

**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

HELD AT MBABANE

CASE NO: 07/23

In the matter between

REX

Versus

DERCIO KHUMBANE

Neutral Citation: *Rex v Dercio Khumbane (07/2023) [2023] SZHC 213
(7 August 2023)*

Coram: M. S. LANGWENYA J

Heard: 2 June 2023; 5 July 2023; 24 July 2023; 7 August
2023

Delivered: 7 August 2023

Summary:

Criminal law-Criminal Procedure-Accused charged with attempted murder- accused pleads guilty to the charge – the Crown accepted the plea – 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 67/1938 was invoked – the accused was convicted on the basis of the contents of the Statement of Agreed Facts and on basis of his own plea – Evidence in mitigation of sentence was evaluated in light of the “triad” paragraph – attempted murder is a serious offence and admits of no suspension of sentence or fine in terms of the law – accused sentenced to a term of eight (8) years imprisonment.

JUDGMENT**Introduction**

- [1] The accused was unrepresented by a legal practitioner during the trial. Before the trial commenced, the accused was informed of his rights to legal representation. He elected to conduct his own defence. Thereafter, the charge was read and explained to the accused in the language of his choice, Siswati.
- [2] The accused was charged with the offence of attempted murder, it being alleged by the Crown that on 19 August 2021 and at or near Nyonyane area in the Hhohho district, the accused person unlawfully and intentionally attempted to kill Mangaliso Banana Mnisi.
- [3] When the charge was put to the accused, he pleaded guilty to the crime charged. The Crown accepted the plea. In this vein, Section 155 of the

Criminal Procedure and Evidence Act 67/1938 applies and 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.”

[4] The learned Crown Counsel, Ms N. Mhlanga informed the Court that the Crown was accepting the accused person’s plea and dispensing with any further evidence. The court was informed that the parties had prepared and signed a Statement of Agreed Facts which the Crown wished to tender in evidence together with the Medical Certificates of the medical examinations carried out on the complainant. Thereafter, both the Statement of Agreed Facts and the contents of the Medical Certificates were read and explained to the accused in Siswati. The accused informed the court that he understood the contents of the statement of agreed facts and the medical certificates and had no objection to them being admitted in evidence. The statement of agreed facts and the medical certificates were admitted in evidence and marked as exhibit A, B and C respectively. A bush knife and a black plastic pick handle were also handed in and marked as exhibit 1 and 2 respectively.

[5] *The statement of agreed facts states as follows:*

STATEMENT OF AGREED FACTS

The accused is charged with the crime of attempted murder in that on or about 19 August 2021 at or near Nyonyane area in the Hhohho Region, the accused did unlawfully and with intent to kill/assault Mangaliso Bhanana Mniṣi all over the body and thereby commit the crime of attempted murder.

[6] *When the charge was read to the accused person, he tendered a plea of guilty to the crime of attempted murder. The Crown accepted the plea.*

- [7] *On or about 17 August 2021 the accused and the complainant had an argument which degenerated into a fight. The bone of contention was that the accused suspected the complainant to have stolen his cellphone and cash amounting to E300.00 (three hundred Emalangeni). The accused burnt down complainant's tent and belongings. The fight and misunderstanding was resolved after the intervention of Sifiso Kunene. The accused continued to make threats against the complainant.*
- [8] *On 18 August 2021 the accused assaulted the complainant on the leg and fled to sleep. On 19 August 2021 at about 20:00hrs the accused arrived at complainant's tent armed with a bush knife and a black pick handle. The accused assaulted the complainant in the legs, head, arms and all over the body until the complainant was unconscious. The complainant regained consciousness when he was admitted at Mbabane Government Hospital. The complainant was admitted and remained in Mbabane Government Hospital for four months.*
- [9] *It is further agreed that on 21 August 2021, at about 07:00hrs the accused confided in Majahonkhe Dadi Simelane that he assaulted the complainant. Majahonkhe was with Gcina Mgcino Vilakati and Sandile Mahlalela when the accused made the admission. The accused never told them the reason for assaulting the complainant.*
- [10] *Majahonkhe Gcina and Sandile went to check on the complainant and found him badly injured and unable to talk and walk. The complainant was subsequently conveyed to Dvokolwako Health Centre where he was admitted. The complainant was assaulted with a pick handle and a bush knife.*
- [11] *It is also agreed that the accused and the complainant had a misunderstanding on another day where the accused damaged*

complainant's belongings. The matter was resolved after the intervention of Sifiso Kunene.

