

**IN THE HIGH COURT OF ESWATINI**  
**JUDGMENT**

**HELD AT MBABANE**

**CASE NO: 450/2019**

In the matter between:

**REX**

Versus

- 1. JUSTICE KHUZULWANDLE DUBE**
- 2. MPENDULO SIGUBEVU DLAMINI**
- 3. LINDA MADLOKOVU DLAMINI**
- 4. MUZI MZESHI TSABEDZE**
- 5. MZWANDILE KHUMALO**
- 6. SIFISO GININDZA**
- 7. CELUMUSA DLAMINI**
- 8. VUSI LUCKY MENDANE**
- 9. SILINDIMPILO SAMKELE SHABANGU**
- 10. MDUDUZI MOTSA**

Neutral Citation: *Rex vs Justice Khuzulwandle Dube & 9 Others (450/19)*  
*[2022] SZHC 28 ( 2<sup>nd</sup> March 2022)*

Coram:               LANGWENYA J

**Heard:** 8 September 2021; 20 September 2021; 22 November 2021; 14 February 2022; 15 February 2022; 2 March 2022.

**Delivered:** 2 March 2022.

**Summary:** *Criminal Procedure-accused charged with attempted murder-plead not guilty to attempted murder but guilty to assault with intent to cause grievous bodily harm-Crown accepts the plea-statement of agreed facts filed-accused found guilty on own plea and on basis of statement of agreed facts-evidence in mitigation of sentence evaluated in light of the 'triad' principle-assault with intent to cause grievous bodily harm a serious crime-accused sentenced to fined, failing payment, sentenced to imprisonment.*

*Criminal Procedure-the first accused convicted on two counts of contravening the Arms and Ammunition Act, 1964-accused fined, failing payment, sentenced to imprisonment.*

## **JUDGMENT**

### **Introduction**

- [1] Mr Gama, for the prosecution made an application for the withdrawal of charges against the eighth accused in the amended indictment. There being no opposition to the application by Ms Ndlangamandla and Mr Piliso for the accused persons, the application was granted.
- [2] Mr Gama further moved an application for the amendment of the charge in count two and count three to read that only the first accused was charged

with contravention of the Arms and Ammunition Act. There was no opposition to the application. The court granted the application.

- [3] The accused persons are charged with the offence of attempted murder. It is alleged that on or about 30 November 2019 and at or near Ngwenya village in the district of Hhohho, the said accused persons acting in execution of a common purpose did unlawfully and with intent assault Bhekithemba Gama and did thereby commit the said offence.
- [4] The first accused is further charged with contravening section 11(1) of the Arms and Ammunition Act 24/ 1964 as amended. It being alleged by the Crown that on or about 4 December 2019 the accused, not being a holder of a valid permit or licence to possess a firearm did wrongfully and unlawfully possess a 9mm browning pistol serial number 9328440 without a licence or permit and thus contravened the said Act.
- [5] The first accused is charged with contravening section 11 (2) of the Arms and Ammunition Act 24/1964 as amended. In that upon or about 4 December 2019 and at Ngwenya village, the accused, not being a holder of a valid permit or licence to possess a firearm did wrongfully and unlawfully possess three (3) 9mm rounds of ammunition without a license or permit and thus contravened the said Act.
- [6] When the first count of <sup>attempted</sup> murder was read to the accused persons, they each pleaded not guilty to attempted murder but guilty to assault with intent to cause grievous bodily harm. The pleas were confirmed by Ms Ndlangamandla and Mr Piliso for the accused persons. The Crown accepted the plea of guilty to assault with intent to cause grievous bodily harm tendered by the accused persons.

