

IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO. 130/07

In the matter between:

REX

VS

1. THANDEKILE MALINGA

2. THEMBA GAMEDZE

3. KHULEKANI DLAMINI

CORAM: BANDA, CHIEF JUSTICE

FOR THE CROWN: MRS. M. DLAMINI (DIRECTOR OF PUBLIC PROSECUTION)

FOR THE 1st ACCUSED: MR. GAMA

FOR THE 2nd 8^B 3rd ACCUSED: PRESENT BUT UNREPRESENTED

JUDGMENT

NOVEMBER 2008

The accused are charged with the offence of attempted murder. It is alleged that on or about the 26th February 2007 at or near Magogeni area in the Manzini Region, the accused each or all of them acting in furtherance of a common purpose, did unlawfully and intentionally attempt to kill Bongani Nhlabatsi. It is further alleged that the accused stabbed the said Bongani Nhlabatsi with a sharp object and further attempted to burn him with fire. All the accused pleaded not guilty to the charge.

The first accused is represented by Mr. Gama and the second and third accused who were present throughout the trial, conducted their own defence.

This is a criminal case and it is the duty of the Crown to prove their case beyond a reasonable doubt. There is no onus placed on the accused to prove their innocence. But proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. As Denning J, as he then was, stated in the case MILLER V MINISTER OF PENSIONS 1947 2 ALL ER 372 at 373, the degree of proof required in criminal cases is settled.

"That degree is well settled. It need not reach certainly, hut it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable, but nothing short of that will suffice".

The prosecution called eight (8) witnesses in support of their

case against the accused. The first witness was Vuyisile Matsebula who is also known as Fikile. She stated that she knew the first accused who is the wife of the complainant in this case. She also informed this court that she knows the complainant. She remembers the first accused telling her about the problem she was having in her marriage with the complainant. The witness stated that the first accused told her that her husband had wanted to marry another woman for whom he had bought a property. The first accused told the witness that she had succeeded in stopping the marriage to continue and that she had consulted a traditional healer in order to achieve this success. She did not, however, reveal the name of the healer to the witness.

The witness further alleged that the first accused told her that although she had succeeded to stop her husband from marrying another woman, her marital problems had continued and her married life was not still normal with her husband. She told the witness that she had tried other ways of improving her marriage relationship with her husband, including apparently wearing

morning gowns as advised by a traditional healer with little success.

The first accused is alleged to have told the witness that she knew that the witness was staying in a Xhosa area which, it would appear, was notorious of harbouring criminals and she asked the witness if the latter could organise some people from that area who could kill her husband. The witness stated that she told the first accused to think of other ways of improving her relationship with her husband like talking to him. It is the evidence of the witness that the first accused insisted on having

her husband killed. The witness stated that on that first meeting the first accused took the witness's phone number and thereafter the first accused would phone the witness to find out if she had succeeded in organising people to kill her husband.

The witness informed this court that the first accused told her that she had a sum of E20, 000 for the purpose and that no specific number of people to attack the complainant was agreed upon. The witness told court that on a certain date she called the first accused to come to Manzini to talk. She says that this was four months after the initial discussions. The witness told the first accused that in the Republic of South Africa there was a group of women who kill their husbands for the sake of money and that such women are sentenced to life imprisonment. It was at this point the witness said that first accused told her that she would get money from her husband's savings and she was prepared to give to the witness E10, 000 as deposit and that the balance would be paid from death allowances from insurance policies which her husband had and that the process of getting such benefits would only take forty-eight (48) hours. The witness then told the first accused that she would try to organise boys. The witness said that the first accused told her that she has not changed her mind and still wanted her husband killed. The witness and the first accused parted and agreed to meet. The first accused continued to phone the witness to see if she had succeeded to organise boys and that she would call at intervals of one or two weeks at a time.

The witness said that it was after the second meeting with the first accused that she met the second accused in these proceedings. The witness said that she then informed the second accused about the plan to kill the first accused's husband. The second accused apparently told the witness that

he could not do it alone and he asked the witness to look for another person and that she should phone him. The witness then went to see the second accused and his friend. It was agreed that they should meet at 7.00pm at Fairview Park in Manzini. This meeting took place towards the end of September or early October 2006. It was at that meeting that the witness first met the second and third accused together. She told them that the first accused wanted her husband killed and the witness revealed to them that the first accused did not want to meet the people that would be organised to kill her husband. The second accused asked at that meeting how much he would be paid for the task. When the second accused was told that he could be paid E2,000 he complained that it was not sufficient and it was then that the witness suggested that each one of them would be paid E5,000. This was agreed and the witness stated that the balance of E10, 000, from the agreed fee with the first accused, would be her profit. The witness said that she informed the first accused that she had organised the boys and that they had demanded E10, 000. The witness stated that although the first accused had complained about the high figure, she agreed to pay the E10, 000 within forty-eight hours (48) and that the balance of E10, 000 would be paid within thirty (30) days.

