



**IN THE HIGH COURT OF SWAZILAND
JUDGMENT**

Criminal Case No: 272/07

In the matter between

THE KING

V

ABDUL SHABANI PEMBE

1ST ACCUSED

LINDA DLAMINI

2ND ACCUSED

MPENDULO NKHAMBULE

3RD ACCUSED

ANDILE MANGO

4TH ACCUSED

DUMISA NHLENGETHWA

5TH ACCUSED

Neutral Citation: *Rex v Abdul Shabani Pembe and 4 Others*
(272/07) [2012] 174

Coram Ota J

Heard: 8th August 2012

Delivered: 10th August 2012

Summary: Accused charged with 4 others-separation of trial.
Accused pleading guilty to some of the offences:-
Accused's pre trial detention of 5 years deprecated

**and incorporated in sentence:- deportation of
Accused to country of origin ordered.**

OTA J,

[1] The accused person **Abdul Shabani Pembe** was arrested together with four others on the 29th June 2007 . The five accused persons were subsequently jointly charged with 7 counts of offences. The indictment reads as follows

[2] **COUNT 1**

*The accused persons are guilty of **ATTEMPTED MURDER.***

*In that upon or about the 11th February 2007 and at or near Pine Valley area in the Hhohho region, the said accused persons each or all of them acting together and in furtherance of a common purpose, did unlawfully and with an intent to kill, intentionally assault and shoot **John McCormick** and did thereby commit the crime of **ATTEMPTED MURDER.***

[3] **COUNT 2**

*The accused persons are guilty of the crime of **ROBBERY***

*In that upon or about the 11th February 2007 and at or near Pine Valley, area in the Hhohho Region, the said accused persons together with others who are still at large, each or all of them acting together and in furtherance of a common purpose, did unlawfully assault **John McCormick** and intentionally using force and violence to induce submission by **John McCormick**, did take and steal from him certain property to wit:*

- | | |
|------------------------------------|-------------------|
| <i>1. Laptop valued at</i> | <i>E12 000.00</i> |
| <i>2. Digital camera valued at</i> | <i>E 5 000.00</i> |
| <i>3. DVD player valued at</i> | <i>E 4 000.00</i> |
| <i>4. DSTV Decoder valued at</i> | <i>E 3 500.00</i> |
| <i>5. Nokia N93 valued at</i> | <i>E 8 000.00</i> |
| <i>6. Motorola C200 valued at</i> | <i>E 300.00</i> |
| <i>7. Motorola C180 valued at</i> | <i>E 400.00</i> |
| <i>8. Sony Erickson valued at</i> | <i>E 4 500.00</i> |
| <i>9. LG cellphone valued at</i> | <i>E 1 000.00</i> |

10.Nokia 1110 valued at	E 1 000.00
11.Motorola C180 valued at	E 400.00
12.Sony Erickson valued at	E 4 500.00
13.Video Recorder valued at	E 2 000.00
14.Wrist watch valued at	E 4 500.00
15.Four Nike takkies valued at	E 3 000.00
16.Addidas takkies valued at	E 600.00
17.Reebok takkies valued at	E 400.00
18.Diesel takkies valued at	E 350.00
19.Four patrolling shoes valued at	E 3 500.00
20.Black shoes valued at	E 250.00
21.Arno shoes valued at	E 1 000.00
22.Money in cash	E 80.00
23.Money in cash	E100 000.00
24.Swazi Drivers license	
25.Swazi ID card	
26.Irish passport	
27.HSBC credit card	
28.HSBC credit card	
29.Barclays Bank Card	
30.National wide card	

*Aggravating the total value of E157,600.00 his property or in his lawful possession and did rob him of same and the accused did thereby commit the crime of **ROBBERY**.*

[4] COUNT 3

*The accused persons are guilty of the crime of **ASSAULT**.*

*In that upon or about the 11th February 2007 and at or near Pine Valley, area in the Hhohho Region, the said accused persons together with others who are still at large, each or all of them acting together and in furtherance of a common purpose, did unlawfully and intentionally assault **MARY FAKUDZE** by hitting her indiscriminately all over the body with fists and kicks and also with an assortment of weapons and the accused did thereby commit the crime of **ASSAULT**.*

[5] COUNT 4

*The accused persons are guilty of the crime of **ASSAULT***

*In that upon or about the 11th February 2007 and at or near Pine Valley in the Hhhohho Region, the said Accused persons together with others who are still at large, each or all of them acting together and in furtherance of a common purpose, did unlawfully and intentionally assault **NOMPUMELELO FAKUDZE** by hitting her indiscriminately all over the body with fists and kicks and also with an assortment of weapons and the Accused did thereby commit the crime of **ASSAULT***

