



**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

HELD AT MBABANE

CASE NO: 13/21

In the matter between

REX

Versus

MAJAHENDLALAMBI M. MOTSA

Neutral Citation: *Rex v Majahendlalambi Motsa (13/2021) [2023] SZHC
198 (24 July 2023)*

Coram: M. S. LANGWENYA J

Heard: 11-12 April 2023; 13-14 June 2023; 24 July 2023

Delivered: 24 July 2023

Summary:

Criminal law-Criminal Procedure-Onus on the Crown to prove beyond reasonable doubt that the accused shot deceased and complainants with the intention to kill the deceased and to attempt to kill complainants-Crown discharged that onus-accused found guilty of murder and two counts of attempted murder.

JUDGMENT

- [1] The accused person is charged with one count of murder and two counts of attempted murder.
- [2] On the first count of murder, the Crown alleges that on 15 January 2021 and at Madelezini area in the Hhohho district, the accused unlawfully and intentionally killed Gift Shongwe by shooting him with a 12 Bore shotgun and did commit the crime of murder.
- [3] On the second count of attempted murder, the Crown alleges that on 15 January 2021 and at Madelezini area in the Hhohho district, the accused unlawfully and with intent to kill, shot Mthobisi Petros Thwala on the left hand with a 12 Bore shotgun and did commit the crime of attempted murder.
- [4] On the third count of attempted murder, the Crown alleges that on 15 January 2021 and at Madelezini area in the Hhohho district, the accused unlawfully and with intent to kill, shot Maxwell Mloni Shongwe with a 12 Bore shotgun and did commit the crime of attempted murder.
- [5] The accused pleaded not guilty to all three counts.
- [6] The Crown led the evidence of six witnesses to prove its case. Documentary evidence in the nature of the post mortem report and the album compiled by

the scenes of crime officer was, by consent of both parties tendered and entered as part of the evidence of the Crown. The accused person gave evidence in support of his defence and did not call witnesses.

The Crown's Case

- [7] On 1 January 2021 PW1 Bandile Somandla Nkosi and his friends¹ were at *kagogomkhulu* store at Madelezini when they received a report from Nelisiwe Mavuso that she had been raped by Nganono. Nganono is a younger brother of the accused. Nelisiwe Mavuso is Mthobisi Petros Thwala's aunt.
- [8] After PW1's group received the report, they searched for Nganono, found him and they assaulted him for allegedly raping Nelisiwe Mavuso. The Court heard that Nelisiwe Mavuso is a person of unsound mind. Nganono is said to have denied raping Nelisiwe and stated that the sexual intercourse between them was consensual.
- [9] On 14 January 2021, Bandile was with Phiwa Mavuso at eNdlalambi when he met Gift Shongwe and Petros Mavuso. Gift told Bandile that he had been assaulted by Nganono, Majaha and Khaya.
- [10] The evidence of PW1 Somandla Nkosi, PW2 Mthobisi Petros Thwala and PW3 Maxwell Mlondi Shongwe is corroborative that on 15 January 2021 they went to bath at Mlumati river. They were with a group of friends namely- Phiwa Mavuso, Petros Mavuso, Maxwell Shongwe, Bandile and Mthobisi Thwala and Gift Shongwe. While the Crown witness named herein were at Mlumati river, Majahendlalambi, Nganono and Khaya arrived at the river aboard a motor vehicle. Immediately Gift saw the accused person and

¹ Mancoba, Wandile, Phiwa, Zwelakhe Mavuso, Gift Shongwe, and Mthobisi Petros Thwala.

his companions he went and confronted them. Gift assaulted the accused person with a fist. The accused person, Nganono and Khaya assaulted Gift with open hands and with fists. When PW1 Bandile and his friends saw that Gift was being assaulted they went and joined the fray and fought on the side of Gift. It was while the fight was ongoing that Nganono took out an axe from the car boot. Gift and his group fled the scene. While carrying the axe, Nganono chased Phiwa Mavuso. Nganono was outpaced by Phiwa Mavuso. The group that was on the side of Gift fled and waited in the forest. While in the forest, they saw Majaha and his companions leave scene driving the vehicle to Majaha's parental home.