In the month of February 2007 the witness told this court that the first accused had informed her that the complainant would be going to Sidvokodvo area and that in the evenings he would normally go for his drinking. The witness stated that in the evening of that day she went and collected the 2nd and 3rd accused. The witness said that the first accused had suggested that it would be better to kill the complainant in the evening as he came back from drinking. The witness then took the 2nd 3rd accused to the gate of the first accused's home. The witness said before she took the two accused to the gate she first had checked if the complainant was at Sidvokodvo or at Matsapa.

The witness stated that although she did not personally see the complainant she noticed that his car was parked there.

The witness had earlier hired a taxi to go and see where the complainant's home was and that she had used a taxi so as not to draw people's attention. The witness dropped the two accused at the complainant's house in the evening between 9.00 and 10.00pm. She had used a Mazda car which belonged to her friend by the name of Zenani. After dropping the two accused the witness went back home and told the two accused to phone her when they were ready to be picked up. The first accused was at her house. Later that evening the two accused phoned the witness to inform her that they could not carry out the plan because the complainant had come back with another person and they wanted to be collected. The witness informed the first accused what had happened and went on the following day which was a Sunday and fully explained to her what had happened. On the following Monday or Tuesday and either on 26th or 27th February the witness could not remember positively, she said she received a call from the first accused telling her that she was with the complainant in the car and it would take time to wake him up. The witness said that the first accused told her that she was taking the complainant to his place of work but would not allow him to go because of the condition in which the complainant was and she asked the witness if she could organise the boys. The witness apparently told the first accused that it would be difficult to organise the boys as it was during day time as it was about 9.00am.

The first accused told the witness where she would park the car and where they would find the complainant. The first accused told the witness that she would park her car at a place where there would be no people like the way towards George Hotel. The witness told first accused that they should meet to discuss and that in the meantime she would look for the boys. The witness met the second accused who told her that he was busy at the time. The witness went to Matsapa Shopping Centre

where she called the first accused and agreed to meet at the SPAR. Meanwhile the third accused was in the witness's car waiting. The witness stated that from Matsapa she drove to Manzini after filling fuel at Engen Filling Station. The witness said that meanwhile the first accused was making regular phones asking the witness what was happening. The time was now between 10 - 11am. The first accused would call every thirty minutes. The witness stated that she finally parked her car near KFC which was close to Dr. Futhi's surgery.

The witness asked the 3rd accused if he could drive a car and his reply was that he could only drive an automatic transmission car. At this point the witness phoned to find out if the second accused was free. He confirmed he was now free and the witness collected him at a place near Nazarene in Manzini. The witness and the two accused went and parked their car near Dr. Futhi's premises. The two accused came out of the car and went to the complainant's car after the witness had showed the car to them. The first accused was waiting at Dr. Futhi's surgery. Nothing happened at Dr. Futhi's surgery because the complainant was found awake. The witness went and informed the first accused who asked the witness to wait. The witness told first accused that she wanted to go home but the accused told the witness to wait because she did not want the matter to be delayed any longer and that she would drive the complainant to a deserted and isolated area where she would wait for the witness and the other two accused. She told the witness to wait for her at a place called Kai Kai. The witness said they went to Kai Kai and later to Mr. Yung's farm. After 40 minutes the first accused phoned the witness to tell her that she had left Manzini going to the complainant's place of employment and that the witness and the other two accused should leave Kai Kai and proceed to their homestead i.e. the first accused and complainant's home. The witness said they were driving slowly

until they got to Young's farm. The witness said that they parked their car in such a way as to give the false impression that they had suffered a mechanical problem.