- [7] When count two and three were read to the first accused, he pleaded guilty to both counts.
- [8] The court was informed by the Crown that the parties had prepared a statement of agreed facts which was handed in to court and marked annexure 'C.' The medical report of the complainant in count 1 was also handed in as annexure 'A'; the ballistic report was marked exhibit 'B'. By consent, the following exhibits were handed into court as part of the Crown's evidence: a browning pistol with serial number 9328440 was marked exhibit '2'; a black bush-knife with a plastic handle was marked exhibit '1.'
- [9] After the accused pleaded guilty to the charges preferred against them, the court enquired from each one of the accused if they were conversant with the contents of the statement of agreed facts. They all stated that they were conversant with the contents of the statement of agreed facts and they associated themselves with it.

#### **The Statement of agreed facts**

- [10] The statement of agreed facts states that on 30 November 2019, the complainant-Bhekithemba Gama was enjoying alcoholic beverages at Ngwemabala 'Summertime' with his friends. The tenth accused-Mduduzi Motsa was also at the scene and enjoying his alcoholic beverages. The complainant and his friends asked Mduduzi to share his drinks with them. Mduduzi Motsa went inside the bar, bought himself some alcoholic beverage and left to board a BMW motor vehicle. The complainant and his lot asked Mduduzi why he had not re-filled the beer. Mduduzi was pursued by the people who were in complainant's company. Mduduzi was carrying a

firearm. The first accused Justice Khuzulwandle Dube grabbed the firearm from the tenth accused, pointed it up and fired three warning shots in the air. Complainant's group fled.

- [11] The complainant and his friends left 'Summertime' and went to Formula One bar. They continued to drink alcoholic beverages there. No sooner had they arrived at Formula One bar than they were joined by the accused persons. The accused persons were aboard a BMW, Golf 3 and a white Toyota Hiace combi. The combi driver had dreadlocks. The second accused, Mpendulo Sgubevu Dlamini pointed at the complainant and accused the complainant of killing his brother. At the time Sgubevu made the accusation he was carrying a bush-knife. When the complainant attempted to escape from the scene, he was accosted and cornered by the accused persons. The accused persons assaulted the complainant with open hands and with bush-knives all over his body. Sgubevu chopped complainant's middle finger with an axe. The complainant was immobilized with a rope, tied to the Toyota hiace combi and dragged by the combi along the road. The complainant sustained further injuries on his back as a result of being dragged by the combi along the road.
- [12] The complainant was subsequently bungled into the Toyota Hiace combi where he was heavily assaulted by the accused persons with bush-knives. When they were done assaulting the complainant, they left him at Ngwenya Town Board traffic circle.
- [13] The complainant was rescued by Thulani Dlamini, an off-duty police officer-who is a resident of Ngwenya. The police were called and they arrived and rushed the complainant to Mbabane government hospital. The complainant was admitted and he spent four days in hospital.

- [14] The medical report sets out the condition in which the complainant arrived in hospital. The report states that the complainant's clothes were soaked with blood. The complainant had suffered multiple abrasions and wounds at the back. He also had an open fracture on his left middle finger and an open fracture and lacerations on the skull.
- [15] I have accepted the medical report without the doctor handing it to court because Counsel for the Crown and the Defence consented to it being so admitted. Accordingly, the court accepts the medical report as *prima facie* evidence of the injuries sustained by the complainant when he was assaulted by the accused persons.
- [16] Following their investigations, the police arrested the accused persons, cautioned them in accordance with Judges' Rules and charged them. The first accused freely and voluntarily led the police to Vusi Lucky Mendane's homestead where exhibit 2 (browning pistol) was retrieved. The firearm was in a plastic bag next to the television inside Vusi Mendane's room. The firearm was sealed in the presence of the first accused and taken as an exhibit by the police.
- [17] The firearm was subsequently tested by a ballistic expert who found it to be serviceable. The rounds of ammunition were found to have a primer, cartridge case, bullet propellant and were designed and manufactured to be fired by centre firearm.
- [18] The accused persons admit that the injuries inflicted on the complainant were a result of their unlawful conduct.
- [19] I am satisfied that the Crown has proved the commission of the offences beyond reasonable doubt. This I say based on the evidence before me and

the pleas of guilty tendered by all accused persons. Accordingly, the accused persons are found guilty of assault with intent to cause grievous bodily harm.

