



**IN THE HIGH COURT OF SWAZILAND**  
**JUDGMENT**

**CRIMINAL CASE NO. 66/11**

In the matter between:

**THE KING**

**AND**

**MAXWELL NKAMBULE**

**Neutral Citation:** *The King vs Maxwell Nkambule (Case No. 333/14)*  
*[2018] SZHC 60*

**Coram:** MLANGENI J.

**Heard:** 5/12/16, 6/12/16, 14/2/17, 15/2/17, 16/10/17,  
17/10/17, 11/01/2018

**Delivered:** 9<sup>th</sup> April 2018

*Flynote: Criminal Law - attempted murder - accused pleading not guilty.*

*Actus reus not denied, accused claiming lawful justification in the form of self-defence.*

*Where the accused has alleged facts which constitute a ground of self-defence, the onus is upon the Crown to negate self-defence.*

*It is not necessary for the Crown to prove intention to kill. It is also not necessary for the accused to apprehend a risk upon his life; it is sufficient if there is reasonable fear of grievous bodily harm upon him.*

*Summary: Following an incident of verbal conflict between two groups of persons, the complainant was later shot and injured by the accused some 280 metres away from where the verbal conflict had occurred. The injury has left the complainant unable to walk.*

*Accused alleged that he acted in self-defence, the complainant and his companions having attacked the accused and his companions with stones.*

*Court found that the accused's evidence that he was pelted with stones was not reasonably possibly true.*

*Held: The accused is guilty of attempted murder as charged.*

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## **JUDGMENT**

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[1] At the age of 23 years the life of Celuxolo Gwebu changed completely. He was a normal, able-bodied young man who enjoyed playing soccer, until the 5<sup>th</sup> March 2011. In the evening of this date a bullet ripped into his spinal cord from behind and left his lower body paralysed. He has been reduced to a wheel chair for mobility, for the rest of his life. He

now requires assistance to carry out essential chores of life and has lost a significant amount of amenities of life.

- [2] The background to this cruel eventuality is almost unreal. In the rural area of Hlutse, next to Siphofaneni, a group of young men left a soccer field and proceeded to a Sikhondze homestead in search of marula drink. The time was apparently approaching evening. It is at the Sikhondze homestead that a sequence of events started and later culminated in Celuxolo Gwebu being shot once with a firearm, resulting in a **“Puncture wound in the back left side of the chest .....and thoracic spine cord injury”**.<sup>1</sup>
- [3] Celuxolo Gwebu is the complainant in this matter, and the accused is Maxwell Nkambule, an adult male of Mbikwakhe Area under Chief Mandanda. The charge against him is that of attempted murder, **“In that upon or about the 5<sup>th</sup> March 2011 and at or near Hlutse area in the Lubombo Region, the said accused person did unlawfully and with intent to kill shot Celuxolo Gwebu with a firearm and did thereby commit the crime of ATTEMPTED MURDER”**. He pleaded not guilty to the charge. He does not deny the act but pleads lawful justification.
- [4] It emerged from the evidence of the Crown and the defence that the events that took place at the home of Vakwakhe Sikhondze are, to an extent, common cause. This home brewed marula drink for sale. I take judicial notice of the fact that the period of early March when the incident occurred is peak season for marula drink in this country, and so it is that the complainant and his friends, upon retiring from the soccer field, proceeded on foot to the said home in search of the famous home brew. At this homestead some of the boys sat under a large tree that is at the entrance of the homestead. At this homestead there were a few

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<sup>1</sup> Medical Report, Exhibit “F”.

elderly men who were near the same tree, drinking marula. Three of the boys namely Mbongiseni Dlamini, Khulekani Ngwenya and Mangaliso Dlamini, approached the home owner to request that she sells marula to them. At this juncture a minibus, colloquially referred to as '**kombi**', arrived at this homestead. In it there were three people including the driver. It was now dusk.

- [5] The elderly people who were drinking marula next to the tree got involved in an unpleasant argument and insults were exchanged among themselves. This argument later subsided. As the kombi was arriving into this homestead another altercation ensued. This one was between the occupants of the kombi and one or some of the boys who had arrived in the company of the complainant. The complainant, PW1, states that at this time he was sitting on protruding roots under the tree, together with one Melusi Tfumbatsa. There is no evidence to suggest that the complainant was directly involved in the verbal confrontation among the elderly guests or that involving those that arrived in the kombi.

