



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 21/2014

In the matter between:

MOSES MUZI LUKHELE

APPELLANT

And

REX

RESPONDENT

Neutral Citation: *Moses Muzi Lukhele v Rex (21/2014) [2014] SZSC 55*
(03rd December 2014)

Coram: MOORE JA, OTA JA and DR. ODOKI JA

Heard: 05 NOVEMBER 2014

Delivered: 03 DECEMBER 2014

Summary

Criminal Procedure – Appeal against sentence – Appellant sentenced to five years imprisonment on each of two counts of Attempted Murder and five years for Unlawful Possession of a firearm contrary to Section 11 (8) of the Arms and Ammunition Act as amended by Act 24/1964 – All sentences ordered to run concurrently – The sentence not backdated to take into account period spent in custody – Whether option of fine appropriate – no material Misdirection or irregularly by court a quo established – Sentence not harsh or excessive as to induce sense of shock – Appeal dismissed.

JUDGMENT

DR B. J. ODOKI, JA

[1] This is an appeal against sentence only.

[2] The Appellant was convicted on two counts of Attempted Murder and sentenced to five (5) years imprisonment on each count. He was also convicted on the third count of Unlawful Possession of a firearm contrary to Section 11 (1) of the Arms and Ammunition No. 24/1964. On each of the three counts the Appellant was sentenced to five years imprisonment without an option of a fine, all the sentences to run concurrently.

- [3] The Appellant has appealed to this Court against the sentence. The first ground of appeal is that the trial judge erred in law by not giving him an option of a fine. The second ground is that the trial judge did not backdate his sentence to take into account the period he spent in custody pending trial.
- [4] Before I consider the grounds of appeal it is necessary to outline the facts of the case as they have a bearing on the appropriateness of the sentence.
- [5] The Appellant was a builder. He was employed by a Mrs. Khumalo to construct a house at her premises, and Linda Simelane was assisting him. Subsequently Khumalo stopped the Appellant from constructing the house because he seldom came to work as he was busy constructing other houses. Linda and Bongani Sibandze, who was staying at Khumalo's premises, proceeded with the construction and completed the two-bedroom house.
- [6] Later the appellant came to the Khumalo homestead allegedly to collect his construction tools and wondered who had built the house in his absence. The Appellant blamed Bongani for driving a wedge between him and Khumalo which led to the termination of his construction

contract with her. The Appellant also blamed Linda for using his construction equipment during the building of the house.

[7] The Appellant asked Linda and Bongani to go into the shack house where Bongani was staying. A confrontation ensued between the appellant and Linda with Bongani which ended up in the Appellant shooting both of them with a pistol. Linda closed the door to the shack house and the Appellant was locked out, but the Appellant continued shooting through the door. The police found eight empty cartridges at the scene.

[8] Linda managed to open the door and run away to the neighbours for assistance. The police came and took Linda and Bongani who had been seriously injured to hospital for treatment.

[9] Bongani sustained gunshot wounds on the left side of his face, and on the left leg which caused fracture of the left distal fibula. Linda sustained gunshot wounds on the abdomen, on the left elbow, on the left shoulder and on the left thigh leading to compound fracture of the left distal humerus. A bullet is still lodged in his thigh.

- [10] The Appellant surrendered himself to the police. He claimed that he shot the two victims in self defence. He admitted the shooting and stated the he had left the victims for dead.
- [11] In his application for appeal, the Appellant appeals against the sentence only and he accepts his convictions for attempted murder and for unlawful possession of a firearm.
- [12] The Appellant prays that his five (5) year sentence be backdated for one year from 6th February 2013 as he was convicted and sentenced on the 3rd April 2014. He also prays that the court gives him an option of a fine.
- [13] The reasons the Appellant advances for reduction of his sentence are that he has a wife and eight (8) children to take care of and two of the children are school going. He says that his wife is diabetic and unemployed and his incarceration is causing them severe suffering. So he needs to go home as soon as possible. He states that he is self-employed and has six workers whom he employs. Lastly, he states that he is a disabled person as he uses an artificial foot, and he needs medical check up to fix his foot.

[14] Counsel for the Respondent conceded that the Appellant's sentence should have been backdated to 6th February 2013 to give effect to Section 16 (9) of the Constitution of Swaziland. He relied on the decision of this Court in ***Delisa Tsela v R Civil Appeal No. 11/2010***.

[15] With regard to the request by the Applicant that the court *a quo* should have granted him an option of a fine, Counsel for the Respondent submitted that the imposition of sentence lies within the discretion of the trial court. He contended that an Appellate court will interfere with a sentence only if there has been a material misdirection resulting in a miscarriage of justice or where there is a striking disparity between the sentence passed by the trial court and the sentence which the Appellate court would have passed. He referred us to the decision in ***Thwala v R 1970 – 1976 SLR 363***. Counsel argued that the Appellant has not discharged his duty to satisfy the court that the sentence is grossly harsh or excessive or that it induces a sense of shock, so as to warrant interference, in the interest of justice.

