Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

Case Nr: CA&R 105/2011
Case Heard: 06/02/2012
Date delivered: 16 /03/2012

In the matter between:

Michael Norman Mthembu **APPELLANT**

and

The State **RESPONDENT**

Coram: Olivier J et Phatshoane J

JUDGMENT

PHATSHOANE J:

1. The appellant, a 33 year old man at the time of the commission of the offence, stood accused of robbery *simpliciter* in the Regional Court, Kimberley, before Acting Regional Magistrate Ms N Mbalo. The state alleged that on 06 August 2010 at or near Donkerhoek, Kimberley, he unlawfully and intentionally assaulted Ms Masego Desiree Kopeledi and with force took her Sony Ericsson Cellular Phone valued at R5000.00.

2. The appellant pleaded not guilty to the charge. On 06 July 2011 he was convicted of robbery with aggravating circumstances. In terms of s 51(2)(a)(i) of the Criminal Law Amendment Act, 105 of 1997 (the minimum sentence legislation), having determined that there were

substantial and compelling circumstances, the Regional Magistrate imposed a sentence of 7 years imprisonment. With leave of this Court the appellant now appeals against both his conviction and sentence.

3. The grounds of appeal are substantially summarized as follows in the appellant's heads of argument:

AD CONVICTION

3.1 That the trial Court erred in finding that the state proved its case against the appellant beyond a reasonable doubt.

3.2 That the trial Court erred in rejecting the appellant's version as not reasonably possibly true.

3.3 That the trial Court erred in finding the appellant guilty of robbery with aggravating circumstances when the charge put to the appellant was robbery *simpliciter.*

AD SENTENCE

3.4 That the trial Court erred in overemphasising the seriousness of the offence and the interest of the community and downplayed the appellant's personal circumstances.

3.5 That the trial Court erred in applying the provisions of s51(2)(a) of the minimum sentence legislation when sentencing the appellant.

4. The following factual matrix emerged from the state's case. Around 24h00 on 06 August 2010 in Donkerhoek, Galeshewe, Kimberley, Ms Kopeledi, the complainant, was with her relative, Ms Sisinyana Motlhomi, at Jerry's Tavern indulging in alcohol. The appellant, a man unknown to the two ladies, approached them and affably offered to escort them home. They succumbed to his approach and departed the tavern in his company. The initial plan was to pass at the appellant's home in order for him to wear his jacket. At appellant's home the two ladies waited inside his shanty allowing him to wear his jacket.

5. Out of the blue the appellant refused to escort the ladies further and instead wanted to have sexual intercourse with them. When they refused he became aggressive, blocked their way and started fighting them. He assaulted Motlhomi resulting in her having scratch marks on her cheeks and neck but managed to escape. Motlhomi did not report that she left the complainant behind in a perilous situation. She says that she was scared of her sister. She also confessed to have been very drunk; compared to the complainant who it is said was 'not that drunk'. In the complainant's words she was more assertive than Motlhomi. The complainant and Motlhomi admittedly drank from 12 noon until midnight.

6. Back at the appellant's shanty, the complainant fought back so as to escape. She says that her Sony Ericsson contract cellular phone was in her breast in the middle of her brassier. In the course of the fray the appellant grabbed her phone there and informed her that if she wanted the phone she would have to engage in sexual intercourse

with him. She managed to flee to Keneilwe's place nearby where she was assisted to summon the police. Around 06h00 in the morning the police and the complainant went to the appellant's home. The appellant denied that he took the complainant's phone. Later that same day the complainant received her phone from the police in same condition but its Subscriber Identity Module (SIM card) had been removed.

7. Mr Oageng Duiker received a telephone call from his home during the morning of Saturday 07 August 2010. He went home and found three policemen, the appellant and a woman. The appellant called him aside and informed him that the police were looking for the complainant's phone. He requested Duiker to fetch the phone at his (the appellant's) home, which his son (Xolani) would hand over to him. Duiker gave Xolani the message from his father, who went inside one of the shanties and came out with the phone which Duiker took to the police station.

