



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Criminal Case No: 447/11

In the matter between:

**REX**

and

**SIYABONGA NXUMALO**

**Neutral citation** : Rex v Siyabonga Nxumalo (447/2011) [2013] SZHC 158  
(24 JULY 2013)

**Coram** : MABUZA J

**Heard** : 29/4/2013

**Delivered** : 24/7/2013

**Summary** : **Criminal Law – Accused charged with attempted murder – Assault – Intention and unlawfulness proved – Accused found guilty as charged.**

## JUDGMENT

### MABUZA J

- [1] The Accused was charged with the crime of attempted murder in that upon or about the 24<sup>th</sup> June 2011 and at Nkambeni area in the Lubombo Region, the said accused person did unlawfully and with intent to kill assault Bawinile Dlamini by hitting her with kicks and throttled her and further hit her with a concrete block on the head and did thereby commit the crime of attempted murder.
- [2] When the charge was put to him, the Accused pleaded not guilty. He was unrepresented because he elected to represent himself as he had no money to hire the services of an attorney.
- [3] The Accused and Bawinile Dlamini (PW3) were lovers and together have a child. Bawinile broke off the relationship with him and he severely assaulted her. The assault took place at PW2's home where she had fled to seek refuge. She testified that when he arrived at PW2's home, the Accused hit her and she fell down whereupon he began dragging her on the ground by the neck. He found a brick lifted it and smashed her head with it. She stated that before she became unconscious she remembers that he was stamping her

back with his foot and now her spine is displaced and crooked. In fact when she was called into the witness box she stumbled and almost fell because she is now crippled and can no longer walk in an erect manner; she now resembles a caricature in a frightful movie. Her spine is bent and her body is permanently deformed. She stated that she used to walk properly before but became crippled after the Accused assaulted her. When she gave evidence she said that she was awaiting surgery so that a Kushner pin could be inserted into her body in order to straighten it. She gave her evidence in a slow distracted manner like one who was mentally challenged.

[4] When the Accused cross-examined her the rest of the story unfolded. After she gave birth she says that he failed to support the child and her family were not happy with that state of affairs and her brother threw her out of their parental home. This prompted her to take the child to the Accused at his parental home and that was when she ended their relationship because she was tired of being physically assaulted. She did not tell him that she was breaking off the relationship, she instead left the child while he had gone to his parental shop to fetch some food for them. She sought shelter at PW2's home because she feared that he would follow her and beat her up. That is exactly what he did. When he cross-examined her he showed no remorse

about having assaulted her; in fact his demeanor was at first very very arrogant but later he apologized to her.

[5] PW2, Busisiwe Dlamini corroborated the complainant's evidence. It was in her house that the complainant sought shelter after running away from the Accused. PW2 testified that on the 24<sup>th</sup> June 2011 the complainant came running into her home; she jumped over the fence and ran and hid behind one of the houses and signalled to PW2 to come to her. PW2 stated that she did not know the complainant but after she introduced herself, she realized that she knew her parents who had a home within the same area. The complainant told her that she was running away from the father of her child as she feared that he would assault her. While they were still talking the complainant saw the Accused coming along the road before he entered the home of PW2 and she hid in one of the houses and slammed the door shut.

[6] When the Accused arrived he greeted PW2 and introduced himself took a half brick and sat on it under a tree. He informed her that he was looking for the complainant who was his wife because she had left their child with a neighbour. PW2 sent for her neighbours a man and his wife to help her reconcile the two young people. When the neighbours arrived PW2 fetched

the complainant and they all sat down to talk about the misunderstanding between the Accused and the complainant. The Accused wanted to leave with the complainant but PW2 refused and told him to instead go and fetch the child and she and her neighbours would accompany the complainant to her parental home with the child because the complainant was terrified that the Accused would assault her if she left with him.

