



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 267/2012

In the matter between:

REX

VS

BHUTIZA GIFT MATSEBULA

Neutral citation: *Rex vs Bhutiza Gift Matsebula (267/2012) [2014]*
SZHC162 (21st July 2014)

Coram: **M.C.B. MAPHALALA, J**

Summary

Criminal Law – murder, attempted murder and arson – accused is charged with one count of murder, two counts of attempted murder as well as one count of arson – pleaded guilty to arson and pleaded not guilty to the other counts – Court held that the accused had the requisite *mens rea* in the form of *dolus directus* to commit all four offences – accused convicted as charged in the indictment – held further that extenuating circumstances exist in respect of the count of murder – accused sentenced to twenty years imprisonment in respect of the first count of murder, five years in respect of the second count of attempted murder, ten years in respect of the third count of attempted murder as well as five years in respect of the fourth count of arson. The sentences in counts 2 and 3 will run concurrently with the sentence in count 1. The sentence in count 4 will run consecutively with the sentences in counts 1, 2 and 3. The period of twenty-three days spent in custody will be taken into account when computing the period of imprisonment

JUDGMENT
21 JULY 2014

- [1] The accused stands charged with one count of murder, two counts of attempted murder as well as one count of arson. In the first count of Murder, the Crown alleges that on the 8th November 2011 at Khiza area in the Shiselweni region, the accused unlawfully and intentionally killed Siphesihle Matsebula. He pleaded not guilty to this offence.
- [2] On the second count of attempted murder, the Crown alleges that on the 8th November 2011 at Khiza area in the Shiselweni region, the accused unlawfully and with intent to kill Makhozasana Hlophe burnt the house in which she was sleeping. He pleaded not guilty to the charge. On the third count of attempted murder, the Crown alleges that on the 8th November 2011 at Khiza area in the Shiselweni region, the accused unlawfully and with intent to kill Lindelwa Matsebula burnt the house in which she was sleeping. He pleaded not guilty to the charge.
- [3] Lastly, on the fourth count of Arson, the Crown alleges that on the 8th November 2011 at Khiza area in the Shiselweni region, the accused unlawfully and with intent to injure Makhosazana Hlophe in her property, set on fire and damaged a certain house being an immovable property of the said Makhosazana Hlophe. He pleaded guilty to the charge.

[4] The accused made certain admissions in terms of section 272 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 which provides the following:

“272. (1) In any criminal proceedings the accused or his representative in his presence may admit any fact relevant to the issue, and any such admission shall be sufficient evidence of such fact.”

[5] The first admission relates to the statement made by the accused before a judicial officer. The statement was admitted in evidence and marked Exhibit 1. The Judicial Officer Magistrate Musa Z. Nxumalo recorded the statement on the 10th November 2011 in the presence of the Court interpreter Pholile Dlamini. The statement was duly signed by the Magistrate, the Court interpreter as well as the accused. Prior to recording the statement, the judicial officer reminded the accused of his right to remain silent, that he was not obliged to say anything unless he wishes to do so but whatever he said would be recorded in writing and might be used in evidence at his trial. The magistrate confirmed that he also took steps to ensure that no police officer or anybody was within sight or hearing distance of the accused save for the Court interpreter; and, the door was closed. The magistrate further informed the accused that he had nothing to fear and that he could speak openly and with complete frankness.

[6] The accused told the magistrate that he was arrested on the 9th November 2011 at Nhlangano and kept in police custody for one night. He confirmed that there was no promise or threat made to him which induced him to make the statement. He further confirmed that the police did not assault him during police investigations, and, that he never received any injuries during his arrest and subsequent detention. The statement was made by the accused in the Siswati language and translated into the English language by the Court Interpreter. The statement was read back to him before he appended his signature.

[7] **STATEMENT MADE BY GIFT BHUTIZA MATSEBULA**

....