#### THE CROWN'S EVIDENCE

- [6] PW1 is the complainant, Celuxolo Gwebu. His account of what caused the confrontation between the kombi people and his group is unclear and was too brief to make good sense of. He states in chief that one of the kombi people referred to one of his group as '**Luphuya**' - meaning a poor person, with no money. He testifies that this led to a verbal conflict. One Touch Sikhondze, who is Vakwakhe Sikhondze's son, then came to make peace and told PW1 and the other boys to leave the homestead as there was no marula for them, and that what was available was reserved for the kombi people. According to PW1, him and his group then left the homestead, uneventfully. His further evidence is that after his group had left the homestead they were soon

followed by the kombi which also used the same pathway. As they turned a corner some distance away the kombi drove past them, then a torch light was directed at them in a searching manner, then he heard gunfire. In his words:-

**“I thought it was a spontaneous explosion. I think it exploded three times. I saw my friends run away, then it crossed my mind that I was hearing gunfire. I tried to run as my friends were also running. I found myself on the ground, my body lost control.....”**

- [7] The above quotation is the complainant’s account, in chief, of how he got the injury which changed his life in a tragic manner. He states that when he was shot at the kombi was about 12-15 metres away from him. He described the immediate surroundings where the injury occurred as sandy, with short grass, with no stones except one large rock nearby. He specifically stated that there are no small stones in that particular spot.
- [8] He was shot at the back side of the body, and the T-shirt that he was wearing was left with one hole at the back which was made by the bullet as it went into his body. The bullet lodged in his body and has not been removed. He was told by the doctors that it was on a delicate part of the body and that it would be too risky to attempt to remove it. After injury he was admitted at the Raleigh Fitkin Memorial Hospital in Manzini for one week and was later transferred to the Mbabane Government Hospital, where he spent about three months. Upon discharge he was told that he will not be able to walk again. He is, indeed, unable to walk and he relies on a wheelchair for mobility. It is apparent that on a journey of any significance he requires assistance. He further stated that he did not provoke anybody prior to the shots being fired, and he has no idea what triggered the conflict.

[9] At this juncture the Crown requested that an inspection in *loco* be conducted at the site where the conflict occurred and this was done on the following day, the 6<sup>th</sup> December 2016.

#### INSPECTION IN *LOCO*

[10] The inspection started at the home of one Vakwakhe Sikhodze, which is a large homestead with several residential structures and many natural trees, including marula ones. PW1 showed the court where the elderly men were sitting and drinking marula, some five metres or so from a tree that is at the entrance of the homestead. He was asked by Crown counsel if there is anyone who was sitting on the pathway while the kombi was approaching and his answer was **'no'**.

[11] The distance between the home and where complainant was injured is about 280 metres. It comprises three straight but different stretches that are in a zig-zag manner, the distances being 60 metres, 100 metres and 120 metres. As a crow flies, the distance would be significantly shorter. For a distance of about 120 metres, the pathway is along a boundary fence of a primary school, right up to the point where the boys turned right at a right angle in a southerly direction as they proceeded to their respective homes. Along this stretch the court observed small pieces of concrete material which suggests that work had been done along the fence, as well as small and sparse natural stones. At the vicinity where the shooting occurred there is a slightly protruding rock which appears to be fairly large under the surface. When the summary of observations was read into the record PW1 clarified that on the date he was injured the pieces of concrete were not there, suggesting that they are a result of work that was done on the fence sometime after the incident. He specifically stated that the position of the fence had since changed. He also stated that at the scene where he was injured he saw one of his group picking up

something but did not realise what it was. This was before he was injured, and he named this person as Bongani Mndvoti.

The witness stated that he did not know the person who shot and injured him, and that this person never came to see him in hospital or anywhere for that matter, to own up or to apologise.

#### CROSS EXAMINATION

[13] The complainant was then subjected to intense cross-examination by defence counsel Mr B.J. Simelane. It is at this stage that a clearer picture emerged regarding the verbal conflict at Vakwakhe Sikhondze's home between the kombi people and the complainant's group of friends. The version that emerged, and was confirmed by the accused in his defence, is that he (the accused) is one of those who arrived in a kombi at Vakwakhe Sikhondze's home to purchase marula drink. As the kombi drove into the homestead, along the small pathway of about 60 metres, one of the boys in the complainant's company sat on the pathway and effectively blocked the way and the kombi could not proceed further without causing him harm. Those in the kombi demanded that he should remove himself from the pathway and he did not do so, hence the altercation.

[14] Although complainant repeatedly denied that one of his group blocked the way of the kombi as it drove to Vakwakhe Sikhondze's homestead, his denial was significantly undermined by the fact that in his statement to the Police he did mention that one of his group sat on the pathway, thereby making it difficult for the kombi to proceed further. Below I capture some of the relevant questions and answers during his cross examination by Mr. Simelane.

Q: When the kombi approached the home did anything noteworthy happen before the occupants alighted?

A: No.

Q: Amongst your friends there was Nhlanhla Dlamini. When the kombi came Nhlanhla sat on the path of the kombi and did not give way?

A: I don't recall this.

Counsel then read to the witness what he said to Sergeant Nkomonye in his statement, the effect of which was that Nhlanhla blocked the way and he was questioned why he was doing this.

Q: Did you tell the Police that Nhlanhla sat in the pathway and did not move?

A: I told them he was sitting under the tree and did not obstruct the kombi in any way.

Q: Why would sergeant Nkomonye create this?

A: I do not know.

Q: You were telling the truth to the Police. Someone blocked the way?