8. The appellant's account of events is dichotomous to the state's version. He portrayed the complainant as his acquaintance. In exculpating himself he says that on 06 August 2010 he received information from Xolani that the complainant and Motlhomi were looking for him. He went in search of them at a certain Mbatha's Store where he found them. They informed him that they were looking for him because they wanted someone to accompany them to a tavern. He went with them to his house to wear a jersey and all proceeded to Jerry's Tavern. Along the way they were joined by a boy from the Mbatha's Store. They whiled away time at the tavern and the ladies

bought beers and drank. He did not drink.

9. The Mbatha's Store boy left the tavern. The appellant enquired from the ladies if he could take them halfway home. They opted to sleep at his home. They left the tavern for his home. The two ladies shared his bed whereas he put up with his son. In the middle of the night Motlhomi wanted to relieve herself. He opened the door for her to go outside but she never returned. In the morning the complainant informed him that she had lost her phone and requested him to assist her to look for it. It could not be found. The complainant left at around 07h00 in the morning but later returned accompanied by the police. The police enquired from the appellant where the phone was. He informed them that he did not know. The Police requested him to accompany them to the police station.

10. In answer to Duiker's evidence the appellant intimates that he took the police to Duiker because he wanted to borrow money from him so that he could buy a replacement phone. In his evidence-in-chief the appellant stated that Duiker informed him that he was going to the appellant's home to enquire from his son whether he knew the people who were in the company of the two ladies at the time that they were looking for the appellant at his home. Strangely, under cross-examination the appellant testified that he was not aware that Duiker was going to his home. He thought that Duiker was going to a bank to withdraw the money he loaned. The appellant states that he does not know the circumstances under which the phone was recovered.

11. Mr Xolani Nkosi, the appellant's son, gave a rehearsed version almost similar to that of his father. In addition he intimated that when Duiker

arrived he (Xolani) informed him that certain boys at Mbatha's Store told him that the complainant left her phone with them. Duiker then requested him to obtain the phone from these boys which he did.

12. The defence wishes to exploit the following apparent conflicts in the complainant's version. Under cross-examination she stated that the appellant pulled the phone from her breast causing the sweater she wore to stretch. She also alleged that she saw it when the appellant grabbed the phone where she kept it. In her words ***"that is why I believe there is no way it fell down, because I saw him take it. That is why I asked him please give me my phone".*** She could not recall whether she was on her feet or lying down when the phone was seized. The following is further recorded:

"Mr Mabaso: I am saying from the statement that you've just given, it sounds as if you are not even aware as to at what stage did the accused remove the cell-phone. You said in the process of you freeing yourself that is when he managed to remove the cell-phone?

Complainant: Yes when we were still fighting, I wouldn't know exactly which time specifically or before or after what- after what was happening, but I know it was during the incident whereas I was trying to leave that he took my cell-phone.

Mr Mabaso: so it is possible that in the- in this tussle, that this phone could have fell down. Am I correct?

Complainant: There is no way sir. He grabbed the phone."

13. The complainant could not give the exact position she was in when she was dispossessed of her phone. In her unsophisticated fashion she tried to explain that the snatching of the phone could have been at any given moment regard being had to the fact the scene was in

motion. She remained resolute that the appellant grabbed her phone.

14. In ***S v Yolelo 1981 (1) SA 1002 (A)*** the Court held that robbery can also be committed if violence follows on the completion of the theft in a juridical sense. In each case an investigation will have to be made into whether, in the light of all the circumstances, and especially the time and place of the (accused's) acts, there is such a close link between the theft and the commission of violence that they can be regarded as connecting components of substantially one action. This is also applicable to a threat of violence insofar as it can be an element of robbery.

15. If the complainant's statement is that the appellant wanted to extort sexual intercourse from her using the cellular phone as a bargaining chip it did not matter, in my view, how he got hold of the phone. The fact of the matter is that the appellant refused to hand over the phone using threats of violence. Having sexual intercourse with another without consent is rape and therefore a violent crime.

I am satisfied that the magistrate was correct in holding that the apparent contradictions in the complainant's version were not material.

