that the appeal court will vindicate me*"

[2] Although he does not point at any specific misdirection or incorrect factual finding in either his conviction or sentence in his written notice of appeal, he raised spirited submissions before us when he argued his appeal. The essence of his address is that the witnesses who testified at his trial were in cahoots with each other and that they conspired to contrive his conviction through fabrication of false evidence. This was done, he argues, because he is blamed for an ongoing adulterous affair he had with the complainant and her anger about a new lover with whom he formed a relationship.

[3] In the course of the trial in the magistrate's court, evidence was heard to the effect that on the night of the incident, the complainant was at home. Her husband was away but two of her children were with her. I will soon revert to the evidence concerning the children, as it is the only apparent anomaly in the evidence and which aspect is relied upon by the appellant as a reason to discredit the evidence heard at this trial.

[4] The complainant further related how they heard a knock at their door during the night and that when her son went to enquire, the accused person identified himself. When told to return the following day when her husband would be home he bashed the locked door and forced entry into their abode. For this, he used an iron rod which he still had upon entry and which rod was shown to the trial court.

[5] In desperation to ward off her attacker, who was well known to her, she tried to use a bush knife but was soon dispossessed of it. The assailant then forced her onto the ground and stripped off her clothes, tearing her undergarments in the process, and proceeded to have sexual intercourse with her. This was in full view of her two small children. All three of them cried in alarm but no one came to the rescue. Once finished, he left them behind and they went to sleep.

[6] She further testified that due to past incidences of inactivity by the police when she reported cases to them, she was reluctant to do so again. However, she did report the matter to a friend of hers, PW3 Lindiwe Sikhondze, and thereafter to SWAGAA (an NGO offering assistance to female victims of crime) which gave her a reference letter. This she took to the police about a week after the incident. They then took up her complaint, took her for medical examination, and investigated the matter which culminated in the arrest of the appellant.

[7] The medical examination was done eight days after the incident but was understanding^ inconclusive after such a long delay and remains uncorroborative of any penetrative sexual assault. That was not to be the end of the matter as the prosecution also called one of the complainant's young children to testify at the trial.

[8] This twelve year old boy made a positive impression upon the magistrate who had the opportunity to observe his demeanour as a witness and carefully evaluated his evidence. The trial court accepted his evidence, which substantively corroborates that of his mother. He was the boy who answered the hammering at their door and who thereafter saw the accused entering their house after he broke down the door. He also related how he saw the accused overpowering his mother, getting on top of her and making the movements characteristically associated with intercourse.

[9] He convincingly stood his ground under cross examination and confirmed that only himself, a sibling and their mother were in the house at the time. He also confirmed the identification of the accused as the assailant, having had good opportunity to see him as the interior of their room was lit. He also confirmed his mother's evidence relating to a futile attempt to ward off her attacker with a bush knife and that the accused had an iron rod with him upon entry, having also used it to break down the door.

[10] Further corroboration of the complainant's evidence in respect of the reporting of the ordeal came from Lindiwe Sikhondze, who related how she came to be told of the incident and how she persuaded the complainant to follow through with her matter. She was shown the broken door by the complainant, as well as the iron rod reportedly used to break it with.

[11] The Crown also called a man from the local community, PW 4 David Msibi, who testified that he knew both complainant and accused. Sometime prior to the incident, he acted as an intermediary to present an apology by the accused to the

complainant's husband, in relation to an undertaking that the accused would refrain from further adulterous relations with the complainant. He only came to learn about the present incident well after the event.

[12] The investigating officer gave formal evidence about receiving the complaint and the results of the investigation. He produced the torn undergarments given to him by the complainant and the iron rod said to have been used to force open door of the complainant's house. He further confirmed that the complainant was referred to the police by SWAGAA and on enquiry by the court, confirmed that previous reports to the police made by the complainant were ignored by the them.

[13] The evidence of the accused person at his trial in the magistrate's court was an emphatic denial of any wrong doing by himself during the night in question. He does not dispute that he went to her house that night but he narrates an entirely different scenario.

[14] Contrary to the corroborated version of the complainant as outlined above, he had it that he went to her house on a pre - arranged visit in order to collect some items she would have bought for him. This time she had used his money instead of her own, as she would have done in the past when they had a rose-coloured illicit love affair.

[15] The accused told the trial court that when he was let into the house by the complainant, she told him that a neighbour's children were also inside her home and that she was apprehensive that they would spill the beans, so to speak, that they would tell her husband that their love affair was rekindled. On learning this, he agreed with her, took the

items she bought for him and that he then left, only to be taken in by the police some days later and charged with rape.

