



IN THE HIGH COURT OF SWAZILAND

JUDGMENT ON SENTENCE

Criminal Case No: 120/14

In the matter between

REX

Versus

THE NATION MAGAZINE

1ST ACCUSED

BHEKI MAKHUBU

2ND ACCUSED

SWAZILAND INDEPENDENT

PUBLISHERS (PTY) LTD

3RD ACCUSED

THULANI RUDOLF MASEKO

4TH ACCUSED

Neutral citation: *Rex v The Nation Magazine & 3 Others (120/14)* [2014]

SZHC 170 (25 July 2014)

Coram: **M. S. SIMELANE J**

Heard: **17 July 2014**

Delivered: 25 July 2014

Summary: Criminal Procedure – Accused convicted for Contempt of Court – Two (2) years imprisonment on each count in respect of Accused 2 and Accused 4 to run concurrently – Fifty Thousand Emalangenzi (E50 000.00) fine in respect of Accused 1 and Accused 3 on each count.

SIMELANE J

- [1] On 17 July 2014, I convicted all four (4) Accused Persons on both counts of Contempt of Court.
- [2] The task at hand today is sentencing. In disposing of this task, I take cognizance of the fact that the law demands that I consider the triad, that is the personal circumstances of the Accused, the seriousness of the offence and the interests of the society. See **Mfanasibili Gule V The King Criminal Case No. 02/11 para. 17** and **The King V Sibusiso Xolani Dlamini Case No. 42/11 para 26 and 27**. More to the foregoing is that the sentence is expected to blend in a measure of mercy according

to the circumstances. In the case of **S V Harrison 1970 (3) SA 684 (A)** at 686 **Holmes JA** demonstrated this trite principle of law as follows:-
“Justice must be done, but mercy not a sledge hammer is its concomitant.” I have also armed myself with the oft quoted dictum by **Holmes JA** in the case of **S V Rabie 1975 (4) SA 855 A**

“Punishment should fit the criminal as well as the crime, be fair to society and blended with a measure of mercy according to the circumstances.”

- [3] Further to the above I lean upon the wisdom that fell from the lips of **Tebutt JA** in the case of **Ntokozo Dlamini and Another v The King Criminal Appeal No. 10/2001**.

“The seriousness of their crimes, their moral blameworthiness and their lack of remorse or regret, justify lengthy sentences of imprisonment. Society would require this court that it marks its severe disapproval of this type of behaviour. Its sentence must also serve as a deterrent not only to the appellants to abstain from similar behaviours in the future but to others who may have like minded scheme in contemplation.”

- [4] It is also important to record upfront that in dealing with sentence in the matter I have duly heeded the salutary caution not to approach such sentence in a spirit of anger. I have sought to balance all the relevant factors in the matter. See **Xolani Zinhle Nyandzeni v Rex, Case No. 29/2010**

[5] In honour of the above trite principle of the law, I have considered the following mitigating factors as adduced by Accused 1-3. They stated under oath in mitigation as follows:-

- (1) That Accused 2 is 44 years old.
- (2) He is married with four (4 children, who are all school going).
- (3) That he is employed as an Editor of Accused 1.
- (4) That his wife is employed in one of the law firms in Mbabane as a Personal Assistant.
- (5) That the first Accused is a very small business with a very minimal income.
- (6) That the first Accused has six (6) employees.
- (7) That the first Accused is published once a month due to financial constraints and has a production of 3000 copies a month.
- (8) It was further submitted by Advocate L. Maziya for Accused 1-3 that the Court should be lenient as the publications in issue are not as robust as those in the matter that was before the Supreme Court.

(9) He further submitted that the Supreme Court ordered the Accused in that matter to pay a fine of E30 000-00 and a leeway to pay in instalments. He implored this Court to be guided by that sentence in the instant matter.

(9) Advocate Maziya also told the Court that the Accused are not first offenders.

[6] It was contended *replicando* by the learned Director of Public Prosecutions Mr. N.M. Maseko as follows:-

(1) The Accused have been convicted of a very serious matter.

(2) That the sentence to be imposed should be one that is commensurate with the seriousness of the offence and of course taking into account the triad.

(3) The Accused have not demonstrated any remorse.

[7] I am mindful of the fact that Accused 1-3 are not first offenders. They were convicted by the High Court and that conviction was confirmed by the highest Court in this country which is the Supreme Court under Supreme Court Case No. 08/13 in May 2014. It is worth mentioning that Accused 1-3 were convicted for similar offences.

[8] Accused 4 is a first offender. This was confirmed by the Crown. I have taken this factor into consideration into his favour, notwithstanding the

fact that he declined to offer any mitigation at all. This on legal advice. I have also taken into account the fact that he is a relatively young man with a young family to support.

[9] I find that the interests of society far outweigh the personal circumstances of the Accused.