16. The erstwhile counsel for the defence in the court *a quo* took issue with the fact that the complainant's evidence in Court differed with what she told the police. *Inter alia*, she is said to have informed the police that the appellant was pressing her down on the bed while in Court she intimated that the appellant was dragging her in the

direction of the bed and in the course of the commotion he had easy access to her phone. As was said in ***S V XABA 1983 (3) SA 717 (A)*** at 730 B-C:

"Police statements are as a matter of common experience, frequently not taken with a degree of care, accuracy and completeness which is desirable…"

See also ***S v Mafaladiso en andere 2003(1)SACR 583 (SCA)*** at 593-e -594-h.

17. A further apparent contradiction in the state's version relates to the spot where the fight took place. According to the complainant it was inside the appellant's shanty whereas Motlhomi testified that the attack on them or the fight with them started inside the house and continued outside the premises. This may well have been so considering the fluid nature of the scene. In my view this discrepancy is similarly not material.

18. In ***Union Spinning Mills (Pty) Ltd v Paltex Dye House and Another 2002 (4) SA 408 (SCA)*** at 416 par 24, the following dictum appears:

"A trial Court has obvious and important advantage of seeing and hearing the witnesses and of being steeped in the atmosphere of the trial. These advantages were not possessed by the Full Court and indeed this Court. Although Courts of appeal are slow to disturb findings of credibility they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness' demeanour but predominantly upon inferences from other facts and upon probabilities. In such a case a Court of appeal with the benefit of an overall conspectus of the full record may often be

in a better position to draw inferences, particularly in regard to secondary facts".

19. The magistrate approached the evidence of the complainant with the necessary caution in view of the fact that she was a single witness on certain aspects of her testimony and had also consumed alcohol. She found her evidence to have been probable in that her responses to the questions were credible and plausible for reasons set out in her judgment. What needs to be taken into account is that Motlhomi, the complainant's friend, escaped with an injury from the appellant's home where they were held hostage. This is a factor that reduces any risk of a wrong conviction.

20. The magistrate criticized the appellant's evidence as lacking credibility. What remains remarkable is that when Duiker went to the appellant's home the latter's son (Xolani) was able to hand over the cellular phone to him. The appellant and Duiker are acquaintances. There is nothing remotely suggesting that Duiker would falsely implicate the appellant. What is important is that the appellant clearly had knowledge of where the complainant's phone was and it was through his act that it was discovered. According to the appellant everything said in Court by Duiker was the truth on the one hand but on the other he denied that he asked Duiker to collect the phone from his son. This contradiction is certainly material.

21. The appellant's s 115 of the Criminal procedure Act, 51 of 1977 (CPA), statement differs materially with his oral testimony in the following respects. In the statement he stated that he left Mbatha's Store with

the two ladies for his home because they decided to continue with their alcohol indulgence at his home. When he testified he intimated that the reason they left Mbatha's Store was so that he could wear his jersey and proceed to Jerry's tavern.

22. The appellant further states in his 115 plea-explanation that his brother confronted the gentlemen who sat with the complainant and Motlhomi at Mbatha's Store about the phone on the day of the incident. This interrogation resulted in the phone re-surfacing from the gentlemen. This statement differs completely with his evidence before Court already highlighted.

I am satisfied that the magistrate did not err in rejecting the appellant's version as not reasonably possibly true.

23. Mr Cloete, for the appellant, contended that the Magistrate misdirected herself in finding the appellant guilty of robbery with aggravating circumstances. In any event, the argument went, the charge put to the appellant was robbery *simpliciter* and nothing more. This much was conceded by Mr Mokone, for the state. Ultimately the crisp issue which remains to be determined is whether the conviction on the count of robbery with aggravating circumstances is sustainable.

24. Section 1 of the Criminal Procedure Act, 51 of 1977, provides that the aggravating circumstances in relation to robbery means the wielding of a fire-arm or any other dangerous weapon; the infliction of grievous bodily harm; or a threat to inflict grievous bodily harm, by the offender or an accomplice on the occasion when the offence was

committed, whether before or during or after the commission of the offence.