I do recall on the 4/11/11 at about 4 pm, I was at my parental homestead at Khiza area when my friend Nduduzo Sithole came along and informed me that Makhosazana Hlophe who is the mother of my two kids was accusing me of having a love relationship with one Samu who is our fellow church-mate at the Zion Church at Khiza area. I do not recall the surname of Samu as she is not from our area but she is employed as a maid in one of the neighbouring homestead.

On the following day at about 9 pm I proceeded to the parental homestead of Makhosazana Hlophe with whom I have two children

aged two years and five years and they are a girl and a boy respectively. I enquired from her about what Ndumiso had told me and she informed me that she had heard rumours to that effect, but requested that we resolved the matter in a church forum.

I then contacted our pastor Mr. Passport Dlamini who resides at MacAlphine Township in Nhlngano and he agreed to help us resolve the issue and we made an appointment for 10 am on 8/11/11. On the said day I duly proceeded to the pastor's house and stayed there till about 5pm but Makhosazana did not turn up. The pastor then advised me to approach Makhosazana at her parental homestead with the view of arranging for another meeting.

I passed by her place and her grandmother explained that she could not honour the appointment with me and our pastor as she was to assist a certain man who had come to plant in the fields at her parental homestead. We then agreed to see the pastor on the following day. Indeed we arrived at the pastor's house at 10 am and the pastor heard our issues and resolved that he would involve our families in resolving our problems.

Our pastor is self-employed as a motor mechanic so I sometimes assist him with his chores. Whilst we were still there Makhosazana would taunt me saying she was going to frustrate me so that I would lose more weight than I already had. This she did when the pastor had finished talking to us and was busy fixing motor wheels. This infuriated me.

I then left the pastor's house at about 1 pm and proceeded to town. I stayed in town with my friends till about 5 pm when I got a lift which dropped me at T-Junction Filling Station. I was carrying a container which I had borrowed from a kombi driver. I then bought petrol for E30.00 and proceeded home.

Later on that day I borrowed a size 10 handigas cylinder from Nduduzo. At about 1:00 am that night I proceeded to the parental home of Makhosazana. I was carrying the petrol in the container, an empty bowl and the handigas cylinder. I went to the house that is used by Makhosazana and my kids for sleeping. I opened the bedroom window as a piece of the window pane is broken next to the window handle. I opened the window and threw the petrol on the bed which I poured into the empty bowl and set same on fire.

I then ran away leaving the handigas cylinder, empty contained outside the house and I had thrown the empty plastic bowl which contained petrol into the bedroom. I went to hide at the forest owned by the Shiselweni Forest Company till about 3 pm on the following day, then I called my pastor and asked for his assistance as I was scared to go home for fear of being brutally assaulted by the mob for what I had done.

My pastor came to fetch me at the forest and took me to his house. He also asked his wife to fetch Makhosazana from her parental homestead so that I could apologise to her for what had happened. The wife obliged and brought Makhosazana and I apologised to her but she was non-committal as it turned out that she was not injured but my two children were critically injured and burnt and were fighting for their lives in hospital. My pastor then took me to Nhlanguano Police Station where I handed myself over to the police. I deeply regret what has happened.

**THUS DONE AT NHLANGANO MAGISTRATE'S COURT
BEFORE MAGISTRATE MUSA Z. NXUMALO ON THE 10TH
NOVEMBER 2011.**

M.Z. NXUMALO

GIFT B. MATSEBULA

[8] The second admission relates to the post-mortem report of Siphesihle Matsebula which was admitted in evidence by consent and marked Exhibit 2. The deceased was six years old at the time of his death, and, the post-mortem examination was conducted at the Mbabane Government hospital on the 14th November 2011. The cause of death was “due to complications consequent to burns”. There were superficial burns over the right side of his face, a portion of the upper limbs, areas of trunk, lower limbs, scalp, palm and neck.

The third admission relates to three photographs which were admitted in evidence by consent and collectively marked Exhibit 3. All photographs show the burnt body of the deceased.

