



**IN THE HIGH COURT OF SWAZILAND  
JUDGMENT**

Case No. 182/2014

In the matter between:

**THE KING**

**VS**

**LUNGELLO SIBUSISO DLAMINI**

**Neutral citation:** Lungelo Sibusiso Dlamini v The King [182/2014] *SZHC 31*  
[2017] (23 February 2017)

**Coram** : **T. L. Dlamini J**

**Heard** : 17 and 18 October 2016

**Delivered** : 23 February 2017

**Summary:** *Criminal Law – Sentence – Accused convicted of attempted murder on his own plea – No part of the sentence is to be suspended in terms of section 313 of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended – Accused sentenced to three years custodial sentence – Sentence to include period while Accused was in custody.*

**JUDGMENT ON SENTENCE  
23 FEBRUARY 2017**

- [1] The Accused is charged with the offence of Attempted Murder. According to the Indictment, on or about the 27<sup>th</sup> July 2011, at or near Bantfwanyana area in the Manzini Region, the Accused did unlawfully and with intent to kill, slit the throat of Nosipho Mtsetfwa with a knife and did thereby commit the offence of Attempted Murder.
- [2] The Accused person appeared before this court on the 17<sup>th</sup> October 2016. When asked if his rights to legal representation were explained to him he answered in the affirmative. He pleaded guilty when the charge was put to him. He then mentioned that he wished to be given an attorney to represent him. He was informed by the court that in terms of the law, he can only be afforded an attorney at the expense of the state when facing a charge that carries a sentence of death or life imprisonment, which was not the case *in casu*.
- [3] The Accused was then given an opportunity to consult his father who was present in court concerning the issue of instructing an attorney. However, he informed the court that they have already discussed the issue with his

father and they cannot afford to pay for the attorney's services. He then asked that the trial should proceed.

- [4] He pleaded guilty to the charge. The crown accepted the plea and a statement of agreed facts was prepared, signed by the representative of the crown and by the Accused person. The statement was presented in court the following day. It was read to the court and the Accused confirmed it to be true. The statement read as follows:

#### **STATEMENT OF AGREED FACTS**

*“The accused is charged with the crime of **ATTEMPTED MURDER.***

*In that upon or about the 27<sup>th</sup> July 2011 and at or near Bantfwanyana area in the Manzini Region, the said accused person did unlawfully and with intent to kill, slit throat of **NOSIPHO MTSETFWA** with a knife.*

*The Accused has pleaded guilty to the charge. It is hereby agreed that:*

1.

*The Accused was a boyfriend to the complainant.*

2.

*On the 27<sup>th</sup> July 2011, the accused visited the complainant at her parental homestead, since the complainant had told him that she was*

*pregnant with his child. When the accused arrived at complainant's homestead the complainant informed the accused that the accused person is not the one who had impregnated her.*

3.

*The accused then took a knife from his pocket and slit the throat of the complainant. The accused then locked the complainant inside the house after taking some money and a Samsung E1070 cellphone that belonged to the complainant.*

4.

*Complainant was left unconscious and bleeding profusely unattended by the accused. The accused threw complainant's cellphone in a pit latrine at his parental homestead where he later freely and voluntarily led the police its (sic) recovery in the presence of independent witnesses after the pit latrine had been demolished by the Fire and Emergency Personnel in the presence of the accused.*

5.

*The complainant was rescued by passers-by after she gained consciousness in the morning and knocked on the window since she had lost her speech. The door of her house was broken down since it had been locked and she was taken to Raleigh Fitkin Memorial Hospital where she was admitted for more than a week.*

6.

*Further, complainant had to attend to an extensive counselling after the assault. Report to that effect compiled by psychiatry and Mental Health Specialist is also handed in by consent.*

*The accused admits that:*

- *He locked the complainant in her room after he had slit her throat.*
- *He had the intention to kill the complainant or at least foresaw that his conduct could result in the death of the complainant.*

*The following will be produced in evidence*

- *Medical report*
- *An opinion from Senior Medical Doctor taken from the notes that were compiled by the doctor who examined complainant as that doctor has left Swaziland.*
- *Complainant's report from the psychiatric Referral Hospital."*

[5] Attached to the statement of agreement facts is an original of Form R.S.P 88 that is completed by a doctor after having examined a patient for purposes of evidence regarding injuries sustained by the patient. Also attached is a report from the National Psychiatric Referral Hospital signed by Dr Violet Mwanjali.