25. The magistrate concluded that a threat to inflict grievous bodily harm was forever present and that this justified her verdict on the count of robbery with aggravating circumstances. This is because, she reasoned, the complainant testified that she had to fight to defend herself; was dragged in the direction of the bed while Motlhomi had fled the scene after the appellant had inflicted injuries on her. The magistrate substantiates her finding further in her judgment on the application for leave to appeal. She relies on the view expressed by the learned authors Du Toit *et al* in their **Commentary on the Criminal Procedure Act** in the notes in the definition section to say that the state does not carry any onus to prove the aggravating circumstances nor the accused to show the absence thereof.

26. In ***S v Isaacs and another 2007 (1) SACR 43 (C)*** at 53 para 37 Yekiso J held:

"Du Toit et al Commentary on the Criminal Procedure Act, in their commentary under the heading 'definitions', observe that there is no onus in establishing the existence or otherwise of aggravating circumstances. They go on to comment, at DEF2A [Service 32, 2004] that the State does not carry an onus to prove aggravating circumstances, nor the accused to show the absence thereof. After a conviction, so the learned authors conclude, the court will examine the facts before it and will determine on the facts whether there was an occurrence which can be described as an aggravating circumstance. I have grave reservations with this proposition particularly in the light of the guaranteed right of presumption of innocence contemplated in s 35(3) of the Constitution of the Republic of South Africa, 1996. My view is that the onus is on the State throughout, including proof of presence or otherwise of aggravating circumstances".

27. Unless the facts alleged to constitute aggravating circumstances are formally admitted they must be proved, and it is, naturally, essential that the exact extent of the admissions should be ascertained. See ***R v Zonele and others 1959(3) SA 319(A)*** at 323E-F. More fundamentally, there is no reference to robbery with aggravating circumstances in the charge sheet nor does the charge sheet reflect the relevant statutory provision upon which the appellant was convicted. See para 2 above. Therefore even if the state proved robbery with aggravating circumstances the appellant could not be so convicted because he was not timeously or at all apprised that he was in jeopardy of being so convicted. He was seriously prejudiced because he was not afforded an opportunity or ample opportunity to mount a defence against such a serious allegation.

28. In ***Moloi and others v Minister for Justice and Constitutional Development and others 2010 (2) SACR 78 (CC)*** at 90 para 28 the following dictum appears:

> ***"In S v Hugo [1976 (4) SA 536 (A)] it was held that, where the State elects to make representations on the charge-sheet upon which it relies, the accused is entitled to regard these as exhaustive and to prepare his defence in respect of these representations, and no other. In R v Alexander and Others [1936 AD 445 at 457], with approval in S v Pillay [1975 (1) SA 919 (N) at 922A], the purpose of the charge-sheet was found to be -***
>
> ***'to inform the accused in clear and unmistakable language what the charge is or what the charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piecing sections of the indictment or portions of sections together what the real charge is which the***

Crown intends to lay against him."

29. There is no evidence pointing to the existence of aggravating circumstances. Nothing in complainant's evidence suggests that there was a threat to inflict grievous bodily harm on her. Similarly there is no evidence that the robbery was perpetrated by way of the wielding of a fire-arm or any other dangerous weapon and/or the infliction of grievous bodily harm on the complainant.

30. The suggestion by counsel for the defence at the Court *a quo* that complainant could not say at what stage she was dispossessed of the phone led to Mr Cloete's alternative submission to the effect that at best for the state the appellant should have been convicted of theft. A person commits theft if he unlawfully and intentionally appropriates movable, corporeal property which belongs to, and is in the possession of another; belongs to another but is in the perpetrator's own possession; or belongs to the perpetrator but in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession: provided that the intention to appropriate the property includes an intention to deprive the person entitled to the possession of the property. See CR Snyman **Criminal Law** fifth Edition, at 483.

31. I have already concluded that there was some form of violence involved in the perpetration of the offence. This simply puts theft out of the equation because it does not have as one of its elements, violence. Robbery on the other hand consists in theft of property by unlawful and intentional using of violence or threats of violence to

induce submission to the taking of it from the person of another or in his/her presence. See ***S v Benjamin en Ander 1980(1) SA 950 (A)*** 958H.

