



**IN THE HIGH COURT OF SWAZILAND**

Criminal Case No. 63/2010

In the matter between:-

**REX**

**Crown**

and

**JOMO MCINISELI SIMELANE  
COSILE SHABANGU**

**1<sup>st</sup> Accused  
2<sup>nd</sup> Accused**

**Neutral citation:** *Rex v Jomo Mciniseli Simelane & Another* (63/10)  
[2012] SZHC 256 (20 November 2012)

**Coram:** HLOPHE J

**For the Crown:** Mr. S. Dlamini

**For the Accused:** Mr. S. C. Simelane

**Heard:** 8/10/12; 9/10/12; 10/10/12; 11/10/12

**Delivered:** 09/11/12

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## JUDGMENT

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- [1] On the 22<sup>nd</sup> day of July 2009, one Tanele Sacolo and the children she was with were attacked while asleep at her home at an area called Etimphandzeni in the Shiselweni District. As a result of this attack, the said Tanele Sacolo, PW1 in this matter and, the complainant in most of the counts was hacked with a bush knife three times, resulting in an injury on the head, one on the forehead just above the left eye and another one on her left hand. PW1 was also raped in the process; whilst PW2, a boy of about 15 years and her relative, was hit on the face with a bush knife. PW1's house and all the items therein, were burnt into ashes. Also burnt to death in the process was PW1's seven months old baby, Cololwakhe Mamba.
- [2] The Police investigations that ensued led to the arrest of both the first and second accused persons. Subsequent to this arrest, both accused persons were charged with murder, attempted murder, rape, arson and assault with intent to do grievous bodily harm.
- [3] For the sake of completeness the full charges against the accused persons were particularized as follows:-

In count 1, the 1<sup>st</sup> and 2<sup>nd</sup> accused were charged with murder it being alleged that on or about the 22<sup>nd</sup> day of July 2009, at or near Timphandzeni area, whilst acting in furtherance of a common purpose,

the accused persons did unlawfully and intentionally kill one Cololwakhe Mamba, a male baby aged seven months at the time.

- [4] On count 2, the accused persons were charged with attempted murder, it being alleged that on or about the 22<sup>nd</sup> day of July 2009, at or near Timphandzeni area in the Shiselweni District the said accused persons, whilst acting in furtherance of a common purpose, did unlawfully and with intent to kill hack one Tenele Samkeliso Sacolo, with a bush knife.
- [5] On count 3, the first accused person was charged with rape, it being alleged that he, on the 22<sup>nd</sup> day of July 2009 and at or near Timphandzeni area in the Shiselweni Region, intentionally have unlawful sexual intercourse with, Tanele Samkeliso Sacolo, a female adult of 25 years without her consent. This rape was alleged to be attended by aggravating factors as envisaged by Section 185 bis of the Criminal Procedure and Evidence Act of 1938 as the complainant was assaulted with a bush knife after she was raped and she was raped in front of her children by the accused who did not use a condom or any protective device, exposing the complainant to sexually transmitted disease which include HIV and Aids.
- [6] In count 4, the 1<sup>st</sup> and 2<sup>nd</sup> accused were charged with arson, it being alleged that on or about the 22<sup>nd</sup> July 2009, and at or near Timphandzeni area in the Shiselweni District, the accused persons whilst acting in furtherance of a common purpose did unlawfully and with the intention of damaging the immovable property of one Veli Mamba, set his (Veli Mamba's) house on fire and thus damaged the house in question and

the properties inside therein amounting in all to a sum of E150 000.00 and by so doing they committed arson.

[7] As regards count 5 the first accused was charged with assault with intent to do grievous bodily harm in that on or about the 22<sup>nd</sup> July 2009, at or near Timphandzeni area, in the Shiselweni District, the said accused person did unlawfully hit one Gcina Mshibo Mamba once on the face with the blade of a bush knife with intent to cause him grievous bodily harm.

[8] Throughout the proceedings the Crown was represented by Mr. S. Dlamini whilst the Defence was represented by Mr. S.C. Simelane. I must express my gratitude to both counsel for the incisive and diligent manner in which they handled the matter, including their timeous intervention whenever a need to do so arose.

