



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL TRIAL NO. 472/10

In the matter between:

REX

VS

JOHN ROLAND RUDD

Neutral citation: *Rex v. John Roland Rudd (472/2010) [2014] SZHC 373 (2013)*
22nd October 2014

CORAM

M.C.B. MAPHALALA, J

Summary

Criminal Law - Attempted Murder and contravention of section 11 (1) read with section 11 (8) of the Arms and Ammunition Act 24/1964 as amended – held that when the accused shot at the complainants, he appreciated the risk of death and serious injuries being sustained but he was reckless whether death or serious injuries were sustained – held further that the accused was accordingly convicted of murder – similarly, the court found that the accused was guilty of contravening section 11 (1) as read with section 11 (8) of the Arms and Ammunition Act 24/1964 as amended on the basis of the ballistic report which linked the fired bullet to the pistol which was pointed out by the accused in the bush together with the ammunition in the magazine.

JUDGMENT

- [1] The accused is charged with two counts. On the first count he is charged with Attempted Murder, and, the Crown alleges that on the 27th April 2012 at KaDake area in the Hhohho region, the accused unlawfully shot at Thokozani Nkwanyana, Mlondi Xaba, Bhekinkhosi Sikhondze and Gugulethu Mngometulu with intent to kill them. He pleaded not guilty to the offence of attempted murder.
- [2] On the second count the accused is charged with contravening section 11 (1) read with section 11 (8) of the Arms and Ammunition Act 24/1964 as amended, and, the Crown alleges that on the 27th April 2012 at KaDake area, the accused being not a holder of a valid licence or permit unlawfully possessed a firearm, to wit, a star pistol serial No. 148946. He pleaded not guilty to the charge.
- [3] PW1 Thokozani Nkwanyana of Nkhanini area and employed as a soldier by the Ubutfo Swaziland Defence Force testified that he knew fellow complainants Gugulethu Mngometulu and Bhekinkhosi Sikhondze; they work together for the Ubutfo Swaziland Defence Force as soldiers. He told the Court that on the 27th April 2012, he was driving a Volvo registered FSD 016 AL in the company of Bhekinkhosi Sikhondze, Gugulethu Mngometulu and Mlondi Xaba, a civilian friend. They were

driving from Nkoyoyo Army Camp where the three of them were based, and, they were visiting fellow soldiers at Ngwenya Army Camp.

[4] When they reached the overhead bridge at KaDake, they found a truck parked on their lane and blocking the road. There was a VW Golf parked in front of the truck. Gugulethu Mngometulu was driving the Volvo sedan in which they were travelling; and, he stopped the motor vehicle behind the truck and blew a hooter for the truck to give way. The driver of the VW Golf sedan, who is the accused, insulted them for blowing the hooter. The truck drove off, and, the accused told them that he was speaking to the truck driver and that they should not have blown the hooter.

[5] The accused insulted them and further threatened to shoot them. Bhekinkhosi Sikhondze retaliated and traded insults with the accused. They told the accused that he could not shoot them because they had not done anything wrong. The accused drew out his pistol and shot at the motor vehicle injuring PW1's right arm. The bullet first hit Mlondi Xaba who was seated behind the driver before hitting PW1 who was seated next to the driver. The bullet went through the rear small window behind the driver and damaged it. Mlondi Xaba was slightly injured, and, his jacket was torn. However, PW1 was seriously injured.

[6] After the shooting they drove away from the scene of crime and followed the truck with a view to obtain the particulars of the accused from the truck driver. However, the truck driver denied knowledge of the accused and further disclosed that the accused had also insulted him at the overhead bridge. PW2 phoned and reported the matter to the police.

[7] PW1 disclosed that they were not wearing army uniforms at the time of the incident since they were not on duty. The police subsequently arrived and PW1 and Mloni Xaba were taken to hospital. A doctor removed the bullet-head from the body of PW1; he was admitted in hospital for three days.

[8] PW1 maintained his evidence under cross-examination. He denied that they were armed as alleged by the accused. He further denied that one of them drew an R4 automatic rifle and threatened to shoot the accused. He also denied that after the shooting, they had chased after the accused's motor vehicle.

[9] PW2 Gugulethu Mngometulu was the driver of the Volvo sedan and employed by the Umtsofo Swaziland Defence Force as a soldier. His parental home is at Mndobandoba area in Big Bend. He told the Court that on the 27th April 2012, they left Nkoyoyo Army Camp with his friends and

drove to Ngwenya Army Camp. They found a truck blocking the road on the overhead bridge at KaDake. There was also a VW Golf sedan in front of the truck.