- [11] Gift and his friends decided to go home. It was while they were walking home that they remembered that they had left their clothes, cell phones and other personal effects on the river banks. Maxwell and Gift decided to go back to the river to get their property. The rest of the group joined them. While walking to the river, Gift Shongwe, Mthobisi Thwala, Maxwell Shongwe and Petros were ahead of the pack while PW1 Bandile and Phiwa followed at a distance. Bandile and Phiwa later decided to stay behind while the rest of their friends walked to the river. It was not long before PW1 and Phiwa heard gunfire. No sooner had they heard the firearm being fired than Mthobisi, Maxwell and Petros came running in full flight in the direction of Bandile and Phiwa. Bandile and Phiwa fled. PW1 noticed that Mthobisi was injured on the left hand. Bandile and his friends wrapped Mthobisi's injured hand with a t-shirt to prevent further bleeding. Bandile also noticed that Maxwell was also injured and that his injury was minor. According to Bandile, Maxwell was injured on the side of the neck. Bandile's group fled

and went to Maxwell's home where they found Maxwell's father. Mthobisi was taken to the hospital by Maxwell's father.

- [12] Maxwell, Bandile and Phiwa went to the scene of crime where they found Gift Shongwe lying on the ground and he was bleeding. Gift lay on the ground face-down. Bandile and his friends later recorded statements with the police.
- [13] During cross examination, Bandile denied that Gift Shongwe was present at *kagogomkhulu* store when they assaulted Nganono on 1 January 2021. This evidence, notably is discounted by PW2 Mthobisi Petros Thwala. Mthobisi Thwala testified that Gift Shongwe was present when Nganono was assaulted on 1 January 2021. It was suggested to Bandile during cross examination that Gift was assaulted by Nganono in retaliation for the assault of Nganono on 1 January 2021. Bandile conceded that Gift confronted Nganono along the river bank of Mlumati river on 15 January 2021 to avenge himself for the assault he had suffered in the hands of Nganono on 14 January 2021.
- [14] Bandile, Mthobisi and Maxwell all denied during cross examination that their group was bullying the accused and his brothers. It was also denied by Bandile that his group outnumbered the accused and his companion when they fought along the Mlumati river bank. Bandile denied that the accused was pushed into a mud pit while the fight was ongoing on 15 January 2021.
- [15] The evidence of Bandile, Mthobisi and of Maxwell is that when they agreed that they were returning to the river to collect their personal effects, they walked past a community garden where they armed themselves with ring-forces in case they met the accused and his companions on their way back to

the river. This they did because there were unsure if the accused and his companions were armed with more weapons other than the axe they were wielding during the fight along the Mlumati river.

[16] The Crown witnesses were adamant that Nganono retrieved an axe and not just the axe handle/ *umphini* of the axe from the vehicle. During cross examination it was suggested to Bandile that after the accused and his companions were overpowered by Bandile's group they left the scene and hid at a certain homestead while Bandile's group armed themselves with ring-forces. This was denied by Bandile. Bandile denied further that during the fight of 15 January 2021 Mthobisi was armed with a knife and that Mthobisi stabbed the accused in the foot. According to Bandile they joined in the fight of 15 January 2021 to help Gift who had been assaulted by the accused and his brothers on 14 January 2021.

[17] PW2 is Mthobisi Petros Thwala. He is the complainant in count two. He was present on 15 January 2021 at Mlumati river when Gift confronted the accused and his brothers about why they had assaulted him (Gift) on the previous day. After the fight PW2 saw the accused and his companions leave the river aboard the vehicle and they went to their parental home. Soon after, PW2 says they saw the accused person's vehicle approach the place where they were at and they fled taking the shortest route out of the area. They reached a community garden where they took ring-forces and walked to the river to collect their personal effects.

[18] Along the way to the river they saw Celumusa Mpila standing next to the vehicle of the accused. Celumusa called them. At the time Celumusa called them, Mthobisi was with Gift, Maxwell, Petros, Phiwa and Bandile. They went to Celumusa. When Celumusa was talking to Gift, the accused alighted

from the vehicle. The accused person was carrying a firearm. Mthobisi and the rest of his group fled the scene. While they fled a gunshot was fired once. PW2 was injured on the hand and was taken to hospital. A bullet was removed from his hand.

