



IN THE HIGH COURT OF ESWATINI
JUDGMENT ON SENTENCE

HELD AT MBABANE

CASE NO: 157/08

In the matter between:

REX

Versus

MUSA SIMELANE

Neutral
Citation:

*Rex v Musa Simelane (157/2008) [2023/ SZHC 282 (18
October 2023).*

Coram:

M. S. LANGWENYA J

Heard:

8, 14 March 2023; 19 June 2023; 17 July 2023; 11, 13,
18 October 2023

Delivered:

18 October 2023

Summary:

Criminal Procedure-accused found guilty of attempted murder-sentence-consideration of the triad-consideration of purpose of punishment-deterrence-reformation and retribution-consideration of section 313 of the Criminal Procedure and Evidence Act 1938-sentence of attempted murder may not be suspended in terms of section 313(J) of the Criminal Procedure and Evidence Act, 1938-the accused person is sentenced to seven years.

JUDGMENT ON SENTENCE

Introduction

[1] On 17 July 2023, the accused person was convicted by this court of the crime of attempted murder of his wife, Thandeka Simelane. The accused shot his wife with a firearm in the left thigh and in the abdomen. The complainant was diagnosed with peritonitis-the inflammation in the abdomen caused by bacteria consequent to spillage of blood and of intestinal contents in the abdomen. As a result of the shooting incident, a bullet is still lodged in the complainant's body. The bullet that is lodged in complainant's body hit and fractured the sacrum bone. The court heard that the injury to the sacrum may lead to the complainant having loss of sensation in the sacrum region. The complainant testified during submissions in mitigation of sentence that she lives with the effects of having a bullet inside her body and that it impedes her from engaging in physical exertion. The complainant told the Court that her marriage to the accused now exists all but in paper as she left her marital home in 2019 and currently resides at her parental home with

her children. The court heard that the couple remains civil towards each other.

- [2] The court heard that the injury that was devastating to the complainant was the gunshot on complainant's lower abdomen. According to the doctor, the bullet entered in the right side of the lower abdomen and hit the intestines. When the complainant was operated upon, the doctor cut off the damaged intestines and rejoined them.
- [3] According to the doctor's evidence, the second gunshot was in the left thigh. The entry wound was in the inner thigh out at the back of the thigh. The complainant was admitted to hospital on 8 August 2007 and discharged on 14 August 2007.

Sentencing considerations

- [4] After the accused was convicted of the crime of attempted murder, it is the court's unpleasant and difficult task to impose the sentence on him, because justice demands that sentencing be the consequence following the commission of a crime and that it should be meted out by the courts.
- [5] As Plasket J (as he was then) observed in *S v Arends and others*¹ the imposition of sentence is not a mechanical process in which predetermined sentences are imposed for specific crimes. It is a nuanced process in which the court is required to weigh and balance a variety of factors to determine a measure of the moral, as opposed to legal blameworthiness of an accused. That measure is achieved by a consideration and an appropriate balancing of

¹ [2010] ZAECGHC16 (1 March 2010).

what the case of *S v Zinn*² described as a 'triad consisting of the crime, the offender and the interest of society.'

- [6] A sentencing court does not always have an untrammelled discretion to determine sentence-a *tabula rassa*, on which to work. It may be constrained by statutory provisions or by precedent from a Higher Court.
- [7] The factors developed in the case of *Zinn* guide that in determining an appropriate sentence, the court must take into consideration the accused person's personal circumstances , interests of society, the crime and the circumstances surrounding its commission. Although these interests may be conflicting in nature, it is expected of the courts to keep a fine balance between them, and they must endeavor not to over or to under emphasize anyone of them. In terms of *R v Rabie*³the court is also called upon to exercise a measure of mercy when imposing sentence.

Personal circumstances of the accused person

- [8] Mr Nzima on behalf of the accused that the accused is a first offender. He is fifty-four (54) years old and is married to the complainant. It was urged that the couple have children to raise. The court heard that the accused has ten children; four of the children are minors and still attend school. The children depend on the accused for their welfare-so it was submitted. The court was told that the accused is a businessman in the transport industry. Through his business, the court was told, the accused supports his wife and family as a breadwinner. There is evidence that the accused spent one night in pre-trial incarceration before he was released from custody.

² 1969 (2) SA 537 (A) at 540G-H .

³ 1975 (4) SA 855 (AD).