A: No one did.

Q: Those in the kombi questioned Nhlanhla for blocking the way. Is this also fabrication?

A: I do not know.

Q: It can't go like that. Either it is or not, it can't be both.

A: It is not fabrication. I heard them exchange words.

Q: Why were they exchanging words, if not for the blockage?

A: I don't know.



Q: I put it to you that you are lying, you witnessed Nhlanhla sitting on the pathway, you saw the altercation, you told the Police the truth?

A: I am now normal compared to when I was admitted.

Q: Among your friends you singled out Nhlanhla. Is this the Police who created this?

A: He was sitting under the tree.

[15] It is on record that the statement was made by the witness to the Police at RFM Hospital, two days after the injury. He was probably still in distress, given the nature and extent of his injury. I do not accept, however, that the extent of distress was such that he would create something about Nhlanhla blocking the path of the kombi when it did not happen. The Police would have no reason to fabricate this, no matter how hard they wished for a conviction. Indeed, in a different set of facts this type of evidence would be in favour of an accused person. I have therefore come to the conclusion that PW1 was highly economical with the truth in respect of the cause of the conflict between his group and the kombi people at the homestead of Vakwakhe Sikhondze. I accept that the path of the kombi was blocked by Nhlanhla Dlamini and that the verbal conflict ensued as a result. But it is another matter whether this, in law, is justification of the injury that was subsequently inflicted upon the complainant a good distance and time away from the homestead of Vakwakhe Sikhondze.

[16] The defence version, which was well canvassed in cross-examination, is that when the complainant's group left the homestead of Vakwakhe Sikhondze they threatened to assault the kombi people and burn the kombi as the latter group were showing off wealth. The gripe, apparently, was that the only available marula drink was said to be

reserved for the kombi people. Because of the threat of assault and to set the kombi on fire, it became necessary for the kombi to be escorted by the accused and one other of the three occupants, and they did escort it from behind on foot, up to where the shooting occurred.

[17] The complainant had ended his evidence in chief by mentioning that just before he was shot at, he saw one of his group pick up something from the ground but did not realise what it was. This person is Bongani Mndvoti. I asked the complainant whether he did or did not see what Bongani Mndvoti did with what he picked up, and his answer was **'no'**. As it was revealed in cross-examination, his denial is at odds with the statement that he recorded with the police. Below I quote part of the statement that he recorded as was read to him by defence counsel:-

**“When we saw the kombi Bongani pushed a big stone on the way of the kombi, one of those in the kombi came out .....**”

Q: Did you tell this to the Police?

A: I did not say that to the Police. I was told by the Police who said one of the occupants of the kombi told them that. Police asked me whether it was true. I told them I saw him pick up something.

Q: Is there a reason he can create this against you?

A: My injuries were still new, I cannot account for what I said.

Q: In your statement you were telling the truth, someone placed a stone on the path of the kombi?

A: I didn't see him placing the stone.

[18] Once again, the complainant is deviating significantly from the statement that he made to the police and acknowledged it as correct,

two days after the incident. I am not satisfied that this deviation is honest and *bona fide*. It appears to me that the complainant is telling an untruth. I accept it as reasonably possibly true that Bongani Mndvoti did place an object on the path of the kombi. It is a matter of regret that the Police made no attempt to find this object and avail it to the court so as to determine its size and capacity to effectively block the passage of the kombi. This would have given a fair indication of what evasive options, if any, were available to the driver of the kombi, especially given that a motor vehicle can move much faster than man on foot. Although the kombi driver does not stand accused in this trial, evasive options that were objectively available to him could well have a bearing upon the state of mind of the accused person at the relevant time. It is on record that the defence's efforts to get the driver to come to court to give evidence were unsuccessful.

[19] It deserves mention that the complainant acknowledged that he and his companions had had marula drink on an earlier occasion but he stated that they were not drunk. He also stated that as far as he was concerned peace was restored at Vakwakhe Sikhondze's homestead and that as they walked back home there was no need to discuss the kombi people, until the kombi caught up with them as they were taking a different route towards their respective homes.

[20] PW2 is one Mangaliso Dlamini. His narrative of events does not significantly add value to that of PW1. He states that he was not there when a quarrel started between the kombi people and his companions at Vakwakhe Sikhondze's homestead. He saw the kombi for the first time when he came back from asking Vakwakhe Sikhondze to sell marula drink to them. He does not know what caused the quarrel, he was informed about it after the group had left the home. He did not state what exactly it is that he was told, and he created more uncertainty by stating that the quarrel was between the kombi people

and those that were sitting next to the tree, the elderly men. This is at odds with the evidence of the other witnesses, including PW1. Relating how the shooting occurred, PW2 had this to say:-

**“The kombi came from behind, next to the school fence. As we turned the corner the kombi slowed down, then we heard a gunshot. We ran. Then we realised one of us was not there, then we went back.....In that place there are no stones, except one rock in the vicinity. When we went back we noticed that Celuxolo was down, we noticed that he was shot.....The kombi occupants did not come to see Celuxolo”.**

Court: Did this shooting come out of the blue, without any altercation that you heard?

