IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.33/2012

In the matter between:

REX

versus

IFEOMA ADIGWE-DIKE
AMECHI KENECHUKWU DIKE

Neutral citation: *Rex versus Ifeoma Adigwe-Dike and Amechi Kenechukwu Dike (33/2012) [2014] SZHC 98 (30th April 2014)*

Coram: Hlophe J

For the Crown: Miss L. Hlophe

For the Defence: Mr. M. T. Mabila

Dates Heard:

Judgment Handed Down: **30th April 2014**

Summary

Criminal Law – Accused persons charged with violating Section 12 (1) (e) of the People Trafficking and People Smuggling (Prohibition) Act, 2009 whilst allegedly acting with common purpose – Accused persons allegedly recruiting complainant from Nigeria for exploitation in Swaziland under the guise she was to be enrolled in a tertiary institution – Whether commission of crime by the accused proved – What crime entails – Circumstantial evidence – Reasoning by inference – When proper to do so – Conclusion to be drawn should be the only one to draw from the facts and should be consistent with all the facts – Accused has no onus to prove his innocence – Where a reasonable doubt exist such to be construed in accused's favour – Doubtful if accused intended to traffic the complainant which should be construed in her favour.

Accused persons charged with assault with intent to do grievous bodily harm – Accused persons allegedly acted in furtherance of a common purpose – Whether offence proved against both accused – Accused1 pleading guilty to common assault – Plea not accepted by crown – Effect of failure to produce medical report – medical report's absence not fatal where other credible and independent evidence is available – Common purpose not proved against second accused – Assault GBH proved against 1st accused.

JUDGMENT

[1] The two accused persons appeared before me charged with two counts comprising the contravention of Section 12 (1) (e) of the People

Trafficking and People Smuggling (Prohibition) Act 2009 as well as the Common Law offence of assault with intent to do grievous bodily harm. In both counts the accused persons are alleged to have acted in pursuit of a common purpose.

[2] As regards the count of contravening Section 12 (1) (e) of the People Trafficking and People Smuggling (Prohibition) Act of 2009, the accused persons are alleged to have, during the period between August 2010 and December 2012, and whilst acting in furtherance of a common purpose recruited and transported one Kenechukwu Stella Ibeabuchi from Nigeria to Swaziland for purposes of exploitation by deceiving her that she would be enrolled in a tertiary institution in Swaziland yet they knew that to be incorrect.

[3] On the second count the accused persons are charged with assault with intent to do grievous bodily harm in that between the months of August 2010 and December 2012, the accused persons had, whilst acting in furtherance of a common purpose, unlawfully and intentionally assaulted one Kenechukwu Stella Ibeabuchi with intent to do grievous bodily harm.

[4] At the commencement of the trial both accused persons, who were initially represented by Mr. Mabila and Advocate Mngomezulu in the proceedings before the latter withdrew and left Mr. Mabila as the only counsel, pleaded not guilty to the first count whilst they tendered different pleas on the second count. The first accused pleaded not guilty to this latter count (assault with intent to do grievous bodily harm) but tendered a plea of guilty to common assault. This latter plea was not accepted by the crown which indicated its intention to lead evidence in proof of the initial assault charge. The second accused on the other hand pleaded not guilty to count 2.

[5] The evidence led with regards the first count is to the effect that the first accused, who like the complainant is of Nigerian descent recruited the complainant from Nigeria to join her and work for her in her business and residence in Swaziland. It is common cause she was not going to be paid a salary for this but she was to be enrolled in a tertiary institution in Swaziland at the expense of the first accused, as a reward for dutifully serving the said accused. During the recruitment concerned, the first accused allegedly met her longtime friend who also happened to be the complainant's uncle's wife, called Bene Nwachukwu. The complainant's uncle concerned was called Chukwu Nwachukwu. After the first accused had disclosed her desire to acquire the services of a certain girl she knew

who used to stay with Mrs. Bene Nwachukwu as her relative, the first accused was told by Mrs. Nwachukwu that the said girl was no longer available and a different one in the form of the complainant was suggested.

