



IN THE HIGH COURT OF SWAZILAND

Case No: 124/2012

In the matter between:

REX

VS

JAMES MANDLA MKHALIPHI

Neutral citation: *Rex vs James Mandla Mkhaliphi 124/2012*
SZHC 162 [2012] (31 July 2012)

Coram: **OTA J**

Heard: **27th July 2012**

Delivered: **31st July 2012**

Summary: **Attempted murder and assault with intent to
commit grievous bodily harm.**

JUDGMENT

The accused person James Mandla Mkhaliphi is arraigned before this court charged with two counts of offences. The indictment reads as follows:

“Count one

The accused is guilty of the crime of attempted murder. In that upon or about 28th August 2011 and at or near Matsapha Mphumelele High School, in the Manzini region, the said accused person did unlawfully and with intent to kill, assault one Elvis Mavuso and did thereby commit the crime of attempted murder.

Count two

The accused is guilty of the crime of assault with intent to cause grievous bodily harm.

In the upon or about 28th August 2011, and at or near Matsapha Mphumelele High School, in the Manzini region, the said accused person did unlawfully assault one Mpendulo Khumalo with intent to cause grievous bodily harm.”

When the accused was arraigned before this court on the 27th 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 the language of his choice, Siswati. The accused pleaded guilty to both counts 1 and 2 respectively. The learned Crown counsel Ms. N. Masuku informed the court that the Crown was accepting the

accused's plea and dispensing with any further evidence. That the parties had prepared and signed a statement of agreed facts which the Crown wished to tender in evidence together with the medical certificates of the medical examinations carried out on the two complainants.

Thereafter, both the statement of agreed facts and the content of both medical certificates were read and explained to the accused in Siswati. The accused confirmed that he understood the content of the statement of agreed facts and medical certificates and had no objection to them being admitted in evidence. The statement of agreed facts and the two medical certificates were then admitted in evidence as exhibits A, B, and C respectively.

The statement of agreed facts states as follows:

"STATEMENT OF AGREED FACTS

On the 28th August 2011 and at or near Matsapha Mphumelele High School in the Manzini Region, the said person did unlawfully and with intent to kill, assault are Elvis Mavuso and also assaulted Mpendulo Khumalo with intent to cause grievous bodily harm.

The accused pleads guilty to both counts and the Crown accepts both pleas.

On the 28th August 2011 PW1 (Elvis Mavuso) and PW2 (Mpendulo Senzo Khumalo) were enjoying beer next to Phumelele High School where there was a wedding. When the time for eating comes, they joined the line at different points.

The altercation started when PW1 and PW2 joined the line for the second time. The accused questioned them as to why they were repeating without waiting for an answer he hacked PW2 on the head.

PW1 then enquired from accused as to why he was hacking PW2 instead of getting an answer he too was hacked by the accused about three (3) times.

On the same day both PW1 (Elvis Mavuso) and PW2 (Mpendulo Khumalo) were conveyed to Raleigh Fiktin Memorial Hospital where they were treated.

The accused admits that:-

- He did hack Elvis Mavuso and Mpendulo Khumalo;*
- That he committed an unlawful act to the complainants;*
- Such an act was dangerous in the sense that a reasonable person would inevitably recognize that it caused some prospect harm.*

The following will be produced in evidence:

- *Medical reports of both complainants; and*
- *Statement of agreed facts.”*

It is trite law that when a case has to be decided on a statement of agreed facts, it is necessary that sufficient particulars of the offence be included therein. This is not only to establish the guilt of the accused beyond a reasonable doubt but also to avail the court the necessary facts in determining what will be the appropriate sentence.

In casu, the statement of agreed facts omitted to state what weapon the accused employed in hacking the complainants in the two offences he is charged with. Ms. Masuku sought to remedy this in her reply to accused's plea in mitigation by telling the court that the accused used a bush knife in the hacking incidents. I promptly enquired of the accused if this was a true representation of the facts. Whereupon the accused admitted in clear and unambiguous terms that he indeed used a bush knife in the two hacking incidents.

These facts ought to have been stated in the statement of agreed facts and indeed it is also desirable that they ought to have been contained in the particulars of the offences with which the accused person is charged. This is because the essence of an indictment is to put the accused on notice of the offence he is called to court to answer and the particulars upon which such offence is predicated. The Crown's case will thus stand or fall on the charges as they are

urged in court. That is why it is imperative that the Crown must employ the greatest care, skill and expertise in drafting of charges.”

The foregoing notwithstanding, since the accused has admitted that he used a bush knife in both hacking incidents, I will proceed to determine this case on the strength of that admission, the statement of agreed facts exhibit A and the medical certificate exhibit B. This is because I am of the firm view that the mere fact that the accused’s admissions in this regard are not contained in the statement of agreed facts, does not detract from the potency of these admissions.