[7] Believing that they had finished counseling the complainant and the Accused, the elders stood up but the Accused pounced on the complainant who was still seated on a mat. He kicked and beat her up. He throttled her and dragged her by her neck for a distance of 8 metres. PW2 tried to talk some sense into him but he ignored her. Her neighbours ran away back to their home. PW2 tried to get some help from a bus which was passing by but it did not stop. Eventually she got help from some young man on a bicycle. The young man tried to talk to the Accused who refused to let go of the complainant whom he continued to strangle. By this time the complainant lay face down and the Accused had let go of the complainant's neck and was jumping up and down her back. After some time he got off her and picked up a brick and smashed it hard on her head and it broke into pieces upon contact with her head. PW2 says that she stood helplessly by

and watched the Accused assault the complainant. The young man from whom she had sought help called the police from his cell phone and the Accused ran away leaving the complainant inert on the ground. The young man went back to the road where he had seen some police officers earlier to request assistance.

[8] PW2 says that while waiting for the police the complainant lay so still that she thought that she was dead. The police van eventually arrived and took the complainant away to the hospital. PW2 did a dock identification of the Accused.

[9] When the Accused cross-examined her he denied that it was possible to throttle the complainant and stamp on her back simultaneously but she maintained her story. He did not deny that he throttled and stamped on her back, he just denied that he did it simultaneously. He denied dragging the complainant for 8 metres and stated that it was not possible because she was big in size. PW2 was adamant about what she had seen him do. She further stated that the police had taken the pieces of the brick with which he had assaulted the complainant with them on the following day when they returned to the scene with the Accused.

[10] Doctor Gondai Makuya (PW1) after stating his medical credentials and qualifications testified that on the 27<sup>th</sup> June 2011 while on duty at the Mbabane Government Hospital, he attended to the complainant. She was transferred from Piggs Peak Government Hospital, and she was unconscious when she arrived. She had injuries on her face and she was bleeding into her eyes. She had a severe head injury. She was taken for a brain scan which showed intracranial bleeding into her brain. Because the bleeding was generalized he could not operate on her as the bleeding involved the whole brain so he used drugs to manage her condition. He testified that the bleeding into her brain increased pressure on her skull and if the pressure is not controlled it would adversely affect the beating of her heart. He stated that she remained unconscious for two months. Even when she was discharged during October 2011 she needed help as she could not eat on her own nor wash herself. When she was reviewed it was discovered that she was crippled on her upper torso and lower limbs. He testified that intracranial bleeding occurred when there was sudden acceleration of the skull for example if the head was banged on a hard surface. The paralysis was caused by the brain cells dying off after the intense bleeding of the brain.

[11] Nothing much turns on his cross-examination by the Accused.

[12] The investigating officer, 5648 Detective Constable Sifiso Dlamini (PW4) testified that the Accused handed himself to the police at Tshaneni and that is where he interviewed him after cautioning him in terms of the judges rules, that the Accused was not obliged to point out anything but if he did such item would be retrieved and used as evidence against him in a court of law. The Accused wished to point out something and led the witness to PW2's home. The witness was accompanied by another police officer 4905 Detective Constable Mfanzile Gama. At the home of PW2, the police engaged Lethu Vilane to accompany them as an independent witness to the pointing out. At the end of the yard the Accused retrieved pieces of the brick that he had smashed on the complainant's head. PW4 retrieved the pieces for use as exhibits herein. He thereafter charged the Accused with the attempted murder of the complainant. He handed in the pieces of brick as exhibits (Exhibit 1)

[13] PW4 testified that because of the complainant's critical condition he was only able to record a statement from her four months later after she was



discharged from the hospital. The Crown closed its case after PW4's evidence.

[14] After the Accused was advised of his rights with regard to giving evidence he elected to give sworn evidence. Under oath he testified that he was arrested on the 25<sup>th</sup> June 2011 and taken into custody on the same day. He was charged with the attempted murder of the complainant. He apologized for having assaulted the complainant on the 24<sup>th</sup> June 2011. He testified that the complainant arrived at his parental home where he lived on the 24<sup>th</sup> June 2011. She informed him that she and her small child had been chased away from her parental home. The Accused was the father of the complainant's child. He invited her to stay for the night and to leave on the following day when she could take the child to his grandparents. The complainant agreed to this arrangement.

