

IN THE HIGH COURT



OF SWAZILAND
JUDGMENT

Criminal Case No. 74/2014

Rex

Versus

Sicelo Zwelithini Mavimbela

Mbongiseni Manyika Magagula

Nkosinathi peter Gwebu

Neutral Citation: Sicelo Zwelithini Mavimbela & 2 others (74/2014) SZHC - 17
[2019] .

Coram: DTshabalalaJ

For Crown: A Matsenjwa

For Defence: Both Accused in person

Heard on: 06/11/17 - 05/03/18

Delivered on: 11/02/19

JUDGMENT^{1 2}

-
- 1 The three accused were charged in Count one with the offence of attempted murder, it being alleged that on or about the 20 December 2013, at or near Mabudlweni in the Lubombo Region, they each or all of them acting jointly and in furtherance of a common purpose, they did unlawfully and with intent to kill, shoot one Bhekithemba Gabile Maziya, with a firearm.
 - 2 In Count two they are charged with the offence of Housebreaking with intent to steal and theft, it being alleged that on the same date, and at the same place as in Count one, they each or all of them acting jointly and in furtherance of common purpose, unlawfully and with intent to steal, broke into and entered the house of the complainant Bhekithemba Maziya, and unlawfully stole a Samsung GT E2220 cellular phone valued at E500, the property of Nelisiwe Siphesihle Shongwe, in the possession of Bhekithemba Maziya.

- [3] The accused persons were duly advised of their rights to legal presentation. They respectively informed the court of their decision to conduct their defences. They all pleaded “Not guilty” to both Counts. At the close of the crown case, the crown withdrew charges against accused No. 3 Nkosinathi Peter Gwebu.
- [4] The facts of the case are that on the night of the 20 December 2013, Pw1¹ and his girlfriend Nelisiwe Shongwe,² were sleeping in their house at Mabudlweni, Siphofanani, in the Lubombo region. Pw1 and Pw5 were awoken from sleep by noise of barking dogs from outside, around 23:00 hours. Pw5 went to peep through the window and saw people outside. Pw1 observed that all of the four windows of his house were guarded by at least one person. He saw a human figure at the two windows of their bedroom and at the two living room windows. Shots were fired from outside through the window into the bedroom where they were, shuttering the window. Pw1 picked a broomstick and used it to try and scare away the attackers. He got shot on both elbows by subsequent shots that were fired at him in succession. The assailants entered the house through the window, prompting Pw1 and Pw5 to escape from the bedroom to the middle room of their 3-room-house. Pw1 called his brother for help on his cell phone.
- [5] Pw1’s brother, Bongwa Maziya and others came to the scene in a car, while the attackers were still in the house. The thugs were searching the house,³⁴

³The complainant, Bhekithemba Maziya.

⁴Pw5.

starting with the bedroom which the complainant and his girlfriend had vacated. They were heard saying that they wanted money. Pw1 heard one of attackers saying “*here is the money bag.*” Pw1 heard the attackers’ voices from their hiding place in the adjacent room. According to Pw1 the money bag was empty. Pw1 who was bleeding profusely from gunshot wounds was subsequently driven to Siphofaneni police station and then to Raleigh Fitkin Memorial hospital in Manzini (RFM) where he was treated and discharged. The thugs found no money and the only item that Pw1 and Pw5 found missing from the house was a cellular phone belonging to Pw5.

[6] Pw1 knew A1 and A2, both were employees of his sugar cutting company, Fundukuwe Investments. When the incident happened, the company had closed for Christmas holidays since the 10 December 2013 and was due to resume operations on 08 January 2014.

[7] Neither Pw1 nor Pw5 identified their assailants on the fateful night. Pw5 was subsequently invited to the Siphofaneni police station where she identified her stolen cell phone. She had previously been invited to identify one phone which turned out was not her missing phone.

[8] The crown sought to link the 1st and 2nd accused to the crimes through their respective statements made before two judicial officers at Siteki Magistrates court. A1 and A2 were arrested separately after which they made the statements. A trial within trial was conducted for this court to determine admissibility of the statements.

