

IN THE COURT OF APPEAL OF SWAZILAND

CRIMINAL APPEAL NO.15/2005

In the matter between:

JABULANE JAMES MASHABA

APPELLANT

AND

THE KING

RESPONDENT

CORAM

LEON JP

TEBBUTT JA

ZIETSMAN JA

FOR APPELLANT

IN PERSON

FOR RESPONDENT

MR. P. DLAMINI

JUDGMENT

Tebbutt JA

Following a plea in the High Court of guilty to a charge of attempted murder the appellant was sentenced by Maphalala J to nine years imprisonment. He appeals to this Court against the severity of the sentence.

At the trial there was a Statement of Facts as agreed between the Crown and the appellant. These set out that the appellant and the complainant had been lovers for some time. They had a 10 year old child and had lived together for more than six years prior to the events giving rise to the charge against the appellant. On the day preceding the events, which took place on 20 January 2003, the complainant did not sleep at home but returned the following day. This caused a serious argument between the parties during which the complainant made derogatory remarks about the appellant's manhood. The agreed Statement of Facts as read out in court then goes on to state:

"The accused person drew out a pistol and shot the complainant two times."

The appellant then went on the run and was arrested only four weeks later. On his arrest he got shot in the buttocks by the police officers. It was also agreed that while he was on the run the appellant called and apologized to the complainant for what had happened which the complainant appears to have accepted, for she visited him at the Zakhele Remand Centre, where he was being held, and did his laundry for him.

In sentencing the appellant the learned trial Judge said this:-

"This is a very serious case where the accused used a dangerous weapon on a defenceless woman who happened to be his live-in-lover. There is no justification at all on the part of the accused to use such a weapon. He not only shot her once but three times. The injuries on the complainant as described in the medical report are of a serious nature and it is a miracle that she survived the assault. No amount of provocation would justify this shooting."

He added:-

"This in my view is a very serious case of attempted murder at the extreme end of the band of attempted murder cases."

The medical report refers to wounds on the right hand, with a fracture of one of the bones of the hand and two wounds on the left upper arm. It does not reflect that the latter were caused by gunshots. There was also an unexplained laceration on the complainant's head above the right ear. The wounds do not show how many shots were fired and the agreed facts were that there were only two.

The trial court's finding that the appellant shot at the complainant three times was not borne out by the evidence and was a misdirection. That it was "a miracle that she survived the assault" is also an overstatement. The learned trial Judge also did not advert to the fact that the parties had apparently become reconciled. These factors, too, were misdirections.

This Court is therefore entitled to set aside the trial court's sentence and is at large to impose such sentence as it sees fit.

The learned trial Judge stated that the interests of society included the protection of women from spousal violence and that the Court's sentence should reflect this trend. With that view I entirely agree. However, even bearing that in mind, I am of the view that taking all the factors in this case into consideration a sentence of nine years imprisonment is not an appropriate one and that one of seven years imprisonment would meet all the circumstances present here.

The appeal is therefore allowed and the following order is made:

1 The conviction is confirmed.

The sentence of nine years imprisonment is set aside and there is substituted therefor a sentence of seven years imprisonment, backdated to 14th February 2003.

P.H. TEBBUTT

Judge of Appeal

I AGREE

R.N. LEON

Judge of Appeal

I AGREE

N.W. ZIETSMAN

Judge of Appeal

DELIVERED IN OPEN COURT THIS DAY OF NOVEMBER 2005.