[6] After a meeting materialised between the first accused and the complainant as well as the latter's guardians namely Chukwu and Bene Nwachukwu, an agreement was reached whereupon the complainant agreed to serve the first accused in her business in return for being enrolled at a tertiary institution. There was subsequently prepared a written agreement in terms of which the complainant bound herself to assist the first accused in her business of selling wares in Swaziland and performing other tasks in return for enrolment at a tertiary institution there. Chukwu Nwachukwu and Mrs. Bene Nwachukwu were described in the said agreement as guardians to the complainant or as her sureties. They all agreed to the arrangement and went on to sign the agreement in their said capacities. The complainant, despite not signing it, stated that she agreed with the terms which were binding on her. The matter was proceeded with on the basis of this assertion, which means that the application of the agreement's terms to the parties, including the complainant is not in issue.

[7] It is not in dispute that the complainant subsequently performed in terms of the agreement as she performed all her tasks in terms thereof including the sale of the first accused's wares. It is common cause that they all stayed in the same house including the first accused's husband the second accused in this matter.

[8] The evidence does not show the second accused taking part in the recruitment of the complainant at all. It does however show him supervising her work in a way when he scrutinized her books of account including making her account for what she had sold and the collections in that regard. This is more apparent from the evidence when the first accused was away in Nigeria, attending to her mother's funeral. Nonetheless it is contended by the crown that the basis for the second accused's liability or guilt is the doctrine of common purpose.

[9] Although most of the terms of the agreement between the first accused and the complainant were in writing, the period she was supposed to serve before being enrolled in a tertiary institution was not written down. It is now the source of a sharp dispute between the parties. According to the complainant, it had been fixed at six months or at the most a year yet according to the first accused it was fixed at two years. It suffices to say that it would be a difficult point to decide if one had to do it herein. It is a

relief that I have found it not necessary to determine after how long a period she had to be enrolled at a tertiary institution as shall be seen herein below.

[10] It is common cause however, that after sometime, precisely four months according to the complainant, the relationship between the complainant and both accused persons turned sour. It is not in dispute that the first signs of the souring relationship manifested themselves on a certain weekend in December 2010, when the accused persons and the complainant went to town in Mbabane to do their shopping and related businesses. It was whilst they attended their different tasks having gone their separate ways that the misunderstanding developed. The first accused allegedly failed to find the whereabouts of the complainant and the second accused such that when she eventually did so, she berated them and beat up the complainant asking her where she had taken her husband to. Whilst she agreed to have been frustrated by her failure to find them, the complainant denied the assault but had it put to the complainant that she had chastised her. Explaining herself to the second accused, the first accused said they had agreed to meet by the spar Supermarket Car Park. It transpired the first accused had not realized that the Spar Supermarket had recently relocated to Gwamile Street from The Mall, which is where she had gone to. At the same time the complainant

had forgotten her cell phone at home without the first accused realizing this fact. As she struggled to find their whereabouts she had called complainant on her cell phone without her cell phone being picked up which infuriated her and made her believe she was being deliberately avoided. It was for this reason she berated her and allegedly ended up assaulting the complainant, accusing her of having taken her husband somewhere. I must say that although she wants to refer to her action as a chastisement, it cannot escape the only conclusion it attracts in law which is that she assaulted her.

[11] Although she claimed to have continued performing her duties diligently and as agreed, complainant claimed that there developed a culture of her ill-treatment by the accused persons. On one occasion, during the absence of the first accused from the country, she was allegedly chased out of the house by the second accused who told her not to come back unless she brought with her the money she had used to buy a certain bottle of cooking oil without the second accused's authority although she said it was needed in the house. She claimed that despite having reported the problems she was enduring to such friends of the accused persons as Dr. Austin Ezogou, she had found no help as instead she was forced to spend the night outside at an acquaintance's place, that is the house of one Miss Madolo, who gave evidence as PW3. During this time the

first accused was not in the country but in Nigeria attending to her mother's funeral.

[12] The other instance to manifest the complainant's ill-treatment in her evidence was when she claimed to have had all her clothes removed from her room including the confiscation of her cell phone and passport. This also exposed her lack of privacy as she claimed that her room would be raided anytime by the accused persons who in the process would conduct unexplained searches. In fact she mentioned several of these incidents of her alleged ill-treatment most of which were not disputed except for an attempt by the defence to try and give a different meaning and cause of these incidents.

[13] She said she eventually met the accused persons and informed them that since she could not be enrolled at a tertiary institution, then she wanted to go back home without much success. The evidence shows two incidents of such discussion the first one being where the first accused is said to have cried and said she had no money to buy her an air ticket and the second one being when she asked for a two months period which was agreed upon. She said she then looked for her passport in the house on a certain day when the accused persons were not there. Although she initially failed to find it, she was to later find it hidden inside an old

wardrobe where it was contained in old sox. This was in the accused's bedroom. The accused person she said were not in the house at the time as they had gone to a party.

