IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No. 165/10

REX

V

ZONKE THOKOZANI TRADEWELL DLAMINI **1ST ACCUSED**

BHEKUMUSA BHEKI DLAMINI **2ND ACCUSED**

Neutral citation:	Rex v ***Zonke Thokozani Tradewell Dlamini and Another (165/10)*** *[*2014] SZHC 26(28 February 2014)
Coram:	**OTA J.**
Heard:	**25 February 2014**
Delivered:	**28 February 2014**
Summary:	**Criminal law: sentencing pursuant to section 5(1) of The Suppression of Terrorism Act (2008); 1st Accused was found guilty on two counts of petrol bombing and doing extensive damage to the homesteads of two top government officials; his unprovoked and unwarranted activities intimidated the public and threatened the national security; the 1st Accused is sentenced to 15 years imprisonment on each count. The sentences are to run concurrently and are backdated to the date of 1st Accused's arrest and incarceration.**

OTA J.

[1] On 25 February 2014 I convicted the 1st Accused Zonke Thokozani Tradewell Dlamini on two counts of offences of contravening section 5 (1) of the Suppression of Terrorism Act of 2008 (The Act). The 1st Accused had thrown petrol bombs and set fire to the homesteads of two top government officials, namely, Vusi Masuku who was at the time of this incident in 2010, the Police Public Relations Officer, as well as, the late MP Bheki Mkhonta who was then the Member of Parliament for the Mtsambama area. The two communities were very shocked by these bombings confirming the intention of the 1st Accused which was to intimidate the public.

[2] In mitigation of sentence, learned defence Counsel Advocate Sihlali detailed a litany of factors, namely:- (1) The 1st Accused is a first offender; (2) has a four year old child who prior to his arrest was totally dependant on him for financial support; (3) was the sole bread winner of his family as he was self employed as an electrician; (4) since his incarceration the 1st Accused's family has been dependant on members of the community and neighbours for subsistence; (5) the1st Accused has been suffering from persistent headaches due to the fact that he was tortured in the wake of his arrest; (6) the 1st Accused is epileptic and needs constant supervision to prevent him from coming to harm in the event of seizures. His continued incarceration without the requisite supervision exposes him to danger as he might have a seizure in the shower or even when performing any of the duties he may be given in prison such as cooking. The 1st Accused may have a seizure and fall on the stove; (7) he is not also getting the appropriate or proper medical treatment for his epilepsy. The treatment he receives is not consistent. He is not medically supervised and does not have regular checkups for his condition; (8) 1st

Accused has been in custody for 3 years and 8 months, a particularly long time. The long incarceration has been caused by undue delay of the trial to the extent that the 1st Accused had to make an application in court to compel the prosecution to proceed with the trial and also had to go on hunger strike to compel an expedited trial. The court should thus consider the 3 year 8 months period of imprisonment as sufficient incarceration for the 1st Accused in the circumstances; (9) the 1st Accused is a young man who is prepared to undergo rehabilitation. He is remorseful and is prepared to apologize to his victims. This is a perfect case for the court to apply restorative rather than retributive justice to enable the parties reconcile, allow the 1st Accused re-integrate back into the community and the community will be rebuilt. More so as 1st Accused was a respected man in his society where he rendered essential service as an electrician.

[3] The learned Advocate against the backdrop of the foregoing factors, urged the court to exercise the discretion given to it by the punishment section of the Act in favour of the 1st Accused person, by imposing a lenient sentence.

[4] For his part, the learned Director of Public Prosecutions (DPP) who appeared for the Crown argued as follows:- (1) The court should consider the triad of circumstances; (2) the 1st Accused has been sentenced for undoubtedly very serious offences pursuant to section 5(1) of the Act; (3)the seriousness of the offences is clear from the punishment prescribed for them by the Act which is imprisonment for a period not exceeding 25 years; (4) the offences committed run contrary to the interest of the society as the 1st Accused not only caused damage to the properties of the complainants but also intimidated and threatened their lives and that of their family members; (5) at the time the 1st Accused committed these offence he was very much alive to the fact that he had a 4 year

old child and a family who were dependant on him financially. He should have thought of them first before committing the offences. The court should attach little weight to this issue as a mitigating factor; (6) there is no medical evidence in proof of the health situation of the 1st Accused and since the defence attorney is not a medical practitioner, he is not entitled to embark, as he did, on an opinion on the 1st Accused's health as he is not an expert; (7) The issue of the 1st Accused's incarceration for 3 years and 8 months can be addressed by backdating the sentence to include this period; (8) the allegation that the 1st Accused is remorseful is not established on the record as the 1st Accused demonstrated no remorse at all throughout the trial. The issue of the hunger strike shows the lack of remorse.

[5] The learned DPP finally submitted that the offences committed are very serious. They should command outright custodial sentences as a deterrent, that will send out a message to others that offences of this nature should not and must not be committed and that the courts frown upon such offences.

[6] In reply, Advocate Sihlali reiterated his previous submissions and urged the court to be lenient.

