IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CRIMINAL APPEAL NO. 74/14

In the matter between:

DOCTOR VICTOR MKHABELA **APPELLANT**

AND

THE KING **RESPONDENT**

Neutral Citation: *Doctor Victor Mkhabela* **vs** *The King (Appeal No. 74/14) 2017 SZHC (184)*

Coram: MLANGENI J.

Heard: 23/08/2017

Delivered: 08/09/2017

Summary: *Criminal Law - Appeal from Magistrates' Court.*

Appellant was convicted on numerous counts of assault, housebreaking and theft, robbery, indecent assault, attempted rape and rape.

On appeal it was held: –

1. *That he was properly convicted in respect of all seventeen counts.*

2. *In respect of some of the sentences the option of a fine set aside, and some sentences increased.*

3. *In respect of count five (5) – attempted rape, the court-a quo erred in convicting the Appellant of attempted rape as the evidence and the law supports a conviction for rape.*

Issue raised by the court whether the time has come for re-consideration of the gender based definition of common law rape in the light of the phenomenon of sexual abuse of men by men.

JUDGEMENT

[1] The Appellant was initially arraigned in the Magistrate Court, Manzini, in 2008 on twenty three charges comprising theft, housebreaking and theft, indecent assault, common assault, robbery and rape. The initial trial was aborted by loss of the court record, and in due course the Chief Justice directed that the trial should start *de novo*, and it did start *de novo* before a different judicial officer. At this stage the charge sheet was amended, with the result that the counts were reduced to eighteen. On the 10th August 2011 the charges were put to the Appellant and he pleaded not guilty to all of them.

[2] In respect of count one the Crown did not lead any evidence, and the Appellant was accordingly acquitted and discharged in respect of that count. At the conclusion of a long trial the Appellant was convicted in respect of counts 2-18 inclusive, and all the sentences were ordered to run consecutively. He has now appealed to this court. He does not have legal representation but has prepared and filed written heads of argument. One set of heads was filed on the 10th March 2015 and another one on the 18th August 2017. The effect of these heads, read together, is that the appeal is against conviction in respect of all seventeen counts, to wit counts two to eighteen inclusive.

[3] It is both necessary and convenient that I tabulate the charges in respect of which the Appellant was convicted as well as the corresponding sentences.

COUNT	CHARGE	SENTENCE
2	Rape	15 years, no fine
3	Indecent Assault	5 years/E5,000.00
4	Robbery	2 years/No fine
5	Attempted Rape	5 years/E5,000.00
6	Robbery	2 years/ no fine
7	Housebreaking & theft	1 year/E1,000.00
8	Housebreaking & theft	1 year/E1,000.00
9	Housebreaking & theft	1 year/E1,000.00
10	Housebreaking & theft	1 year/E1,000.00
11	Housebreaking & theft	1 year/E1,000.00
12	Housebreaking 7 theft	1 year/E1,000.00
13	Robbery	1 year/ no fine
14	Robbery	1 year/ No fine
15	Robbery	1 year/ No fine
16	Robbery	1 year/no fine
17	Indecent Assault	8 years/ E8,000.00
18	Common Assault	1 year /E1,000.00
	TOTAL	**48 YEARS**

[4] I mention, needlessly, that the offence of robbery is serious in every respect. The value of the items involved may be small, as in count 14 where the food was valued at E70.00, but the use of force, violence or threats thereof has very traumatic consequences upon the victim. In count 14 for instance, the Appellant is alleged to have assaulted the complainant with a bush knife in order to obtain the food. A bush knife is capable of inflicting significant, even deadly, injuries. It appears to

me that a sentence of one year, with or without the option of a fine, has the effect of trivialising a very serious matter, a scourge in many societies which has to be punished in a manner that reflects the outrage that such offences evoke. It is on this basis that I encourage presiding officers at all levels to mete out appropriate sentences in robbery cases, and in my view such sentences should be no less than two years imprisonment, regardless of value, and the option of a fine given only in exceptional circumstances. In the case of the Appellant it is clear that he made crime a way of life, especially robbery, and I would not have pronounced sentences less than two years for each count of robbery and would certainly not have given the option of a fine in respect any of those counts.