[20] The first accused is found guilty of contravening section 11(1) of the Arms and Ammunition Act 24/1964 as amended being count 2 of the indictment.

[21] The first accused is found guilty of contravening section 11(2) of the Arms and Ammunition Act 24/1964 as amended being count 3 of the indictment.

[22] The Crown submitted that all the accused persons are first offenders; that they do not have previous convictions.

### **JUDGMENT ON SENTENCE**

[23] In mitigation of sentence, both counsel for the accused made submissions on their behalf. Mr Gama for the Crown also made his submissions.

*The First accused-Justice Khuzulwandle Dube*

[24] The first accused is employed as a cross-border truck driver. He is a first offender. He was arrested on 4 December 2019 and released on 9 December 2019. He was admitted to E3,000.00 (three thousand Emalangeni) bail which he paid. The accused pleaded guilty to the charge of assault with intent to cause grievous bodily harm and did not waste the court's time. It was urged that the fact that the accused pleaded guilty, that is a sign of remorse and appreciation that what he did was wrong.

[25] The personal circumstances of the first accused are: he has six minor children who are all dependent on him for support and maintenance. The accused handed himself over to the police. He is a Form 4 graduate. The court was implored to consider the circumstances in which the first accused

came to be in possession of the firearm. It was stated that the first accused got the firearm from Mduduzi Motsa and he was trying to come to the aid of Mduduzi Motsa when he fired warning shots at his attackers. It was submitted further that the first accused cooperated with the police.

- [26] In sentencing the first accused for the contravention of section 11(1) of the Arms and Ammunition Act, the court was urged to follow the judgment of *Sifiso Ndwandwe v Rex*<sup>1</sup> where the appellant was sentenced to five (5) years imprisonment with an option to pay E500.00 (five hundred Emalangeni). For the contravention of section 11(2), the appellant was sentenced to two years imprisonment with the option of paying E2,000 (two thousand Emalangeni) fine. The sentences were ordered to run concurrently.

*The Second Accused-Mpendulo Sigubevu Dlamini*

- [27] Ms Ndlangamandla submitted on behalf of the second accused that he is twenty-six years old; he is unemployed and has two minor children. He is a first offender. He is remorseful for his actions. It was submitted that the second accused's state of sobriety during the commission of the offence was suspect. The accused had been drinking the whole night and the incident took place in the morning when the accused were drunk.
- [28] The court was informed that the complainant and his lot were the aggressors. The complainant and his friends started the fracas which led to the assault of the complainant. This they did by drinking alcoholic beverage belonging to Mduduzi Motsa, the tenth accused herein. The complainant and his friends were cheeky to expect the tenth accused to further re-fill the drinks for them to drink some more.

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<sup>1</sup> (05/2012) [2012] SZSC 39 (30 November 2012).



- [29] The second accused was arrested on 3 December 2019 and was released on 24 December 2019. He paid E3,000.00 (three thousand Emalangeni) for his release.

*Accused 3-Linda Madlokovu Dlamini*

- [30] It was submitted on behalf of the third accused that as a sign of remorse he pleaded guilty and did not waste the court's time. He was twenty-nine years at the time of the commission of the offences. He has two minor children and is not in formal employment. He does piece jobs as and when they become available. He was released from custody on 24 December 2019 after he paid E3,000.00 (three thousand Emalangeni) bail. He is a first offender. It was submitted on behalf of the accused that the environment in which he grew up is a violent one. The implication is that he is a product of his violent environment.

*Accused 4-Muzi Mzesh Tsabedze*

- [31] The court was informed that the fourth accused was twenty-four years old at the time of the commission of the offences. He has four minor children. By virtue of pleading guilty he did not waste the court's time. He is remorseful.
- [32] He is a first offender. He was arrested on 3 December 2019 and was released on bail on 13 December 2019. He paid E3,000.00 bail to be released from pre-trial incarceration.

