



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Criminal Case No: 499/11

In the matter between

REX

V

DUMSANI MENZI MKHATSHWA

Neutral citation: *Rex v Dumsani Menzi Mkhathswa (499/11)*  
[2012] SZHC 159

**Coram:** OTA J.

**Heard:** 27<sup>th</sup> July 2012

**Delivered:** 31<sup>st</sup> July 2012

**Summary:** **Attempted murder - intention to commit principles thereof.**

[1] The Accused person **Dumsani Menzi Mkhathswa** is charged with the crime of Attempted Murder. The Indictment alleged the following:-

“

*In that upon or about 5<sup>th</sup> November 2011 and at or near Vulamehlo area, in the Manzini region, the said Accused person did unlawfully and with intent to kill, assault one **NOMVULA MAGAGULA** and did thereby commit the crime of ATTEMPTED MURDER”*

- [2] When the Accused was arraigned before me on the 27<sup>th</sup> of July 2012, his right to legal representation was duly explained to him and the Accused elected to conduct his own defence. Thereafter, the charge was read and explained to the Accused, in siSwati. The Accused pleaded guilty to the charge.
- [3] Crown counsel **Ms N Masuku**, then informed the court that the crown was accepting the plea of guilty without the necessity of further evidence and that the parties had prepared a statement of agreed facts which the crown wished to submit in evidence, together with the medical certificate of the medical examination carried out on the Complainant.
- [4] The statement of agreed facts was then read and explained to the Accused in siSwati. The Accused indicated to the court that he understood the content of the statement of agreed facts, and that the facts are a true reflection of the facts of this case and he accepts it to be so. The medical report was also read and explained to the Accused in siSwati and the Accused told the court that he understood the content of the medical report and had no objection to it being admitted in evidence.

[5] Thereafter, the statement of agreed facts and medical report were admitted in evidence as exhibits A and B respectively, by consent.

[6] It is apposite for me to recite the content of the statement of agreed facts at this juncture. It reads as follows:-

“ **STATEMENT OF AGREED FACTS**

**DUMSANI MENZI MKHATSHWA** (hereinafter referred to as the Accused) stands charged with the offence of Attempted Murder. The Accused pleads guilty to the charge of Attempted Murder and the Crown accepts the plea.

On the 5<sup>th</sup> November 2011 and at or near Vulamehlo area in the Manzini region, the said Accused had an altercation with PW1 (**Nomvula Magagula**) who is the Complainant and the mother to Accused's 5 year old daughter.

The cause of the altercation was that Accused met PW1 along the way and asked her where she was going to and in response PW1 said she did not see any reason why she has to report to him wherever she went. That was when the Accused took out a knife and stabbed PW1 several times on the chest and legs and the Accused left PW1 lying down soaked in blood.

On the same day **Mr. Simelane** who was passing by found PW1 lying down helplessly and took her to Raleigh Fitkin Memorial Hospital by his car where she was admitted.

*The Accused admits that:-*

- *he did stab PW1 (**Nomvula Magagula**);*
- *he committed an unlawful act to the Complainant;*
- *such an act was dangerous in the sense that a reasonable person would inevitably recognize that it caused some prospect(sic) harm.*

*The following will be produced in evidence:-*

- *Medical Report*
- *Statement of Agreed Facts "*
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[7] I am satisfied that the statement of agreed facts has demonstrated sufficient particulars of the event to decide this case. In view of the Accused's plea of guilty, there is no need to lead further evidence in accordance with Section 238 of the Criminal Procedure and Evidence Act, 67/1938, as amended. This is because I am of the firm conviction that the statement of agreed facts ext A, as well as the Medical report ext B, constitute evidence beyond a reasonable doubt that the Accused committed the offence charged.

[8] I say this because the statement of agreed facts shows clearly that the Accused met the Complainant, the mother of his 5 year old daughter along the way, and asked her where she was going. The Complainant

replied that she did not see why she has to report to the Accused wherever she went. It was at that juncture that the Accused took out a knife and stabbed Complainant several times on the chest and on the legs and left her lying down soaked in blood. On the same day, one **Mr Simelane** who was passing by found Complainant lying down helplessly and took her to Raleigh Fitkin Memorial Hospital with his car and she was admitted.

- [9] Further, exhibit B the Medical certificate establishes the severity of the injury sustained by the Complainant by reason of the stabbing which the Accused perpetrated on her. Exhibit B shows that the Complainant sustained multiple number of 3cm x 7 stab wounds on the chest and 20cm lacerations lateral upper thigh to upper leg and 3cm laceration lateral left thigh.
- [10] I am firmly convinced that the actions of the Accused on the day in question were unlawful. He stabbed the Complainant for no apparent reason with a knife. The Accused stabbed the Complainant several times in the chest which is a very sensitive part of the body. It is in evidence that at the time of the stabbing the Complainant was not armed and did not pose any threats to the Accused.
- [11] After the stabbing the Accused did absolutely nothing to assist the Complainant, but left her lying in a pool of her own blood. It was the timely intervention of one **Mr Simelane** who took the Complainant to the hospital that perhaps saved the Complainant's life.