[5] In making representations before me the Appellant stated that, being not trained in law, he would rely solely on his written heads of arguments, and was not in a position to add anything to that. I understand this perfectly, for while he may have been assisted in preparing the heads, such assistance was not available at the hearing of the appeal. In dealing with the appeal I have kept this disadvantage in mind. Similarly, the Crown relied largely on its written submissions as filed by Counsel Ms L. Hlophe.

[6] The Crown's supplementary heads have usefully made an important concession regarding some sentences that the Crown believes should have been ordered to run concurrently. The sentences are in respect of count 3 and 4; counts 9, 10, 11 and 15; counts 13 and 14. While there is an element of discretion upon the court in deciding whether to order concurrence or consecutiveness[1], the guiding principle is well-

[1] Sifiso Ndwandwe v Rex (05/2012) [2012] SZSC 39, para 20

established in our law. If an accused is found guilty of more than one offence, but some or all arising out of the same transaction or conduct, it is proper to order that the sentences run concurrently. The rationale is that it would be unfair to punish the accused in a measure that goes beyond the guilt of his state of mind[2]. S.A. Moore J.A. has put it in this manner:-

> **"The governing principle established by the authorities and by academic writers is that consecutive sentences are ordinarily permissible only if they relate to separate incidents or transactions".[3]**

[7] In the case of **SIFISO NDWANDWE v REX**[4] the Supreme Court stated the principle in the following terms:-

> **"…..as a general rule consecutive sentences are ordered where the offences do not form an integral part of the same transaction. This is in the sense that they were committed on different dates, in different circumstances and are of a wholly different characters….."[5]**

[8] The articulation of this principle is well and good, but its application is not without challenges. If, for instance, a pervert succeeds in raping several women who happen to be in one hall or residence at the same

[2] See the King v Mbukwa Foreman Dlamini, Review Case No. (02/2017) [2017] SZHC 134 at para 11.
[3] Samkeliso Madati Tsela v Rex, Appeal Case No. 20/2010, page 16.
[4] See note 1, supra.
[5] At para 20.

time, and does so in successive fashion, is he to be handed concurrent or consecutive sentences? Or, in a residential compound, a rampaging thief moves from door to door stealing residents' belongings while they are away attending night service? It appears to me that within the four corners of the principle each case must be dealt with on the basis of its peculiar circumstances, the twin objective being to be fair to the accused while taking into account the nature and consequences of his or her conduct. On the examples that I have given above I would, taking the totality of the evidence into account, be willing to hand down consecutive sentences. On the example of rape, which is possibly the **"ultimate invasion of human privacy"[6],** it might occasion injustice to hand down concurrent sentences to a rapist who has violated several people, merely because he achieved that in one spell of wickedness. There might be a good argument that concurrent sentences should be considered only in minor offences. Put differently, the more serious the offence the more reluctant should the courts be to order concurrence. This is where the reason could be for sentences in respect of murder to generally run consecutively, as when a convict is sentenced to many life sentences which we read about in some jurisdictions.

[9] In this appeal the Appellant has not raised any issue in respect of sentencing. His submission is mainly that the convictions ought to be set aside on the basis of insufficiency of evidence. But because he is not represented I cannot turn a blind eye to issues of sentence if they do arise, and the Crown has raised such issues in a manner that favours the Appellant. I will come back to this aspect in due course.

[6] Per Moore J.A. in Mgubane Magagula v Rex, Crimininal Appeal No. 32/2010, para 14.

[10] The first line of enquiry is whether the convictions should or should not stand. Herein I deal with each of the counts.

