

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CRIMINAL CASE NO. 383/2011

In the matter between

REX

V

ALLEN BETRAM STEWART

Neutral citation: *Rex v Allen Betram Stewart (383/11) [2023] SZHC 05 [2023]*
(31st January 2023).

Coram : Tshabalala J

Heard : 31/01/23

Delivered : 10/02/23

**JUDGMENT
ON
SENTENCE**

[1] It is common cause that the offender was convicted of attempted murder on the 31 January 2023. In mitigation of sentence the court was informed by his attorney that he is a first offender, he has a wife who is unemployed

and five children, three of who are still in school. His family is fully dependent on him. He is diabetic with type 2 diabetes mellitus. Immediately after the shooting he drove himself to the police to report the shooting, and cooperated with the police.

- [2] Defence counsel implored the court to consider in offender's favour that he did not simply attack the complainant, but that there had been a commotion the day before and at the gravesite where the offender's brother was buried. It is common cause that the complainant had been requested the previous day to excuse himself and let the offender's family to bury their loved one without his involvement, nonetheless the complainant decided to show up again in the morning.
- [3] Counsel has submitted in written submissions that the circumstances of the case warrant a fully suspended sentence. The submission is a departure from the initial oral submission that the offender be given an option to pay a fine, which prompted the court to require counsel to furnish authorities in support thereof.
- [4] In arriving at the appropriate sentence, I take account of the triad, that is, the personal circumstances of the accused as narrated to the court, the interests of society as well as the seriousness and prevalence of the offences of attempted murder in this jurisdiction.
- [5] The court takes into account in favour of the offender that he is a first offender, with a family that depends on him for support. Also taken into account is all the circumstances of this case, and as highlighted by counsel for the offender, which may indicate presence of element of provocation

on the part of the offender. That is one aspect of the triad that the court is obliged to consider.

[6] The court must also consider the seriousness of the offence of attempted murder. There can never be justification to attempt to take another's life for mere misunderstanding between the parties. Society frowns on loss of life of a citizen at the hands of another citizen. An attempt on life is viewed by society with similar disdain and wish to see perpetrators punished accordingly.

[7] Before arriving at appropriate sentence, I had opportunity to see sentencing trends as reflected in some of attempted murder cases handed down in our jurisdiction. I am also indebted to counsel for the defence for providing a useful, informative catalogue in that regard.

[8] In the case of *Rex v Xaba*¹ MCB Maphalala as he then was, referred to *Rex v. Bongwa Mcondisi Dlamini*² wherein he reviewed the following cases on sentencing in Attempted Murder, and had this to say, At para 68-72:

"68. ...I would like to state that the range of sentences in cases of Attempted Murder is three years for the less serious cases up to ten years for the more serious cases.

69. In the case of *Siboniso Sandile Mabuza v. Rex Criminal Appeal No. 1/2007*, the Supreme Court of Swaziland confirmed a sentence of three years in respect of each of the

¹Criminal case No: 93/2013.

² Criminal Case No. 102/2008.

two counts of Attempted Murder; and, the appellant had to serve a total of six years imprisonment.

70. In the case of **Mduduzi Mkhwanazi v. Rex** Criminal Appeal No. 3/2006, the Supreme Court confirmed a sentence of seven years imprisonment for Attempted Murder.

71. In the case of **Delisa Tsela v. Rex** Criminal Appeal No. 11/2010 the Supreme Court of Swaziland confirmed a sentence of seven years imprisonment with two years suspended for three years on condition that the appellant was not convicted of an offence involving violence during the period of suspension. With due respect, section 313 of the Criminal Procedure and Evidence Act precludes a suspended sentence in offences mentioned in the Third Schedule: Murder, Rape and Robbery and any conspiracy, incitement or attempt to commit any of these offences cannot be a subject of a suspended sentence.

72. In the case of **Gerald Mvemve Valthof v. Rex** Criminal Appeal No. 5/2010, the Supreme Court reduced a sentence of Attempted Murder from fifteen years to ten years imprisonment. Certainly this was a serious case of Attempted Murder where the appellant had attempted to kill his wife. In addition he was convicted of the murder of his two children; however, I will not deal with this aspect." [Emphasis added]

[9] Section 313 of the Criminal Procedure and Evidence Act No. 67/1938 as amended is relevant for the purpose of sentencing; and, it precludes this

court from imposing a suspended sentence in respect of offences listed in the Third Schedule of the Act being Murder, Rape, Robbery and any conspiracy, incitement or attempt to commit these offences. Section 313 provides the following:

"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 recognisances to appear at the expiry of such period, and if at the end of such period the offender has observed all the conditions of such recognisances, it may discharge him without passing any sentence."

[Emphasis added]

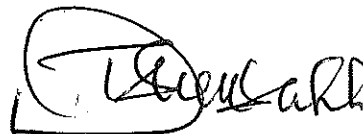
- [10] This court shares the view that overall circumstances of the case *in casu* warrant a minimum sentence per the spectrum referred to above. In a recent case of *Rex v Victoria Shongwe*³ this court was faced with a case of attempted murder which presented circumstances that warranted a lenient sentence for the convicted offender. The court in that case referred to constraints imposed by the provisions of the said Section 313 (1) of the Criminal Procedure and Evidence Act, which precludes courts from suspending any portion of sentence in such matters. It has not been shown to this court or even suggested existence of interpretation of this

³ (132/12) [2012] SZHC 79 [2022] (05 May 2022).

section which gives the courts the leeway or discretion to suspend portion of sentence in attempted matter cases.

[11] In the case of *Rex v Khulekani Mkhombe*⁴ the high court invoked the provisions of Section 29 of the Constitution of 2005 on the protection of the rights of a child, in making a distinction, and ruled that the provisions of Section 313(1) of the CP&EA were not applicable to the case before it, which involved a 17-year-old convicted offender.

[12] The court finds that a sentence of three years imprisonment is appropriate. The offender is accordingly sentence to three years imprisonment.



D Tshabalala

Judge

For Crown : K Mngometulu
For Defence: S Gumedze

⁴ Crim case No. 82/09.