



IN THE HIGH COURT OF ESWATINI
JUDGMENT

HELD AT MBABANE

CASE NO. 211/14

In the matter between:

REX

Versus

LUCKY MAGAGULA

FIRST ACCUSED

MPENDULO MOTSA

SECOND ACCUSED

Neutral Citation: *Rex v Lucky Magagula & Another (211/14) [2020] SZHC 145 [2020] (3 August 2020).*

Coram: **LANGWENYA J**

Heard: 2 March 2020; 3 March 2020; 6 April 2020; 9 April 2020; 2 July 2020; 3 August 2020.

Delivered: 3 August 2020

Summary: *Criminal law-Criminal Procedure-attempted murder-complainant assaulted first with open hands, fists and kicked without provocation by first*

accused-second accused assisted first accused by giving him a hammer with which he hit complainant-common purpose proved.

Criminal law-Criminal Procedure-second accused used an assortment of weapons to assault complainant-complainant got burned with hot water and suffered second degree burns-

Criminal Law-Criminal Procedure-Assaulting the complainant in the manner accused persons did meant they foresaw that the injuries they inflicted on her could cause her death but were reckless whether or not death resulted-accused found guilty of attempted murder.

JUDGMENT

- [1] The accused persons are charged with the offence of attempted murder, it being alleged by the Crown that on or about 14 August 2012 and at or near Mangozeni area in the Manzini district; the said accused persons, each or both of them, acting jointly in furtherance of a common purpose, did unlawfully assault Tholakele Mkhaliphi with a hammer and with a lid of a three-legged pot on the head and further poured boiling water on the complainant and with intent to kill her did thereby commit the crime of attempted murder.
- [2] Both accused persons pleaded not guilty to the charge.
- [3] The Crown led the evidence of five witnesses while the accused persons each led evidence on their own behalf.

[4] The Case for the Crown

PW1 is Tholakele Gladys Mkhalihi and the complainant in this matter. She lives at Malkerns. She is fifty-three years old. On 14 August 2012 she was at Beauty Sukati's home and chatting with her inside the kitchen when she was approached by Mr Hlandze. Mr Hlandze informed her that he had been sent by Lucky Magagula to ask the complainant to buy him home brew. Tholakele told Hlandze to inform Lucky Magagula that she did not have money to buy alcoholic beverages; that if she had, she would buy herself some traditional brew. The complainant was carrying papers that she meant to take to the police station for certification.

[5] Beauty Sukati prepared and sold home-brew to the public as a source of livelihood. People came to her home bought and enjoyed the home-brew.

[6] No sooner had Hlandze left Beauty's kitchen than the first accused came in a tirade and assaulted Tholakele on the face with an open hand and throttled her. A fight ensued and the complainant threw the first accused on the ground, sat on him and hit him with fists.

[7] The second accused, Mpendulo Motsa came into the kitchen and found the complainant having an upper hand in the fight. Mpendulo Motsa pulled Tholakele's hair piece and tore into her hair. As a result, the complainant's hair came off. The second accused held complainant's hands and Lucky Magagula was able to break free from complainant's grip. The first accused was given a hammer by the second accused. The first accused hit the complainant with the hammer on the chest above the breast area. The hammer fell from the first accused's hand. The first accused grabbed a lid of a three-legged pot and twice hit the complainant with it on the head. The complainant

extricated herself from Magagula's grip and tried to flee but tripped and fell. The first accused threw an *imbokodvo* or a stone used to grind tobacco at the complainant. Complainant got up from the ground and fell for the second time.

