



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 284/2011

In the matter between:

REX

VS

MCEBO SIKELELA DLAMINI

Neutral citation: *Rex vs Mcebo Sikelela Dlamini (284/2011) [2014] SZHC405 (02 December 2014)*

Coram:

M.C.B. MAPHALALA, J

Summary

Criminal Law – Attempted murder – accused charged with attempted murder – requirements of the offence considered – self-defence not competent as accused committed the unlawful attack upon the complainant – similarly provocation not competent as the accused’s act which caused the injuries did not occur in the heat of passion caused by sudden provocation – held that the accused had *mens rea* in the form of *dolus eventualis* – accused accordingly convicted.

**JUDGMENT
02 DECEMBER 2014**

- [1] The accused was charged with attempted murder and, the Crown alleges that on the 2nd August 2011 at Ndubazi area in the Shiselweni region, the accused unlawfully assaulted Themba Mncube with the intention of killing him. The accused pleaded not guilty to the offence.
- [2] The defence challenged the confession made by the accused on the basis that it was not made freely and voluntarily as required by law; hence, a trial within a trial was held. PW1 Wakhile Mhlanga is related to the complainant; his mother is a sibling to the complainant. He told the court that his homestead and the Dlamini homestead where the accused is employed are neighbours. On the 2nd August 2011, he saw the accused running away from his homestead after assaulting the complainant who was then lying on the ground injured and unable to talk. He reported the incident to his mother, who in turn reported the matter to the police. The police arrived and took the complainant to hospital.
- [3] PW1 maintained his evidence under cross-examination. He denied as alleged by the defence that the assault occurred within the boundaries of the Dlamini homestead which were marked by a barbed wire. PW1 reiterated his evidence that the assault occurred outside the boundaries of the Dlamini homestead and within the boundaries of his own homestead.

[4] PW1 further denied as alleged by the defence that the accused had assaulted the complainant in self-defence pursuant to an `assault by the complainant with a knobstick. The defence's version was that the accused had confronted the complainant on the previous day after finding them within the boundaries of the Dlamini homestead; and, he asked them why they were straying into the Dlamini homestead. It is common cause that the accused is employed by the Dlaminis to look after their homestead as well as their cattle since they reside in Mbabane and only visit home during weekends; hence, the defence argued that the accused was in the circumstances entitled to question the complainant's presence in the Dlamini homestead. However, PW1 denied not only that the complainant was carrying a knobstick but that he had assaulted the accused.

[5] PW2 Musa Nxumalo, a magistrate working at Nhlangano Magistrate's Court testified that on the 3rd August 2011, he recorded a statement made by the accused. Constable Mangaliso Kunene brought the accused to the Magistrate's office; then he waited away from the hearing distance of the Magistrate's office. Only the Magistrate and the Court Interpreter Vusi Sithole remained in the office with the accused.

[6] The accused told the Magistrate that he was making the statement of his own accord after being advised to do so by the police. He denied that he

was induced by threats or promises to make the statement. He further assured the Magistrate that he was not physically assaulted by the police during their investigations; and, that he never sustained any injuries or wounds during the period of incarceration. The statement was read back to the accused by the Magistrate, and, he confirmed that it had been correctly recorded. The statement was duly signed by the Magistrate, the accused as well as the Court Interpreter.

[7] The Statement made by the accused:

“STATEMENT OF AGREED FACTS

I do recall on the 1st May 2011 at about 6.00 pm, I found one Themba Zom Ncube in the yard of the homestead of Bheki Dlamini at Ndubazi area which I am employed to look after. The homestead is fenced off and I had locked the gate when I left for the shop. Themba Zom Ncube could not explain how he entered the yard, and, instead he started threatening me and jumped over the yard by reeling the fence and advanced towards me.

He then hit me on the neck with a knobstick, and, I ran away to seek refuge. He told me that he was not scared of me and would deal with me on the following day upon returning from the dip tank. On the following morning, I went to his parental homestead at about 5.30 am and hid from him; and, when he came out of his house, I pounced on him and hit him with a pick handle on the left temple and he fell down. I then ran away and left him lying on the ground. I surrendered myself at Nhlanguano police station at about 5.00 pm on the same day when I heard that the police had come looking for me. That is all I wish to say about this matter. Thus done at Nhlanguano Magistrate's Court before Magistrate Musa Z. Nxumalo on 3rd August 2011."