- [19] During cross examination it was suggested to PW2 that he and his group attacked the accused and his companions with iron rods; that the accused fired a warning shot to disperse them. PW2 stated that when the accused pointed the firearm at them, they were talking to Celumusa and Gift had his back to the accused as he spoke to Celumusa. PW2 testified further that the accused intended to commit the crimes charged because he went home and fetched the firearm which he used to shoot them. This evidence was not disputed. PW2 testified that when Celumusa called Gift, PW2 was in front of Gift. When the gunshot was fired, PW2 fell on top of Gift out of shock. PW2 only fled the scene after the accused had driven off and left the scene.
- [20] During cross examination, Mthobisi denied that they were armed with the ring-forces because they wanted to attack the accused and his brother. Mthobisi stated that when they came carrying the ring-forces they used an alternative route back to the river and they were blocked by the accused whose aim was to attack them. It is the evidence of Mthobisi during cross examination that the accused knew that PW2's group would return to the river that is why he went to his parental home and armed himself with a firearm. The accused was four metres away from Mthobisi and his friends when he was carrying the firearm.
- [21] PW3 is Maxwell Mlondi Shongwe and the complainant in count three. The deceased person is his brother. He testified that Gift told him that he was heavily assaulted by Majaha and Nganono on 14 January 2021. Gift did not

tell Maxwell why Majaha and Nganono assaulted him. Maxwell noticed that Gift had injuries on his mouth.

[22] PW3 testified that during the fight at the river on 15 January 2021 he saw the accused wielding an axe. PW3 alerted his friends that the accused was carrying an axe. The accused chased after Phiwa. Phiwa outran the accused. PW3 and the rest of his companion fled and stood on a bridge. He saw the accused and his brother leave the river and they drove to their parental home. When the accused and his brother returned from their parental home, they chased PW3 and his friends. PW3 and his friends fled using a different route home since the accused and his companions had blocked the route that PW3 and his friends would normally use to go home.

[23] Along the way home PW3 and his friends armed themselves with ring-forces which they got along the way and returned to the river to collect their personal effects. Along the way, they found the accused and his companions parked in a hidden place as they approached the vehicle from behind. Phiwa and Mtwi remained behind seated because they were overcome with fear when they saw the accused person's vehicle. Outside the vehicle was Celumusa Mpila and Nganono. From a distance PW3 did not see the accused. When they got closer, PW3 saw the accused inside the vehicle. PW3 says he was about fifty metres away when he saw Celumusa next to vehicle.

[24] When PW3 and his friends saw the accused's vehicle, they were terrified. When they were ten metres away from the vehicle, Celumusa came towards them and held Gift and dragged him for about five steps ahead of PW3 and the other friends they were travelling with. PW3 did not hear what Celumusa said to Gift. It was while Celumusa and Gift were talking that he saw the

accused person emerge from the vehicle. The accused was carrying a firearm. The accused aimed the firearm at PW3 and his friends. PW3 and his friends froze for a few seconds while Celumusa quickly moved to the side next to a fence. The accused person pulled the trigger and shot Gift. Gift was behind PW3 and was with Celumusa when he was shot by the accused person. When the gunshot went off, PW3 fell to the ground and the gunshot grazed his neck and caused bleeding to his chest. Mthobisi fell as a result of shock when the gunshot was fired. Mthobisi was shot on the hand. PW3 fled the scene to the main road. PW3 was with Mthobisi and Petros at the time. Gift was not with them when they fled home after the shooting incident.

[25] They returned to the scene and found Gift lying face-down on the ground; his back was riddled with bullet holes. Gift was dead. PW3 recorded a statement with the police. PW3 testified that his injury was minor; that he did not initially go to hospital for treatment on the day of the incident. PW3 went to the hospital on a later day. It is PW3's evidence that they had not provoked the accused person before he shot them.

[26] During cross examination, PW3 conceded that when they decided to return to the river they knew they would meet the accused and his companions. PW3 denied that when they met the accused person and his brother they confronted them. It is PW3's evidence that they had no intention to fight the accused or his companions when they approached Majaha's vehicle from behind where it was parked. PW3 testified that even though they knew that Majaha and his companions were armed with an axe, they had the courage to approach and come close to them because they were now with an adult in Celumusa Mpila.

- [27] It was suggested further during cross examination that Nganono assaulted the deceased on 14 January 2021 in retaliation because Gift assaulted Nganono on 1 January 2021. PW3's response to this suggestion was that he was unaware of the assault on Nganono on 1 January 2021.
- [28] PW3 denied that they attacked the accused person and that the accused acted in self-defence when he shot them. PW3 testified that the accused alighted from the vehicle carrying a firearm; PW3 and his friends froze as they saw that the accused was pointing the firearm at Gift. At the time, Gift was behind Celumusa. Gift turned and looked at PW3; PW3 fled, two metres away PW3 and Mthobisi fell and when they got up they realised that they were injured. PW3 insisted that the accused person did not fire a warning shot in the air; that he pointed the firearm at PW3 and his friends and shot at them. PW3 testified that he saw that the accused pointed the firearm at them when he turned to flee the scene.
- [29] The Crown further called PW4 Celumusa Mpila. He testified that Gift is his cousin and that the accused is his brother, friend and relative. He told the Court that on 15 January 2021 he was using the vehicle that the accused was seen driving later on that day. Celumusa went to Matsamo driving the vehicle and on return after crossing the Mlumati river bridge, he met Nganono and gave him the vehicle. He directed that the vehicle be washed because it was going to be used at Ncabaneni at Nganono's aunt's home. Celumusa informed Nganono that they will find him at the river where he went to bath. Celumusa was with Mduduzi and Sibusiso Sibandze at the river and was later joined by Gcina Shongwe. While Celumusa was bathing in the river, two boys-Bo and Ngcebo- came and reported that there was a fight upstream. Celumusa and the people he was with paid no attention to

