



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CRIMINALCASE NO. 151/2011

In the matter between:

REX

VS

NJABULO THABO MTHETHWA

CORAM:

OTA, J

FOR THE CROWN:

S. FAKUDZE

ACCUSED IN PERSON

JUDGMENT

OTA, J

The Accused person **Njabulo Thabo Mthethwa**, is charged with the offence of Attempted Murder. The indictment alleged that upon or about the 26th of September 2010, and at or near **Makhwelela** area in the Shiselweni Region, the said Accused person with intent to kill, unlawfully stabbed **Sizwe Mndzebele** with a knife and did thereby commit the crime of Attempted Murder.

When the Accused was arraigned before this Court on the 23rd of November, 2011, his right to legal representation was duly explained to him and he elected to conduct his own defence. The charge was then put to the Accused and he pleaded not guilty. Thereafter, a trial in which the crown paraded a total of three witnesses ensued.

PW I was **Sizwe Mndzebele**, the complainant. The relevant aspect of his testimony is that on the 26th of September 2010,

he was at an Nzima homestead in the Makhwelela area, where a traditional ceremony of bringing back the bride was taking place. That he was in charge of the ceremony and welfare of the guests. That his duties also included slaughtering a goat. That whilst executing his duties, he took out a cigarette and lite it. That the Accused approached him and asked for the cigarette.

PW I refused to give the Accused the cigarette. The Accused took offence and an argument ensued between the two. Thereafter, the Accused slapped PW I on the face resulting in both parties engaging in a fight. They were separated by the people around.

After the fight, the Accused left for his homestead. PW I reported the matter to **Mrs Nzima**. Thereafter PW I, saw the Accused approaching the gate of the Nzima homestead, and **Mrs Nzima** went to talk to the Accused at the gate. PW I told the Court that he did not take further notice of the Accused. That whilst PW I was still serving the people, the

Accused approached him from the back, tapped him on the shoulder,

when he turned, the Accused stabbed him on the left part of his chest just above the heart, with a knife, with a brown handle. PW I told the Court, that he sustained injuries as a result of the stabbing. That he was taken to the Nhlangu Health Centre and later referred to the Hlatikulu Hospital, where he was admitted for 1 week and 2 days. PW I identified the knife allegedly used for the stabbing.

Under cross-examination, PW I denied that he was the one that provoked the Accused on the day in question. PW I denied that Accused took the knife from him, rather insisting that after the initial fight, the Accused went to his homestead and brought the knife. He denied that a friend of his pushed the Accused to where he was and he slapped the Accused, resulting in the fight. He insisted that the fight was as a result of his refusal to give his cigarette to the Accused. He told the Court that he never slapped the Accused or gave

him a fist. He denied that he approached the Accused who was seated at

the gate and hit him on the back. He denied that he was then carrying a bloodied knife. He insisted that when the Accused

stabbed him he was standing with **Mrs Nzima**, asking her about what to do with the meat. PW I told the Court that one **Dumsani Zulu** whom the Accused said tried to stop him from getting to the Accused, was not there at the time of the incidence. PWI denied ever fighting with the Accused over the knife resulting in injuries to the Accused's fingers. PW I said that it is not the truth that the Accused took the knife from him when he thought PW I had stabbed him. PW I agreed with the Accused that **Mrs Nzima** was there and will be the one that can tell the Court what happened between the parties.

PW 2 was **Getrude Nzima**. She confirmed that on the day in question the traditional ceremony was taking place in her homestead and that the complainant, PW I, was in charge of the ceremony. She said that PW I entered the house after slaughtering the goat and informed her that he had a fight with the Accused over cigarettes. That PW I told her that the Accused left for his homestead after the fight. PW 2 then told

PW I that he and the Accused should talk the following day to reconcile. PW I thereafter returned to his duties of preparing meat for the people.

PW 2 told the Court that thereafter, someone informed her that the Accused was approaching the gate of her homestead. That she and her husband, one **Mr Mia**, went out to the gate and met the Accused and asked him to go back since he had started a fight earlier on. That the Accused informed them that he had come back to apologize to PW I and promised that he will cause no further noise.

That based on these assurances, they let Accused enter into their homestead.

PW 2 further told the Court that she then went back into the house. That after that, a child came to tell her that PW I wanted to know what to do with the meat. That she went out to meet PW I, who was then next to the house carrying the meat in his hands. That whilst she was standing with PW I,

the Accused approached PW I and said "*I am now here*". PW I responded that he does not want them to fight. PW 2 told the Court that she also asked the Accused what he meant by "*I am now here*" but the Accused did not respond, rather the Accused took out a knife with a brown handle from behind his back and stabbed PW I.