- [9] It was submitted that the accused requests that the court be lenient when passing sentence. The court heard that the accused has learnt his lesson and that he undertakes not to commit any other offence if he is given a second chance.
- [10] The court heard also that the accused suffers from hypertension and sugar diabetes. For these chronic illnesses, the court was informed, that the accused requires a specific if special diet. It was urged that the conditions in prison may not be conducive for him as they exacerbate his chronic ailments.
- [11] The court is of the view that the Correctional Services have medical facilities that are equipped and able to attend to the accused person's medical condition. In the event the accused person cannot get medical help from medical facilities in-house the Correctional Services, he can be referred to public hospitals for further investigation and treatment.
- [12] It has not been argued in this case that the in-house medical facilities where the accused has been kept since he was convicted in July 2023 and other public hospitals where serious conditions are referred by Correctional Services have failed to deal with the accused person's medical condition.
- [13] It was submitted further on behalf of the accused that he is remorseful and requests for a chance to make good the wrongs with his wife and children. The court was urged to unite and bring the family together and not tear it apart through the sentence it will impose. I observe here that it is not so much the sentences imposed by courts that tear families apart as much as it is violent crimes committed by family members against each other. The reality in this matter is that the couple ceased to live together in 2019 when the complainant left the marital home with her four children. It cannot possibly be the sentence

the complainant left the marital home with her four children. It cannot possibly be the sentence that this court will impose that has caused the current separation or as the defence puts it, the disunity between the couple.

[14] It was argued that a sentence that would bring the family together would be one giving the accused an option of a fine because the parties are married and have a future together. No authority was cited in support of this submission. Throughout the trial, the demeanour of the accused person was anything but reassuring. He looked visibly angry and agitated even as he glibly gave new evidence that had not been put to Crown witnesses.

[15] The court was urged to follow the judgment of this court in *Rex v Sizwe Mzwandile Maka.ma*⁴ where, as Mr Nzima submitted it was a case of a crime of passion and the accused was convicted of attempted murder but was given an option of a fine. The judgment on sentence was not available as it could not be traced. The facts of the *Maka.ma* judgment are distinguishable from the facts of the present matter before this court. One such distinguishing factor is that the complainant in that matter was shot once in the arm. In the *Maka.ma* judgment it was two male police officers fighting over a woman's affection.

[16] Mr Nzima submitted that after the incident, the accused apologized to his wife and they resumed living together as husband and wife; that the accused paid *lobola* for his wife and the couple subsequently had another child. It was submitted that the accused apologized to his wife's family for the incident. It was further contended on behalf of the accused that after the incident, there was never any other incident of violence between the parties. This, the court was told was because the accused was remorseful. That said,

⁴ (350/2012) [2017] SZHC 161 (27 July)

it is also important to consider the immediate post-murder behaviour of the accused when the court assesses whether there was remorse on his part.

[17] The accused left his wife bleeding and lying in a pool of blood in their bedroom. He informed his children to call the police and ask them to attend to the matter. He did not bother to take his injured wife to the hospital despite that he had transport at his disposal to do so. He evaded arrest and drove to the Republic of South Africa where he remained for twenty-four hours before handing himself over to the police. This, in my view is not the hallmark of someone who is remorseful for his actions but rather a cold and vengeful person.

[18] In my view, the accused is not so much remorseful as he is regretful. The two are not synonymous. In *S v Matyityi*⁵, Ponnann JA differentiated between regret and remorse when he said:

'There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of *inter alia*; what motivated the accused to commit the deed; what has since provoked his or her change of heart; whether he or she does indeed have a true appreciation of the consequences of those actions.'

[19] Considering that the evidence presented herein ruled out that a crime of passion, I am unable to say against the above guidelines as to what

⁵ 2011(1) SACR 40 (SCA) para

motivated the accused to attempt to kill his wife. I am also unable to say, from the evidence and submission what provoked his heart to change if at all.

[20] I fail to understand how the payment of *lobola* and cohabitation of a married couple and the fact that they bore a child after the incident is a sign that the accused was remorseful. Is it not a legal requirement or an expectation that a husband gives *lobola* to her in-laws when the marriage in terms of customary law is sealed? Is it not an expectation that a married couple should live together and bear children if they so choose?

[21] The defence argued that the punishment meted out to the accused must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances⁶. In *S v Mhlakaza and another*⁷ the court found that the object of sentencing is not necessarily to satisfy public opinion but to promote public interests. A sentencing policy that caters predominantly for public opinion, the court held, is inherently flawed. It noted that given the current levels of violence, it seemed proper that the emphasis should be on retribution and deterrence and that retribution may even be decisive.

[22] In *Scott Crossley*⁸ the court held that any sentence imposed must have deterrence and retributive force. But one must not sacrifice the accused person on the altar of deterrence while deterrence and retribution are legitimate elements of punishment, they are not the only ones, or for that matter, even overriding ones. Again, that must be weighed against the accused person's prospects of reformation and rehabilitation. It is true that it

⁶ *5 v Khumalo* 1973(1) SA 697(A).

⁷ (386/96) [1997] ZASCA 7; [1997] 2 All SA 185(A).

⁸ 2008 (1) SACR 223 (SCA) para

of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society. In this case, I am of the view that the interests of the accused should come second to the interest of society and that the sentence imposed should be retributive as well as serve as deterrence to the accused and other would-be offenders.