[6] COUNT 5

*The accused persons are guilty of the crime of **ASSAULT** .*

*In that upon or about the 11th of February 2007 and at or near Pine Valley in the Hhohho Region, the said accused persons together with others who are still at large, each or all of them acting together and in furtherance of a common purpose, did unlawfully and intentionally assault **WYNARD SMITH** by hitting him indiscriminately all over the body with fists and kicks and also an assortment of weapons and the accused did thereby commit the crime of **ASSAULT**.*

[7] **COUNT 6**

*The accused persons are guilty of the crime of **ASSAULT**.*

*In that upon or about the 11th of February 2007 and at or near Pine Valley area in the Hhohho Region, the said accused persons together with others who are still at large, each or all of them acting together and in furtherance of a common purpose, did unlawfully and intentionally assault **ROBERT McCORMICK** by hitting him indiscriminately all over the body with fists and kicks and also with an assortment of weapons and the accused did thereby commit the crime of **ASSAULT**.*

[8] **COUNT 7**

*The accused persons are guilty of the crime of **ASSAULT**.*

*In that upon or about the 11th February 2007 and at or near Pine Valley area in the Hhohho Region, the said accused persons together with others who are still at large, each or all of them acting together and in furtherance of a common purpose, did unlawfully and intentionally assault **JAUN McCORMICK** by hitting him indiscriminately all over the*

body with fists and kicks and also an assortment of weapons and the accused did thereby commit the crime of ASSAULT.

- [9] When this matter served before me on the 8th of August 2012, only the 1st accused **Abdul Shabani Pembe** appeared in court. Learned Crown Counsel, **Mr Sikhumbuzo Fakudze** applied for a separation of the trial of the 1st accused from that of the other four accused persons. This application was premised on the provision of Section 170 of the Criminal Procedure and Evidence Act 67/1938, as amended (CP&E). Crown counsel also informed the court that the crown was withdrawing the charge of robbery in count 2 of the indictment against the 1st accused; and that the crown will however be proceeding with the rest of the charges in counts 1,3,4,5,6 and 7 of the indictment, respectively
- Learned defence counsel **Ms M DaSilva** who appeared for the accused person confirmed **Mr Fakudze's** representation. The Accused's trial was thus separated from those of the other four accused persons and the charge of robbery as contained in count 2 of the indictment was withdrawn against the Accused.

[10] Thereafter, the charge was put and explained to the accused person in English. The accused person informed the court that he understood the charges and that he was pleading guilty to the offences in counts 1,3,4,5,6 and 7 respectively. **Ms M DaSilva** confirmed accused's pleas of guilty to these counts.

[11] **Mr Fakudze** informed the court that the crown was accepting the Accused's pleas of guilty to counts 1,3,4,5,6 and 7 respectively, and that the parties had prepared and signed a statement of agreed facts.

[12] Thereafter, the statement of agreed facts was read and explained to the accused in English. Defence counsel **Ms DaSilva**, confirmed the content of the statement of agreed facts, which was thereafter admitted in evidence as exhibit A.

[13] 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

A

WHEREAS the accused is indicted with five others for the crime of Attempted Murder, Robbery and five counts of Assault together with four accused persons.

B

NOW the Crown withdraws the Robbery count against the accused person.

C

AND NOW the accused pleads guilty to the Attempted Murder count and the Assault counts.

D.

AND NOW the Crown accepts the pleas

E.

The accused further accepts that:

- 1. In respect of the Attempted Murder count , upon or about 11th February 2007 and at or near Pine Valley area in the***

Hhohho Region, he together with four accused persons acting together and in furtherance of a common purpose each and or all of them did unlawfully and with intent to kill, intentionally assault and shoot John McCormick.

2. In respect of Count 3 (Assault) upon or about 11th February 2007 and at or near Pine Valley area in the Hhohho Region, he together with the four accused persons acting together and in furtherance of a common purpose each and or all of them did unlawfully and intentionally assault Mary Fakudze by hitting her indiscriminately all over the body with fists and kicks and also with an assortment of weapons.

3. In respect of Count 4 (Assault) upon or about 11th February 2007 and at or near Pine Valley area in the Hhohho Region, he together with the other four accused persons acting together and in furtherance of a common purpose each and or all of them did unlawfully and intentionally assault Nompumelelo Fakudze by hitting her indiscriminately all over the body with fists and kicks and also with an assortment of weapons.