[7] Now, it is the established position of our law, that the court in sentencing should take into account the triad of circumstances, consisting of the offender, the interest of the society and the peculiar facts and circumstances of the offence. These factors find expression in the oft quoted declaration of **Corbett JA** in the case of **S v Rabie 1975 (4) SA 855 (AD) at 862 G:-** as follows:-

> **"Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances".**

[8] Zonke Thokozani Tradewell Dlamini, I have thus considered the factors urged in mitigation of your sentence. In as much as you did not prove that you were tortured or that you now suffer from persistent headaches due to the alleged torture, you however have my sympathy on the established fact that you are epileptic, a condition which you lived with way before your incarceration. It is a notorious fact that this medical condition is associated with seizures. I take judicial notice of that. It is however also a well established fact that His Majesty's Correctional Services has been found to have in place a praiseworthy program in other to take care of the medical needs of its inmates. It follows that the correctional institution where you are presently at, is well equipped to accommodate your ailment See **Rex v Khanyakwezwe Dludlu Criminal Case No. 61/2006, Rex v Phumlani Masuku Criminal Case No 240/2010.** I have also noted your plea for leniency and your desire not to be saddled with a custodial sentence to enable you go back to reconcile with and re-integrate into your community, as well as, take care of your child and your extended family who are solely dependant on you for subsistence. I agree that your wish to apologize to and re-integrate into your community shows remorse. I have not also lost sight of the fact that you are a first offender and a respected member of your community where you had hitherto rendered essential electrical services.

[9] Zonke Thokozani Tradewell Dlamini, it is however, rather supprising that your defence Counsel Advocate Sihlali raised the issue of your purported hunger strike which is alleged to have become necessary in other to compel an expedited trial, in mitigation of your sentence. What your counsel however conveniently failed to highlight is that the trial was principally delayed by the defence. I say this because, I became seized of this matter on 2 February 2012 when the trial commenced. The delay occasioned between then and when the trial was concluded on 25 February 2014 was principally due to the continued unnecessary delays

occasioned by the frequent unavailability of your defence Counsel Advocate Sihlali, who is an attorney instructed from South Africa. The court had to bend backwards on several occasions to accommodate adjournments and grant long postonements at the instance of the defence attorney in the interest of justice. The record will show that on over three of those occasions the court had called upon the local instructing attorney Ms Da Silva to take over the defence. To avoid unnecessarily burdening this judgment, one of those examples will suffice. On 18 February 2013 Advocate Sihlali failed to attend court and the court called upon Ms Da Silva to take over the defence. The Accused persons indicated in open court that they were prepared to accommodate a long adjournment provided Advocate Sihlali was given the opportunity to attend court. Ms Da Silva sought for a long postponement to April 2013. This resulted in a postponement of the matter to 2 - 5 April 2013. Also on record is the fact that on numerous occasions when defence Counsel Advocate Sihlali was minded to make himself available for this trial, he habitually arrived in court later that the time set down for commencement of the trial thus occasioning further unnecessary delays. The court took him to task in open court over this issue on numerous occasions. It is thus a startling revelation that the Accused persons subsequently chose when the presiding officer was away on leave on medical grounds in June 2013, a leave duly approved by the judiciary, to stage the purported hunger strike (which they abandoned after one day) and to lay blame at the door step of the court.

[10] It is also on record that after the purported hunger strike and upon my return form leave, the court sought to set the matter down in August 2013 but was informed by Ms Da Silva that Advocate Sihlali will not be available until October 2013. The matter was postponed to 7 October 2013, on which day Advocate Sihlali was still absent. It was only when she was pressed by the court to proceed with the defence that Ms Da Silva informed the court that the defence was terminating their

instructions to Advocate Sihlali and she will be proceeding with the matter. It was thereafter that this case proceeded to a logical conclusion on the evidence and the defence closed on 8 October 2013. Thereafter, the matter was adjourned to 5 December 2013 for submissions primarily to give Ms Da Silva who was not originally seised with the matter the opportunity to acquaint herself with the lengthy evidence led in the case in the interest of justice. It was only on 5 December 2013 that Advocate Sihlali reappeared in this case as defence counsel.

[11] It is inexorably apparent from the foregoing that the defence was the major cause of the delay in this trial. I thus find it highly unethical and in fact contemptuous for defence counsel to raise this issue in the way he did in these proceedings obviously seeking to distance himself from blame. This sort of conduct is most certainly undesirable. It is worth mentioning at this juncture, that in the wake of the purported hunger strike the local instructing attorney Ms Da Silva displayed high professionalism by approaching the Registrar of the High Court as well as the court to tender an apology for the conduct of the Accused persons. It is this standard of ethics that the court also expected from Advocate Sihlali and not for him to raise this issue in the way and manner he embarked upon. Since I have demonstrated that the defence was the major cause of the delay, it does not lie in their mouth to now seek to pass the buck and attempt to urge it as a mitigating factor. This is unsustainable. In any case, and as correctly submitted by the learned DPP, section 16 (9) of the Constitution Act 2005, mandates that any period that the 1st Accused spent in incarceration before the completion of his trial should be taken into account in imposing a term of imprisonment. There is therefore no prejudice he has suffered in the circumstances.