[15] At about 1:00 p.m. the Accused went to the shop in order to buy soap and some relish. He left PW3 with the child at a neighbour's home. On his return he met up with a different neighbor who informed him that the complainant had gone and the child was left alone with the neighbour with whom he had left them. Indeed he found the child crying and nobody knew

where the complainant had gone as she had not reported that she was leaving. He requested the neighbours to continue looking after the child while he went to look for the complainant. He eventually spotted her along the road ahead of him and when she saw him she ran into PW2's home where she hid. He followed her and introduced himself to PW2 and informed her that he was looking for the complainant as she had left their child stranded.

[16] PW2 suggested that she call her neighbours to assist her hear the matter. The neighbours arrived and found him seated under a tree and PW2 went to fetch the complainant who was hiding in one of the houses. The Accused explained that he had come to fetch the complainant because she had left their child alone at a neighbours home. PW2 suggested that he fetch the child and bring it back and she would accompany the complainant together with the child to the complainant's home which was also in the vicinity.

[17] While they were still talking a bus drove by and the Accused suggested to the complainant that they board the bus together and go and fetch the child.

[18] The complainant refused. He stood up and went to her and assaulted her. He hit her with fists and kicked her and she fell on to a brick; that is how she injured her head. That is also when he realized that he had injured her and that he had committed a crime. He went back home and informed his parents about how he had assaulted the complainant. Thereafter his father accompanied by a neighbour went to PW2's home in order to take the complainant to the hospital but found that she was no longer there as the police had taken her to the hospital. On his return his father advised him to hand himself to the police which he did the following day. On the 25<sup>th</sup> June 2011 PW4 interviewed the Accused and recorded a statement from him. He says that PW4 informed him to go and point out the brick that had injured the complainant and he did so in the presence of PW2 and a young lady. The police took the brick and together with him returned to the police station where he was formally charged with the attempted murder of the complainant and has been in custody since his arrest.

[19] When he was cross-examined and it was put to him that the complainant had run away from him because he was assaulting her, he denied that he had assaulted her. He admitted that it was at PW2's home where he had assaulted her by kicking her and using his fists but denied that he had hit her

with a brick on her head. He maintained his story that she fell upon the brick which injured her head. He further stated that he assaulted her because he was angry and shocked that she had left the child as she knew that he lived alone and could not look after the child on his own and because she was refusing to go back to fetch the child.

[20] The Court put some questions to the Accused such as if he had paid damages for impregnating the complainant and he said he had not done so. And whether he maintained the child and he responded that he used to buy the child food and clothes. And whether he had assaulted PW3 because she no longer wished to continue their relationship, he denied this. Asked how old she was when she fell pregnant he responded that she was 20 years old but was no longer in school as she had left at Grade 5. He had left school at Form 3.

### **Unlawful assault**

[21] The complainant testified that the Accused assaulted her on the 24<sup>th</sup> June 2011. The assault was witnessed by PW2 as it occurred at her home where the complainant had run away to when she fled from the Accused. The

doctor, PW1 presented his findings after examining the complainant and the injuries that he described corroborated PW2 and the complainant.

[22] The Crown has proved that the assault was unlawful because it was unprovoked. The child also belongs to the Accused and the reason that he gave for assaulting her was that it was because she refused to return to take the child back. That reason in my view did not justify the brutal assault that was meted out on her. There was no provocation nor was the assault justified nor was he defending himself from assault or imminent danger from her or warding off an unlawful attack from her. The unlawfulness of the assault has been proved.

### **Intention**

[23] When the Accused arrived at PW2's home he first pretended to be conciliatory and demurely explained his mission, waited for PW2's neighbours to arrive sat under a tree in a respectful manner. As soon as the complainant refused to return with him in order to fetch the child he got into a rage and began to viciously assault the complainant. When PW2 and the young man who arrived on a bicycle tried to stop him he threatened them and told them not to come near him and the complainant. He assaulted her

until she lay still. He kicked her, hit her with fists, stamped on her back and as if that was not enough he finished her off by smashing her head with a brick when she was no longer moving. He then left her lying there and did not offer any assistance or even help take her to hospital. Surely his intention was to kill her and he tried his best to do so. I am satisfied that the Crown has proved intention.

[24] I am satisfied that the Crown has proved the case against the Accused beyond a reasonable doubt and accordingly find him guilty as charged.

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**Q.M. MABUZA**  
**JUDGE OF THE HIGH COURT**

For the Crown : Miss N. Masuku

For the Accused : In person