

IN THE HIGH COURT OF SWAZILAND

REX

Vs

MLAMULI OBI XABA

Criminal Case No. 6/2007

Coram: S.B. MAPHALALA – J

For the Crown: MR. SIMELANE

For the Defence: IN PERSON

REASONS FOR SENTENCE

30<sup>th</sup> May 2007

[1] At this stage of the proceedings the court ought to mete out an appropriate sentence. The principle that governs this aspect of the proceedings were aptly stated in the often cited case of **S v Zinn 1969 G**) S.A. 540 called the triad consisting of the interest of society, the interest of the accused and gravity of the offence.

[2] The accused person has stated before court factors in mitigation of sentence being (i) that he is first offender and is 36 years old; (ii) that he is breadwinner of 3 children; (iii) that he was drunk when he committed this offence and (iv) that the sentence imposed by the court should be suspended and also backdated to the date he was arrested.

[3] According to the learned author *JRL Milton, South African Criminal Law and Procedure Vol. 11* at page 439 the intimate and personal nature of this act makes this a particularly reprehensive form of assault, involving not only the application of force to the body of the victim but, by ignoring the woman's unwillingness to engage in sexual intercourse, also "the ultimate invasion of a woman's privacy and autonomy (see *Snyman, Criminal Law* at page 424).

[4] *Ashworth, Principles of Criminal Law* at page 298 states the following:

**"They may be described generally in terms of sexual autonomy and sexual privacy. The argument must begin from the proposition that our both" is our own: it is a personal zone, and respect for privacy and personal autonomy both surround this. Since these values are high among those which the criminal law ought to respect no further corroboration of this starting point is necessary. Each citizen may be said to have sexual choices imposed on him or her ... [Sexual privacy is a part of one's personality, it is a mode of expressing that personality in a way which is therefore fundamental that one should be able to choose to express oneself in this way - and, if so, towards and with whom. The essence of sexual privacy is that it should be voluntary. Thus, even where a sexual assault involves no significant physical force, it constitutes harm in the sense that it invades a deeply personal zone, gaining non-consensually that which should only be shared consensually ...**

**It must be emphasized that the crucial element in sexual assault resides in the close inter-relationship between the body and the personality. This close relationship, some would say identity, emphasizes that central values such as autonomy and privacy are bound up in all sexual cases. It is the threat to these values which brings the real, deep and sometimes long-lasting effects of sexual assault".**

[5] The effects of a sexual assault such as rape are considerable. There is the fear of harm experienced during the rape, accompanied by the realization that the victim may contract a venereal disease or the deadly HIV virus. The victim may become pregnant as a result of the rape and have to endure the trauma of deciding to terminate the pregnancy or bear the child. A complainant in the criminal process, the rape victim suffers further victimization, rape victims may suffer from a "rape trauma syndrome", a condition involving deep disruption of the victim's life pattern and thought processes, not just in terms of the physical effects of rape (physical pain, inability to sleep, prolonged distress) but also in terms of the effects on well-being (new-found fears, mistrust of surroundings and other people, embarrassment, and so on). (See *D. Hansson, What is Rape Trauma Syndrome (1992)*).

[6] Not surprisingly, in the view of the law, rape constitutes the most serious non-fatal violation of the person and the self that can be perpetrated (see *Milton (supra)* at page

440 and the cases cited thereat).

[7] Rape is not, as many think, motivated simply by sexual lust. Psychiatric studies of rapists reveal that the principal motivation for rape is the expression of aggression that is manifested by a sexual attack upon a woman. Rape is:

**"a pseudosexual act prompted more by retaliatory and compensatory\* motives than by sexual ones. It is complex and multidetermined, but involves issues of control and hostility more than those of passion and desire. The rapist is not assaulting because he is sexually frustrated or deprived, any more than the alcoholic is drinking because he is thirsty. Failure to appreciate this has resulted in blurring rape and sex in the minds of the general public, with the unfortunate consequence that the victim is often held more responsible than the perpetrator".**

[8] The incidence of rape is distressingly high. Rape occurs between persons who are strangers as well as between persons who are acquainted. So-called "stranger rape" occurs between persons who are known to each other (socially, as lovers or spouses). What characterizes this type of rape is that forms of coercion other than force or fear are deployed against the woman. The woman is placed under duress of an emotional or economic nature. In some cases her refusal to proceed from foreplay to intercourse is simply ignored.

[9] The importance of bearing in mind the true nature of rape lies in the effect of perceptions of the victim.

**"Since it is commonly assumed that the offender is motivated by his offence to gratify a sexual desire, and since he is directing his sexual assault at a particular victim, it is further assumed that the victim must have done something, either deliberately or inadvertently, to arouse such desire in the offender. Victim selection and offender motivation, by focusing on the sexual aspects of the victim's appearance and behaviour.**

**how she looked, how she was dressed, and how she acted. One of the most persistent and insidious stereotypes regarding rape is that of the seductive or provocative female who "only got what she asked for". In reality, victim selection is determined primarily by availability and vulnerability rather than sexual desirability, and anyone could be a victim of sexual assault. Rape happens not only to young adult women but to both sexes and all age groups, from infants to the aged".**

[10] The duality of protected interests creates a certain amount of uncertainty as to the exact boundaries of the concept of rape. Where the rape involves the use of force or violence there is no difficulty in identifying the sexual intercourse involved as rape. But where a woman is tricked into agreeing to sexual intercourse, or is persuaded to agree by the use of emotional or economic pressure, the sexual intercourse so obtained is not readily identified in the public mind as rape. Yet the emotional trauma in the form of

violation of her self-respect and may be less than that suffered wheie she is forcibly compelled to submit (see *JRL Milton supra* at page 441 and the cases cited thereat).

[11] Having considered the above-cited legal principles and the facts of the matter it is clear that accused perpetrated a rape on a small girl who at the time was 13 years old. The accused person might have been drunk when he committed the offence but that fact does not exonerate him from liability in this case. Offences of this nature are on the increase where adult males rape small girls with the danger of infesting them with the HIV virus. In *casu* the accused person acted in an irresponsible way. He is related to the small girl and should have given protection to the girl instead of acting as a scavenger. In this judgment I have considered that a period of 5 years imprisonment for his plea of guilty will be a proper discount on the overall sentence to be imposed. In such cases a period of 20 years imprisonment have been imposed by this court. However, on the facts of the present case I have come to the considered view that the accused be sentenced to 15 years imprisonment without the option of a fine and that the sentence be backdated to the date accused was arrested and so it is ordered.

**S.B. MAPHALALA**  
**JUDGE**