



IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO. 335/13

HELD AT MBABANE

In the matter between:

REX

VS

1. CHRISTOPHER DLAMINI

2. MUPHO MAMBA

Neutral Citation: *Rex vs Christopher Dlamini & Another [335/13] [2019] SZHC*
178 (19 September 2019)

Coram: **M. LANGWENYA J**

Heard: **23 April 2019, 17 July 2019, 25 July 2019, 9 September**

Delivered: **19 September, 2019**

Summary: Criminal Procedure-Accused charged with attempted murder-
the first accused is a mini bus driver and the second

accused a bus conductor-the complainant was a passenger in
accused persons' bus-the complainant was drunk when he
boarded the bus-he paid the bus fare and fell asleep in the bus-
he woke up to learn that the bus was no longer going to reach
his bus station-he used vulgar language against the
accused persons- the accused threatened complainant with
assault-complainant sought to alight from mini bus but
was prevented from doing so by the accused-when complainant
wrestled and fled from the accused he was hacked with a
bush knife-the accused pleaded not guilty to the charge-the
accused were found guilty as charged.

JUDGMENT

[1] *The accused persons are charged with the offence of attempted murder. It is alleged that on or about 27 April 2013 and at or near Mbekelweni area in the Manzini region, the said accused each or all of them acting jointly in furtherance of a common purpose did unlawfully assault Nkhululeko Fish Simelane with a bush knife with intent to kill him and did thereby commit the said offence.*

[2] Both accused persons pleaded not guilty to the charge.

The case for the Crown

[3] PW1 Randy Thwala resided at Fairview Kamshayangoma in 2013. On 27 April 2013 he was at the bus rank in Manzini and boarded a mini bus which was destined to KaMagwaza. The complainant also boarded the same mini bus and sat behind PW1 and fell asleep soon after he had paid the bus fare. The mini bus was trading under the style Magwaza/Calvary and was white in colour. When the mini bus was heading towards KaMagwaza the driver and the conductor announced that the mini bus was not going to reach KaMagwaza as it was now turning at Mavuso. The complainant used unpalatable language when he protested against the mini bus not reaching KaMagwaza where he had paid to be taken.

[4] The driver of the mini bus enquired from the conductor if the complainant had paid so that he could be refunded his cash and then they would drive back to Manzini bus rank with the complainant. When PW1 alighted at KaNgubeni, the complainant also attempted to alight with this witness. The complainant had alighted from the bus already when he was accosted by the bus conductor and an argument ensued between the two. The driver of the mini bus came out of his seat wielding a bush-knife and hacked the complainant with it once on the left side of the face. The mini bus drove on to kaMagwaza with the bus driver and conductor on board leaving the complainant lying on the ground. PW1 called a child from a spaza shop near where the complainant lay and asked that the complainant be taken to the hospital. At the time the complainant was bleeding profusely. PW1 also called the police. The mini bus then drove back to town and the father of the

child from the spaza shop pursued the mini bus and later returned to the scene with the mini bus and the police.

- [5] When the police arrived on board the mini bus, the complainant was still seated on the road side bleeding and losing consciousness. PW1 identified the second accused as the conductor of the mini bus. He explained that the bush knife looked like a machete as it was bent in the front. The bush knife was black in colour. According to PW1 the bush knife was shaped like a banana and was fifty centimetres long with a blade that was about five centimetres wide.
- [6] PW1 does not know who was first to draw blood between the bus conductor and the complainant. The warring parties were already outside the mini bus when the driver came with a bush knife and struck the complainant with it. PW1 stated that the complainant was trying to alight from the mini bus and was prevented or stopped from doing so by the conductor. That is when the fight between the complainant and the conductor escalated.
- [7] During cross examination it was put to PW1 that the complainant refused to pay the bus fare and instead used vulgar language against the accused persons. It was also suggested that the complainant was a rubble rouser in the mini bus as he attempted to open the door and pulled the conductor's feet which resulted in the conductor falling behind the mini bus. PW1's response that this version was false. It was PW1's evidence that the

complainant was hacked with a bush-knife at kaNgubeni where PW1 alighted and not KaMagwaza where he had initially paid to be taken to by the mini bus. According to PW1 the complainant was apprehensive when the conductor and the driver said they were going to Manzini bus rank with him because he did not know what would happen to him when he got to the bus rank with the duo.