4. In respect of Count 5 (Assault) upon or about 11th February 2007 and at or near Pine Valley area in the Hhohho Region, he together with the four accused persons acting together and in furtherance of a common purpose each and or all of them did unlawfully and intentionally assault Wynard Smith by hitting him indiscriminately all over the body with fists and kicks and also with an assortment of weapons.

5. In respect of Count 6 (Assault) upon or about 11th February 2007 and at or near Pine Valley area in the Hhohho Region, he together with the other four accused persons acting together and in furtherance of a common purpose each or all of them did unlawfully and intentionally assault Robert McCormick by hitting him indiscriminately all over the body with fists and kicks and also with an assortment of weapons.

6. In respect of Count 7 (Assault) upon or about 11th February 2007 and at or near Pine Valley area in the Hhohho Region, he together with the other four accused

persons acting together and in furtherance of a common purpose each and or all of them did unlawfully and intentionally assault Jaun McCormick by hitting him indiscriminately all over the body with fists and kicks and also with an assortment of weapons.

F.

It is agreed that all the offences were committed on the same day and simultaneously.

The accused was arrested on the 29th of June 2007 and has been in custody ever since.’’

[14] It is trite learning 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 reasonable doubt, but also to avail the court the necessary facts in determining what will be the appropriate sentence. See **Rex v James Mandla Mkhalihi Criminal Case No. 51/2011.**

[15] In casu, the statement of agreed facts has not demonstrated the injuries suffered by the complainant in count I, if any, and the

degree of said injuries. I am also not fortunate to have been availed of a medical certificate of the complainant, **John McCormick** in respect of that count, for me to gauge the degree of injury suffered. All that the statement of agreed facts tells the court is that “**the accused person acting together with the four others and in furtherance of a common purpose each and or all of them did unlawfully and with intent to kill, intentionally assault and shoot John McCormick and did hereby commit the crime of Attempted Murder**”

[16] **Ms Da Silva** told the court while mitigating for the Accused, that the complainants did not suffer serious injuries. Such facts ought to have been contained in the statement of agreed facts and not to be brought to court through the embellishing address of counsel from the bar.

[17] The foregoing notwithstanding, the accused has agreed to the foregoing facts contained in the statement of agreed facts. That means that the accused agreed that he and his comrades on the day in question intended to kill the complainant, **John McCormick** when they unlawfully assaulted him and shot him.

[18] I must say that by assaulting and shooting the complainant, the Accused clearly foresaw that the injury he intended to inflict on the Complainant could have caused his death, but the Accused was reckless whether or not death resulted. The Accused clearly had *mens rea* in the form of *dolus eventualis*.

[19] This is the law on this Subject matter as was enunciated by the South African Court 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 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*”

[20] It is worthy of note that the foregoing case was adopted by the courts in the kingdom with reference to the case of **Henwood Thornton v Rex 1987-1995 SLR 271 at 273**, 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**...as 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 an 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”

[21] In the light of the totality of the foregoing, I find that the crown has proved its case beyond reasonable doubt. I find the accused guilty of attempted murder and accordingly convict him of that offence as charged in Count 1.

[22] In counts 3,4,5,6 and 7, respectively, the accused person pleaded guilty to the offence of assault.

The statement of agreed facts clearly shows that the accused person accepts that on the 11th February 2007, he and the other four

accused persons acting together and in furtherance of a common purpose, each and all of them did unlawfully and intentionally assault the complainants in those counts, namely, **Mary Fakudze, Nompumelelo Fakudze, Wynard Smith, Robert McCormick** and **Juan McCormick**, by hitting them indiscriminately all over the body with fists and kicks and also with an assortment of weapons.

[23] The act of the accused person and his companions, in assaulting the complainants in the way and manner demonstrated in the statement of the agreed facts was undoubtedly unlawful. I thus find that the crown has proved its case beyond reasonable doubt and the accused is found guilty of assault in Counts 3,4,5,6 and 7 respectively, and is accordingly convicted of that offence as charged in those counts.

Judgment on Sentence

[24] In mitigation, the defence asked for leniency. Learned defence counsel **Ms DaSilva**, who pleaded on behalf of the accused, told the court that the accused is a foreigner. He had come to Swaziland to visit his friends and accompanied them to the house where this incidence took place.

[25] As the crime took place the accused was caught up in it, though he did not participate in all the assaults or in the shooting. Counsel further contended, that the accused has cooperated in respect of the charges and has not wasted the courts time. That the accused has been in detention awaiting trial for 5 years from the date of his arrest, during which time he lost his employment and lost contact with his wife and two children.