[6] The statement of agreed facts constitutes a formal admission in terms of Section 272 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended (CP& E Act). The section provides as follows:

*“272, (1) In any criminal proceedings the accused or his representative in his presence may admit any fact relevant to the issue and any such admission shall be sufficient evidence of such fact”*

- [7] The Accused person was accordingly convicted of the offence on his own plea as contemplated in terms of Section 328 of CP & E Act.
- [8] In mitigation the Accused expressed his sincere apology, particularly to complainant and her family. He conceded that his conduct was wrong but that it was too late to make it right. He mentioned that he was young at the time when he committed the offence and that he acted out of extreme anger because he believed that he was the only boyfriend for the complainant.
- [9] He also submitted that he was doing the best that he can in order to turn his life around and become a better person. He mentioned that at the time of his arrest he had been offered a place to study at the University. He then produced a letter of offer of a place to study at the University of Swaziland for a B.Sc degree in Environmental Health Sciences. He was arrested during that period and could not make the necessary arrangement for his admission to the University. He further mentioned that his high school classmates were now doing their third year at the University. He still has the desire to enroll at the university.

- [10] The Accused further submitted that he wishes to have a paternity test conducted in order to determine if he really is not the father of the child. He mentioned that if the test would point to him as the father, then he wants to be a responsible father and take full responsibility for the maintenance of the child.
- [11] In response, Counsel for the Crown submitted that the court should take into account the interest of society as well and not that of the Accused only. Counsel mentioned that offences against women committed by their male counterparts are now on the rise. They result in the loss of life at times. Counsel further asked the court to take into account that the complainant became so terrified to the point that she was afraid to open up about who assaulted her.
- [12] Counsel further submitted that after having committed the offence, the accused locked the complainant inside the house. He left her seriously injured and unconscious, and that he took the complainant's money and cell phone before he left.
- [13] Counsel then submitted that the accused is charged with an offence falling under the Third Schedule of the CP & E Act and therefore, no part of his sentence can be suspended in terms of Section 313 of the Act.

[14] In arriving at the appropriate sentence, I am required by law to take into account the triad. That is the personal circumstances of the Accused, the interests of society, as well as the seriousness and prevalence of the offence of attempted murder in this jurisdiction.

[15] Section 313 (2) of the CP & E Act is applicable in this case because attempted murder is listed in the Third Schedule of the CP & E Act. The court is precluded from suspending the whole or part of the sentence imposed in respect of the offence. The Section provide as follows:

*“313 (2) If a person is convicted before the High Court or any Magistrate’s court of any offence other than one specified in the Third Schedule, it may pass sentence, but order that the operation of the whole or any part of any such sentence be suspended for a period not exceeding three years, which period of suspension in the absence of any order to the contrary, shall be computed in accordance with subsections (4) and (5) respectively.”*

[16] Nothing was submitted about the Accused’s previous record. The court will therefore treat him as a first offender. He is still a young man and can turn his life around.

[17] I have also taken into account that the accused visited the complainant who was his girlfriend at the time and who had told him that she was pregnant with his child. However, when the accused arrived at her homestead the complainant then changed tune and informed the accused that he was not the



one who impregnated her. I have also taken in his favour that he pleaded guilty to the charge and did not waste the court's time.

[18] I have also taken into account that the accused used a knife to slit the throat of the complainant although I am not certain about the severity of the cut. Two medical reports were filed with the papers filed of record. I have some reservations, however, about the reports and I will deal with them later in this judgment.

[19] I have also taken into account that after assaulting the complainant, the accused then took her money and cell phone, and left her unconscious and locked in her room. With regard to the money and cellphone that the accused agreed to have taken, I have a difficulty in understanding why he was also not charged for the theft of these items. Notwithstanding that the accused conceded in the statement of agreed facts that he took these items, I do take into consideration the fact that he is a lay person and was unrepresented in the case. There might be justifiable reasons why he took these items. Since he was not charged with any offence in respect of them, I will give him a benefit of doubt.

[20] Counsel for the Crown also submitted that the court should take into account the fact that the offence greatly terrified the complainant such that she was afraid to say who assaulted her and almost killed her. The summary of evidence that is attached to the Indictment reflect, however, as follows:

## **SUMMARY OF EVIDENCE**

### **“PW1: NOSIPHO MTSETFWA**

*This witness will tell the court that on 29 July 2011, she was alone sleeping in her house when one Lungelo Dlamini who was her boyfriend came to visit. ... she also discovered that her cell phone Samsung E1070 and her money were missing. The witness opened the window and after sometime saw Mandlenkhosi Mathunjwa and she knocked on the window to draw his attention since the witness had lost her speech. Mandlenkhosi came and raised an alarm to some neighbors who responded promptly and the witness was taken to hospital and the police were called (own emphasis)...*

### **PW 4: ZAKHELE MATSENJWA**

*This witness is a cousin to PW1. He will tell the court that on the 31<sup>st</sup> July 2011, he went to the Raleigh Fitkin Memorial Hospital to visit PW1 after learning that she sustained some injuries. This witness will further tell the court that PW1 informed him that Lungelo Dlamini was responsible for the injuries. He will further tell the court that Lungelo Dlamini told him about the injuries sustained by PW1.” (own emphasis)*

- [21] On the basis of the information in the summary of evidence filed in court, I find as untrue that the complainant was so terrified that she was afraid to state who assaulted her.

