

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 311/2023

In Matter between:

COLANI GININDZA

1ST APPELLANT

CELUCOLO SHABANGU

2ND APPELLANT

And

REX

RESPONDENT

Neutral citation: *Colani Ginindza and Celucolo Shabangu v
Rex (311/2023) SZHC 240 [2023] (24.08.2023)*

CORUM: Makhanya A. J

Date heard: 15.08.2023

Date delivered: 24.08.2023

JUDGMENT

INTRODUCTION

- [1] The appellants were charged with assault with intent to do grievous bodily harm at Pigg's Peak Magistrate Court. They were both unrepresented at the trial.
- [2] On arraignment, they pleaded guilty to the charge. The prosecution led the evidence of only one witness to prove the commission of the offence. The medical report of the complainant was entered by consent.
- [3] The Appellants led their evidence under oath and they did not call any witness.
- [4] The Learned Magistrate convicted them as charged. They were both sentenced to 5 (five) years imprisonment without an option of a fine.

FACTUAL BACKGROUND

- [5] A summary of the material facts on which the Appellants were convicted. The offence was alleged to have occurred on the 21st April, 2019, at Mpofu area in the Hhohho region.
- [6] First Appellant's evidence is to the effect that the complainant had been accusing him of having taken his girlfriend.
- [7] He detailed before the court *aquo* all the incidents that led them being charged of assaulting the complainant.
- [8] In the month of January, 2018, both the 1st Appellant and the complainant were seated at the back of a bakkie which was in motion. Complainant pushed 1st Appellant who almost fell on the ground and the motor vehicle had to be stopped. Complainant was moved to seat with the driver.
- [9] On another incident, 1st Appellant had bought his 5L of marula ^{or} ~~beers~~ at a certain homestead. There were other people who were drinking including his uncles.
- [10] The complainant came to him. He asked him to give him the marula beer. 1st Appellant gave complainant, complainant then dispossessed 1st Appellant saying "kute buganu lobunatfwa boTsekwane"

- [11] 1st Appellant wanted to go home as a result of his marula been dispossessed by complainant and it was already around 1900hrs. Complainant saw him, he picked up an empty bottle 330 ml and hit 1st appellant on the head and he fell down. When 1st appellant rose from the ground, complainant attacked him with fists.
- [12] 1st Appellant went to report to his grandmother the assault, complainant attacked him before he could report, and he told 1st Appellant that no one was going to sleep.
- [13] 1st Appellant was leaving the homestead. Complainant attacked him again with a baton and assaulted him. They moved to the graveyard, 1st Appellant still being assaulted by the complainant.
- [14] One Thulile Ngcamphalala happened to pass by, he saw complainant assaulting 1st Appellant, he warned him that he might kill him and be arrested.
- [15] 1st appellant proceeded home to sleep as he had injuries. In the following morning, the complainant's mother saw him and she apologised. She offered to give him some money for medication. She also pleaded with him not to report the complainant to the police.
- [16] 1st Appellant left the country and proceeded to South Africa where he was treated and remained there for some time.
- [17] The 1st Appellant had returned from South Africa, on the 20th April, 2019, he was at his grandmother's homestead seated under a tree in the afternoon. He saw complainant approaching the homestead. He had a bush knife in his possession.
- [18] Complainant proceeded to the house where his grandmother was. 1st Appellant enquired from the complainant what he wanted from the house, complainant responded by saying, he can't talk to "bomaplazana"
- [19] On the 21st April, 2019, 2nd Appellant, his mother, Mdumiseni Shabangu and Sipho Shabangu all proceeded to the complainant's parental homestead to lodge a complain about complainant's treatment of the 1st Appellant.
- [20] Complainant was not found home. His parents apologised to the 1st Appellant's family.

- [21] In the afternoon of the 21st April, 2019, both Appellants went to the veld to look for the family cattle. They did not find them but they met a certain boy who told them that he has seen a cow between the homesteads.
- [22] Appellants proceeded to look for a bull. They were walking between the homesteads, they met the complainant who was in the company of Mthuntun.
- [23] Complainant uttered the words "The child of a witch must move out of my way" refer to page 14 paragraph 3 of the record of proceedings.
- [24] The Appellants moved out of the path but complainant came on their side. When they tried to move away, he came to them. He (complainant) started hitting 1st Appellant. 1st Appellant and then complainant started wrestling with each other. The 2nd Appellant tried to separate them but complainant hit him too.
- [25] 2nd Appellant, joined the fight and they assaulted the complainant. They went home to report the incident. Both Appellant were subsequently arrested.
- [26] The Medical Report relating to the complainant was entered by consent.
- [27] The Appellants are aggrieved by the sentence which was imposed on them by the court *aquo*.

