

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CRIMINAL CASE NO. 398/2014

In the matter between

REX

V

MANDLA NGWENYA

Neutral citation: *Rex v Mandla Ngwenya (398/14) SZHC - 193 [2020]15 October 2021*

Coram : Tshabalala J

Heard : 06/05/2019

Delivered : 15/10/21

Summary: Criminal law – Accused is charged with attempted murder, however the evidence falls short of the intent to murder the complainant. The court returns a competent verdict of assault with intent to cause grievous bodily harm.

JUDGMENT

[1] The Accused pleaded not guilty to a charge of attempted murder of Gcina Mnisi. It is alleged that on or about the 29th October 2015, at or near

Jubukweni in the Hohho region, he unlawfully and with intent to kill, assaulted the said Gcina Mnisi. It took many postponements to set the matter down for trial due to unavailability of various defence counsels that the Accused said he had engaged to represent him in this matter. After the trial eventually started in June 2018, it was not a smooth sailing as from time to time either defence counsel was in default or attendance of crown witnesses had not been secured. The crown was ultimately put to terms to close its case, and the defence on its part concluded its case in May 2019.

- [2] The crown led the evidence of three witnesses, the complainant, his wife and a medical doctor. PW1 Gcina Mnisi, who was the complainant, testified that the accused was a son of his brother-in-law. On the 29th October 2015 around 0500 hours the complainant was in his house with his wife.¹ He responded to a knock at his door, where he found two strangers. He then saw behind them the Accused person walking close to the wall towards him, at high speed. Without uttering a word, the Accused grabbed PW1 by his short pants, pulling him down the doorsteps, to the other side. The accused said they should talk. The two strangers were at that point behind PW1. The Accused informed PW1 that they had come for him to go to Tjebovu Dipping Tank for the purpose of transferring cattle. All this time the Accused imposed himself physically on PW1 with great force. PW1 responded that he would not transfer the cattle because the Accused stole the cattle in question.
- [3] The Accused punched PW1 with a fist on the left eye. At the same time PW1 heard sound of a gun being cocked. PW1 learnt later that one of the two men accompanying the Accused was Sicelo Mavuso, Accused's brother-in-law.

¹PW2.

The three men picked PW1 up and carried him towards the gate. They all assaulted the complainant, the Accused in particular hit him with a fist on the face and pulled him towards a waiting car, which move the complainant resisted.

- [4] During the commotion the Accused pressed PW1's face down on the ground and climbed on top of him while Mavuso stripped off PW1's jacket. PW1 lost strength and felt extreme heat on his lower part of the body. When he rose PW1 saw his right testicle hanging and bleeding profusely.
- [5] At some stage the Accused uttered words to his companions that they must take PW1 to Mabhala forest. He said this as they dragged PW1 towards their car. He regained strength, fought and resisted being taken away. His left eye got blinded by blood. He alleges that his testicle was cut by the accused, but did not see the object that he used.
- [6] PW1 was rescued by the arrival of his neighbour Mandla Masuku who came and parked his car in front of the Accused's car and asked why they were killing his neighbour. PW1 heard Mandla demanding a knife saying, "*bring that knife you are wiping blood from.*" PW1 was not sure who Mandla was addressing concerning the knife. The Accused let go of PW1 and went to start the car and the trio drove off from the scene. Mandla was not called to testify. Nonetheless the complainant was cross examined on Mandla's statement concerning a knife. Defence counsel asked PW1 to confirm that Mandla demanded the knife from Sicelo Mavuso, and the complainant's response was in the affirmative.
- [7] Mandla Masuku drove PW1 to the police station, and then to Mbabane Government hospital, where he was admitted for 4 days. The Doctor

informed him that his chances of bearing children were slim due to the injury to his private parts.

- [8] PW1 testified that the Accused's attack on him was motivated by a grievance the Accused had over inheritance of cattle left with PW1 by the latter's deceased aunt who had no children of her own. PW1's evidence was that after the death of her aunt's husband, she gave cattle to PW1 to keep for her. PW1's aunt later died, at which time PW1 already had a misunderstanding with the Accused over the former's possession of the said cattle. These were the cattle in respect of which the Accused tried to force PW1 to go to the dip tank to have their registration transferred to a Mavuso homestead.
- [9] PW1 stated under cross examination that he did not know exactly when his wife came to the scene, but assumed that she was present when his testicles were cut because he had seen her earlier at the time he and the assailants exited the gate.
- [10] PW2, Lindiwe Mnisi, complainant's wife, confirmed PW1's testimony on the arrival of the Accused and his two companions in the early hours. PW1 answered the knock and went out to talk the Accused, who was known to her, and two others that she did not know.
- [11] PW2 went out when she heard them arguing, and heard the Accused saying *"let us go, you are delaying us."* She saw the people grab PW1 forcefully against his will. They were fighting and pulling PW1 whilst he resisted. They pushed and dragged him to the road, with the Accused assaulting PW1 with fists.

