



**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

HELD IN MBABANE

CASE NO: 158/22

In the matter of

REX

Versus

NTOKOZO MTHEMBU

Neutral Citation: *Rex vs Ntokozo Mthembu (158/22) [2023] SZHC 162
(26 June 2023)*

Coram: LANGWENYA J

Heard: 20-21 June 2023

Delivered: 26 June 2023

Summary: *Criminal law-Criminal Procedure-accused charged with attempted murder-the accused pleaded guilty to the charge-evidence of the complainant and of a doctor who explain the contents of the medical report was led-other evidence of witnesses who were present at the scene when the accused assaulted the complainant was heard by the Court-The Court also heard the evidence of a member of the community police-A statement of agreed facts was prepared and with the consent of both parties, was handed into Court-Section 155 of the Criminal Procedure and Evidence Act 1938 was invoked-the accused was accordingly convicted on the basis of his own plea and on the content of the statement of agreed facts-Evidence in mitigation of sentence was evaluated in light of the 'triad' principle-attempted murder found to be a serious offence-accused sentenced to a term of eight years imprisonment.*

JUDGMENT

Introduction

- [1] The accused was unrepresented by a legal practitioner. Before the commencement of trial, the accused was informed of his right to legal representation. He elected to conduct his own defence. The accused stated that he did not have money to hire the services of an attorney.
- [2] The accused was charged with the offence of attempted murder, it being alleged by the Crown that on 6 March 2022 at Macobolwane, Msunduza area in the Hhohho district, the accused unlawfully and intentionally attempted to kill Vusi Ronny Dlamini.

- [3] When the accused was arraigned he pleaded guilty to the crime charged. The Crown accepted the plea. In this vein, section 155 of the Criminal Procedure and Evidence Act applies and it states as follows:

‘That the accused may plead that he is guilty of the offence charged, or with the concurrence of the prosecutor, of any other offence of which he might be convicted on such indictment or summons.’

The Crown Case

- [4] The Crown led the evidence of the complainant to prove the commission of the offence. The complainant is Vusi Ronny Dlamini. He testified that he currently lives at Khorinte. In March 2022 he resided at Maqobolwane, Msunduzwa where he rented a flat. On 6 March 2022 he was asleep in his flat having locked and secured the place. While he slept, the accused kicked the door open and entered. The accused attacked and assaulted Mr Dlamini with a pick handle. The accused was carrying the pick handle and a knife when he entered Mr Dlamini’s flat. The accused did not use the knife. The accused assaulted Mr Dlamini with the pick handle on the neck and on the arm. The complainant fell to the ground and rose and tried to flee from his assailant. The accused left when the complainant tried to flee. When the complainant fled his flat, he met the accused. The accused was now carrying a bush-knife. The accused assaulted the complainant with the bush-knife. The accused left the scene and the complainant fled to a Dvuba homestead. Before the complainant reached the Dvuba homestead, the accused caught up with him and continued to assault him. The accused used both the sharp side and the flat side of the bush-knife to assault the complainant. The accused hacked the complainant on the head, at his backside and on both hands when the complainant tried to block the blows from the bush-knife.

- [5] The accused also used a belt to further assault the complainant. The complainant testified that he could not positively identify the weapons that were used by the accused to assault him.
- [6] The complainant testified that he was assaulted by the accused because of a handigas that was found in accused's flat. The accused also rented a flat on the same premises as the complainant. The complainant was accused of being a snitch by the accused person. The handigas was subsequently taken from the accused person's flat.
- [7] The complainant sustained injuries as a result of the assault by the accused person. He was admitted in hospital on 7 March 2022 and discharged on 12 March 2023. He testified that consequent to the injuries he now suffers from chronic headaches.
- [8] According to the medical report which was marked exhibit 'A', the complainant had bruises and swelling under the eyes and behind the eyes. He also had laceration of the scalp or a deep cut in the head. From the head injury, the bone could be seen in the laceration which measured about ten centimetres. The complainant also had a cut on the lower lip. He also presented with a significant depressed left frontal skull fracture on the left side of the forehead. The complainant also had soft tissue injury as a result of multiple signs of injury all over his body. The accused was taken to the theatre and the skull fracture was repaired on 10 March 2022. According to the doctor's evidence, the integrity of complainant's skull was compromised by the injuries inflicted on the head. A significant part of the left side of complainant's skull was weakened significantly.

