

**IN THE HIGH COURT OF ESWATINI**

HELD AT MBABANE

CRIMINAL CASE NO. 440/2019

In the matter between

REX

V

DUMSANI DOUGLAS XABA

ACCUSED

Neutral citation: *Rex v Dumsani Douglas Xaba (440/19) [2022] SZHC 72 [2022]*  
(29 April 2022).

Coram : Tshabalala J

Heard : 11/10/2021 – 26/04/22

Delivered : 29/04/2022

***Summary:** criminal law: Faced with attempted murder charge the accused claimed that he used the complainant as a shield to block bush-knife attacks from his assailant. However, overwhelming evidence shows that after accused's assailant fled, the accused turned on the complainant who tried to intervene and relentlessly inflicted life-threatening injuries on him with a bush-knife. Legal requirements for attempted murder and the requisite mens rea are discussed.*

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## JUDGEMENT

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- [1] The Accused pleaded not guilty on an indictment for attempted murder. It is alleged that he unlawfully and intentionally, on the 2<sup>nd</sup> October 2019, at or near Damaseku in the Shiselweni region, and with intent to kill, assaulted Mlungisi MTV Zwane by hacking him with a bush-knife several times on the head. Previous advice for Accused's rights to legal representation was repeated and he chose to conduct his defence.
- [2] PW1 who is the complainant in the matter, Mlungisi MTV Zwane testified that on the material day he and his cousin Mpendulo Zwane (PW5) and fellow villagers including Smangele Dlamini (PW2), Zodwa Shabangu and others were imbibing traditional beer at a Mamba homestead. A misunderstanding arose between PW5 and the Accused, with the former being the aggressor. PW5 told PW1 that he wanted to fight the Accused because he heard that the Accused had quarrelled with one Zodwa. It emerged later in evidence that Zodwa was PW5's lover.
- [3] PW1 and PW5 left for home after the Accused had left ahead of them. When the two walked down the hill, Simangele (PW2) entered a Xaba homestead on the left of the pathway, while PW1 and PW5 proceeded on their way. However, they later re-traced their steps back for PW1 at the instance of PW5 claiming that he needed to fetch something from the women. It turned out that the real reason was that PW5 wanted to confront the accused. PW5 confirmed this in his own evidence.

- [4] PW1 and PW5 met up with the Accused and PW5 attacked the accused, and PW1 intervened by pushing the Accused away to separate the two. PW5 produced a bush-knife and tried unsuccessfully to hack the Accused. The bush-knife fell as a result of PW1 pushing the Accused away from harm's way. PW5 fled the scene, leaving PW1 with the Accused.
- [5] The Accused turned to PW1 and hit him with a stone on the back of his head, and then proceeded to hack the witness with a bush-knife several times on the head until PW1 passed out. He later gained consciousness at Mbabane government hospital.
- [6] Before passing out PW1 heard Simangele (PW2) who was in the company of the accused, asking the accused why he was hacking PW1 who had no differences with (Accused).
- [7] PW1 was admitted at hospital where he regained consciousness towards the end of November 2019. He was eventually discharged and thereafter recorded a statement at Dumaseku police station. He said that he had not fully recovered from the serious injuries he sustained. His bones hurt whenever the weather is cold. He totally lost sight of his left eye while the right eye cannot see properly. PW1 showed visible healed scars on his head which he said was from the stone attack by the accused.
- [8] PW1 identified a black bush-knife exhibited in court as the one that was used to assault him.
- [9] Rights of Accused and the purpose of cross examination were explained. He put up a probing cross examination of PW1. It came out of Accused's cross

examination that the Accused interpreted PW1's act of pushing him away at the time that PW5 attacked him as attack by PW1 as well. He believed that PW5 and PW1 ganged up against him. PW1 explained that he had no issues with the Accused or anyone, and pointed out that PW5 lied to him about his decision for going back on their way home.

[10] The Accused disputed PW1's evidence and denied ever assaulting him with a bush-knife. He claimed that it was PW5 who hacked PW1, mistaking him for the Accused. The Accused admitted only manhandling the witness. Accused further suggested that PW1 was mistaken that he was hacked by the Accused due to the fact that it was dark and he could not see properly. The witness stood by his evidence that he made no mistake regarding identity of his assailant.