[9] The fourth admission relates to the Medical Report of Lindelwa Matsebula. She was examined by a doctor on the 9th November 2011 at Nhlangano Health Centre. She had suffered serious burn injuries in her body. She was later transferred to Hlatikulu Government Hospital due to the serious injuries sustained. The medical Report was admitted in evidence and marked Exhibit 4. During the trial the Crown invited the Court to inspect

her injuries; at the time, she had been discharged from hospital. However, it was evident that the injuries, though healed, had been severe.

The fifth admission relates to the five litre petrol container which is also mentioned by the accused in his confession. It was admitted in evidence and marked Exhibit A. The container was used by the accused to carry petrol which he used in burning the complainant's house where she was sleeping with her two minor children Lindelwa and Siphesihle Matsebula.

The last admission relates to a Cadac Gas Cylinder which is referred to in the confession. It was abandoned by the accused at the homestead of PW3 after the commission of the offence. During the trial it was admitted in evidence and marked Exhibit B.

[10] PW1 Makhosazana Hlophe is the complainant in the matter. She testified that the accused is the father of her two children Siphesihle Matsebula, since deceased, and Lindokuhle Matsebula. She told the Court that the accused came to her maternal home where she resides with the children and told her that Siphesihle Matsebula should enrol into Grade I on the following academic year; and, she told him to look for a job in order to support the children since he did not want her to work. During this time she was working at a Textile Factory in Nhlangano. She further reminded

him that she had been paying pre-school fees for Siphesihle on her own, and, that he should take responsibility for the education of the child failing which they should terminate their relationship. In response the accused said he would ask Pastor Passport Dlamini to intervene in the dispute.

[11] The accused arranged a meeting with the Pastor at his homestead. During the meeting PW1 admitted to the pastor that she had decided to end their relationship on the basis that the accused did not want her to continue working when he was not working himself to support the children. The pastor felt that the dispute required the intervention of the two families. The pastor went outside the house and the accused threatened that he would do something bad to her because she had ended their relationship; then he left the homestead. PW1 told the Pastor of the accused's threats, and, he felt that she should sleep at his homestead overnight because of the threats; she declined the offer since her grandmother was expecting her to return home. On her return home, she told her grandmother PW3 about the accused's threats; PW3 suggested that she should sleep in her house together with her children but she declined the offer.

[12] PW1, Makhosazana Hlophe, Thobile Simelane and the two children slept in their house; at night Thobile Simelane left the homestead and went to her boyfriend's home situated within the neighbourhood; however, Thobile

returned shortly and told PW1 that she had seen the accused hiding next to the homestead. PW1 fell asleep; then suddenly, she saw a fire burning on the children's bed. She shouted for help calling her mother. She took Lindelwa and later Siphesihle and placed them on the dining room. Meanwhile the fire was burning on Siphesihle, and, she was badly burnt. Her mother came and tried to put down the fire; neighbours called the Fire Department which eventually arrived and put out the fire. An ambulance also came and transported the two children in the company of PW1's mother Siphwe Simelane to the Nhlanguano Health Centre. The police recorded a statement from PW1. Meanwhile her grandmother found a five litre container as well as a Cadac Gas Cylinder behind the homestead.

[13] On the next day PW1 went to hospital to check on her children. She was shocked, traumatised and scared when she saw the severe injuries sustained by the children. Siphesihle Matsebula had sustained serious burn injuries; he was later transferred to Hlatikulu Government Hospital where he succumbed to death. Lindelwa Matsebula was also seriously injured and couldn't walk; she was later transferred to the Mbabane Government Hospital where she was treated for about a month including performing a skin graft.

All clothing and bedding belonging to PW1, PW2's sister Thobile Simelane and the children were burnt including the beds in the three-roomed house. Burnt remains of a mattress and a blanket were taken by the police including the five litre container as well as the handigas cylinder.

