

CRIM. CASE NO. 180/95

In the matter between

REX

And

MAVELA MAGAGULA

Coram
For the Crown
For the Defence

S.B. MAPHALALA – J
MR. M. SIBANDZE
MR. M. NXUMALO

SENTENCE
(06/04/99)

Maphalala J:

The court has heard accused personal circumstances in arriving at a proper sentence. The court was told that the accused is an elderly man who is 69 years old and that he is married to two women and has eleven minor children. I must say though as an aside that the accused seems to have been a late starter to have eleven minor children at age 69. I was also told that the accused is a sickly person who needs constant medical attention with swelling feet. That he can only receive such treatment the traditional way. Mr. Nxumalo urged the court to impose a sentence with an option of a fine in view of these circumstances.

I invited Mr. Sibandze for the crown to address me on the point whether it was competent to impose a sentence with an option of a fine on a crime of attempted murder. Mr. Sibandze directed the court's attention to the provisions of The Criminal Procedure and Evidence Act (as amended) more particularly to Section 133 read with the Third Schedule of the Act which clearly show that such a sentence would not be competent in our present statutory framework.

I have considered all the personal circumstances of the accused and I am thankful to Mr. Sibandze's enlightened input. In arriving at a proper sentence I sought refuge from the case of *S vs Zinn 1969 (2) S.A. 537 (A)* where the judge in that case propounded what has now commonly been called "triad", viz, i) the interest of the society, ii) the interest of the accused, and iii) the gravity of the offence.

Starting with the first leg of the "triad" it is clear that society is to be protected from

trigger-happy men like the accused who chose to use the force of arms rather than established channel of dispute resolution. Fair enough, he was enraged to see his wife coming from complainant's house in a compromising position.

Coming to the second leg it is clear that accused is elderly man and sickly, maturity would tend to increase the subjective blameworthiness of an offence since "he is old enough to know better". Besides the insight that comes with age, he should also be able to resist temptation better than a younger, more impulsive type of offender with increasing age the situation is reversed however. As one nears the "second childhood" the behaviour of some elderly people may become less responsible, often as a result of physical or mental illness. Their sensitivity to punishment usually also increases since a sick person might not survive a spell in goal. In *S vs Berliner 1967 (2) S.A. 193 (A)* the accused was aged 61 years, with a heart ailment that, according to uncontradicted medical evidence, allowed him only another four or five years to live. The court a quo imposed five years imprisonment on the count of fraud and one year upon each of two counts of theft, but since the latter were ordered to run concurrently with the count of fraud, it came down to five years imprisonment. On appeal Ogilvie Thompson J.A. considered the matter carefully but declined to interfere with the trial court's sentence:

"While a convicted person's health may, depending upon the circumstances, sometimes afford a good reason for not sentencing him to imprisonment, there is certainly no general rule that ill-health automatically relieves a criminal from being imprisoned medical and hospital facilities are of course, available for convicts".

Now coming to the last leg that of the gravity of the offence. It is clear here that the actions of the accused might have easily resulted to the death of the complainant.

Having looked at all these factors my considered view is that a sentence of imprisonment would be in order in this case. My view is that a sentence of 2 (two) years' imprisonment without the option of a fine would be in order.

In the result, I sentence the accused to a term of imprisonment of 2 (two) years without the option of a fine for the attempted murder of the complainant.

S.B. MAPHALALA
JUDGE