



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No. 25/2012

In the matter between:

Rex

And

SIKELELA BRIAN MYENI

Neutral citation: *Sikelela Brian Myeni v Rex* (25/2012) [2017] SZHC 218 (26
October 2017)

Coram : **T. L. Dlamini J**

Date heard : 20 and 25 September 2017

Date of delivery : 26 October 2017

Summary: *Criminal Law and Procedure – Accused person charged with Attempted Murder – Pleads guilty to the charge – statement of agreed facts prepared and duly signed.*

Held: *That the accused is convicted on his own plea and sentenced to four years in prison.*

Held Further: *That no part of the sentence is to be suspended in terms of section 313 of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended – And that the imprisonment term to include period spent by the accused in custody whilst awaiting trial for this offence*

JUDGMENT

[1] The accused stands before me charged with the offence of Attempted Murder. According to the Indictment, upon or about 19th December 2011, at or near kaMfishane area in the Shiselweni region, the accused person did unlawfully assault one **Elizabeth Dlamini** with a spade with intent to kill her and did thereby commit the crime of Attempted Murder.

[2] On his appearance before this court on the 20th September 2017, I first asked the accused if he was advised about his right to legal representation. He informed the court that he was advised but he unfortunately does not have the financial resources to pay for the attorney's services. He then advised the court that he is ready to proceed with the trial.

[3] The charge was read and put to the accused in the language of his own choice, *siSwati*. He confirmed that he understands the charge and pleaded guilty to it. The Crown accepted the plea and a statement of agreed facts was then prepared and duly signed by counsel for the Crown and by the accused. The statement was handed in and was also read for the record. The accused confirmed it to be a true and correct reflection of the agreed facts. The statement was recorded as follows:

STATEMENT OF AGREED FACTS

“ Sikelela Brian Myeni (hereinafter referred to as the Accused person) stands charged with the offence of Attempted Murder. He pleads guilty to the charge and the Crown accepts the plea.

It is agreed as follows between the Crown and the Accused.

- 1. On the 19th December 2011 the accused returned from Lobamba where he attended the Incwala ceremony. When he was travelling from the station going***

home, he met Bheki Dlamini who is a son to the complainant who lightly struck him twice with a stick on the head and told him to stop ill- treating the complainant. He proceeded home and along the way he met a community police who told him that his uncle wants to have him and one Mphendvulo Dlamini who is a son to the complainant to be arrested. The allegation was that the said Mphendvulo was having an affair with his uncle's wife and the accused was involved in the issue.

- 2. When he got home he saw the complainant talking to other people and he believed that she was gossiping about him but he did not hear what she was saying. The homestead where he resides is adjacent to the complainant's homestead. He went home and took a spade as he saw Mphendvulo Dlamini and Mcebisi Ndlangamandla weeding the fields pulling oxen. He then shouted at the said Mcebisi to stop leading the oxen and he did. The complainant then asked Thobile Dlamini to lead the oxen and she reported the accused to PW3 Xolile Dlamini. PW3 tried to talk to the accused but he was aggressive and stated that they are being mistreated in the home. PW2 Eunice Dlamini came and requested for the complainant.*
- 3. While complainant and PW2 were talking, the accused came and asked to talk to the complainant. He was told that he should wait as they were talking and at that moment the accused hit the complainant with the spade on the neck and PW2 tried to block it and it cut her little right finger. The complainant fell, suffered a 2 cm injury on the neck, bled profusely and was unconscious and was taken to Mfishane Clinic by PW4 Sonto Dlamini and one Moses Dlamini. The complainant gained consciousness the next day at the Hlathikhulu Government Hospital. The accused further confessed to PW5 Hhomu that he had injured someone at his home.*
- 4. The accused person admits that the complainant was injured on the neck due to his intentional and unlawful conduct and he foresaw that his conduct could result in the death of the complainant.*
- 5. The accused person was arrested on the 26th December 2011 and was released on bail on the 10th April 2012.*
- 6. It is further agreed that the following be handed in by consent to form part of the Crown's evidence.*
 - (a) Medical Report*

(b) Statement of Agreed Facts

(c) Spade

Dated at MBABANE on this 20th day of September 2017.