[16] Counsel submitted further that some of the personal circumstances of the Appellant that were raised were not considered by the trial court because they were not raised there. It was counsel's contention that an Appellant

cannot raise new facts on appeal which were known to the Applicant during the trial, but he failed to bring them up.

[17] Counsel for the Respondent further argued that the appropriate punishment for the offence of attempted murder is a custodial sentence between five (5) years to fifteen (15) years as stated by Agim JA in ***Bhekizwe Motsa v R Criminal Appeal No. 37/2012 [201] SZSCS 6.***

[18] Finally, learned counsel submitted that the trial judge blended justice with mercy when he ordered the sentences on three counts to run concurrently, which means that the Applicant will serve only five (5) years. It was his contention that giving the Appellant an option of fine would render the sentence too lenient and inappropriate.

[19] In sentencing the appellant the trial judge ordered that the four (4) months Appellant spent in custody be taken into account in computing the period of imprisonment. The Respondent conceded that the court *a quo* erred in backdating the period spent in custody to four months only instead of backdating the period to run from 6th February 2013 to comply with the provisions of the Constitution.

[20] The Appellant was sentenced on 4th April 2014 and he was remanded into custody on 6th February 2013. The Appellant therefore spent about fourteen (14) months in custody. It may well be that there was a typographical error in the judgment which stated a period of 4 instead of 14 months. This was clearly a misdirection or irregularly which caused a miscarriage of justice. Therefore the Applicant's complaint on this ground has merit and is allowed. It is ordered that the Applicant's sentence be backdated to 6th February 2013.

[21] As regards the complaint that the court *a quo* erred in not giving the Applicant an option of a fine, the court has to decide whether the learned trial judge in the court *a quo* addressed himself to the correct principles of sentencing by taking into account the circumstances of the offender, the circumstances of the offence, and the interest of society, commonly known as the triad. The Appellant has to satisfy the Court that the court *a quo* misdirected itself or committed an irregularly which caused a miscarriage of justice, or that the sentence is too harsh or severe as to induce a sense of shock.

[22] In sentencing the Appellant the trial judge took into account the following mitigating factors: that the Applicant was a first offender, that he had two

minor children and that his wife was sickly suffering from diabetic, that the Appellant was remorseful and had surrender himself to the police.

[23] However, the Appellant did not plead in mitigation that he was disabled with an artificial foot and that he needed medical treatment to fix it. Neither did the Appellant inform the court that he was self-employed and he had so many workers. Therefore it is unjustified to blame the trial court for not taking these factors into account.

[24] It is possible that the fact that the Appellant has a disability by having an artificial leg and have been considered as a mitigating factor. But it is difficult to see how the fact that the appellant is self-employed and had workers can constitute mitigating factor.

[25] 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. The Appellant without any provocation or justification attacked and fired many shoots at two innocent people at close range on suspicion that they had been responsible for the cancellation of his construction

contract. The victims sustained serious injuries which were life threatening.

[26] In his judgment the trial judge referred to the submission of the Crown Counsel that the Appellant should be given a custodial sentence consistent with Section 313 of the Criminal procedure and Evidence Act, as a deterrence to other offenders.

[27] Section 313 of the Criminal Procedure Act provides that an offence of attempted murder is one of those offences where a suspended sentence cannot be imposed. By analogy, it must be assumed that it is inappropriate for a court to impose a fine in a case of attempted murder like the present one.

[28] The Appellant is extremely lucky that the trial judge imposed three lenient sentences of five (5) years and then ordered the sentences to run concurrently. Ten years of the sentence were in a sense suspended, as the Applicant would not serve him.

[29] In conclusion, I find that the Appellant has failed to show that the trial judge materially misdirected himself or committed any irregularity which occasioned a miscarriage of justice in imposing the sentence of

imprisonment against him. The sentence of five years without an option imposed is not manifestly harsh or excessive nor does it induce a sense of shock as to justify interference by this Court. This ground of appeal lacks merit and must fail.

[30] In the result, this appeal partially succeeds. It is ordered that the Appellant's sentence be backdated from 6 February 2013. The appeal against the sentence of five (5) years imprisonment is dismissed.

DR B. J. ODOKI
JUSTICE OF APPEAL

I Agree

S. A. MOORE
JUSTICE OF APPEAL

I Agree

E. A. OTA
JUSTICE OF APPEAL

For the Appellant: In Person

For the Respondent: H. Magongo