the report. At about 5pm Celumusa left the river. Nganono and his brother did not come to him to report that they had finished washing the vehicle.

[30] On his way home, Celumusa met Lwazi Magagula. He was informed by Magagula that the Cressida vehicle was parked in a corner along the route Celumusa was using. Celumusa found the vehicle parked where Magagula said it was. Inside the vehicle was Majaha, Nganono and Khaya. Majaha sat on the driver's seat, Nganono was on the front passenger seat while Khaya sat on the back seat of the vehicle. Inside the vehicle there was a firearm. The firearm was placed on the gear lever on the left- hand side of Majaha.

[31] Celumusa noticed that the vehicle had not been washed. He asked the occupants of the vehicle why the vehicle had not been washed and he received no answer. Nganono then alighted from the vehicle and said he was going to tell Celumusa why the vehicle had still not been washed. Celumusa and Nganono went and stood under a tree and Nganono told him that while they were at the river certain boys from the Shongwe homestead came and started a fight with them. It was while Nganono was explaining the matter to Celumusa that Petros, Maxwell, Gift and Mthobisi came to the scene using a route that cuts through the forests. They were armed with ring-force iron rods. Celumusa went to them and asked the group to explain to him what the matter is and what they were fighting over because they are all from the same area.

[32] It was while Petros and his friends were trying to explain to Celumusa what the matter was that Celumusa suddenly saw the boys disperse, scatter and run helter skelter. At the time the boys started fleeing, Celumusa turned and looked behind and he saw the accused carrying a firearm and pointing it in the direction Celumusa and the boys were. Celumusa fled, while fleeing he

heard a gunshot. When Celumusa turned, he saw Gift lying on the ground after the gunshot sounded. The accused got into the vehicle and drove off.

[33] Celumusa returned to the river where he had left Gift's uncle and he reported the incident to him. He went back to the scene with Gcina Shongwe-Gift's uncle and found that Gift was dead. Police were called and they came and recorded statements.

[34] Celumusa testified that the accused was at a distance behind them when he fired at them. Celumusa turned and saw the firearm. He fled to his right-hand side. When he fled to his right-hand side, the accused person was no longer at the position and spot he was standing in earlier. Celumusa did not see the accused fire the gun but he heard a gunshot.

[35] During cross examination, it was suggested to Celumusa that he blocked Gift and his friends because he believed they were going to attack the accused and his brothers. Celumusa's testimony is that when he saw Gift and his crew carrying ring forces, and after what Nganono told him, he thought the fight was ongoing. He tried to calm both sides and to prevent the fight. Celumusa testified further that it was when Gift and his four friends were trying to explain to him what the bone of contention was that all hell broke loose.

[36] PW5 is 8041 Constable Siphon Dlamini. He is a scenes of crime officer stationed at Piggs Peak Police station. On 15 January 2021 at about 7pm he received a telephone call from the Desk officer who stated that there was an incident of a case of murder at Ndlalambi, Madelezini area. He went to the scene of crime with other officers from Piggs Peak Police station. At the scene of crime, they found a young lad lying on the ground and covered with

a kanga. He examined and observed the body of the boy. The boy was dead. The boy lay face-down and he wore a white vest and a pair of trousers. The deceased had sixteen bullet holes on his back. The deceased was also bleeding from his mouth.

[37] Next to the deceased, ten to fifteen centimetres away from him, there was a ring-force. There was also another ring-force which was a metre away from the body of the deceased. The ring forces were estimated to be 50cm in length and their width was estimated to be plus-minus one centimetre. PW5 took photographs of the scene and compiled a photo album of same. PW5 also took the ring forces as exhibits in this matter. The ring-forces were marked exhibit 1.