[8] PW2 is Nosipho Zinhle Angel Ndwandwe and lives at KaMagwaza. Her homestead is next to that of the complainant. On 27 April 2013 she was at a shop when a white mini bus stopped abruptly next to the shop. PW2 went outside the shop to enquire what the matter was. He saw the complainant alight from the mini bus and fleeing as he was pursued by the conductor who held the complainant by his T-shirt. The bus driver also got out of the mini bus and hacked the complainant with a bush knife on the left side of the head. PW2 was shocked because when the driver hacked the complainant with the bush-knife it stuck on complainant's head. The bus driver removed the bush knife from complainant's head and calmly returned to the driver's seat and drove off. The complainant crossed the road, lost consciousness and fell on the ground and was bleeding profusely. PW2's father drove in his car in hot pursuit of the mini bus and returned with the mini bus and the police to the scene of crime. The complainant was taken to the hospital by the police. PW2 pointed to the accused persons as the complainant's assailants. PW2 identified the bush-knife that was used by the bus driver as black in colour and bent in the front part. PW2 was not very far from the scene when the complainant was injured by the mini bus driver.

[9] During cross examination the second accused stated that his T-shirt was torn when he fought off the complainant who was trying to rob him of the cash he had collected from passengers. PW2's answer was that the version of the second accused was not true as it was the second accused who held the complainant by the T-shirt and stopped him from fleeing when the driver came and hacked complainant with a bush-knife. PW2 stated that soon after the accused persons had committed the crime they got into the mini bus and drove away in the direction of their trip. When they turned back and drove past the scene, they did not stop but drove towards Manzini.

[10] PW3 is Nkhululeko Fish Simelane and is the complainant in this matter. He the Court that he lives at Mbekelweni next to KaMagwaza. In April 2013 he boarded a mini bus from Manzini to KaMagwaza. He was drunk on the day after having had two bottles of alcoholic beverages. He paid the bus fare using a twenty Emalangeneni note and then fell asleep in the mini bus. He says he was subsequently woken up by the bus conductor who ordered him out of the mini bus. He says he used vulgar language when he was dragged out of the mini bus by the bus conductor. It was when he had been pulled out of the bus that the bus driver hacked him with a bush knife on the left cheek and the left side of the head above the ear. PW3 showed the Court a deep scar covering the whole cheek and part of the head on the left hand side.

[11] PW3 states that he was taken to the hospital but not before he had passed out. He was admitted in hospital and spent a week there. The complainant

identified the accused persons as his assailants. PW3 said the first accused is the driver of the mini bus and the second accused is the conductor. It is the evidence of the complainant that at no stage did he chase the driver or the conductor or any of the passengers in the mini bus.

[12] It was complainant's evidence that the accused persons told him they wanted to 'fill him up' (*kumugcwalisa*)-an expression he understood to mean they wanted to beat him up. The complainant says he never refused to pay his bus fare nor did he retaliate when he was assaulted by the accused persons.

[13] During cross examination the complainant conceded that he boarded the mini bus carrying one beer bottle which contained his drink. He admits that he dropped off KaNgubeni and not KaMagwaza because he had used vulgar language and the conductor and the driver said they would '*gcwalisa*' or beat him. It was during cross examination that the complainant told the Court that after he was hacked with a bush knife by the driver of the mini bus he cried and shouted that he was dying.

[14] The complainant does not know who took him to the hospital.

[15] The complainant denied opening the mini bus door unilaterally; he denied pulling the conductor by the scruff of the neck or the legs least of all by the T-shirt and chasing after the conductor when he fled from him. The

complainant also denied that he carried a knife on the day he was attacked by the accused.

[16] PW4 is 5512 Detective Constable Zakhele Simelane and the investigating officer in this matter. In 2013 he was stationed at Manzini police station. On 27 April 2013 at about 1715hours he received a 999 report while at Manzini North Police post. The report was to the effect that a male person had been hacked with a bush knife at KaMagwaza bus station. The report enumerated that the perpetrators of the crime were on board a white mini bus with inscription 'calvary' and a sticker 'William 10'. It was his evidence that the report stated further that the perpetrators of the crime left their victim next to the road and drove to Manzini aboard the white mini bus. On receipt of the report, PW4 with 2498 Constable Aaron Gwebu rushed out of the Manzini North police post and went to the main road to Manzini and within minutes the mini bus approached. PW4 stopped the mini bus and the driver complied. PW4 found the driver and the conductor inside the mini bus and introduced himself and the officer he was with as police officers. He informed the driver and the conductor that he was investigating an assault with intent to do grievous bodily harm matter. He cautioned the suspects in terms of the Judges' rules.

