

IN THE HIGH COURT OF SWAZILAND**REX**

Vs

BONGANE KHUMALO ERNESTO MADOLO

Criminal Case No. 81/2007

Coram S.B. MAPHALALA – J

For the Crown MR.S. MDLULI

For the Defence IN PERSON

SENTENCE 26th July 2007

[1] This criminal case was brought before this court for sentencing where the learned Principal Magistrate in the court below stated the following:

"The court finds that the offences for which the accused has been convicted are very serious. The complainant was attacked during the night by the accused on two (2) different occasions. The accused broke into the complainant's house on both occasions before proceeding to rape her. The conduct of the accused person towards the complainant has kept her in perpetual fear as she always feels unsecured with her little children. The consecutive rapes have very much humiliated and devastated the complainant mentally. For these reasons the court will refer the matter to the High Court for purposes of sentencing".

[2] Indeed, this matter has been brought before this court for sentence in terms of the provisions of the Criminal Procedure and Evidence Act.

[3] In the court *a quo* the accused person was charged and convicted of seven counts which included the crimes of rape, robbery and housebreaking with intent to steal and theft in various places in the Lubombo Region. For the sake of completeness I proceed to outline these crimes in this judgment as follows:

Count 1:

Accused no. 1 is guilty of the crime of rape, in that upon or about the 14th June 2005, and at or near Mkhokhi area in the Lubombo district, the said accused did wrongfully and unlawfully and intentionally forced one Zandile Ngwenya SFA 27 years to have sexual intercourse with her without her consent.

Count 2:

Accused no. 1 is guilty of the crime of rape, in that upon or about the 17th July 2005, and at or near Mkhokhi area, in the Lubombo district, the said accused did wrongfully, unlawfully and intentionally forced one Zandile Ngwenya SFA 27 to have sexual intercourse with her without her consent.

Count 3:

Accused no. 1 is guilty of the crime of robbery, in that upon or about the 11th June 2005, and at or near Mkhokhi area in the Lubombo district, the said accused did wrongfully, unlawfully and intentionally by using force and violence to induce submission by Gcebile Shabangu did take and steal from her a 7250 Nokia cell phone valued at E2, 700-00, money in cash E140-00, a bag containing yellow T-shirt, green trouser and an orange skirt, the property of or in the lawful

possession of Gcebile Shabangu by hitting her with open hands, fists and hitting her hard with a hard object on the head, the property valued at E3,000-00.

Count 4:

Accused no. 1 and 2 are guilty of the crime of housebreaking with intent to steal and theft, in that upon or about the 17th July 2005, and at or near Mkhweli area, in the Lubombo district, the said accused did wrongfully, unlawfully and intentionally break and enter the house there situate of Phindile Mhlanga and did unlawfully steal a pink jacket, white school shirt, the property of or in the lawful possession of Phindile Mhlanga valued at E200-00.

Count 5:

Accused no. 1 and 2 are guilty of the crime of housebreaking with intent to steal and theft, in that upon or about the 17th July 2005, and at or near Mahlabatsini area in the Lubombo district, the said accused did wrongfully and intentionally break and enter the house situate of Khanyisile Hlophe and unlawfully steal a radio cassette, wall clock, travel document, graded tax slip, sandals, black bag, black/white bag and a waist belt, the property of or in the lawful possession of Khanyisile Hlophe valued at E630-00.

Count 6:

Accused no. 1 and 2 are guilty of housebreaking with intent to steal and theft, in that upon or about the 17th July 2005, and at or near Mahlabatsini area in the Lubombo district, the said accused did wrongfully and intentionally break and enter the house there situate of Ntombizini Dlamini and unlawfully steal takkies, waist belt, jacket, FM radio an inventor the property of or in the lawful possession of Ntombizini Dlamini all valued at E300-00.

Count 7:

Accused no. 1 and 2 are guilty of the crime of housebreaking with intent to steal and theft in that upon or about the 17th July 2005, and at or near Mkhokhi area, in the Lubombo district, the said accused did wrongfully and intentionally break and enter the house there situate of Bongane Malambe and unlawfully steal a pair of white takkies, black jeans, with T-shirt, black shoes, red underwear, shield roll on, black kiwi polish, top of adidas tracksuit and a sum of E10-00, the property of or in the lawful possession of Bongane Malambe valued at E305-00.