The witness said that after about 15-20 minutes the first accused came driving a Ford vehicle white in colour with a canopy. The witness said that the second and the third accused who had all this time been with the witness in her car, came out and went to the first accused's car which had been parked behind their car. The witness said that the first accused pointed out to the other accused where the complainant was. The witness said the complainant was in the canopy of the car but she could not hear what the first accused was saying to the other accused persons. The witness was able to say, however, that the two accused were assaulting the complainant at the back of his vehicle. She could not say how the two accused were assaulting the complainant but could hear the noise. The witness said she came out to close the bonnet of her car and that the two accused were still at the complainant's car assaulting him. She could not see where the first accused was at that point but she saw the two accused as they pushed the complainant's car off the cliff while the complainant was still in the car. The witness said that she called the first accused who told the witness to go and collect the two accused. The witness's evidence is that she collected the two accused from a point 100 metres from the scene. The witness said she could see smoke coming from below the cliff where the complainant's car had been pushed. The witness said she went and dropped the two accused at William Pitcher College and took her car to a car wash. She tried to call the first accused but she was not picking up the phone. The witness said that after two days the first accused called her to tell her not to call her as they both were in hospital having been admitted at Manzini Clinic. The witness further stated that the first accused stressed that the witness

should not call her and that she would also not call the witness.

There can be no doubt that the first prosecution witness, Vuyisile Matsebula is an accomplice and indeed she was produced as such witness by the Crown. She gave evidence after I had given her the necessary warning. Accordingly I direct myself to be cautious of the danger of convicting on the evidence of an accomplice for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused, but such witness is peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. See R V N CAN AN A 1948(4) SA399 at 405 when it was stated-

"This special danger is not met by corroboration of the accomplice in material respects not implicating the accused or by proof aliunde that the crime charged was committed by someone; so that satisfaction of the requirements of Section 285 does not sufficiently protect the accused against the risk of false incriminating by an accomplice. The risk that he may be convicted wrongly although Section 285 has been satisfied will be reduced and in the most satisfactory way, if there is corroboration implicating the accused".

And Section 237 of the Criminal Procedure and Evidence Act provides as follows:

"Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons on the single evidence of any accomplice.

Provided that such offence has, by competent evidence, other than the single and unconfirmed evidence of such accomplice, been proved to the satisfaction of such court to have been

actually committed".

It is clear; therefore that corroboration is required as matter of law before any conviction can be grounded on the single evidence of an accomplice.

The second witness the prosecution called was the complainant Bongani Nhlabatsi. He stated to the court that the first accused is his wife and that he first met her in late 1998 and got married in 2000 or 2001. He remembered that his birthday is always on 15th April. He said that he normally goes to Matsapa and to Sidvokodvo Recreational Centre for socialising. He said that he has a CONCO Provident Fund which is valued at E600, 000 and that it increases every year as he contributes to the fund. He said that in February 2007 it was valued at E520, 000 according to the statement he had received. He told this court that his wife was fully aware of his benefits including the funeral benefits which are valued at E10, 000. The witness stated that he bought a property which was identified by his wife. He identified the first accused as his wife who, according to him, was now 'in the hands of the law'. The witness denied having another woman as a friend.

He stated that he remembered knocking off duty on a Friday and that he spent sometime at the Recreational Club. He said he came back home on Friday at about 9pm. He was driving a Mazda car white in colour but could not remember who was with him. He said that sometimes his neighbour follows him but could not remember anything suspicious on that Friday evening. He said he remembered having a 'hangover' on a Sunday and he explained what the feeling of a 'hangover' is. He informed this court that the drive way to his house is one way and explained that if he enters his gate another car cannot enter.

The witness stated that on the following Monday he remembers waking up in the morning and preparing to go to work. He said he drove to work together with his wife and his mother and that before he got to the road going to Siphofaneni he felt uneasy as if his blood pressure was high and he told his wife to drive him to work. He remembers feeling very sleepy as his wife drove him to his place of work and that he knew where he was being driven. He said on this particular day his blood pressure was extreme and could not control it'. He stated that at about 9am his wife suggested that they should go to Dr. Futhi's surgery. Dr. Futhi is the witness' doctor. He said as they approached Dr. Futhi's surgery he was surprised to see that rather than park where they normally do his wife parked the car at the back. He said this raised his suspicion but he thought that is where his wife had wanted to park the car.

He remembers asking his wife to go and queue for him in the surgery while he remained sleeping in the car. She came back and told him to enter the surgery but only to find that he had to go and stand in the queue again. He stated that while he was still on the queue he noticed that his wife went outside. He said Dr. Futhi advised him that his blood pressure was not good and gave him some medication. He said that when he left Dr. Futhi's surgery he slept at the back of the car where there was a canopy. He said that his wife drove to his place of work where she handed over his sick sheet and that from his work place his wife drove home. He remembered that they had dropped his mother at about 7am and it was before they went to Dr. Futhi's surgery.

