



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 10/2014

In the matter between:

MTHABA SOLOMON SHABALALA

APPELLANT

AND

REX

RESPONDENT

Neutral Citation: *Mthaba Solomon Shabalala V. Rex (10/2014) [2015]*

SZSC 36 (29 July 2015)

Coram: SB MAPHALALA AJA, Q.M. MABUZA AJA, SA

NKOSI AJA

Heard on: 14 JULY 2015

Delivered on: 29 JULY 2015

Summary

*Criminal Procedure – Appeal against sentence – Appellant sentenced to nine years imprisonment for offence of attempted murder – Appeal on grounds that sentence is severe and harsh and imposes a sense of shock and trauma, and that court **a quo** failed to take into account personal circumstances of the appellant – No serious misdirection by court **a quo** amounting to a miscarriage of justice – However Appellant shown remorse was cooperative with police and mitigated successfully – Appeal allowed on suspension of 3 (three) years of the 9 (nine) year sentence.*

JUDGEMENT

S. A. NKOSI AJA

[1] The appellant was convicted of attempted murder and sentenced to nine (9) years imprisonment. The appellant has appealed to this court on the ground that the sentence is severe and harsh and imposes a sense of shock and trauma.

[2] In his Heads of Argument the appellant submitted that the commission of the offence was unpremeditated and it occurred on the spur of the moment. He contended that he did not intend to kill the complainant but to scare him away with the bush knife. He admitted he was reckless and pleaded that he was remorseful. He also submitted that he was not sober when he committed the offence as drunkenness had clouded his sense of judgment. He stated that he was a first offender and sole breadwinner for his family. For these reasons he appealed to the court to reduce his sentence.

[3] The appellant stated that he was the bread winner of the family and that his children had been kicked out of school for lack of school fees and that his teenage girls were getting into problems of relationships, since they had no income. He said he was drunk at the time the offence was committed, and readily admitted the offence.

[4] Counsel for the respondent supported the sentence as appropriate and submitted that the trial had properly directed itself on the law and relevant factors to consider before it imposed the sentence. It was also argued for the Respondent that the Appellant had inflicted two serious injuries on the complainant using a dangerous weapon on the critical part of the neck for a flimsy reason that the complainant had called the Appellant's son by a nickname.

[5] The brief facts of the case are that the appellant and the complainant were neighbours. The Appellant had invited members of the complainant's family to visit his home to drink amarula beer. The appellant accused the complainant of killing his chickens with a sting he had come with, but

complainant denied the accusation. The father of the complainant also objected to the accusation against his son.

[6] As the complainant left the Appellant's homestead, the Appellant followed him and hacked him with a bush knife twice on the neck, thereby inflicting a deep cut wound on the left side of the neck extending to the left ear. The Appellant handed himself to the Police, together with the bush knife.

[7] In sentencing the Appellant the trial judge stated,

“When imposing sentence I have taken into account the triad. That is the seriousness of the offence, the interest of the society as well as the personal circumstances of the accused. The range of sentences for attempted murder is three to ten years, depending on the seriousness of the injuries sustained by the complainant. See cases of REX V. MUZI DLAMINI Criminal Case No 1261/11 SIBONISO SANDILE MABUZA V. REX Criminal Appeal No. 1/2001, MDUDUZI MKHWANAZI V. REX Criminal Appeal No. 3/2006, DELISA TSELA V. REX, Criminal Appeal No. 11/2010 as well as GERALD MVEMVE V. REX Criminal Appeal No. 5/2010”.

[8] The court *a quo* also observed,

“Section 313 of the Criminal Procedure and Evidence Act precludes suspended sentences in respect of offences mentioned in the third schedule to the Act including murder, rape and robbery as well as any conspiracy incited or attempt to commit any of these offences. In the circumstances, the accused is not entitled to a suspended sentence”

[9] It is therefore clear that the trial judge was alive to the principles of sentencing particularly the need to balance the various factors which contribute to the triad.

[10] The trial judge specifically addressed himself to the personal circumstances of the Appellant when he stated:

“In mitigation of sentence the accused pleaded with the court to be lenient to him as he was a first offender and the sole breadwinner in his family. The accused is unmarried with thirteen children born outside marriage’ however he has a live-in lover. He was born in 1965, unemployed and not educated. He was arrested on 26th February 2009 and released on bail in May 2009 after paying bail”.

[11] Therefore I do not find any merit in the complaint that the trial judge did not take into account the Appellant’s personal circumstances. The defence of drunkenness was not raised at the trial, and there was no evidence to support

the claim that the Appellant's actions were induced by drunkenness. The Appellant was the host of the complainant and his family and ought to have extended to them hospitality rather than hostility.

[12] The sentence of nine years imprisonment imposed by the trial court is within the range of sentences imposed or approved by this court, which range is three to ten years.

[13] It is well settled that sentencing is a matter which is predominantly within the discretion of the trial court. An appeal court will only interfere with the sentence if there is a material misdirection or irregularity leading to a miscarriage of justice. In the instant case however the Appellant has shown what the Court has determined to be genuine remorse. He convincingly articulated his children's plight, the fact that he fully cooperated with the police after his arrest and readily did plead guilty at his trial. He is also a first offender.

[14] I accordingly find that even though the sentence of 9 (nine) years is appropriate, a portion of such sentence should have been suspended by the trial court for the aforementioned reasons.

[15] Consequently the appeal is partly allowed and the sentence of 9 (nine) years is substituted with the following order:

- That the sentence of 9 (nine) years is confirmed. However 3 (three) years of the sentence are suspended for a period of 5 (five) years provided that the Appellant is not found guilty of an offence related to the use of violence within the period of suspension.

S. A. NKOSI AJA
ACTING JUSTICE OF APPEAL

I Agree

S. B. MAPHALALA AJA

ACTING JUSTICE OF APPEAL

I Agree

Q. M. MABUZA AJA
ACTING JUSTICE OF APPEAL

For the Appellant: In Person

For the Respondent: A. Matsenjwa