[9] Before the hearing could commence, I was informed that both counsel had since met and discussed the matter so as to reach some agreement in its with a view to curtailing its scope. As a result of the discussion, the said counsel agreed on what aspect of the matter needed to be proved and that which did not. To this end there was filed a statement of agreed facts couched in the following words:-

### **STATEMENT OF AGREED FACTS**

*It is agreed between the Crown and the accused persons as follows:*

1. *On or about the 4<sup>th</sup> March 2009 one MNBOBANDOBA MASUKU who was husband to the second accused was killed whilst at ETIMPHANDZENI AREA. The said MNBOBANDOBA was hacked with sharp objects and his body was*

*burned inside his own car. During the process a child of about 2 years old sired by the 2<sup>nd</sup> accused and the said MNDOBANDOBA named NTANDO MASUKU was also hacked and injured as a result of which injuries his left hand is still nonfunctional to date.*

- 2. One VELI MAMBA who is husband to complainant in Count 2 and 3 was a main suspect and was arrested in relation to MNDOBANDOBA'S death. He obtained bail and the matter is still pending.*
- 3. Upon his release on bail, word reached the 2<sup>nd</sup> accused person to the effect that VELI MAMBA was boasting that he will never be convicted or serve prison time in relation to the said offence. The second accused person being pained by the death of her husband planned revenge. She then hired the 1<sup>st</sup> accused person to kill VELI MAMBA and burn his cars. Both accused bought petrol in Nhlangano and proceeded to TIMPHANDZENI where VELI MAMBA was to be killed and his cars burned.*
- 4. The 2<sup>nd</sup> accused directed the 1<sup>st</sup> accused to the homestead of VELI MAMBA where it was expected that he would be found and killed and his motors vehicles burned.*
- 5. At about 23:00hrs on the 22<sup>nd</sup> July 2009 the 1<sup>st</sup> accused person set about his mission. The second accused person did not go with the 1<sup>st</sup> accused to the homestead of VELI MAMBA but stayed behind at a nearby homestead and waited for the 1<sup>st</sup> accused to come and give a report. The 1<sup>st</sup> accused later returned and handed over to the 2<sup>nd</sup> accused a bush knife which was to have been used in killing VELI MAMBA and thereafter reported that he had completed the task.*

[10] Both accused pleaded not guilty to each one of their Respective Charges, and the crown commenced its task of leading evidence to prove the case against each one of the accused persons beyond a reasonable doubt as required of it in law.

- [11] In this regard the crown led four witnesses comprising PW1, Tanele Samkeliso Sacolo; PW2, Gcina Mshibo Mamba; PW3, Thandi Simelane and PW4, 2861 Detective Constable Alex Jabulani Mathobela.
- [12] During her testimony, PW1, Tenele Samkeliso Sacolo, informed the court that it was during her deep sleep on the night of the 22<sup>nd</sup> July 2009, when she heard a loud bang on her door followed by the door which fell on the children sleeping on the floor, when upon waking up, she saw a man, approaching, and walking on the fallen door towards her bed. He was armed with a bush knife and what appeared to be a two litre container which she was to later determine was carrying petrol.
- [13] She was at the time carrying her seven months old baby, Cololwakhe Mamba, whom she had just picked up upon waking up as a result of the loud bang on the door. She was in the company of two other people in the house at the time, namely Gcina Mshibo Mamba, a boy of about 15 years then and a girl of about nine years called Nqobile Zwane.
- [14] This person who walked in armed as stated above, she contends, was the 1<sup>st</sup> accused. When this person walked in, he asked her as to why they had killed Mndobandoba Masuku. She had enquired if it was said she was the one who had killed him, to which he had said it was her husband, Veli Mamba.
- [15] He ordered her to desist from raising an alarm and to brighten the lamp which was otherwise faint or dim. He then ordered her to sleep facing

upwards. He thereafter ordered the boy, PW2, who was in the house with her to have sexual intercourse with her. The boy refused to do so, claiming that he could not have sexual intercourse with his mother as that is how he regarded her. This prompted the accused to then hit the boy, PW2, with a side of the bush knife on his face after which he pulled blankets and threw them over him covering him in the process.