[10] He blew the hooter, and, the accused who was driving the VW Golf sedan drove towards them. The accused asked why they were blowing the hooter when he was still talking to the truck driver. Thereafter, the accused insulted them. One of the passengers in the Volvo sedan Bhekinkhosi Sikhondze told the accused that he should not insult them since he was blocking the road. In response the accused threatened to shoot them; and, Bhekinkhosi Sikhondze told the accused that he could not shoot them since they had not done anything wrong.

[11] The accused was seen talking to an occupant of the VW Golf who was seated at the backseat asking him to give him the gun. Shortly thereafter, the accused shot at the small window of the Volvo sedan behind the driver. PW2 then drove the motor vehicle from the scene at a high speed. Meanwhile PW1 complained that he had been shot. They drove to the Ngwenya Army Camp where PW2 was able to phone and report the incident to the police. With the assistance of the police, PW1 and Mloni Xaba, who were both injured during the shooting were taken to hospital. Subsequently, they recorded a statement with the police at Oshoek Border

Post. The motor vehicle in which they were driving was damaged as a result of the shooting. PW2 emphasized that at the time of the shooting, they were not on duty; hence, they were not wearing army uniforms. He further disclosed that they were not armed with service weapons as they were off-duty.

[12] PW2 maintained his evidence under cross-examination. He confirmed that the accused had only fired one shot. He insisted that the accused wanted to kill all four of them when he fired the shot. He denied as alleged by defence that one of the occupants of the Volvo sedan had pulled out an automatic rifle and threatened to shoot at the accused. He reiterated that none of the occupants of the Volvo sedan was armed with a firearm. He reiterated his evidence that as soldiers they do not carry service weapons when they are off-duty. Similarly, he denied that they had chased after the accused's motor vehicle after the shooting; he contended that it was the accused who was the first to insult them after PW2 had blown the hooter signaling to the truck driver to move away from the road. He confirmed that PW1 was seriously injured. Mlondi Xaba was slightly injured, and, the bullet tore apart his jacket bruising his chest in the process.

[13] An inspection in loco was held at the scene of crime on the overhead bridge. During the subsequent cross-examination of PW2, it transpired

that the truck had stopped on its lane, and the VW Golf sedan was on both lanes partly blocking the truck. The accused was speaking to the driver of the truck. The Volvo sedan stopped behind the truck and blew a hooter; and, this prompted the accused to drive towards the complainants' motor vehicle. The accused insulted the complainants for blowing the hooter when he was still talking to the driver of the truck.

Bhekinkhosi Sikhondze, told the accused not to insult them since he was blocking the road with his motor vehicle. The accused inturn threatened to shoot the complainants. Again Bhekinkhosi Sikhondze responded and told the accused that he could not shoot them because they had not done anything wrong. The accused took out his pistol and pointed it to the complainants' motor vehicle. PW2 engaged the motor vehicle in motion. At that instant the accused released the trigger of the pistol, and, he hit the small window behind the driver.

[14] PW3 Banele "Skimari" Mayisela of Mangwaneni Township in Mbabane testified that on the 27th April 2012, he was drinking liquor at Hilltop Township in Mbabane when Mxolisi Mfundo Kunene and the accused arrived at the bar driving a black VW Golf. PW3 and Mxolisi Mfundo Kunene are related to each other as they are brothers in-law. The accused and Kunene joined PW3; and, they drank liquor and had a braai together.

[15] Subsequently, they visited a bar at Ngwenya Border Post where they bought and drank liquor. When the type of liquor they were drinking was finished, they went to a bottle store at KaDake to buy the liquor with the intention of coming back to the bar at Ngwenya Border Post. On their way back at KaDake overhead bridge, they came across a truck working for Salgaocar Company and transporting iron ore.

The accused signaled to the driver of the truck to stop. He insulted the driver of the truck accusing him and his company of depleting the country's iron ore, and, that they should go back to their country of origin. The driver and the truck were from Mozambique; however, the driver didn't respond to the insults made by the accused. The accused further blamed the driver and his company for damaging the country's roads when transporting the iron ore from the Ngwenya mine to Mpaka Railway depot from where it is exported abroad.

[16] After this confrontation the accused signalled to an oncoming second truck to stop whilst the first truck continued with its journey to load iron ore at Ngwenya Mine. The accused repeated the same insults and accusations to the second truck driver. PW3 unlike PW1 and PW2 testified that he saw two trucks whereas the other two witnesses only mention one truck.

