

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

CRIM.APPEAL CASE NO:

11/10

In the matter between:

DELISA TSELA

APPELLANT

AND

REX

RESPONDENT

CORAM: EBRAHIM, JA

DR. TWUM, JA

FARLAM, JA

FOR THE APPELLANT

IN PERSON

FOR THE RESPONDENT

P. DLAMINI

Summary

Attempted murder, plea of guilty to attempted murder and possession of firearm - suspension of part of sentence for attempted murder - commencement of sentences - section 16 (9) of the Constitution - relevance of judicial discretion.

JUDGMENT

DR. S. TWUM J.A.

[1] This is an appeal from the judgment of Mabuza J. dated 4th February 2010 against sentence.

[2] The appellant was arrested on 18th August 2008 and charged with :

(i) Attempted murder;

(ii) Being in possession of a firearm contrary to

Section 11 (1) as read with section 11 (8) of the Arms and Ammunitions Act 24 of 1964, as amended by Act 6 of 1968.

[3] The accused and the Crown agreed on the facts underlying the two offences and a "Statement of Agreed Facts" was prepared. It was accepted by the accused. The facts agreed were:

- The agreed facts reveal that on the 16th August 2008, the accused telephoned the complainant who is the mother of his two children aged 5 and 2 years. She did not answer the phone; instead a relative answered. The complainant was apparently at her parental home at Bhunya. The accused had called her to inform her that he would be coming to see her.
- Upon arrival at her home, the accused did not find her. He was in the company of Josephat December Dlamini (PW4). The accused left some groceries which he had brought for the children and together with PW4 went to look for the complainant.

- Along the way they met the complainant and proceeded with her to a bar at Dambathi where they enjoyed some drinks.
- They thereafter proceeded to the Dambathi bus station. The accused demanded that the complainant should leave with him. She responded that she had not been informed beforehand that she would have to leave with him. A scuffle ensued as the accused tried to force the complainant to go with him. This scuffle took place in full view of Phetsile Dlamini (PW3) and PW4.
- The accused produced a gun (a. 22 revolver) and fired once at the complainant and the bullet hit her. The accused walked off; and PW4 organised transport for the complainant. She was taken to the nearby health centre at Sappi Usuthu Forest. She was later transferred to the Raleigh Fitkin Memorial Hospital at Manzini where she was treated. The bullet was never extracted from the complainant's body. The revolver was handed in by consent as Exhibit 1. It was examined by the police armourer and found to be serviceable.

[4] The accused pleaded guilty to the two offences and he was accordingly convicted on his own plea.

[5] Before he was sentenced, the accused was asked by the trial judge if there was anything he wished to say before she passed sentence.

[6] The accused said he was 34 years old and a first offender. He said he had a difficult childhood. His parents had separated and nobody taught him good morals. He said he attended school up to form one. But he was self-employed. He said he was remorseful of what he had done and acknowledged that he had not led an exemplary life. He had apologised to the victim and added that during his 16 months pre-trial incarceration he had come to accept

Christ as his personal saviour. He said he even led religious services in the correctional services. He concluded by saying that he would no longer be harmful to society. He wished to be released to enable him work to support his children and their mother.

[7] In passing sentence, the trial Judge said she had taken the accused person's plea in mitigation into account. She said she had also taken note of the fact that the accused pleaded guilty to the offences and did not waste the court's time. However, she said she had also taken into consideration the circumstances of the victim who now walks with a bullet in her body. She had also taken into account the interests of society which expects that offenders will be punished.

[8] The accused was sentenced as follows:

Count 1:

The accused is sentenced to 7 years imprisonment; two years of which are suspended for three years on condition that the accused is not convicted of any crime of which assault is an element.

Count 2

The accused is sentenced in terms of section 11 (8) (c) (ii) of the Arms and & Ammunition Act 24/1964 to 2 years imprisonment without an option of a fine.

The sentences in both counts are to run concurrently.

[9] On 22nd February 2010, the appellant appealed to this Court. No grounds of appeal were filed but he promised to file them later. From that document it was clear that he wanted his sentence to be

back-dated to the date he was arrested and detained in lawful custody.

[10] On 14th April 2010, the appellant filed Heads of Argument. In it he complained that his sentence was too harsh and induced a sense of shock. He repeated all the matters he placed before the court *a quo* in mitigation of sentence and urged this Court to take them into account when considering his appeal. One new matter he urged before this court was that the court *a quo* did not consider his pre-trial incarceration and did not take it into account when it passed sentence on him. He urged this Court to take it into account.

[11] From the Heads of Argument filed by the Respondent, Crown counsel denied that the sentence passed by the court *a quo* on the appellant was harsh. He said the appellant had benefited from a suspension of two (2) years of his 7 years term for the offence of attempted murder. Further, the two sentences were ordered to run concurrently. In those circumstances, he submitted that the sentences imposed on the appellant did not merit intervention by this Court.

[12] I agree with counsel for the Crown that this Court should not interfere with the sentences. That is not to say that his complaint that his sentence was not backdated should also not be considered.

[13] Crown Counsel conceded that under section 16 (9) of the Constitution, the appellant was entitled to have his pre-trial lawful custody taken into account by the trial court when imposing a term of imprisonment. He added that indeed the court *a quo* expressly stated that it had taken that into account when fixing his sentence.

[14] I have diligently searched the record and I have not found any such express statement by the trial Judge. In my view it begs the question, as counsel did, that in terms of section 16 (9) of the

Constitution the court *a quo* has a discretion whether to backdate a sentence of imprisonment or not. Rather, the real question to be asked is whether or not the court *a quo* is bound to take into account the accused person's pre-trial incarceration. My answer will be "Yes". No judicial discretion arises.

[15] In applying section 16 (9) of the Constitution, three scenarios are possible. The court *a quo* may expressly order that the pre-trial period of lawful custody should be deducted from the term of imprisonment it had actually passed. Secondly, the court may say that it had taken that period into account and it is for that reason that it has settled on the term it had imposed. The third scenario is for the court to say nothing at all specifically about the pre-trial incarceration. In my view, this third option is what happened in this case. I am unable to divine what option the court *a quo* applied. In those circumstances this Court must give the appellant the benefit of the doubt that the court *a quo* acted per incuriam.

[16] The appellant claimed that he was in pre-trial custody for 16 months. This was not challenged by Crown counsel. I will therefore take that into account and order that the commencement of his sentence should be backdated to 18th August 2008 and thereby give effect to section 16 (9) of the Constitution.

Delivered in open court on 27th May 2010.

DR. SETH TWUM

JUSTICE OF APPEAL

I agree: A.M. EBRAHIM

JUSTICE OF APPEAL

I agree: I.G. FARLAM

JUSTICE OF APPEAL