[16] Thereafter he went on to force himself on the complainant in the rape count, (PW1 herein) and proceeded to have sexual intercourse with her after explaining that is what he had wanted Gcina Mamba to do when he ordered him to have sexual intercourse with her. Having consummated the sexual intercourse with the complainant, he took up the two litre container he had come with and started sprinkling the petrol contained in it on the bed. Thereafter, he took the bush knife and started hacking the complainant, PW1, with it. He in fact inflicted three very serious injuries on the complainant's head, forehead and on her left hand.

[17] Before he started hacking her with the bush knife, she had asked him not to kill her and the children as she pleaded for their lives. The accused is said to have told her that he was going to kill her and the baby after having completed the sexual intercourse he demanded from her.

[18] Sensing death from the first accused person's bush knife hacking, PW1, fought back as a result of which she grappled with the accused, over the bush knife. Their wrestling over the bush knife led to their pushing each other outside the house, where the complainant or PW1, managed to

escape from the first accused. She says she ran to the nearby homestead as she raised an alarm and shouted for help. One Thandi Simelane PW3, came out and met her by the gate of that homestead. As PW1 was naked, she was given some clothes to wear and cover herself up. She had to be assisted to walk into the house by Thandi Simelane, PW3, because she could no longer walk with ease as she had become weak.

[19] At the time the first accused entered PW1's house and after asking her about the whereabouts of Veli Mamba, he had, over and above, ordering her not to shout, ordered her to put the baby, who was crying and was being carried by the complainant, down next to the other children. This baby had been left in that position and had continued crying throughout PW1's ordeal and remaining in the house.

[20] As PW1's wounds and injuries were being washed and bandaged, she saw her house being burnt. Her seven months old baby had been left lying on the floor where he was crying when she left the house. Thandi Simelane called a neighbour and later called the Police reporting what had, and was still happening there. PW1 was eventually taken to hospital where she was treated.

[21] According to PW2, Gcina Mamba, he was asleep in the house with PW1 and Nqobile Zwane, when a loud bang on the door, followed by a falling door was heard. There then entered a stranger who ordered his mother PW1, to brighten the dim lit lamp. He further ordered PW1 to put down the baby she was carrying and to sleep on the floor. He says he then ordered her to open up her private parts; using very vulgar language in the process.



[22] The first accused went on to order PW2 to have sexual intercourse with PW1. When he refused to do so, saying she was his mother, he was assaulted with the bush knife's blade on the face. He says he was thereafter covered with blankets by the accused. Whilst covered with the blankets, he heard the first accused ask PW1 if it was nice. She answered back wondering how it could be as he was wielding a bush knife apparently to force her. He thereafter observed, through a crevice in the blankets, the first accused sprinkling some liquid contained in the container he had bought with him on the bed. He thereafter took his bush knife with which he started hacking PW1. They later wrestled over the knife after PW1 fought back.

[23] It was during the wrestle over the bush knife that Gcina Mamba and Nqobile Zwane managed to escape and ran to their grandmother's homestead nearby. When they left the room, which was after PW1 and the accused had gone out as they wrestled over the bush knife, the house was intact and no lamp fallen. The baby was still on the floor where he had been left lying.

[24] PW3, Thandi Simelane corroborated PW1's evidence and told the court that whilst at her home she heard someone shouting by the gate raising an alarm and she went to attend to her. This person was PW1. She was naked and had injuries or wounds on her head and on the forehead just above her left eye as well as on her left hand. She gave her clothes, and assisted her into her house as she could not walk out of being weak. Inside her house she attended to her by washing and cleaning her wounds over and above bandaging them. PW1's relative was called by

PW3 and informed about what had happened. She also called the Police.

[25] PW1 and PW3 could see PW1's home from where they were as well as her burning house as the flames became visible through the windows. The Police officers eventually arrived and took PW1 to hospital.

[26] PW4, 2861 Detective Constable Alex Jabulani Mathobela, gave evidence and informed this court that he was the investigating officer in the matter and that around midnight of the 22<sup>nd</sup> July 2009, he got a report that at a place called Timphandzeni, there was an attack at a certain homestead which was also burnt down. He then proceeded to the said homestead in the company of his colleagues.

[27] Upon arrival at the area concerned, they found the homestead still burning down. There were a lot of people gathered outside. The occupants of the homestead were however not there. They were to later learn from an old woman, one Tryphinah Mamba, who arrived there, that the two children from that home had run to her homestead and sought refuge there. At about the same time, a call came through, directed at Tryphinah Mamba, informing her that PW1, was at her place where she had sought refuge. The Police themselves were also called at that time.