The witness said that as they drove on the gravel road going to his house and as they passed Mr. Young's farm he noticed that the car was stopping in the middle of the road. He said he saw 'two guys' approaching the car. They opened the canopy doors and 'one of them asked me if I was Bongani Nhlabatsi'. The witness said that while this was happening the guy with plaited hair told him that they were looking for him. The witness said that one of the two guys was light in complexion and that the other was dark in complexion. He said it was the dark guy who had plaited hair and that the person with light complexion had small dreaded locks. The witness identified the two people as the second and third accused in this case. He could not remember who opened the canopy but said it was the third accused who was in front and that it was this accused who asked if the witness was Bongani. It is the evidence of the witness that this accused was wearing blue surgical gloves. The witness said that after they asked for his name he looked at their eyes and felt that the two were thugs who were looking for money and cellphone. The witness said the two accused told him that they wanted neither and that they had come 'to sort me out'. The witness said that he had E250 at the back of his pocket and when he showed it to them they said they did not want money or cellphone. He remembered that his cellphone was a Nokia 6110 model. He stated that he saw the third accused picking a stone the size of the witness fist and hit him on the forehead which pushed him in a sleeping position and at that point the third accused came into the car and that as the witness tried to wake up he was hit again on the same spot with the same stone. The witness said that after he had fallen the second time he saw the accused producing a knife which, he said is normally called as 'three star'. The accused was trying to stab the witness on the chest and that the witness was blocking the stabs with his hands. The witness heard the third accused tell the second accused to burn the car. The witness said that the second accused was standing outside the door of the car and the

witness was now feeling weak and dizzy. The witness stated that at that point he felt the car gaining momentum towards the bottom of the cliff. He said he saw the third accused jump out of the car before it gained speed. The witness stated that he smelt some smoke and fire but he could not jump out as he had been hit twice on the forehead and was becoming dizzy than he had been at Dr. Futhi's surgery.

The witness stated that as the car was going down the cliff he kicked the door of the car and jumped out but he fell on the ground stone which cut him on his head. The witness stated that as he fell to the ground the second and third accused came and pulled him into the bush where they tied him with a rope from his own car. He identified the rope as the one which he used for tying up building materials on the canopy of his car. The witness said that when they tied him he passed out. The witness stated that as he lay down he saw the third accused's foot going to the witness' head and that he heard the second accused telling the third accused why he was wasting time as it was he who was supposed to finish the witness off. The witness said that the third accused replied that his hand was not good enough to finish the witness. The witness stated that the third accused was hitting him with his foot and trying to stab the witness on the neck. The witness stated that from that moment he passed out and that he remained there for about 30 minutes to one hour when he woke up and jumped into Mr. Young's fence. The witness said he did not see any of the accused except his burning car. The witness said that while in Mr. Young's farm he called a Mr. Sifiso Mahlangu a colleague at work and he also called the triple nine numbers but it was not responding. He decided to sleep again in the bush and when he woke up he called his elder brother and called the triple nine numbers again. The lady who answered the call told him that help would come.

The witness stated that he was not aware where his wife and the two accused had gone and he decided to move away from the scene and when he had moved about 200 metres away he

decided to sleep again. He then heard a fire engine vehicle and because he was not sure if the two accused had guns or not, he decided not to go to the fire engine vehicle as he thought - they might shoot him. He slept again and when he woke up he decided to walk up to the fire engine vehicle and in front of it was a police car. He said he went to the police car. He struggled back and walked to the cliff where the whole incident had started and he saw the police down the cliff and when one of them saw him they ran towards the witness to help him. He tried to jump into the police car but could not and was eventually helped to climb into the police car. The witness stated that this was about midday and when he asked for water the police said that because of his condition they could not give him water. The witness said he was bleeding from his head and that he had so much blood that some of it was coming through his foot. The witness remembered being driven to Imphilo Clinic where he was seen by Dr. Bellu. The witness showed scars to court on the forehead and a scar on the left and right hand; scar on the neck stretching from the neck to the top of the chin and to the top of the left side of chest; scar in the left side of back of his head.