[22] Counsel for the crown also implored the court to take into consideration the report of the National Psychiatric Referral Hospital. Paragraph 3 of the report states as follows:

*“Social and medical evaluation was done and revealed that Ms Nosipho Mtsetfwa was assaulted by her former boyfriend who nearly killed her. She was terrified to report the matter to the police because she was endangered not to do so otherwise he would kill her entire family ...”* (own emphasis)

[23] As I mentioned earlier on, I have reservations about the report. The complainant informed her cousin Zakhele Matsenjwa who was to be witness PW4 about who assaulted her. The name of the assailant was therefore not unknown because the complainant told her cousin about who assaulted her.

[24] The second paragraph of the report state the following:

*“Ms Nosipho Mtsetfwa was attended for the first in (sic) the 12<sup>th</sup> September 2013 as an outpatient and a diagnosis of post Traumatic Disorder was entertained.”*

[25] There is no explanation why the evaluation was done on the complainant on the 12<sup>th</sup> September 2013 when she was assaulted on the 27<sup>th</sup> July 2011. There is a period of two years and two months in between the assault date and the evaluation date. No evidence was placed before court to show that there were no other possible intervening factors that may influence the outcome of the evaluation.

- [26] It is common cause that the complainant was admitted in hospital after the assault “*for more than a week.*” This is stated in paragraph 5 of the statement of agreed facts.
- [27] The report also states that the complainant “*was terrified to report the matter to the police because she was endangered not to do so, otherwise he would kill her entire family.*” I take cognizance, however, of the fact that the police were called when the complainant was taken to hospital, and that she told her cousin Zakhele Matsenjwa about the identity of the assailant.
- [28] For the aforementioned reasons, the Psychiatric Referral Hospital report adds no value to the crown’s case in my considered view. It appears as if it was prepared simply to make a case for the crown.
- [29] On the statement of agreed facts there is attached to it an original of a doctor’s report made on Form R.S.P 88. This report bears a stamp for the Manzini Police Station dated 18 October 2016. At the bottom where it is signed it bears the date 17/09/13.
- [30] To the Indictment there is attached a copy of a doctor’s report made on Form R.S.P 88. This copy bears a stamp for the Mafutseni Police Station dated 11 September 2013. At the bottom where it is signed it bears the date of 17/09/13.

[31] Notwithstanding that both doctor's reports bear the same date of 17/09/13, there is no doubt in my mind that the copy is not a copy of the original. It is a copy of another original document. In addition to that, the original report depicts a cut on the neck of the complainant whereas the copy document does not. I do take note as well, that the original document was filed when the statement of agreed facts was submitted in court on the 18<sup>th</sup> October 2016. The copy was, on the other hand, filed with the Indictment in May 2014.

[32] The above mentioned observations leave me with more questions than answers. For that reason, I will give the Accused the benefit of doubt and find in his favour in so far as the evidence of the medical report is concerned. This is more so because the doctor who examined the complainant is not the one who prepared the attached original report. The doctor who examined the complainant is reported to have left the country. The court has not been given evidence in order to precisely know the extent or severity of the cut on the complainant's neck.

[33] I have also taken into account the interests of society. I agree with counsel for the crown that offences involving couples who are in a love relationship are on the rise and do result in the loss of life in some instances. The society therefore looks upon the courts to impose sentences that would deter would be offenders.

[34] I have therefore considered the triad in arriving at a sentence that I find appropriate to impose.

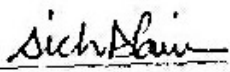
[35] In the case of **Rex v Bongwa Mcondisi Dlamini, Criminal Case No. 102/2008**, (unreported), the court stated that:

*“the range of sentences in cases of Attempted Murder is three years for the less serious cases up to ten years for the more serious cases.”* (para 68).

[36] In the case of **Siboniso Sandile Mabuza v Rex, Criminal Appeal No. 1/2007**, (unreported) the Supreme Court confirmed a sentence of three years in respect of each of the two counts of attempted murder.

[37] The accused person deserves another opportunity to turn his life around and become a responsible member of society. I therefore impose upon him a custodial sentence of three years imprisonment.

[38] The accused informed the court that he was arrested on the 11<sup>th</sup> September 2013 and was released on bail on the 23 June 2015. This evidence was not disputed or challenged by the crown. On the 18<sup>th</sup> October 2016 the accused was remanded into custody by this court. He therefore has spent 25 months and 17 days in custody. As contemplated in terms of section 16 (9) of the Constitution Act No. 001 of 2005, this period is to be deducted from the imposed custodial sentence of three years. It is so ordered.

  
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T. L. DLAMINI  
JUDGE OF THE HIGH COURT

**For the Crown** : Ms. B. Ndlela

**For the Accused** : In Person