[38] When the post-mortem examination was conducted on the body of the deceased on 22 January 2021 one bullet head was found in the body of the deceased. The bullet head was extracted from the back of the deceased's body next to his backbone. The bullet head was kept in seal bag with number 010709 and it is brown in colour. The bullet head was marked exhibit 2.

[39] The investigating officer is 8026 Detective Constable Mfundo Shongwe. On 15 January 2021 he was on duty when he received a report that three people had been shot at Ndlalambi. He, together with other police officer went to Ndlalambi where they found Mciniseli Shongwe at the scene of crime. Mciniseli Shongwe showed the police the body of the deceased. The body of the deceased was covered in a green kanga. PW6 examined the body of the deceased and noticed that he wore a white vest and shorts. At deceased's backside the vest was soaked in blood and the deceased had fifteen bullet holes.

- [40] On further investigation, PW6 found that Mlondi Shongwe and Mthobisi Thwala were also shot. Mthobisi was not at the scene of crime when the police arrived. The police found Mlondi at the scene of crime and he recorded a statement with the police. Mlondi was bleeding from the left side of the neck. PW6 sent Mlondi to Buhleni police station to get RSP 88 and to go to Mkhuzweni Health Centre. Mthobisi, PW6 established had been rushed to hospital before the police arrived at the scene of crime. The body of the deceased was taken to the hospital where the doctor certified him dead. When the police arrived at the scene, the accused was not present.
- [41] On 16 January 2021 PW6 was at Ngonini and the accused was handed over to the police by his lawyer. PW6 introduced himself to the accused and explained his mission to him. He cautioned the accused in terms of the Judges' rules and the accused said something which was recorded by the police. The accused was cautioned in terms of the Judges' rules before he pointed out a firearm after leading the police to his parental home. The firearm had a red cartridge. PW6 took the firearm and the cartridge as exhibits in this matter.
- [42] A week after the incident of murder was committed, PW6 went to Mkhuzweni Health centre where the doctor who treated Mthobisi Thwala gave PW6 a bullet that was extracted from Mthobisi's left hand. PW6 kept the bullet as an exhibit. After due caution, the accused was charged with one count of murder and two counts of attempted murder.
- [43] PW6 handed in the firearm-a 12 bore shotgun, a red spent cartridge and the bullet that was extracted from Mthobisi's hand. The 12bore shotgun was marked exhibit 3; the red spent cartridge was marked exhibit 4 and the bullet retrieved from Mthobisi's hand was marked exhibit 2.

- [44] During cross examination PW6 confirmed from his evidence only one shot was fired from the 12 bore firearm. The firearm was licensed and it belonged to the accused person's father.
- [45] By consent the postmortem report and the two medical reports were handed in as evidence on behalf of the Crown's case. The postmortem report was marked as exhibit 'B', Mthobisi Thwala's medical report was marked exhibit 'C' and Mlondi Shongwe's medical report was marked exhibit 'D.'
- [46] The post-mortem report reflects that the deceased was about eighteen years when he died. The deceased died due to firearm injuries on the backside of his body. The deceased presented with injuries on the neck, chest, lungs, heart and on the spinal cord. The pathologist further noted in his report that the deceased had multiple entry wounds on the backside of his body. The report further states that deceased's chest bone was fractured; that his mediastum and thymus was ruptured; his trachea and bronchi had a perforated injury in the middle portion of the oesophagus and trachea. The right lung had three perforated wounds while the left lung had two perforated wounds. The heart had two perforated injuries. The pathologist noted in the report that there were fourteen entrance wounds on the backside of the deceased.
- [47] Mthobisi Thwala's medical report reflects that he was sixteen years old at the time he was attended to at the hospital. The report states that the patient presented with three entry gunshot wounds with one exit wound on the left

hand. The X-Ray showed two bullet pellets which were removed successfully. The patient had a fractured fourth metacarpal bone².

[48] On 16 January 2021 Mloni Shongwe was attended to at the hospital. His medical report reflects that he presented with an abrasion on the left supraclavicular area. The doctor determined that Mloni sustained soft tissue injury following blunt trauma.

[49] The Crown closed its case.

Defence Case

[50] The accused testified that he is twenty-four years old and that he was born on 15 January 1999. The accused told the Court that he was not present on 1 January 2021 when his brother Nganono was assaulted. On 14 January 2021 he went to wash a vehicle he was driving at the Mlumati river. He was with Nganono when he went to the river. At the river they found Gift Shongwe. Nganono asked the accused to take him to Gift Shongwe to find out why he was assaulted on 1 January 2021. The accused and Nganono went and confronted Gift about the assault of Nganono on 1 January 2021. The accused was walking in front and Nganono was following the accused. When they met Gift and before the accused person could ask him about Nganono's assault, Gift hit the accused and a fight ensued. It was while the fight was ongoing that Khaya came and joined in the fight. Petros Mavuso came, intervened and stopped the fight. The accused also told Nganono and Khaya to stop the fight.

