IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: AR140/2016

In the matter between:

SIYABONGA MAPETE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Delivered: 20 October 2016

MFAYELA AJ

[1] The appellant who was unrepresented at the trial was charged with two (2) counts. Count 1 of attempted murder and count 2 escaping from lawful custody in contravention of section 117(a) read with section 1 of Act 111 of 1998.

Count 1

[2] The facts briefly are as follows:

a) Mr Moses, the complainant, a court orderly, was escorting the appellant inside Durban Magistrate Court. Suddenly, the Appellant strangled him for about 15 to 20 minutes whilst uttering the words "*I want to kill you*". He continued to strangle him even when the complainant pretended to be dead.
b) The appellant only stopped when he heard another officer, Chiliza, approaching.
c) The complainant was a single witness in so far as the attack is concerned.

[3] The following is common cause:

a) The appellant, who was in custody, was being escorted by the Court Orderly, who is the complainant in this matter.
b) The complainant sustained injuries as per Dr Singh's evidence.
c) There was no one else where this incident happened except the appellant and the complainant.

[4] The issue for determination is whether or not the appellant assaulted the complainant on the day in question. There is strong corroboration that the complainant was attacked and assaulted by the appellant.

[5] The following militates against the appellant's version:

a) When Chiliza came, the appellant had no shirt on.
b) When Chiliza appeared the appellant ran away from the scene. The appellant was not rendering any assistance to the complainant.
c) The keys were found on the spot where the appellant was apprehended.
d) The complainant told Chiliza that the appellant strangled him.
e) The complainant had blood stains on his shirt.
f) The Doctor noticed that there was swelling on the neck of the complainant and his voice was hoarse. He said that the injuries are consistent with strangulation.
g) The appellant stated on numerous occasions that he wanted to kill the complainant. The incident took about 15 to 20 minutes.

It is clear that the appellant formed the intention to murder the complainant and attempted to do so. The finding of the learned Magistrate to this effect cannot be faulted.

[6] The appellant's version that he did not attack the complainant was correctly rejected by the learned Magistrate as false beyond a reasonable doubt. His appeal against the count of attempted murder must fail.

Count 2

[7] It is common cause that the appellant was in lawful detention. After a struggle, the complainant dropped the keys and he told the appellant to take the keys and escape. The appellant took the keys and took a few steps but

Chiliza appeared. Cell keys were found next to the appellant when he was handcuffed. The appellant in fact did not escape but attempted to escape. It was conceded by the State in argument that the conviction of escaping from custody could not stand.

[8] The prosecutor does not have to list the competent verdicts in the charge sheet if the accused is unrepresented. The presiding officer is obliged to warn the accused that there are competent verdicts. In this matter, competent verdicts were not explained to the accused. It is imperative that competent verdicts be explained to the lay person who is conducting his/her own defence[1].

[9] In *S v Fielies & another*[2], Griesel J confirmed that the constitutional right embodied in section 35 (3)(a) of the Constitution includes the right to be informed of the competent verdicts, but that failure to explain competent verdicts is not always a fatal irregularity. "Where the absence of warnings concerning competent verdicts creates the situation where an undefended accused is left to flounder the trial would be unfair"[3]. In this instance, the State correctly conceded in argument that a conviction of attempted escape was not appropriate.

[1] See S v Mofokeng 2013 (1) SACR 143 (FB).
[2] 2006 (1) SACR 302 (C) at para 9.
[3] S v Dayimani 2006 (2) SACR 594 (E) at para 19.

Sentence

[10] The main purposes of punishment are deterrence, reformation retribution and rehabilitation. The Court must also consider the triad consisting of the offence, the offender and the interest of the society[4].

[11] The appeal court can only interfere with sentence imposed if there is a striking disparity between the sentence imposed and the sentencing court and the sentence the appeal court would have imposed[5].

The appellant is not remorseful. He has a previous conviction for murder. This is a very serious offence. The officer was executing his duties. Months later the complainant's voice was still hoarse. The doctor indicated that the injuries were serious and he could have died.

[12] However, the sentence of fifteen (15) years imposed by Court is disturbingly inappropriate. The State counsel agreed that fifteen (15) years is harsh.

In *S v Makhakha*[6] the Accused who strangled the complainant with intent to rape was sentenced to ten (10) years' imprisonment.

[4]See S v Zinn 1969 (2) SA 537 (A) at 540 G.
[5]See S v Kgosimore 1999 (2) SACR 238 (SCA) at 241 e-f.
[6] 2014 (2) SACR 457 WC.

[14] I therefore make the following order.

a) The appeal against conviction on count 1 is dismissed.

b) The appeal against conviction and sentence on count 2 is upheld and the order of the Magistrate is altered to one of not guilty on count 2.

c) The appeal against sentence on count 1 is upheld and the sentence of the Magistrate on this count is set aside and substituted by a sentence of ten (10) years' imprisonment, such sentence being backdated to 30 September 2012.

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MFAYELA AJ

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GORVEN J

Date of hearing:	11 October 2016
Date of Judgment:	20 October 2016
For the Appellant:	P. Marimuthu, instructed by the Durban Justice Centre.
For the Respondent:	C. Radyn, instructed by the Director of Public Prosecutions, Pietermaritzburg, KwaZulu-Natal.