



IN THE HIGH COURT OF SWAZILAND

Criminal case No. 249/09

In the matter between:

REX

VS

ZODWA PRETTY MAGAGULA

Neutral citation: *Rex vs Zodwa Pretty Magagula (249/2009) [2012] SZHC234 (2012)*

CORAM

MCB MAPHALALA, J

Summary

Criminal law – accused charged with Attempted Murder – *mens rea* in the form of *dolus eventualis* suffices – accused convicted of Attempted Murder and sentenced to five years wholly suspended sentence.

Judgment
18th September 2012

[1] The accused was charged with Attempted Murder and the Crown alleged that on the 22nd July 2009 at Ngojeni grazing land in the Hhohho region, she unlawfully and intentionally assaulted Thembisile Methula with intent to kill her. She pleaded guilty to Assault with Intent to Cause Grievous Bodily Harm. The Crown didn't accept the plea.

[2] A Statement of Agreed Facts signed by the parties in accordance with section 272 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 was admitted by consent, and, it was marked Exhibit 1. The Statement reads as follows:

“Whereas the accused stands before court on the charge of Attempted Murder, she admits to the following facts which are relevant to the charge thereto:

- 1. The deceased did on the 22nd July 2009 send Nothando Magagula to go and call the complainant, Thembisile Methula.**
- 2. When the complainant came in the company of the said Nothando Magagula and one Sibongile Nxumalo, the accused then confronted the complainant about the love affair between the complainant and her husband.**
- 3. When the complainant denied the allegation, the accused then started assaulting the complainant all over the body.**

4. **The Complainant was rushed to Dvokolwako Health Centre and thereafter transferred to Mbabane Government Hospital.**
5. **On the 25th July 2009 the accused handed herself to the Tshaneni Police Station where she was formally charged and arrested by 3948 D/Sgt. Khetsiwe Khumalo, the investigating officer in the matter.**
6. **On the 26th July 2009 the accused led the said police officer to her sister's home where she freely and voluntarily retrieved a hammer which had bloodstains as a weapon used in the assault of the complainant.**
7. **The accused admits that she inflicted the injuries on the complainant as they are on the medical report and/or as the doctor's evidence.**
8. **Accused asserts that she did not have the intention to murder complainant but only to 'teach her a lesson'.**
9. **Thus she pleads as she already has to a lesser crime of assault with Intention to do Grievous Bodily Harm.**
10. **The Crown having not accepted the plea and from these admissions the '*actus reus*' element of the crime of Attempted Murder having been shown, the Crown will lead evidence to prove the existence of the necessary intention for the crime of attempted murder."**

[3] PW1 Dr. Donald Nyanguridza employed by the Government of Swaziland and based at Mbabane Government Hospital testified that he was on duty on the

23rd July 2009 and that he attended to the complainant; he submitted a medical report as part of his evidence and further explained his findings in detail.

[4] According to the Medical Report, the complainant had multiple bruises all over the body, on the head, neck, chest, abdomen and lower legs; the middle finger of the left hand was broken. The doctor concluded that the injuries sustained by the complainant were consistent with a repeated application of force with a blunt object and sharp object on the skull. There were cuts on the head with a sharp object. The defence didn't cross-examine or dispute the evidence of PW1.

[5] PW2 Thembisile Methula, the complainant, testified that she was nineteen years of age when the offence was committed and that she was attending Standard 10 in South Africa. She told the Court that on the 22nd July 2010 she was at home studying when Nothando Magagula arrived and told her that the accused was calling her. She told her that she would find the accused at a Magagula homestead; PW2 was accompanied by Sibongile Nxumalo who was eighteen years of age.

[6] They didn't find the accused at the homestead; and, they looked for her in the vicinity. They saw her in a bush; she came from behind and hit her with a stone on the head and she fell down. The accused then sat on top of her; she

took a broken bottle and inflicted cuts on her face as well as on her head. She told the court that the resultant scars were still visible on her head and face.

[7] The accused further hit her with a hammer all over the body. She also removed her skirt and panty and hit her private parts with the hammer. As she assaulted her, she was heard saying that it would not be her first time to kill a person because she had done it before. When she had finished assaulting her and PW1 was lying on the ground, she walked a few steps and she was heard saying that she felt like finishing off the complainant.