²The metacarpus is a group of five bones of the hand between the phalanges and the carpus. Even though the metacarpal bones are small, they are classified as long bones since they have structural characteristics of long bones; each metacarpal bone consists of a shaft, distal head and a wide proximal base. See

[51] On 15 January 2021 the accused was at his parental home. At about 3pm Nganono arrived home driving the vehicle that the accused had given to Celumusa Mpila earlier. The vehicle belonged to the accused person's aunt who lives at Ncabaneni. Nganono informed the accused that Celumusa had asked that they wash the vehicle as they would use the vehicle to go somewhere on the next day. The accused and Nganono took the cleaning utensils and went to wash the vehicle at the river. At the river, they parked the vehicle at the place they had parked it the previous day in readiness to wash the vehicle. The accused told Nganono to wash the boot while the accused sat inside the vehicle.

[52] It was while the accused was seated inside the vehicle that he saw Gift, Mthobisi Thwala, Somandla, Petros Mavuso and Maxwell Shongwe come their way. They came to the accused and Gift said: 'today is D-day' (*lamuhla nge lemancamu*). Gift twice hit the accused on the face with fists. It was when Gift tried to hit the accused on the third time that the accused got up and retaliated by hitting Gift. The people who were with Gift joined in the fight and they pushed the accused into the mud. When Nganono heard the noise, he came running to the scene and he removed the people who were now on top of the accused person. The people moved away but not too far from where the accused person was.

[53] The accused testified that he then retrieved an axe-handle (*umphini*) and chased after his assailants. His assailants all fled and the accused went to the vehicle. Inside the vehicle the accused noticed that he had been stabbed on the foot. The accused told Nganono to finish washing the vehicle and they drove away from the river taking a route that went upward. While they were driving, the accused remembered that he had to meet Celumusa Mpila. The

accused suggested that they drive back by the river and wait for Celumusa along that route. The place where they waited for Celumusa was at Timphisini along the route leading to the accused person's parental homestead. The accused person testified that he was asleep inside the vehicle. Celumusa came along with two boys. Nganono and others were outside the vehicle. Celumusa came to the driver's seat window and he stated that he heard that the accused and his companions had a fight at the river. The accused did not respond to Celumusa's enquiries because he was in pain. Celumusa then went with Nganono.

[54] While the accused remained inside the vehicle, he saw Gift and his friends arrive from behind the vehicle and they were carrying iron rods. Nganono and the people he was with fled to the front of the motor vehicle. Celumusa moved towards Gift and his friends. Gift and his friends moved closer to the motor vehicle. The accused recalled that at the river Gift and his friends attacked him. The accused alighted from the vehicle and got hold of the firearm. The accused testified that he fired a warning shot in the air. When the accused fired the shot, Gift and his friends were about six metres away from the accused person.

[55] The accused did not notice if anyone was injured by the gunshot he had fired. The accused testified that he saw the group scatter and some of them fell to the ground. The accused got inside the vehicle and drove away. He left Celumusa and Nganono at the scene. When the accused arrived home, he reported the incident to his mother. He left his parental home and went to Mvembili. He later met with his attorney. On 16 January 2021, the accused was arrested after he was handed over to the police at Ngonini police station.

- [56] The accused testified that he did not have the intention to kill Gift because when he fired the gunshot, he meant to shoot in the air. The accused also stated that he had no intention to kill the complainants in count 2 and count 3.
- [57] The firearm was inside the vehicle when Gift and his friends arrived at the scene. The accused testified that ordinarily the firearm was kept in a safe. On the fateful day, they had forgotten to remove the firearm from the vehicle. The firearm belonged to the accused person's father; the accused person's father used the vehicle and the firearm to scare rabbits away from his garden.
- [58] During cross examination the accused admitted that after the fight along the Mlumati river banks, he and his brother went to their parental home. The accused testified that they went home to return the cleaning utensils they used to wash the vehicle. The accused denied that he went home after the fight of 15 January 2021 to get the firearm. When he was confronted about why he did not use the firearm during the fight when he was under attack at the river, the accused stated that he only used the nearest weapon when he was under attack at the river.
- [59] During cross examination, the accused testified that when he saw Gift and his friends carrying iron rods, he figured out that they were about to attack him considering that they were charging towards him.
- [60] When asked to comment on the fact that Gift had injuries at his backside, the accused opted to keep his peace as he had no comment on the matter.
- [61] The accused testified that he was under attack when Celumusa was talking to Gift and Gift's friends fled the scene. The accused insisted that he was