[11] PW2, Simangele Dlamini a 41-year woman, was Accused's sister-in-law. She was one of the people who were drinking at Mamba's and later left with others in the evening. She assisted her aunt one Dindi Dlamini (DW2) who was too drunk, with her baby. She entered Dindi's house and put the latter's baby to bed.

[12] While PW2 was in Dindi's house. The Accused came in the house running, took a bush-knife from the corner of the house and left immediately. PW2 also left. It is her evidence that she joined the Accused and left with him. They met up with PW1 and PW5. She saw PW5 attacking Accused with a bush-knife while PW1 punched the Accused. She could not ascertain who got injured because it was evening. She did not see who hacked PW1. After being attacked Accused left the scene. PW2 showed reluctance to testify and the crown stated that she was deviating from her evidence.

- [13] After a short adjournment, PW2 informed the court that she had been threatened with death and death of her children if he disclosed what happened in court. She said the threats came from Dindi, the elderly woman she helped with a baby, who later testified as DW2. Asked why she did not report death threats to the police she said it did not cross her mind. PW2 told the court after the adjournment that she was ready and comfortable to give full and correct evidence on what she witnessed. The court reminds itself that due to this episode it ought to approach the evidence of PW2 with a degree of caution. This means that in accepting her evidence on key issues such evidence should be corroborated by other credible evidence.
- [14] PW2 continued with evidence and corrected herself on what transpired between the Accused and PW1. She stated that she was in the company of the Accused after he retrieved a bush-knife from Dindi's house. She reiterated that PW5 attacked the Accused with a bush-knife while PW1 punched the Accused with a fist. Thereafter the Accused hacked PW1 with a bush-knife on the head several times. The Accused fled the scene after hacking PW1.
- [15] PW2 raised alarm, called Zodwa Shabangu. She and Zodwa waited at the scene until arrival of police at 21:00 hours. PW2 and Zodwa assisted police to load PW1 into their car. He was in a bad condition.
- [16] PW2 stated under cross examination that prior to fetching the bush-knife from Dindi's house the Accused waited at the gate while PW2 went in Dindi's house with the baby. Further that at that stage PW5 was in the vicinity brandishing a bushknife, and this prompted PW1 to ask what has the Accused done wrong, and no one responded.

- [17] PW2 further stated under cross examination that she asked Accused why he was taking the bush-knife and his response was that PW5 was being insolent.
- [18] PW2 denied Accused's suggestion that she arrived later at the scene and did not witness the incident, having arrived after it was over. PW2 insisted that she arrived at the scene with the accused and saw what happened.
- [19] PW2 denied Accused's version put to her under cross examination that PW5 hacked PW5, mistaking him to be the Accused. She denied that the Accused used PW1 as a shield against to block the blows by PW5.
- [20] PW3, Constable Makhosonke Ngcamphalala was stationed at Hlathikhulu police station. He received a report of the incident at 20:12 hours while patrolling in town. He and Constable Magwaza proceeded to the scene at Mpini where they found two women – PW2 and one Zodwa Shabangu, who showed them a male lying in a pool of blood, with head injuries and unresponsive.
- [22] PW3 found a bush-knife next to the victim. The injured man was taken to Hlatikhulu hospital and the bush-knife taken as an exhibit. He said it was the same the bush-knife was the same that was displayed in court.
- [23] PW4 Dr Grace Ruhinda was based at Mbabane government hospital as a medical doctor and specialist surgeon. He was responsible for trauma patients, and conducts surgeries. He referred to a medical report completed and signed by him after examining PW1 who was brought to Mbabane on the night of 03 October 2019.