GROUND OF APPEAL

- [28] It has been contended by the Counsel for the Appellants that the court *aquo* should have afforded them an opportunity to pay a fine.
- [29] The second ground is that the sentence is too harsh.
- [30] The third ground, is that the trial court did not back date their sentence.
- [31] It was contended that Appellants were first offenders.
- [32] Counsel for respondent conceded that the sentence was harsh.

The Applicable Law

The Appellants want this court to interfere with the court *aquo's* discretion.

- [33] In the case of **Ndukuzempi Mlotso v Rex (11/2014) paragraph 8, M.C.B Maphalala** (as he then was) had this to say:

"It is trite Law that the imposition of sentence lies within the discretion of the trial court, and, that an Appellate Court will only interfere with such sentence if there has been a material misdirection resulting in a failure or miscarriage of justice. The Appellant bears the onus to satisfy the court that the sentence is harsh and excessive to the extent that it induces a sense of shock. Similarly, the Appellant bears the onus to satisfy the court that there has been a material misdirection by the trial court resulting in a failure of justice which in turn warrants interference by the Appellate Court in the interest of justice. This court has followed and applied this principle in determining appeals on sentence for a very long time, over the years."

- [34] The Learned Magistrate stated that he took into account the personal circumstances of the Appellants, that they pleaded guilty which show remorse on the part of the Appellants.
- [35] It also took into account that they are both married. 1st Appellant's wife left him after his arrest and that he has two (2) children. The 2nd Appellant has three (3) children and his wife is unemployed. He is the breadwinner and also takes care of his brother who was involved in an accident.
- [36] The trial court stated that the offence was very serious and such cases are prevalent in the jurisdiction. The Appellants showed remorse by pleading guilty but that did not ameliorate the seriousness of the offence.
- [37] In my view the court *aquo*, overlooked the fact that the complainant has been the aggressor on several occasions including the day of the incident.
- [38] It is trite that punishment should fit the criminal as well as the crime, be fair to the accused, and to society and be blended with a measure of mercy. In **S v V 1972 SA BII at b14 D-E Holmes JA** emphasized that the element of mercy and enlightened administration, should not be overlooked. He added that mercy was an element of justice and referred with approval to *S v Harrison 1970 (3) SA 684 (A)* where the Learned Judge had said; "justice must be done, but mercy, not a sledge hammer, is its concomitant"
- [39] The trial court was deprived of the true facts of the incident. The only version that was presented before the court was that of the Appellants. The crown should have called the said Mthuntun who was in the company

of the complainant to assist the court, refer to page 14, paragraph 3 of record of proceedings.

[40] The Appellants were remorseful throughout the trial. They immediately reported the incident to their mother and they did not waste the court time.

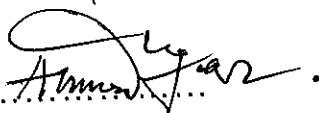
[41] In the case of **Philile Dlamini and Another v Senior Magistrate N.O (Nhlangano) and another (4345/07)**, the court stated;

"As a general rule in this jurisdiction first offenders should normally be afforded an opportunity to pay or fine. The fine imposed must also be within the capacity of the offender to pay. This is a salutary-rule aimed at giving first offenders the chance not to go to jail and be contaminated by hardened and serious offenders one recidivists"

[42] In the instant case the Learned Magistrate committed a misdirection by failing to consider the factor that complainant was the aggressor throughout. See the case of **Sifiso Ndwandwe v Rex Criminal Appeal case no.05/2012**.

[43] Accordingly, the decision of the court *aquo* is substituted with the following:

1. The sentence of five (5) years imprisonment is confirmed.
2. Appellants are to pay each an option of a fine of E 5 000.00 (Five Thousand Emalangeni)
3. The sentence is backdated to the 22.04.2019 the date of their arrest.

4.


A.Makhanya

Acting Judge of the High Court

Appearances:

For the Appellants – S. Zwane

For the Respondent – M. Dlamini