[17] PW4 got inside the mini bus and directed the driver to drive to KaMagwaza bus station where the 999 report said the victim lay with serious injuries. When PW4 was on board the mini bus a police van with registration

numbers GSD 425PO approached from the Manzini direction and he requested 5271 Constable Dlamini who was driving the police van to rush to KaMagwaza bus station. A crowd of people also tried to stop the police van at the scene of crime.

[18] At the scene of crime he saw a young gentleman lying next to the road in a pool of blood and his clothes were soaked in blood. The gentleman had a gaping wound on the left side of the face above the ear. PW4 tried to get the particulars of the gentleman and he only told him that his name is Victor and passed out. The gentleman was taken to the RFM hospital by PW4 and other police officers. The driver of the mini bus and the conductor were told to proceed to the Manzini North police post and that is where PW4 left the duo before he took the victim of the crime to the hospital.

[19] At the hospital, PW4 could not get much information from the victim because of his critical condition. The doctors informed this witness that the victim would be admitted and will remain in hospital for some time.

[20] PW4 returned to the scene of crime and made enquiries about the particulars of the victim of crime. His investigation hit a snag because the people he interviewed did not know the victim. It was during his investigation that he got information to the effect that a certain instrument was used to injure the complainant. PW4 went to the police post where he found the accused persons. He cautioned the accused persons according to the Judges' rules

and questioned them about the matter. He then preferred an attempted murder charge against them. He again cautioned the accused persons against pointing out items implicating them in the commission of the offence as such items would be used in evidence against them during the trial. The accused freely and voluntarily took the police to the mini bus where the first accused opened the driver's door of the mini bus and next to the right hand side of the driver's seat took out a black bush-knife which has a black metal handle and handed same to the police. The bush-knife was taken as an exhibit in this matter. The witness identified and handed the bush-knife in Court and it was marked as exhibit 1.

[21] PW4 subsequently identified the victim of the crime as Victor Fish Simelane. He got such information from the victim's hospital file. The victim was injured on the left hand side of the head on the cheek where he had a long deep wound.

[22] The Crown made an application in terms of section 220 of the Criminal Procedure and Evidence Act, 1938 to allow PW5 Dr. Basawill Tshimpaka to present to Court the contents of a medical report which was compiled by a doctor who has since left the country. The import of the application was explained to the accused persons and they stated that they had no objection to the application made by the prosecution. PW5 first gave the Court his qualifications as a medical doctor. He stated that he has been working as a

doctor in the country since 2011. In 2015 he joined the RFM hospital where he works in the surgical department.

[23] On 27 April 2013 and at about 1905hours Victor Simelane was attended to at the hospital. His condition was weak and his clothing was bloodied. He had a 20cm deep laceration on the left side of the skull. The victim's left temporal bone was fractured. The doctor told the Court that the injuries suffered by the complainant were serious and that it was possible that he could have died from the injuries as the fracture is on the left skull bone below the temporal bone. The complainant was admitted, sutured and treated with antibiotics. He was also transferred to Mbabane government hospital where he was attended to by an ENT (ears, nose and throat) specialist. The complainant was weak from bleeding-he lost a lot of blood as a result. According to the doctor, the complainant was conscious but weak on admission. The long term effect of complainant's injury is that he might have ear problems. The doctor handed in the medical report as part of his evidence. The medical report was marked exhibit 'A'. The Crown closed its case.

The case for the defence

Evidence of the first accused

[24] The first accused told the Court that on 27 April 2013 he was driving a mini bus and ferrying passengers to KaMagwaza and the complainant was one of the passengers. The mini bus had driven past Central when the second

accused asked passengers to pay the bus fare. The complainant refused to pay. The first accused stopped the mini bus and asked the complainant to get off for refusing to pay the fare, the complainant refused to alight from the mini bus. The other passengers told the first accused to drive off and promised to deal with the complainant for refusing to pay the bus fare. The first accused complied with the passengers' directive. When the mini bus got to Mpholi, the first accused enquired from the second accused if the complainant had paid his fare. The second accused responded in the affirmative and told him that the complainant had paid using a E20 note and had been given his change.