[14] Upon her search and recovery of her passport being discovered by the accused persons, she was allegedly assaulted heavily by the first accused in the presence of the second accused, as a result of which she developed a swollen and bruised face. The beating she said went on for an hour or so. In her own words, the complainant said she was saved from the first accused's further beatings by the second accused who restrained the first accused. This is the assault that forms the basis of count 2. The second accused dissociated himself from this incident, whilst the first accused made it look much insignificant with the complainant allegedly not having suffered any visible injuries. Clearly the evidence as corroborated by the witnesses in the matter, who included PW3 and PW4 suggests otherwise as shall be seen herein below.

[15] The complainant maintained that save for having once heard of the first accused having gone to Limkokwing University in Mbabane in an attempt to find her a place there as a tertiary institution, she was never taken to any tertiary institution nor was she aware of any private endeavours by the first accused to enroll her at such tertiary institutions,

in line with their agreement. Although she said she had managed to talk to the first accused and enquired from her about her enrolment at such an institute the first accused is said to have stated that she was short of money for the exercise including her subsequent assertion being short of money to purchase her a return air ticket to Nigeria and asking for two months to do so in or around September/October 2012.

[16] After her allegedly having been thrown out of the house such that she allegedly spent a night at Miss Madolo's house, the complainant averred that there was held a meeting between herself and the first accused in the presence of Mrs Okerue where the first accused allegedly asked that she gives her two months to raise money to buy her an air ticket for her to go back to Nigeria. Although she had agreed to this in September/October 2012, this did not materialize because instead of the ticket being purchased, she was assaulted as mentioned above when she was discovered to have searched and found her passport in the accused person's bedroom without their permission. She said she was instead accused of having stolen the second accused person's $2500.00 US Dollars, which she vehemently denied.

[17] From this incident their relationship deteriorated to such an extent that she spent days without being given food which forced her to rely on

donations by those members of the public who could help her. The accused persons denied this assertion.

[18] The evidence of PW3, Dr. Austin Ezogou, confirmed that the complainant was once chased out of the house by accused 2 in the absence of accused 1 and that the relationship between the two parties deteriorated. Significantly Dr. Ezugou pointed out that he agreed with an assertion of the accused to the complainant, that she could possibly not have the money to use to buy complainant an air ticket back home during the two months she had undertaken to do so because according to him nobody would have such money at that time. Of further significance is his evidence to the effect that the first accused told him in the face that complainant would not be allowed to leave for Nigeria before she paid the monies she claimed were owed her by complainant such as the $2500.00 US Dollars allegedly stolen from her bedroom as well as those she alleged were not accounted for from the items complainant had sold.

[19] PW3 confirmed that the complainant had spent a night at her place after she had allegedly been kicked out of the house by the second accused. After the complainant failed to return the money she had used to purchase some cooking oil without authority. In her observation the complainant was being exploited because despite selling wares she wore the same

clothes. Significantly, she testified having been lastly told by the complainant that the sourness in their relationship had resulted in her being beaten by the first accused. As she said this she showed her scratches all over her body together with bruises on her face resulting from an apparent assault.

[20] PW4, one Jabulani Simelane, an employee of the Swaziland Broadcasting and information Services, told the court he knew the complainant. He said he met her during one of her trips to his place of work where she ended up selling him some jewellery. There later developed some acquaintancy between the two of them. This witness testified of various forms of ill-treatment the complainant informed him she was suffering in the hands of the accused persons. These included his being chased out of the house one night, having her cell phone and clothes confiscated, being accused of stealing some money belonging to the second accused as well as being assaulted by the first accused on a certain day after she was discovered to have searched for her passport in the accused person's bedroom.

[21] Of significance in this witness's evidence was his testimony that on a certain Sunday afternoon, he had met the complainant next to the entrance to the New Mall as he was from church. He noted that her face

was abnormal as it was apparently swollen and had dark bruises following an alleged beating she said she had been subjected to by the first accused. The swollen face and the dark blue bruises on one of its side, indicated the apparent severity of the beatings she had allegedly been subjected to. The complainant informed him as well that her clothes, cell phone and passport were confiscated from her by the accused persons. In fact she was allegedly subjected to the severe beatings referred to above after she had taken the liberty to search for her passport in the accused person's bedroom. She was eventually forced to return the said passport to the accused persons.