[16] The record reflects that the appellant held out that a long standing love affair with the complainant was unjustly turned against him because he found a new lover and that it upset the complainant so much that she turned against him to the extent of falsely accusing him of raping her and in the process, fabricating evidence against him and contriving with others to do likewise.

[17] Precisely because it is not an impossibility that a jilted mistress conceivably might do as was suggested by the appellant, concocting evidence about a fabricated rape in order to get back at her former lover because he had found new affections, anxious consideration needs to be given to the assertions by the appellant before us. It would indeed be a miscarriage of justice with most severe consequences if an innocent man is to be imprisoned through trumped up charges.

[18] The learned trial magistrate was alive to this, as demonstrated in his carefully and well considered judgment. He came to conclude that the appellant's exculpatory version had to be rejected and he accepted the crown's version. In my considered view, this was correctly concluded and the conviction remains to be confirmed.

[19] This is for a number of reasons. The accused told the trial court that he was granted entry to the complainant's house, peacefully so and without any recourse to violence. On the other hand, the uncontroverted evidence of the complainant and her son is that he used considerable

force to open their door. This was also noted by an independent witness, the police officer, when he visited the crime scene. The iron rod was displayed at the trial and it established a clear link to the appellant as the person who took it there.

[20] In cross examination, the version of the appellant became watered down. He contends that he went to the complainant's house on the fateful night but he disavows being let in, contrary to his own evidence. He then wanted to have it that the complainant opened the door for him and that she came out, speaking with him outside her house. He was at a loss to explain why he did not put this version of events in contest of evidence to the contrary.

[21] It remains incompatible to accept the appellant's version of a peaceful visit to the complainant's house, collecting items she would have bought for him and then leaving because she told him that the children would report the rekindling of their adulterous love affair, contrary to clear evidence that he broke down the door and forced his way into the house, which evidence is confirmed by the non -partisan police officer. The origin of the iron rod used at the time points to no one else than the appellant himself.

The version of a peaceful visit by a Romeo to his Juliet during the night is in stark contrast to the Crown's evidence. Instead, it rather seems that the reason for the visit was to fetch his teeth which were previously knocked out by the complainant's husband and that while there and agitated by the memory of the assault on him and the complainant's rejection of further advances, he lost his temper, broke the door and forced himself onto the complainant - not in love but to ventilate his anger and frustrations, in retaliation.

The appellant denied that the complainant's husband knocked out his teeth and that he went to collect them. However, both the trial court and also this court noted the distinct absence of his front teeth. In the course of argument, he stated the cause of loss of his teeth due to falling off a bicycle, long ago. He did not advance this alternative during his trial. It smacks of an afterthought.

The complainant stated that at the time of the incident, the accused told them that he had come to collect his teeth and that she then told him to return the following day. When given the opportunity to challenge her evidence, he put other reasons for his presence to her but never challenged her evidence as to the stated cause for him to be there - to fetch his teeth which were knocked out by her husband when he assaulted the appellant because of his unwelcomed advances to the complainant. Such material aspects, crucial to his line of defence, would not so readily be overlooked by a man who is as innocent as he says when he extensively cross examined the witnesses.

I now revert to the only argument that at face value might appear to be meritorious - the presence or absence of a neighbour's children in the complainant's house on the night in question. This seemingly dissonant anomaly is relied upon by the appellant to argue that the cumulative body of evidence against him is a gross fabrication.

The anomaly arises from the evidence of the complainant whose clear evidence is that at the time, she was alone in her house with only her own children, Mbongeni (PW2) and Bongekile. PW2 corroborated this. When it was otherwise suggested to PW3, she agreed with the accused's version that her own two children, Mathanda and Maswati, were also present at the house of the complainant on the night in issue, the 18th October 2005. Neither

of those two children were called to testify at the trial. There is room for doubt as to whether these other two children were not rather witnesses to a different event, a few days prior to the current incident. Their mother says that they told her that the accused had come "to attack" the complainant, not that they reported either an incident of rape or a peaceful visit by him to merely collect some items bought for him by the complainant.

In the evidence in chief of PW3, she did not make any mention of her own children spending the fateful night with the complainant or that they reported to her that they noted anything at all. Her evidence is that she was told of the ordeal by the complainant herself and not also by her own children. Also, that the complainant told her that she was raped in the presence of her own children, not that her friend's children were also there.