The witness said there had been a huge scar round his neck where the rope had gone through. The witness recognised the black sock and the red T-shirt which was given to him by his South African friend. The witness also recognised his motor vehicle from the pictures that were produced in court. The witness said that the doctor had given him one month off duty and that he had to attend physiotherapy sessions as an outpatient.

The witness stated that he knew the first prosecution witness as a friend of his wife and had known her since 2002. The witness agreed that PW1 had helped them to adopt a child but denied

that any money was involved. He also agreed going to see officials at the Department of Social Welfare but again denied that any money was involved.

The witness agreed that there had been notes written which threatened him and his wife but he doubted the authenticity of some of them as he suspected they had been written by his wife in order to persuade the witness to pay more attention to her. The witness denied his wife ever complained about his drinking habits and he denied ever assaulting her. The witness identified the second accused as one of the persons who attacked him and as the person who had small dreadlocks. The witness identified third accused in court as the person with a dark complexion and as the person who assaulted him and that it was this accused who wore blue surgical gloves and also as the person who hit him twice on the forehead and that it was this accused who had plaited hair.

The third prosecution witness was Phila Cleopas Lukhele. He is a public transport driver and was at the material time driving a kombi vehicle. He stated that he knew Mr. Young's farm which was on his route. The witness said he remembered driving his kombi vehicle on 26th February 2007 and he remembered seeing some smoke coming from the bush. He said he did not pay particular attention as it was coming from a place which was a farm and he thought it was people collecting honey. He said that as he approached Magogeni a place which is known as a hiding place for criminal thugs he found a woman walking at this dangerous place. The woman was heading in his direction and was speaking on her cellphone. He observed that the woman was walking very slowly and that she stopped his vehicle. The witness then heard some of his passengers say that there was a car burning.

The witness said he left his car and went where the car was burning and found that there was nobody inside it but at the back he noticed that there was a mattress, some shoes and a blanket. The witness said he took the items from the burning car and threw them out. He went into the front of the car where he saw that the ignition key was still there but as he attempted to remove the key the car burst into flames. The witness went back to his kombi and to this woman who had stopped him. He asked the woman if she knew anything and she is alleged to have told the witness that thugs had attacked them and that the thugs were five in number. She further told the witness that the thugs had parked their car in such a way as to block the passage of any car. The woman told the witness that three of the thugs attacked her and that two of them went to the back of the vehicle and attacked her husband. The witness said that when he asked the woman where her husband was, she told him that he was burning in the car and that the thugs had taken him away. The witness asked the woman the colour of the car that the thugs and that she told him they were using a maroon car. The witness said he could not remember meeting any maroon car. He could only remember meeting a white and green car. The witness identified the green car in the photos produced in court. It should be remembered that this is the car PW1 identified as the car which she had used on the material day. The witness also said that the woman had told him she had not called the police. The witness stated that he noticed that the woman had no injuries on her body. The witness identified the woman as the first accused in this case and that he had known her before and he recognised the burning car as the complainant's car. The witness told the woman that he would give her a lift on his way back to Manzini.

The fourth prosecution witness was Busisiwe Sibongile Magagula. She stays at Croydon. She said that she was a

traditional healer and she knew the first accused as Thandekile Malinga. The witness said the first accused went to her residence and sought from her advice because her husband was ill-treating her. The witness said that the accused wanted her to help kill her husband. The witness said the accused told her that her husband had developed a sexual relationship with another woman and that he had bought her a house. The witness stated that she asked the accused why she was taking this 'evil way' rather than to ask to be cleansed so that her husband can continue to love her. The witness said that the accused rejected her advice and insisted that her husband be killed. The witness said that she asked the accused to think about her child and what she would say to the child but the accused told the witness to do what she had requested.

The accused told the witness that her husband was travelling to South Africa on the following Thursday and that she wanted him to have an accident in which he should be killed. The witness told the accused to bring a pair of her husband's socks and a top. It is the evidence of the witness that on the following day, the accused duly brought the pair of black socks and a red T-shirt which have both been produced in these proceedings as exhibits. The complainant has identified these items as his pieces of clothing. The exhibits were brought to the witness on a Monday and she told the accused to contact her on Wednesday a day before the accused's husband was due to travel to South Africa. It is the evidence of the witness that on Wednesday the accused called her when the witness told her that she was away from her home and that she had not prepared the charms. The witness said that the accused phoned her again on Thursday but the witness said she did not pick up her call. The witness stated that she did not hear from the accused until the day when she came to her in company of the police who took her to Mliba Police station. The witness identified the pair of socks and the

red T-shirt as the pieces of clothing the accused brought to her. The witness identified the first accused as the person who asked for help to kill her husband.