[26] Counsel prayed for leniency taking into account the period the accused has spent in custody, the fact that the victims did not suffer any serious injury and the fact that there are no other aggravating factors that will warrant a heavy sentence.

[27] **Abdul Shabani Pembe**, the law enjoins me in passing sentence, to take into account your personal circumstances as the Accused, the interest of the society and the peculiar facts and circumstances of the case.

[28] I also call in aid the words of **Addelson J in S v Harrison 1970 (3) SA 684 (A) at 686**, where His Lordship said the following:-

“Justice must be done, but mercy, not a sledge hammer is it’s concomitant”

[29] Then there are the words of the court in **S v Rabie 1975 (4) SA 855 (A) 862G, where Corbett J.A** said the following:-

“ A judicial officer should not approach punishment in a spirit of anger because being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity nor surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality”.

[30] Finally, is the dictum of **Moore JA** in the Court of Appeal of **Botswana Case of Motoutou Mosilwa v Rex, Criminal Appeal No. 124/05** which is as follows:-

“ *It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentencer’s message should be crystal clear so that the full effect of deterrent sentences may be realized and that the public may be satisfied that the court has taken adequate measures within the law to protect them of serious offenders. By the same token, a sentence should not be of such severity as to be out of all proportions to the offence or to be manifestly excessive or to break the offender or to produce in the minds of the public the feeling that he has been unfairly and harshly treated*”

[31] **Abdul Shabani Pembe**, having armed myself with the foregoing factors, I want to let you know that the offences you committed are very serious and violent ones. The seriousness of these offences is heightened by their prevalence in the Kingdom. The incidence of assaults on innocent people with very dangerous weapons, sometimes snuffing out their lives, has reached such frightening

dimensions that it has become of paramoutcy that it be discouraged in the interest of the peace and stability of the society.

[32] Having said this **Abdul Shabani Pembe**, I want you to know that I have also taken cognisance of your personal circumstances demonstrated in your plea in mitigation and I must say that they are very pathetic.

[33] I say this because the record shows that the Accused suffered pre trial detention for 5years before the commencement of his trial. This kind of treatment cannot escape condemnation. It is inhuman. It violates the Accused's fundamental right to human dignity and freedom from degrading treatment as entrenched in Section 18 (1) of the Constitution of Swaziland Act, 2005. It also violates his right to liberty as entrenched in Section 16 of the Constitution. See also the case of **Army Commander and Another v Bongani Shabangu Appeal Case No. 42/2011, para 10** where the Supreme Court condemned the Respondent's pre trial detention of 5 months before his trial commenced.

[34] It is important that a pre trial criminal process must observe the fundamental rights of the Accused. Such an incident as in this case

which involved a flagrant and inhuman violation of the fundamental rights of the Accused renders the ensuing criminal process suspect.

[35] The condition of the Accused during the trial can better be imagined. Having suffered such an experience, it is obvious that he was no longer in a position to offer any reasonable defence to the charge against him having been rendered totally a miserable visue.

[36] This kind of situation should not be allowed to repeat itself. This is because it puts into serious question the humaneness and therefore the effectiveness of our criminal justice system.

[37] I say this because in contemporary criminal jurisprudence, one of the best indicators of an effective criminal justice system is that it is humane. The lack of it is clearly a sign of the incompetence of the law enforcement agency.

[38] Considering the foregoing, I think that the punishment that will fit the circumstances of this case in the interest of substantial justice and bearing in mind public legitimate expectation of law

enforcement, is a sentence of 5 years in count 1 and 2 years in counts 3,4,5,6 and 7 respectively. These sentences are to run concurrently.

[39] Further, in line with the Supreme Court decision in a plethora of cases, which include the case of **Bhekizwe Motsa v Rex Appeal No. 37/2010**, this sentence shall include the period of Accused's pre trial detention which started from the 29th of June 2007. Accordingly, since the Accused's pre conviction detention is over 5 years, he is considered to have served the prison term already and is therefore entitled to be released forthwith.

[40] The circumstances show that the Accused got involved in the crime on his first entry into this country. Having come into the country instead of engaging himself in activities that will be useful to himself and the Swazi Society, he rather engaged in a criminal activity. This renders him an undesirable person, such that he should be deported upon completion of his sentence.

[41] In the circumstance, the Accused having already completed his sentence, it is hereby ordered that he be deported to his country of origin, The Republic of Tanzania, forthwith.

For the Crown: S. Fakudze

For the Accused: M. Da Silva

**DELIVERED IN OPEN COURT IN MBABANE ON THIS
THEDAY OF.....2012**

OTA J

JUDGE OF THE HIGH COURT