[8] Thereafter, she inserted soil into the complainant's private parts. Nothando Magagula and Sibongile Nxumalo watched helplessly when the accused assaulted the complainant. When she was assaulting the complainant with a hammer, she was busy accusing her of having an illicit love relationship with her husband; the complainant denied the accusation, but she continued assaulting her. After the assault, the accused left the complainant lying on the ground in the bush bleeding. She tried to stand up and walk but she failed. Sibongile Nxumalo then went home to report the incident and Nothando Magagula remained behind with the complainant; her family hired a motor vehicle which transported her to Dvokolwako Health Centre. Subsequently, she was transferred to Mbabane Government Hospital.

[9] Under cross-examination the complainant admitted that she attended the same church with the accused, the apostolic Church under Pastor Phillip Nobela, DW2. However, she could not recall a meeting allegedly called by DW2 to try and mediate between the accused and the complainant. She further denied that she had admitted to the accused that she had a relationship with the accused's husband Bhekinkosi Zikalala.

[10] However, she admitted meeting the accused at the school gate in 2009 at Madzanga High School where she accused her of having a love relationship with her husband; and, that she had denied any involvement with him. She further denied instructing her boyfriend on that day to assault the accused as alleged; she further denied having a boyfriend at the school.

[11] PW2 further denied calling the accused a witch or a prostitute at the scene of crime prior to the assault and insisted that the accused came from behind and hit her with a stone without any provocation. She reiterated that the accused hit her with a hammer all over her body including her private parts after removing her skirt and panty; and, that she further inserted soil into her private parts. She told the court that when the accused said she felt like finishing her, she meant that she wanted to kill her.

[12] PW3 Sibongile Nxumalo, aged eighteen years, testified that sometime in 2009 Nothando Magagula arrived at her parental homestead; and, she told her that

the accused was calling her. They didn't find the accused where she had been left by Nothando Magagula by the roadside. They saw her further down the road coming and carrying a stone; she hit the complainant with the stone and she fell down. She further scratched her face with a bottle. Thereafter, she removed her underwear and inserted soil into her private parts.

[13] She assaulted her with a hammer all over the body until she was very weak. She sat on top of her as she assaulted her saying that it was not the first time that she had killed a person, and, that she had previously killed another person. She accused her of having a relationship with her husband.

[14] After she had stopped assaulting her, she walked a few paces and said she felt like finishing the dog, referring to the complainant. Meanwhile PW3 and Nothando Magagula watched helplessly as the accused assaulted the complainant; they were also crying. The accused left them on the scene with the complainant lying on the ground with serious injuries and unable to stand up and walk.

[15] PW3 took the complainant and put her a short distance from the scene; thereafter, she sent Nothando Magagula to call a family member Ntombizini Nxumalo who arrived shortly in the company of neighbours. The complainant was later driven to hospital.

- [16] PW3 reiterated her evidence that the accused arrived at the scene carrying both the hammer and the bottle as her weapons. The scene of crime was in a bush far from the nearby homesteads. She denied that the complainant said anything to the accused or provoked her in anyway before she was assaulted. PW3 maintained her evidence under cross-examination.
- [17] PW4, the investigating officer Detective Sergeant Khetsiwe Khumalo, testified that on the 25th July 2009, he was on duty at Tjaneni Police Station when she received a docket for investigation of Attempted Murder; the complainant was Thembisile Methula who had reported to the police that he was assaulted with a bottle and a hammer and soil inserted into her private parts.
- [18] She proceeded to Ngojeni area, the parental home of the complainant; she found her bed-ridden. The complainant was in the company of her mother and Sibongile Nxumalo. She was seriously injured with bandages over her head, left and right hands; her face was swollen. In her investigations, she found that the complainant had been assaulted by the accused.
- [19] Since the complainant was bedridden, PW3 took her to the scene of crime where she found a broken bottle with bloodstains; she took the bottle with her as an exhibit in the case. At about 3pm on the same day, the accused surrendered herself to the police. PW4 introduced herself to the accused as the investigating officer in the case; and she further informed her of her rights to

legal representation as well as to remain silent. She further cautioned her in accordance with the Judges' Rules, that she was not obliged to say anything but that whatever she would say would be recorded in writing and used against her during the trial. She was formally charged with Attempted Murder.

[20] On the following day, PW4 again cautioned the accused that she was not obliged to show her the weapons used in the commission of the offence but that whatever she would show her would be used as evidence in court during the trial. The accused led PW4 and another police officer to Nkambeni area where they found Nondumiso Mtsetfwa, a maid, and they introduced themselves as police officers and further told her that the accused wished to show them something.