- [12] *It is also agreed that the assault of the complainant was reported at Mliba Police Station. The investigating officer 4865 Detective Constable Jerome Dlamini received the report of a serious case of assault and went to Dvokolwako Health Centre with other police officers. They found the complainant with a gash wound on the forehead as well as on the back of the head. The complainant had injuries on both legs. His legs were swollen and had burn wounds. The complainant was unable to talk. The investigating officer gathered that the perpetrator was Darcio Khumbane.*
- [13] *On 22 August 2021 the accused was arrested at Zandondo area at Egushede after due caution. The accused was further cautioned in terms of the Judges Rules and he freely and voluntarily led the police to Samkelo Justice Simelane where they recovered a bush knife. The accused further gave the police a black pick handle. The items were taken and handed in as exhibits in the matter. The accused was conveyed to Mliba Police Station where he was charged with attempted murder of the complainant.*
- [14] *At Dvokolwako Health Centre, the complainant was examined by Dr Gule who observed that the complainant was in a critical condition; he had bruises and abrasions on the head and face; he had wounds on the head, face, leg and arms. The complainant further had fractures or dislocation in lower legs, skull and left upper arms.*
- [15] *It was also agreed that the complainant was admitted at Dvokolwako Health Centre and on 24th August 2021 he was transferred to Mbabane Government Hospital where he spent four months receiving treatment.*

[16] *It is further agreed that the accused acted unlawfully and with intent when he assaulted the complainant; the accused admits that the injuries caused to the complainant were a result of his unlawful conduct; it is agreed that the complainant had not provoked the accused on the day of the assault and lastly, the accused admits that due to his intentional act, he foresaw that his conduct could result in death of the complainant.*

[17] *The Crown tendered the statement of agreed facts and the medical report from Dvokolwako Health Centre and from Mbabane Government Hospital, the bush knife and a black plastic handle as exhibits in this matter.*

Application of Law to the facts

[18] Now the statement of agreed facts shows that on 19 August 2021 the accused assaulted the complainant with a bush knife and a pick handle until he was unconscious. The complainant was conveyed to Dvokolwako Health Centre and later to Mbabane Government Hospital for treatment. At Dvokolwako Health Centre the doctor stated that the complainant was in a critical condition when he arrived in hospital. He was later transferred to Mbabane Government Hospital where he was admitted and treated. The Medical Report from Dvokolwako Health Centre shows that the complainant had bruises on the head and in the face; wounds in the head, face, legs and arms; he also had fractures and dislocations on the bilateral lower legs, skull and left upper arm. The skull wound was 7cm deep; the skull further reflected extensive beating, multiple decomposing wound as a result of severe extensive beating.

[19] The Medical Report from the Mbabane Government Hospital reflected the injuries captured in the report from Dvokolwako Health Centre.