- [8] Inside the kitchen there was a drum full of boiling water on the fire. The first accused kicked the drum and the water spilled and burned the complainant on her lower posterior as she lay on the ground. People came to the aid of the complainant and she was later taken to Mankayane government hospital.
- [9] The complainant testified that she suffered burns which resulted in her skin peeling off. She said she was unable to walk properly as a result of the injuries she suffered at the hands of the accused persons. The complainant showed the court scarring on both her legs and said that was a result of the burns she suffered from the boiling water.
- [10] During cross examination it was put to the complainant that she was the aggressor. PW1 denied being an aggressor. It was further put to the complainant that she was the one who assaulted the first accused with a hammer. The complainant denied using a hammer, grinding stone and a three-legged pot lid to assault the first accused.
- [11] It was put to the complainant that the second accused saw the skirmish between the first accused and the complainant but did nothing about it. The complainant's response was that what she told the court in her evidence in chief about what the second accused did is true.
- [12] The complainant told the Court that she was admitted in hospital and spent five months being treated. She informed the court that she did not make a full recovery from her injuries because her head injuries play up during hot

weather and her feet are always painful as a result of the injuries she suffered at the hands of the accused persons.

[13] The Crown led the evidence of PW2 Dr Chenkenyere. He told the court that in August 2012 he was on duty at Mankayane government hospital at the out-patient department, casualty department and in the wards. He attended to Tholakele Mkhalihi who presented with second degree burns. He explained that the second degree burns were life threatening to the complainant considering its depth, extent coupled with the pre-existing illnesses that the complainant had. The first degree burns, the doctor explained affects the first layer of the skin and could affect the second layer as well. The doctor prepared a medical report which he handed in court as part of his evidence. According to the medical report, the complainant did not suffer a skull fracture. She presented with two scalp lacerations 5cm long x 1cm deep and another which was 10cms long x 1cm deep. She had multiple bruises and specifically both her cheeks, the right side of chest, behind her right ear and right shoulder were bruised.

[14] PW3 is Beauty Sukati. She testified that she brews and sells *umcombotsi* as a source of livelihood. She is seventy-eight years old. In August 2012 she was at home at Mangozeni. The first and the second accused were also at her home on that day seated outside her house and enjoying their home-brew. There were a number of other people who were drinking the home-brew outside her house. PW3 was at her kitchen when the first accused came in, not once but twice to help himself to the home-brew without paying for it. It was on the second occasion when Magagula took the home-brew without paying for it that PW3 enquired from him when he was going to pay for the liquor he had been taking and drinking.

- [15] Tholakele then arrived and found PW3 in her kitchen. Tholakele was carrying papers. PW3 asked Tholakele what the papers were and was told by the complainant that she was looking for a job and was taking the papers to be certified at the police station. Tholakele had come to check on Beauty Sukati. It was while they were chatting inside the kitchen area that Hlandze came and said he had been sent by the first accused to ask Tholakele to buy him a drink. Tholakele told Hlandze to inform the first accused that she does not have money to buy a drink.
- [16] No sooner had Hlandze left the kitchen than the first accused came inside the kitchen, and without saying a word, slapped PW1 with open hands and also throttled her. When Beauty tried to intervene, she was also slapped by the first accused. Beauty left the kitchen and raised an alarm outside as there were a number of other men who were enjoying their drinks on her yard. None of the people there came to PW1's rescue. Beauty then asked Eric Zwane to run and report the matter to the police station. The police arrived and took over the scene.
- [17] PW3 identified the hammer, the lid of a three-legged post and the *imbokodvo* as belonging to her. She told the Court that she used the *imbokodvo* to grind tobacco. It was her evidence that the lid of the three-legged pot as well as the grinding stone were in the kitchen when the attack on the complainant took place.
- [18] During cross examination, PW3 denied ever giving complainant the hammer and telling her to assault the first accused with it. PW3 informed the court that the hammer belonged to her and that she had, on previous occasion given it to the first accused who had asked to use it. It was the evidence of PW3 that she

does not know how the hammer came to be in the hands of the second accused on that fateful day. It was PW3's evidence that she was surprised when the first accused came into the kitchen, and, without provocation attacked the complainant.