- [9] Pw1 testified that his employees including A1 and A2 were supposed to have been paid their end of year bonuses on the 20/12/13 but the payments were not effected because the day fell on a public holiday. It was on the night of the same day that the employees' bonuses should have been paid that Pw1's house was invaded by armed assailants looking for money.
- [10] It came out under cross examination of Pw1 by A1 that the latter came to Pw1's house on the 21/12/13, the day after the attack. According to A1 the purpose of his visit was to collect his bonus, but instead Pw1 called the community police and the national police who arrested him. According to Pw1, the reason he called the community police was that A1 came armed with a knife during the visit to his house.
- [11] Pw2 Daniel Gamedze testified that A1 was his nephew. They were also neighbours. During December 2013 he met A1 who offered and sold him a cell phone urgently for E30. A1 told him that he needed money, was in a hurry and wanted to go away. A1 told him that he and his friends were from a place which A1 did not specify, where a person was shot and injured. Pw2 inquired if the person died, and A1 told him he did not die. Subsequently police came and inquired about the phone that Pw2 bought from A1. Pw2 recorded a statement at Siphofaneni police station. Police told him to keep the phone as it was not the one they were looking for. The evidence of Pw2 is further that following the arrest of A1 the latter phoned him from custody. A1 requested him during the phone call to talk to the Siphofaneni police and

ask them to speed up his court case because he was not denying the charge. While under cross examination by A1 Pw2 clarified their previous conversation concerning the person who was shot and injured. Pw2 testified that A1 told him that a person under his care was injured with a fire arm. However, A1 seemed to dispute the mention of a gun. He elicited a confirmation from Pw2 that he knew A1 very well and did not know him to carry any guns. Pw2, nonetheless stood by his evidence that A1 told him that a person under his care was injured with a gun.

[12] Under A1's cross examination, Pw2 could neither agree nor deny that the person that A1 said was injured under his care was one Mnciniseli Dlamini with whom A1 had feud. However, Pw2 heard about the feud between A1 and Mnciniseli long before the day A1 sold him a cell phone and told him about the man under his care who was shot and injured.

[13] Pw4 Detective Constable Mhlonishwa Sibandze testified that he recorded a statement from Pw2 to the effect that A1 told him that he and others were responsible for the attack at Pw1's home. Pw4 received from Pw2 a cell phone that the latter bought from A1. The cell phone was given back to Pw2 because it was not the one stolen during the attack at Pw1's home. Detective constable Sibandze testified that A1 was arrested on the 22 December 2013 at Pw1's home where he had been apprehended by community police. The community police also handed him an okapi knife allegedly confiscated from A1. At the police station A1 was duly cautioned in terms of the Judges Rules. Following his responses during interrogation in connection with attempted

murder case committed against Pw1 it was suggested to A1 and he agreed to make a statement before a judicial officer.

[14] The evidence of Pw4 was that the charge of attempted murder preferred against A1 was based on statements of other suspects who implicated him, and secondly on the statement of Pw2 to the effect that, firstly A1 confessed to him that he and others were responsible for the attack and injury of a person he did not identify. A1 later after his arrest asked Pw2 to tell the police that he was not denying the charge and therefore to speed up his trial. The crown ultimately relies on A1's judicial statement.

Trial within a trial

[15] The prosecution sought to introduce A1 and A2's judicial statements in its evidence. The court directed that a trial within trial be conducted to determine admissibility of the statements against the accused persons. That is whether the statements were voluntarily made without undue influence or pressure. The procedure and purpose of the trial within trial was explained to the accused, as well as their right to cross examine the witnesses and the purpose thereof. The crown called the evidence of two police officers who accompanied the accused persons from police custody at Siphofaneni to the Siteki magistrates court. Pw7 No. 6377 Constable Thulani Msibi presented A1 to Pw1O, magistrate Florence Msibi on the 24/12/13 and left them together with Pw8, Clerk/Court Interpreter Bongani Hlatshwako. According to Pw8, Pw7 brought two suspects, A1 and A2, on the 24/12/13 Pw7, to record

statements before judicial officers. A1 before Pw10⁵ while A2 appeared before Pw9.⁶

A1's Statement

[16] Pw8 who was present when A1 made his statement testified that the procedure was followed to ensure that no police officer was in sight or in the vicinity. Pw8 interpreted the pro-forma preliminary questionnaire that A1 responded to before recording of the actual statement, from English to Siswati. He interpreted the suspect's responses all of which were recorded by the magistrate. The completed form together with the suspect's statement were Exhibit "D" before this court. The main statement was made in Siswati and interpreted to English. A1 confirmed the contents and signed it via his Right Thumb Print (RTP).

[17] Pw10's evidence was that she recorded a statement⁷ from A1 at Siteki on the 24/12/13. The preliminary questionnaire was completed by her hand as well as the main statement both of which were interpreted from English to Siswati and back by Pw8.⁸ She confirmed the pre-statement procedure testified to by Pw8. The statement was taken behind closed doors. Pw10 informed the suspect that he was not obliged to say anything and that he was free to say anything that he wanted to say.