[14] Under cross-examination PW1 conceded that after pregnancy and before Siphesihle Matsebula was born, she went to stay at the accused's parental home so that he could support her and the child; she further conceded that the accused subsequently paid damages for impregnating her in terms of Swazi Law and Custom. She also conceded that the accused had assisted her to obtain an Identity Personal Document which enabled her to get a job in the Textile Factories. She subsequently relocated to her maternal home partly because Siphesihle Matsebula was due to attend a pre-school next to the homestead, and partly because the accused was refusing to allow her to work at the Textile Industry. She denied that the relocation was caused by the long distance between her place of work and the accused's parental home; however, she conceded that on weekends, she would visit the accused's parental homestead with Siphesihle Matsebula.

[15] She told the Court that in November 2011, whilst working at the Textile Industry, she fell pregnant with Lindelwa Matsebula, and, the accused's mother told her that the child was not fathered by the accused. She denied

telling the accused that he was not the father. She further denied that the paternity dispute precipitated the intervention of Pastor Passport Dlamini. She also denied that during the meeting she had with the pastor, she had confirmed that the child was not fathered by the accused.

The defence contended that the accused was greatly angered by the revelation that he was not the father of the child after he had supported the child financially since conception. However, PW1 insisted that the accused was the father of the child; she went further and agreed to the taking of a paternity test.

[16] PW2 Siphiwe Simelane is the mother of PW1, and, she testified that on the 9th December 2011 she was at her parental homestead at Khiza area in Nhlangano. At midnight she heard PW1 shouting for help; she went to their house and saw Siphesihle Matsebula coming out of the house running towards her direction but did not talk to him. She ran to the house and noticed that there was smoke in the dining-room. She went out to fetch water with a view to extinguish the blazing fire. Meanwhile PW2's mother was calling for help from neighbours who came to assist; they called for the Fire Department which arrived promptly and extinguished the fire. She testified that Siphesihle Matsebula had sustained serious burn injuries, and, that he was subsequently taken to Nhlangano Health Centre by an

Ambulance together with the two children. They were transferred to Hlatikulu Government Hospital on the next day where they were admitted from the 9th November 2011 up to the 7th December 2011 when Siphesihle Matsebula died. Both PW1 and PW2 were looking after the children in hospital interchangeably. Lindelwa Matsebula was later transferred to the Mbabane Government Hospital for further treatment.

Under cross-examination PW2 denied recording a statement with the police and confirming that the dispute between the accused and PW1 was the paternity of Lindelwa Matsebula or that the burning of the house was caused by the paternity dispute. She further denied knowledge that PW1 had told the accused that he was not the father of Lindelwa Matsebula. She insisted that as far as she was concerned, the accused was the father of Lindelwa Matsebula and that PW1 had never told her that the accused is not the father of the child.

[17] PW3 Dumsile Simelane is the mother of PW2 Siphiwe Simelane. She testified that on the 8th December 2011, the accused came to her homestead and told her that Pastor Passport Dlamini wanted to speak to PW1 at his homestead; he gave E10.00 (ten emalangi) for her transport fare to the pastor's homestead. She was to board a kombi. On her return from the pastor's home, PW1 told PW3 that the pastor had not called her

but the meeting had been organised by the accused. PW1 further told PW3 that the accused had made threats to her life for ending their relationship. PW3 invited her and the children to sleep in her house for fear of their safety, but she declined the offer.

[18] PW3 further testified that at night she heard PW1 shouting and calling for her mother, PW2. She came out and grabbed Siphesihle Matsebula by hand; PW2 followed her to PW1's house. The house was burning and she called for assistance from neighbours who arrived promptly to assist them extinguish the fire. Behind the house she found a gas cylinder as well as a five litre container. Siphesihle Matsebula was badly injured by the fire; he told her that it was their father who was burning the house. Neighbours called the police as well as the Fire Department.