- [12] PW2 assisted PW1 to resist getting into the car. She saw Accused grab PW1's shorts from behind, holding them tightly and then heard PW1 asking "*where are you taking me, I don't want to transfer the cattle.*" The Accused said they were taking him to the dip tank whether he liked it or not. The assailants lifted PW1 up from time to time.
- [13] During the commotion PW2 saw the Accused putting his hand underneath PW1 from behind, grabbing his testicles. PW1 screamed for help saying that the accused was killing him. PW1's shorts were torn open, exposing him. She then saw PW1 dripping with blood, his testicles exposed and torn open. One Phila Mnisi came to the scene and calmed the situation down.
- [14] PW1 stood shaking and asked Mandla Masuku to take him to hospital. Phila Mnisi and PW2 assisted PW1 into the car while the accused and his companions left the scene.
- [15] PW3, Dr Grace Ruhinda testified that he was a Medical Doctor stationed at Mbabane Government Hospital under Department of General Surgery. He stated that Dr Makhunyana who attended and treated the complainant on the left the hospital for studies four years ago. PW3 read a Medical record (RSP 88) the contents of which were of 40-year old Gcina Mnisi was examined by Dr Makhuyana on the 29th October 2015 at Mbabane Government Hospital.
- [16] According to the medical report, the patient's clothing was blood soaked; he had a swollen bruised right eye with laceration on the lower lid; a +-10 cm laceration in the scrotum with the *testis* exposed. The wounds were sutured to close them.

[17] Based on the report, PW3 formed an opinion that the patient's *testis* was expected to heal with a scar. He stated that some scars are internal and can't be seen. PW3 informed the court that from reading the documents and from his knowledge, the injury was not a common one because it is in a hidden organ. Depending on the cause of the injury, the neighbouring vital organs could have been impacted. With defence's consent, PW3 handed the Medical Report compiled by Dr Makhuyana in evidence and was admitted as Exhibit "A."

Defence case

- [18] The Accused testified in his defence that he resided in Mbabane at Makholokholo township. They were cousins with PW1. On the day in question he went to PW1's home to fetch him to go to Tjebovu dip tank to clear cattle from PW1's name and enter them into Accused's name. These were the cattle that PW1 took away from one Simon Ngwenya. He brought along two others to assist him to drive the said cattle.
- [19] On several occasions he had made arrangements with PW1 to go to the dip tank for the said purpose, one of which occasions was at the Veterinary offices in Mbabane. On a Friday, the first week of October, 2014 a decision was made that PW1 should pass or transfer their cattle. According to the Accused the decision was made by himself, PW1, one Mlungisi Yende and two veterinary officers.
- [20] Following the said 'agreement,' on 29th October, the accused arrived at PW1's home with Mlungisi Yende and Sicelo Mavuso. PW1 came out of his house wearing shorts whereupon the accused asked him to go and get dressed, but he refused. PW1 told the Accused that he was not going to clear the cattle because the Accused declined his request to evict people from a

certain house at Manzana. A disagreement arose between PW1 and Sicelo Mavuso, resulting in PW1 headbutting Sicelo Mavuso four times. The duo of PW1 and Sicelo pushed each other up to, and outside the gate. They both fell on burnt grass. Sicelo punched PW1 on the eye. They were separated by PW1's wife (PW2). PW1 rose and shouted and called people saying "*come, they are now here.*"

- [21] Accused's evidence was further that he did not see anyone touch PW1's testicles and did not see how he got injured on the scrotum. When they left, PW1 was only injured on the eye from where he bled a little. Neither him nor his companions were in possession of a gun or knife. the Accused denied assaulting PW1 at any stage throughout the entire period. The Accused claimed that burnt grass stumps on the terrain where PW1 and Sicelo were fighting could have caused the injury on his scrotum. When PW1 refused to go with them, he left him alone without any ill-feeling. He invited Sicelo and Mlungisi to PW1's house to drive the cattle that PW1 was supposed to transfer to him.
- [22] DW2 Sicelo Mavuso, 23 years old at the time of giving evidence, testified for the defence and told the court that he resided at Makholokholo and knew the complainant. He was related to the Accused's brother-in-law. The previous day to the incident the Accused invited him over the phone to assist him drive cattle from undisclosed place to the dip tank, together with Mlungisi Yende.
- [23] PW1 appeared from his house wearing short pants. PW1 ignored Accused's request to go and get dressed. PW1 and the Accused talked as they walked towards the gate, while DW2 and Mlungisi Yende followed behind them. The accused and PW1 talked for about 20 minutes.