*Accused 5-Mzwandile Khumalo*

- [33] He is a first offender. He was arrested on 3 December 2019 and was released on bail on 24 December 2019. He paid bail of E3,000.00 (three thousand Emalangeni). At the time of the commission of the offences he was twenty-

nine years old. He is employed as a public transport driver and has three minor children.

*Accused 6-Sifiso Ginindza*

- [34] At the time of the commission of the offence, the accused was twenty-six years old. He has two minor children. He depends on piece jobs to support his children. He is a first offender.

*Accused 7-Celumusa Dlamini*

- [35] He is a first offender. He has four minor children. He is employed as a Deputy Sheriff. If incarcerated, it was submitted he would lose his job. He was twenty-seven years old at the time of the commission of the offence charged. He was arrested on 3 December 2019 and released on bail of E3,000 (three thousand Emalangen) on 13 December 2019.

*Accused 9-Silindimpilo Samkele Shabangu*

- [36] It was submitted on behalf of the ninth accused that she is twenty-six years old. She has two minor children. She does piece jobs to support her minor children. She was arrested on 11 December 2019 and released on bail of E1,000 (one thousand Emalangen) on 11 May 2020. She is the only accused person who spent the longest time in custody for the offence charged. The court was informed that she spent the longest time because she could not raise the amount of E3,000 (three thousand Emalangen) bail that she was initially admitted to.

*Accused 10-Mduduzi Motsa*

- [37] Mr Piliso for the tenth accused submitted that the accused is employed by Ubutfo eSwatini Defence Force (UEDF). He is married. He has four minor

children and he is the bread winner because his wife is unemployed. He is thirty-seven years old. It was submitted that the tenth accused was provoked by the complainant and his crew. The court was informed that the accused was arrested and charged with the offence of attempted murder in November 2021 and spent three days in custody before he was released on bail. He was admitted to E15,000.00 (fifteen thousand Emalangi) bail and had to pay E2,000.00 (two thousand Emalangi) and provide surety for the amount of E13,000.00

- [38] It was submitted that the accused is a first offender. The court heard that the accused pleaded guilty as a sign of remorse and did not waste the court's time.
- [39] An overarching submission was that the court must be lenient to the accused persons when passing sentence because the offences were not pre-meditated. The offences were committed on the spur of the moment when the sobriety of the accused persons was questionable as they had been imbibing in alcoholic beverages for an extended period of time-so the submission goes.
- [40] The court was implored to pass a sentence that will serve to rehabilitate the accused persons. It was argued that no useful purpose would be served by sentencing the accused persons to imprisonment considering their ages and the fact that prior to the commission of the offences charged, the accused persons were law abiding citizens.

#### **Crown's submission**

- [41] The Crown urged the court to impose sentences that will have a deterrent effect on the accused persons. Mr Gama for the Crown submitted that the court should consider that the accused used dangerous weapons to inflict

injuries on the complainant. It was the Crown's contention that the injuries were inflicted on a delicate part of complainant's body-the skull among others. The injuries inflicted on the complainant resulted in a permanent disability as his middle finger was cut. The court was urged to show its abhorrence to acts of violence by passing a sentence that will have deterrent effect.

- [42] The court was urged further to impose the maximum sentence permissible under the Arms and Ammunition Act to discourage resort to the use of firearms to solve misunderstandings.

#### **Brief analysis of evidence**

- [43] Evidence before this court is that except for the tenth accused, all the accused persons are young people in terms of the Youth Policy of this country which states that a young person is one whose age is up to thirty-five years old. The tenth accused was a young person in 2019 as he was thirty-four years old. He is thirty-seven years old now. The offence of assault with intent to cause grievous bodily harm was committed by the accused on a spur of the moment after the complainant and his group of friends provoked the tenth accused by insisting on him giving them his alcoholic beverages. That said, the reason for the commission of the offence is but one factor to be taken into account in the sentencing process.