The police were shown all the items which were burnt including beds, clothes and bedding. The two children were later taken by an ambulance to hospital, and PW2 accompanied the children to hospital. The children were transferred on the next day to the Hlatikulu Government hospital where Siphesihle Matsebula subsequently died. During the trial PW3 came to Court with Lindelwa Matsebula who was badly injured but healed; the Crown invited the Court to observe the injuries that she had sustained.

Under cross-examination PW3 contended that the accused was aware that PW1 and her children slept in that house, and, that the accused had an intention to kill PW1 and the children when he set the house on fire. She further stated that the burning of the house followed the threat made to PW1's life by the accused.

[19] PW4 Passport Dlamini is the pastor in the church where both the accused and PW1 attended, the Holy Faith Mission in Zion at Khiza area in Nhlangano. He testified that the accused had reported to him on the 7th November 2011 that they had a misunderstanding with PW1, and, he had advised the accused to come to his homestead with PW1 on the next day, on the basis that he could not discuss the issue with him alone. During the meeting the accused explained that PW1 wanted to terminate their relationship, and, that she had already told her mother that he was not the father of Lindelwa Matsebula. PW4 told the Court that PW1 confirmed what the accused had said; however, she didn't explain the reasons behind the termination of their relationship. He told them that the dispute was beyond his powers as a pastor and that it required the intervention of both their families.

[20] PW4 admitted that the accused was angry after the meeting; and, that he had suggested to PW1 that she sleeps at his home overnight, but she had

declined the offer. At night he received a phone call from PW2 telling him that the house was burning; and, he sent his wife to the homestead to assist the family. The police arrived at his homestead in the morning and asked what he knew about the incident. Later that day the accused phoned and asked PW4 to accompany him to the police station.

Under cross-examination PW4 conceded that to his knowledge the accused was not a violent person and that he was surprised by this incident. However, he denied that during the meeting held with the accused and PW1, the accused was emotionally stressed and could not control himself. He conceded that PW1 had admitted during the meeting that Lindelwa Matsebula was not fathered by the accused; however, she had not disclosed the father of the child.

[21] PW5 Mciniseli Mkhulisi was a kombi driver, and, he testified that on the 8th November 2011, the accused borrowed a five litre empty container. The accused told him that he wanted to buy petrol for a motor vehicle which had run out of petrol. He gave the container to the accused, and on the next day, the police arrived and enquired if the container belonged to him, and he confirmed it. PW5 was able to identify the container in Court during the trial. The defence did not cross-examine PW5.

[22] PW6 Ndumiso Sithole testified that on the 20th November 2011 at 8 pm, the accused came to his residence at Mbangweni area to fetch his Cadac handigas Cylinder. In the next morning the police arrived at his residence and enquired about the handigas cylinder. PW6 had borrowed the handigas cylinder from the accused. He was able to identify the handigas Cylinder in Court during the trial. The defence did not cross-examine this witness.

[23] PW7 Constable Muzi Mkhabela, the investigator in the matter, testified that on the 9th November 2011, he received a report on the burning of a house at Khiza area in the Shiselweni region in which three people were in occupation. He proceeded to the scene of crime together with two other police officers. PW3 showed them the burnt house; and, they found that all the property which was inside the house was burnt. Police officers from the Scenes of Crime Unit had already transported the injured children to hospital in the company of PW2. There were remains of burnt items on the scene.

Upon further investigation they found that Constable Mabuza from the Scenes of Crime Unit had already taken as exhibits, a handigas Cylinder as well as a Castrol GTX empty container. He also discovered upon investigation that the container belonged to PW5 and that it was borrowed from him by the accused on the previous day; Nduduzo Sithole admitted

giving the handigas cylinder to the accused. In their investigation they also found that the accused had burnt the house due to a misunderstanding with PW1. The accused was subsequently arrested at Herpes Township in Nhlangano at the homestead of PW4 Passport Dlamini. The accused further recorded a confession with Magistrate Musa Nxumalo.

During the trial, PW7 handed to Court exhibits A and B, being the Castrol GTX container and the handigas cylinder both of which were admitted in evidence in the confession. He further handed to Court the remains of a burnt blanket and a burnt mattress both of which were admitted in evidence and marked exhibits C and D respectively.