[19] PW3 disputed that the complainant was the aggressor and the first one to land a punch on the accused. PW3 testified that the complainant fell and the first accused poured hot water on her as a result she suffered burns. PW3 insisted during cross examination that the second accused came with a hammer inside the kitchen when the assault was on-going.

[20] The Crown then led the evidence of Eric Sozabile Zwane. He told the court that he lives at Mangozeni and works at Swazi Can. It was his evidence that he knows both accused. The first accused was a community police at Mangozeni in 2012. He testified that in 2012 he used to help PW3 sell her home-brew.

[21] On 14 August 2012 he was from work at about 1pm when he met PW3 who asked him to run to the police station and report that the accused persons were assaulting Tholakele. Eric went to the police station and reported the assault. PW4 then proceeded to Beauty's homestead where he found the first accused atop the complainant and assaulting her with fists. The police arrived and held the first accused and removed him from the complainant who was on the floor. The first accused was arrested by the police. The second accused was also inside the kitchen when the police arrived. The second accused held complainant's head and hands while the first accused assaulted her.

- [22] When the first accused was arrested, the second accused left the scene. After the assault, the complainant appeared to be weak as she could not walk on her own. There was blood all over the house.
- [23] PW5 is 5335 Detective Constable Sabelo Dlamini and an investigating officer in this matter. On 14 August 2012 at 2pm he was on duty at Malkerns Police station when Eric Zwane came and reported that Tholakele Mkhalihi was being assaulted at Mrs Beauty Sukati's homestead. He went to the scene in the company of two other police officers. The distance between the police station and Mrs Sukati's home is between forty and sixty metres.
- [24] When the police exited the gate of the Malkerns police station, they saw PW3 and she was also shouting and saying that somebody was being killed at her homestead.
- [25] At the scene of crime, the police found a number of people seated outside. The police went inside one of the houses and found the second accused sitting on the complainant while the first accused was assaulting her with kicks and fists. The complainant lay on the floor and had blisters on her thighs. There was blood on the floor.
- [26] PW5 introduced himself and the team of police officers he was with to the accused persons. He then stopped the first accused from assaulting the complainant. The first accused was then taken to the police station. The second accused disappeared from the scene.
- [27] At the police station, PW5 introduced himself to the first accused and informed him he was investigating a charge of attempted murder. He cautioned the first accused in terms of the Judges' rules. The first accused said something on the basis of which he took the first accused to the scene. On

their way to the scene of crime, they met the second accused. PW5 introduced himself to the second accused and informed him he was investigating a crime of attempted murder. He cautioned the second accused in terms of the Judges' rules and arrested him. He then proceeded to the scene of crime with both accused persons.

[28] At the scene of crime they found that the complainant had been conveyed to hospital by the 977 ambulance. The accused persons were cautioned in terms of Judges' rules that they were under no obligation to point out anything but that if they did, whatever they pointed out would be used against them in evidence in a court of law. The first accused pointed out a lid of a three-legged Maputo pot, a hammer and a grinding stone. The pointing out was done in the presence of an independent witness-make Tfoliwe Tsela. PW5 handed into court the exhibits that were pointed out by the first accused at the scene of crime.

[29] It was the evidence of PW5 that at the scene of crime, only the complainant was injured. The first accused was not injured.

[30] **Defence Case**

DW1 is Lucky Magagula and the first accused in this matter. He is 46 years old and unmarried. He has one child who is 19 years old. He was arrested on 14 August 2012 and released on bail on 8 June 2017. DW1 testified that he knocked off from work at 630am on 14 August 2012 and went to visit his sister at eNdumbaneni. He was later called by Timothy Hlandze who was at Mangozeni at Beauty Sukati's home. He arrived at PW3's home and found Timothy Hlandze. Hlandze gave the first accused a jar of home brew to drink. The first accused says he was then called by the complainant who was in the

kitchen. When he got in the kitchen, the complainant, without saying a word landed a punch on the first accused and he fell to the ground. The complainant sat on the first accused. The first accused tried to push the complainant away without success because the complainant is generously endowed and was heavy on him.