[21] Again she cautioned the accused that she was not obliged to show them anything but that whatever she would show them would be used as evidence in court during the trial. Nondumiso Mtsetfwa was invited to witness the pointing out. The accused entered the house and came back with a hammer which had bloodstains; she retrieved the hammer under her bed. She explained to the police that the hammer was the weapon which she used in committing the offence; she handed the hammer to the police.

[22] PW4 handed the bottle and the hammer as part of her evidence and they were admitted and marked Exhibits A and B respectively. She told the court that

during her investigations, she found that the accused had initially hit the complainant with a stone; however, she could not locate the stone because there were many stones at the scene of crime. She maintained her evidence during cross-examination, and, further confirmed that she handed herself to the police. She further confirmed that she was co-operative with the police during their investigation.

[23] The accused, in her evidence in-chief, testified that she was now divorced from her husband as a result of this case. They have two children with her former husband. She admitted that they attended the same church with the complainant.

[24] Prior to the incident, she was walking to church when she came across Bhekinkosi Zikalala and the complainant sitting on the wayside; the complainant was sitting on Zikalala's lap, and, she was on her way home from school.

[25] On the next day she went to speak with the complainant at her school, and, she called her to the school gate; she came with her boyfriend. She asked the complainant why she was in love with her husband. The complainant called her a fool and accused her of lying that she was in-love with her husband; the complainant further asked her boyfriend to hit her, and, he hit her with an open hand three times and also kicked her.

[26] She reported that incident to her pastor's wife Elizabeth Nobela. The Pastor Phillip Nobela arranged a meeting the following Sunday between the complainant and the accused with a view to resolve the dispute; the Pastor's wife also attended the meeting. The complainant admitted the relationship with Zikalala but promised to terminate it.

[27] However on the following Sunday, she found Zikalala and the complainant together holding each other's hands. Later that day, when she arrived at home, Zikalala admitted the relationship with the complainant.

[28] The accused admitted assaulting the complainant on the next day with a hammer and a bottle as well as inserting soil in her private parts. She told the court that she assaulted the complainant because she called her a witch and a prostitute. According to the accused, she had called the complainant to discuss the matter amicably because they attended the same church; however, she couldn't explain why she came carrying the hammer. She denied hitting the complainant with a stone; similarly, she denied leaving the complainant on the scene after the assault and stated that they had left the scene together.

[29] After the incident, she sent her family to apologize to the family of the complainant, and, they also gave her money for hospital expenses. She further told the court that she regretted what she did.

- [30] On her release on bail, her husband didn't welcome her at the marital home; he called her a fool and ordered her to leave the homestead. He further told her to take the two children with her and further support them unilaterally. The children are aged six and seven years respectively.
- [31] Under cross-examination the accused admitted that she never reported the assault by the complainant's boyfriend to the police; she told the court that she reported the incident to the church since they attended the same church with the complainant.
- [32] She admitted that it was not put to the complainant that she was given money for hospital expenses; similarly, she admitted that the medical report was not challenged by the defence that the complainant was assaulted several times all over the body.
- [33] PW5 Dominic Nobela admitted that the accused and the complainant were members of his church; and, that he tried to intervene in their dispute after the accused had reported to him that she suspected that the complainant and Zikalala were in love. He arranged a meeting in which both parties attended; and, the complainant denied the relationship with Zikalala.
- [34] The accused has admitted the '*actus reus*', that is, the unlawful assault upon the complainant. She denied the existence of *mens rea* in the form of intention.

She admitted assaulting the complainant with a hammer, the broken bottle as well as inserting soil into her vagina. Similarly, the accused does not dispute or challenge the medical report which outlines the serious injuries inflicted upon the complainant by the accused. It was the evidence of the complainant as well as PW3 that the accused initially assaulted the complainant with a stone and she fell to the ground; thereafter, she used the hammer to assault her all over the body. The broken bottle was the last weapon used to assault the complainant.

[35] In addition to the multiples injuries inflicted all over her body, the complainant also suffered certain fractures. The undisputed evidence of both the complainant and PW3 was that after the assault, the accused told her that she was lucky to be alive as it was not her first time to kill a human being; the complainant couldn't walk after the assault, and a motor vehicle had to take her to hospital from the scene of crime.

