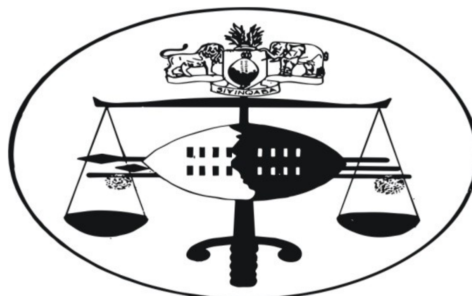

IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE APP. NO. 383/2020

In the matter between

PHUMLANI FAKUDZE Appellant

And

THE KING Respondent

Neutral Citation: *PHUMLANI FAKUDZE v THE KING (383/2020) [2020] SZHC 259 (24 November 2020)*

Coram : MAMBA J.

Heard : 20 OCTOBER 2020

Delivered : 24 NOVEMBER 2020

[1] The appellant, a 40 year old man of Emvembili area in the Hhohho Region, was convicted on 3 counts of assault with intent to cause grievous bodily harm. He was tried and convicted by the Pigg's Peak Magistrate's Court on 25 September 2020. Following his conviction, he was sentenced to a term of imprisonment for two (2)

years on each count. He was not given an option to pay a fine. Additionally, the sentences were ordered to run concurrently. The effect of this, was that he has to serve a custodial sentence of two (2) years.

[2] At the beginning of his trial the appellant was appraised of his rights to legal representation and he opted to conduct his own defence. He made his first Court appearance on 25 April 2019 where upon he was remanded into custody till the 2nd day of May 2019. On that day he was represented by Counsel who successfully applied for bail on his behalf. Bail was conditionally fixed at E2,500.00 by the presiding Magistrate.

[3] After several postponements, the matter was set down for trial in the presence of the appellant's attorney. However, when the matter was called for trial on 12 March 2020, the lawyer for the appellant was not present in Court and the matter was then stood down to allow the appellant to get in touch with his attorney. At 1130 Am, when the matter was called for the second time, still the said attorney was not present in Court and the accused pleaded with the Court to

commence his trail in the absence of his attorney. He told the Court that

> 'I cannot find my attorney. I would like the matter to proceed without my attorney. I am not employed and I have children to take care of, the more I come to Court without the matter proceeding, the more expensive it costs for me.'

The Court acceded to his plea and the trial began in the absence of the appellant's attorney.

[4] In all 3 counts, as already stated, he was accused of having assaulted the complainants with a knobstick or knobkerrie with intent to cause grievous bodily harm.

[5] On being arraigned, he pleaded guilty on all the charges.

[6] All the crimes were committed by the appellant at Msahweni area on 18 April 2019. On the first count the complainant, Ntombi Dlamini was assaulted with the knobstick 5 times; three time on her arms and two times on her back. On the second count or charge, the complainant, one Robert Dlamini was hit several times on the

forehead and both arms.' The victim on the 3rd count was Livingstone Dlamini who was assaulted four (4) times on his arms by the appellant.

[7] It is common cause that the 3 complainants were related to each other and the appellant. The appellant is married to the daughter of Ntombi Dlamini's sister. Livingstone was assaulted whilst attempting to stop the appellant from assaulting Ntombi. As a result of the assault, Livingstone sustained a broken arm and became disfigured on one of his arms. This was revealed by the x-ray prognosis at the hospital. Robert Dlamini was in turn assaulted by the appellant whilst trying to reason with him not to assault Livingstone.

[8] The appellant surrendered himself to the police, six (6) days after the said assaults.

[9] The medical reports were handed into Court by consent and the medical Doctors who compiled them were not called to testify in the trial. These reports substantially confirmed the injuries sustained by each of the complainants – as stated in the charge sheet.

[10] At the close of the case for the Crown, the appellant was duly warned of his rights and the options open to him. He chose to remain silent. Again when it was time for him to make submissions, he merely said that

> 'I admit that indeed the victims are old and I admit I was wrong. I have nothing to say.'

[11] The Learned Magistrate convicted the appellant on all 3 counts based on his own plea and on the evidence led by the Crown. The appellant has not, in this appeal, challenged his conviction. He has appealed against sentence only.

[12] In his Notice of Appeal, which was filed on his behalf by Counsel, he states that the sentence imposed on him 'induces a sense of shock and is more punitive than rehabilitative [and] the Court *a quo* erred in law when passing sentence by not considering the general rule in our jurisdiction governing the sentencing of first offenders, in that first offenders should be given an opportunity to pay a fine than a

straight custodial sentence.' He states further that the Court *a quo* erred by not stating its reasons for departing from the said general rule.

[13] I know not of any general rule in this jurisdiction which stipulates that all first offenders, regardless of the cases they have been convicted of and the gravity of such crimes, must, as a matter of law be granted an option to pay a fine. For example, it would be incorrect to suggest that a person convicted of rape or murder has a right to be given an opportunity to pay a fine, on the simple fact that he is a first offender. Each case has to be determined based on its particular and peculiar facts and circumstances.

[14] In the present appeal, the appellant violently and viciously attacked 3 elderly persons with a knob stick and inflicted on them severe injuries. He did this without provocation. The attack on Livingstone and Robert was as a result of them trying to stop the appellant from beating Ntombi Dlamini. They had a right to come to her assistance and defend her. She was their relative and the attack upon her was unlawful. The Court found as a fact that in view of *inter alia*, the weapon used, the accused had actually intended to

cause grievous bodily harm and not just a casual and superficial injury on each of his victims. The appellant has not challenged this finding either.

[15] In determining sentence the Court referred to the triad and also specifically stressed the fact that sentence or punishment must not be meted out in anger but must, whenever appropriate, be blended with mercy. The offences committed by the appellant were ‘gruesome,’ the Court held, and, were committed against unarmed and defenceless elderly persons. (I pose here to note though, that Livingstone was armed with a spear. His aim was to frighten off the appellant and cause him to cease assaulting Ntombi). He did not use the spear on the appellant.

[16] The Court *a quo* was alive to the fact that the crimes for which the appellant was convicted essentially took place at the same time. They were in essence one single transaction in the sense that the first one led to the commission of the other two charges or counts. It was no doubt with this in mind that the Learned Court ordered that the sentences must run concurrently. I can find no irregularity, fault or misdirection in this regard. An effective custodial sentence of two

years is in my judgment, appropriate in the circumstances of this case. It does not induce a sense of shock at all.

[17] For the above reasons, the appeal is dismissed.

MAMBA J

FOR THE APPLICANT:	**MR. S. GUMEDZE**
FOR THE RESPONDENT:	**(OFFICE OF THE DPP)**