A: Yes.

[21] Under cross-examination this witness stated that he did not see a stone being put on the path of the kombi, that Bongani Mndvoti was behind in the group. He further denied that the accused was attacked with stones by his group while attempting to remove the stone, and stated that as a matter of fact there are no stones there. He further stated that the school fence has been put up twice and thought the pieces of concrete might come from that exercise.

[22] PW3 was Detective Constable Sihle Zwane who is stationed at Siphofaneni Police Station and was attached to Scenes of Crime at the relevant time. He proceeded with other Police officers to the scene of the incident on the 6<sup>th</sup> March 2011, a day after the incident. He found three empty cartridges at the scene. These cartridges were taken for ballistic testing. I stated earlier that the accused does not deny the shooting. On the same day this witness proceeded to RFM hospital

where he took pictures of the complainant's injuries and developed them. The photographs are collectively "Exhibit **"A"** and one of them, "**SZ2**", shows the position of the gunshot wound below the left scapula on the back side of the body.

[23] Under cross-examination nothing much transpired from this witness. He stated that when he interviewed the complainant in hospital the latter was in a bad state but coherent. He required physical assistance but answered questions well.

[24] PW4 is 3345 Detective Inspector Vincent Marvyn Mbingo who is a ballistic officer based at Police Headquarters, Mbabane. He has had extensive training and experience in testing firearms and ammunition. On this particular occasion the task before him was examination of exhibits that were presented to him in sealed exhibit bag numbers RSP-12018 (a pistol) and SWAG 022895 (two cartridges and three cartridge cases). These exhibits had been obtained in the investigation of this case. The purpose of examining them was to determine, among other things, whether the empty cartridges were discharged from the firearm of the accused person. The results were positive and they are contained in a report which is Exhibit "**E**", which this witness handed in as part of his evidence. I mentioned earlier that the accused does not deny having shot the complainant using the firearm, so this evidence by the Crown was for good measure rather than out of absolute necessity. The used cartridges were three, and this is in keeping with the evidence of the complainant that the accused person shot three times.

[25] This witness was not cross-examined. The court wanted to know from him if it was possible to tell the direction that the victim was facing when he was shot at. The answer given was that the victim was facing away from the assailant, and in this respect the court was again

referred to picture “**SZ4**” and the arrow thereon, which is part of Exhibit “**A**” which comprises four pictures relating to the complainant’s injuries. This picture shows one bullet wound at the back of the victim, below the left scapula, and so does the medical report Exhibit “**F**” which was handed in by consent.

[26] PW5 is Bongani Mndvoti who was part of the group of boys and was present when the complainant was injured and during the antecedents thereto. He told much the same story as the others, with the addition that as the kombi was approaching the group from behind, some of the kombi people were following it behind, on foot. This is consistent with what the accused said in his evidence. Other additions were that at the time he was carrying a container of marula drink which they had with them at the football ground. He also stated that as the kombi approached, someone said “**Here are the rogues from Hlutse**” - *nati letigebengu tase Hlutse!* He alleges that he then heard gunfire, four times and immediately realised that Celuxolo was injured. He stated that before the gunshots he had not done anything, suggesting that he did not in fact place a stone on the path of the kombi. Under cross-examination he denied just about everything and stated that at Vakwakhe’s home the conflict was started by one Mgudlu Ngwenya against the kombi people. The witness mentioned an alternative and more direct foot path to their respective homes, but that they did not normally use this route. At the inspection the court was made aware of this route. It is less clear and apparently not used as often as the one which they used on this particular day.

[27] The witness specifically denied placing a stone on the path of the kombi and emphatically said that there are no loose stones on that particular area other than the rock that protrudes slightly from the ground. He stated that at all material times he was carrying the marula container

and continued carrying it as he ran. Below are some questions and answers during his cross-examination.

Q: When shots were fired no one ran, you came closer and threw stones?

A: We all ran away, except two, we ran in upward direction.

Q: The stones only stopped after the fourth shot went to the ground?

A: Not true.

Q: Reason why you did not use the other path was that you wanted to carry out the attack, which you did?

A: No. That route is short and it leads to the one we used, the main path.

Q: Your cousin said that you put a stone because you did so?

A: No, I do not agree. The bucket had marula drink, not much, it could not fill a five litre container.

Q: The drunken mood buoyed you to think you were invincible?

A: No

[28] PW6 was the investigating officer, 4588 Sergeant Zwelithini Nkomonye. He states that three empty cartridges were found on the scene. He is the one who charged the accused, and he handed in a Browning pistol (9mm) with serial number 68393, which had a magazine with two live rounds of ammunition. The pistol was marked Exhibit **"1"**. In his investigation he was able to establish the cause of the fracas at Vakwakhe Sikhondze's homestead, namely the fact that the way of the kombi was blocked by Nhlanhla Dlamini, and that later on and some distance away the path of the kombi was blocked by a stone. At the

scene he did not find the stone though. The stone was mentioned by the complainant while in hospital on the 7<sup>th</sup> March 2011, some two days after the incident.