- [44] I have also taken into account the fact that the accused persons were drunk when the offences that they have been convicted of were committed. Their judgment may have been impaired as a result. This, however is not to say a drunk person is at large to commit violent crime or any crime for that matter and expect to be treated with kid gloves. Every case must be judged on its

own facts. In some cases, being drunk and then committing an offence may serve as an aggravating factor in the sentencing process while in others it may be mitigatory. In this case, the latter is true.

[45] I have also considered that the accused pleaded guilty and saved the court's time.

[46] The court was informed that most of the accused persons have minor children that they support either from what they make out of piece jobs or from their employment as truck driver, public transport driver or as an employee of the Army. In most cases, accused persons submit that the court should pass a lenient sentence because they have minor children who are dependent on them. The reality though is that people should think about their dependants before they involve themselves in crime.

[47] I want to comment on the submission that the third accused committed the crime convicted of because he is a product of an area where violence and violent crime reign supreme. This submission shows that the third accused is not taking responsibility for his actions, preferring to blame his home area for his unlawful conduct. This, in my view shows that the third accused is failing to own up to what he did wrong in participating in the assault of the complainant.

[48] The crime of assault with intent to cause grievous bodily harm is a serious offence. The medical report lays in graphic detail the injuries that the complainant suffered in the hands of the accused. As a result of the injuries suffered, the complainant lost a part of his finger and had to be sutured on the head. The fact that the complainant was immobilized and tied to a moving vehicle which dragged him along the road makes this a most

gruesome if gratuitous assault. The accused persons used an assortment of dangerous weapons to assault the complainant in the nature of bush-knives and an axe. There is no doubt in my mind that the physical integrity of the complainant was violated by the accused persons in this regard.

[49] The ease with which people resort to violence at the slightest provocation is deprecated. The complainant in particular and society in general expect the courts to protect them from the rampant violent crime by passing appropriate sentences.

[50] Having regard to all the above factors and the submission of Counsel, I have no doubt that the following sentences are appropriate.

#### **Sentence**

[51] On the conviction for assault with intent to cause grievous bodily harm, the first accused Justice Khuzulwandle Dube is sentenced to a fine of E3,000.00 (three thousand Emalangeni) and failing payment thereof, he is sentenced to three years imprisonment. The period of six days spent in pre-trial incarceration from 4-9 December 2019 when he was released on bail will be taken into account in computing the period of imprisonment. The amount of E3,000.00 (three thousand Emalangeni) paid as bail will be taken as a fine for assault with intent to cause grievous bodily harm.

[52] On count 2 being the contravention section 11(1) of the Arms and Ammunition Act, 1964, the first accused is sentenced to a fine of E5,000.00 (five thousand Emalangeni) and failing payment thereof, he is sentenced to five years imprisonment. The period of six days spent in pre-trial incarceration from 4-9 December 2019 will be taken into account in computing the period of imprisonment.

- [53] On count 3 being contravention of section 11(3) of the Arms and Ammunition Act, 1964, the first accused is sentenced to a fine of E2,000.00 (two thousand Emalangeni) and failing payment thereof, he is sentenced to two years imprisonment. The period of six days spent in pre-trial incarceration from 4-9 December 2019 will be taken into account in computing the period of imprisonment.
- [54] The sentences shall run concurrently.
- [55] On the conviction for assault with intent to cause grievous bodily harm, the second accused Mpendulo Sgubevu Dlamini is sentenced to a fine of E3,000.00 (three thousand Emalangeni) and failing payment thereof, he is sentenced to three (3) imprisonment. The period of twenty-one (21) days spent in pre-trial incarceration from 3-23 December 2019 will be taken into account in computing the period of imprisonment. The amount of E3,000.00 (three thousand Emalangeni) paid by the accused as bail will be taken as a fine for this conviction.
- [56] On the conviction for assault with intent to cause grievous bodily harm, the third accused Linda Madlokovu Dlamini is sentenced to a fine of E3,000 (three thousand Emalangeni) and failing payment thereof, he is sentenced to three (3) years' imprisonment. The period spent in pre-trial incarceration will be taken into account when computing the period of imprisonment. The amount of E3,000.00 (three thousand Emalangeni) paid as bail will be taken as a fine for this conviction.
- [57] On the conviction for assault with intent to cause grievous bodily harm, the fourth accused Muzi Mzesh Tsabedze is sentenced to a fine of E3,000.00 (three thousand Emalangeni), and failing payment hereof, he is sentenced to