- [24] According to the doctor, PW1 sustained life-threatening injuries. He was kept at ICU with assisted breathing. His punctured left eye was beyond repair and therefore removed. The right eye had haematoma. A Medical report completed by PW4 was admitted in evidence as exhibit "A".
- [25] PW5 Mpendulo Zwane, was a resident of Timpandzeni, Lavumisa, earned a living by growing dagga. PW1 was his nephew, and the Accused a cousin to his (PW5) mother.
- [26] On the 02 October 2019 he was drinking traditional brew at a Mamba's homestead, present were PW1, PW5 and others when dusk came he left together with PW1, Ncamiso Sihlongonyane, Alfred Sihlongonyane, Zodwa Gamedze and PW2. The Accused, in the company of Dindi who carried a baby on her back, followed after PW5 and company. Later the Accused and others caught up with PW5's group.
- [27] PW2 carried Dindi's baby because Dindi was too drunk. Dindie, Simangele and Accused entered the gate to Dindi's the homestead. PW5 remained at the gate with Zodwa. Accused came out of the homestead and slapped PW5 and Zodwa with an open hand. PW5 fled from the Accused and caught up with PW1 and others who were waiting for him. PW5 related to them that the Accused assaulted him and Zodwa.
- [28] PW5 and PW1 went back to where the Accused was. He wanted to find out from the Accused the reason for assaulting him. They came upon the Accused and PW2. PW5 inquired from the Accused why he assaulted him. In response the Accused assaulted him again, and PW5 retaliated. They exchanged blows with Accused, who overpowered him. PW5 retreated and pulled out a bush-knife from his backpack and went back to Accused. PW5

tried to hack the Accused but slipped and fell, and his bushknife fell as well. The Accused drew his own bushknife from the waist and chased after PW5, while PW1 followed PW5.

[29] PW5 heard PW2 calling Zodwa's name for about three times, saying that Zodwa should hurry up and that the Accused had just hacked PW1. PW5 proceeded to his home.

[30] PW5 stated that on that day he was sent by his uncle to harvest herbs, and that he carried the bushknife in his backpack for that purpose.

[31] PW5 denied under cross examination, Accused's version that after Accused blocked blows from PW5's bushknife the Accused grabbed PW1 and used him as a shield, and that PW5 hacked him mistaking him for the Accused. PW5 stuck to his evidence.

### **Defence Case**

[32] After close of the crown case the court explained the rights of the Accused and he understood. He elected to give evidence under oath and called one witness.

[33] The Accused gave evidence as DW1 to the effect that he did not hack PW1 with a bushknife but PW5 hacked him by mistake believing that he was the Accused. It is Accused evidence that he did not carry any bush-knife on the evening in question.

[36] Accused's version of events which he also put to Crown witnesses when he cross examined them, is that the complainant together with PW5 approached



him uttering death threats against him. They assaulted him with fists and he fought back. PW5 produced a bushknife and landed a blow on Accused's stomach, but only scratched his jacket surface. PW5 aimed another bushknife blow on Accused's head which he warded off, sustaining a minor cut on the head.

[] As the attack got serious Accused grabbed PW1 and used him as a shield against further blows from PW5, resulting in PW5 hacking PW1 under mistaken belief that PW1 was the Accused.

[37] According to the Accused, PW5 fled the scene when he realized that he had cut his brother. Accused said he went to report PW5's attack on him to community police, one Celani Sihlongonyane. Accused declined Sihlongonyane's advice to go and report the matter to the national police, because PW5 was his relative. Accused also reported PW5's assault to his aunt in 2020 after the death of Sihlongonyane in the same year.

[38] The Accused went back to work at Phongolo in RSA but was arrested along the way in connection with alleged assault of a person at Damaseko. Accused was arrested in 2019, a month after incident involving PW5 and PW1.

[39] Accused denied under cross examination that he fetched bush-knife from Dindi's house as stated by PW2.

[40] DW2 Dindi Dlamini, 70 years old, testified that the crown witnesses, Accused and others were at a drinking hole enjoying alcohol. She herself was drunk and had a baby. She admitted that she was helplessly drunk and received help with her baby from PW2. DW1 denied that the Accused took

a bush-knife from her house. She however conceded that she was not in the house and could not have seen what the Accused did.

## **Findings**

- [41] The following facts are common cause: That the Accused, the complainant and all the witnesses who testified were residents of Damaseku with the exception of the PW5 Mpendulo Zwane who told the court that he hailed from neighbouring area of Timpandzeni. PW5 said he ventured to Damaseku on a mission to harvest medicinal herbs for his uncle, after which he decided to go to the drinking spot where he hooked up with his cousin, PW1 and others for a drinking spree. It is also common cause that they were all drunk at the end of the day when they left for their homes.
- [42] Prior to leaving the drinking place PW5 had expressed to PW1 his desire to fight the Accused, which he did much later. Accused's evidence and that of the Crown witnesses converges on some aspects and differs on some. At some stage during the long walk home, PW5 sought out the Accused, made a u-turn together with PW1 and went back to where the Accused person was.
- [43] According to PW5 the reason he went back to the Accused was that Accused had earlier slapped him and his girlfriend Zodwa. He wanted to find out from the Accused why he assaulted them.
- [44] It is apparent that while PW5 was baying for Accused blood, PW1 was merely tailing behind him and had no issues or intention to fight with the Accused. When PW5 pulled out a bush-knife PW1 pushed the Accused away to separate them. However, the Accused interpreted PW1's conduct

as an attack on him. This may offer possible explanation for Accused's assault of PW1 after PW5 fled the scene.