Upon cross-examination the witness was asked whether he did look for the stone **“which was critical to this fracas”**. His answer was that at the vicinity the stone was not there on the 6<sup>th</sup>, March 2011 and that it was mentioned on the 7<sup>th</sup> March 2011 by Celuxolo when interviewed in hospital.

Cross-examination by Mr. Simelane proceeded as follows:-

Q: When confronted with this, Celuxolo says he was not well on the 7<sup>th</sup>.

A: It could be true. On the 6<sup>th</sup> he was in deep pain-his condition was fluctuating. According to me he seemed okay on the 7<sup>th</sup>.

[29] The court asked the investigating officer why the issue of the stone was not pursued fully, given its importance in the scenario that was alleged. His answer was that it was a lapse in concentration. I actually think that it was negligent not to pursue an issue that was said to be one of the most proximate causes of the serious injury upon the complainant. Upon re-examination he stated categorically that on the 6<sup>th</sup> there was no stone in the vicinity of the injury on Celuxolo. At this stage the Crown closed its case, and this was after the medical report of Dr Tshilumba was handed in by consent and marked Exhibit **“F”**.

[30] The Crown witnesses who were part of the group of boys did not impress me in their testimony. Their evidence was either evasive or economical on important issues. For instance, their account of the cause of the fracas at Vakwakhe Sikhondze’s homestead between their group and the kombi people was conspicuously wanting. I got the clear impression that they deliberately sought to conceal the obstruction of



the kombi by one of them as it arrived at the homestead. In the case of the complainant, this is despite the fact that he was only a few metres away from where the blockage is alleged to have occurred. Again, their account of the role of Bongani Mndvoti in relation to the object that was allegedly put on the way of the kombi just before the shooting occurred leaves questions unanswered. It appears to me that in their own way they sought to strengthen their case at the expense of details that may not, at the end of the day, determine the outcome of the matter one way or the other.

[31] At the close of the Crown case the evidence, in my view, sufficiently established the following facts:-

31.1 At Vakwakhe Sikhondze's home a fracas did occur between the boys and the kombi people;

31.2 The fracas was caused by blockage of the path of the kombi by one of the boys;

31.3 Another fracas occurred among elderly men who were near a tree in the yard, but this fracas had nothing to do with the kombi people;

31.4 Touch Sikhondze and his mother Vakwakhe Sikhondze restored peace and told the boys to leave the homestead as there was no marula for them;

31.5 The boys then left.

31.6 At the scene where the shooting occurred, an object was placed on the path of the kombi. The size of the object was not independently established, hence it is unclear whether it was such as to leave the kombi driver without an option to take evasive measures such as driving on the side of the object;

31.7 The accused fired rounds of ammunition from his pistol, with one bullet ripping into the body of the complainant.

[32] Given that the defence does not deny the criminal act which is the subject of the charge, the onus is upon the accused to establish lawful justification. In cross-examination much was done in this endeavour, as well as in evidence by the accused and on his behalf.

#### DEFENCE EVIDENCE

[33] In his evidence the accused stated that on the fateful day he accompanied some friends in a kombi to get marula drink from the Sikhondze homestead at Hlutse. He describes the pathway leading to the home as narrow, allowing only one car to travel at a time. As the kombi arrived at the said homestead, the headlights were already on since it was dusk. The time was after 7:00pm. There was one person who was on the path of the kombi and there were other people under and near a tree. The accused's companion, Sikhondze, alighted from the kombi and enquired from the one on the path why he was sitting on the way of the motor vehicle. The response was in the form of a question, as follows:-

#### **“Doesn't the motor vehicle have a hooter?”**

[34] There is a certain Mgudlu Ngwenya, from the neighbourhood, who was encouraging confrontation. An argument started amongst those who were under the tree, involving Mgudlu Ngwenya. The one who was blocking the pathway eventually removed himself but Mgudlu Ngwenya continued to foment trouble, saying who did the kombi people think they were to deserve to be given way to. One Touch Sikhondze, who belongs to this homestead, then came to make peace. The exact words of the witness follow:-

**“Touch Sikhondze tried to make peace, but Mgudlu Ngwenya said we should be assaulted and the kombi set on fire. The noise abated, but no one left, until Touch’s mother arrived .....Vakwakhe Sikhondze, the owner, also tried to make peace and told the group to leave the home as the marula that was available was reserved for Sikhondze who had ordered it in advance”.**

[35] It is significant to highlight that according to the evidence of the accused it is Mgudlu Ngwenya who said that the kombi people should be assaulted and the kombi set on fire. It is common cause that Mgudlu Ngwenya was not in the company of the boys. He is a resident of the same area who happened to be at this homestead at the time and had the zest to encourage confrontation. According to the evidence, Mgudlu Ngwenya was already at this homestead when the boys came looking for marula drink.

