



IN THE HIGH COURT OF ESWATINI
JUDGMENT ON SENTENCE

HELD AT MBABANE

CASE NO. 409/15

In the matter between:

REX

Versus

NKOSINATHI C. NDZINISA

First Accused

NKOSINATHI NTJALINTJALI

Second Accused

BHEKITHEMBA NDZINISA

Third Accused

SANELE SIBUSISO TSABEDZE

Fourth Accused

Neutral Citation: *Rex vs Nkosinathi C. Ndzinisa & 3 Others [409/15] [2021]*
SZHC 55 (15 April, 2021)

Coram: **LANGWENYA J**

Heard: 27 February 2019; 28 February 2019; 27 May 2019; 28 May
2019; 3 June 2019; 4 June 2019; 9 October 2019; 14
October 2019; 15 October 2019; 9 December 2019; 10

February 2020; 11 February 2020; 18 February 2020; 20
February 2020; 24 February 2020; 26 February 2020; 28
February 2020; 13 March 2020; 7 July 2020; 26 August 2020;
17 November 2020; 10 February 2021; 5 March 2021; 10
March 2021; 15 April 2021.

Delivered: 15 April 2021.

Summary: *Criminal Procedure-accused found guilty of a number of robbery counts-housebreaking and theft-attempted murder and contravention of the Arms and Ammunition Act.*

Consideration of triad of sentencing-purpose of punishment-deterrence-prevention-reformative-retributive-a balance must be struck between the competing factors of sentencing in order to deliver sentences commensurate to offences on which accused convicted.

Accused sentenced-sentences to run concurrently.

JUDGMENT ON SENTENCE

[1] On 10 February 2021 this court convicted the first and the second accused persons of multiple counts of robbery, house breaking and theft and contravention of the Arms and Ammunition Act. In addition the second accused was found guilty of two counts of attempted murder of two police officers. This was the ultimate result after the accused pleaded not guilty to the charges and the Crown led evidence to prove its case. The accused persons insisted that they were innocent on all charges throughout the trial but this court found that the Crown proved its case beyond

reasonable doubt on the charges on which both accused persons were convicted.

- [2] In an effort to arrive at an appropriate sentence this court has considered the frequently cited *triad* factors of sentencing which consist of the crime, the criminal and interests of society¹. Another important factor is the consideration of the element of mercy². Authority abounds however that cautions against taking the consideration of the element of mercy to mean misplaced pity. In *S v Sparks & Another*³ it was stated that the punishment must fit the crime as well as the criminal, be fair to society and be blended with a measure of mercy according to the circumstances. The above-stated factors should be considered together with the main purposes of punishment which are: deterrence, preventative, reformatory and retributive. All these factors are of critical importance to sentencing and this court accordingly takes them into account.
- [3] In sentencing, I am enjoined by law to strike a balance between the competing factors of sentencing in order to deliver a sentence that is commensurate to the offences on which the accused persons are convicted. In doing so, it may be unavoidable to emphasize one factor at the expense of the others.
- [4] In applying these factors to the facts and circumstances of this case, this court finds it fitting to start with a restatement of the personal circumstances of the accused persons who both testified under oath in mitigation of sentence. The first accused is a first offender. The first accused informed the

¹ *S v Zinn* 1969 (2) SA 537(A).

² *S v Kumalo* 1973 (3) SA 697(A) at 698.

³ 1972 (3) SA 396(A) at 410H.

court that he is thirty years of age, unmarried and has a seven years old minor child. His girlfriend is unemployed and requires accused's assistance with the registration of their minor child. The first accused was taken into custody on 25 September 2014 where he remains to date. He submitted that he has since developed anaemia while in custody and this condition requires specialized treatment which is expensive and he cannot afford it. It was the evidence of the first accused that he fears being exposed to covid 19 as he has remained in custody for a long time now. It is his submission that prior to being arrested by the police, the first accused person earned his keep through carrying a *shisa nyama* business close to the University of eSwatini, Kwaluseni campus. He apologized to the court for being charged and found guilty of serious crimes.