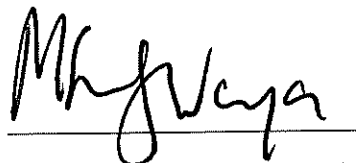
three (3) years' imprisonment. The period of ten days spent in pre-trial incarceration from 3-13 December 2019 will be taken into account in computing the period of imprisonment. The amount of E3,000.00 (three thousand Emalangeni) paid by the accused as bail will be taken as the fine for this conviction.

- [58] On the conviction for assault with intent to cause grievous bodily harm, the fifth accused Mzwandile Khumalo is sentenced to a fine of E3,000.00 (three thousand Emalangeni), and failing payment hereof, he is sentenced to three (3) years' imprisonment. The period of twenty-one (21) days spent in pre-trial incarceration from 3-24 December 2019 will be taken into account in computing the period of imprisonment. The amount of E3,000.00 (three thousand Emalangeni) paid by the accused as bail will be taken as the fine for this conviction.
- [59] On the conviction for assault with intent to cause grievous bodily harm, the sixth accused Sifiso Ginindza is sentenced to a fine of E3,000.00 (three thousand Emalangeni), and failing payment hereof, he is sentenced to three (3) years' imprisonment. The period of twenty-five days spent in pre-trial incarceration from 3-27 December 2019 will be taken into account in computing the period of imprisonment. The amount of E3,000.00 (three thousand Emalangeni) paid by the sixth accused as bail will be taken as the fine for this conviction.
- [60] On the conviction for assault with intent to cause grievous bodily harm, the seventh accused Celumusa Dlamini is sentenced to a fine of E3,000.00 (three thousand Emalangeni) and failing payment hereof, he is sentenced to three (3) years' imprisonment. The period of ten days spent in pre-trial incarceration from 3-13 December 2019 will be taken into account in



computing the period of imprisonment. The amount of E3,000.00 (three thousand Emalangeni) paid as bail will be taken as the fine for the assault with intent to cause grievous bodily harm.

- [61] On the conviction of assault with intent to cause grievous bodily harm, the ninth accused Silindimpilo Samkele Shabangu is sentenced to a fine of E1,000.00 (one thousand Emalangeni) and failing payment hereof, she is sentenced to three years' imprisonment. The period of five months spent in pre-trial incarceration from 11 December-11 May 2020 will be taken into account in the computing the period of imprisonment. The amount of E1,000.00 (one thousand Emalangeni) paid as bail will be taken as the fine for the assault with intent to cause grievous bodily harm.
- [62] On the conviction of assault with intent to cause grievous bodily harm, the tenth accused Mduduzi Motsa is sentenced to a fine of E3,000 (three thousand Emalangeni and failing payment hereof, he is sentenced to three years' imprisonment. Any period spent in pre-trial incarceration by the accused will be taken into account in computing sentence. The amount of E2,000.00 (two thousand Emalangeni) paid as bail will be taken as part-payment of the fine for assault with intent to cause grievous bodily harm.



M. S. LANGWENYA

**JUDGE OF THE HIGH COURT**

**For the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> 5<sup>th</sup> 6<sup>th</sup> 7<sup>th</sup> and 9<sup>th</sup> accused:**

**Ms N. Ndlangamandla**

**For the tenth accused:**

**Mr N. Piliso**

**For the Crown:**

**Mr S. Gama**