[45] Accused's version that PW1 was hacked by PW5 is improbable as it is clear that PW5 fled immediately falling and losing hold of his weapon. It is apparent that the Accused proceeded to hit PW1 with a stone before hacking him with a bush-knife.

[46] PW1's evidence that he was hacked by the Accused is corroborated by that of PW2 who was at the scene and witnessed the scuffle from beginning to end.

[47] The court finds that Accused's evidence that he used PW1 as a shield and that PW5 hacked him as false and must be rejected as devoid of merit. Even though the incident happened at dusk and visibility was low the court notes that the three people involved, that is PW1, PW5 and Accused were in close proximity with each other. The fact that PW5 fled the scene as soon as his first attempt to chop the Accused was aborted and after he lost hold of his weapon, leaves no doubt that as to who assaulted PW1.

[48] It is also apparent that the Accused was armed with a bush-knife himself. His denial that he armed himself with a bush-knife at Dindi's house is a bare denial. PW2 had no reason to implicate him falsely in that regard.

[49] I am satisfied with the evidence and that it is proven that the Accused viciously assaulted the complainant. The question is whether the evidence establishes intention on his part in the light of the observation that he perceived PW1 to be in collaboration with PW5 in the attack against him.

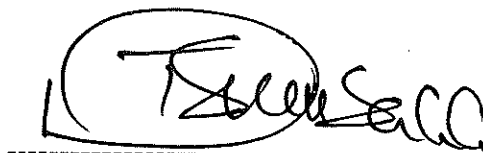
- [50] The Accused chose to deny liability for the attack. He did not raise self defence against PW1. Even if he did claim to have acted in self-defence would it be sustainable given that he continued to attack PW1 when he clearly posed no threat to him.
- [51] It is my view that the offence of attempted murder has been established. This is because even if in the mind of the Accused, the complainant was part of the problem he nonetheless used excessive means to deal with him. The amount of force, the nature of the weapon he used and part of the body he inflicted injuries on, that is the head which is a delicate area, are all considered to determine Accused's state of mind in the commission of the offence.
- [52] As the court stated in **Rex v Mandla Eric Mkhonta**<sup>1</sup> per MCB Maphalala as he then was, "*it is now trite law that in order to support a conviction for attempted murder, there need not be a purpose to kill proved as an actual fact. It is sufficient if there is an appreciation that there is same risk to life involved in the action contemplated coupled with recklessness as to whether or not the risk is fulfilled in death. Only mens rea in the form of dolus eventualis is required for purposes of attempted murder, and mens rea in the form of dolus directus is not required.*"
- [53] There can be no doubt that when the Accused hacked the complainant several times, he foresaw the possibility that he might die, but he was reckless whether or not he died. The doctor's evidence shows that the injuries inflicted on the complainant were serious and life-threatening.

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<sup>1</sup> Criminal Case No. 422/10

[54] The law applicable to support conviction for attempted murder is that an intention to kill need not be proved as an actual fact, it being sufficient that there was an appreciation that there is a risk to life in the action embarked upon. Such appreciation should be coupled with recklessness whether or not the death eventually occurs. This was stated by the court in **Rex v Sikelela Brian Myeni** <sup>2</sup> in reference to statement made in **Rex v Huesbch** <sup>3</sup>.

[55] From the foregoing the court finds that the Crown has proved its case for attempted murder beyond a reasonable doubt. The Accused is found guilty as charged.

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

D Tshabalala  
Judge

For the Crown: Mr SM. Dlamini – DPP's Chambers

Accused in person

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<sup>2</sup> Criminal Case No. 25/2012

<sup>3</sup> 1953 (2) SA 561 at 567