- [9] The doctor explained that the injuries sustained by the complainant were severe. The integrity of the skull was affected and his brain tissue was affected. It was the doctor's evidence that the complainant's brain nerves were also affected as they will never be as good as the nerves of someone who did not suffer similar injuries. The court was told that the patient may suffer post-trauma issues like seizures, have a risk of infection as well as chronic headaches.
- [10] The medical report was handed in and marked exhibit 'A.'
- [11] The Crown further led the evidence of Andile Eric Kunene. He testified that on the night of 6 March 2022 he was in his rented flat asleep when he heard noise outside as if something was being banged against the wall. He then heard a person pleading for his life and saying 'please do not kill me.' Mr Kunene woke up and peeped through the window and saw that the person who was pleading for his life was on his doorstep. He then went outside carrying a torch. The person who was pleading for his life lay on Kunene's doorstep and was being assaulted with the flat side of a bush-knife. Mr Kunene pleaded with the accused to stop assaulting the complainant. The accused stopped the assault and left the scene. Mr Kunene noticed blood on the ground.
- [12] When the accused returned to the scene, Mr Kunene asked him to remove the complainant from Kunene's doorstep. The accused removed the complainant from Kunene's doorstep and continued to assault him with the flat side of a bush-knife. Mr Dvuba, a community police came to the scene and the accused left for some time but again returned to the scene. At the time the people present there formed a human wall around the victim. Mr

Kunene used his torch and saw the accused take another weapon. The accused then left the scene for good. The police were called.

- [13] Mr Nene Paulos Dvuba is a member of the community police at Msunduza. On the night of 6 March 2022 and at around 11pm he was woken by neighbours and told to go to a place where someone had been assaulted and was lying on the ground.
- [14] It was the complainant who lay in a pool of blood on the ground. Vusi was unresponsive when Mr Dvuba enquired how he got injured. While Mr Dvuba stood next to Vusi, the accused person came carrying a bush-knife. Mr Dvuba asked the accused what was going on and the accused person said he wanted to kill the complainant. Mr Dvuba said he then moved aside because the accused was carrying a bush-knife.
- [15] When the accused got to the complainant he kicked the unresponsive complainant and assaulted him with the flat side of a bush-knife and there was blood splatter as he carried on with the assault. Mr Dvuba stated that he saw all this because there was light coming from a Mabuza homestead which was near the scene where the victim of the assault lay. Dvuba heard the accused say he will only stop assaulting Vusi when Vusi was dead. The accused failed to hearken to Mr Dvuba when he reprimanded him.

The Statement of Agreed Fact

- [16] The Crown then presented a statement of agreed facts which was read into the court record by the Crown. The contents of the statement of agreed facts were confirmed by the accused.
- [17] The Court enquired from the accused personally if he was conversant with the contents of the statement of agreed facts and whether he had any

objections to it being admitted into Court as evidence. The accused said he was aware of the contents in the statement of agreed facts and he also pointed out that he had no objection to it being admitted into court as evidence.

- [18] The common cause factors are that Vusi Ronny Dlamini was asleep in his rented flat at Msunduza when the accused broke in through the door of the complainant's flat. The accused and the complainant were acquaintances as they were both renting flats at the same homestead.
- [19] When the accused entered into complainant's room, he assaulted the complainant with a bush-knife several times: once on the head, on the lower lip and on the backside and on the hands as the complainant tried to deflect the blows from the bush-knife. The complainant ran out of his flat.
- [20] The accused pursued the complainant and continued to assault him on his backside with the bush-knife. The accused further took off his belt and whipped the complainant while the latter was trying to flee from him. During the assault, the complainant was pleading with the accused not to kill him.
- [21] Even when the complainant had fallen on the doorstep of Andile Kunene's flat, the accused could not be deterred as he continued to assault the complainant. The accused also banged complainant's head against the wall of Andile Kunene's flat. Vusi Dlamini was bleeding profusely and he fainted in a pool of blood. Even when Vusi had fainted, the accused continued to assault him much against pleas from the people who had gathered at the scene telling him to stop what he was doing. The accused was assaulting

Vusi with kicks and with the flat side of the bush-knife while the complainant lay on the ground.