[11] COUNT TWO (2) – Rape of Thembisile Mabuza.

11.1 In support of his appeal on this conviction the Appellant raises two issues – that no evidence was given by an investigating officer on the count; that the evidence of two witnesses, the complainant and one Thandi Dube who was present when the crime was committed, was contradictory in that the complainant says that a penis was inserted in her private parts, and Thandi Dube was not specific that the accused inserted his penis.

11.2 In many cases the evidence of the investigating officer might not even be necessary. What is important is that the witness or witnesses who do testify must furnish evidence that proves all the elements of the offence, such that there is no reasonable doubt. The complainant was raped in the presence to two other adult women who are said to have been about one metre away when the rape act occurred. The Appellant, who was brandishing a bionet, threatened the complainant with death, forced her to lean against a tree, pressed her hard on the tree, pulled down her panty and inserted his penis into her vagina from behind. After that he freed the three and told them that even if they reported him to the Police nothing would come of it. The ordeal occurred over a period of about three hours, hence there was no difficulty with recognising the Appellant who did not cover his face when he committed the offence. He was identified by PW20 during an identification parade. PW20 is Ntombifuthi Mshoni who is one of the two other ladies who were present when the rape

was committed. Her testimony corroborated that of the complainant.

11.3 I find that the Appellant was properly convicted. The sentence of fifteen (15) years imprisonment is also in order, especially in view of the callous and animalistic manner in which it was committed. I say **'animalistic'** because doing such an act in the presence of others is normally associated with animals, never mind the fact that this was, on all accounts, probably a tense moment for all concerned. In other jurisdictions the penalty would be much higher, and this is the direction that this country must adopt if this sadistic offence is to be curbed.

[12] COUNT THREE (3) – Indecent Assault on Hlobsile Nkambule

12.1 I do not readily understand why the charge was indecent assault and not rape. In her evidence the complainant, PW14, specifically says the following:-

> **"…..he opened his trousers zipper, lifted up my dress as I was lying facing up. He took his penis and inserted it in my vagina ….made up and down movements. I was still tied. I was not wearing a panty…."**

12.2 Under cross-examination by the Appellant:-

Q: Is it true the person inserted his penis in your vagina?

A: True.

Q: So this person raped you?

A: Yes.

Q: If evidence were to be brought that the person rubbed his penis on your vagina, what can you say?

A: I can not deny.

Q: So why lie you were raped?

A: What was this person actually doing? I am telling the truth, what he did, he raped me.

12.3 The complainant identified the Appellant at an identification parade

12.4 The line of cross-examination by the Appellant reveals that at the very least Appellant rubbed his penis on the complainant's vagina. Assuming that he did not do anything more, does this not amount to rape? According to legal authorities it does amount to rape. The slightest contact with the complainant's vagina suffices. There need not be ejaculation or anything more. In this respect the words of MCB Maphalala J.A., as he then was, quoting with approval from P.M.A. Hunt, are instructive.

> **"There must be penetration, but it suffices if the male organ is in the slightest degree within the female's body. It is not necessary that the hymen should be ruptured, and in any case it is unnecessary that the semen should be emitted…."[7]**

Complainant says that the assailant made up and down movements. That is not the same as rubbing a penis on the private parts. I have no reason to disbelieve what the witness said.

[7] Mbuso Blue Khumalo v Rex, (12/12) [2012] SZSC 21 at para 31

12.5 The witness persisted in her evidence that she was raped. Assuming in favour of the assailant that the version put to the complainant was reasonably possibly true, that he merely rubbed his penis on her private parts, that according to our law is rape. On closely comparable facts, I came to the same conclusion in the case of **R v ASA LOMAHUDZA NDZINISA**[8].

12.6 I find that on count 3 the Appellant is guilty of rape, not indecent assault. Complainant's mouth was tied using granny's dress, her hands were tied at the back, as well as her feet. She was lifted by Appellant to the bed and her dress pulled up. The purpose of this sick labour could not have been to rub his penis on her private parts. The Appellant is quite cruel, and the evidence suggests that he stops at nothing when he wants to achieve something.