[22] At the close of the crown case an application was made for the acquittal and discharge of the second accused person on the ground that a prima facie case had not been made against him. I declined the application and pointed out that in exercise of my discretion it was important that he explains himself particularly considering that the person recruiting the complainant was his wife with whom they stayed together with the fact that the services she was rendering were enjoyed by both of them. Furthermore he was shown supervising her at some stage just as he was shown chasing her out of the house on some other day. There was also the issue of the alleged loss of &2500.00 Dollars. During the defence case, both accused persons decided to give evidence in their defence.

Before they could do so, however they led the evidence of PW1, the uncle to the complainant namely Chukwu Nwachukwu. The court had been informed even before the crown's case was finalized that this witness, who is based in Nigeria, was going to be called by the crown. This was eventually not to be the case and that gave the defence an opportunity to call him for their own which they went on to do.

[23] Mr. Nwachukwu confirmed that he and his wife, Mrs. Bene Nwachukwu were the guardians or sureties of the complainant. They are the ones who signed the agreement releasing her to come and work in Swaziland for the first accused. The terms of the agreement he said were that she was to help the accused with selling her wares and with the general household chores. No complaint was ever made to them that she was ever made to do any other work than that agreed upon. Whilst the complainant was required to perform the tasks concerned in return for being enrolled at a tertiary institution, this he said, was required to be done after two years. Even then, it would be so if the first accused was satisfied she had mustered the tricks of the trade with the result that she had generated sufficient money to pay for her educational fees as well.

[24] This witness refuted any conclusion of deception and exploitation of the complainant. In fact he was surprised why the matter had been reported

to the police as according to them it was a minor family dispute which needed to be resolved by the family. Concerning the assault on the complainant by the first accused, he merely saw it as moderate chastisement which he said was consistent with their culture as Nigerians where as part of growing up, youngsters did have to be chastised from time to time.

[25] The second accused who gave evidence as DW2, told the court that he was not involved in the recruitment of the complainant from Nigeria to Swaziland as that was a decision by his wife the first accused without his involvement. He said he only stayed with both of them as a family and denied ever exploiting the complainant or even deceiving her about an enrolment at a tertiary institution. In fact all the terms of complainant's coming to Swaziland were between the first accused and the complainant. He thus denied liability for the alleged trafficking of the complainant in violation of Section 12 (1) (e) of the Act.

[26] He further denied having taken part in the assault of the complainant either directly or in furtherance of a common purpose with the first accused. In fact he denied any such assault having to be attributed to him, contending that the complainant had herself stated that he had restrained the first accused from continuing her assault.

[27] Giving her own version, the first accused who gave her evidence as DW3, tried to dissociate herself from the charges. She disputed having recruited the complainant from Nigeria to Swaziland for purposes of exploitation by deception she was to be enrolled in a tertiary institution, when that was known to be untrue. According to her she genuinely recruited the complainant and had the intention to enroll her at a tertiary institution.

[28] She recruited the complainant to genuinely help her in her business of selling wares comprising hair pieces and jewellery. The terms of their agreement had been found by the complainant and her guardians to be acceptable. She had hoped to be able to enroll her at a tertiary institution in Swaziland. Throughout her stay in Swaziland the complainant never claimed to have been made to do any other work than that agreed upon.

[29] She said she went to several tertiary institutions looking for complainant's space but could not find any for her. Furthermore the agreed time within which to do same was two years as opposed to the 6 months to a year period suggested by the complainant.

[30] She denied having assaulted the complainant three or four months after her arrival in Swaziland, but claimed to have chastised her. I must say from the onset that I did not see her as disputing the alleged assault as

related to this incident. I only saw her as perhaps disputing the severity of the assault and suggesting that the chastisement referred to was an assault of a minor nature.

[31] Although she admitted to assaulting the complainant after she discovered her to have searched her bedroom in her absence with her husband's money allegedly disappearing, she denied the assault was as severe as the complainant wanted to make it look. She claimed it was more the common assault than an assault with intent to do grievous bodily harm as she had claimed to have hit her lightly with an open hand which she claimed to have done out of frustration. She was therefore pleading guilty to common assault as opposed to assault with intent to do grievous bodily harm.

[32] She could not afford the money required to purchase the air ticket taking complainant to Nigeria and needed some time to raise the said sum. This was despite her earlier undertaking, she was going to take her back in two months.