[8] Under cross-examination the Magistrate reiterated his evidence that Constable Mangaliso Kunene was not within hearing distance of his office when the accused recorded the statement. The accused was also warned of his legal rights that he was not obliged to record the statement. He denied that the accused was induced by threats of assault to record the statement, and, averred that the accused personally stated that he was recording the statement on his own accord and not induced by threats or promises made

by the police. He insisted that the accused made the statement freely and voluntarily without any undue influence.

[9] PW3 Vusi Sithole was the Court Interpreter at the Nhlanguano Magistrate's Court when the accused recorded the statement with PW2. He testified that he was conversant with both Siswati and English languages. He confirmed that on the 3rd August 2011, he appeared before PW2 and translated when the accused recorded the Statement. It was only the three of them in the office and the door was closed. The police officer who had accompanied the accused to the Magistrate was not within hearing distance of the office. The accused appeared normal, and, the statement was read back to the accused who confirmed the correctness thereof. Thereafter, all three of them signed the statement.

[10] Under cross-examination PW3 confirmed that he was a sworn interpreter, and, he maintained his evidence. He corroborated the evidence of PW2 in all material respects. In particular PW3 maintained that the police officer who accompanied the accused to record the confession was not within hearing distance of the Magistrate's office when the accused recorded the statement. He confirmed that the accused's right not to make the statement was fully explained by the Magistrate, and, the accused told the Magistrate that he was making the statement of his own volition to the extent that he

was not induced by promises or threats by the police to record the statement. Lastly, PW3 confirmed that PW2 had read back the statement to the accused before he appended his signature.

[11] PW4 Constable Mangaliso Kunene testified that on the 3rd August 2011, he was instructed by his police superiors to accompany the accused to the Nhlanguano Magistrate's Court to record a confession. The accused was received by Magistrate Nxumalo. Thereafter, he waited at the reception office, about twelve to fifteen metres away. He was only called to fetch the accused after he had finished recording the statement. He confirmed that he could not hear what was being said in the Magistrate's office, and, that he was not privy to the statement made by the accused. The door to the Magistrate's office was closed. Similarly, he told the Court that he had enquired and was advised by the accused that he was in good health before and after recording the confession. PW4 explained to the Court that this was the standard procedure. PW4 was not part of the police investigation team.

[12] PW5 Sgt Friday Mabuza was the investigating officer, and, he testified that the accused was arrested on the 2nd August 2011. He told the court that the accused was cooperative with the police investigating team. He explained that the accused was handed to him by his employer Bheki Dlamini. He

denied that the accused was tortured or physically assaulted during the police investigation. He denied that the accused was instructed to record the statement but he insisted that he was merely advised to record the statement in view of what transpired during the interrogation. Similarly, he denied that the statement was not made freely and voluntarily as suggested by the defence.

[13] The accused gave evidence in the trial within a trial, and, he confirmed that his employer Bheki Dlamini had surrendered him to the police on the 2nd August 2011. Thereafter, he was interrogated by the police who demanded that he produce the weapon used in the commission of the offence. He confirmed that he was not physically assaulted by the police during the thirty minutes of police interrogation. However, he told the court that he was ordered by the police to record the confession, and, he denied that the confession was made freely and voluntarily.

[14] The accused confirmed, however, that PW4 had accompanied him to record the statement, and, that after handing him over to the Magistrate, he went to stay at the reception. The accused remained in the office with the Magistrate as well as the Court Interpreter. He further confirmed that during the recording of the statement, the door of the Magistrate's office was closed.

[15] The accused further told the court that he was directed by the police to tell the Magistrate that he was not induced by promises or threats to record the statement. However, it is apparent from the evidence that the accused was merely interrogated for thirty minutes, and, that he was not physically tortured during the interrogation. The accused does not deny that his rights to record the confession were fully explained by the Magistrate, and in particular, that he was not obliged to do so. The accused does not deny that he recorded the confession in the presence of the Magistrate and the Court Interpreter, and, that there was no other person who was within a hearing distance of the office. There is no evidence adduced before this court which suggests that the confession was not made freely and voluntarily or that it was made with undue influence as suggested by the defence.