[4] The above statement was signed by both the accused and the representative for the Crown.

[5] The medical report and spade that were handed in by consent as part of the Crown's evidence were marked as EXHIBIT "A" and EXHIBIT "C" respectively.

[6] In terms of section 272 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended (the Act), the statement of agreed facts constitutes a formal admission of the facts. The section provides as follows:

"272. (1) In any criminal proceedings the accused or his representative in his presence may admit any fact relevant to the issue, and any such admission shall be sufficient evidence of such fact."

[7] The law applicable in support of a conviction for Attempted Murder is that an intention to kill need not be proved. It is sufficient that there was an

appreciation that there is a risk to life in the action contemplated. Such appreciation should be coupled with recklessness about whether or not the death eventually occurs. This was stated by **Schreiner JA** in the case of **Rex v Huesbsch 1953 (2) SA 561 at 567.** The Honourable Judge expressed the law in the following words:

“ In order to support a conviction for attempted murder there need not be a purpose to kill proven as an actual fact. It is sufficient if there is an appreciation that there is some risk to life involved in the action contemplated coupled with recklessness as to whether or not the risk is fulfilled in death.”

[8] This case was followed and quoted with approval by **Nathan J** in **Rex v Mndzebele 1970 – 1976 SLR 198 at 199 (F)** where he stated the following:

“... a person has the necessary intention to kill if he appreciates that the injury which he intends to inflict on another may cause death and nevertheless inflicts that injury, reckless whether death will ensue or not.

[9] The authorities add that in addition to the contemplation of risk to life plus recklessness, there should be an intention at least to injure the complainant. See: **Rex v Mndzebele (supra)**. The highest court of this country also approved and applied the law as stated in **Rex v Huebsch (supra)**. See: **Henwood Thornton v Rex, SLR 1987 – 1995 (4) 271 at 273 (H), (1/1991)**

[1994] SZSC 4 (08 April 1994) and **Sibusiso Kukuza Dlamini v Rex, Appeal Case No. 39/2010** (unreported).

[10] Per **Kotze JA**, the case of **R v Huebsch (supra)** of the Appellate Division of South Africa establishes the correct principle as being:-

“ That it suffices for the Prosecution to prove in a charge of attempted murder an appreciation that there is some risk to life coupled with recklessness as to whether the risk is fulfilled in death.” **Henwood Thornton v Rex (supra)**

[11] The **Henwood Thornton v Rex (supra)** decision is binding on this court. It sets out the law applicable in this country. The accused admitted that the complainant was injured on the neck by his intentional and unlawful conduct and that he foresaw that the death of the complainant could result from his conduct.

[12] I am therefore satisfied that the accused is guilty of Attempted Murder. He is therefore convicted on his own plea. This verdict was pronounced in court on 20th September 2017. The accused’s bail was then

terminated in accordance with section 145 of the Act and the accused went back to custody.

[13] In mitigation, the accused expressed his apologies for having committed the offence. He submitted that he also went to apologize to the complainant. He further stated that the complainant accepted the apology. However, when asked by the court, she denied that she accepted the apology. The reason she gave is that the accused informed her that he was told to come and apologize. The apology, according to the complainant, did not therefore come from the heart of the accused.

[14] The accused also submitted that he is the eldest son at home and he no longer has parents with his siblings. He has a young child that he has to maintain, including those of his brothers. He earns a living by working in the forests in South Africa and that he came to the Kingdom to attend his trial.

[15] He further submitted that he is not a troublesome person and requests the court to give him the option to pay a fine when sentencing him as he is a first offender.

[16] The Crown made no submission in aggravation save to inform the court that the accused is a first offender.

[17] In determining sentence, I have to consider the interests of society, the seriousness and prevalence of the offence, and the personal circumstances of the accused.

