IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CRIMINAL TRIAL NO. 82/09

In the matter between:

REX

VS

KHULEKANI MKHOMBE

CORAM	MCB MAPHALALA, J
FOR CROWN	Mr. Phumlani Dlamini
FOR DEFENCE	Mr. Sikelela Magongo

Summary

Criminal Trial - Charge of Attempted Murder - defence of provocation - *mens rea* required in attempted murder cases - convicted as charged and sentenced to five years imprisonment four of which are suspended for three years on condition he is not convicted with an offence in which violence is an element.

JUDGMENT
14th FEBRUARY 2011

[1] The accused was charged with Attempted Murder in that on the 22nd February 2009 at Ndunayithini Area in the Shiselweni Region, he unlawfully and with intent to kill assaulted Nkanyezi Simelane with a bush knife. He pleaded not guilty to the charge.

[2] PW1 Nkanyezi Simelane, the Complainant, testified that on the 22nd February 2009, and in the company of Sipho Magagula, they met with the accused and Colani Dlamini; the latter was carrying a bushknife. PW1 greeted Colani Dlamini who is his cousin and asked jokingly why he was carrying a bushknife and Colani said it belonged to the accused. PW1 requested to have a look at the bushknife and Colani Dlamini gave it to him. However, the accused grabbed the bushknife from PW1 and took it. PW1 told the accused that he was not fighting with him but was merely looking at the bushknife. Meanwhile Colani Dlamini and Sipho Magagula were walking ahead of PW1 and the accused proceeding to the shop. PW1 left the accused and walked towards the shop; however, after a few paces, the accused assaulted him on the neck from behind with the bushknife, and then ran away.

[3] PW1 noticed that he was injured and went to a nearby Thumbela homestead where he reported that he was injured. They called the police who took him to Matsanjeni Health Centre; he was transferred to Mbabane Government Hospital immediately. He was not able to talk and walk for a period of three weeks. He was treated as an in-patient for three months before he was discharged.

[4] It was put to PW1 during cross-examination that during the struggle for the bushknife between PW1 and the accused, two women who were passing rebuked PW1 and asked him why he was confronting and harassing the accused as he was younger than himself. PW1 denied this; and, the said women were not called by the defence to give evidence on behalf of the accused. PW1 further denied that he threatened to stab the accused with the knife, and there is no evidence that PW1 was carrying a knife; hence, the defence of provocation cannot be established. Both PW1 and the accused reside in the same area and knew each other.

[5] PW2 Sipho Magagula corroborated the evidence of PW1 that he took the bushknife from Colani Dlamini for the purpose of seeing it. The accused grabbed the bushknife from PW1 and said it belonged to him. They fought over possession of the bushknife; PW2 and Colani Dlamini left them and went to the shop. When they were about fifteen metres away, PW2 looked back and noticed that PW1 was injured; and, he saw the accused running away from the scene towards his homestead. PW1 was also running to a nearby Thumbela homestead; he followed him and found him lying down on the ground and unconscious. Police came and PW1 was taken to Matsanjeni Health Centre for treatment.

[6] During cross-examination the defence put it to PW2 that PW1 had initially grabbed the bushknife from the accused; this was denied by PW2. It was further put to PW2 that two women passing by the road rebuked PW1 for harassing the accused who was younger than him;

again this was denied by PW2. It was further put to PW2 that accused had run away from the scene prior to the assault and that PW1 pursued him; PW2 denied this. PW2 further denied that PW1 had threatened to stab the accused with a knife.

[7] PW3 Constable Justice Dlamini testified that on the 24th February 2009 the accused admitted to him and to Constable Masuku having committed the offence; and, that was after he had cautioned him in terms of the Judges Rules. They found him at his parental homestead with his father Piti Mkhombe.

[8] PW4 Constable Masuku testified that on the 22nd February 2009 at about 17:50 hours he received a report from Sipho Magagula that PW1 had. been hacked with a bushknife at Ndunayithini Area. He proceeded to the scene in the company of another police officer; they found a group of people surrounding PW1 who was injured with an open gushing wound, and his clothes were soaked in blood. They rushed him to Matsanjeni Health Centre for treatment.