12.7 On the basis of the aforegoing, in respect of my finding that Appellant committed rape upon Hlobsile Nkambule, I set aside the Honourable Magistrate's sentence and substitute a prison term of twelve (12) years without the option of a fine.

[13] COUNT FOUR (4) – Robbery upon Hlobsile Nkambule

13.1 The evidence is that while the complainant was still tied hands and feet, the Appellant proceeded to help himself to her money in cash, various items of foodstuffs, clothes, shoes, suitcase, etcetera. In cross examination complainant was asked how she would respond if evidence was brought to the effect that the goods that were taken from her were three T-shirts, juice, two caps.

[8] (78/2016) [2016] SZHC.

This is hardly a denial of the offence. Her answer was that **"may be, I have forgotten that."** At least it suggests that the complainant may have forgotten to mention some of the things that were taken during the robbery.

13.2 I confirm the conviction as well as the sentence of two (2) years without the option of a fine. The crown has conceded that this sentence should run concurrently with the one in count three (3) and I certainly agree and can only thank Ms L. Hlophe for her contribution to the cause of justice.

[14] COUNT FIVE (5) – Attempted rape upon Zanele Madau

14.1 The evidence shows that it is the complainant's courage and bravery that saved her from the worst. When the complainant was attacked she was in the company of children, including a seven year old who was slapped by assailant and threatened with stabbing with a knife. The victims were guided by this lone man deep into a forest, threatening them with a knife. Complainant was asked to choose between death and another thing. She asked to be thrown in the river, but the assailant had other plans. He ordered her to undress from waist down, he also undressed himself and positioned himself for sexual intercourse. Just then the complainant grabbed the assailant by the neck, a struggle ensued and complainant was able to run away, the assailant in hot pursuit with a knife drawn to stab the complainant.

14.2 The Appellant was pointed out in court by the complainant who had been with him for about two hours during the ordeal, and the assailant's face was not covered.

14.3 The *modus operandi* says it all. In cross-examination the Appellant asked:-

Q: Is it true the person ordered you to undress skirt, not trouser?

A: I was wearing pants.

Q: If evidence was brought that you wore a skirt, what can you say?

A: I wore pants, not a skirt

14.4 I can only come to one conclusion, that the Appellant was properly convicted of attempted rape. I am also of the view that this is possibly a border-line case that could well amount to rape. This is so in view of the fact that when the complainant mustered courage and grabbed the Appellant's windpipe his penis was about to enter the complainant's private parts. I also confirm the sentence of five years but add that there is no option of a fine. I do not agree that an amount of E5, 000.00 equals the harrowing experience of the complainant, her movie –like escape from certain rape which involved jumping into a river where she could have been hurt by creatures of the river. The trauma upon the young children who were present is beyond measure. If this was the only conviction against the Appellant, and he had the fine, it cannot be right that this would all end with a general receipt for E5, 000.00, period.

[15] COUNT SIX (6) – Robbery of Peggy Taala

15.1 The evidence is that while the complainant was on her way to church, in the company of a boy aged 10, the Appellant emerged

from a forest, armed with a bush knife or slasher. He shouted for money and hit the complainant's umbrella such that it fell down. He then forcefully took her bag which had personal items including E430.00. None of the items were recovered. The complainant identified the Appellant at a parade, and she told him so during cross-examination. Her evidence was brief and precise, and in cross examination the Appellant did nothing more than raise issues relating to the exact value of the goods that were taken and whether they had been recovered or not.

15.2 I confirm the conviction as well as the sentence of two (2) years without the option of a fine.

[16] COUNTS 7,8,9,10,11 and 12 – Housebreaking with intent to steal and theft

16.1 The Appellant swooped upon a residential compound after the residents had left for work. The complainants are the occupants of the various residential units in the compound, from which personal and household goods were stolen. Many of the items were recovered with the assistance of the Appellant who pointed them out to the investigating officer in various forests where he had kept them.