[10] Having carefully considered all the factors *ante*, it is expedient for me to point out that the offence committed by the Accused persons is a very serious one. The seriousness of the offence is compounded by the fact of the very unacceptable unfortunate and increasing trend of the Accused persons writing scurrilous articles that have the propensity of tarnishing the reputation, authority and dignity of the Courts. It is a defiance campaign against the Courts and the administration of justice. The Courts have an obligation to discourage such conduct in the interest of the stability of our country. The Accused 1-3 are repeat offenders and I am so mindful of this fact. The conduct of all the Accused persons is reprehensible and unacceptable to any right thinking member of our society.

[11] The Accused persons have not been remorseful throughout the trial. This, I say because, at the preliminary stages of this trial the Accused persons attacked the trial Judge and said he must behave like a Judge. This was captured as a head line in bold by the print media locally and internationally with technological advancement in the dissemination of information. Locally this was captured by both the Times of Swaziland and the Swazi Observer on the 11th April 2014. This disgusting conduct

of the Accused, particularly Accused 4, who is an admitted attorney of the High Court and should know better that no attorney worth his salt can ever behave in this fashion no matter how aggrieved he may be has left much to be desired. May I say that Accused 4's conduct in this regard is wanting insofar as his professionalism is concerned. He clearly lacks the standard of ethics required of members of our noble profession as officers of the Court. Put simple, he is a disgrace to the profession.

[12] Accused 4 further displayed his arrogance and disregard for the Court and the rule of law by chanting political slogans in Court as I was delivering my judgment in the instant matter on 17 July 2014 and in the process he incited his so called supporters to also chant political slogans. In the process they made a lot of noise thereby undermining the dignity, repute and authority of this Court. This Court had to admonish the Accused to desist from chanting political slogans in Court. This conduct can never be condoned. Indeed, as I have said it before, it is clear that Accused 4 is earnestly pursuing regime change at all costs. He must realize that this has compromised his position as an officer of the Court. He can not have it both ways. Those people, locally and internationally, who are encouraging him to do so are doing him a disservice. Swaziland is a sovereign state. Her laws and constitutional structures must be respected. It is the fundamental responsibility of the Courts in this country to ensure that this is achieved through appropriately stiff sentences as a deterrent.

[13] Accused 4 further implored this Court to impose any sentence it deems fit. He said even if he is imprisoned for years it is well with his soul.

This buttresses the fact that Accused-4 has not been remorseful throughout this trial. He displayed an “**I don’t care**” attitude. Hopefully the sentence I am about to impose will be “well with his soul.” It is no more than what he called for himself.

[14] Accused 2 for his part also disrespected the Court by calling the presiding Judge by name. He said in open Court, “why should my wife be punished because of Mpendulo’s poor eye sight.” This was captured by the Times of Swaziland and the Swazi Observer on the 26th April 2014. This was after I had expelled a certain woman who was sleeping in my Court. This woman according to Accused 2 was his wife. Indeed I expelled her because as a Judge I have a right to summarily punish anyone for any misconduct committed in my presence. Accused 2 rather than respect the Court’s order charged towards the bench, walked out of the Accused dock in anger and attacked the Judge.

[15] I am also cognizant of the fact that the Court is a paramount institution and should be respected. No one, I repeat, has a right to write scurrilous articles in the manner the Accused persons did. Such conduct destroys public confidence in the Courts, without which this country cannot function effectively. The Courts hence have to use the very ammunition of Contempt of Court in self-protection from journalists like the Accused persons. There should be accurate, factual, unbiased and responsible reporting by journalists and not mischevious inaccurate sensationalism which the Accused embarked upon.

[16] Having carefully considered the triad, I am of the firm conviction that a sentence of Two (2) years imprisonment without the option of a fine in each count in respect of Accused 2 and Accused 4 respectively is commensurate with the offences committed and will serve as a deterrent to others, in particular like minded journalists in this country. The sentences are ordered to run concurrently and backdated to 18 March 2014 in respect of Accused 2 and backdated to 17 March 2014, in respect of Accused 4 being the dates when they were taken into custody respectively.

[17] Accused 1 and 3 are sentenced to a fine of Fifty Thousand Emalangeni (E50 000.00) on each count, to be paid within one (1) month from date of judgment herein.

[18] In default of payment of the fine imposed in paragraph 17 above by the 1st and 3rd Accused, the Attorney General is hereby authorized to institute proceedings for the recovery of the said fine as if it were a civil debt owing to The Government of Swaziland.

[19] It is so ordered.

[20] Rights of Appeal explained to the Accused.

M. S. SIMELANE
JUDGE OF THE HIGH COURT

For the Crown : Mr. N. M. Maseko
(The Director of Public Prosecutions)

For the Accused Persons:

Accused No. 1-3: Advocate L. Maziya

Accused No. 4 : Mr. M. Z. Mkhwanazi