[17] PW3 further told the Court that there was a Volvo sedan which had stopped behind the second truck. Its driver blew a hooter signaling to the truck driver not to block the road. The accused did not take kindly to the blowing of the hooter, and, he drove towards the Volvo sedan. He insulted the driver for blowing the hooter, and, an occupant of the motor vehicle also insulted the accused who then threatened to shoot the occupants of the Volvo sedan. PW3 was seated on the backseat of the accused's motor vehicle.

[18] An occupant of the Volvo sedan took out his hand from the window and challenged the accused to shoot one of his fingers. Immediately thereafter, the Volvo sedan started driving away; the accused retrieved his pistol under the driver's seat and shot once at the Volvo sedan. The accused drove away in his motor vehicle. PW3 alighted from the accused's motor vehicle at Hilltop Township in Mbabane. PW3 emphasised that he never saw any of the occupants of the Volvo sedan carrying a firearm.

[19] Under cross-examination PW3 disclosed that the pistol used in the commission of the offence belongs to the accused. PW3 further denied that he had used the same pistol to shoot at KaNganono in a fight that involved two rival gangs of Mahwalala and Hilltop Townships. Similarly, he denied that he was in possession of the pistol prior to the shooting in this case.

[20] PW3 denied that the accused shot at the complainants after seeing one of them retrieving a gun with the intention of shooting the accused. He contended that he didn't see any of the complainants carrying a firearm. He reiterated his evidence that the accused insulted the truck drivers. PW3 further denied that after the shooting, the complainants chased after the accused's motor vehicle. He also denied that they were close friends with the accused and averred that he only met him at a sheeben at Mahwalala Township through Mxolisi Kunene. PW3 confirmed that during the shooting, he was at the backseat of the accused's motor vehicle and Mxolisi Kunene was seated in front next to the accused.

[21] PW4 Mxolisi Kunene resides at Mncitsini area at Msunduzi Township in Mbabane. He works for Pick & Pay Supermarket in Mbabane as a merchandiser and packs South African products. He told the Court that PW3 Banele "Skimari" Mayisela is his brother in-law. He testified that on the 27th April 2012, he was on leave; and, that he received a telephone call from the accused inviting him to go out for drinks. Together with the accused they picked up PW3 from Hilltop Township. Thereafter, they drove to a bar at Ngwenya next to the border gate where they continued drinking. When the "whiskey" which they were drinking was finished, they went to a bottle store at KaDake where they purchased the liquor intending to drink it at the bar at Ngwenya border post.

On their way back, at the overhead bridge at KaDake, they came across two trucks going to the Iron Ore Mine at Ngwenya. The accused signaled to the driver of the first truck to stop, and, he insulted the truck driver accusing him and his company of depleting the country's iron ore and further damaging roads when transporting the iron ore. The truck driver did not respond to the accusations but drove the truck away.

[22] Immediately thereafter, the second truck arrived, and, the accused blocked it and parked his motor vehicle in front of the truck on both lanes. He made the same insults to the driver of the second truck as he did to the first truck driver. A Volvo sedan emerged and stopped behind the truck. It blew a hooter signaling to the truck driver to move away and not block the road. The accused was infuriated by the blowing of the hooter when he was still talking to the truck driver. The occupants of the Volvo sedan questioned the accused why he was blocking the truck. The accused insulted them, and, they returned the insults at him.

The accused threatened to shoot them; however, they told him that he could not shoot them because they had not done anything wrong. The accused retrieved his gun from under the driver's seat and shot once at their motor vehicle damaging the window. PW4 told the Court that he was not carrying a weapon and that he was not aware if PW3 was carrying any weapon. He

further told the Court that he was not aware if the occupants of the Volvo sedan were armed. Both motor vehicles left the scene after the shooting. PW4 alighted from the motor vehicle at Hilltop Township in Mbabane. Contrary to the evidence of PW3, he told the Court that it was PW3 who was more closer to the accused than himself.

[23] Under cross-examination, PW4 denied telling the police that PW3 was in possession of the pistol and subsequently handed it to the accused prior to the shooting; he reiterated his evidence that the accused had retrieved the pistol under the driver's seat. He confirmed that Bhekinkhosi Sikhondze had returned the insults at the accused but denied seeing any of the occupants of the Volvo sedan carrying any firearm. Similarly, he denied that after the shooting, the driver of the Volvo sedan had chased after the accused's motor vehicle.

[24] PW5 Musa Siphon Maseko resides at Bhunya village and is employed by Swazi Lumber Security. He was asked by the police to accompany them with his co-worker Majaheni Simelane to the Bhunya forests to witness a pointing out of an exhibit by the accused. The accused who was in the company of a woman and the police pointed at a black pistol in the bush which was hidden below an electricity pole.

