

IN THE HIGH COURT OF SWAZILAND

CRIMINAL TRIAL NO.91/95

In the matter between:

REX

VS

ELPHAS ENOCK KUNENE

FOR CORAM : J.M. MATSEBULA A.J.

FOR CROWN : MR. WACHIRA

FOR DEFENCE : MR. T. MASINA

JUDGMENT

15/02/96

The accused is charged with crime of attempted murder. The accused pleaded not guilty when the charge was put to him and the Crown heard the evidence of the doctor, Dr. Ntiwane PW1 who also in the course of his evidence referred to RSP88 which was handed in as Exhibit 'A' which is a certain medical report. Exhibit 'A' reveals the following injuries:

- a) multiple abrasions over the right hand;
- b) multiple scalp lacerations described as deep over the head and;
- c) a punctured wound over the left fractured forearm and under the sub-heading 'remarks' PW1 states 'grievously assaulted all over the body with multiple wounds.'

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The injuries described in Exhibit 'A' weren't challenged by the defence nor was any question put to the doctor that they had been caused by a knobstick and that the accused would say he had only delivered at the most four blows. In response to the question the doctor stated that any assault resulting in deep open wounds can cause death to the victim. PW1 also stated that the lacerations were of a serious nature and that the patient could have died. The court will revert to this shortly.

Then the Crown called the evidence of the complainant PW2 Abednigo Majaji Dlamini. He stated that on this day, he was walking away when he suddenly felt something struck him on the back of his head. He looked at the back and saw the accused who then continued hitting him with, according to the witness, an iron rod. He had immediately warded off the blows and in the process suffered a fracture to his forearm. He raised an alarm but the accused continued to hit him with an iron rod until he fell down and became unconscious. He came too when he was in hospital.

He showed the court healed scars on the back of his head where his scalp was indented, on the top of the head another healed scar, the right fore-finger which have since become abnormal in that it cannot function any longer. He also showed the court the healed scar where he had sustained a

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fracture to his left forearm. The court considers these injuries to have been very serious indeed. He stated that he did not give the accused any reason for the assault. He told the court that he and the accused had had a quarrel previously at their respective areas in the rural area and that he had been charged before a court of law and had been convicted. Both in his evidence in chief and under cross examination the complainant left the court in no doubt that he and the accused were not on speaking terms. Under cross-examination he denied that he had met the accused at the stair-case near Multisave Shop, in other words that there were moving to opposite directions but that the accused had approached from the rear and struck him with an iron rod. According to him this was at the stair cases.

The Crown also led the evidence from Constable S.K. Maseko who testified that he had been sitting on a bus, stationary bus, with a friend when he saw the accused hit the complainant on the back of his head and; he testified that after the accused had noticed that he the witness had seen him and had seen what was happening the accused fled and disappeared in the crowd. He also testified that the complainant and the accused were fifty metres away from him when he saw this. He said at that distance he could see that the accused was using an iron rod. He told the court that he and the accused belonged to the same congregation

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that is, Jericho Church and worshipped together for ten years previous to this occasion. He told the court that on this particular day he was off duty and that he had merely assisted in pursuing the accused because the complainant had raised an alarm.

The Crown also led the evidence of Thandi Thulisiwe Dube PW4. It was her evidence that she was a vendor and had her wares displayed at the Old Bus rank. She told the court that she saw people come from below and pointing at a man and saying he has assaulted another man. She says she saw the person who was being pointed at carrying an iron rod in his right hand. According to her he was walking fast but not running. And she told the court that she had not seen the assault herself. She was asked under cross examination and she stated that the person passed some four paces in front of her and that she clearly saw the person to be able to identify him and it was the accused. She says it was an iron rod because she could see it was shining. It was put to her by the defence counsel that she had been schooled to come and tell the court what she told the court but she maintained she had not been schooled but she was merely telling the court what she had seen.

Then the Crown also called PW5 Nkosinathi Mngometulu a police officer, who stated that on the 30th May 1995 he had

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received a report and then went to the Old Bus rank and found the complainant who had been injured.

And he found that the complainant was bleeding.

The complainant was conveyed to hospital and that he had gone back to the police station and had found the accused there who had surrendered himself voluntarily. PW6-3589 Constable Lukhele stated that he was the investigating officer in the matter. He had visited the complainant and obtained information from the complainant at the hospital. Armed with that information he then went to the police station where he interrogated the accused who was already there in police cells. He was told by the accused that the complainant had hit him, the accused first and that the accused had hit the complainant in self-defence. He told the court that he had seen no injuries on the accused nor did the accused himself show any injuries.

A question was put to him that some beast had passed hands between the complainant and the police

and he denied any knowledge about any beast that had been given to the police. The defence did not pursue this matter and the court has got no idea what the significance thereof was.

The accused also testified in his own defence. He told the court that the complainant and her children had attacked his

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brother one Aaron Kunene on some previous occasion and that the complainant had been taken to court and convicted of the assault.

It was the accused's evidence that the complainant had then threatened and vowed to get even with the complainant. The accused then went into details explaining to the court the differences and the quarrels they had had as far back as 1992.

On the 30th May 1995 it was the accused's evidence that he had met the complainant and he was coming up the stairs leading to the Multisave. He stated that the complainant was carrying some plastic container and a knobstick called 'lingedla'.

The court In the course of the trial ascertained what this 'lingedla' is and the court must say it was aware of how 'lingedla' looked like, but for the record purposes the court ascertained and then it was described as the knobsticks with some grooves and sharp edges.