[9] PW4 further confirmed and corroborated PW3 about the events of the 24th February 2009 at the parental homestead of the accused; the latter admitted having committed the offence after being cautioned in terms of the Judges Rules. The accused further led them to a mountain where he had hidden the bushknife; it was retrieved and taken to the Police Station to be used as an exhibit.

[10] Under cross-examination by the defence PW4 maintained that during his investigations, he established that PW1 never threatened the accused with physical violence; and, that PW1 had been given the bushknife by Colani Dlamini to look at it. PW4 further told the court that the extent of the injuries sustained by PW1 indicates an intention on the part of the accused to kill PW1.

[11] The Medical Report of PW1 was admitted in evidence by consent. The doctor noted that PW1 was highly intoxicated and that his clothing was blood-soaked. He had a potentially fatal, life threatening injury of the neck with loss of blood; and, that the injury was caused by a sharp object.

[12] The accused testified under oath that he was 17 years of age when the offence was committed; and, that he was schooling at Lugongolweni Primary school. He knew PW1, Colani Dlamini and PW2 since they reside in the same area. According to him, he had been cutting logs for a fence earlier in the day at the instance of another woman. On his way to the shop, he met PW1 in the company of PW2. PW1 said the bushknife was similar to that of Siboniso Magagula; and, he grabbed the bushknife from him and he resisted. They fought over possession of the bushknife. Two women passing by the roadside rebuked PW1 for fighting him because he was older than him; PW1 then released him, and further laughed at him. They walked towards the shop; then he saw PW1 putting his hands in his pockets and threatening to stab him. He ran away from him, and, PW1 pursued him.

He assulted him with the bushknife; and, then PW1 ran away. He was arrested the following day by the police. He concedes leading the police to the mountains to recover the bushknife he used in assaulting PW1.

[13] Under cross-examination, the accused conceded that he had assaulted PW1 with the bushknife; the reason he said was because PW1 had put his hands in his pocket and threatened to stab him. He further conceded that he did not see the knife. He threw the bushknife in the mountain after the assault because he was shocked; he - denied hiding the bushknife as alleged by the Grown. -

[14] It is not in dispute that PW1 was highly intoxicated; PW1, PW2 and the accused do acknowledge this fact. The Medical Report also states that PW1 was "quite intoxicated".

[15] The "*Actus reus*" is not in issue; it is common cause that PW1 was hacked with the bushknife by the accused. The only issue for decision by this court is whether he had the requisite "*mens reef* to commit the offence of Attempted Murder.

[16] The accused has given an explanation why he assaulted PW1; hence, he has put his case to the Crown witnesses. He told the Court that he saw PW1 putting his hands in his pockets and threatening to stab him, then he hacked him with the bushknife. However, he conceded that he did not see the knife. In the case of **Rex v. Difford** 1937 AD 370 at 373 which was quoted with approval by the **Supreme**

Court of Swaziland in the Criminal Appeal of **Celani Maponi Ngubane and Two Others v. Rex** Criminal appeal No. 6/2006, **Greenberg JA** had this to say:

> "No onus rests on the accused to convince the Court of the truth *of* any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then, he is entitled to his acquittal."

[17] From the evidence led, it is apparent that the explanation given by the accused is not only improbable but that it is false. There is no evidence that PW1 was carrying a knife with which he threatened to stab the accused; the accused concedes that he did not see the knife but only saw him putting his hands in his pocket. Furthermore, the accused in his evidence in-chief and during the cross-examination of Crown witnesses, he stated that when PW1 confronted him, two women who were passing by ridiculed and chastised PW1 for harassing a young boy; however, none of the two women were brought to court to testify on his behalf.

[18] It is common cause that PW1 was highly intoxicated and that he was not a threat to the accused; furthermore, he could not defend himself since he was highly intoxicated. The defence did not put to the Crown witnesses that PW1 pursued the accused and attacked him. The evidence does not disclose any provocation on the part of the

complainant; furthermore, it does not show any unlawful attack on the part of the complainant which could necessitate that the accused defends himself by inflicting the injuries sustained by the complainant. I reject the evidence of the accused that the complainant was the aggressor at all.