- [5] The second accused submitted that he is thirty one years of age. He was taken into custody on 25 September 2014 and remains there to date. He is a first offender. He is unmarried and has one minor child who was unborn when he was arrested. His level of formal education is Form 2. It is the second accused's submission that he was assaulted by the police when he was arrested. As a result of the assault by the police the second accused says he suffered injuries in his ears which have resulted in hearing loss. He now frequents the Mbabane government hospital as a result of the injury to his ears. It was the evidence of the second accused that when he was arrested he was self-employed and sold his wares at a market stall at Moneni in Manzini. He supported his mother with the proceeds of his business. His mother is unemployed.

- [6] Both accused persons submitted that they were unable to eloquently marshal their defence because they were not legally represented. They both rue the fact that they could not afford legal representation. They both stated that they were sorry to have been tried and convicted of the offences charged. They both asked that the court metes out lenient sentences to them. The second accused appealed to the court to give him a chance at freedom so he could go out there and warn other young people about the futility of involving themselves in crime. Both accused persons applied that their sentences be made to run concurrently. They both argued that they are not people of violent disposition.
- [7] Both accused persons applied that certain property that was taken from them as exhibits by the police be returned to them. This application was vigorously opposed by the Crown on the basis that the said property was proceeds of crime; and that the accused persons did not furnish the court with proof of ownership of same. The first accused submitted that all his receipts were taken by the police. The problem with this piece of evidence is that it was not put to the police who allegedly took the stolen property from the house of the first accused at Mvutjini. What compounds the issue is that during the trial, it was the first accused's evidence that the property taken by the police belonged to his brother who is now deceased. Absent proof of ownership coupled with the mixed messages of first accused's evidence, the application that exhibits taken from his possession be returned to him is refused.
- [8] In the same vein, the brown boots retrieved by the police at the second accused's house at Moneni in Manzini cannot be returned to the second

accused because they were positively identified by one of the complainants from Malkerns as belonging to him. The second accused had intimated during the trial that his father bought him the boots. Strangely, the second accused never called his father to buttress his version in this regard.

[9] It must be stated for the record that even though the accused persons were un-represented, the court explained the procedure in the conduct of the criminal trial as well as the rights of the accused and how to marshal their defence. The court also assisted them to put their defence to the Crown witnesses.

Submission by the Crown

[10] **The Crown submitted that the accused have been convicted of serious offences** where violence and the use of firearms is an ingredient. Mr Mngomezulu for the Crown submitted that the use of firearms in incidents of robbery often results in the loss of life. The court was urged to consider the trauma that was visited on the complainants as a result of accused persons' conduct. The Crown argued that the complainants in the robbery cases were traumatised and require psychological counseling.

[11] The court was implored to consider that most of the electronic gadgets- mainly cellphones taken from the complainants were never recovered. This places the complainants at a disadvantage and loss as they will never be able to put their hard earned property into use.

[12] The Crown submitted further that the accused persons did not show remorse for their unlawful and dangerous conduct. It was the Crown's submission that the accused persons exhibited an arrogant attitude despite that the court

had found them guilty and despite the overwhelming evidence led by the prosecution. The Crown singled out the conduct of the first accused with regard to his conviction for attempted murder of the two police officers at Hill top traffic circle. Mr Mngomezulu submitted that calling the police dogs before he shot at them was a reflection of the first accused person's disdain for the law. The Crown submitted that the court should send a strong message to the accused persons and to other would be offenders that police officers doing their jobs are not game to criminals.

- [13] The Crown submitted further that the accused persons subjected complainants and society in general to a reign of terror for a period of time in the year 2014. The accused persons also targeted business people in their robbery spree. The court was told that a crime infested country tends to turn away investors and that has a negative effect on the economy of the country. The court should therefore mete out appropriately serious punishment for such offences.
- [14] The Crown urged the court further to pass sentences that would run consecutively as the charges concerned do not emanate from the same transaction. It was argued that even though the accused persons are first offenders, the court has a duty to remove violent criminals from society for a long time.
- [15] The Crown then applied that the exhibits be released to the complainants in terms of Section 324 of the Criminal Procedure and Evidence Act, 1938.