[18] I have taken into consideration that the accused is a first offender and is the eldest in a family that no longer has parents. He has a young child to support, including those of his brothers. He was 23 years when he committed the offence. I have also taken into consideration that the modern approach to sentencing is reformatory than imprisonment.

[19] I further considered the fact that the accused pleaded guilty to the charge. This is a sign of being remorseful in my view. The court's time is not unnecessarily wasted if an accused pleads guilty.

[20] On the other hand, the complainant is an old woman who was 56 years at the time when the offence was committed against her. The values of our society are strictly against disrespecting older members of the society by the youth. The assault of a woman of 56 years by a 23 years old young man is completely unacceptable and intolerable.

[21] Attacks committed on woman are on the rise. Woman are generally defenceless, and in most instances are killed without lawful justification. According to the medical report, the complainant was inflicted with a cut of 2 cm on the neck and was left with a swollen left cheek. The statement of agreed facts reflects that the complainant bled profusely and became unconscious. She regained consciousness in hospital on the following day.

[22] The courts are expected by society to impose deterrent sentences, and to minimize the occurrence of such offences as best as that can be achieved.

[23] When sentencing, the court is precluded by section 313 of the Act from suspending the sentence or any portion thereof in respect of a conviction for Attempted Murder. This section allows the suspension of a sentence only in respect of offences not specified or listed in the Third Schedule of the Act. It provides as follows:

“313 (2) If a person is convicted before the High Court or any magistrate’s court of any offence other than one specified in the Third Schedule, it may pass sentence, but order that the operation of the whole or any part of such sentence be suspended for a period not exceeding three years, which period of suspension, in the absence of any order to the contrary, shall be computed in accordance with sub – sections (4) and (5) respectively.” (own emphasis)

[24] The Third Schedule lists Murder, Rape, Robbery and any conspiracy, incitement or attempt to commit any of the above listed offences. It is

for this reason that a sentence or any portion thereof cannot be suspended in respect of an Attempted Murder.

[25] The punishment for Attempted Murder is not prescribed in statute or common law. Punishment is therefore left in the discretion of the court. See: **Bhekisizwe Motsa v Rex (37/2010) [2012] SZSC 6 (31 May 2012)** paragraphs [20] and [21].

[26] I have considered the option of the payment of a fine for Attempted Murder. However, I have failed to find judgment where the option of a fine was granted by the court. Custodial sentences have been issued instead. For the sake of uniformity, parity, consistency and certainty in our criminal law on punishment for offences, I will follow the trend that has been established by our courts.

[27] The range of sentences for Attempted Murder is three years for the less serious cases up to ten years for the more serious cases. See **Rex v**

Bongwa Mcondisi Dlamini, High Court Criminal Case No. 102/2008 (unreported), paragraph 68.

[28] In the case of **Siboniso Sandile Mabuza v Rex, Criminal Appeal No. 1/2007** (unreported), the Supreme Court confirmed a sentence of three years in respect of each count of Attempted Murder.

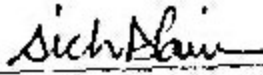
[29] In **Gerald Mvemve Valthof v Rex (5/2010) [2010] SZSC 19 (30 November 2010)** the Supreme Court reduced a sentence for Attempted Murder from fifteen (15) years to ten years. This was a serious Attempted Murder case where the appellant attempted to kill his wife, wherein he also killed his two children.

[30] In the circumstances, the accused is sentenced to four (4) years imprisonment.

[31] The accused was arrested on the 26th December 2011 and was released on bail on the 10th April 2012 according to the statement of agreed

facts. On the 20th September 2017 the accused was found guilty by this court. Consequent to the conviction, his bail was terminated and the accused went back to custody.

[32] On the basis of section 16 (9) of the Constitution Act No. 001 of 2005, the period that the accused has spent in custody in respect of this offence shall be taken into account in computing the period of imprisonment.



T. L. DLAMINI
JUDGE OF THE HIGH COURT

For the Crown: Mr Stanley M. Dlamini

For the Accused: In Person