[19] It is not in dispute that the bushknife was very sharp, and the accused did not deny this. The extent of the injuries sustained by the complainant bears testimony to the fact that the bushknife was very sharp; the injuries were potentially fatal and inflicted using force. There is evidence that after the assault, the complainant lay motionless at the Thumbela homestead and unconscious. When he arrived at Matsanjeni Health Centre, his clothes were blood-soaked. There was a deep gaping wound on the neck. He was transferred to Mbabane Government Hospital immediately upon his arrival due to the seriousness of his injuries.

[20] In the case of **Rex v. Huebsch** 1953 (2) SA 561 (A) at **567, Schreiner JA** stated as follows:

> "In order to support a conviction for Attempted Murder there need not be a purpose to kill proved as an actual fact. It is sufficient if there is an appreciation that there is some risk to life involved in the action contemplated coupled with recklessness as to whether or not the risk is fulfilled in d e a t h

[21] This case was approved and followed in the case of **Rex v. Mndzebele** 1970-1976 SLR 198 at 199F (HC), where **Nathan J** as he then was stated:

> "A person has the necessary intention to kill if he appreciates that the injury which he intends to inflict on another may cause death and nevertheless inflicts that injury reckless whether death will ensue or not."

[22] **His Lordship Justice Ben Dunn** in the case of **Rex v. Mbanjwa Gamedze** 1987 - 1995 SLR 330 at 336d stated the following:

> "The majority decision in the case of **Henwood Thornton v. Rex** Court of Appeal... accepted the South African Appellate Division decision of **Rex v. Huebsch** 1953 (2) SA 561 (A) at 567, as establishing the correct principle in cases of Attempted Murder that in order to support a conviction of Attempted Murder there need not be a purpose to kill proved as an actual fact. It is sufficient if there is an appreciation that there is some risk to life involved in the action contemplated, coupled with recklessness as to whether or not the risk is fulfilled in death. The **Henwood** decision is binding on this Court, and correctly sets out the law of this country."

[23] The Supreme Court of Swaziland in the appeal case of **Henwood Thornton v. Rex** 1987-1995 SLR 271 at 273 dealt with a conviction of Attempted Murder; **Kotze JA** who delivered the majority judgment approved and applied the South African case of **Rex v. Huebsch** (supra) as reflecting the law in this country. He stated as follows:

> "...it suffices for the prosecution to prove in a charge of Attempted Murder an appreciation that there is some risk to life coupled with recklessness as to whether the risk is fulfilled in death."

[24] The Crown has proved beyond reasonable doubt the commission of the offence. When the accused assaulted the complainant, he appreciated the risk to life involved in the action contemplated but was reckless whether the risk is fulfilled in death. In the circumstances, the accused is convicted of Attempted Murder.

[25] In mitigation, the defence argued that the accused should be given a wholly suspended sentence on the basis that he is a first offender, that at the time of commission of the offence he was young and 17 years of age; furthermore that he was from a very poor background such that he had to drop out of school. At the time he was still at the primary school in Standard IV. He further argued that the complainant was an adult at the time aged twenty four years; and, that the complainant had taken liquor and, that it is possible that he provoked the accused.

[26] Mr. Magongo for the defence referred the court to Section 29 of the Constitution which provides for the Rights of Children; he urged the court to depart from the provisions of Section 313 of the Criminal Procedure and Evidence Act No. 67 of 1938. The said Section prohibits

the imposition of a suspended sentence in relation to offences listed in the Third Schedule, namely, murder, rape, robbery and any conspiracy, incitement or attempt to commit any of these offences. It is common cause that the accused has been convicted of Attempted Murder, and, accordingly, a suspended sentence is prohibited. Mr. Magongo argued that Section 313 should not be applied to young people in the light of the Rights of the Child entrenched in Section 29 of the Constitution. He argued that doing otherwise would subject the accused to inhuman treatment.