[24] Under cross-examination PW7 told the Court that when the accused set the house on fire, he was aware that the children and their mother were sleeping inside the house. He further found from his investigation that the accused often visited the homestead of PW3 and that he knew the sleeping arrangement at the homestead. He further stated that the accused had been seen on the previous night loitering around the homestead by Thobile Simelane, a sister to PW2. He confirmed that the relationship between the accused and PW1 was strained since she was in love with another man; and, that the accused had poured petrol through the window and the door

and set the house on fire with a view to kill all the occupants of the house and further destroy all the property inside the house.

He denied that the accused burnt the house because he was under extreme emotional stress on the following basis; firstly that the pastor had told the accused and PW1 to report their dispute to their families; and, secondly, because the accused had secured the empty container to put petrol in order to commit the offence soon after the intervention by the Pastor. PW7 argued that such conduct on the part of the accused exhibited an intention to commit the offence.

[25] The accused gave evidence in his defence. He testified that on the 8th November 2011, he sought the intervention of PW4 in their dispute with PW1. The dispute related to the paternity of Lindelwa Matsebula whom PW1 had said was not fathered by him. Another dispute related to the accusation by PW1 that he was failing to provide for the school needs of Siphesihle Matsebula who was due to enrol at school the following year. PW4 had advised them to report their misunderstanding to their respective families for a resolution. He conceded buying petrol and setting the house on fire; however, he denied knowledge that the children and PW1 were sleeping in the house. He further denied that he had an intention to kill the

occupants of the house. He argued that when he committed the offence, he was emotionally stressed because of their misunderstanding with PW1.

[26] Under cross-examination the accused conceded that he never mentioned the paternity dispute in his confession. However, in his evidence in-chief, he mentioned that it was the main cause of their misunderstanding with PW1 which led to the burning of the house. Ironically he told the Court that he could not recall borrowing the five litre GXT container from PW5 Mciniseli Mkhulisi or fetching the handigas cylinder from PW6 Nduduzo Sithole because he was stressed. The Crown disputed that the accused was stressed and argued that since the meeting he held with PW4 and PW1 was in the morning, he had enough time to cool down from any possible stress because he burnt the house in the early hours of the next day. The Crown further argued that the burning of the house followed threats made to PW1 by the accused on the previous day shortly after the meeting with Passport Dlamini.

The accused conceded that he knew that PW1 and the children sleep in the house because he visited them often at the homestead, but he denied that he intended to kill them. However, the Crown reminded him that in his confession he stated that “he went to the house where Makhosazana and the children were sleeping” which pointed to an intention to kill them. The

Crown further put to the accused that the main reason for burning the house was the termination by PW1 of their relationship.

[27] The Crown has proved the commission of the offence beyond reasonable doubt. The accused's plea of guilty in count 4 relating to Arson means that he was involved in the killing of Siphesihle Matsebula in the first count as well as the attempted murder of PW1 in count 2 and Lindelwa in count 3. The accused conceded in his confession as well as in his evidence that after the meeting with PW1 and Passport Dlamini, he fetched the handigas cylinder from PW6, Nduduzo Sithole, which was found abandoned on the next day at the homestead of PW3 behind the burnt house. The accused further conceded that after said meeting, he borrowed a five litre GXT container from Mciniseli Mkhulisi and filled the container with petrol which he used in burning the house.

[28] There is undisputed evidence that shortly after the meeting with PW1 and Passport Dlamini, the accused threatened the life of PW1. Soon afterwards he went to collect the handigas cylinder from Nduduzo Sithole and further borrowed the five litre GXT container which he used to carry the petrol. It was still in the morning when he left the homestead of Passport Dlamini. I agree with the Crown's submission that even if the accused had been

provoked or emotionally stressed after the meeting, he had sufficient time to cool down before he burnt the house after midnight.