16.2 In respect of count 8 entry was gained through the window, such that one window pane was broken.

16.3 One cellphone was recovered from one Galayi Kunene after the Appellant had informed the Investigating Officer he sold the phone to the said Galayi Kunene.

16.4 Most of the items were recovered from various forests, with the assistance of the Appellant. Some of the complainants who identified their items had died at the time of the trial. During cross-examination of the investigating officer PW23, 3416D/Sergeant Silenge it transpired that the Appellant was present when some of the items were identified by their owners. It also transpired that in that process the Appellant admitted having stolen the items that were recovered. Some questions and answers during cross-examination of the investigating officer are as follows:-

Q: What did I say in answer to the charges?

A: In all, you admitted.

Q: Did you write that down?

A: Wrote on RSP 218 the admission

Q: Am I supposed to make a statement at the Police Station?

A: It's your right, you can't be forced

16.5 The identity of the Appellant was never an issue in respect of the various housebreaking counts.

16.6 I confirm the convictions in respect of count 7,8,9,10,11 and 12 as well as the respective sentences of one year imprisonment on each count. I am not persuaded that the option of a fine is appropriate in a situation where an accused person goes on a spree of theft, stealing just about anything that he gains access to. But it is also true that these offences, considered in isolation from the many more serious ones, would pass for the option of a fine. I therefore caution myself against being influenced in my

sentencing by other adverse findings I have made in respect of the Appellant.

16.7 In the circumstances I also confirm the options of a fine as pronounced by the Honourable Magistrate.

[17] COUNT THIRTEEN (13) – Robbery upon Zodwa Dlamini

17.1 The complainant, Zodwa Dlamini, actually knew the Appellant from a prior criminal trial in which the Appellant had stolen from her. On this particular occasion the witness was walking to work in the early hours of the morning of the 16th January 2011. She was in the company of one Letta Dlamini. The Appellant caught up with them, wielding a slasher and demanded money, and she recognised him immediately as Doctor Mkhabela, the Appellant. Appellant then forced the two to a forest where he ordered them to undress the two-piece overalls they were wearing. Appellant then took from the witness a cellphone and accessories, pick-pocketed Letta Dlamini and took from her a bag which had a lunch box and scones. This evidence was confirmed by Letta Dlamini, PW16.

17.2 The cross-examination of PW15 by the Appellant was around the value of the cellphone, whether the weapon was a bush knife or a knife or a slasher, and whether the items taken from PW15 were recovered or not. She stated that her cellphone was never recovered.

17.3 I confirm the conviction on this count but vary the term of imprisonment from one year to two years without the option of a fine. It is my view that robbery, especially where the robber is armed with dangerous weapons – in this case a slasher and a

knife, threatening defenceless people – must be given the seriousness that it deserves. It does not serve the interests of justice to allow robbers an opportunity to pay a fine and walk free.

[18] COUNT FOURTEEN (Robbery on Letta Dlamini)

This witness was in the company of the complainant in count thirteen. Her evidence corroborates that of PW15. I accordingly confirm the convictions and alter the sentence to two (2) years without the option of a fine, as a deterrent against the Appellant and other would-be offenders.

[19] COUNT FIFTEEN (15) – Robbery on Dumsile Maseko

19.1 This witness is PW1. Her evidence is that she was attacked by the Appellant at C3 compound in the morning while inside her room after other residents had gone to work. Before attacking her he made small talk outside the room about looking for a job, and he had been there on the previous day, so she had two separate occasions to observe him.

19.2 On the second day, the day of the attack, he had a bush knife. Wielding the bush knife, he demanded money from her, tied her hands with an electric cable and forced her to go uphill to a forest where he took personal items from her. He left her there, tied, and came back later with two school bags containing clothes. It later transpired that some of the clothes were in respect of counts 9, 10 and 11, where the goods were stolen from a residential compound.