The fifth prosecution witness is the police officer who works in the Fingerprint Section and is responsible for taking photographs at scenes of crime. He took the photographs at the scene of crime in this case.

The sixth prosecution witness is Dr. Mzondile Mbelu. Dr. Mbelu studied medicine at the Universities of Natal and Pretoria. He is a general practitioner with special interest in trauma. At the relevant period he was operating from Manzini Clinic. He remembered the date of 26th February 2007 when he was on duty in the casualty unit. It was about 3pm when the police brought in a patient by the name of Bongani Nhlabatsi. The doctor said the patient had a history of being assaulted and stabbed. The patient came in soiled blood and stained clothes and that upon examination he found that the patient had multiple lacerations on the left of the neck to the upper part of the chest; to the forehead and to the wrists. The patient had also bruises over his body. The doctor stated that he started resuscitation procedures and he put the patient on drips; the patient was semi-conscious and he appeared to have lost a lot of blood. The doctor said that he then replenished what the patient had lost. He said they controlled bleeding by suturing the bleeding and because of the nature of the injuries and their location (neck) the doctor decided to take the patient to theatre. It was the doctor's opinion that the injuries the patient had sustained to the neck were life threatening. The doctor said that the purpose of taking the patient to theatre was to explore the wounds and to assess the depth of the wounds. He said they needed to assess and examine if other organs had been

destroyed in the neck. He said that what they did in the theatre helped then to control the bleeding and regain the muscles. The doctor said that it was fortunate that the injuries only affected the muscles and not the nerves. The doctor said the injuries were in line with the patient being stabbed. The doctor said they were able to assess the wounds which were deep and extended to the oesophagus.

The seventh prosecution witness was Zethu Andile Matsebula. She is a sister to the first prosecuting witness and that she resides at Madoda area in the Manzini. She stated that she knew where the PW1 stayed in 2006 and that she, too, lived at Madoda. The witness remembers a date in February 2007 when some people came looking for PW1. He remembered that one person was short and dark. He said that this person was asking for her sister PW1 who was not around. The witness said that the person told her grandmother that PW1 owed the person money for doing some work for her at Mankayane. The person said he had destroyed a wall for PW1 at Mankayane. The witness said PW1 had no wall at Mankayane. It was also the evidence of this witness that a second person also came looking for PW1. This person was tall and light in complexion. The person had dreads as well. The witness said the third accused is the short and dark person and that he had identified himself as Khulekani.

The eighth prosecution witness is a police officer Sinikiwe Tfwala. He is the investigation officer in the case. He interviewed all the accused in this case.

DEFENCE CASE

All the accused person gave evidence from the witness box. The first accused's case is that she never told PW1 to organize

people to kill her husband. She contended that the attack on her husband and her was done by robbers who waylaid her and her husband on the notorious area known for harbouring criminal thugs who attack people. She stated that on the particular day as she drove her husband from Dr. Futhi's surgery to her husband's home they were suddenly attacked by five people who had blocked their way. She stated that three of the five people attacked her and the remaining two went and attacked her husband who was sleeping in the canopy of the car. She said that the three people who attacked her pushed her into the forest and that one of the attackers kept guard over her and she was told not to touch her cellphone. She was also told not to look to the road but into the forest where they had been attacked. The first accused said that although she did not see what was happening at the back of her car she heard noises and sounds which told her that there was some struggle going on in the car; that she later heard a big bang and a huge fire and that later the person who kept guard over her told her to sit down and he then left her. She later heard loud door banging and car doors closing. She went to the road where she met a kombi and that she explained to the people in the kombi what had happened to her. She stated that the people who had attacked her and her husband had been riding in a maroon car which had earlier overtaken them on the road.

The second accused's case is that he remembered a lady by the name of Gugu coming to her home. He stated that that lady was in the company of PW1 and on that particular day he was away. The two ladies apparently wanted him to do a job for them. He found out that they wanted him to dig a foundation. The accused was told by his mother that the ladies had left E50 so that he could phone them. He said that on the following morning he went to the Plaza shop where he phoned Gugu who told him that he should not bother because PW1 had found other people to do

the job. He went back home and told his mother. However, on 13th April 2007 the accused said he saw coming with the police and took him to a police station. He stated that he told the police that when the offence was committed he was somewhere else and that he had a witness to support him. He stated that he led the police to the third accused as the person who was with him where he had gone. He stated that the police threatened him but he refused to confess to something which he had not done. He stated that the police threatened him while at the police station.