The threats he made to PW1 presuppose that he made up his mind to commit the offence during the meeting; and, that he left PW4's homestead to fulfil his threats of committing the offences. The accused conceded knowledge that PW1 and the children generally slept in the house since he often visited the homestead. There is no doubt that when he set the house on fire, he knew that PW1 and the children were sleeping in the house. There can be no doubt that the accused intended to commit the offences charged.

[29] The defence of provocation cannot avail the accused in the circumstances; he had enough time to cool down. Sections 2 and 3 of the Homicide Act No. 44 of 1959 provide the following:

“2. (1) A person who-

(a) Unlawfully kills another under circumstances which but for this section would constitute murder; and

(b) Does the act which causes death in the heat of passion caused by sudden provocation as defined in section 3 and before there is time for his passion to cool;

Shall be guilty of culpable homicide.

(2) This section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.

3. (1) Subject to this section “provocation” means and includes any wrongful act or insult of such nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another who is under his immediate care or to whom he stands in a conjugal, parental , filial or fraternal relation or in the relation of master or servant, or deprive him of the power of self-control and to induce him to assault the person by whom such act or insult is done or offered.”

[30] It is apparent from the evidence that the Homicide Act cannot avail the accused in the circumstances on the basis that he did not commit the offences in the heat of passion caused by sudden provocation, and, before there was time for his passion to cool. The alleged provocation by PW1 occurred in the morning hours and the accused had enough time for his passion to cool on the basis that he committed the offences after midnight. There is no doubt that the accused was angered by the termination of the relationship as opposed to the paternity dispute of the second child; hence, the accused does not mention the paternity dispute in his confession. Passport Dlamini also stated that he had advised PW1 and the accused to involve their families in the dispute; however, the accused did not follow the advice but opted to kill PW1 and the children.

[31] Even assuming that the accused was provoked, he was not entitled to resort to a severe form of violence by burning the house and killing the occupants. The provocation was not commensurate with the violence inflicted by the accused. Cohen ACJ in *Rex v. Aaron Fanyana Dlamini* 1979 – 1981 SLR 30 at 35 had this to say:

“The nature of the accused’s conduct must bear some relationship to the insult (or wrong) done to him. It is not every case where there has been provocation which entitles the resort to a severe form of violence.... to establish absence of intention ... the provocation must have been commensurate with the violence following on it ... the use of an insulting epithet would not constitute adequate provocation to reduce the crime from murder where the accused has drawn a weapon and killed the provoker.... if the violence bore no reasonable relationship to the provocation it was not such as would have been resorted to by a reasonable man.”

[32] It is apparent from the evidence that the accused had *mens rea* in the form of *dolus directus* on the basis that the commission of the offence was premeditated. After the meeting with PW1 and PW4 the accused had verbally threatened the life of PW1. Thereafter, he went about preparing to fulfil the threat by collecting the gas cylinder, securing a five litre container to carry the petrol, hiding next to PW3’s homestead till after midnight and setting the house alight.

As stated in the preceding paragraphs, he knew that PW1 and the two minor children sleep in that house; and, his intention was to burn the house and consequently kill the occupants of the house. It is trite law that the intention of an accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased. See *William Mceli Shongwe v. Rex* Criminal Appeal No. 24/2011 *Mandla Mlondolozzi Mendlula v. Rex* Criminal Appeal No. 12/2013; *Ntokozo Adams v. Rex* Criminal Appeal No. 16/2010 and *Xolani Zinhle Nyandeni v. Rex* Criminal Appeal No. 29/2008.

[33] Similarly, there is sufficient evidence that the accused committed the offences of attempted murder as reflected in counts 2 and 3 of the indictment. These offences occurred simultaneously with the murder charge when the accused set fire to the house. All the offences for which the accused is charged require *mens rea* in the form of intention. The conduct of the accused shows that he had *mens rea* in the form of *dolus directus* in committing the said offences. However, it is well-settled that in order to support a conviction of attempted murder, there need not be a purpose to kill proved as an actual fact, it suffices 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 followed in death. See

Rex v. Huebsch 1953 (2) SA 561 (A) at 561; *Henwood Thornton v. Rex* 1987 – 1995 SLR 271 at 273.