5 Magistrate Florence Msibi.

6 Magistrate Donald Mavuso.

7 Exhibit "D."

8 Court Interpreter Bongani

- [18] I am satisfied from the evidence of magistrate Msibi and the court interpreter that at the time of making the statement A1 appreciated that he was not obliged to make the statement. From his answers to the questionnaire it was evident that he was not under any undue pressure or influence to make the statement. This was consistent with the conclusion that the statement was voluntarily made by him. This finding was confirmed by A1 when he was required to cross examine Pw10 on the contents of the preliminary form. A1 's statement was accordingly ruled to be voluntarily made and admitted in evidence as Exhibit "D."
- [19] Pw 10 read A1 ' s statement into record. She indicated that it was incomplete as the last page after page 3 was missing. All three pages were initialled by the Magistrate, the interpreter and bore the RTP of A1. Pw10 did not know how and when the fourth page of the statement went missing.
- [20] In the statement A1 stated in a regretting tone that on Friday 20th December 2013 he and 5 others met and deceived themselves concerning his place of employment which was his source of income. He personally did not go to the scene. His role was that of drawing the map and providing directions to the complainant's residence. He did not know what his co-conspirators were carrying to the scene. They promised to return to him but did not. They only communicated via phone voice calls and text messages.
- [21] The co-conspirators reported back to him after the incident that they failed to get the money from the place where he directed them. They also gave

feedback that damage was done and that a shot was fired. The unnamed partner in the crime told A1 that he fired a shot in the air and that a person was shot. He demanded more answers on how the person was shot but their conversation was cut off because the caller ran out of calling units.

[22] A1 is recorded in the statement as having expressed concerns that he was going to be the prime suspect for the shooting. He also worried about losing his job as a result of the incident. A1 received another call that night, from the complainant's sister who informed him that the complainant had been shot on the arm and that no money was taken. She called him again around 0400 hours and assured him that Pw1 was not seriously injured, that he had been treated and discharged at hospital.

[23] A1 further states in the confession statement that police took him for questioning early in the morning. He did not waste time during questioning and told the police something.⁹

A2's Statement

[24] Pw9 who was stationed at Siteki Magistrate's Court recorded a statement from A2 on 24/01/2014. A2 was brought to his chambers by Pw7. Pw9 ensured that there was no one outside the door before securing it. He introduced himself to the suspect. There was no interpreter as most staff were on Christmas leave.

⁹ This was the end of the statement. Whatever he told the police may have been captured on the missing part of the statement.

He translated the preliminary questionnaire¹⁰ from English to Siswati and then recorded A2's answers in Siswati. A2's responses to the pre-statement questions show that he was not influenced either by promises or threats or assaults to make the statement. The responses reflect a voluntary decision on his part. Pw9 then recorded the statement attached as Annexure "A" to Exhibit "C". The statement, like the questionnaire is recorded in Siswati. Pw9 read the statement into the record and it was simultaneously interpreted to English.

[25] A2 stated in the confession statement that he sent people he claims he did not know to rob Pwl. He met the people for the first time at Siphofaneni. He knew that Pwl, his employer of 10 years had money on the fateful day. On the 20/12/2013 around midnight he went to Pwl's home with three young men. The three men entered the homestead while he remained behind. He subsequently entered the homestead and went to position himself behind a toilet. He saw a red motor vehicle belonging to Pwl's brother parked in the forecourt of the house. He ran away when the car engine was started and its lights went on. That was how he parted ways with the three young men. The following morning, he met one of the boys at the police station after their arrest.

[26] According to A2's statement their plan was to share the robbery proceeds equally. He learnt that no money was found. He also heard that Pwl was shot. He

10

did not know that one of the partners in crime carried a fire arm. The plan

he was aware of was that the young men were going to hold Pwl and demand money only without causing any injuries or attempted murder.

[27] The accused person's rights were fully explained after close of the crown case as well as their options regarding sworn or unsworn statement and the right to call witnesses. They both elected to give evidence under oath. They called no

[28] In his evidence A1 distanced himself from the statement he made to the Magistrate and claimed that he only told PwlO that he wanted to be removed from police cells to the remand centre. A1 was a shifty witness under cross examination he changed his previous testimony and denied knowledge of facts he previously admitted. In Chief he said that police asked him if he knew A2 and that he confirmed knowing him. Under cross examination he changed and said that he knew him from seeing him at the police station after their arrest.