[28] They proceeded there, and found PW1 already bandaged by Thandi Simelane, PW3. She was taken to hospital thereafter. He thereafter commenced his investigations which led him to accused 2 after it had transpired she had been seen in the area. She implicated accused 1 who

they then looked for. They found accused 1 in Nhlangano, next to a place called Phoenix Bar.

[29] He was then taken for questioning at the Nhlangano Police Station. This followed his being cautioned in terms of the Judges Rules that he was not obliged to say anything and that if he said anything such would be recorded and could be used in evidence against him. This accused led the Police to Timphandzeni area, where they found Nqobile Shabangu who after caution in terms of the Judge's Rules took them to a toilet, a pit latrine, from where she retrieved a bush knife. The bush knife was handed into court as an exhibit and was accordingly marked. The bush knife was said to have been used during the commission of some of the offences with which the accused are charged.

[30] This witness says when he interrogated the accused persons as well as when they would lead them to point out anything he had each time cautioned them according to the Judge's Rules. From the answers he received from the accused persons after caution he then charged them with the offences concerned. The first accused allegedly freely pointed out the greenish over coat he allegedly wore during the commission of the crime. That coat too was handed into court and was made an exhibit.

[31] Certain photographs were entered into court by consent. The photographs showed the scene of crime being the burnt house both inside and outside. Of paramount significance is the photograph initially marked photo D. This photograph showed a picture of the burnt child at close range. It was otherwise entered by consent and marked exhibit D5.

[32] It had also transpired during the evidence of PW1, that she had at some stage, and particularly after her release from hospital, been taken to the Nhlanguano Correctional Services Institution, where an identification parade had been arranged. She said she was able to identify the first accused from the other men of more or less similar body and build and looks. The men had all been made to wear a soccer kit. Photographs showing the said parade and in particular the one showing the deceased being identified, were handed in by consent, and were marked exhibits E1 to E5.

[33] There was also entered by consent a postmortem report of the deceased baby, Cololwakhe Mamba. The cause of death was recorded in the said report as being, "Due to Burns". Describing the external appearance and condition of limbs, the Doctor recorded the following:-

*"Body is completely burnt, beyond recognition, with missing portions of limbs, skull bone exposing brain matter cooked, ribs, soft tissues of scalp, face, neck, trunk, limbs due to burns. Trunk organs are exposed and all organs cooked. Stomach empty, no identifiable ordour present, ¾ genitalia burnt, third degree burns all over body present with soot particles in trachea, Bronchi favouring ante mortem sunis. Facilities are lacking for X – raying the body and follow universal procedures.*

*This report was marked exhibit F.*

[34] The medical report prepared by a certain Doctor Masimba Jinguri was also introduced by the crown. The defence however, indicated that it was objecting to the handing in of the said report in the absence of the medical Doctor who prepared it. It was contended that certain questions

needed to be put to the Doctor. By way of clarification, this report related to the injuries that had been inflicted on the complainant to count two as well as to the rape referred to in count three.

[35] Following the objection raised on behalf of the accused with regards the admissibility of the medical report, the crown applied to have the report admitted in terms of section 221 of the Criminal Procedure And Evidence Act of 1938. It must however be clarified that only the portion relating to the rape and not the part referring to the injuries, sustained or referred to in count 2 was being objected to. The report was otherwise provisionally admitted, as regards its contents, pending determination in this judgment. It was accordingly marked annexure “G”. I now deal with the question of its admission.

[36] Section 221 of the Criminal Procedure And Evidence Act 1938 provides as follows:-

*“221 (1) In any criminal proceedings in which any facts are ascertained –*

*(a) By a Medical Practitioner in respect of any injury to, or state of mind or condition of the body of a person, including the results of any forensic test or opinion as to the cause of death of such person; or*

*(b) By a Veterinary Practitioner in respect of any injury to, or the state or condition of the body of any animal including the results of any forensic tests or his opinion as to the cause of death of such animal,*

*such facts may be proved by a written report signed and dated by such medical or veterinary practitioner, as the case may be and that report shall be prima facie evidence of the matters stated therein.*

*Provided that the court may of its own motion or on the application of the prosecution or the accused require the attendance of the person who signed such report but such court shall not so require if –*

- (i) The whereabouts of the person are unknown; or*
- (ii) Such person is outside Swaziland and having regard to all the circumstances, the justice of the case will not be substantially prejudiced by his non – attendance.*

*(2) Where a person who has made a report under subsection 1 has died, or the court in accordance with the proviso to subsection (1) does not order his attendance, such report shall be received by the court as evidence upon its mere production, notwithstanding that such report was made before the coming into effect of this Act.*

[37] Mr. Dlamini for the crown contended that the report be admitted without the Doctor who prepared it because his whereabouts were unknown and he had already left Swaziland.