[33] Having recorded the facts of the matter as brought about by the evidence I am of the considered view it is necessary for me to comment about the

offence of people trafficking as provided under the Act. Section 12 (1) of the Act provides as follows:-

> *Offence of People Trafficking*
> *"12. (1) A person who recruits, transports, transfers, harbours, receives, employs, maintains or holds any person or persons for the purpose of exploitation, by one or more of the following means –*
>
> *(a) …*
>
> *(e) deception…,*
>
> *Commits an offence and is on conviction liable to a term of imprisonment not exceeding twenty (20) years.*
>
> *(2) A person convicted under this section shall in addition to any penalty under subsection (1) pay the trafficked person (victim) any amount of loss as may be determined by court".*

[34] 'People trafficking' as a concept is defined in the People Trafficking and People Smuggling Act 2009 in the following terms in Section 2:

> *"People trafficking" means the recruiting, transporting, transferring, harbouring, providing or receiving of a person for the purpose of exploitation".*

[35] It is apparent that the provisions of the section concerned are extremely harsh. The idea is perhaps to provide deterrence to would be offenders. This can been seen from the penalty portion of the section. It obviously does not contemplate a fine nor a suspension of any portion of the

sentence. The sentence it suggests is an indicator that the legislator expects very harsh and long imprisonment sentences when one looks at the suggested period. This makes hard for the court to impose a short term of imprisonment as the circumstances may perhaps warrant. The same thing applies to imposing a suspended sentence. Even though in sentencing it talks of a sentence not exceeding 20 years, it is clear that the legislature was clearly advocating for harsher than normal imprisonment sentences. The problem with such statutory provisions on sentences is that interferes with the discretion of the courts on sentencing making it difficult for the courts to impose sentences as they would consider warranted by the circumstances of each matter given that each matter turns on its own circumstances. It is therefore not unthinkable that there would be a matter in which whilst a conviction may be warranted from the facts, the court would be presented with moral dilemma to impose the harsh sentence prescribed where the court is convinced a much less severe sentence was required or was appropriate. This often happens in sentences where the prescribed sentence is a lengthy custodial one or where there is a minimum sentence imposed. It is not unlikely that in such cases the court's fearing an injustice might end up leaning towards acquitting an accused than imposing the prescribed sentence if it is viewed as unconscionable.

[36] Having said that, it may be necessary for the legislature to revisit the penalty provisions of statutes like the one in this matter so as to restore the discretion of the courts on sentencing which they should exercise according to the dictates of justice.

[37] Section 12 (1) (e), as the one the accused persons are accused of having violated provides as follows:-

> *"A person who receives, employs, maintains or helds any person for the purpose of exploitation, by one or more of the following means – (e) deception; commits an offence and is, on conviction liable to a term of imprisonment not exceeding twenty (20) years"*.

[38] When considering Section 12 (1) (e) together with the particulars of the indictment, it is clear that the accused persons are alleged to have committed the offence of violating Section 12 (1) (e) of the Act by recruiting and transporting the complainant from Nigeria to Swaziland for purposes of exploitation through deception that she was going to be enrolled at a tertiary institution yet the accused knew that to be untrue. There is no doubt that in these circumstances, the question is whether or not it has been established that the complainant was recruited from Nigeria and transported to Swaziland for exploitation purposes through deception that she would be enrolled at a tertiary institution; and that the

accused knew that to be untrue that is the promise of enrolment at tertiary institution

[39] Whereas it is common cause that the complainant was recruited from Nigeria to Swaziland, can it be said that the said recruitment to the accused persons' awareness or knowledge was for exploitation purposes and was based on a deception that she was to be enrolled at a tertiary institution, when that was not known not to be the case.

[40] As one answers these questions, sight should not be lost of the fact that this is a criminal matter in which the position is settled that on accused person has no duty to prove his innocence as it is the duty of the crown not just to prove its case against the accused person but where it is required to do so beyond a reasonable doubt. The case of ***Vusi Roy Dlamini vs Rex, Appeal Case No. 3/99*** is instructive on the duty imposed on the crown by law to prove a case against the accused person beyond a reasonable doubt. In case of a reasonable doubt being there the law is that such a doubt ought to be construed in the accused person's favour. The case of Rex vs ***Longubo Msheshengwane Matibuko Case No…*** as well as that of ***Pius Simelane vs Rex Appeal Case No. 2/97*** are instructive in this regard.