After that the Accused ran away and was chased by the people, apprehended and brought back to PW 2's

homestead. The police were called. PW 2 told the Court that she handed over the knife to the police upon their arrival. It was further

PW 2's evidence that the Accused was the aggressor in the whole incidence. That she did not witness PW 1 assault the Accused at any point. PW 2 also identified a knife with brown handle allegedly used for the stabbing.

Under crossexamination, PW 2 insisted that when they went to meet the Accused at the gate he was coming from his homestead. She told the Court that PW 1 did not approach the

gate and hit the Accused. It was further her evidence that the Accused stabbed PW 1 such that the plate of meat PW 1 was carrying fell down. PW 2 insisted that she was telling the truth and she has no reason to fabricate a story against the Accused or side with PW 1 against him. PW 2 also told the Court that she did not witness the first incidence that resulted in a fight between the parties as she was in the house.

PW3 was 5313 **Constable Z Masango**, a police officer, attached to the CID, at the Nhlanguano Police Station. He told the Court that on the day in question upon receipt of a report of attempted murder at the Makhwelela area, that he and one other police officer went to the homestead of PW 2, **Getrude Nzima** in that area. That at the homestead, PW 2 informed them that the victim had been taken to the hospital by a neighbour and she gave them an okapi knife which she said was used for the stabbing. That at that time the Accused was already apprehended by some community police. It was further PW 3's evidence that they recorded statements from PW 2 and one **Bongikhosi Nzima**. Thereafter, they proceeded

to the Nhlanguano Health Centre to check on the victim. On arrival there, they discovered that the victim had been transferred to the Hlatikulu Hospital. From there they went to the charge office at the Nhlanguano Police Station, where he cautioned the Accused in accordance with the judges rules, that he is not obliged to say anything, but whatever he

says will be taken down and may be used as evidence against him. That the Accused elected to say something.

Thereafter, the Accused was detained and charged. PW 3 told the Court that he then proceeded to the Hlatikulu Hospital with his supervisor to check on the victim. He said the victims condition was not good but they managed to record a statement from him. The okapi knife allegedly used for the stabbing was tendered in evidence through PW 3 and marked exhibit A. Nothing turns on the cross-examination of PW 3.

It is worthy of note that the Medical report of the Medical examination conducted on PW I on the 26th of September

2010, at the Nhlanguano hospital was admitted in evidence by consent, pursuant to section 221 of the Criminal Procedure and Evidence Act 67/1938, as amended (CP & E), and marked exhibit B.

At the close of the case for the crown, the Accused's rights to defence were read to him and he elected to testify on oath and to call two other witnesses. In his defence, Accused admitted that he had gone to the Nzima homestead with his friend on the day in question. He said after a period, he decided to leave but was blocked by PW 1 and his friends. That PW 1 pushed him towards his friends and then slapped him telling him that he was only a boy. That PW 1 also gave him a fist and he started bleeding through the mouth and nose. Thereafter, he went to sit at the gate. That whilst at the gate **Mrs Nzima** approached him and told him that she will let him and PW 1 talk and reconcile the following day.

It was further the Accused's evidence, that he then sent a boy to get his phone from the homestead. That whilst still seated at the gate with his head bowed, because of the blood coming from his mouth and nose, that PW 1

approached him and hit him on the back. Accused said he then looked up and saw that PW 1 was carrying a bloodied knife. Accused told the Court that this caused him to believe that PW 1 had stabbed him. Accused further told the Court that based on this belief, he also stabbed PW 1 and then ran to his homestead where his grandmother after examining him, told him that he had not been stabbed. He further told the Court that it was after this that he was apprehended.

Under cross examination, the Accused agreed that he did not put it to PW 1 and PW 2, that PW 1 hit him with the fist to such an extent that he started bleeding through the mouth and nose. Accused agreed that whilst cross examining PW 1, he said that **Mrs Nzima**, PW 2, was present when the stabbing took place and will be able to shed light on the incidence.

DW 1 was **Dumsani Zulu** who told the Court that on the day of the incidence, even though he was not close, he could

however see that the Accused stabbed the complainant and ran away. He said he did not know what happened before the stabbing because he was not there. This witness was not crossexamined.

DW 2 was **Sibusiso Malindzisa**. He told the Court that on the day in question he saw the Accused and PW 1 fighting and people were separating them. That he also joined to separate them. DW 2 said he does not know much of what caused the fight, but that he had heard them arguing about a cigarette. DW 2 said he saw them fighting for the second time. He also confirmed that he did see the Accused approaching the gate of the homestead and that the Accused came into the homestead because the incidence happened inside the homestead next to the Rondavel. He said that some blood was coming from the Accused, which the Accused whipped on him.