[38] The specifically contested portion of the medical report relates to the opinion expressed by the Doctor and as recorded on the report after he had examined the complainant in the rape matter so as to determine whether or not sexual intercourse had occurred. The opinion concerned is expressed as following:-

*“Might have been sexually abused but physical examination did not reveal clear cut signs of sexual abuse.”*

[39] Mr. Simelane for the accused stated that he wanted the Doctor concerned to clarify his opinion because he had recorded his observations as being

normal on such things as the breasts, labia major, labia minora, vestibule, fourchette and perineum of the complainant's private parts.

[40] I do not agree with Defence Counsel that the ambiguity with which the Doctor expressed his opinion is much if one considers the facts of the matter. The Doctor in my view simply stated that following his examination of the complainant concerned, he could not rule out the possibility that sexual intercourse had taken place. The normalcy expressed vis – a – vis the specific parts of the complainant is not surprising when one considers the fact that the complainant was a married woman, who had given birth to children including the 7 months old baby, killed on the said day.

[41] I therefore have to admit the report prepared and handed into court as proof of what it says. I am of the view that the Doctor does not need to be called owing to my not having ordered his attendance because it is clear his whereabouts are unknown and he has left Swaziland. Furthermore I see no prejudice the admissibility of the report shall bring about vis – a – vis the accused.

[42] Each one of the crown witnesses were subjected to cross – examination by Defence Counsel Mr. Simelane. In summary the defence put to the crown witness was that the first accused was related to the second accused who was the former's niece. Following the death of the latter's husband, one Mndobandoba Masuku, who was killed through being hacked with a bush knife and eventually burnt inside his car, the second accused hired the first accused to kill the suspect in the killing of the said Mndobandoba Masuku, one Veli Mamba, husband to PW1. This it

was alleged was sparked by an alleged boast by Veli Mamba that he would not be tried nor convicted of the murder of Mndobandoba which he allegedly said after being released on bail.

[43] As a result of the said arrangement the first accused and the second accused purchased petrol and armed first accused with a bush knife to proceed to the homestead of Veli Mamba. The plan was allegedly that Veli Mamba be killed the same way he had killed Mndobandoba, which was to hack him with a bush knife, bungle him into his car and burn him therein.

[44] It was put to the said witnesses that all 1<sup>st</sup> accused was interested in was to kill Veli Mamba in avenging the death of Mndobandoba Masuku and not anyone else. The tone in this defence was that the death of Cololwakhe Mamba, the deceased, was a coincident and was a mistake brought about by the fact that the first accused had not seen the baby or was unaware that the baby was there.

[45] It was otherwise denied that the accused had raped and attempted to kill PW1 as alleged. It was further denied that the first accused had unlawfully assaulted PW2.

[46] It was however conceded that the accused had burnt the house, hence his plea of guilty to arson. Otherwise the version on how the events unfolded inside the house leading to the charges eventually preferred against the accused, was put to the crown witnesses as follows.



- [47] That having entered the complainant's house looking for Veli Mamba, and after having asked why Mndobandoba had been killed; the first accused had been attacked by the complainant who then got hacked in the process and as they wrestled over the bush knife. PW2 joined in the alleged assault of the first accused who then assaulted him with the side of the bush knife in an attempt to ward him off.
- [48] That the wrestle over the bush knife between PW1 and the first accused had led to the latter being overpowered and eventually pushed out of the house, where at PW1 got an opportunity to escape. That as the first accused returned to the house, he was met by a huge fire by the door as the house was now burning from inside. The fire was worsened by the explosion of something which he could not tell but now believes was a gas cylinder which was used as energy for the refrigerator. He otherwise did not know that there was a child or baby who had remained in the house.
- [49] It was disputed to the crown witnesses, that the first accused had seen the child or baby concerned in the house. It was also put to the crown witnesses that the first accused had not had sexual intercourse with the complainant in count 3. It was denied he had sprinkled petrol on the bed.
- [50] During cross – examination the statements provided by the police were used to cross –examine the witnesses. These statements eventually had to be handed into court.