- [25] When the mini bus reached KaNgubeni a certain customer asked to be allowed to alight but before the mini bus came to a stop, its door was flung open by the complainant who then pulled the second accused's leg in the process. The complainant had a knife in his hand. The complainant used a knife to tear second accused's T-shirt. The second accused fled the scene but was pursued by the complainant. When the first accused saw the second accused fleeing he was scared and looked for a wheel spanner in order to scare the complainant away from attacking the second accused. Instead of finding a wheel spanner, he got a bush-knife and went to where the duo was. He tried to scare the complainant who came out fighting. He then hit the complainant on the face with the bush-knife. The second accused informed the Court that it was not his intention to hurt the complainant. It was during his answer to the question posed by the Court that the first accused stated

that his intention was to scare the complainant when he hit him with the bush knife.

[26] According to the evidence of the first accused he stood next to the complainant when he realized that he had injured the complainant. He informed the remaining customers in the mini bus that he was going to report the matter to the police. He thought the complainant was attacking them with the aim to rob them of the collections they had made at the time. It was while they were going to report the matter to the police that they were met by PW4 who directed them to the scene of crime. The complainant was taken to the hospital.

[27] During cross examination the first accused stated that the complainant had a knife in his possession and he used the knife to tear his co-accused's T-shirt. The first accused said he informed the investigating officer that the complainant was carrying a knife. The investigating officer made no reference to a knife in the possession of the complainant nor was he asked by the accused about the knife.

[28] The accused were arrested and charged with the offence of attempted murder on 27 April 2013. The first accused spent four months in custody before he was released on bail.

The case for the second accused

[29] The second accused was the conductor of the mini bus when the complainant was injured. He told the Court that when the complainant was injured at KaNgubeni, the mini bus continued with its trip and dropped other passengers KaMagwaza. On return, the first accused suggested that they report the matter of the injured person to the police. Before they could get to the police station, they found the police waiting for them along the road. The police were from Moyeni. One of the police officers got inside the mini bus and directed the driver to return to the scene of crime. At the scene, the complainant was taken to hospital in a police van while the other police officers got into the accused persons' mini bus which then drove to Manzini police station where they were subsequently questioned and charged with the offence of attempted murder.

[30] It was during cross examination that the second accused told the Court that the complainant was the aggressor. It was the version of the second accused that when the mini bus reached KaNgubeni bus stop, the complainant unilaterally and abruptly opened the mini bus door and held the second accused person's leg while the mini bus was moving. It was while the mini bus was in motion that the complainant held second accused's leg which then got stuck behind the mini bus door. The second accused and the complainant then got off the mini bus and the complainant drew out an object and the second accused fled from the complainant. The complainant pursued the second accused and the first accused came running and carrying something that the second accused did not see. When the second accused

turned back, he saw the complainant fall on the ground. Both accused persons got back to the mini bus and drove off with the remaining passengers. This, in a nutshell was the evidence of the second accused about what transpired prior to and during the injury of the complainant.

[31] During cross examination, the second accused stated that he did not see a knife in the possession of the complainant when they had an altercation. It was the evidence of the second accused that they did not accompany the complainant to the hospital. That the accused went to the police station when the complainant was taken to the hospital by the police.

[32] The second accused told the Court that he did not inform the investigating officer about complainant's weapon because he was frightened.

Application of the law to the facts

[33] Attempted murder requires an *actus reus* and *mens rea*. An accused person must appreciate that the injury he intends to inflict on his victim may cause death and regardless inflict that injury recklessly with no regard whether death ensues or not¹.

[34] In order to support a conviction for attempted murder it is sufficient if there is an appreciation that there is some risk to life involved in the action

¹ *R v Mndzebele* 1970-76 SLR 198 at 199F.

contemplated and or executed, coupled with recklessness as to whether or not the risk is fulfilled in death or not.

[35] In *casu*, the first accused person assaulted the complainant with a bush-knife on the head and face. This constitutes an *actus reus*. The Crown alleged that the accused acted in furtherance of a common purpose. The doctrine of common purpose involves imputing to the second accused the actions of his co-accused. The action of hacking the complainant with a bush knife is the one that the second accused made common purpose with. All things being equal, such action is enough to sustain the guilt of both accused for the charge of attempted murder.