[34] Accordingly, the accused is convicted of all the offences for which he has been charged. The next inquiry relates to the existence or otherwise of extenuating circumstances. Section 295 of the Criminal Procedure and Evidence Act 67/1938 requires the court on a conviction of murder to indicate whether or not extenuating circumstances exist. It provides the following:

“295 (1) If a court convicts a person of murder it shall state whether in its opinion there are any extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them:

Provided that any failure to comply with the requirements of this section shall not affect the validity of the verdict or any sentence imposed as a result thereof.

(2) In deciding whether or not there are any extenuating circumstances the court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs.”

[35] It is now trite that extenuating circumstances are facts bearing on the commission of the offence which reduce the moral blameworthiness of the accused as distinct from his legal culpability. In determining the existence of extenuating circumstances, the trial court has to consider three factors: firstly, whether there are any facts which might be relevant to extenuation such as drug abuse, immaturity, intoxication or provocation, and, the list is not exhaustive. Secondly, whether such facts, in their cumulative effect probably had a bearing on the accused's state of mind in doing what he did. Thirdly, whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did; in deciding this factor, the trial court exercises a moral judgment.

See: S. v. Letsolo 1970 (3) SA 476 AD at 476 G-H

William Mceli Shongwe v. Rex criminal Appeal No. 24/2011 at para 52

Bhekumusa Mapholoba Mamba v. Rex Criminal Appeal No. 17/2010

[36] Three extenuating circumstances exist in this matter: firstly, the provocation by PW1 that Lindelwa was not his child when the accused had been supporting the child financially for many years. Secondly, the breakdown in the love relationship with PW1. The Supreme Court in the case of *Zwelithini Njovane Khumalo v. Rex* Criminal Appeal No. 5/2014 followed its earlier decision in the case of *Mandla Bhekithemba Matsebula*

v. *Rex Criminal Appeal No. 2/2013*. *His Lordship Justice Dr. B.J. Odoki* at para 20 reiterated the principle that a breakdown in a love relationship constitutes an extenuating circumstance. His Lordship stated the following:

“20. This definition was applied in the case of *Mandla Bhekithemba Matsebula v Rex Criminal Appeal Case No. 02/2013* where this court gave a list of possible factors that appellate courts of Swaziland and surrounding countries have held to be extenuating circumstances. The factors the courts have held to amount to extenuating circumstances include belief in witchcraft, mental delusion, intoxication, immaturity, provocation, breakdown in love relationship, lack of education, among others.”

[37] The accused is a first offender. However, there are aggravating factors. Firstly, the accused set fire in a house where innocent children were sleeping; one child was killed and the surviving child is permanently scathed. Secondly, the offence against the accused is gender-based as it was perpetrated against a defenceless woman. The Supreme Court has held that courts should step up their resolve to stamp out unbridled violence perpetrated by men against innocent and defenceless women by imposing appropriately stiff sentences as a deterrent. See *Siboniso Shongwe v. Rex Criminal Appeal No. 11/2012* at para 7.

[38] I have considered the triad, that is the seriousness of the offence, the interests of society as well as the personal circumstances of the accused. The accused is sentenced to twenty years imprisonment on the first count of murder, five years imprisonment on the second count of attempted murder, ten years imprisonment on the third count of attempted murder as well as five years imprisonment on the fourth count of arson. The sentences in counts 2 and 3 will run concurrently with the sentence in count 1; and, the sentence in count 4 will run consecutively with the sentences in counts 1, 2 and 3. Accordingly, the accused will serve a total sentence of twenty-five years in prison. The period of twenty-three days spent in custody will be taken into account when determining the period of imprisonment.

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

For the Crown
For the Defence

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