[41] There is no dispute that the complainant was recruited and transported from Nigeria to Swaziland. The question is whether he said recruitment was for exploitation purposes and further whether there was any deception of enrolment at a tertiary institution yet the first accused was well aware as at the time the accused was recruited and transported from Nigeria to Swaziland that such a promise was not truthful? Further given that the duties to be performed by complainant were agreed upon and were written down, can it be said that their performance amounted to exploitation. Exploitation is defined as "the act of using something for selfish purposes" in the Oxford English Dictionary whilst in the Macmillan Essential Dictionary it is provided that, to exploit is "to treat someone unfairly in order to get some benefit for yourself". There is no doubt, that performance of the agreed tasks themselves would not amount to exploitation as they were agreed upon. The exploitation would only arise where the other side deliberately failed to perform its part of the bargain. Cleary the parties herein were in agreement that if all the terms of the agreement were fulfilled by all the parties the question of exploitation would not arise. There is no clear evidence that the first accused and by extension the second accused were from the onset clear that the promise of enrolment to a tertiary institution of the complainant was a ruse. In order to conclude that from the onset the complainant was being deceived about being enrolled at a tertiary institution one would

have to reason by inference. The position of the law is now settled that in order to so reason, the conclusion sought to be drawn must be consistent with all the proven facts of the matter and must be the only reasonable one to draw from the set of facts. See in this regard the case of ***R v Bloom 1939 AD 199*** as well as that of ***Pius Simelane vs Rex Appeal Case No. 2/1997.***

[42] A strong suspicion can be drawn from the circumstances of the matter to the effect that the promise of enrolment at a tertiary institution was a ruse when considering the fact that same was made, with the first accused not being shown to have known as at the time she made the promise of such enrolment whether complainant's academic results entitled her for such enrolment at any institution in Swaziland including whether she had an idea on what the tuition and other related fees were like. However the cardinal question becomes, if it is contended by inference that the promise of enrolment at a tertiary institution was a ruse, is it the only inference to draw from the set of facts? It seems to me not because I do not have proof that the accused well knew that her promise was untrue. It is reasonable possibly true for her to have taken things for granted and assumed that she qualified because she had in her own words completed school and passed. Because of this it is not the only inference to draw that the accused person well knew she did not qualify or even that she

could not afford the fees. Again the fees payable could have been genuinely taken for granted as being to be affordable until the accused discovered what they really were and that she was unable, to pay them or could not afford them. In such a case would she be said to have promised the complainant well knowing the promise concerned not be genuine? I do not think so.

[43] What this means is that if it was not the only inference to draw that such a promise was a ruse well known to the accused as she made it, and the crown having not shown as one duty bound to do so in criminal matters that was the position, it means that there was a reasonable doubt. If indeed there was such a doubt, then it should be construed to the accused's benefit in criminal matters. See in this regard ***Vusi Roy Dlamini v Rex (Supra)*** as the case ***of R v Difford 1939 AD.***

[44] It could be argued that perhaps the doubt on the authenticity of the promise lasted up until the time after it became clear that complainant wanted to go back home but her passport was confiscated. Beyond that point she should have been repatriated back home. This thinking can only remain plausible if it were to disregard the fact that the accused persons may at that time genuinely not have had the money to purchase the air ticket as confirmed by Dr. Austin Ezogou who said that at the time

in question no one had money and that it was worse still for the first accused who had just returned from Nigeria. Although she had undertaken to purchase complainant a ticket after two months of her undertaking, if in reality she turned out not to have the money would that amount to proof of a criminal intention on her part? I think not and there should be evidence for me to so conclude. Otherwise there is a reasonable doubt, in whose favour it is clear in law how to construe it. As concerns the 2nd accused person on count 1, it seems to me that his liability cannot be found from the basis of common purpose. In other words it has not been shown that he had a common purpose to commit the offence concerned with anyone even if the reasonable doubt had not availed the first accused.

[45] It seems to me that a case has not been made against the first accused on count one because there is in existence a reasonable doubt which should be construed in her favour. I am therefore of the firm view that she should be acquitted. Although for different reasons the same result ought to avail the second accused on count 1. It perhaps can be emphasized that in the case of the second accused the same result (acquitted and discharged) would still have been reached even if the accused was not availed of the reasonable doubt I have found availed her.