Similarly, there is no evidence that the accused was ordered to record the confession by the police as opposed to being advised to do so. The accused has admitted that the interrogation lasted for only thirty minutes, and, that he was not physically assaulted or tortured by the police or even threatened with physical assault. The evidence by Sgt. Friday Mabuza that the accused was co-operative with the police investigation team has not been disputed by the police, and, I have no reason to dispute that evidence.

[16] Section 226 (1) of the Criminal Procedure and Evidence Act 67/1938 as amended provides the following:

“226. (1) Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible in evidence against such person:

Provided that such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto. . . .”

Section 238 (2) provides the following:

“(2) Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons by reason of any confession of such offence proved to have been made by him, although such confession is not confirmed by any other evidence:

Provided that such offence has, by competent evidence, other than such confession, been proved to have been actually committed.”

[17] At the conclusion of the trial within a trial, this court came to the conclusion that the confession recorded by the accused was made freely and voluntarily, and, without any undue influence; hence, the confession was admitted in evidence.

[18] The ruling on the admissibility of the confession marked the beginning of the main trial. The complainant Welile Ncube, PW6, testified that the accused physically assaulted him on the forehead with a pick-handle. The assault took place at the complainant's homestead at about 6 am when he was preparing to go to the dip tank. The accused waylaid the complainant at his homestead and hit him; they were not fighting with the accused. After the assault, the complainant fell down, and, he was subsequently taken to Mbabane Government hospital. He told the Court that the assault was not provoked. He insisted that even though he had been discharged from hospital, he had not yet fully recovered, and, that he was still attending hospital on a regular basis.

[19] Under cross-examination, PW6, denied that on the previous, he had strayed into the premises of the Dlamini homestead, and, that he was subsequently confronted by the accused for being within the premises illegally. He further denied that pursuant to the said confrontation, he had hit the accused with a knobstick and further threatened to assault him on the following day

after the dipping session. Similarly, he denied that he was a bully to the extent that he beat the accused whenever they met without provocation and that his conduct had been reported to the local Chief's Kraal. He rejected the suggestion by the defence that the accused's employer had assisted him after the incident; he told the court that it was Machawe Ngwenya who transported him to hospital.

[20] PW7 Dr. Orlando testified that on the 2nd August 2011, he was based at Nhlanguano Health Centre, and, that he examined the complainant who was in a critical condition and unconscious due to physical assault. The complainant did not respond to a verbal command and had sustained a big trauma on the head with internal bleeding on the brain. There was a big and deep laceration on the pivotal bone area (i.e. head) exposing the skull bone and showing a depressive fracture of parietal bone. The doctor remarked that due to the severe cranial trauma and intracranial hypertension, the patient faced a high risk of death.

[21] The Crown recalled the investigating officer Sgt. Friday Mabuza who told the Court that due to the injuries sustained by the complainant, he was subsequently transferred from Nhlanguano Health Centre to Hlatikulu Government Hospital. Shortly thereafter, the complainant was again transferred to Mbabane Government Hospital for further treatment.

[22] Sgt. Mabuza further told the court that after due cautioning, the accused led him to his employer's motor vehicle which was parked next to the police station. The accused retrieved a pick-handle and gave it to him. The accused was in the company of his employer Bheki Dlamini. The accused had explained that the pick-handle was used in the commission of the offence. The accused was charged with attempted murder, and, on the following day, he recorded a confession with the Magistrate. Sgt. Mabuza also explained that the complainant remained at the Mbabane Government hospital for three months as he was unable to speak. The pick-handle was admitted in evidence during the trial, and, it was marked Exhibit A.

[23] Under cross-examination Sgt. Mabuza explained that after the assault, the accused had run away for fear that the complainant had died. He told the court that the complainant had fallen down after the assault and became unconscious. He also explained that the accused was co-operative during police investigation, and, he further stated that the complainant may not be in a position to identify the pick-handle used on the basis that he was assaulted very early in the morning and had no opportunity to observe the weapon because he fell unconscious after the assault. It was the evidence of the accused that the pick-handle brought to court as the exhibit was smaller than the one used to assault him.