32. In ***S v Salmans 2006 (1) SACR 333 (C)*** at 340d-e Foxcroft J pronounced that the physical grabbing of a bag or a cellular phone out of a complainant's hand constitutes a physical intervention necessary for the dispossession, and whether one calls it force or violence, one has a physical act committed against the person of another which complies with the definition of robbery.

It therefore follows that a conviction on robbery with aggravating circumstances cannot be sustained and has to be altered to robbery *simpliciter*.

33. On the question of sentence. In imposing seven years imprisonment the magistrate was motivated, *inter alia*, by the aggravating circumstances she considered to have been present in the commission of the robbery. In addition she applied the provisions of s 51(2)(a) of the minimum sentence legislation in circumstances where they should not have been invoked, leading to a material misdirection.

34. It is trite that the determination of a sentence is pre-eminently a matter for the discretion of the trial Court. Equally settled is that a mere misdirection is not by itself sufficient to entitle a Court of appeal to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Where the material misdirection by the trial court vitiates its exercise of that discretion an appellate Court is at large to

consider the question of sentence de novo, as we hereby do. See ***S v Kibido 1998 (2) SACR 213 (SCA)*** at 216g-I; ***S v Malgas 2001 (1) SACR 469 (SCA)*** at 478d.

35. The appellant passed standard 6 (grade 8 in today's terms) at school. He worked at Reagile as a technician earning R1 100.00 per month. He also repaired vehicles over the weekends. He has two children aged 14 and 2 years that he maintained. His partner is unemployed. It counted in the appellant's favour that the complainant's cellular phone was recovered and returned to her albeit without its SIM card. As the magistrate observed, the complainant and Motlhomi were not seriously injured. She also observed that the crime committed was prevalent in the region.

36. The appellant is not a first offender. When he gave his evidence in mitigation he expressed regret for what he did. I am not persuaded that he showed any contrition regard being had to his conduct throughout the trial. On 31 July 2002 he was convicted of rape and sentenced to 10 years imprisonment. Two years of this term was suspended for a period of five years on condition that the appellant was not found guilty of rape during the period of suspension. The fact that the appellant demanded sexual intercourse from the complainant by using her cellular phone as a bargaining instrument is an aggravating factor. The complainant and Motlhomi trusted him but he took advantage of their gullibility and state of sobriety. Courts should send out a strong message of its condemnation of crimes involving violence.

37. This Court should impose a sentence that will strike a proper balance

between the serious nature of the offence, the interests of the community and the personal circumstances of the appellant. Also trite is that the punishment must fit the criminal, the crime, taking into account the interest of society, as well as the need to blend the sentence with a measure of mercy according to the circumstances. See ***S v Rabie 1975 (4) SA 855 (A) at 861A-862F***.

38. In ***S v Isaacs and another*** supra although the facts are distinguishable the Court had substituted the conviction of robbery with aggravating circumstances with robbery *simpliciter*. Having considered the appellants' personal circumstances and the gravity of the offence, it found the sentence of four years' imprisonment to have been fitting. All things considered a custodial sentence is justifiable. I am of a view that a sentence of 3 years imprisonment would be appropriate.

39. In the result the following order is made:

ORDER

1. **The appeal is partly successful to the extent set out below:**

2. **The conviction on robbery with aggravating circumstances is set aside and the following is substituted in its place:**

"The accused is found guilty of robbery simpliciter"

3. **The sentence of 7 years imprisonment is set aside and the following is substituted in its place:**

"The accused is sentenced to three years imprisonment"

4. **In terms of s 282 of the Criminal Procedure Act, 51 of 1977, the sentence is antedated to 06 July 2011.**

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MV PHATSHOANE

JUDGE

NORTHERN CAPE HIGH COURT

Olivier J:

40. I have read the judgment of my sister Phatshoane J in this matter. I agree with her finding that the appellant had committed robbery when he grabbed or snatched the cellphone. There is no basis for interfering with the regional magistrate's factual findings in this regard.

41. I also agree that the regional magistrate's erred in convicting the appellant of robbery with aggravating circumstances. The conviction should have been one of robbery *simpliciter*. I also have no problem with the sentence proposed by my sister. It follows, therefore, that I concur in the result and orders under paragraph 39 of her judgment.