19.3 The witness positively identified the Appellant at the trial as she had two separate occasions to observe him. The *modus operandi* is unmistakable, and like in other instances the Appellant never covered his face when doing these crimes.

19.4 In cross-examination the Appellant sought to distinguish between a slasher and a bush knife, and the witness was of the view that these names are interchangeable. Complainant confirmed that the Appellant was the attacker, and further that she participated in an identification parade at Sigodvweni Police Station where the Appellant was identified.

19.5 I confirm the conviction and alter the sentence to two years in prison without the option of a fine

[20] COUNT SIXTEEN (16) – Robbery on Thabsile Dladla

20.1 The complainant is PW7. On the day in question she left her residence in the morning on a journey to Inkhundla Centre for a meeting. Along the way she came across the Appellant who asked her for directions to a certain homestead belonging to Mashayinkwela. At some point, whilst walking, she mysteriously fell down and at that stage Appellant hit her with a bush knife on the head, such that she felt like her skull **“was cracking”**. A struggle over possession of the bushknife ensued and the witness managed to get possession of it, in the process getting injured on one of her hands. The Appellant snatched her bag which contained shoes and other items, all valued around E130.00. Appellant then fled. She subsequently identified him in an identification parade at Sigodvweni Police Station.

20.2 During cross-examination of the complainant by the Appellant the following transpired:-

Q: You said you took the bush knife. Where is it?

A: Here is it before court.

Q: What is it that you have shown court?

A: At first it was a slasher, you sharpened it into a bush knife like thing.

Q: Is it true your shoes were taken worth E200.00?

A: I said E79.00.

Q: You said they could be worth E130.00 your properties. If evidence could be brought that they are worth E245.00 what can you say?

20.3 From the point of view of the defence this line of cross-examination is totally futile and, even from a lay person, it demonstrates the absence of a defence.

20.4 I confirm the conviction and vary the sentence to two (2) years in prison without the option of a fine

[21] COUNT SEVENTEEN (17) – Indecent Assault on Gijimani Shabangu

21.1 The evidence of the complainant is straight-forward. He was in the forest looking for cattle when the Appellant suddenly appeared. After some small talk the Appellant grabbed him by his clothes, opened a knife while swearing at him, ordered him to undress the bottom part of his body and bend over. There after he inserted his penis inside the complainant's anus. In the

process the complainant was ordered to hold and keep the penis inside, or he would be stabbed with the knife. The witness states that he complied and the Appellant **"did all he wanted to do".** The incident is callous, sordid and humiliating. Appellant was positively identified by the complainant at a parade at Sigodvweni Police Station.

Whilst cross examining the complainant the Appellant incriminated himself by introducing the subject of money which the assailant took from the complainant at the scene of crime, E10.00 according to the complainant and E30.00 according the questions that were put to the complainant during cross-examination. The witness had not mentioned an amount of money that was taken during the assault, but under cross-examination he agreed that an amount of money was taken from him during the attack. The uncertainty regarding the exact amount that was taken could be due to memory lapse or illiteracy, as the witness never went to formal school.

21.2 There is no doubt in my mind that the Appellant was properly convicted.

21.3 It is regrettable that such an occurrence continues to be treated as indecent assault in our jurisdiction, despite that it has all the elements of rape, but for the fact of same gender. At a time when homosexuality just falls short of being fashionable, one would expect the common law to grow with the times, in a manner that affords the male gender equal protection against sexual violation. This growth does not have to come from legislation. The courts have inherent authority to develop the law in keeping with changing times and circumstances, in a manner

that responds to new challenges and experiences[9]. Given the advent of violation of men by men, it might even be possible to attack common law rape on the basis of discrimination. What happened to the complainant in this case goes far beyond the original scope of indecent assault. The adventurousness of mankind has overshadowed the parochial, gender –based definition of rape. It is perhaps an irony, yet hardly surprising, that animals are not half as adventurous. The common law has to grow in response to the changing times, but it must be accepted that in this type of situation it is the prosecution that has to navigate the uncharted waters, and I have no doubt that the judiciary would give keen consideration to a widened definition of common law rape, that takes into account the abuse of men by men, or of men by women.