[36] It is equally important to highlight that the accused’s evidence that the threats of assault were made by Mgudlu Ngwenya did not change during cross-examination, and he was not re-examined by his counsel. So his version, as presented in his evidence-chief, stands, namely that the threats of assault and to set the kombi on fire were made by Mgudlu Ngwenya.

[37] Once the marula transaction was completed, the kombi group loaded the containers on the kombi and left this Sikhondze homestead. This, according to the accused, was after about 15 minutes or so. As they left the home the accused and Sikhondze agreed that **“since we had been threatened”** him and Sikhondze would walk behind the motor vehicle, escorting it.

[38] The witness does not state where Mgudlu Ngwenya, the maker of the threats, was at this point in time. He also does not state that Mgudlu

Ngwenya left together with the group of boys. He did, nonetheless, find a reason to provide protection to the kombi, together with Sikhondze, by walking behind it.

- [39] About 280 metres away, at a junction, the kombi stopped and the accused says upon enquiring why it stopped **“we were told that the boys had blocked the pathway by putting a stone on the way. I went to the front of the kombi and saw the stone. As I moved the stone, stones landed next to me, being thrown”**. He described the stone that was blocking the way as being about 30 x 40 centimetres in size. He states that the stones that were thrown at him were from the direction of the school fence where the boys were. At that stage he took out his firearm **“and shot in the air three times”**. The boys shouted that he was merely scaring them:-**“Uyasetfusa”** and continued throwing stones and charged forward at him. He continues:-

**“I then fired three times on the ground as the situation got worse. I went into the Quantum. Then we left there and then. We dropped babe Skhondze at his home and proceeded to Manzini”**.

- [40] The evidence of the accused suggests to me that he shot six rounds of ammunition – three in the air and three on the ground. We already know from the evidence of the Crown that only three empty cartridges were found in the vicinity. We also know that one bullet remains in the body of the complaint.
- [41] The accused also stated that there was no space for the kombi to take evasive action, so it was necessary for him to remove the stone, and it is at that time that stones were thrown at him by the group of boys. He did not intend to injure the complainant. When he fired the gun he intended to scare the attackers off.

[42] Cross-examination of the accused was extensive and thorough. When asked what his intention was in following the kombi from behind, he stated that the reason was the threat that had been made to assault them and set the kombi alight. He was asked why he took it upon himself to deal with the threat of injury rather than report it to the Police, and his answer was that he did not think that it was necessary to inform the Police, especially as the home owner had made peace between the parties.

[43] There is obviously an element of contradiction here. Because the home owner had restored peace he didn't think the matter was serious enough to inform the police, yet the matter was serious enough for the kombi to be escorted from behind. Never mind the fact, as I observed above, that the utterer of the threats was Mgudlu Ngwenya, not the boys, and Mgudlu did not leave with the boys. Neither was he with the boys when the shooting occurred.

[44] Some questions and answers to the accused in cross-examination follow below:-

Q: .....When you left the house of Vakwakhe there was no longer any threat, so you should have got into the kombi.

A: The people were not sober, so there was no guarantee what might happen.

Q: That is the point, you were not sure, but you failed to call the police.

A: We thought that since the home owner had intervened it would be okay.

[45] Further cross-examination was in relation to the position in which he was when he fired the shots, the distance in relation to the boys, the

direction in which he shot, whether the stones that were thrown at him hit him or the kombi and the distance of the kombi from those who were throwing stones. According to the accused, those who were throwing stones at him and the kombi were about six metres away, but no stone hit him or the kombi or Sikhondze.

Q: Isn't it strange that the group throwing stones did not hit you with the stones, especially that close to you?

A: It could be about how good they were at throwing stones.

[46] The group of boys were six or seven. Pelting stones from six meters away they would need to be extremely bad at throwing to miss the target, especially one as big as a kombi. The court asked the accused where Sikhondze was in this hectic scenario, and he stated that he is not sure. This is quite odd, to say the least.

[47] Upon inspection of the site, at the exact spot where the injury occurred there was no evidence of stones that could be readily available for the kind of attack that is described by the defence. The fact that no stone hit either the kombi or the accused or Sikhondze makes this version preposterous and highly improbable. It is also highly improbable that a group of unarmed boys would charge forward in the direction where gunfire came from, no matter how intoxicated they might have been. The fact that the complainant was hit at the back suggests that he was running away from the danger. This part of his evidence and that of his companions, that upon hearing the sound of gunfire they ran away in different directions, only to realise that one of them, the complainant, was unable to flee, appears to me to accurately describe what happened at that point in time. I find this for a fact.

[48] DW2 was one William Sikhondze, also known as **"Touch"**. His evidence is inconsequential to these proceedings. He was unable to identify who

uttered the threats of assault or setting the kombi alight. He was not at the scene where the shooting occurred. In fact he agreed under cross examination that in his evidence he had said nothing of relevance to the charge of attempted murder. On the day in question he did not even see the accused. Appropriately, he was not re-examined.