[29] Despite that he was given a chance and advised to cross examine Pwl 0 on the confession statement, he did not challenge the Magistrate's evidence on the making of statement at all. In his evidence A1 basically denied the contents of his statement, arguing that the crown presented no evidence that he shot Pwl, and therefore denies that he was involved.

[30] A2's evidence also deviated from the judicial statement as he denied knowledge of the offence committed against Pw1. A2 claims the contents of the statement were influenced by fear of police assault. This is despite that before making the statement he told the magistrate that no threats were made to him to induce him to make the statement.

Analysis and findings

[31] The crime of attempted murder was proved by the evidence of Pw1 and Pw5 that a hail of bullets was fired into their bedroom at night and in that incident Pw1 was hit and injured on both forearms. A medical report was introduced in evidence which corroborated Pw1 and Pw5's evidence. It is to the effect that Pw1 sustained gun-shot wounds on both of his arms.

[32] The crown adduced no direct evidence linking A1 and A2 to the commission of the offence other than the confession statements. The main evidence of crown is the confession statements made by the accused persons. In their respective statements the accused directly put themselves across as masterminds of the attack on the complainant. The accused persons' efforts to distance themselves from the statements are futile as the evidence overwhelmingly shows that the statements were made voluntarily without undue pressure. The accused persons were not reliable witnesses and their belated denial of the contents of their statements are clearly mere afterthoughts. They made no attempts to challenge the evidence of the two judicial officers who testified, despite advice from the court of their rights to do so.

A confession made by an accused is admissible against him by virtue of Section 226 of the Criminal Procedure and Evidence Act No.67/1938 as amended (CP & EA). Section 238 of the Act also makes it competent for the court to convict on the evidence of a confession. The requirements of these provisions are satisfied by the proved facts of the case against both accused persons. In line with section 226(1) and its first proviso, it has been proved by competent unchallenged evidence of Pw8 and Pw10 in relation to A1 on one hand, and the evidence of Pw9 in relation to A2 that their respective confessions were freely and voluntarily made by them in their sober senses. The relevant parts of the two provisions read thus:

“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 without having been unduly influenced thereto:...”

"238

(2) - Any Court which is trying any person on a charge of any offence alleged against him 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. -

[34] The Supreme Court stated in the case of *Simelane v Rex*¹¹ that the crown's reliance on the evidence of a confession supported by evidence *aliunde* was clearly permissible in terms of the law. The Supreme Court confirmed the approach of the court *aquo* in citing the aforesaid provisions of Sections 226 and 238.

[35] Having found that the confessions made by A1 and A2 to Pw10 and Pw9, respectively, were freely and voluntarily made and therefore admissible, it follows therefore that accused's conviction can properly be based on those confessions. There is evidence *aliunde* on the commission of the offence of attempted murder tendered by the complainant and PW5 that the complainant was shot and injured following a hail of bullets fired through the window of their bedroom. The medical report by the doctor who examined the complainant noted the entry and exit gunshot wounds on both forearms of Pw1.

11 (13/2011) [2012] SZSC 54 (30 November 2012);

Common purpose:

[36] The evidence of confessions by A1 and A2 is to the effect that they participated in the plan to rob Pwl of his money. They state that the plan they hatched with their co-conspirators did not include shooting Pwl, and that both accused were not aware that one of their recruits for the crime was armed with a firearm. It is however, sufficient for the common purpose principle that A1 and A2 foresaw that force would be used to induce Pwl to hand over the money or to restrain him while the thieves helped themselves to his money. Even if the accused persons were not aware of the firearm in particular, they nevertheless tacitly associated themselves with whatever form of force or violence that their messengers would employ to achieve the common venture. Robbery by definition involves the use of force and or violence. It is evident that the accused persons left it to the thugs they had engaged for their common venture to use a means available to them to carry out the robbery. The accused cannot then be heard to distance themselves from the shooting that nearly claimed Pwl's life. In fact, A2 in his confession places himself at the scene of the crime. He said he kept close to his fellows and took position within the complainant's yard. He parted ways with them after they were interrupted in their mission by the car of Pwl's brother who came to the rescue of Pwl. The accused persons are by virtue of the doctrine of common purpose liable in equal measure with their unidentified partners for the latter's actions in furtherance their common enterprise, that of robbing Pwl. Both accused persons are therefore liable for the violent actions of their associates done in execution of their joint plan. The shooting of Pwl is inseparable from the master plan that A1 and A2 initiated. It is sufficient that the attempt on Pwl's life by shooting was done in furtherance of the very same plan of robbing

Pwl. The shooting therefore fell within the common design. It is immaterial that it was not specifically authorized by the main or other conspirators.