[24] The accused had another opportunity during the trial to give further evidence in his defence. He testified that the Dlamini homestead is a neighbour to the complainant's homestead, and, that the complainant was not in good terms with him. He told the court that whenever they herded cattle with the complainant, he would drive Dlamini's cattle astray to people's maize fields. He insisted that he had reported the accused's conduct to his employer who in turn reported the matter to the Chief's Kraal; and, the complainant had apologised and undertook not to conduct himself in a similar manner again.

[25] The accused further told the court that on the 1st August 2011, he saw the complainant trespassing at the Dlamini homestead, and, that when he confronted him, the complainant hit him with a knobstick on his neck. The accused insisted that the complainant had threatened to hit him again the following day. After the assault, he ran away and reported the incident to his employer's wife. However, he confirmed that he was not injured during the assault even though his neck was swollen. He was never hospitalised.

[26] On the next day the accused went to meet the complainant's mother carrying a pick-handle. Before meeting her mother, the complainant appeared, and, the accused without conversing with him hit him with the

pick-handle; then he ran away to his friend's homestead where he telephoned his employer's wife and reported the incident. His employer subsequently surrendered him to the Nhlanguano police.

[27] Under cross-examination the accused admitted that he assaulted the complainant with a pick-handle. However, he could not explain why he assaulted the complainant without provocation when he had gone to talk to the complainant's mother. Furthermore, he could not explain why he left after the assault without seeing the complainant's mother. Ironically, the accused admitted that he was angry when the complainant hit him with a knobstick the previous day; hence, he went to the complainant's homestead in the morning and assaulted him with a knobstick. The accused's evidence was corroborated by the evidence of Christopher Big Boy Ntuli to whom the accused reported the incident. Similarly, it was the evidence of Mr. Ntuli that the accused did not show him the alleged injuries inflicted by the complainant on the previous day.

The accused admitted that he never put to Crown witnesses that the complainant was carrying a knobstick on the 1st August 2011 which he used to assault him on the neck. Similarly, the accused admitted that it was never put to Crown witnesses that he had knocked at the house of the complainant's mother since he wanted to talk to her.

[28] DW2 Robert Bheki Dlamini is the employer to the accused. He testified that he employed the accused in 2009 to look after his homestead at Nyamane area in the Shiselweni region as well as herd his cattle. He told the court that he resides in Mbabane with his family. He further told the court that the relationship between the accused and the complainant was not good as the complainant bullied the accused. He stated that the accused had reported to him on several occasions of instances of bullying by the accused; and, that in 2010, he reported the matter to the Chief's Kraal. A member of the Chief's Inner Council Christopher Big Boy Ntuli was appointed to meet with the two families in 2010 with a view to resolve the matter amicably.

In certain instances he would receive reports that the complainant had driven his cattle astray to other people's plantations. He told the Court that he had received a report from the accused that the complainant had assaulted him on the 1st August 2011, and, that the injuries were shown to him. He further received a report that the accused had assaulted the complainant; and, he surrendered the accused to the police. He conceded under cross-examination that his evidence was based on what the accused had told him and that he had no personal knowledge of the events as they unfolded between the accused and complainant.

[29] The evidence of DW2 stands on the same footing as that of Christopher Big Boy Ntuli, a Crown witness whose evidence was largely based on what the accused had told him. The only evidence which has a strong probative value related to his knowledge of the bad blood which existed between the accused and the complainant. Ntuli's evidence that he was appointed by the Chief's Kraal to broker a peace initiative between the accused and the complainant is common cause.