[49] DW3 was Paul Cijimpi Sikhondze. He was with the accused at all times material to the charge that the accused is facing. He materially corroborated the evidence of the accused on what transpired at the homestead of Vakwakhe Sikhondze. One point of departure, however, is that according to Sikhondze it is the boys – not Mgudlu Ngwenya – who threatened to assault the kombi people and set the kombi on fire. Sikhondze also added evidence to the effect that as the boys left the home they said they **“would deal with us when we left the home, that they would attack us. There was no other route to leave the home. We would have opted for it”**.

[50] Well, if things were as serious as Sikhondze describes, then surely the right thing would have been to call the police, especially since there was no alternative route as he alleges.

[51] Regarding what transpired at the scene of injury, Sikhondze’s account is close to that of the accused, but says that he saw only one stone being thrown at them **“because it was dark”**. He states that the accused fired two times in the air and that the boys dared him to shoot and they charged at him. He proceeds to say that the accused then fired on the ground and there was a spark. Accused did not mention a spark. According to this witness they then got into the kombi and left.

[52] So there it is. Two men together in the thick of things, in close proximity. One of them saw many stones being thrown continuously at them; the other one saw only one. Certainly, something does not add up.

[53] It is extraordinary that although the accused and the boys were separated by a distance of about 5-6 metres at that particular time, neither him nor PW3 noticed that one of the boys was hurt to the extent of being unable to run and had actually gone down. PW3 said that he had a lit torch, but the only place he lit was where the stone blocking the path was. It is incongruous that despite the frenetic events in the vicinity the only place that he lit was where the stone was. It does not make sense that he did not light the torch in the direction of the alleged attackers.

[54] Under cross-examination the following transpired:-

Q: You were following the kombi, accused goes to the front to remove the stone, what were you doing all this time as the boys were insulting and threatening you?

A: I was standing, doing nothing.

Q: Why? I ask because you were one of those to escort and protect the kombi?

A: The time was short. I didn't get the chance to get into the kombi until the accused fired on the ground then we got a chance to run to the kombi.....

Q: What was accused carrying?

A: A firearm. I saw it for the first time when he was pushing the stone.

Q: Men of your age having been threatened and unarmed would not have done what you did, following the kombi from behind. You knew that the accused was armed and could use the firearm?

A: I didn't know.



[55] So, according to this witness the only available means of warding off the threat was the torch that he had in his hands, but he also states that he did not point the torch towards the boys because it would show his position. In the circumstances it is unlikely that this witness did not know that the accused was armed, especially as they were friends and the journey to buy marula stemmed from a visit to this witness by the accused person.

[56] He was not re-examined. The defence then closed its case, following unsuccessful attempts to get the driver of the kombi to come to testify.

[57] The accused person's ground of justification is self-defence. In the circumstances of the case this appears to include defence of property, in that the accused and PW3 took the conscious decision to escort the kombi as it travelled along this rural pathway.

#### THE LAW ON SELF-DEFENCE

[58] In this jurisdiction the law regarding self-defence has been canvassed in numerous decisions. Of these I am particularly edified by the exposition of Masuku J. in the case of REX v BONGANI MUNYAMUNYA MAZIYA<sup>2</sup>, where His Lordship's analysis of the law draws from different jurisdictions. Quoting with approval from a case in Botswana<sup>3</sup>, the Honourable Judge had this to say:-

**“.....in considering whether an accused person has acted in self-defence, the court should not take what has been described as ‘the armchair approach’ to the facts. It is all very well, sitting in the cool, calm atmosphere of the court to opine that the accused should have taken this step or**

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<sup>2</sup> Criminal Case No.192/09

<sup>3</sup> Magula v The State [2006]1 B.L.R. 209, per Tebbutt J.P.

**that when faced with an unlawful attack upon him. The trier of facts must, however, try to place himself in the position of the accused in the circumstances that existed at the time .....It must also be remembered that it is not necessary that the accused person should have feared for his life. He can act in self- defence if he had a reasonable apprehension that the aggressor intended to inflict grievous harm on him”.....<sup>4</sup>**

[59] In the same judgment His Lordship observes that **“the degree of force employed in repelling the attack should be no more than is reasonably necessary in the circumstances.”** This is otherwise referred to as the requirement of proportionality, which implies that if the force used is excessive in the circumstances the defender could well be viewed as the aggressor and will not succeed in this defence. It has been stated that if there is a relatively minor attack it would not be proper to permit an act of retaliation **“which is wholly out of proportion to the necessities of the situation”.**<sup>5</sup> Everything depends on the particular facts and circumstances of the matter including emergency that may have existed at the time and not being self-created<sup>6</sup>.

[60] In fewer words, the law can be crystallised in the following manner:-

60.1 There must be an unlawful attack or an act of aggression upon the defender;

60.2 The defender must have a reasonable apprehension that the attacker intends to inflict grievous harm on him. He need not fear for his life<sup>7</sup>.