[36] I am of the view that by assaulting the complainant with a bush knife in a delicate part of the body, the accused persons foresaw that the injury they inflicted on the complainant could have caused his death, but the accused were reckless whether or not death resulted. When the complainant was injured and was bleeding profusely, the accused persons nonchalantly boarded the mini bus and drove off and left the complainant unattended. The accused clearly had the *mens rea* in the form of *dolus eventualis*.

[37] The following quotation is trite law on the subject matter of attempted murder- Schreiner JA in *Rex v Huebsch*² expressed his view in the following terms:

² 1953 (2) SA 561 at 567.

‘In order to support a conviction for attempted murder there need not be a purpose to kill proved as actual fact. It is sufficient 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 fulfilled in death.’

[38] The *ratio* in *Huebsch* case has been adopted by this Court in the following cases of *Henwood Thornton v Rex*³; *Rex v Mbanjwa Gamedze*⁴ where Dunn J said the following:

‘The majority decision in the case of Henwood Thornton v Rex Court of Appeal case accepted the South African Appellate Division decision of Rex v Huebsch...as establishing the correct principle in cases of attempted murder that there need not be a purpose to kill proved as an actual fact. It is sufficient if there is an appreciation that there is some risk to life involved in an action contemplated coupled with recklessness as to whether or not the risk is fulfilled in death. The Henwood decision is binding on this Court and correctly sets out the law of this country.’

[39] I find that the Crown witnesses were credible in their recollection of events of that day. None of the Crown witnesses saw the complainant carrying a knife as belatedly alleged by the accused persons; neither did any of the Crown witnesses’ evidence point to the complainant as being a danger to the accused persons.

[40] PW1 and the complainant himself stated that on the day in question, the complainant was drunk to a point he fell asleep on board the mini bus. The complainant used unpalatable language against the accused persons when the passengers were told by the accused persons that the mini bus was no

³ 1987-1995 SLR 271 at 273

⁴ 1987-1995 SLR 300 at 336

longer going to reach KaMagwaza bus stop. The evidence is that the complainant had paid his fare to KaMagwaza at that time.

[41] It would appear at least to me that the accused persons were peeved by the complainant's temerity to object to the accused persons' intention not to drive to KaMagwaza bus stop when he had paid to be dropped off at KaMagwaza. This was after the accused unilaterally took a decision to return to Manzini before reaching KaMagwaza bus stop. The accused persons, it would seem had decided they would drive back to Manzini bus rank where they would assault the complainant.

[42] In the normal scheme of business operations-the customer is king. In the case at hand, this does not appear to have been so. The accused do not seem to have had the complainant's interest at heart as they prevented him from alighting from the mini bus when he chose to; assaulted and injured him only to come up with a trumped up defence that they thought he was robbing them of the day's collection. In behaving in the manner they did, the accused persons displayed 'how not to treat a passenger' in their lawlessness. When people use public transport, they do not sign a death warrant in the hands of the conductors and bus drivers. All that the public wants is a decent public service where their rights as passengers are respected by the employees manning public transport vehicles.

[43] I am unable to understand how the complainant, drunk as he was on the day, could have been a threat to the accused persons to a point they hacked him with a bush knife when he was fleeing from the second accused at the time.

[44] The first accused says the complainant was wielding a knife when he was attacking the second accused person. In my view nothing could be further from the truth. I say this for the following reasons: first, the version of the knife was not put to the Crown witnesses-specifically PW1 and PW4. Second, except for the accused persons' say so, no one else saw the complainant carrying a knife. Besides, it is inconceivable that the second accused would not have been harmed when he prevented the complainant from alighting from the mini bus if he was armed. The accused appeared to be making their case as they went along.

[45] For the above reasons, the version of the accused persons is not reasonably possibly true in the circumstances. It is accordingly rejected.

[46] In light of the totality of the foregoing, I find that the Crown has proved its case beyond reasonable doubt. I find the accused persons guilty of attempted murder and accordingly convict them of the offence charged.

For the Crown: Mr M Nxumalo

Accused No. 1: In Person

Accused No. 2: In Person

Delivered in open Court in Mbabane on 19 September 2019.



A handwritten signature in black ink, appearing to read 'M. Langwenya J.', is written over a horizontal line. The signature is cursive and somewhat stylized.

M. LANGWENYA J.