The crux of this aspect comes from the mouth of the appellant himself. Although he maintains that two children of the complainant and two children of PW3 were present when he visited her "by appointment", he made the mistake of putting it to the complainant that there were six and not four children with her on the night of the eighteenth October. He said:

> "*I put it to you that there were six (6) children in your house on the night of the 18/10/05 and the other children were the Sikhondze children*".

To this, she replied:

> "*That is not correct. These children* (the Sikhondze children) *had been in my home on another day when you had come to attack me*".

The differences in number of the neighbour's children, as related by the appellant at his trial, whether they were *two* plus two of

the complainant or *four* plus two of the complainant, casts severe doubt on the veracity thereof. It seems far more likely that indeed two, and not four children of the neighbour PW3 were indeed present at the complainant's house, but that it was on a different night. On that night, they witnessed a previous incident of assault, as testified by the complainant, but it does not also follow that they were present during the fateful night when she was raped.

This conclusion is fortified by the evidence that they reported an "attack" by the accused, not an incident of rape. Further, if the version of the accused had to be accepted, it would have had to be done by also accepting that it was the other two children whose presence caused the complainant to peacefully exit her house and speak with the accused outside the house, telling him to rather leave in order to avoid the children telling others about a rekindling of their relationship. It also would have had to be accepted that altogether there were either four or six children in the house, depending on which version of the accused reliance had to be placed, as well as rejecting the evidence of both the complainant and her son that only two children were inside the house. It also would have meant a rejection of clear and independently corroborated evidence that an iron rod was used to break the door in order to gain entry.

[31] In all, I cannot fault the finding of the learned trial magistrate that the Crown has proved the guilt of the appellant beyond reasonable doubt. The trial court rejected the exculpatory evidence of the accused and correctly so. The trial magistrate accepted evidence to the effect that the accused went to the complainant's house to fetch his teeth which were knocked out by her husband, not that he went there to collect items she bought for him. It was also correctly held that indeed he broke down the door with an iron rod, gained

entry and forced himself upon the complainant after disarming her of the bush knife with which she attempted to defend herself.

[32] A final attempt was made by the appellant to have his convictions set aside on the basis of an alleged irregularity in his trial. He argued that he was not given an opportunity to call witnesses that would impugn the Crown's "schooled" witnesses. His defence case rested entirely upon his own evidence, which he says he should have been allowed to fortify with witnesses he would have wanted to call but which opportunity he was deprived of by the trial court.

[33] That this is not so is borne out by the record. It is clearly recorded that at the closure of the Crown's case the options as to the way forward were comprehensively explained to him by the presiding magistrate. It was also told to him that whatever he chooses to do, with reference to his own presentation of evidence, "*...you may call witnesses in your defence, if you wishes* (sic) to *do so*".

After he testified in his own defence the court asked him if he had any witnesses to call, to which he responded:

> "*Yes, but the witness that I wanted to call is reliably said to have disappeared from home and it is not known as to where he is now. I was told by his relatives who visited me in Big Bend Correctional Services*".

[34] It is therefore not correct for the appellant to allege an unfair and irregular trial on the basis that he was not given an opportunity to call his own witnesses. He had the opportunity but he did not use it. He also did not indicate that he wished to call anyone else, apart from the person

who reportedly disappeared. His final bid therefore also stands to fail.

[35] In the event, it is my considered view that the conviction of the appellant in the magistrate's court was sound in law and that there is no reasonable doubt about his guilt that could justify his appeal to be upheld. The complainant's evidence was sufficiently corroborated to dispel a potential misfinding of fact and the exculpatory defence of the accused could not reasonably possibly have been found to be true, as adumbrated above.

[36] Following the conviction of the appellant on the charge of rape, the learned magistrate referred him to the High Court for imposition of sentence. This would have been because the trial court also found aggravating circumstances to have accompanied the incident of rape, firstly, that the accused attacked the complainant at night and broke into her house before raping her, secondly that he tore her clothes and proceeded to rape her in full view of her two children.

Section 185 (bis) of the Criminal Act Procedure and Evidence Act, 1938 (Act 67 of 1938) ("the Act") provides as follows:

> "*(1) A person convicted of rape shall, if the court finds aggravating circumstance to have been present, be liable to a minimum sentence of nine years without an option of a fine and no sentence or part thereof shall be suspended*" *(empasis added).*

From the record before us, it is clear that the formulation of the charge against the accused was devoid of any reference to the statutory provisions of Section 185 (bis) quoted above. The accused was therefore not informed through the indictment, and

not separately by the court either, that if convicted, he was at risk of facing a minimum sentence of at least nine years imprisonment. Not being so informed, it would have been an irregularity by the trial court to impose a sentence which takes Section 185 (bis) into account, if such sentence exceeded that court's ordinary jurisdiction.