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<sup>4</sup> At page 7 of the judgment in R v Bongani Munyamunya Maziya, supra.

<sup>5</sup> Mmoletsi v The State [2007] 2 B.L.R. 708 at page 72, per Dr. Twum J.A.

<sup>6</sup> Palmer v R [1971] 55 CR APP. R 223 (England).

<sup>7</sup> Magula v The State, supra.

60.3 In repelling the attack the defender must do no more than what is reasonably necessary in the circumstances. In determining this the court should avoid an armchair approach, and must place itself in the position of the defender at the particular time.

[61] Where the accused person has alleged facts which constitute a ground of self-defence, the onus is upon the Crown to negate such evidence<sup>8</sup>. Initially, the Crown must establish the criminal act and the requisite form of intent, and if the accused adduces evidence of self-defence he must succeed unless the Crown has led evidence that negates self-defence.

[62] Has the accused in this case established an unlawful attack or an act of aggression upon himself? It is reasonably possibly true that a stone was placed on the path of the kombi to block it from proceeding with its journey. The complainant, in his statement to the police, mentioned this and the defence said much about that. This, in my view, constitutes unlawful aggression. But the blockage of the path, alone, would not justify the very violent manner in which the accused reacted. It is in this context that I must now consider the defence evidence that once the kombi was unable to proceed, the group of boys then threw stones at the accused, DW3 and the kombi which had a driver inside, and that by shooting the accused was warding off this attack.

[63] The accused's evidence that stones were thrown is improbable. Stones thrown by a group of seven boys from a distance that is within ten metres would certainly have caused some harm to the accused or to PW3 or to the kombi or to all. None of them were hit by a stone. It is unthinkable that an object as large as a minibus would not be hit by a stone within that distance. I therefore reject the evidence that stones were thrown at the accused and his companions.

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<sup>8</sup> R v Muleko 1955 (2) SA 401.

[64] I also reject the evidence that when the accused fired shots in the air- or wherever he fired - the group of boys came charging at him. Such a reaction, by unarmed boys who only had a container of marula, is unthinkable, even if they were very drunk. In any event, the evidence does not suggest that they were so drunk as to be totally irrational, to the extent of challenging unmistakable death.

[65] I am persuaded, as testified by the Crown's witnesses, that when shots were fired the boys ran away from the direction of the kombi and the accused. This, in my view, is supported by the fact that the only injury upon the body of the complainant was at the back. He could not have been charging towards his assailant at the time he was shot as alleged by the defence.

[66] I am therefore unable to accept that the accused acted in self-defence, having observed above that the blockage of the path of the kombi would not alone be a basis for the degree of apprehension that the defence alleges.

[67] Assuming, in favour of the accused, that stones were thrown as alleged or in any other way, the question would still arise whether his reaction was within the realm of reasonableness or proportionality. In other words, was the threat of danger so serious that it was necessary for him to fire so many shots in the direction of unarmed people? I think not. It is my considered view that he would still be found to have exceeded the bounds of what was reasonably necessary in the circumstances. If there was real danger, as he alleges, one shot in the air would have been enough to get the boys scuttling away in the direction they had already taken, having left the path of the kombi at a right angle and turning right.

[68] What happened at the home of Vakwakhe Sikhondze, the alleged threats and the failure by the accused and his companions to inform the

police, betrays a certain state of mind. The accused and his companions took it upon themselves to deal with any eventuality that might occur, and it is no coincidence that the accused, who had a firearm, is one of those who volunteered to escort the kombi.

[69] For a conviction for attempted murder to be sustained, it is not necessary to prove an intention to kill. The case of R v SIKELELA BRIAN MYENI<sup>9</sup> says it all.

**“It is sufficient that there was an appreciation that there is a risk to life in the action contemplated. Such appreciation should be coupled with recklessness about whether or not the death eventually occurs.”**

[70] In the case of Sikelela Brian Myeni the Honourable Judge quotes with approval from REX v MNDZEBELE<sup>10</sup>, per Nathan C.J. as he then was, in the following terms:-

**“.....a person has the necessary intention to kill if he appreciates that the injury which he intends to inflict on another may cause death and nevertheless inflicts that injury, reckless whether death will ensue or not.”<sup>11</sup>**

[71] The fact that the accused did not specifically target the complainant is not of any assistance to him, and indeed an argument to this effect was not advanced by the defence.

[72] It is unfortunate that the accused did nothing to console his victim, not on the fateful day, not on any other day.

[73] In the circumstances I find the accused guilty of attempted murder as charged.

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<sup>9</sup> (25/2012) [2017] SZHC 218.

<sup>10</sup> (1970 – 1976) SLR 198 at page 199, per Nathan C.J.

<sup>11</sup> R v Sikelela Brian Mnyeni, supra, at para 7 per T. Dlamini J.

  
T.M. MLANGENI

**JUDGE OF THE HIGH COURT**

**For the Crown: Mr. M. Nxumalo**

**For the accused: Mr Ben J. Simelane**