Under cross examination, DW 2 told the Court that the incidence that happened next to the Rondavel was the stabbing, but that he was not present when it occurred.

At the close of the defence, both the crown and the Accused addressed the Court. It is convenient for me to make references to portions of the address by both sides as I deem expedient, in the process of my analysis in this judgment.

Having carefully considered the totality of the evidence adduced in this case, I find that the crown has proved beyond a reasonable doubt, that on the 26th of September 2010, the Accused stabbed the complainant PW 1, in the upper left side of his chest with an okapi knife and that PW 1 sustained severe injuries as a result of the stabbing. The evidence of the crown witnesses, especially PW 1 and PW 2, as well as the medical report exhibit B, constitute evidence beyond a reasonable doubt of the fact of said stabbing and injuries.

I find the crown witnesses very credible and reliable witnesses. PW 1 and PW 2 led very cogent and consistent evidence which corroborated each other in material particular. Their evidence was to the effect that whilst PW 1, complainant, was carrying a plate of meat in his hands talking to PW 2, that the Accused approached complainant, tapped him on the back and when the complainant turned, the Accused proceeded to stab him on the left part of his chest with a knife, exhibit A, which the Accused took from behind his back. It is also apparent from the testimonies of PW 1 and PW 2 that there had been a fight between the Accused and PW 1, prior to the stabbing. After the fight, the Accused left PW 2's homestead to his home and later came back. Whilst still approaching the gate of PW 2's homestead, PW 2 and her husband, met the Accused outside the gate and tried to dissuade him from going into the premises, since he had earlier on started a fight. PW 2 and her husband eventually let the Accused into their homestead on assurances by the Accused that his mission there was to apologize to PW 1, and that he would not cause any further

noise. The Accused however did not live up to these promises,

but rather stabbed PW 1. I believe PW 1 and PW 2, as I find them credible and reliable witnesses. I find absolutely no reason and none is urged by the Accused, why PW 2 in particular, should fabricate this magnitude of story against him.

The Accused himself consistently through out this trial, agreed that he did stab the complainant on the day in question. The Accused did not dispute that exhibit A, the okapi knife, was used in the stabbing or that exhibit B, the Medical Report correctly captured the injuries sustained by PW 1 as a result of the stabbing. His defence however is that the stabbing was due to the fact that he was provoked by the complainant.

I must say that I do not believe any part of the Accused's evidence, other than that he did stab the complainant with exhibit A. This is because Accused contradicted himself in many aspects of his evidence. Whilst cross examining PW 1,

Accused suggested to him that **Mrs Nzima**, that is PW 2, was there during the stabbing incidence and would be in a better position to tell the Court what transpired. PW 2 as I have

already demonstrated, was called as a crown witness, and she gave cogent and consistent evidence in support of PW 1's evidence on the issue of the stabbing. Quite dramatically after PW 2's evidence, the Accused turned around not only to accuse PW 2 of telling lies, but also of not even being present at the scene of the stabbing contrary to his earlier assertions.

Furthermore, the Accused also told the Court whilst cross examining PW 1, that the cause of the fight preceeding the stabbing was not because PW 1 had refused to give him a cigarette, but because PW 1 and his friend's were bullying him. The Accused told the Court that in the process of bullying him, one of PW 1's friends pushed him at PW 1 and PW1 slapped him. However, in his defence the Accused told the Court that it was PW 1 that pushed him in the direction

of his friends and thereafter proceeded to slap him on the face and gave him a fist.

Then there is the Accused's assertions, whilst still cross examining PW I, that DW I, **Dumsane Zulu**, was present

during the stabbing and had tried to prevent PW I from getting to the Accused. This piece of evidence was impeached by

DW I, who told the Court that he was not near the parties during the stabbing incidence, but that he could see that the Accused stabbed PW I and then ran away.

More to the foregoing, is that the evidence of DW 2, whom the Accused also called as a witness, contradicted the evidence, of the Accused in material particular. Even though DW 2 told the Court that he did not witness the stabbing incidence, he however stated that the fight preceding the stabbing was caused by an argument over a cigarette which PW I refused to give to the Accused, contrary to Accused's assertions. DW 2 also told the Court that he did see the

Accused approaching the gate of the Nzima homestead and that Accused did come into the homestead because the stabbing took place therein near the rondavel. This is also contrary to Accused's assertions that he never left the Nzima homestead after the fight but sat at the gate where the stabbing took place.