From the record filed in the appeal, the SC 10 coversheet used in the magistrate's court is devoid of any indication as to either the rank or the identity of the trial magistrate, but the record is signed off by "*D. V. Khumalo, Acting Senior Magistrate (Lubombo)*". The penal jurisdiction of a senior magistrate, acting or otherwise, is established by the Magistrate's Courts Act, 1938 (Act 66 of 1938). Section 72 (l)(a)(i) thereof limits a magistrate's court of the first class to impose imprisonment for a period not exceeding two years. Section 73 of the same Act empowers the Minister, in consultation with the Chief Justice by notice in the Gazette, to confer upon a magistrate increased penal jurisdiction in criminal matters. This was done in 1988 by Notice, which increased the maximum period of imprisonment which can be imposed by every senior magistrate to seven years.

The trial magistrate presumably referred the accused to the High Court for imposition of a sentence in excess of his own penal jurisdiction of seven years, but not under the provisions of Section 292 of the Act which requires such referral to be based on "*information about his character and antecedents*". More likely, referral to the High Court was based on a practice directive by the Chief Justice, which provides for sentencing referral in respect of certain convictions of rape. It equally well could have weighed on the magistrate's mind that a conviction of rape where aggravating circumstances are found to exist, requires a minimum sentence of nine years, which is beyond the sentencing jurisdiction of a senior magistrate. In any event, the magistrate

did not record his reasons for committing the accused for sentence by a superior court. Section 293 of the Act sets out the further procedure to be followed by the High Court, entailing *inter alia* that it is to satisfy itself of the accused's guilt. Had it not been for the enactment of Section 293 (4) of the Act, the High Court might have been said to be limited in its sentencing discretion. It reads that:

> "*293... (4) If the High Court, under this section, passes any sentence upon any person he shall be deemed to have been tried and convicted for the offence concerned before the High Court.*"

The reason I mention this is because in the course of a fair trial, an accused should ordinarily not be subjected to a more severe sentence, if convicted, than what he would have been able to receive at the time this trial commenced. An obvious exception would be where his previous convictions come to light after his conviction in a magistrate's court and cause him to be referred under section 292 of the Act for sentence beyond the jurisdiction of the trial court.

[41] The principle remains that in the ordinary course of events, for example, when an accused faces a potential conviction of rape but in the absence of a further allegation of aggravating circumstances as per section 185 (bis) of the Act, the trial court is not enjoined to impose the statutory minimum sentence of nine years, because the accused was not made aware of such a possibility from the outset. In such a case, the court would be limited to its ordinary sentencing jurisdiction.

> In the present matter, however, due to the proviso under Section 293 (4) (supra) the High Court was at liberty to impose any sentence within its inherent and unlimited

jurisdiction.

This was done by the learned Chief Justice, who gave consideration to the relevant sentencing factors and imposed a term of imprisonment of ten years. It was not also ordered to commence with retrospective effect.

[42] The appellant did not argue the sentence to be improper in that there was any misdirection or that it induced a sense of shock by being startingly disproportionate with a sentence that would have been imposed by this court. All he asked for is that in the event his appeal on the merits was to be dismissed, that commencement of his sentence be ordered to be backdated to the date of his arrest, the 27th October 2005.

He says he has been held in custody since then, which the Respondent confirms, and the Respondent's counsel is in agreement with backdating of the sentence.

[43] This court is in agreement that the duration of the sentence is proper and that it should be confirmed. The court *a quo* gave due consideration to the personal circumstances of the appellant, the seriousness of the crime and the interests of the community, appropriately blending it with a measure of mercy and it cannot be faulted with the sentence it imposed.

[44] Due to the long period of incarceration of the appellant prior to his sentence and being blameless for not being sentenced anytime sooner, we hold the view that it would be appropriate to order that the sentence be confirmed on appeal but that it also be ordered, as per the provisions of section 318 of the Act, that the sentence be deemed to have commenced on the 27th day of October 2005.

In the event, it is ordered that the appeal against both sentence and conviction be dismissed, save for an order that sentence be backdated to the 27th October 2007.

Jacobus P. Annandale AJA

I agree

P.H. TEBBUTT
Judge of Appeal

I agree

N.W. ZIETSMAN
Judge of Appeal

Handed down in open court at Mbabane on this the 22nd day of May 2008.