The accused stated that as soon as the complainant had seen him (the accused) he shouted 'you were lucky to have escaped unhurt when we had wanted to kill you' . This was in reference to the previous exchange of quarrels referred to earlier in the judgment and the accused said it was on the

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occasion when his goats had strayed but had not entered the complainant's fields but the complainant had then threatened to assault him together with his children. The accused also said the complainant had said it was his (accused's) last day to see the sun and that the complainant had then started swearing at him and calling him all sort of names.

The complainant said, 'I can still kill you today' and by so saying he delivered a blow on his forehead with a 'lingedla'. He the accused had managed to dispossess the complainant of the knobstick and in self defence striking him at least three or four times. And the accused did not give any account of how the other injuries, the multiple injuries that the court has referred to in this judgment had been received by the complainant.

The accused said on his part he was struck on his forehead and he stated that all the Crown witnesses who had implicated him had told the court lies. Under cross examination by Mr. Wachira the accused changed his story about the meeting place, he said they had met on the ground not on the staircases. Then he also said he asked the police at the police station to allow him to go to hospital and get treatment for the blow that had been delivered on his forehead and that they had refused. The court can mention here that to none of the police officers had any question been

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put to the effect that the accused had asked them that he should be taken to hospital and that they had refused to do so. Nor were the words which were for the first time given by the accused under cross examination as having been uttered by the complainant when they met put to the complainant.

The court was then addressed by the respective counsel making their submissions and the court has listened very carefully to the submissions. And the court was referred to a number of cases, cases which are binding on this court. Mr. Wachira for the Crown stated that even assuming the court were to accept the accused's version how the complainant had been injured. On his version he could still be guilty of assault. However, the court does not accept that version, because there was private defence raised but it was not clear how the complainant suffered so numerous injuries when the accused was acting in self-defence when he the accused had been struck only once in his forehead.

Nor was the accused able to show any injury that he had sustained as a result of the assault by the complainant on him. Having said that, it follows that the court rejects the defence raised by the accused and accepts the version given by the complainant.

What now remains is for the court to decide whether the accused having been charged with the crime of attempted

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murder he is in fact guilty of the crime of attempted murder or of some of the alternative charges one of which is assault with the intent to do grievous bodily harm.

The court has been referred to a number of decided cases. First one being CRIMINAL CASE 24/1992 the case of THE KING VS DOMINGO MAKAMA. The judgment there was given by the then Judge of the High Court Justice Rooney. A firearm had been used in that particular case in assaulting the complainant and in the course of giving his judgment Justice Rooney stated that he was bound by the Thornton Henwood's case and the court is also bound by this Thornton Henwood case. The court will refer to a passage at Page 3 of that decision of the appellate division of Court of Appeal in Swaziland where in the middle His Lordship the Judge of the Appeal Court Justice Kotze had the following to say:

'a case of this nature cannot in my view be decided on the egresses, say so or ipse dixit. One must look at all the evidence.'

Referring to the accused, learned Judge said that the accused acted with reckless abandon is clear from another passage of this evidence, and again he then quoted. And I quote from what the accused would have said in that case:

'I said if anybody moves, I shoot, that I repeated Your Worship several times. There was an Americo moving towards me wanting to talk to me privately.

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The other two decided to move away and that is the time I shot.'

Now I have said that according to this decided case it is sufficient for the prosecution to prove on 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.

In another case to which the court has been referred is the case of the KING VS MBANJWA BHEKUMUSA GAMEDZE CASE NO.173/94 UNBEPORTED. The learned Judge Dunn said the following:

'That the accused had kept himself within the area obviously for the purpose of ensuring that his desired end was achieved. He then left the area leaving the complainant for dead,'

The Judge then relying on the Henwood Thornton case said he found that he was bound by those decisions. I may mention that in that case a cane knife had been used. I say so, because one has got to take into account the circumstances in each and every case and also the weapons used in order to be able to say whether or not an accused person is guilty of an attempted murder.

There is a general principle in our law that each and every

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case deserves to be decided on its own merit. It is true that the court is bound by cases to which reference has been made, but it is also expected to look at the merits of this particular case and then apply those merits to find out whether in this particular case charge of attempted murder can be returned.

In this particular case the court has accepted the evidence that an iron rod had been used but again I refer to the case of the KING VS DOMINGO CASE 24/92 UNREPORTED at Page 6 where Justice Rooney said the following and I quote:

'there is no evidence as to what the accused intended by firing the shots. I suspect that his purpose was to frighten away the Dlaminis. I am unable to presume the intention to kill in this instance, however, he must be deemed to have intended to do grievous bodily harm by shooting the woman in the arm.'

Similarly in the present case there is no evidence of what the accused intended except what has been referred to by Mr. Wachira, the recklessness whether the complainant was going to die or not on the part of the accused.

The court is of the view that the merits of this particular case now before the court differ somehow from the other

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case which the court has been referred to and the court finds that the Crown has not proved that the accused intended at that moment by hitting the complainant with the iron rod to kill the complainant.

But the court would say, as it was said in the KING VS DOMINGO/MAKAMA's case that the accused must be deemed to have intended to cause grievous bodily harm by hitting the complainant in the way that he did.

In the results the court finds the accused not guilty as charged of attempted murder but of assault with intent to do grievous bodily harm on the complainant's body.

J.M. MATSEBULA

ACTING JUDGE