- [51] The defence decided to call the first accused to his defence at the close of the crown's case. The second accused was otherwise not called to her defence, it being said her case was covered in the statement of agreed facts filed by the consent of both parties.
- [52] In his defence the first accused reiterated the case put to the crown witnesses detailed above. He maintained he had planned to kill Veli Mamba in the same way he had allegedly killed Mndobandoba which was to hack him with the bush knife and eventually burn him in his own car.
- [53] The first accused was also cross – examined at length. It was put to him, significantly, that the first accused had not just set out to kill only Veli Mamba but anyone found at his house hence his having hacked PW1 with a bush knife after he had already indicated as alleged that he was to kill her first and then the baby later. His alleged sprinkling the bed with petrol was part of the plan to kill those found in Veli Mamba's house, which is why Gcina Mamba was covered with the blankets he was covered with. Furthermore it was put to the first accused that the burning of the child to death was part of the plan given that even Mndobandoba's child who was with him on the day he was killed had been hacked and burnt to the extent his hand is not functional todate.
- [54] On the evidence before me I find that the first accused was aware that the child was in the house at the time he entered there. I accept the evidence of PW1 and PW2 that when the first accused entered the house, the child was carried by PW1, its mother who pleaded with the first accused not to kill them. In fact I must say I accept the version of

PW1 and PW2 on how the events unfolded inside the house. This I do because their versions do not only corroborated each other but they were the most convincing and credible in their testimonies. They withstood intense cross – examination and remained unshaken. Accordingly I also find that the first accused did have sexual intercourse with PW1 and that same was forced upon her through the threats of violence which if they were not express then they were implied. It shall be remembered that PW1 and PW2 corroborated each other on how the said rape occurred including its prelude. PW2 testified how he heard first accused ask PW1 if it (sex – rape) was nice as he was covered with the blankets. It was not in dispute that Veli Mamba has not been convicted of the death of Mndobandoba for which up to that time he was only a suspect.

[55] The evidence reveals that the complainant in count 2 PW1, was not mistakenly injured or injured casually in the cause of a struggle over the bush knife as the accused puts it. The accused had already said that he was going to kill her together with the baby [and the others] after the rape he had perpetrated on PW1. His sprinkling the bed with petrol goes to confirm that his intention was not just to kill Veli Mamba alone as alleged but the occupants of the house. It is clear Veli Mamba was not in the house at the time, so why was the bed being sprinkled with petrol then? Secondly he failed to give a sound and probable explanation on why he had taken the petrol into the house in the first place if his aim had been to burn Veli Mamba in his car as he had put it. Consequently I find that the complaint in count two was deliberately and intentionally hacked with the bush knife. The only reason I can think of at that stage was to simply kill her and the others and burn them inside the house or

was to incapacitate her and then burn her inside the house, together with the children she was with.

[56] Considering the weapon used and the part of the body it was used on PW2, I have no hesitation that the first accused intended to injure PW2 in a serious way. This means that he cannot be said to have effected casual assault on the person of PW2 as he wants it to look like.

[57] The facts indicate, and I find, that the burning of the house was part of the plan by the first accused to consummate the crimes he had set out to commit, namely to kill Veli Mamba and those with him in the house.

[58] As concerns the law, relating to the offences concerned, the position is now settled that murder consists in the unlawful and intentional killing of a human being. Whilst the first accused claims not to have intended killing the deceased, I have already found as a fact that he was aware that the baby was there in the house at all times. Furthermore, the baby is said to have cried throughout the ordeal and when PW1 and the others were in the house. There is no way he would not have taken note of baby. His contention in this regard is inherently false. His sprinkling the bed with petrol is not consistent with an unplanned burning of the house and therefore the child who to the accused's knowledge had been left in the house when he wrestled out of the house with the baby's mother. In my view the death of the baby, Cololwakhe Mamba was the most barbaric, cruel and gruesome way of ending one's life let alone that of an innocent child.