- [22] The accused momentarily left the scene and returned to continue where he had left off with the assault of Vusi. The accused was not deterred by pleas of people who were imploring him to stop what he was doing. Andile Kunene told the accused to remove the complainant from his doorstep, which he did. The accused dragged the unresponsive complainant for a distance of ten-fifteen metres on the ground to a dirt road. The accused continued with his assault of Vusi. He then stopped and left the scene. Mr Dvuba, a community police arrived at the scene and found Vusi lying on the ground in a pool of blood. Vusi was unresponsive at the time. The accused returned carrying a bush-knife and made utterances that he wanted to kill Vusi. He then kicked Vusi several times and further assaulted him with the flat side of the bush-knife. The accused stated that he will only stop his assault of the complainant when he was dead. The accused then left the scene and police were called and found that the complainant was unconscious.
- [23] Vusi was rushed to Mbabane government hospital where he was admitted and was treated. He was admitted on 7 March 2022 and was discharged on 12 March 2022.
- [24] The accused person surrendered himself to the police on 7 March 2022 at 0145hours. When the accused arrived at the police station's service centre, he was barefoot and was crying. The accused was carrying a bush-knife. The accused had blood stains on his hands and on his feet. The accused appeared drunk.

- [25] The accused admits the following: (a) that he acted intentionally when he inflicted the wounds on Vusi Ronny Dlamini; (b) that he acted unlawfully in the circumstances; (c) that he acted recklessly and that this posed a risk to the life of Vusi Ronny Dlamini; and lastly that all the injuries on Vusi Ronny Dlamini were in accordance with the doctor's findings as articulated in the medical report and were a result the accused person's unlawful act.
- [26] The parties agreed that the following exhibits be handed in as part of the evidence in this matter: the medical report, the photo album, the bush-knife, the belt, red and black t-shirt, blue pants and the statement of agreed facts.
- [27] The statement of agreed facts was signed by Ms Pipošiarova for the Crown and the accused signed on his own behalf.

Application of the law to facts

- [28] 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.
- [29] 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.
- [30] In this matter, the accused hacked the complainant with a bush-knife. The accused further used the flat side of a bush-knife to inflict injuries on the head, lip, hands and backside of the complainant. The doctor explained that the injuries were serious as they compromised the skull of the victim among

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

others. I am of the view that by assaulting the complainant with a bush-knife in a delicate part of the body, coupled with the accused person's utterances that he would not stop the assault before the complainant was dead, the accused foresaw that the injuries he inflicted on the complainant could have caused death, but the accused was reckless whether or not death resulted. The accused left the complainant for dead and did not assist him as he lay unresponsive on the ground. The accused clearly had the necessary intention to commit the crime charged.

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

'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.'

- [32] The *ratio* in *Huebsch* has been adopted by this Court in the following cases: *Henwood Thornton v Rex*³ and *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.'

² 1953 (2) SA 561 at 567.

³ 1987-1995 SLR 271 at 273.

⁴ 1987-1995 SLR 300 at 336.

- [33] I find the Crown witnesses were credible in their recollection of events of that day. Their versions of events is confirmed by the version of the accused as stated in the statement of agreed facts.
- [34] The accused, it would appear, assaulted Vusi Dlamini because he considered him to be a snitch. It appears that this is a case of snitches get stitches. The accused thought the complainant was responsible for telling people about the handigas that was found and subsequently taken from his flat. He was aggrieved that he was deprived of the handigas which he used to cook his food. Because the handigas had been taken away from him, he had to spend more money buying fast foods and that made accused very angry.
- [35] I am satisfied that the Crown has proved the commission of the offence beyond reasonable doubt. This I say based on the evidence before Court and the plea of guilty tendered by the accused. The accused is accordingly found guilty of the offence of attempted murder.

JUDGMENT ON SENTENCE

- [36] The accused person has been found guilty of the crime of attempted murder. It is my duty to now impose an appropriate sentence on the accused person.
- [37] In order to arrive at an appropriate sentence the Court is required to consider the broad judge-made guiding principles known as the *triad*⁵. In *S v Zinn*, the Appellate Division held that in imposing a sentence ‘what has to be considered is the *triad* consisting of the crime, the offender and the interests of society.’ These factors must be considered equally and one should not be heavily relied upon over the other⁶.