[25] Under cross-examination PW5 maintained his evidence. He reiterated his earlier evidence that the pistol was pointed out by the accused in his presence and that of the police, his co-worker Majaheni Simelane as well as the accused's girlfriend. He denied as was put to him by the defence attorney that the pistol was found by Constable Vermaak before the pointing out by the accused.

[26] PW6 Majaheni Simelane resides at Mhlangeni area next to Bhunya; and, he is employed by Swazi Lumber Security. He is a co-worker to PW5. PW6 testified that on the 19th June 2012, the police from Bhunya police station arrived at their workplace at Bhunya and asked for two security officers from their supervisor. The police explained to their supervisor that they needed the security officers to accompany them to the nearby forests along Bhunya/Malutha public road. The Bhunya police were in the company of other police from Mbabane, and, they were driving in two different police vans. They further explained that they were in the company of the accused who wanted to point out an exhibit in the forest, and, that the security officers were required to witness the pointing out.

[27] The supervisor appointed PW5 and PW6 to accompany the police to the forest. Along the way the police stopped their motor vehicles, and, the accused alighted from the police van. The accused is known to PW6 since

they were all residing at Bhunya village. The accused pointed out the pistol which was hidden in the bush next to the road. The pistol had four live rounds of ammunition. The police took pictures of the pistol as well as the site where it was found.

[28] PW6 maintained his evidence under cross-examination. He conceded that when they arrived at the forest with the police from Bhunya Police Station, they found other police officers from Mbabane who were in the company of the accused. The accused alighted from the police van and pointed out at the pistol in the bush, not very far from the road. He denied that the pistol had been found by Constable Police Vermaak as suggested by the defence.

[29] PW7 Bhekinkhosi Mfundo Sikhondze, a soldier based at Nkoyoyo Palace testified that on the 27th April 2012, he was travelling in the Volvo sedan with Gugulethu Mngometulu, Thokozani Nkwanyana and Mlondi Xaba. All the three occupants of the Volvo sedan were off-duty soldiers with the exception of Mlondi Xaba who was a civilian. PW7 and his co-workers were not in army uniform. They left the army base at Nkoyoyo visiting the Army base at Ngwenya. On the overhead bridge, they found a truck blocking the road, and, the truck driver was talking to the accused who was the driver of the VW Golf which was parked next to the truck.

[30] The driver of the Volvo sedan Gugulethu Mngometulu then blew a hooter alerting the truck driver to move away and not block the road. The time was between 7.30 pm and 8 pm. The accused insulted them for blowing the hooter, and, the truck drove off to its destination to the Iron Ore mine. A verbal exchange ensued between them resulting in the accused threatening to shoot the complainants.

Immediately thereafter, the accused shot at the small window behind the driver injuring Thokozani Nkwanyana who was seated in front of the motor vehicle next to the driver. The window was damaged, and, the jacket of Mlondi Xaba was torn by the bullet. After the shooting they drove away to the Ngwenya Army Base next to the Iron Ore Mine. Thereafter, they reported the incident to the police. Mlondi Xaba who was slightly injured on the chest as well as Thokozani Nkwanyana who was seriously injured were taken to hospital by the police. Thereafter, they recorded statements with the police. PW7 was able to identify the accused in Court, and, he told the Court that the accused had not covered his face during the attack; hence, it was easy to identify him.

[31] PW7 maintained his evidence under cross-examination and insisted that it was the accused who had provoked the complainants by blocking the road and further insulting them. He denied that one of his colleagues Mlondi

Xaba was carrying a firearm which prompted the accused to shoot them. Similarly, he denied that they had chased the accused's motor vehicle after the shooting.

[32] PW8 Detective Constable Bhekisisa Charles Shongwe is the investigator in this case. He testified that on the 28th April 2012, he received two dockets about Thokozani Nkwanyana and Mloni Xaba who were injured during the incident. A bullet-head was retrieved from Thokozani Nkwanyana by a doctor at the Mbabane Government Hospital; and, he handed the bullet-head to Sergeant Mervyn Mbingo, the ballistic expert based at the Mbabane Police Headquarters. PW8 further told the Court that his investigations led to the arrest of the accused on the 18th June 2012 at Bhunya Police Station. The accused had been arrested for a traffic offence by the Bhunya Traffic Police, and, they subsequently handed the accused over to him and his investigating team.