[24] PW1 was talking harshly while the accused talked quietly. As the two men argued, DW2 went to them and asked the Accused what was going on. PW1 snapped at him that it was none of his business. DW2 got into a quarrel with PW1 who grabbed him by his clothes and head-butted him twice on the mouth, drawing blood.

[25] PW2 came out of the house at that time. DW2 and PW1 fell on the ground covered with burnt grass and vegetation. PW1 got on top of DW2 and choked him. DW2 got furious and punched PW1 with a fist below the eye causing him to bleed. They both rose and were separated. Upon rising PW1 raised an alarm saying that DW2 and others wanted to kill him. PW1's cousin came and calmed the situation and directed that they talk. PW1 then punched the accused on the mouth and said that he was the one who landed him in this situation. The Accused and team then drove away from the scene.

[26] The accused did not carry a firearm or a knife. No one hit PW1. The Accused never touched or assaulted PW1. DW2 fought PW1 in self-defence because PW1 started the fight. He did not witness injury caused to PW1's testicles.

Analysis and findings

[27] There is medical evidence in Exhibit "A" presented to court by PW3 that the complainant suffered severe laceration to his scrotum which was ripped open and had to be surgically sutured to close it. The salient question is who or what was responsible for injuring the complainant?

[28] The crown bears the onus of prove of the guilt of the Accused for the offence charged beyond a reasonable doubt. The Accused on the other hand bears no responsibility to prove his innocence.

[29] There is evidence that the complainant was injured during the scuffle that ensued between him on one hand, and the Accused and his two companions on the other hand. The evidence of PW1 and PW2 is quite clear on this aspect. Their evidence has the hallmarks of credibility despite minor inconsistencies. This cannot be said of the evidence of the defence. Both the Accused and his witness were at pains to completely distance the Accused from assault of the complainant. It is clear that the defence is taking advantage of the prosecution laxity, inexplicably omitting to bring DW2 and Mlungisi Yende to answer on this charge as well. But is defence succeeding in the effort to shield the Accused from culpability and shifting the blame to DW2, the young 18-year-old school boy? I don't think so.

[30] Firstly, the Accused admittedly was inconvenienced and infuriated by the complainant's recalcitrance in the whole saga of passing the disputed estate cattle to him. He came all the way to enforce a prior agreement he said they reached with the complainant concerning transfer of the said cattle, but the complainant backed down and told him he was going nowhere and that he did not want to transfer the cattle. The evidence points to Accused person's desperation and efforts to forcibly, with the help of DW2 and Yende, bundle up the complainant in his car to take him to the dip tank.

[31] The court accepts the evidence of the complainant and the supporting evidence PW2 that after the complainant answered a knock at his door and stepped out of his house there was an argument between him and the Accused over the latter's demand that they go to the dip tank which the complainant

rejected. That the Accused with the help of his two cohorts in the persons of DW2 and Mlungisi Yende, dragged and pushed the complainant to the gate with the aim of forcing him into the Accused's car, with intention to drive off with him. They however, met with strong resistance from PW1, assisted by his wife PW2. It was during the tussle and manhandling of the complainant by the Accused that the latter inflicted the gruesome injury to the complainant's private parts that was earlier described by the complainant and per Exhibit "A." It is the complainant's evidence that after he felt the extreme pain on the lower part of his body the Accused let go of him.

[32] The complainant stated that he did not see or know what the Accused used to injure him. He is only certain that the injury was inflicted after falling to the ground facedown with the Accused bending down over him. That the Accused inflicted the injury at this point finds corroboration in PW2's testimony that she saw the Accused while on top of the complainant, slip his hand inside the complainant's shorts, after which the complainant screamed. The court therefore rejects the suggestion by the Accused that the complainant's scrotum was slit open by freshly burnt grass on top of which he fell. The court is satisfied that the attack on the complainant and the assault were unlawful with no justification whatsoever.

[33] Elements of a crime of attempted murder are the same as of murder, short of fulfilment of death. An attempt to murder requires prove of *mens rea* or intention to murder and *actus reus* on the part of the Accused. In **R v S Mndzebele**², Nathan CJ as he then was, put the position as follows:-

"In order to support a conviction for attempted murder, it must be proved that in addition to a contemplation of risk to life plus recklessness, there was an intention at least to injure the complainant."
[underlining added]

² 1970-76 SLR 198.