[31] The second accused came inside the kitchen and shouted at Tholakele to stop assaulting DW1 as she would kill him. Tholakele took a grinding stone which was supporting the door and hit DW1 with it. The second accused then fled the scene. The first accused extricated himself from complainant's grip and was able to stand. He was hit by the complainant with a hammer on the head. DW1 testified that he was saddened that in court the Crown witnesses were now saying he is the one who hit Tholakele with a hammer when it is the other way round. The accused persons were informed of their right to cross examination but the first accused still did not put his case to the complainant. If such a situation happens in a trial, the law is settled that failure to put one's case to the witnesses may mean the version proffered at a late stage is fabrication¹.

[32] DW1 testified further that Tholakele pursued him and he snapped and retaliated with a fist. She fell to the ground and because there was a fire and a drum with hot water, the first accused accidentally stepped on the firewood; the water spilled on the complainant and she got burned. As soon as the complainant fell, the first accused says he left the kitchen and went and stood under a tree within Mrs Beauty Sukati's homestead. The first accused testified

¹ *R v Dominic Mngomezulu*

that the police found him standing under a tree on the yard; they arrested and took him to the police station.

[33] During cross examination, the first accused denied sending Hlandze to ask the complainant to buy him traditional beer. DW1 denied that he wanted to kill the complainant when he assaulted her with an assortment of weapons. It was his evidence during cross examination that he could not check on the complainant when she was in hospital because he was in police custody at the time. It is his evidence that when his family tried to go see the complainant, her family refused them permission because, they stated the matter was now *sub judice*. The first accused said he did not foresee that the complainant might die as a result of the assault. The evidence of Crown witnesses, supported by that of the first accused is that immediately after the complainant was assaulted and injured, the first accused did nothing to help her. In his words, the first accused went and stood outside in the yard under a tree.

[34] During cross examination, the first accused admitted that he was a community police at the time of the incident. It was his evidence that he could not, as a community police protect the complainant at the time of the incident because the complainant was assaulting him. He testified that he was shocked and defended himself against the assault by the complainant. It is a sad world when people who are entrusted with the duty to protect the people in their community turn around and visit violence on those people.

[35] DW2 is Mpendulo Motsa and the second accused in this matter. He is 44 years old and is unmarried. He has one child who is twenty years old. He was arrested on 14 August 2012 and released on bail on 6 February 2020. Before he was arrested, he worked as a painter.

- [36] He was with the first accused at PW3's home enjoying traditional beer at the invitation of Hlandze. He then went to buy a cigarette inside the kitchen at PW3's home and found the complainant sitting atop the first accused and assaulting him. He reprimanded the complainant and told her to stop hitting the first accused as she was going to kill him. The complainant took a stone and threw it at the second accused. The second accused left the kitchen and raised an alarm outside the kitchen and asked them to come and assist as the second accused was unable to diffuse the situation.
- [37] A lot of people came and tried to intervene. The second accused did not go back to the house. DW2 testified that he also saw the complainant take a hammer and hit the first accused with it. DW2 testified further that he then went outside and stood there until police arrived. The police arrested the first accused and left with him.
- [38] Three hours after the first accused was arrested, the second accused went to the police station to collect the key from the first accused. He was arrested when he arrived at the police station. DW2 said he was drunk when he got to the police station in the evening.
- [39] DW2 denied that he ever pulled complainant's hair when she found her assaulting the first accused. He also denied giving the first accused a hammer with which to assault the first accused. He also denied restraining the complainant by holding her head and hands so she could be assaulted by the first accused. DW2 testified during cross examination that the first accused was arrested by the police inside the house where the fight took place.

[40] **Application of the Law to the Facts**

Attempted murder requires the *actus reus* and *mens rea*. The accused persons must appreciate that the injury they intended to inflict on the complainant may cause death and regardless inflict that injury recklessly with no regard whether death ensues or not².