Now the statement of agreed facts shows clearly that on the day in question whilst at a wedding party, the accused and both complainants joined the line at different points to collect food. The incidence happened when Elvis Mavuso complainant in count 1 and Mpendulo Khumalo complainant in count 2 joined the food line for the second time. The accused questioned them as to why they were repeating and without waiting for an answer he hacked Khumalo on the head. Mavuso then enquired of the accused why he was hacking Khumalo on the head. It was then that the accused also proceeded to hack Mavuso on the head three times. The accused has admitted before court that he used a bush knife to hack both complainants on that day. On the same day both Mavuso and Khumalo were taken to the Raleigh Fitkin Memorial Hospital RFM where they were treated.

Exhibit B the medical certificate of the medical examination that was carried out on Mavuso shows that he suffered multiple lacerations on the head, left forearm and chest by reason of the hacking incidence. Exhibit C the medical examination carried out on Khumalo shows that he sustained lacerations on his forehead by reason of the assault orchestrated on him by the accused.

On the attempted murder charge in count 1, I am satisfied that the Crown has proved its case beyond a reasonable doubt. The accused employed a bush knife and hacked the complainant three times on a part of the body as sensitive as the head, over an insignificant squabble as to why the complainant lined up to eat a second time. There was no justification for such a violent assault on the complainant because at the time of the hacking the complainant was not armed with a weapon and did not pose any threats to the accused. The magnitude of the injury which the complainant sustained as a result of the accused's activities is evidenced in exhibit B.

I must say that by employing a bush knife and hacking the complainant three times on the head, the accused clearly foresaw that the injury he intended to inflict on complainant could cause his death, but the accused was reckless whether or not death resulted. The accused clearly had *mens rea* in the form of *dolus eventualis*. That is the law on this subject matter as is shown in the case of **Rex v**

Huebsch 1953(2) SA 561 A at **567**, where *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 appreciated 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 foregoing position of the law has been adopted in the Kingdom and its continued application in the Kingdom has rendered it sacrosanct. Thus, in the case of **Henwood Thornton v Rex 1987 - 1995 SLR 271** at **273**, the erstwhile Court of Appeal of Swaziland, declared 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.”

In the light of the totality of the foregoing, I find that the Crown has proved its case beyond a reasonable doubt in count 1. The accused is found guilty and is accordingly convicted of the offence of attempted murder charged in that count.

On count 2, the Crown has also proved that the accused hacked the complainant therein, on the head with a bush knife without any

provocation. The complainant was not armed and did not pose any threats at all to the accused at the material time of the incidence. The fact that the complainant suffered serious injury is clear from exhibit B. The activities of the accused on that day were undoubtedly unlawful and unacceptable and the accused has admitted that such an act was dangerous in the sense that a reasonable person would inevitably recognize that it would cause some prospect of harm.

I thus find that the Crown has proved its case beyond a reasonable doubt in count 2. The accused is found guilty and accordingly convicted of the offence of assault with intent to cause grievous bodily harm charged in that count.

JUDGMENT ON SENTENCE

In mitigation the accused asked for leniency. In response Ms. Masuku prayed for a punitive sentence to discourage the prevalence of this sort of offence in the Kingdom.

In passing sentence, the law enjoins me to consider the circumstances of the accused, the interest of the society and the peculiar facts and circumstances of the case.

I have thus considered that the accused is a first offender and is remorseful.

Having considered your personal circumstances, I should however point out to you at this juncture that the offence you committed is a serious and violent one. It is one that must be discouraged as a matter of paramountly because of its rampantness in the Kingdom. I acknowledged the prevalence of this sort of offence in my decision in the case of **The King v Fana Sicelo Dlamini Criminal Case No.48/2011**, paragraph 6 where I said the following:

“6. ...I say this because, the incidence of the rampant use of knives in assaulting and in most instances, outrightly killing innocent and defenceless people in the Kingdom, has reached nightmarish dimensions therefore, the gruesome stabbing of the complainant in settling a minor dispute as presented in this case, was certainly unwarranted and unacceptable. That is why I maintain that this reckless trend of stabbing in the face of the slightest provocation, which has pervaded our society must be discouraged.”

James Mandla Mkhalihi, the complainants were minding their business, and posed absolutely no threats to you, when you hacked them on the head with a bush knife in the way and manner that you did as I have herein before demonstrated. Your actions were uncalled for and unacceptable and must be discouraged.

Having therefore carefully considered the triad, I find that your interests must submit to the interests of the society.

In the circumstances, I find the following sentences condign of the offence committed:

A sentence of 5 (five) years in count 1 and a sentence of 3 years in count 2. These sentences are to run concurrently and are back dated to the 28th of August 2011, the dated of the accused's arrest and incarceration. It is so ordered.

Right to appeal and review explained.

OTA J

JUDGE OF THE HIGH COURT

For the Crown: Ms. N. Masuku

Accused in person