[46] Having said all I have, I am convinced that the accused persons ought for the reasons set out above, not be found guilty on the first count and they are both acquitted and discharged of same.

[47] On count 2, I have no doubt that the second accused cannot be found guilty on any of the two instances of assault established by the facts, being the assault of complainant by accused 1 outside the Spar Supermarket at the Old Bus Rank in Mbabane and that which occurred inside the accused person's bedroom in or around October/November 2012, after she was found to have secretly searched and retrieved for her passport.

[48] This I say because on the first proven instance of assault, in December 2010 outside the Spar Supermarket and at the Old Bus rank in Mbabane the second accused was not shown as taking part in the assault of the complainant nor was he shown to have associated in any way with the first accused as she assaulted the complainant. In her own words, the complainant says the second accused told the first accused to "stop her madness". On the second incident referred to above as having occurred in October/November 2012, the second accused is again not shown to have taken part in the assault of the complainant. If anything, he is shown to have restrained the first accused from continuing with assaulting the

complainant. Whereas there could be a strong suspicion he may have liked what the first accused did to the complainant particularly on the last assault, it is not enough to lead to his conviction. This is not supported by the principle of common purpose. In this principle there has to be established an express agreement or one by conduct that the parties desire the natural result of the conduct of one of their own.

[49] Of course the position is markedly different with regards the first accused. She is shown by the evidence to have assaulted the complainant outside the Spar Supermarket at the Old Bus Rank in Mbabane, an incident she sought to down play by saying that she moderately chastised the complainant through her attorney. Although this evidence does indicate common assault as opposed to assault with intent to do grievous bodily harm, I have no doubt it is part of the assault inflicted by the accused on the complainant during the period alleged in the indictment.

[50] On the second incident of assault as occurred in October/November 2012, there was no denying its occurrence even from the first accused herself who only sought to trivialize it by saying it was an ordinary assault. I have no doubt there can be no ordinary assault in a case where the complainant has dark blue bruises and swelling on the face as a result of such an assault which was so visible as to be noted by everybody who

knew her as can be seen from the evidence of the complainant, PW3 and PW4.

[51] In the case of ***Rex vs Magalemba Richard Nxumalo, Criminal Case No.137/2006 (Unreported) at page 13.*** I had occasion to consider the **distinction** between assault with and intent to do grievous bodily harm and common assault. Therein I found, whilst referring to authorities, that assault with intent to do grievous bodily harm refers to an assault to injure and to injure in a serious manner. In fact the position was put as follows-:

> *"It is not all the time that injuries inflicted on a victim of an assault necessarily involve a risk to life as well as an intention to kill that person. This in my view is what makes the difference between attempted murder and assault with intent to do grievous bodily harm as distinct offences. It was in this consideration that Miller J put the position as follows in S v Mbelu 1966 (1) PH H176 (N) (as reported in P. M. A. Hunt's South African Criminal Law and Procedure Volume II, 1982 Juta & Co. at page 491) when he commented on assault with intent to do grievous bodily harm:-*
>
> *"[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"*

I therefore cannot say that the assault inflicted on the accused on the second occasion was not intended to injure in a serious manner.

[52] So much was made about the unavailability of a medical report which it was contended confirmed that the assault inflicted on complainant in October/November 2012 was not with intent to do grievous bodily harm. I do not agree that an assault with intent to do grievous bodily harm can only be proved where there is a medical report. I have no hesitation that where there are visible and graphic injuries which are identified by witnesses such as the dark blue bruises and the swollen face effected on the complainant's face besides the marks said to have been all over her body can be indicative of any other form of assault than the aggravated one referred to as assault with intent to do grievous bodily harm.

[53] On this latter incident alone, I have no alternative but to find the first accused person guilty of assault with intent to do grievous bodily harm.

[54] For the foregoing reasons I have therefore come to the conclusion that the accused persons are not guilty and are both acquitted and discharged in count one whilst in count two the first accused is found guilty of assault with intent to do grievous bodily harm, whilst the second accused is

acquitted and discharge. Having said what I have I hereby make the following order:-

As regards Count 1

(a) Both accused persons are acquitted and discharged.

As regards Count 2

(b) The first accused be and is hereby found guilty of assault with intent to do grievous bodily harm.

(c) The second accused be and is hereby acquitted and discharged.

Delivered in open Court on this the 30th day of April 2014.

N. J. HLOPHE
JUDGE - HIGH COURT