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

[42] In the present case, the first accused used an assortment of weapons to assault the complainant. To be precise, the first accused assaulted the complainant with kicks, fists, a hammer, a lid of a three-legged pot as well as with a grinding stone-*imbokodvo* while the second accused held the complainant's head and hands. The second accused also pulled complainant's hair piece and hair. The accused also caused boiling water to be spilled on the complainant through their reckless conduct when the first accused stepped on firewood which was boiling water in the kitchen.

[43] The Crown alleges 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 assaulting the complainant with an assortment of weapons as well as spilling hot water on her is the one that the second accused made common cause with. The second accused also associated himself with the conduct of the first accused by holding the complainant's hands and head as well as pulling her hair in a bid to help his

² *R v Mndzebele* 1970-76 SLR 198 at 199F

co-accused. All things being equal, such action is enough to sustain the guilt of both accused for the charge of attempted murder.

[44] I am of the view that by assaulting the complainant with a hammer, a grinding stone, a lid of a three-legged pot as well as having hot water spilled on her lower posterior, the accused persons foresaw that the injuries they inflicted on the complainant could have caused her death, but the accused were reckless whether or not death resulted. When the complainant was injured and was bleeding and had blisters on her thighs, none of the accused persons attempted to help her get to the hospital. The accused persons clearly had the act and intention in the form of indirect intention.

[45] The following quotation is apposite:

‘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 death³.’

[46] The *ratio* in *Huesbsch* has been adopted by this court in the cases of *Henwood Thornton v Rex*⁴; *Rex v Mbanjwa Gamedze*⁵ where Dunn J said the following:

‘The majority decision in the case of *Henwood Thornton v Rex* a court of appeal case accepted the South African Appellate Division decision of *Rex v Huesbsch*...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.’

[47] The evidence of Crown witnesses was cogent and credible. Whatever contradiction there was in their evidence is to be expected from people trying

³ *R v Huesbsch* 1953 (2) SA 561 at 567.

⁴ 1987-1995 SLR 271 at 273

⁵ 1987-1995 SLR 300 at 336.

to recall and restate facts of a matter that happened eight years ago at the time of the trial. The evidence of most of the Crown witnesses place both accused persons at the scene of crime.

[48] The evidence of Beauty Sukati is that of an eye witness who was present when the skirmish leading to the assault of the complainant happened. The first accused is, according to PW1 and PW3's evidence the aggressor who, without provocation assaulted the complainant who was in the company of PW3 at the time. When the second accused arrived at the scene and found the complainant and the first accused fighting, he nailed his colours on the mast by associating himself, in word and in deed- with the criminal conduct of the first accused. He admonished the complainant to stop assaulting the first accused as she was going to kill him; held the complainant and gave the first accused a hammer so he could assault the complainant with it.

[49] There is evidence that both accused had been drinking at Beauty Sukati's home prior to the fight ensuing. There is, however no evidence of how much alcoholic beverage they had consumed when they engaged in the assault of the complainant.

[50] That the victim of the accused persons' crime was a woman older than the accused persons is telling. Here are two men in their late thirties when the offence was committed, assaulting a woman to the point of almost killing her because she could not buy them a drink! Why, the complainant should have bought the accused a drink is unclear. Why, if the complainant was unable to buy the said drink she had to be assaulted is also unclear. What is clear though is that both accused persons had no respect for the complainant as a human

being and as a woman. This behaviour and attitude cannot be countenanced by the courts.

[51] The complainant was entitled to fight back in self defence when she realized she was under unlawful attack. That the first accused complains he was overpowered by the complainant is of no moment as she was entitled in law to ward off an unlawful attack by the first and second accused persons.

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

[53] 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.



M. LANGWENYA
JUDGE OF THE HIGH COURT

For the Crown: Mr M. S. Dlamini

For the Defence: Accused persons in person.