The case for the third accused is that 13th April 2007 he saw second accused coming to his home with the police. He stated that the second accused was bleeding on his face. He said that the second accused went to him to confirm where they had been on 26th February 2007. He said before he could say where the second accused had been the whole day a police officer hit him in the face with an open hand. He said the police arrested him and put him into the police van and that he saw that PW1 was on board the police car. He stated that he asked the second accused why he brought the police to his home when he was not involved. He told the police that the second accused was his neighbour. The accused recalled being taken to the alleged scene of crime where photographs were taken. The accused confirmed the scene of crime as the place where the court inspected the loco.

Mr. Gama, who appeared for the first accused, has submitted that the only evidence on which the prosecution has relied is the evidence of an accomplice witness. He has further submitted that before the court can accept such evidence it must first find that the accomplice has given credible evidence and has urged this court to consider carefully the evidence of the accomplice witness and to find if she is a witness who can be believed. Mr. Gama also submitted that the court must look for corroboration. He has contended that PW1 had made a statement to the police which was inconsistent with the evidence she gave in court. He has argued that PW1 had already known that the first accused had been arrested and therefore, Mr. Gama submits, that PW1 had to give a statement against a person who had already been arrested. Mr. Gama also urged the court to remember that PW1 said she had been promised E20, 000 and yet in the statement she made to the police she had apparently told them that she had been promised E50, 000. Mr. Gama contends, therefore, that such a witness cannot be credible and that she must be lying when she says that the first accused is complicit in the offence charged. Mr. Gama submitted that the corroboration must be independent evidence which implicates the accused. He has, therefore, submitted that the evidence of PW2, the complainant, in this case is not the corroboration the court should look for. Mr. Gama makes a similar observation with regard to the evidence of Lukhele the kombi driver and has submitted that to be seen at the scene of the crime is not sufficient corroboration. Mr. Gama has also attacked the evidence of PW4 the traditional healer who identified the first accused as having gone to her and asked her to kill the complainant through an accident. Mr. Gama has, therefore, submitted that there is no credible evidence to implicate the first accused in the commission of the crime that took place on 26th February 2007. Mr. Gama has raised the possibility that the threatening notes which were addressed to the first accused and her husband could have been written by PW1 and other

conspirators and has submitted that the evidence produced by the Crown is improbable and that his client is entitled to an acquittal.

The second and third accused have denied being involved in the commission of the offence and that the evidence on the identification is inconsistent. They have stated that the evidence of the police is not sufficient to convict them.

The Director of Public Prosecutions who appeared for the Crown has submitted that the Crown has proved its case against all the accused beyond reasonable doubt and that they should be convicted as charged. She has conceded that PW1 is an accomplice witness whose evidence requires corroboration. The learned Director has contended that there is evidence of other witnesses which corroborates evidence of the accomplice in material particulars. She has referred to the evidence of the complainant himself, the evidence of the traditional healer PW4 as evidence which corroborates the evidence of the accomplice witness.

I have reviewed the evidence in this case to some great length. The founding evidence for the Crown in this case is based on the evidence of the accomplice witness. In many respects the evidence called by the Crown is very similar to the evidence given by the first accused. The first accused admits that PW1 had been a friend of hers since 2002 and that she was a person in whom she could confide anything including problems in her marriage. The first accused has admitted telling PW1 that she had problems in her marriage and that she had asked the witness for help. She admits telling PW1 about her marriage problems which she had gone through with one woman for

whom her husband had bought property. She told the witness how she managed to stop that marriage. She further agreed that she had sought the help of the witness to try to solve her marital problems. The only difference is that whereas the witness said the help which the accused wanted from her was to organize people to kill the husband her version is that she only wanted help which could help her husband quit drinking.

The first accused also agrees going to see PW4 the traditional healer who stated that the help the first accused sought from her was medicine which could kill her husband in a motor accident. The first accused admits taking to the witness a pair of socks and a red T-shirt which the witness had asked the accused to bring which would be used in making concoction which would kill the first accused's husband in an accident. She also admits phoning the witness to find out what was happening.