The Court's Conclusion

- [16] The first accused person told the court he suffers from anaemia while the second accused person testified that he suffers from ear injuries as a result of assault by the police. They each submitted that as a result of their medical conditions they require medical attention on a frequent if prolonged basis. In the absence of medical evidence or records supporting both accused persons' assertions, the seriousness of their ailments and the extent of their medical conditions cannot be determined. It would appear that both accused persons' medical conditions appear not to be life threatening; neither was it contended that they were likely to be aggravated by their continued incarceration or bring about undue hardship.
- [17] The Crown proposed that sentences imposed should be served consecutively with that imposed on robbery counts. It is trite that regard must be had to the cumulative effect of sentences of long-term imprisonment and for the court to ensure that the total sentence imposed is not disproportionate to the accused's blameworthiness in relation to the offences committed.
- [18] It cannot be disputed that the accused persons were convicted of very serious offences where violence is a part. These offences are further prevalent in the country despite severe sentences being meted out by our courts. The robbery counts involve using firearms to force complainants to give in to accused persons' demands. Jabulani Simelane was assaulted with the butt of a firearm while being robbed of his property at eZulwini. Jabulani Simelane is old enough to be a father of both accused persons. Gugu Dlamini of Malkerns was also assaulted with a firearm below the jaw and below her breast. The firearm discharged and a bullet hit the roof of Gugu's Dlamini's

house. At Nkonotja Zwane's home, the accused announced their arrival by kicking the door to the bedroom and firing a shot. The first accused also fired at the two police officers who were manning a road block at Hill top after he had referred to them as dogs.

[19] I must say that violence against police officers in uniform and doing their work is unacceptable and deserves censure. It is important for every person and for criminals in particular to be reminded that police officers are an integral part of the administration of criminal justice system. They are an important cog in the bigger scheme of investigation, arrest, questioning and processing of an accused person who is ultimately found guilty of criminal conduct. They serve as a buffer between law abiding citizens and criminals; they are first responders to people in distress as a result of lawlessness. It behoves all of us therefore to respect the men and women in uniform for the work they do to protect us all. They cannot therefore be referred to as dogs nor should they be shot at willy-nilly by trigger happy criminals like the first accused.

[20] With regard to the interests of society, the number of cases of robbery, attempted murder on our court rolls shows no sign of abatement. Courts are therefore duty bound to protect society from desperadoes like the accused persons and from the devastating effects of such offences by imposing severe sentences to deter the accused persons and other would be offenders from committing similar offences.

[21] Some of the victims of your violent conduct told the court they were traumatized and still struggle to get on with their lives after you terrorized them. They informed the court that as a result of the violence the accused

visited on them, they are still undergoing psychological treatment and counseling. This court sympathizes with the victims of your unlawful and violent conduct and considers same in sentencing.

[22] In expressing condemnation of these barbaric offences, the court in *S v Matolo en 'n Ander*⁴ said the following:

'In cases like the present the interests of society is a factor which plays a material role which requires serious consideration. Our country at present suffers an unprecedented, uncontrolled and unacceptable wave of violence, murder, homicide, robbery and rape. A blatant and flagrant want of respect for the life and property of fellow human beings has become prevalent. The vocabulary of our courts to describe the barbaric and repulsive conduct of such unscrupulous criminals is being exhausted. The community craves the assistance of the courts: its members threaten, *inter alia*, to take the law into their own hands. The courts impose severe sentences, but the momentum of violence continues unabated. A court must be thoroughly aware of its responsibility to the community, and by acting steadfastly, impartially and fearlessly, announce to the world in unambiguous terms its utter repugnance and contempt of such conduct.'

[23] These remarks, although made in a South African context, finds equal application to our country too.

[24] I interpose to state that the accused persons never apologized to the complainants for the brutality they visited upon them. They only contended themselves with imploring the court to take into account that they are not violent people by nature. They submitted that they are sorry to have appeared before court charged with the offences they were found guilty of.

[25] The fact that the accused are first offenders and have spent a period of six years and seven months in pre-trial incarceration must be weighed against

⁴ 1998 (1) SACR 206 (O) at 211 d-f.

the calculated violent nature of the offences committed by the accused persons.

[26] In view of the seriousness and prevalence of the offences, the need for retribution, deterrence and prevention outweighs the personal circumstances of the accused persons. This court also considered sentences imposed in similar matters in this jurisdiction for the purpose of consistency.