There is no doubt in my mind that the Accused is an untruthful and unreliable witness. His evidence as demonstrated ante, is not only contradictory in itself, but also inconsistent with that of his witnesses DW 1 and DW 2. The Accused appears to have been changing his evidence as though striving for perfection. As the case lies, there is no evidence tendered to substantiate the Accused's testimony that he never left the premises after the initial fight and that he was not in possession of exhibit A, but rather retrieved it from PW I, after he presumed that PW I had stabbed him at the gate. Let me say it here that in the circumstances of this case, for this Court to believe the defence which the Accused

laboured to advance, that it was his assumption that he was stabbed by PW I, which led him to stabbing PW I in retaliation, by would be perverse in the extreme. I say this because, assuming without conceding, that I were to accept that PW I was holding a bloodied knife as testified to by the Accused, I hold the view that the mere fact that a party is holding a bloodied knife is not sufficient for another party to

presume that he has been stabbed with the knife. For such a party to make that presumption, he must have felt some pain as a result of such stabbing or at least experienced some bleeding in consequence thereof. This is obviously not such a case. I do not believe the defence touted by the Accused and it stand, rejected in the circumstances.

Exhibit B is the medical report of the medical examination conducted on the PW I at the Nhlanguano Health Centre, by one **Dr F Ndakiti**, after the stabbing incidence. Exhibit B demonstrates that the PW I sustained lacerations on his upper chest which was 3-4cm long. Exhibit B further

demonstrates that PW I was referred to Hlatikulu Hospital for chest x ray to rule out lung injury, because he had symptoms of difficulty in breathing as a result of the stabbing. There is undisputed evidence that PW I was admitted at the Hlatikulu Hospital for

a total of one week and 2 days and that his condition when seen at the hospital by PW 3, was not good.

I am firmly convinced that the Accused was unlawful in his conduct on the day in question. He went to his homestead after the initial fight between him and the complainant, came

back with exhibit A, with the sole purpose of stabbing PW I. In his determination to achieve this aim, borrowing the words of **Mr Fakudze** in his oral submissions in Court, the Accused “pulled wool” over the eyes of PW 2 and her husband, who tried to prevent him from entering into their homestead, by telling them that he intended to apologize to PW I and that he will not cause any further trouble, thus deceiving them into letting him into their premises, whilst

still plotting his unlawful enterprise. Thereafter, the Accused proceeded to use the okapi knife exhibit A to stab PW I in the upper left part of his chest, thus inflicting on him injuries to such an extent that he experienced difficulty in breathing, and had to be referred to the Hlatikulu Hospital, where he was admitted for 1 week and 2 days.

It is proved that the Accused ensured that he stabbed PW I on the chest, by first tapping PW I on the shoulders, when PW I

turned towards the Accused, the Accused planted the knife in his chest. It is also proved that at the material time of the stabbing, PW I posed no threats to the Accused, as he was standing with a plate of meat in his hands talking to PW 2.

I must say that by employing a knife and stabbing PW I in the way and manner that has been proved in this case, the Accused clearly foresaw that the injury he intended to inflict on PW I, could cause death, but he was reckless whether or not death resulted.

It is thus apparent to me that the Accused has mens rea in the form of *dolus eventualis*. This is the position of the law in this jurisdiction, which has its foundation in the decision of the South African Appellate Division in the Case of **Rex V Huebsch 1953 (2) SA 561 A at 567, where Schreiner JA** declared 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”.

The erstwhile Court of Appeal of Swaziland adopted and applied the principle evolved in **Rex V Heusbsch (supra) in the case of Henwood Thornton V Rex, 1987 - 1995 SLR 271 at 273, wherein Kotze JA**, stated thus

“ ---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”.

It is worthy of note that in the later case of **Rex V Mbanjwa Gamedze 1987-1995, SLR 330 at 336f, Dunn J**, applied this principle in the following language:-

*“ 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 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''.

I must also add that I further find that the Accused had direct intention to kill the PW I. His actions on that day were clearly

calculated and premeditated. After the initial fight, he left for his homestead, where he procured a lethal weapon like exhibit A, the okapi knife. He returned back to the Nzima homestead, deceived PW 2 and her husband and gained entry into the premises. He ensured that he stabbed PW I on a sensitive part of his body by first tapping him on the shoulders and when PW I turned he imbedded the okapi knife in his chest.

In any event, I have already held that the Accused had mens rea in the form of dolus eventualis. He fully appreciated that there was some risk to the life of PW I

by his actions, but was reckless as to whether or not the risk is fulfilled in death.

In the circumstances, 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.