[12] I am of the view, that by employing a knife and stabbing the Complainant in the way and manner that is proved in this case, the Accused clearly foresaw that the injury he intended to inflict on the Complainant could cause death but he was reckless whether or not death resulted.

[13] I am of the firm conviction that the Accused had mens rea in the form of dolus eventualis. He clearly appreciated that there was some risk to life involved in the action contemplated coupled with recklessness as to whether or not the risk is fulfilled in death.

[14] That is the position of the law in this jurisdiction as demonstrated in the case of **Henwood Thornton v Rex, 1987 - 1995 SLR 271 at 273, where Kotze JA.** 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”*

[15] The decision in **Henwood Thornton (supra)** was followed in the case of **Rex v Mbanjwa Gamedze 1987 - 1995, SLR 300 at 336, where Dunn J,** said the following:-

*“ The majority decision in the case of **Henwood Thornton v Rex** Court of Appeal case accepted the South African Appellate division decision of **Rex v Huebsch 1953 (2) SA 561 A, at 567,** establishing the correct principle in*

*cases of Attempted Murder that 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''.*

[16] In the light of the totality of the foregoing, I find that the crown has proved its case beyond a reasonable doubt. I find the Accused guilty and accordingly convict him of the offence of Attempted Murder as charged.

### **JUDGMENT ON SENTENCE**

[17] In mitigation the Accused pleaded for leniency. He apologized for the offence he committed and sought for a light sentence because he is a first offender and he has three children who are now left unattended by reason of his incarceration.

[18] In reply **Ms N. Masuku** called for a punitive sentence to serve as a deterrent to others, in the face of the prevalence of this sort of offence against the female populace.

[19] In passing sentence on you, I have warned myself of the oft quoted dictum of **Holmes JA** in the case of **S V Rabie 1975 (4) SA 855 A**, where his Lordship said the following:-

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

[20] I further arm myself with the words of wisdom that fell from the lips of **Tebutt JA, in the case of Nzokozo Dlamini and another v The Crown, 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”*

[21] **Dumsani Menzi Mkhathshwa**, I have thus considered your personal situation. I have considered that you are as first offender and are remorseful. I take cognisance also of the fact that you have left behind three children who are now left unattended by reason of your incarceration. You have my sympathy.

[22] **Dumsani Menzi Mkhathshwa**, having carefully considered your personal circumstances, I am however still firmly convinced that the offence you committed is a serious one. The seriousness of this offence is compounded by the fact of the very unacceptable unfortunate and increasing trend of the molestation of females in



the Kingdom by their male counterparts. The incidence of assaults perpetrated on females by their lovers has become the norm rather than the exception. In most of these situations the lives of the females are snuffed out, prematurely, in a most gruesome fashion and for nothing other than a trifling squabble. This is the nightmare we face and it is one that we must all join hands together to discourage in the interest of the sanctity and stability of the society.

[23] In casu, **Dumsani Menzi Mkhathwa**, the Complainant was obviously your lover and the mother of your 5 year old daughter. You stabbed her several times in the chest and legs with a knife over nothing other than that she would not tell you where she was going. At the time of the stabbing Complainant was unarmed and did not pose any threats to you.

[24] I want to tell you **Dumsani Menzi Mkhathwa**, that the mere fact that you and Complainant were lovers did not make her your property or prisoner. She was still entitled to her fundamental rights to freedom and liberty as enshrined in the Constitution of Swaziland Act, 2005. You therefore had absolutely no lawful justification or excuse to seek to curtail that right by the stabbing incidence you orchestrated on the day in question.

[25] To crown it all, you in a very cold blooded move, abandoned the Complainant lying in a pool of her own blood after the stabbing incidence. Your activities **Dumsani Menzi Mkhathwa** left much to be desired. They are reprehensible and unacceptable.

[26] Having therefore carefully considered the triad, I am of the firm opinion that a sentence of 7 years is fitting of the offence committed to serve as a deterrent to others. This sentence is backdated to the 5<sup>th</sup> of November 2011, the date of Accused's arrest and incarceration. It is so ordered. Right of Appeal and review explained.

For the Crown:                    N. Masuku  
Accused in person

**DELIVERED IN OPEN COURT IN MBABANE ON THIS**

**THE.....DAY OF.....2012**

**OTA J  
JUDGE OF THE HIGH COURT**