[12] Zonke Thokozani Tradewell Dlamini, having carefully considered the totality of the factors urged in mitigation above, I want you to know that the offences you committed are vey serious ones. The disenchantment of the good people of Swaziland towards any act of terrorism speaks loudly from the punishment which parliament deemed fit to prescribe for this offence in terms of section 5 (1) of the Act, as follows:-

> **"A person who commits a terrorist act, subject to any other specific penalty provided in this Act for that offence, shall be guilty of an offence and, <u>on conviction, shall be sentenced to any period of imprisonment not exceeding twenty – five (25) years or to such number of life sentences as the court may impose"</u>**. (emphasis added)

[13] There is no doubt and as rightly contended by Advocate Sihlali, that the legislation confers a discretion on the court in meting out an appropriate sentence, which will of course depend on the peculiar facts and circumstances of each case. *In casu*, I am firmly convinced that the offences you committed are so grievous that they must command outright custodial sentences. I say this because whilst your unsuspecting victims slept at night, you slithered into their homesteads and threw petrol bombs at their houses causing extensive damage to their properties and serious threats to their lives and that of their families. At the Masuku homestead the uncontradicted evidence is that the whole house, the rafters and tiles collapsed. Several of the household items were burnt including a double bed, base, four sofas, 3 carpets, grass mats, clothing material, shoes, jackets, trousers, one huge handy gas stove, a drawer for storage together with the cutlery. Mr Masuku's mother who was in a house adjacent to the house which was bombed was so shocked by the incident that she had to see a Doctor the following day. She passed away 8 days after the incident. There is nothing in the evidence to show how Mr Masuku who is your relative could have provoked you into causing such magnitude of destruction to his homestead. Then, there is also the destruction to

the homestead of the late MP Bheki Mkhonta. The evidence established that your illicit activities also caused extensive and serious damage to that homestead. The windows, walls, ceiling of the house as well as the scaffoldings therein were all damaged. It is uncontroverted evidence that MP Mkhonta had a good relationship with you during this period. The mayhem you unleashed in his homestead was thus unprovoked and unwarranted. The communities did not also deserve your acts of intimidation. All in all your actions in my view were clearly indefensible.

[14] Zonke Thokozani Tradewell Dlamini, I want you to know that your offence which is terrorism, has assumed the front burner all over the world. For now it is arguably the crime that destabilizes and destroys a society more than any other. Its disequilibrative effect on society is no longer in doubt. It is the type of crime that should not be allowed to gain root in any place. Apart from the difficulty of controlling it, it brings down governments and renders life and every other thing unsafe in the community. That is why every country in the world is very wary of it. The beautiful Kingdom of Swaziland is a country known for its peace and stability. That is its biggest attraction. Activities like this are capable of destroying the enviable peace and stability that this country enjoys and also of destroying its tourism and economy generally. It is therefore necessary that this evil which is fast gaining grounds in the Kingdom, judging by the common cause evidence of several other similar crimes that have been recorded in the country, should be prevented by all means including using deterrent measures to discourage those who may want to embark on its commission.

[15] In the case of **Rex v Thandaza Silolo Case Number 170/13,** the High Court convicted the Accused for 11 counts of offences. The first 8 of which were for

contravening section 5(1) of Suppression of Terrorism Act. The court imposed the following sentences respectively for the 8 counts

Count 1 **5 years**

Count 2 **5 years**

Count 3 **5 years**

Count 4 **10 years**

Count 5 **5 years**

Count 6 **5 years**

Count 7 **5 years**

Count 8 **10 years**

[16] The court also imposed the following sentence for the remaining 3 counts which were for contravening the Police and Public order Act of 1963 namely:

Count 9 **5 years**

Count 10 **5 years**

Count 11 **5 years**

[17] Some of these sentences were ordered to run concurrently with others. The end result was a custodial sentence of 25 years. Silolo had repented and pleaded guilty to the charges. He did not therefore waste the time of the court by pleading not guilty which would have elicited a full blown trial.

[18] Furthermore, in the case of **Rex v Amos Mbulaheni Mbedzi Criminal Case No. 236/2009,** the Accused was convicted on 5 counts of offences. The 5th count was

for unlawful possession of explosives. The evidence revealed that the explosives found on the Accused could assemble a total of thirteen different bombs. For this count of offence, the court imposed a sentence of 15 years.

[19] Zonke Thokozani Tradewell Dlamini, it is against the totality of the foregoing background that I will sentence you to 15 years imprisonment on counts 1 and 2 respectively. The sentences are to run concurrently and are backdated to 12 June 2010 the date of your arrest and incarceration. It is so ordered.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE …….. DAY OF …….2014

OTA J.

JUDGE OF THE HIGH COURT

For the Crown	**The Director of Public Prosecution** **(Mr N. Maseko)** **(with him Crown Counsel Mr. S. Maseko)**
For the 1st Accused	**Advocate C. Sihlali** **(instructed by Attorney M. Da Silva)**