[23] From the side of the offender it has been said, that retribution amounts to the atonement for his crime through punishment he receives. From the side of the community it amount to an "emphatic denunciation" of the offender and his crime and the infliction of pain to the degree it deserves. By serving his sentence it is regarded that his debt to society has been paid.⁹ If the punishment is too lenient, the accused is not "hurt", as the element of retribution has been described. In *S v Ndlovu*¹⁰ Young J said:

"The object of punishment is to hurt the accused sufficiently to prevent him from committing a similar offence."

[24] The elements of prevention or deterrence touch on both the community and the accused. The accused has to be deterred from committing a similar offence again and members of society should be made aware of the sentence imposed for this type of offence and cautioned to refrain from committing a similar offence.

[25] Finally, the rehabilitation element should be considered, namely that the possibility exists that the accused may be rehabilitated in prison and become a useful citizen after his release. The weight of this element depends on the accused person himself.

⁹ Du Toit 'Straf in Suid Afrika, 1st ed. Page 108

¹⁰ *S v Ndlovu* 1969 (2) SA 23 (R)

[26] The offence that the accused has been found guilty of is serious. The offence was perpetrated in a most brutal manner. The accused person showed no mercy or empathy for his wife, the very same mercy and empathy that he pleads for today.

Submission by the Crown

[27] The Crown submitted that the court must follow the law as laid down by the Supreme Court in *Moses Muzi Lukhele v Rex*¹¹ where the court put the appropriate range of sentencing for attempted murder to be between five years and fifteen years. In paragraph 25 of its judgment, the Supreme Court stated as follows:

'There were also aggravating circumstances in this case which justified the imposition of a custodial sentence. Attempted murder is a serious offence as it contains an element of intention to murder. The appropriate range of sentences for this type of offence is between five (5) and fifteen (15) years (my emphasis).

[28] It is in the *Moses Muzi Lukhele* matter that the Supreme court emphasized that in terms of section 313 (1) of the Criminal Procedure and Evidence Act 1938, sentences for attempted murder cannot be postponed or suspended. Section 313 (1) of the Criminal Procedure and Evidence Act, 1938 states as follows-

'Powers as to postponement and suspension of sentences

313 (1) 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, the court may in its discretion postpone for a period not exceeding three years the passing of sentence and release the offender on one or more conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as it may order to be inserted in recognizance to appear at the expiry of such period, and if at the end of such period of the offender has observed all the conditions of such recognisances, it may discharge him without passing sentence.'

¹¹ (21/2014) (2014) SZSC 55 (3rd December 2014) at para 25

[29] In the *Moses Muzi Lukhele* matter, the Supreme Court stated that it was inappropriate in that case for a court to impose a fine because the attempted murder therein was of a serious nature. I do not read this to mean that the Supreme Court was making a blanket ban of the imposition of a fine in appropriate cases, and this, in my view is a question of fact.

[30] It was submitted by Mr Phakathi for the Crown that the court should not impose an option of a fine in this matter because the attempted murder herein is on the serious end of the scale. I cannot agree more with this submission. The nature of the injuries sustained by the complainant were grave and she walks around with a bullet in her body because of the shooting by her husband. The complainant spent eight days in hospital as a result of the injuries inflicted on her by the accused. Having shot the complainant and as she was writhing in pain, her phone rang and it was her mother calling her. The accused was in possession of complainant's phone at the time. He calmly asked the complainant if she wanted to bid her mother good bye. He did not offer help to her injured wife at the time.

[31] The escalating number of violent crimes in our country can only be effectively condemned by courts of law through the imposition of effectively deterrent and retributive sentences. In *S v Mhlakaza and Another*¹² Hams JA stated the following in regards to the effect of violent crimes and the objectives of punishment:

"Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence. Retribution may even be decisive."¹³

¹² *S v Mhlakaza and Another* at 519d

¹³ *S v Nkwanyana and Others* 1990 (4) SA 735 (A) at 749 C-D

Inter ests of the community & gravity of the crime

[32] Families within the community deserve to live in a better world than this. A world in which married people can iron out their differences without resort to violence. A world in which there is peace in the homes.

[33] Attempted murder is a serious and prevalent crime in our country. The accused shot his wife with a firearm not once but twice, at close range on delicate parts of the human anatomy. He shot and injured someone he ought to love and protect. He shot an unarmed and defenceless woman. This cannot be countenanced.

[34] I am of the view that considering the callousness and brutality in which the crime was committed, it would be inappropriate for this court to impose a fine in this matter.

[35] Having considered all the aspects above, the following sentence is imp used:
The accused is sentenced to seven (7) years imprisonment without the option of a fine. The sentence will take into account the period of one night which the accused spent in pre-trial incarceration.

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JUDGE OF THE HIGH

For the Crown: COURT

For the Defence: Mr S.

Phakathi Mr

O. Nzima