42. I am, however, unable to agree with the reasoning in paragraph 15 of that judgment. My sister finds (apparently as an alternative to the finding that the cellphone was grabbed from the complainant) that,

when the appellant subsequently offered to return it if the complainant would agree to have sex with him, that conduct in itself constituted violence or a threat thereof, which violence would have been so closely linked to the taking of the cellphone that it would in itself have constituted robbery.

43. It is trite that for robbery to be committed "*The property must be obtained **as a result** of … violence or threat of violence*"[1]. Even though it is not necessary that the violence or threat should precede the taking of the property, it should nevertheless be so closely related to the taking that it can be regarded as part thereof and as causally linked to the taking of the property[2].

44. The appellant's "*offer*" that the complainant could get her cellphone back if she agreed to have sex with him, did not constitute violence or a threat of violence. It could in no way have led the complainant to believe that there was going to be immediate violence to her person[3].

45. It would seem as though the reasoning of my learned colleague is that, if the complainant had agreed to have sexual intercourse with the appellant in order to recover her property, there would not have been valid consent, that the subsequent sexual intercourse would therefore then have constituted the crime of rape, that rape is "*a violent crime*" and that, on this basis, the attempt to "*extort sexual intercourse*" constituted a threat of violence.

46. The fact of the matter is, however, that the complainant did not agree to have sexual intercourse with the appellant and that no sexual

1 **Criminal Law**, Snyman, 4th edition, p507
2 **S v Yolelo** 1981 (1) SA 1002 (AA) at 1015
3 **S v Mtimunye** 1994 (2) SASV 482 (T) at 4084; **Crminal Law, supra**, pp 430 & 432

intercourse took place. The enquiry into whether there had been a threat of violence after the taking of the cellphone can surely not be premised upon a hypothesis.

47. The appellant's "*offer*" left the complainant with a choice. She could either agree or not agree to have sexual intercourse with the appellant. Agreeing to have sexual intercourse with the appellant would result in the retrieval of her cellphone. The result of not agreeing to have sexual intercourse with him, on the other hand, would mean that the appellant would not return the complainant's cellphone; not that she would be raped or otherwise physically harmed. The *"offer*" contained no element of a threat of physical violence to the person of the complainant, not even implicit. It follows that, in my view, my colleague's statement that the appellant had "*refused to hand over the phone using threats of violence*" is incorrect.

48. It is completely unnecessary to speculate about whether agreeing to sexual intercourse under such circumstances would have constituted valid consent. Even if not, it would not, however, follow that the sexual intercourse would have been a violent act. I cannot agree that in all circumstances "*rape …* (is) *a violent crime*". It has long been recognised in our law that rape is not necessarily an act or species of violence[4]. The emphasis is on the lack of consent, which can be the result of violence or a threat thereof, but it can also be the result of something that has nothing at all to do with violence. One need only think of examples like sexual intercourse with a sleeping or intoxicated woman and, in certain instances, "*consent*" by fraud[5].

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4 **Criminal Law, supra**, pp445-446; **R v K** 1958 (3) SA 420 (A) at 423B
5 **R v C** 1952 (4) SA 117 (O)

49. An act of violence or a threat thereof is also not an element of rape as it is now defined in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amended Act.[6]

50. To sum up, even if the appellant's offer may have constituted extortion or an attempted extortion[7]; it did not constitute a threat of violence. The appellant did not threaten the complainant with intercourse; non-consensual or otherwise. His offer clearly implied that it was up to the complainant to decide whether she was prepared to have sexual intercourse with him. If not, she would not be subjected to sexual intercourse. She would only forfeit an opportunity of retrieving the cellphone which had by then already been robbed.

51. There was no causal link between the appellant's refusal to return the cellphone without sexual intercourse and the taking of the cellphone. It had already been taken prior to that refusal, by force, and the subsequent refusal had clearly not been necessary to enable the appellant to deprive the complainant of her property or to get away with it.

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C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

On behalf of the Appellant	Adv P.J. Cloete
Instructed by	Legal Aid Board
On behalf of the Respondent	Adv U. Mokone
Instructed by	Director of Public Prosecutions

6 32 of 2007
7 **Criminal Law, Supra**, p448