[4] In the court below nine (9) witnesses for the Crown were called and the accused person who was conducting his own defence gave a sworn statement. On the assessment of the evidence before it the learned Principal Magistrate found the accused not guilty in respect of Count 5 being that of the crime of housebreaking with intent to steal and theft at Mahlabatsini area and Count 7 also pertains to the crime of housebreaking with intent to steal and theft at Mkhokhi area in the Lubombo Region. The accused therefore stands to be sentenced by this court in respect of the remaining counts being 1, 2, 3, 4 and 6 being the crimes of rape, robbery and housebreaking with intent to steal and theft.

[5] In mitigation of sentence before this court the accused advanced a number of factors which should be considered by this court in passing sentence. The first point canvassed by the accused person is that at home he is the sole breadwinner looking after his mother. That he was employed as a kombi conductor in Manzini earning a salary of E600-00 per month. Secondly, that he was born in 1981 making him 26 years old. Thirdly, that he is not married but has one child who was six months old

when he was arrested. Lastly, that he was arrested for this crime on the 15th August 2005, and that whatever sentence this court imposes should be backdated to this date.

[6] The sentences by the courts are governed by what has been commonly known as the **triad** propounded in the often-cited case *S vs Zinn 1969 (2) S.A. 537* where the court laid down the following criterion: "**what has to be considered is the triad consisting of the crime, the offender and the interest of society**".

[7] The *triad* was also expanded upon in the case of *S vs Qamata and another 1997 (1) S.A. 479* where Jones J refined it as follows:

"It is now necessary for me to pass sentence. It is proper to bear in mind the chief objectives of criminal punishment namely, retribution, the prevention of crime, the deterrence of criminals, and the reformation of offender. It is also necessary to impose a sentence, which has a dispassionate regard for the nature of the offence, the interests of the offender, and the interests of the society. In weighing these considerations should bear in mind the need:

- a) to show an understanding of and compassion for the weaknesses of human beings and the reasons why they commit serious crimes, by avoiding an overly harsh sentence;
- b) to demonstrate the outrage of society at the commission of serious crimes by imposing an appropriate and, if necessary, a severe sentence; and
- c) to pass a sentence, which is balanced, sensible, and motivated by sound reasons and which therefore meet with the approval of the majority of law-abiding citizens. If I do not, the administration of justice will not enjoy the confidence and respect of society.

[8] In the present case the accused person has been convicted of two counts of the rape of a single complainant on two occasions. He has been convicted of one count of robbery and two counts of housebreaking with intent to steal and theft of two different complainants. This indicates to me that that the accused and his co-accused who is not before court were on a crime spree where they wrecked havoc in that part of the country in the months of June and July of 2005. Therefore members of the public are entitled to the protection of the law from such culprits. The courts are under the duty to send a clear message to other potential rapists as well as to the community that the courts are determined to protect the quality, dignity and freedom of all women and that they will show no mercy to those who seek to invade those rights. The only protection the court has in its disposal is to sentence people like the accused before me to long periods of imprisonment. The interest of society overrides the other interests I have stated above in paragraph [5] of this judgment on sentence.

[9] As regards the two counts of rape in Count 1 and 2 the accused is sentenced to fifteen (15) years in respect of each count and the sentences to run concurrently to each other. In respect of Count 3 that of robbery the accused person is sentenced to ten (10) years imprisonment to run concurrently with the sentences of rape in Counts 1 and 2. In respect of the two remaining counts regarding the offences of housebreaking with intent to steal and theft in counts 4 and 6 the accused person is sentenced to ten (10) years in respect of each count to run concurrently with each other and to run consecutively with the crimes of rape and robbery stated earlier on in this paragraph.

[10] In the result, for the afore-going reasons the accused person is sentenced as follows:

- (a) In respect of Count 1 and 2 that of rape the accused person is sentenced to 15 years imprisonment in respect of each count and the sentences to run concurrently of each other.
- (b) In respect of Count 3 that of robbery the accused is sentenced to ten (10) years imprisonment to run concurrently with the sentences in (a) above.
- (c) In respect of Counts 4 and 6 that of housebreaking with intent to steal and theft the accused is sentenced to 10 years in respect of each count to run concurrently of each other and consecutively to the sentence stated in (a) and (b) above.
- (d) The sentences are backdated to the date of arrest being the 15th August 2005.

JUDGE

S.B. MPAHALALA