[34] Description of the injury in the medical report lacked details to guide the court on whether or not it was life threatening. The doctor who examined the complainant and compiled the report was not available to give evidence, and PW3, Dr Ruhinda's evidence was of no assistance in this regard.

[35] The court finds that the offence of attempted murder has not been proved, instead, assault with intent to cause grievous bodily harm, which is a competent verdict on a charge of attempted murder is appropriate. See section 184(1) of the **Criminal Procedure and evidence Act/1938** which provides that:

“Any person charged with assault with intent to murder, may be found guilty of an assault with intent to do grievous bodily harm or common assault, if such be the facts proved.”

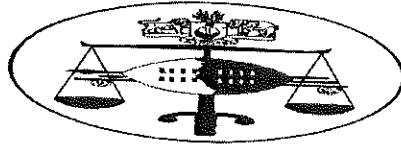
[36] The Accused is accordingly found guilty of assault with intent to cause grievous bodily harm.



D Tshabalala J
Judge

For the Crown : K Mngomezulu DPP's Chamber

*For the Accused : N Ndlangamandla Mabila Attorneys in Association with
N Ndlngamandla & S Jeje*



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In the matter between

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V

MANDLA NGWENYA

Neutral citation: *Rex v Mandla Ngwenya (398/14) [2020] SZHC 193 [2021]*
(15 October 2021).

CORAM : Tshabalala J

HEARD : 19/07/2022

DELIVERED : 21/07/2022

JUDGEMENT ON SENTENCE

- [1] The Accused has been convicted of assault with intention to cause grievous bodily harm, a lesser offence to the charge of attempted murder he was indicted for. It was alleged that on or about the 29th October, 2015, at or

near Jubukweni in the Hohho region, he unlawfully and with intent to kill, assaulted one Gcina Mnisi. He pleaded not guilty.

- [2] The matter was postponed for sentencing to allow counsel for the Accused to file submissions in mitigation of sentence. The Crown on its part informed the court that the Accused had no previous convictions.
- [3] In arriving at a sentence the court is obliged to consider the triad, namely the crime of which the Accused has been found guilty, the offender and the interests of society. The court is required in terms of the triad to try and balance evenly the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on society.
- [4] The following circumstances have been highlighted by Defence Counsel in favour of the Accused which the court takes into consideration:
 - 1) He is aged 53.
 - 2) Has nine children of school going age who depend on him.
 - 3) He is on high blood pressure and sugar diabetes treatment.
 - 4) He is self-employed and a bread winner at home.
 - 5) He was in custody for 6 days in respect of this matter before he was released on bail.
- [5] In consideration of the interests of society the court is aware of the need to protect others from individuals who take the law into their own hands. The court is concerned that offences of violence and unwarranted attacks on others are highly prevalent, on a scale equivalent to a pandemic. This is evident from numerous cases of serious assault cases the courts deal with on

a daily basis. Deterrent sentences are required in the circumstances. The court in **Rex v Lucky Manana**¹ referred to **Rex v Muzi Dlamini**² wherein the court remarked that it had “.....a constitutional duty to come to the assistance of members of the public who can’t defend themselves and impose appropriate sentences that will serve to curb this scourge.”

- [6] It is a huge challenge for the court to decide on an appropriate sentence that can serve to curb the scourge of violence and assaults in society. The nature of offence in this case was particularly violent and heinous.
- [7] Having considered the relevant elements guided by the triad, I am of the view that a partially suspended sentence with an option of a fine will be sufficient and serve as a deterrent to the Accused in particular from engaging in further acts of violence.
- [8] The Accused is sentenced as follows:

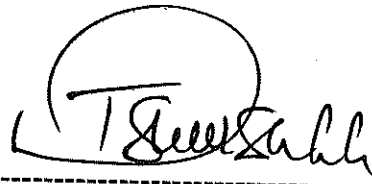
Emalangeneni Six Thousand (6000.00) fine, failing payment of fine to serve Six (6) years imprisonment. Half of the sentence is suspended for three (3) years on condition that the Accused is not convicted of an offence involving violence committed within the period of suspension.

ORDER

- [9] As per the request made on behalf of the Accused, his bail deposit of Emalangeneni three thousand (3000.00) cash may be converted to pay for the fine imposed in this matter.

¹ Case No. 325/2012.

² Case No. 126/2011.

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

D. Tshabalala J
Judge

*For the Accused: N. Ndlangamandla – Mabila Attorneys in Association with
N. Ndangamandla & S. Jeje*

For the Crown: K. Mngomezulu DPP's Chambers