[36] PW4 the investigating officer corroborated the evidence of the three other Crown witnesses in all material respects following his investigations. She was able to find the hammer and the bottle used in the commission of the offence; both weapons were blood-stained, and, they were admitted in court as exhibits. During her investigations she found the complainant at home covered with bandages over her head and on both hands, and, her face was swollen; she was bed-ridden and seriously injured.

[37] The accused alleged that she invited the complainant to the bush so that they could talk as church members about the relationship of the complainant and Zikalala, and, that she didn't intend to assault her; however, she failed to explain why she brought the hammer with her to the scene if she had no intention of assaulting the complainant. Furthermore, her evidence that the complainant provoked her by calling her a witch and a prostitute cannot stand in the light of the evidence by both the complainant and PW3 that the accused hit her with a stone even before they could talk with each other; this evidence coupled with the evidence that she arrived at the scene carrying a hammer constitutes clear evidence that the accused intended to kill the complainant.

[38] The accused testified that she found the complainant and Zikalala on two occasions in an uncompromising position; however, she didn't speak to them. The complainant denied any relationship with Zikalala in her evidence in-chief; she further denied the allegations by the accused that they were found in an uncompromising position with Zikalala by the accused on two separate occasions. The complainant further denied as alleged by the accused that she ordered her boyfriend to assault her when she came to talk to her at the school gate.

[39] The only witness brought by the defence, Pastor Dominic Nobela, told the Court that the complainant denied any relationship with Zikalala in a meeting he had organized to intervene in the dispute. Similarly, the defence didn't

bring Nothando Magagula to testify in her defence that the complainant had provoked her by calling her a witch and a prostitute. Similarly, the accused didn't bring any witnesses to testify that the complainant was in love with her husband. Accordingly, the defence of provocation raised by the accused is not supported by the evidence.

[40] The evidence shows that the accused had *mens rea* in the form of *dolus directus* to kill the complainant in light of the serious injuries inflicted on the complainant and the fact that she came to the scene armed with a hammer. She hit her with a stone without either party uttering any word; she fell to the ground. The use of the broken bottle to assault the complainant as well as the excessive force used with the hammer and stone point to an intention to kill the complainant. In addition the words uttered by the accused that the complainant was lucky to be alive and that she had previously killed a human being show a direct intention to kill. The fact that the complainant was admitted to hospital and further bedridden for some time point to the intention to kill.

[41] In the case of *Rex v. Huebsch* 1953 (2) SA 561 (A) at 567 *Shreiner JA* expressed the law 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 death.”

- [42] This case was approved and followed in this country in many cases including *Rex v. Mndzebele* 1970-1976 SLR 198 at 199F (HC), *Rex v. Gamedze Mbanjwa* 1987-1995 SLR 330 at 336D as well as the Court of Appeal of Swaziland in the case *Henwood Thornton v. Rex* 1987-1995 SLR 271 at 273.
- [43] In light of the evidence before me, I am satisfied that the accused had the requisite *mens rea* to commit the offence of Attempted Murder; and, I find him guilty as charged.
- [44] In mitigation of sentence the defence argued that the accused was a first offender, and that she has two minor children solely dependent upon her for support. There were no aggravating factors advanced by the Crown.
- [45] In passing an appropriate sentence, the court is enjoined to take into account the personal circumstances of the accused, the interests of society as well the seriousness of the offence. It is trite law that punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances. The question of mercy should be seen as a corrective measure for any tendency towards callous or arbitrary vindictiveness in the sentencing of offenders; at the same time, it should not justify any suspicion of a desire to condone or minimize serious crime. See the cases of *S. v. Kumalo* 1973 (3) SA 697(AD) at 698A; *S v. Rabie* 1975 (4) SA 855 (AD)

at 862G; (1) SA 583 (AD) at 586C; *S v. De Maura* 1974 (4) SA 204 (AD) at 280E.

[46] In the circumstances it is my considered view that a custodial sentence would not be in the interest of society in light of the personal circumstances of the accused as well as the facts of the case. A wholly suspended sentence would serve the interests of justice. Accordingly, I sentence the accused to five years imprisonment which would be wholly suspended for five years on condition that she is not convicted of an offence involving violence within the period of suspension.

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

For Crown
For Defence

Crown Counsel M. Nxumalo
Attorney Justice Mzizi