[59] As expressed in *Thandi Tiki Sihlongonyane vs Rex Court of Appeal case no. 40/97* there are two types of intention (dolus) namely *dolus eventualis* and *dolus directus*. Describing these forms of intention, the Court of Appeal said the following:-

“(i) *Dolus directus* occurs where the accused directs his will to causing the death of the deceased. He means to kill. There is in such event an actual intention to kill; and

(iii) *Dolus eventualis* (occurs) where accused foresees the possibility of his act resulting in death yet he persists in it reckless whether death ensues or not”.

From the facts of the matter referred to above, I have no hesitation to find that the intention exhibited by the first accused was *dolus directus*. Otherwise there would be no sound explanation on why he took the petrol to the house of his victims, why he sprinkled petrol on the bed, why he did not pick up the baby from the floor after he had hacked its mother and chased her away. It shall be remembered that I have rejected his version that the fire was caused by an accident. It shall further be recalled he had already pronounced to PW1 he was going to kill the baby after killing her. This then establishes a case of *dolus directus* – direct intention to kill the child and not the accident he refers to.

[60] In any event it is obvious that the accused cannot escape being guilty of murder even on *dolus eventualis* – legal intention – when considering that he had set out to kill a human being. It therefore should not matter much if he killed a different person from the one he had set out to kill in

the first place, as long as the death of the deceased was foreseeable as a possibility. I have no hesitation when he entered the complainant's house with petrol and went on to sprinkle it on the bed, he foresaw the possibility of any of the occupants dying but was reckless whether or not it did arise. See in this regard ***S v Nkombane and another 1963 (4) SA 877 (A)***.

[61] Attempted murder occurs in a case where the accused, whilst intending to kill the deceased, sets out to do so, but does not consummate the act either because of an interference from another force or because he fails to execute the act with the necessary skill. The case of ***R v Schumbi 1945 AD 543 at 547*** is instructive in this regard.

[62] In the matter at hand the evidence reveals that before he hacked the complainant in count 2 with the bush knife, the first accused had pronounced that he was to kill the complainant with her baby and was going to start off with her. Under these circumstances there would be no doubt that the intention behind the act in question was to kill the complainant and on this basis alone attempted murder is in my view established.

[65] If however his pronouncement that he meant to kill her were for any reason not to matter, there is in my view sufficient evidence to establish a constructive intention to kill the complainant. In ***Sibusiso Kukuza Dlamini Criminal Appeal case no. 39/2010***, the Supreme Court, had the following to say per Ebrahim JA; whilst quoting from ***R v Du Randt 1954 (1) SA 313 (AD)***;

*“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.”*

[66] The learned Judge of Appeal went on the quote as follows from the case of ***R v Tazwinga 1968 (2) SA 590 at 591***;

*“It is not necessary therefore, for the crown to prove that the accused appreciated that the act contemplated involved a probable risk to life. It is enough if the crown goes no further than establishing that the accused must have appreciated that there was a reasonable possibility of risk of life involved in the action contemplated.”*

[67] I am convinced that attempted murder has been proved against the first accused. He used a bush knife against the complainant and directed it at a delicate part of the complainant’s body the head and the forehead. This clearly establishes the reasonable possibility of risk to life referred to in ***R v Tanzwinga*** (Supra) referred to above.

[68] In rape matters the crown is required by law to prove over and above the intention to commit the crime the identity of the accused, the fact of the sexual intercourse (penetration) and the lack of consent. The case of ***Rex v Valdema Dengo Review Case no. 843/1988*** is instructive in this regard.

[69] In the matter at hand, the identity of the accused is not in issue at all. He himself admits that he was at the scene and he is the person who

inflicted the wounds on PW1 with the bush knife, even though he denies raping the complainant in this count.

[70] PW1, whose evidence I have accepted, informed the court that the accused ordered her to lie down and face upwards whilst armed with a bush knife so that he could show PW2 what he expected him to do when he ordered him to have sexual intercourse with her. According to PW1 he went on to have sexual intercourse with him.

[71] Of significance in this brief factual resume, he had already expressed himself on what he was to do and contrary words were never expressed. PW1 is corroborated by PW2, who although was covered with blankets by the first accused, heard the first accused ask PW1 if it (what he was doing to her) was nice, with the response by her to the effect it could not be as he was armed with a bush knife.