Principles underpinning the triad

- [37] Regarding the crime, the punishment imposed must not be disproportionate to the offence⁷.
- [38] In as far as the offender is concerned; the Court should consider the personal circumstances of the offender and ensure that the sentence fits the offender.
- [39] Lastly, the sentence imposed should be in the public interest⁸. Public interest requires that punishment imposed should: serve as a deterrent to other would-be criminals and to the offender; serve as a preventative measure to crime as well as to rehabilitate offenders⁹.

Personal circumstances of the accused

- [40] The accused is a first offender. He surrendered himself at the Mbabane police station on 7 March 2022 and has remained in custody to date. The

⁵ 1969 (2) SA

⁶ *S v Holder* 1979 (2) SA 70A

⁷ *Dodo v S* 2001 (3) SA 381 (CC) at paragraph 37.

⁸ *S v Makwanyane* 1995 (2) SACR 1 (CC)

⁹ *S v Rabie* 1975 (4) SA 855 (A) at 866 A-C.

accused has spent fifteen months in pre-trial incarceration. The accused is thirty-four years old. He is not married. He has three minor children who currently reside at their maternal grandparents' home. The eldest child is seven years old and the youngest is four months old. His partner, with whom he has the three minor children is a person of unsound mind. Prior to his incarceration the accused worked at a Car Wash where he was paid ten Emalangeni for every car he washed in a day. He supported his children with the little money he got from the work he did at the Car Wash.

- [41] The accused testified that he is sorry for committing the offence. To show that he is remorseful, the accused testified that he asked his family to help pay for Ronny's treatment and to apologise to Ronny on his behalf. The accused prayed for a lenient sentence and undertook to help Ronny once he is released from custody. He testified that since Ronny now suffers from constant headaches, he would like to help him financially.
- [42] The complainant testified before court during the trial. The accused did not show nor did he verbalise his remorse to the complainant. I am of the view that the accused is not so much remorseful as regretful for his conduct. The two are not synonymous. Remorse implies being cut to the quick for the plight of another while regret implies being sorry about one's conduct once caught out.
- [43] In this matter the facts speak for themselves. The complainant was asleep in his flat when he was violently attacked by the accused. The accused assaulted the complainant until he was unconscious. The accused refused to listen to people who were asking him to stop assaulting the complainant. While assaulting the complainant, the accused was heard saying he would only stop the assault once the complainant was dead. The accused left the

complainant for dead and did not render any assistance while the complainant lay on the ground unconscious.

[44] It is the accused person's evidence that he acted out of anger. The accused stated that because he stammers, it becomes difficult for him to express himself seamlessly especially when he is angry. He testified that because of the difficulty to express himself when angry he then loses self-control.

[45] During the trial I observed that the accused stammers when he speaks. That, in my view is a disability which the accused lives with. The disability referred to herein is not, however a licence to break the law. The accused was the aggressor. He found the complainant asleep in his room when he invaded it and assaulted him. If the complainant had done something wrong, the accused had some options open to him including reporting the matter to the police and asking other people to mediate. The accused chose the way of violence and acted unlawfully when he intentionally assaulted the complainant. His conduct cannot be allowed to go unpunished.

[46] The accused testified further that to show that he is remorseful, he cooperated with the police and handed himself over to them. He also admitted to committing the offence and did not waste the Court's time.

[47] A consideration of the accused person's personal circumstances is but one aspect of the *triad*. The crime must also be considered. The offence is one which involves visiting violence on the person of another. The complainant and the accused, the court heard both rented flats at the same homestead and their relationship was cordial prior to the commission of this offence. There was no need for the accused to violate the complainant's physical integrity in the manner he did instead of solving any misunderstanding amicably.

[48] Accordingly, such conduct warrants recognition in the determination of an appropriate sentence to reflect the natural indignation that the community would feel at conduct of that kind.

[49] I have tried to balance your personal circumstances against the interests and expectations of society and the seriousness of the crime. I take the view that in this case, retribution and deterrence should come to the fore and that personal circumstances of the accused person by themselves should necessarily recede into the background.

[50] Having regard to all the above factors and the submissions made by the Crown in aggravation of sentence and the submissions of the accused person to which I have given anxious consideration, I consider the following sentence to be appropriate:

[51] The accused is sentenced to eight years imprisonment. The period of fifteen (15) months spent in custody will be taken into account in computing the period of imprisonment.

[52] The rights of appeal and review were explained to the accused person.


M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the Crown:

Ms Jarmila Piposiarova

For the Defence:

Accused In Person.