- [20] At Mbabane Government Hospital, a brain CT scan was done and the doctor observed that there was frontal contusion bleeding in the frontal skull as a result of skull fracture. The patient was admitted on 24 August 2021 at Mbabane Government Hospital.
- [21] The medical report shows that the complainant sustained the injuries outlined therein by reason of the assault orchestrated by the accused.
- [22] On the attempted murder charge, I am satisfied that the Crown has proved its case beyond reasonable doubt. The accused employed a bush knife and a pick handle and inflicted multiple injuries on the body of the complainant over a suspicion that complainant had stolen his money and cellphone. There was no need for the accused to take the law into his own hands. If he suspected complainant to have stolen his cellphone and money, he should have reported the matter to the police. There was no justification for such a violent assault on the complainant because at the time of the assault, the complainant was not armed with a weapon and did not pose any threat to the accused.
- [23] The magnitude of the injuries which the complainant sustained as a result of the accused's activities is evidenced in exhibit B and C.
- [24] By employing a bush knife and hacking the complainant on the head, arms and legs and all over the body, the accused clearly foresaw that the injuries he intended to inflict on the complainant could cause his death, but the accused was reckless whether or not death resulted. The accused clearly had *mens rea* in the form of *dolus eventualis*. That is the law on this subject matter as stated in *Rex v Huebsch 1953 (2) SA 561 A* at 567, wherein Schreiner JA stated as follows:

“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 some risk to life involved in the action contemplated coupled with recklessness as to whether or not the risk is fulfilled in death.”

[25] In our jurisdiction the Court of Appeal has stated in *Henwood Thornton v Rex 1987 – 1995 SLR 271* at 273 as follows:

“.....it suffices for the prosecution to prove in a charge of attempted murder an appreciation that there is some risk to life coupled with recklessness as to whether the risk is fulfilled in death.”

[26] In light of the totality of the foregoing, I find that the Crown has proved its case beyond reasonable doubt. The accused is found guilty and is accordingly convicted of the offence of attempted murder.

JUDGMENT ON SENTENCE

[27] 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.

[28] In order to arrive at an appropriate sentence the Court is required to consider the broad judge made guiding principles known as the *triad* (See *S v Zinn 1969 (2) (A)*). In *S v Zinn* the court determined 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 other. *S v Holder 1979 (2) SA 70A*.

[29] Regarding the crime the punishment must not be disproportionate to the offence. *Dodo v S 2001 (3) SA 381 paragraph 37*.

[30] 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.

[31] Lastly, the sentence imposed should be in the public interest – *S v Makwanyane 1995 (2) SACR 1 (CC)*. 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 offenders – (*S v Rabie 1975 (4) SA 855 (A)*) at 866 A-C).


Personal circumstances of the accused

[32] The accused is a first offender. He is 29 years old, unmarried and has two minor children in eSwatini and three minor children in his home country – Mozambique. The eldest child is 12 years old while the youngest is seven (7) years old.

[33] The accused was arrested on 21/8/2021 and has been in custody since. His home country is Mozambique. The accused arrived in eSwatini while he was very young and lived here with his father. His father is now deceased. The accused resided in Manzini Kakhoza prior to his incarceration for the offence he has now been convicted of. He earns a living as a self-employed plumber and carpenter. In a good month he makes seven thousand Emalangeni (E7000.00). The accused last visited Mozambique in January 2021. One of his minor children lives with his sister in Mozambique – Matola. The two minor children in eSwatini live with their mothers in Ngculwini and at Logoba respectively. Before his arrest, the accused supported all his children.

[34] In mitigation of sentence, the accused asked for leniency and told the court that he has since learned his lesson. He submitted that life in prison is hard. Ms Mhlanga prayed for a punitive sentence to discourage the prevalence of this sort of offence in the country.

- [35] I have considered the accused person's personal circumstances and that he is pleading for leniency.
- [36] 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. There was no need for the accused to violate complainant's physical integrity in the manner he did instead of reporting him to the police if he suspected him of theft of his cash and cellphone.
- [37] Accordingly, such conduct warrants recognition in the determination of an appropriate sentence to reflect the national indignation that the community would feel at conduct of that kind.
- [38] 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 your personal circumstances by themselves should necessarily recede into the background.
- [39] I consider the following sentence appropriate. The accused is sentenced to eight (8) years imprisonment. The period of 23 months spent in custody will be taken into account in computing the period of imprisonment.
- [40] The rights of appeal and review were explained to the accused person.


M. S. LANGWENYA
Judge of the High Court

For the Crown: Ms N. Mhlanga

For the Defence: Accused in person