under attack at the time because Celumusa was trying to prevent them from coming towards the accused. The accused denied that he aimed the firearm at the deceased and to the complainants in count 2 and count 3. When the accused was asked to explain how it is that the deceased sustained gunshot injuries on his backside if he was attacking the accused, his response was that he is unfamiliar with firearms he did not know how to fire a gunshot. The accused insisted that he was acting in self-defence when he fired a single gunshot.

[62] The defence closed its case.

Application of the law to the facts

[63] For the Crown to succeed it had to prove, beyond reasonable doubt, that the accused shot the deceased with a firearm, with the intention to kill him and that the multiple gunshot injuries caused his death. The Crown further had to prove that the accused inflicted the injuries on complainants in count 2 and count 3 intentionally.

[64] It is common cause that the accused person had a fight earlier on the day of 15 January 2021 with the deceased and his friends. The deceased was the aggressor when he assaulted the accused before the incident degenerated into a fight between the deceased, his friends and the accused and his companions. The fight at the Mlumati river ended when the deceased's group fled from the accused and his companions after an axe was allegedly wielded by the accused.

[65] It is the encounter of 15 January 2021 later that day, at a scene far from the Mlumati river that is the nub of the dispute. The accused asserts that he had parked the vehicle along the road waiting to meet Celumusa Mpila when the

deceased and his friends approached from behind the vehicle. The deceased and his friends were armed with iron rods and came charging towards the accused. This evidence is discounted by Crown witnesses including Celumusa Mpila. The evidence of the Crown is that the deceased and his friends were in conversation with Celumusa Mpila when they were shot at. The deceased had his back towards the accused; evidence that is not denied by the accused. The deceased was shot at his backside and this is confirmed by evidence of the police pathologist in the post-mortem examination. It is inconceivable that the deceased would have been charging towards the accused when he was shot if the entry wounds were at deceased's backside and not in front. The accused testified that when he saw the deceased and his friends approach armed with iron rods, he recalled that he was attacked by the group earlier that day; he later stated under cross examination that the deceased and his companions came charging at him before he fired a warning shot in the air. The accused says he acted in self-defence.

[66] It is a fact that there was no fight between the accused and his victims before they were shot. It would appear however that the accused was still angry at his victims for winning the fight on the banks of the Mlumati river earlier on the fateful day. The accused could not bring himself to explain to Celumusa what the fight earlier that day was about. The accused testified that he sat in the vehicle and was in pain, ostensibly because he was stabbed on the foot during the fight at the river. In my view, the accused was seething with anger after the fight early that day. When the accused saw his victims talking to Celumusa, he got out of his vehicle and shot them. The accused was not in danger at the time he shot, injured Mthobisi and Maxwell and when he killed Gift.

[67] The notion that the accused acted in private-defence when he fired a shot at the deceased and the complainants in count 2 and count 3 does not hold water. By the time he shot at the deceased and the complainants there was no fight. The deceased and the complainants were in conversation with Celumusa. The accused person's bodily integrity was not in danger at the time he fired at the deceased and at the complainants. In respect of the accused person's answer that when he saw the deceased and the complainants armed with iron rods, he recalled that they attacked him earlier that day point more to an act of vengeance and retaliation than one of private-defence. In *S v Shaningua*³ it was stated that:

'Private defence is not a means of exercising vengeance or retaliation and there would be no defensive act where the unlawful attack had already passed.'

[68] The accused person conceded that after the fight at Mlumati river he drove home. The Crown evidence is that the accused drove home to arm himself with a firearm. The accused testified that he went home to drop the car washing material. The evidence of Celumusa is undisputed that when he met the accused and Nganono at the scene of crime, the vehicle had not been washed. Why the car washing material would be returned home when the vehicle had not been washed is unclear. More importantly, Celumusa's evidence that the vehicle was not clean when he found the car parked along the road was not disputed. It can therefore be safely said that it was an afterthought on the part of the accused to say he drove home to drop the car washing material. It is more likely that the accused went to his parental home to arm himself with the firearm than it is that he went there to drop car-washing material.