What is of particular significance is the evidence relating to the events that took place on the fateful day of 26th February 2007.

The first accused agrees totally with the evidence of PW1 regarding the sequence of events on the morning of that day. The first accused agrees with what the witness said that they exchanged phone calls that morning discussing where they could possibly meet. They both agree that they met at Matsapa and agree that they met at Dr. Futhi's surgery. The first accused agrees that she spoke of her movements as she travelled from Dr. Futhi's surgery to the workplace of her husband and when they started driving home. The first accused agreed that they consistently talked to each other as she drove towards their home. It is equally significant to note that PW1 had told court that the first accused had told her that she would drive the complainant to a deserted and isolated place where the witness and the people she had organized would find the complainant. It

is also significant to note that the first accused parked her vehicle at the back of Dr. Futhi's surgery instead of in front. Indeed this development surprised the complainant who stated that it raised suspicion in his mind as they always parked in front of the surgery. It should be remembered also that according to PW1 what had been agreed on that morning is that since the complainant felt dizzy on that day and was sleeping in the back of the car and in the canopy, the first accused would park the car at a convenient place where the other accused would drive the complainant away and kill him. It will be further recalled that the second accused was asked if he could drive a car but said he could only drive a car with automatic transmission. The complainant's car was manual. In fact an attempt to drive the complainant's car was made at Dr. Futhi's surgery except that it was aborted when they found that the complainant was awake.

The first accused admits that she was aware that the complainant had insurance policies. Indeed it was the evidence of the complainant that the first accused was aware of the policies which include funeral benefits. It was the evidence of the complainant that the first accused would get the E10, 000 from the funerals benefits which he enjoyed.

I have carefully considered the evidence which both the prosecution and the defence have called. While there can be no doubt, and indeed the prosecution introduced the first witness as an accomplice, I have found the witness to have answered all the questions that were put to her frankly and honestly. I am satisfied and I find her to be a credible witness and that the evidence she gave was not tainted by her desire to minimize her role in the offence. I am satisfied and I find that there is sufficient and, in my view, overwhelming corroborative evidence

which clearly implicates the first accused in material particulars. The evidence of the complainant himself, the evidence of PW3 and PW4 provides the necessary corroborative evidence including the evidence of the first accused herself.

The first accused story about the attack on her and her husband was a well rehearsed story which was intended to be a diversion and distraction of attention from her and her fellow accused. It is curious to note that although she stated that she was attacked by three assailants there was no sign of any injury on her and to imagine that any robber attacking her would leave her handbag and cellphone with her is beyond comprehension! And compare that to the multiple injuries which were inflicted on the complainant which the doctor described as life threatening and the wounds were so deep that they extended to the oesophagus. And what was also curious was that a person who had been the object of a robbery attack did not consider reporting the matter to the police. Further her story about the attackers using a maroon car was intended to be a diversionary ploy because she knew very well that the two accused were using a green car driven by PW1. Lukhele PW3 in this case said he did not meet any maroon car on the way. He said that he met a white and a green car. He identified the green car which was identified as being used by PW1 as the car he met on that particular day. I would therefore reject the first accused's story as false and an afterthought. It is a story which was never put to the prosecution witnesses to get their reaction to it. It is important for the defence to put its case to the prosecution witness. The court is entitled to see and hear the reaction of a witness on very allegation made although there is no onus placed on the accused to convince the court of his explanation. I find the first accused's story an improbable one and I reject it.

I am satisfied and I find that the second and third accused are the people who attacked the complainant. I also find that they

are the people PW1 hired to kill the complainant. There can be no doubt that the evidence of the complainant clearly corroborates the evidence of the first witness. The complainant identified them as the two persons who assaulted him. The assault was carried out during broad daylight in the late hours of the morning. The complainant's identification of the two accused was very definite and clear and there was no doubt in his mind about the people who attacked him.

This offence was committed because of the first accused who was driven by greed, jealousy and greed took the better part of her. This case is a clear vindication of the adage that "money is the source of all evil". This woman was not satisfied with what the husband had done for her. He had bought two properties for her and she had agreed that he was a good husband and yet she still wanted him killed. It is a pathetic story. The complainant suffered life threatening injuries. Some of the injuries were so deep as to extend to the oesophagus.

I find that the prosecution have proved their case beyond reasonable doubt and find all the accused guilty of the offence of

attempted murder as charged.

R.A. BANDA
CHIEF JUSTICE