[37] In *Thomas v S*¹² cited in the Supreme Court's decision of *Mbuyisa and another v Rex*¹³ the court defined the doctrine of common purpose as follows:

"... a set of rules of common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime f

[38] Burchel and Milton define the same doctrine in the following words:

- Where two or more people agree to commit crime or actively associate in a joint unlawful enterprise each will be responsible for the specific criminal conduct committed by one of their member which falls within the common design. Liability arises from the common purpose to commit the crime. "

[39] For the requirements of common purpose to apply it must be proved that there existed a prior conspiracy or premeditated motive to commit the crime on the part of the accused persons. See *Malinga v Rex*¹⁴ referencing Tebbutt JA in *Wagawaga Ngcamphalala & Others v Rex*¹⁵ wherein definitive elements of common purpose were stated thus:

12 2003 (6) SA 505.

13 (21/2015) [2017] SZSC 05 (10 June 2017) at paragraph [77]

14 (41/2012) [2016] [46] SZSC 54 (30 June 2016).

15 Criminal appeal No. 17/2002.

“...the physical and vicarious factor of association of two or more persons in a joint unlawful enterprise; each thereby being responsible for any acts of his fellows which fall within their common object; secondly the mental element of common intent to assist one another in committing the offence. Such assistance can be in the form of shared specific purpose arising by prior agreement or spontaneously to assist

Attempted murder

[40] According to the evidence of the complainant and Pw5 their assailants who had surrounded their house fired shots through the window of their bedroom where they slept. The complainant was hit on both forearms by some of the shots. There is no doubt that the shots were fired without regard that the occupants of the bedroom would be hurt or fatally injured. The person who fired the shots through the window did so recklessly with no regard that the occupants could be hit. This gives rise to criminal legal intent in the form of *dolus eventualis*.

[41] The principles of an intention to commit the offence of attempted murder are the same as those applicable to the offence of murder. In the present case the perpetrators had *mens rea* to commit the uncompleted crime of murder, and this was in the form of *dolus eventualis*. By aiming and firing several shots through the window of the bedroom they appreciated the risk or ought to have appreciated the risk to life of the occupants but nonetheless were reckless

whether or not death resulted from their action. The position of the law as stated in *Henwood Thornton v Rex*,¹⁶ quoted in *Rex v Mkhathswa*¹⁷ is that:

“It suffices for the prosecution to prove in a charge of attempted murder an appreciation that there is some risk to life ----- with recklessness as to whether the risk is fulfilled in death.”

[42] The binding *Henwood* decision therefore sets out the law that there need not be a purpose to kill proved as an actual fact. As highlighted earlier in this judgment, the liability of A1 and A2 for attempted murder arises from their participation in common purpose with their partners in crime who in agreement with them went to the scene with the clear intention to commit the crime of robbery against the complainant. As already set out in this judgement the crown evidence through the confession statements made respectively by A1 and A2 directly links them to the offence charged.

[43] In the light of the foregoing facts and legal principles, the crown has proved its case against both accused persons beyond a reasonable doubt, in respect of Count one. The same cannot be said of Count two, *housebreaking with intent to steal and theft of the cell phone*. Only the offence of *House Breaking with intent to steal* has been proved against Alnad A2. The latter is a competent lesser offence to the one with which they are charged. There is no evidence against the accused persons for the theft of the cell phone that was eventually identified by Pw5 at the police station. The accused persons’ guilt for *House Breaking with intent to steal* is based on the

16 1987 1995 SLR 271 at 273.
17 (499J/11) [2012] SZHC 159.

same principle of common purpose applied in relation to Count one. Their joint venture with the men who gained unauthorized entry into the house of Pw1 through the window after breaking it renders them equally liable for the crime.

I accordingly find the accused persons guilty as follows:

COUNT 1:

A1 - Guilty of attempted murder as charged

A2 - Guilty of attempted murder as charged. COUNT

2:

A1 - Guilty of House breaking with intent to steal

A2 - Guilty of House breaking with intent to steal.

A handwritten signature in black ink, appearing to read 'D Tshabalala', is written over a horizontal line.

D TSHABALALA
JUDGE OF THE HIGH COURT