[30] It is apparent from the evidence that on the 2nd August 2011, the accused arrived at the parental homestead of the complainant at about 05.30 hours when the complainant was preparing to drive cattle to the dipping tank. Without any warning, notice or communication with the complainant, the accused hit the complainant with a pick-handle on the head; and, the complainant fell down and became unconscious. The accused fled the scene after committing the offence. The complainant was subsequently transported to Nhlanguano Health Centre. Due to the seriousness of the injuries sustained, the complainant was on the same day transferred to Hlatikulu Government Hospital. It is the evidence of Dr. Orlando that the complainant sustained a big deep wound on the head exposing a depressive fracture of the parietal bone. There was internal bleeding on the brain. The complainant had to be transferred again and hospitalised at the Mbabane Government Hospital for three months. When he was eventually

discharged from hospital, he was unable to speak properly and had to return to hospital for further treatment as an out-patient on a frequent basis pending recovery.

[31] The accused has alleged in his defence that the complainant had trespassed into the Dlamini homestead a day prior to the assault; and, that when he confronted him, the complainant assaulted him with a knobstick on his neck and then ran away. He has further alleged that the complainant had threatened to assault him again on the following day. This evidence is contained in his confession.

However, in his evidence in-chief, he contends that he assaulted the complainant in self-defence. However, there is no evidence before court that the complainant had assaulted the accused on the 2nd August 2011 which would have warranted self-defence by the accused. In the circumstances self-defence cannot avail the accused.

[32] The accused has alleged in his defence that the complainant assaulted him on the previous day after he had confronted him for trespassing in the Dlamini homestead. However, there is no evidence of the assault. Christopher Big Boy Ntuli has testified that he was not shown the injuries allegedly sustained by the accused on his neck. It is the evidence of the

accused that he was never hospitalised for the injuries sustained; hence, there was no medical report in respect of the alleged injuries. Furthermore, the accused has alleged that the complainant was in the company of other people during the purported assault; however, none of these people gave evidence on his behalf in order to sustain these allegations.

[33] The defence of provocation cannot avail the accused in the circumstances on the basis that the accused was allegedly provoked on the previous day. The accused did not hit the complainant in the heat of passion caused by sudden provocation. In the case of *Rex v. Thulani Peter Dlamini* Criminal Trial No. 28/2006 at para 29, I dealt with provocation as follows:

“It is a trite principle of our law that the defence of provocation can only avail the accused where the act which causes death occurs in the heat of passion caused by sudden provocation. In addition the provocation should be commensurate with the violence inflicted upon the deceased. The provocation should result in a loss of self-control to such an extent that the mental element requisite for murder is not present.

See the cases of *Rex v. Aaron Fanyana Dlamini* 1979-1981 SLR 30 at 35; *Rex v. Nkambule Paulos* 1987-1995 (1) SLR 400 at 405 (HC; *Sipho Isaiah Lukhele v. Rex* 1970-1976 SLR 164 at 164 (CA).”

[34] It is not in dispute that there was enmity between the accused and the complainant emanating from the bullying of the accused by the complainant. Such evidence was not disputed by the complainant. This transpired from the evidence of the accused, DW2 Bheki Dlamini as well as Crown witness Christopher Ntuli. It is apparent from the evidence that the accused assaulted the complainant in revenge of his bullish tactics. However, that could be considered as a mitigating circumstance.

[35] The extent of the injuries inflicted by the accused upon the complainant is enormous, and, it shows beyond any doubt that the accused had *mens rea* in the form of *dolus eventualis* when committing the offence. In *Rex v. Bhutiza Gift Matsebula* Criminal case No. 267/2012 at para 33, I had this to say with regard to the requirements of attempted murder.

“ . . . 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.”

[36] The complainant testified that he had not recovered fully from his injuries; and, that evidence was not disputed. Similarly, the medical report was not

challenged or disputed by the defence. The medical report sets out the extent of the injuries sustained by the complainant including a fracture of the skull as well as internal bleeding in the brain. The fact that the complainant fell to the ground upon the assault and was rendered unconscious cannot be overlooked. It was the undisputed evidence of Dr. Orlando that due to the cranial trauma sustained by the complainant as well as the intracranial hypertension, the complainant faced a high risk of death. Such a conclusion by the doctor was never disputed by the defence.

[37] Accordingly, the accused is convicted of attempted murder as charged. In addition the accused's bail is terminated in accordance with section 145 of the Criminal Procedure and Evidence Act 67/1938 as amended.

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

For Crown
For Defence

Crown Counsel Ayanda Matsebula
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