

THE HIGH COURT OF SWAZILAND

REX

Vs

MDUDUZI MKHWANAZI

Criminal Case No. 75/2005

Coram

For the Crown

For the Defence

S.B. MAPHALALA - J

MR. P. DLAMINI

IN PERSON

SENTENCE

(7th February 2006)

[1] The accused person has pleaded guilty to two counts of attempted murder where it is alleged by the Crown on Count 1 that upon the 1st August 2004, at Mathendele Location, Nhlangano in the Shiselweni Region, the accused did unlawfully and with intent to kill, assault one Bongani Mkhwanazi using various dangerous weapons, thus the said accused did thereby commit the crime of attempted murder. On the second count the accused is charged with a similar offence at the same time and at the same place on one Thulane Shongwe.

[2] At this juncture the court is called upon to mete out an appropriate sentence. What must be considered is the *triad* consisting of the crime, the offender and the interest of society (see *S vs Zinn 1969 (2) S.A. 537 (A) at 540 G*; *S vs Scheepers 1977 (2) S.A. 154 (A)*).

[3] The elements of the *triad* contain equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense and of or to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating 'whereof satisfies the requirements. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community; its welfare and concern. This conception as expounded by the courts is sound and is incompatible with anything less (see *S vs Banda and others 1989 - 90 (4) B.L.R page 289* and the cases cited thereat).

[4] The guidelines that I have referred to stem from the importance of the legal principles applicable in sentencing an offender.

[5] Therefore, all the elements of the *triad*, although not identical are indissociable.

[6] In *S vs Banda and others (supra)* it was held that in considering the offender, due regard must be heard *inter alia*, to the following:

- i) His/her age and background;
- ii) Level of education, attainment and position in society;
- iii) Family circumstances, whether married or not, and the question of dependants;
- iv) Motive in committing the offence, whether for personal gain or for reasons of avarice, or being actuated by some moral or laudable objective;
- v) Whether the offender stood to gain by the offence;
- vi) The question of the accused being a first offender;
- vii) The effect of punishment on the offender, and more particularly if a sentence of imprisonment is imposed;
- viii) The prospects of reformation and correction, and becoming a useful member of society;
- ix) The presence or absence of remorseful or construction;

- x) Whether instead of imprisonment and alternative method of punishment would not be appropriate in the circumstances;
- xi) A perceptive understanding of the accused human frailties as effected by the circumstances surrounding the commission of the offence in question and a balancing of those frailties against the evil of the offender's deed, (see *S vs Sigwahla 1967 (4) S.A. 566 (A)* at 571 E -
- xii) Influence or encouragement of another. See *S vs De Boer 1968 (4) S.A. 866 (A)*; *S vs Lehnberg En Andere 1975 (4) S.A. 533 (A)*; *S vs Van Rooi En Andere 1976 (2) S.A. 580 (A)*.

[7] The above list is not exhaustive, but I believe that it contains pragmatic tests for the truth of the assertion of considering the position of the offender.

[8] Furthermore, on the crime it was held in *S vs Banda (supra)* that in passing sentence the court must take into account the moral and ethical nature of the crime, and the gravity of the offender. It is accepted and is indeed logical that a more serious crime will carry with it a greater moral blameworthiness than a minor or less serious offence. This involves a moral and value judgment. A process of arid intellectualism is sufficient. Mere theorising is not sufficient. What matters finally is how the court views the crime on its own merits, and all the relevant proven facts and circumstances must be carefully considered and assessed.

[9] The sentence therefore must be commensurate with the gravity or otherwise of the crime, and in a necessary concomitant of punishment (see *S vs Zinn (supra)*).

[10] The interest of the community. The court fulfils an important function in applying the law in the community. It has a duty to maintain law and order. The court operates in society and its decisions have an impact on individuals in the ordinary circumstances of daily life. It covers all possible grounds. There is no sphere of life it does not include. The court must also by its decisions, and the imposition of sentence, promote respect for the law, and in doing so must reflect the seriousness of the offence, and provide just punishment for the offender while taking into account the personal circumstances of the offender, (see also *S vs Banda (supra)* page 289 and the cases cited thereat)

[11] See also cases of *S vs Maarman 1976 (3) S.A. 510 (A)*; *S vs Holder 1979 (2) S.A. 70(A)* at 77-8.

[12] In the present case the accused person has advanced a number of factors in mitigation of sentence as follows: (a) the accused person is a first offender, (b) he is 38 years old and is not

married, (c) he was a mechanic employed in South Africa at the time of the commission of the offence. The accused person has also pleaded for a lenient sentence because he has pleaded guilty to the two offences.

[13] I have considered these factors in mitigation against the legal position as enunciated above. These are indeed very serious offences where the accused almost killed one of the complainant Bongani who was his own brother. The accused person used an assortment of weapons in this case i.e. a crow bar, an axe and a spear. He acted very violently towards the two complainants in this case, and he must thank his lucky stars that no one was killed that day. Therefore, the court is duty bound to impose a harsh sentence which accords with the accused's actions that day.

[1.4] In the result, for the above-cited reasons, the two counts are treated as one for purposes of sentence and the accused is sentenced to 7 years imprisonment in respect of each count and further that the sentence is backdated to the date of arrest being the 6th August 2004.

S.B. MAPHALALA

JUDGE