[72] The Doctor who examined PW1 also confirmed, albeit indirectly that sexual intercourse had occurred when he said he could not rule out its having taken place. There is authority in abundance that the lack of corroboration in the form of there being no medical report or no medical confirmation should not lead to an acquittal of an accused person. In ***Abraham Ngwenya and another v The King Criminal Appeal case no. 33/1996***, the Court of Appeal expressed the position in the following words per Leon JA;

*“[T]he failure to lead medical evidence does not in my view, mean that such failure must inevitably lead to the conclusion that is fatal to a conviction... There is no rule of law which requires the court to refuse to convict an accused in the absence of corroborative evidence of penetration. Caution*



*must be exercised because rape cases are easy to lay and difficult to disprove. But even where there is no corroboration properly so called of the actual penetration there may be direct and circumstantial evidence which cumulatively points in that direction and that direction only”.*

[73] I am convinced that if the material before me does not directly establish the corroboration of the sexual intercourse or penetration, it then points to one direction and one direction only that same was committed. Consequently the first accused cannot escape liability for the rape of the complainant in count 2.

[74] As concerns the charge of arson, I take it that there is no need for me to say more in that regard considering the accused person’s plea of guilty thereto. It suffices for me to say that the evidence does in my view establish the unlawful and intentional destruction of the property of Veli Mamba in the form of the house and the items therein said to be worth over E150 000.00

[75] On the charge of assault with intent to do grievous bodily harm, authority is abound to the effect that the accused must intend to injure and injure in a significant manner. See in this regard ***Rex v Richard Magalemba Nxumalo and another High Court case no. 137/2006 at page 13*** thereof where the case of ***S v Mbelu 1966 (1) PHH 176 (N)*** is cited as reported in ***PMA Hunt’s South African Criminal Law and Procedure volume II, 1982 Juta and Co. at page 491.***

The position was expressed as follows in the said cases:-

*“[H]owever one expresses it, it is at least clear that there must be an intent to do more than inflict casual and comparatively insignificant and superficial injuries which ordinarily follow upon an assault. There must be proof of an intent to injure and to injure in a serious respect.”*

[75] I am therefore of the considered view that when the first accused hit PW2 with a bush knife on the face, he intended to injure in a serious respect which means he cannot escape liability for the offence with which he is charged.

[76] Having reached this stage of the Judgment, I now need to consider the fate of the second accused. As shall be noted, she admitted in the statement of agreed facts what her role was in the matter which is that, she hired the first accused to kill Veli Mamba, the husband to PW1 and father to Cololwakhe Mamba the deceased in count 1. She was aware that petrol was to be used, in the process, which in my view entailed burning down the house and its occupants to death. The motive why she did all that is immaterial at this stage. It suffices that she acted in common purpose.

[77] Because of her role she was accused of having acted jointly with the first accused and in furtherance of a common purpose. She did not dispute having acted jointly with the first accused by hiring him to kill Veli Mamba.

[78] The reality is that she had actively taken part in the planning of the killing of a human being. It should not matter in my view whether a different person other than the one intended to be killed was killed if the death of such a person was a reasonable possibility. I am convinced he

foresaw the possibility of the death of any of the occupants of Veli Mamba's house but was reckless whether or not it occurred.

[79] As regards count 2, the attempted murder, it again goes to what the common design was between the perpetrations of the crime, which was to kill a human being. That the attempt was on a different person cannot in my view absolve her from liability on the basis of common purpose. There can be no doubt that the operation agreed upon entailed a reasonable possibility of risk to life of the occupants of Veli Mamba's house. She therefore cannot escape liability for this count as well.

[80] On count 4, the arson charge, I have already found that she did not only plan how to kill Veli Mamba, and I have found those with him in the house as well, but she had taken part in the acquisition of the petrol. I have rejected the version that Veli Mamba was to be burnt in his house and she chose not to give evidence to clear those issues that needed to be. That being I have no hesitation to find her guilty of the arson as well.

[81] On the basis of the foregoing, I have come to the conclusion that the accused persons are guilty as charged and I convict them of all the charges preferred against them.

**Delivered in open Court on this the .....day of November 2012.**

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**N. J. HLOPHE**  
**JUDGE**