21.4 Having said the above, I conclude on this aspect by pointing out that the facts of this indecent assault charge warrant a stiff sentence. If eight years in prison is reasonable, then the option of a fine certainly is not. It appears that a condom was not used. The victim was humiliated in being ordered to hold the penis in place and ensure that it was not dislodged, otherwise he would be stabbed. In my view it could have been worse only if the complainant was stabbed or killed. If the Crown had cross-appealled on sentence I would not have hesitated to pronounce a much longer jail term, without the option of a fine. I have a certain amount of discretion, though, to interfere with the sentence where I would not have ordered it in the circumstances of the case[10]. I would not, under any circumstances, give the option of a fine on the present facts. I accordingly confirm the

[9] See Siphilile Princess Resting v Ali Sifiso Resting and Another, (1704/15) [2017] 82, para 7 and the cases cited therein. See also Amanda van Straten v Nicollette Cornelia Bekker (6056-2014) [2016] NAHCMD 243, per Masuku J.

[10] Mbuso Blue Khumalo v Rex, supra.

sentence of eight years imprisonment and add that this is without the option of a fine. In the unlikely event that Appellant has paid the fine, this should be brought to my attention so that I can make an appropriate order.

[22] COUNT EIGHTEEN (18) Assault upon Nomvuselelo Ndlovu.

22.1 The complainant knows the accused as they are related somehow. On the day in question the Appellant came to the complainant's home and asked to see the complainant. This was in the presence of the complainant's parents. Appellant accused the complainant of telling people that he (Appellant) is a thief and rapes people. Appellant produced a firearm and threatened to kill the complainant. This was in the presence of the complainant's mother. Appellant then forced the complainant out of the home to a nearby bush where he further threatened to kill her.

22.2 There is no doubt that the Appellant has no respect for the dignity of other people, and that according to him the only important thing is himself.

22.3 I confirm his conviction, but I consider that the sentence of one year imprisonment is on the lower end, taking into account the circumstances of the assault. I nonetheless confirm the sentence, subject to that it is without the option of a fine.

[23] In respect of all the counts the Appellant led his own evidence as well as that of two witnesses. Nothing in that evidence materially affects

the conclusions of the *court-a-quo*. In the result, the appeal is dismissed in its entirety, subject to the changes that are reflected below:-

Count 2 (rape) – 15 years, no fine, confirmed.

Count 3 (indecent assault/rape) – 12 years, no fine.

Count 4 (robbery) - 2 years, no fine, to run concurrently with count 3.

Count 5 (attempted rape) – 5 years, no fine.

Count 6 (robbery) - 2 years, no fine.

Counts 7,8,9,10,11 and 12 (housebreaking and theft) – 1 year each or E1, 000.00 all to run concurrently.

Count 13 (robbery) – 2 years, no fine.

Count 14 (robbery) – 2 years, no fine, to run concurrently with count 13.

Count 15 (robbery) – 2 years, no fine.

Count 16 (robbery) – 2 years, no fine.

Count 17 (indecent assault) – 8 years, confirmed no fine.

Count 18 (common assault) – 1 year, no fine.

[24] The cumulative jail term, if the Appellant does not pay the concurrent fine in respect of counts 7,8,9,10,11 and 12, is 52 years. If he pays the concurrent fine, 51 years.

T.M. MLANGENI

JUDGE OF THE HIGH COURT

Appellant: **In person**

Respondent: **Ms. L. Hlophe**