[27] In considering the proximity in time and place (in certain counts) and the relation of the actions of the accused persons, this court in sentencing will order that the sentence imposed on the offences of housebreaking and theft, attempted murder as well contravention of the Arms and Ammunition Act should run concurrently with the sentence imposed on the offence of robbery.

[28] Taking all the above stated factors, reasoning and conclusions into account, this court is of the considered view that the sentences set out below meets the justice of the case. In the result, the accused persons are sentenced as follows:

[29] Count 2 both accused persons are each sentenced to a term of five years imprisonment.

[30] Count 3 both accused persons are each sentenced to a term of five years imprisonment.

[31] Count 4 both accused persons are each sentenced to a term of two years imprisonment.

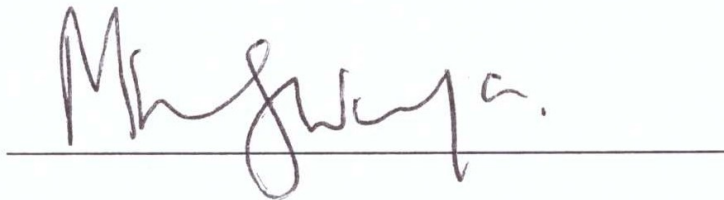
- [32] Count 5 both accused persons are each sentenced to a term of two years imprisonment.
- [33] Count 6 the second accused is sentenced to a term of two years imprisonment.
- [34] Count 7 both accused persons are each sentenced to fifteen (15) years imprisonment
- [35] Count 8 both accused persons are each sentenced to fifteen (15) years imprisonment
- [36] Count 9 both accused persons are each sentenced to fifteen (15) years imprisonment
- [37] Count 10 both accused persons are each sentenced to fifteen (15) years imprisonment
- [38] Count 11 The first accused person is sentenced to fifteen (15) years imprisonment
- [39] Count 12 The first accused person is sentenced to fifteen (15) years imprisonment
- [40] Count 13 both accused persons are each sentenced to fifteen (15) years imprisonment.
- [41] Count 14 the first accused person is sentenced to fifteen (15) years imprisonment
- [42] Count 15 the second accused is sentenced to fifteen (15) years imprisonment
- [43] Count 16 the second accused is sentenced to fifteen (15) years imprisonment

- [44] Count 17 both accused persons are each sentenced to fifteen (15) years imprisonment
- [45] Count 19 both accused persons are each sentenced to fifteen (15) years imprisonment
- [46] Count 20 both accused persons are each sentenced to fifteen (15) years imprisonment
- [47] Count 21 both accused persons are each sentenced to fifteen (15) years imprisonment
- [48] Count 22 both accused persons are each sentenced to fifteen (15) years imprisonment
- [49] Count 23 both accused persons are each sentenced to fifteen (15) years imprisonment
- [50] Count 24 both accused persons are each sentenced to fifteen (15) years imprisonment
- [51] Count 25 the first accused is sentenced to fifteen (15) years imprisonment
- [52] Count 26 the first accused is sentenced to three (3) years imprisonment
- [53] Count 27 the first accused is sentenced to three (3) years imprisonment
- [54] Count 30 the first accused is sentenced to fifteen (15) years imprisonment
- [55] Count 32 the first accused is sentenced to three (3) years imprisonment
- [56] Count 33 the first accused is sentenced to fifteen (15) years imprisonment
- [57] Count 36 the first accused is sentenced to eight (8) years imprisonment

[58] Count 37 the first accused is sentenced to eight (8) years imprisonment.

[59] It is ordered that all the sentences be served concurrently and they will take into account the period of six years and seven months that both the accused have spent in pre-trial incarceration.

[60] It is ordered further, that in terms of section 324 of the Criminal Procedure and Evidence Act, 1938 that the property which is the subject of the trial herein and was used as exhibits be returned to their respective owners and or possessors.

A handwritten signature in black ink, appearing to read 'M. Langwenya J.', is written over a horizontal line. The signature is cursive and somewhat stylized.

M. LANGWENYA J.

For the Crown: Mr. K. Mngomezulu

For Accused 1: In Person

For Accused 2: In Person.