³ (CC 09/2016) [2017] NAHCMD 224 (14 August 2017)

[69] During the fight at the river, the accused is alleged to have wielded an axe before the deceased and his companions fled the scene. The accused person says he used an axe-handle to pursue his assailants. When asked why he did not use the firearm during the fight at the river the accused testified that he only used a weapon that was close to him. There is evidence that the axe was retrieved from the boot of the vehicle. The accused testified that he was seated inside the vehicle when he was first attacked by the deceased at the Mlumati river. Surely, if the firearm was inside the vehicle it would have been the weapon closest to the accused than the axe which was in the boot. Celumusa Mpila only noticed the firearm when he met the accused and Nganono at the scene of crime. It was not suggested to Celumusa that the firearm was inside the motor vehicle when he gave the vehicle to Nganono to be washed. From this set of facts, the only inference that can be made is that the firearm was not in the vehicle when the accused was engaged in a fight with the deceased at the river. The firearm was only collected from the accused person's parental home after the deceased and his companions had fled from the accused who was, at the time wielding an axe. It is inconceivable again, that the accused was carrying the handle of the axe when the deceased and his friends fled at the river. This is because, the deceased and his companions were winning the fight against the accused and they only fled because they saw that the accused was now armed with a dangerous weapon, an axe.

[70] The accused aimed and shot at the deceased and at the complainants. It is not true that the accused fired a warning shot in the air. The evidence of PW2 and PW3 as well as the evidence of Celumusa Mpila is clear that the accused aimed the firearm at Gift and at PW2 and PW3. The deceased was shot at his

backside; Mthobisi was shot on the hand and Maxwell was grazed by the bullet on the neck.

[71] The accused was not honest in his evidence. His testimony of seeing his victims come charging at him before he fired a warning shot in the air is disputed by Celumusa, Mthobisi and Maxwell. The testimony of the accused in this regard is also controverted by the independent evidence of the post-mortem report which states that the deceased had entry gunshot wounds at his backside. It is improbable that the deceased would have suffered entry gunshot wounds at his backside if he was charging at the accused when he was fired at. This is false beyond reasonable doubt. I accordingly reject the version of the accused as implausible and false beyond reasonable doubt. I accept the version of the Crown witnesses as true.

[72] In *Shongwe v Rex*⁴ the Court stated as follows:

‘In determining the mens rea in the form of intention the court should have regard to the lethal weapon used, the extent of the injuries sustained as well as the part of the body where the injuries were inflicted.’

[73] After the accused shot at the deceased and at complainants, he got into his vehicle and left the scene. He did not give assistance to the deceased who lay bleeding on the ground. He inflicted multiple injuries on the deceased’s backside when the deceased posed no danger to the accused at the time he was shot. From the evidence led by the Crown, the accused had the necessary intention to commit the offences charged.

[74] Concerning the two counts of attempted murder, it is important to note that the conviction of attempted murder depends, as Beck JA puts it in *R v Henderson*⁵

⁴ Criminal Appeal Case No: 24/11 at para 6

‘...on whether the evidence established beyond reasonable doubt that the appellant, when about to fire the shot that struck the complainant must have foreseen, and indeed did therefore subjectively foresee, the real possibility that he might kill (one of the men before him) but nevertheless chose to fire, reckless as to whether or not he might do so.’

[75] According to C.R. Synman⁶, a person is guilty of attempting to commit a crime if, intending to commit that crime, he unlawfully engages in conduct that is not merely preparatory but has reached at least the commencement of the execution of the intended crime. In *S v Ndlovu*⁷ Joubert JA stated that the components of attempted murder are wrongfulness, intent and an attempted act.

[76] It is the Court’s view that the evidence led show that the subjective state of mind of the accused was aimed at committing the crime of attempted murder in count 2 and count 3. If an accused used a firearm and aimed it at the complainants in the appreciation that there was some risk to life involved in his action, and he was reckless as to whether or not the risk was fulfilled in death, there was sufficient mental element for a verdict of attempted murder. Accordingly, in my view the Crown has proved beyond reasonable doubt that the crime of attempted murder and murder was committed by the accused person.

[77] I am satisfied that the Crown has proved the commission of the crimes of murder and two counts of attempted murder in count two and three.

⁵ Supreme Court of Zimbabwe Case No: 17/1984

⁶ Synman, C.R. ‘Criminal Law’ 4th edition at page 282

⁷ 1984 (3) SA 23(A) at 261-2

[78] Accordingly, the accused is found guilty of the crime of murder and of two counts of attempted murder.



M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the Crown:

Mr Mandla Dlamini

For the Defence:

Miss Noncedo Ndlangamandla.