[27] Section 29 (2) of the Constitution provides as -fellows?-

> **"A child shall not be subjected to abuse or torture or other cruel, inhuman and degrading treatment or punishment subject to lawful and moderate chastisement for purposes of correction."**

[28] Section 29 (7) (d) provides as follows:

> **"Parliament shall enact laws necessary to ensure that children received special protection against exposure to physical and moral hazards within and outside the family."**

[29] The rights of children and young persons are specially entrenched in the Constitution. This puts young people in a special category in the same way as women and the disabled whose rights are similarly entrenched in the Constitution. The common law has long accepted that "Youthfulness is a mitigating factor because it affects the moral culpability of the accused. It is the age of the accused at the time of commission of the offence that should be taken into account when sentencing. It is generally" accepted- in most jurisdictions that young people do not possess the maturity of adults; hence, they should not be treated in the same manner and degree as adults in criminal trials. They are susceptible to peer pressure as well as adult influence. Similarly, they are legally incapable of assessing properly the consequences of their actions. It is against this background that the Constitution of this country draws a sharp distinction between children and adults, and place them in a special category. It is further accepted that in general the underlying cause for young people to commit crimes stems from immature judgment, their character which is still developing and weak, youthful vulnerability to error, to impulse and their susceptibility to influence. They should not be judged as inherently criminal:

- **R V Matsebula 1977-1978 SLR 182 at 182**
- **Mahlambi v Rex 1977-1978 SLR 98 at 102**
- **S v Petrus 1969 (4) S.A. 85 (AD) at 89,95-96**
- **S v F 1989 (1) S.A. 460 (2HC) at 462 B-D**

[30] A young person below the age of eighteen is physically and psychologically immature, and, they are more vulnerable to influence and pressure from others; their capacity to make informed choices and decisions is limited by the lack of maturity. It would be harsh and-unjust, therefore, to exact from them full moral accountability for their criminal actions. It is for these reasons that Section 29 (2) of the Constitution provides that young people should not be subjected to "abuse or torture or other cruel, inhuman and degrading treatment or punishment subject to lawful and moderate chastisement for purposes of correction". It would be cruel and inhuman to subject the accused to the provisions of Section 313 (2) of the Criminal Procedure and Evidence Act No. 67 of 1938 and not suspend his sentence on the basis that he was below the age of eighteen years when he committed the offence.

[31] **His Lordship Justice Ponnan in the case of S v B 2006** (1) SACH 311 at paragraphs 18 and 19 had this to say with regard to sentencing young offenders:

> "The principle that detention is a matter of last resort and for the shortest appropriate period of time is the "*leit motif* of juvenile justice reform. Those principles are articulated in international law and enshrined in the Constitution.... Child offenders should not be deprived of their liberty except as a measure of last resort, and where incarceration must occur, the sentence must be individualized with emphasis on preparing the child offender from the moment of entering into the detention facility for his or her return to society."

[32] It is for this reason that Section 29 (2) (d) of the Constitution obliges Parliament to "enact laws necessary to ensure that children receive special protection against exposure to physical and moral hazards within and outside the family". That legislation should eliminate laws directed to young people which are abusive, cruel, inhuman and degrading; the legislation should recognize that young people are immature, susceptible to influence and pressure, and, that they are incapable of assessing and making proper choices and decisions. The said legislation should draw a distinction between adults and young people. It should cater for children's courts which are more friendly and less scary than ordinary courts; "*pro deo*" counsel should be provided for those young people who cannot afford legal representation. More importantly, the punishment of the young offenders should be of a reformative nature. The legislation should provide for alternative forms of punishment than imprisonment.

[33] In coming to the proper sentence I will take into account the interests of society, the seriousness of the offence committed as well as the personal circumstances of the accused, and in particular that he was below the age of eighteen years when he committed the offence; in addition, he was a first offender, he was a primary school drop-out caused and necessitated poverty. In the light of the Rights of young people entrenched in Section 29 of the Constitution, Section 313 (2) of the Criminal Procedure and Evidence Act No. 67 of 1938 has no application to young people, and, it should be amended by Parliament as envisaged by Section 29 (7) of the Constitution; section 313 (2) is contrary to section 29 (2) of the Constitution because it subjects young

people to abuse, torture, cruel, inhuman and degrading treatment Section 313 (2) as a form of punishment is inimical to lawful and moderate chastisement for purposes of correction of young person because it subjects young people in respect of offences in the Third Schedule to unsuspended custodial sentences; it is common knowledge that young offenders instead of being rehabilitated become hardened criminals subsequent to their exposure with habitual and hardened criminals in prison.

[34] The accused is sentenced to five years imprisonment four of which are suspended for three years on condition that he is not convicted of any offence in which violence to the person of another is an element. The period of detention of the accused prior to bail from 24th February 2009 to 27th May 2009 shall be taken into account in calculating the period of his imprisonment.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT