IN THE SUPREME COURT OF APPEAL OF SWAZILAND

CRIMINAL APPEAL NO. 3/2006

In the matter between:

MDUDUZI MKHWANAZI

V

REX

Coram: Banda JA
Ramodibedi JA
Magid AJA

FOR THE APPELLANT : Mr. Dlamini
FOR THE RESPONDENT : Mr. Makhanya

JUDGMENT

Banda JA

The appellant was convicted by the High Court sitting at Mbabane on his own plea of guilty to two counts of attempted murder. After due mitigation was made the learned trial judge sentenced the appellant to a term of imprisonment of what we consider to be seven (7) years on each count to run concurrently. We make this observation on the sentence because of the ambiguous manner in which the learned trial judge pronounced it. We quote below what the learned trial judge said when he pronounced the sentence -

> "*In the result, for the above-cited reasons, the two counts are treated as one for the purposes of sentence and the accused is sentenced to 7 years in respect of each count and further that the sentence is back dated to the date of arrest - being 6th August, 2004*".

It was not clear to us if the sentences were intended to run consecutively or concurrently. We have assumed that the intention was to make them run concurrently.

After the appellant pleaded guilty to the two counts learned counsel for the crown informed the court that he had accepted the two pleas of guilty and that a Statement of Agreed facts had been prepared and was read as part of the record. The appellant confirmed the correctness of that statement. The appellant now appeals to this court against both his conviction and sentence.

The Statement of Agreed facts, as submitted to the trial court, is as follows: -

> "*It is agreed that on the 1st August 2004 at Mathendele location in Nhlangano, accused came to the house which was occupied by Bongani Mkhwanazi PW1 who is complainant in count 1, and Thumane Shongwe PW5 who is complainant in count 2 according to the indictment.*
>
> *1. The said house is a family house and accused is a brother to Bongani Mkhwanazi.*

2. Accused first knocked at the door but no one opened for him. He then went to collect a crow bar from the tool room, in order to open the door but he failed. He again went to the tool room to collect an axe which he then used to chop the dining room door and it opened.

3. When accused was about to enter into the sitting room, the lights went off and he then lit a paper and he entered.

4. After accused had entered into the sitting room, Bongani Mkhwanazi came to him and an argument ensured. At that time Bongani Mkhwanazi had a spear with him and accused ordered him to put it down and he did so.

5. Accused then took the spear from the floor and he stabbed Bongani

Mkhwanazi twice on the chest. At that moment Thumane Shongwe had joined in the fight and she was injured on the forehead and left posterior chest.

6. Bongani Mkhwanazi and Thumane Shongwe ran out of the house to raise an alarm and police were called to the scene and they were both taken to Nhlangano health centre where they were treated and discharged on the same day.

7. Then on the &h August 2004, accused handed himself to the Nhlangano police regarding this matter and he was then arrested.

8. Accused has been in custody since the day of his arrest.

9. Accused agrees that his actions were unlawful in the circumstances.

Learned Counsel for the Crown informed the trial court that the Statement of Agreed facts covered both counts in the indictment.

The appellant was not represented at his trial but he is now represented in this court by Mr. D.S. Dlamini. In the notice of appeal the appellant filed a number of grounds which compendiously attacked his conviction on the general ground that it could not be supported having regard to the facts and materials which were adduced at his trial.

However, in the Heads of Argument which learned counsel for the appellant filed Mr. Dlamini took issue with the appellant's conviction by contending that the conviction against the appellant could not be sustained because all the elements of the offence of attempted murder had not been proved beyond a reasonable doubt. He contended that the Statement of Agreed facts which was signed by the appellant and the Crown did not contain sufficient grounds or facts to support the conviction against the appellant. He submitted that it was not proved from the statements of facts how the appellant could be said to have had the necessary intent to kill the victims. Mr. Dlamini cited some materials which he contended were not part of the agreed facts. It was also Mr. Dlamini's contention that it was improper and highly prejudicial for the learned trial judge to have accepted the medical report as part of the material facts in the case. He submitted that it was not clear whether the person who submitted the report was the same person who conducted the examination on the victims.

Mr. Dlamini further submitted that it was improper to have convicted the appellant without leading any evidence. He submitted that by refusing to direct the crown to lead evidence inspite of the pleas of guilty by the appellant was a serious misdirection by the learned trial judge as it was a direct contravention of the provisions of Section 238 (1) of the Criminal Procedure and Evidence Act. On sentence Mr. Dlamini submitted that a sentence of seven (7) years was excessively harsh and contended that a sentence of not more than two (2) years would have been sufficient in the circumstances of this case.

Mr. Makhanya, Senior Crown Counsel appeared for the Crown and submitted that the learned trial judge did not err in law and in fact when he convicted the appellant on the two counts of attempted murder. He argued that since

the appellant was not charged with the offence of murder the learned trial judge correctly followed the provisions of Section 238 (1) of the Criminal Procedure and Evidence Act as interpreted by this court in the case of **WILLIAM TOUCH DLAMINI v R** (unreported) Criminal Appeal No. 22/2002. Mr. Makhanya further argued that the appellant cannot now be heard to state that the Statement of Agreed facts does not justify the conviction when he had already accepted and confirmed them. On sentence Mr. Makhanya has submitted that a term of imprisonment of seven (7) years imprisonment for attempted murder cannot be described as excessive.

We have carefully considered the arguments canvassed before us by both learned counsel for the Crown and learned counsel for the appellant. We would like to commend Mr. Dlamini for the determined and forceful manner in which he argued the appeal for the appellant. We have also reviewed the facts and all the materials which were before the trial court. An appeal to this court from the High Court in its original jurisdiction comes by way of rehearing. We must therefore review all the evidence which was placed before the trial court; carefully weighing and considering all the materials and we must then make up our mind not disregarding the judgment appealed from but carefully weighing and considering it. We must however, not shrink from overuling it if on full consideration we come to the conclusion that it was wrong. As we have already observed earlier in this judgment the appellant pleaded guilty to two counts of attempted murder; a Statement of Agreed facts was admitted as part of the record and the appellant confirmed the accuracy of those facts. We are satisfied and find that the learned trial judge properly directed himself on the provisions of Section 238 (1) of the Criminal Procedure and Evidence Act. The provisions of that Section provide in the following terms -

> *Section 238 (I) "If a person arraigned before any court upon any charge has pleaded guilty to such charge, or has pleaded guilty to having committed any offence (of which he might be found guilty on the indictment or summons) other than the offence which he is charged, and the prosecutor has accepted such plea, the court may, if it is;*
>
> (a) *the High Court or Principal Magistrates Court and the accused has pleaded guilty to any offence other than murder, sentence him for*

such offence without hearing any evidence or

(b) *a magistrates court other than a Principal Magistrates' court, sentence him for the offence to which he has pleaded guilty upon proof (other than the unconfirmed evidence of the accused) that such offence was actually committed:*

Provided that if the offence to which he has pleaded guilty is such that the court is of the opinion that such offence does not merit punishment of imprisonment without the option of a fine or whipping or a fine exceeding two thousand Emalangeni; it may, if the prosecutor does not tender evidence of the commission of such offence, convict the accused of such offence upon his plea of guilty, without other proof of commission of such offence, and thereupon impose any competent sentence other than imprisonment or any other form of detention without the option of a fine or whipping or a fine exceeding two thousand Emalangeni, or it may deal with him otherwise in accordance with the law"

Mr. Dlamini had intimated during his argument that he would endeavour to distinguish the present case from WILLIAM TOUCH DLAMINI Case. No such attempt was made but indeed even if such attempt had been made it would not have succeeded. We are doubly satisfied that William Touch Dlamini case correctly interpreted the provisions of Section 238 (1) of the Criminal Procedure and Evidence Act. We hold as the Dlamini case did that "the contents of the Statement of Agreed facts are sufficient to constitute a compliance with the provision of Section 238 (1) of the Criminal Procedure and Evidence Act". In our view that finding is further reinforced by the provisions of Section 272 (1) of the Criminal Procedure and Evidence Act which provides in the following terms -

"*In any Criminal proceedings the accused or his representative may*

admit any fact relevant to the issue and any such admission ***shall be sufficient evidence of that fact*****"**

It could not be any clearer than that!

There can be no doubt, in our judgment, that by using a spear and aiming it, as he did, at the chest of the victim in the first count the appellant had the necessary intention to kill or at least to cause serious injury. The conviction on the first count was therefore, properly grounded. This was a case in which the appellant pleaded guilty and the Crown had a duty to adduce facts that would support the charges brought against the appellant. It was necessary to produce the medical report to prove the injuries inflicted and in any event the medical report was admissible under Section 221 (1) of the Criminal Procedure and Evidence Act. There was no request made for the attendance, at the trial, of the person who signed the report. We can find no merit in the objection raised by Mr. Dlamini to the medical report. However, we are not satisfied that there was sufficient evidence to support the conviction on the second count. There is no evidence to show that it was the appellant who inflicted the injuries on the victim in the second count and learned counsel for the Crown has quite properly, in our view, conceded this point. Consequently the conviction on the second count cannot be supported.

We have considered the sentence imposed with care. As always sentence is a matter for the discretion of the trial judge. We are satisfied that the learned trial judge properly directed himself on the relevant factors to consider before he imposed the sentence. We are unable to say that a sentence of seven (7) years imprisonment was manifestly excessive nor can we say that it is a sentence which comes to us with any sense of shock.

In the result the appeal on the first count is dismissed but is allowed on the second count.

Accordingly the appellant is found not guilty on the second count and is acquitted. The appeal against sentence is dismissed in its entirety. The appeal only succeeds to the limited extent shown in this judgment.

BANDA – JA

I agree

RAMODIBEDI – JA

I agree

MAGID AJA

Delivered on day of May, 2006.