[33] On their arrival at Bhunya Police Station, they introduced themselves to the accused and further cautioned him of his rights to silence and legal representation. They further told him that they were investigating two cases of attempted murder involving Thokozani Nkwanyana and Mloni Xaba. On the 19th June 2012 the accused subsequently led them to a forest at Bhunya where he pointed out a pistol which had been used in the

commission of the said offence. The pointing out was done in the presence of the police from the Hhohho Regional Police Serious Crimes Unit, Bhunya Police Station as well as PW5 and PW6. Constable Thusi from the Police Scenes of Crime Unit took photographs of the pointing out by the accused.

The pistol had four live rounds of ammunition. The serial number of the pistol was 148946. The accused did not have a licence for possessing the pistol and the four live rounds of ammunition; and, he was further charged for the unlawful possession of the pistol as well as the ammunition. During the trial the pistol was admitted in evidence and marked Exhibit A, the four live rounds of ammunition were collectively marked Exhibit B, the bullet-head was marked Exhibit C and the magazine was marked Exhibit D.

[34] Under cross-examination PW8 denied that when PW5 and PW6 were brought to the scene, police constable Vermaak had already found the pistol in the forest. He further denied that the where-about of the pistol was disclosed by Dumsile Zwane, the accused's girlfriend, and, he confirmed that the pointing out was made by the accused. He also denied that the accused was not cautioned prior to the pointing out; and, he further contended that the pointing out was made freely and voluntarily by the accused.

[35] The Medical report of Thokozani Nkwanyana was admitted in evidence by consent, and, it was marked Exhibit 2. An entry wound on the medial aspect of the right arm was noted. There was no fracture of the arm. The medical report of Mlondi Xaba was admitted in evidence by consent, and it was marked Exhibit 3. All that was noted by the doctor was chest pains; and, there were no fractures, wounds or abrasions.

[36] The ballistic report compiled by Sergeant Vincent Marvin Mbingo was admitted in evidence by consent, and, it was marked Exhibit 4. The pistol was found to be serviceable after testing. There was one fired bullet, four live rounds of 9 mm ammunition as well as a magazine were examined by the ballistic expert. He confirmed that the spent bullet was fired from the same pistol.

[37] PW9 Mlondi Mthokozisi Xaba works at the Crime Stop Company in Mbabane. He testified that on the 27th April 2012, he visited his friend Thokozani Nkwanyana at Nkoyoyo Army base. Together with Gugulethu Mngometulu and Bhekinkhosi Sikhondze, they visited Ngwenya Army barracks next to Ngwenya Iron Ore Mine.

[38] At the overhead bridge at KaDake, they found two trucks which had stopped in the middle of the road. A VW Golf sedan had stopped in front

of the first truck, virtually blocking the truck and occupying two lanes. The accused who was driving the VW Golf was talking to the truck driver but PW9 could not hear what was being said. The accused then talked to the driver of the second truck leaving the driver of the first truck to drive away. It was at that stage that the driver of the Volvo sedan Gugulethu Mngometulu blew a hooter signaling to the driver of the second truck to move away from the road.

[39] The accused was not impressed with the blowing of the hooter as he was still talking to the driver of the second truck. He insulted the occupants of the Volvo sedan, and, they returned the insults. The accused then threatened to shoot them. Bhekinkhosi Sikhondze jokingly asked the accused to shoot his finger as he held his hand out of the window; he did not believe that the accused would execute his threats.

[40] The accused shot once to the small rear window behind the driver's seat; and, in the process, the T-shirt and jacket of PW9 were torn by the bullet. PW9 was slightly injured with a bruise on the chest. The small rear window was shattered. The Volvo and the VW Golf were still stationary when the shot was fired. Both motor vehicles left the scene immediately after the shooting. The accused was with two other men. PW9 was able to identify the accused in Court.

[41] PW9 and his colleagues went to the Ngwenya Army Camp where they reported the incident. Thokozani Nkwanyana was seriously injured as a result of the shooting. After bruising PW9, the bullet proceeded to hit Thokozani Nkwanyana. The incident was reported to the police, and, the injured were subsequently taken to hospital by the police. PW9 corroborated the evidence of the other Crown witnesses that the three soldiers who were travelling with him were off-duty, and, not armed. Similarly, they were not wearing army uniforms.

[42] Under cross-examination PW9 insisted that none of his colleagues in the Volvo sedan had taken liquor when the incident occurred. He reiterated his evidence that there were two trucks found at the scene and that the accused was talking to the driver of the first truck. However, he was hesitant whether the accused had alighted from his motor vehicle. Furthermore, he could not explain how the accused could talk to the driver of the first truck through a window if the VW Golf had been parked in front of the truck and occupying two lanes.

[43] However, he insisted that the accused was initially talking to the driver of the first truck, and, that the VW Golf was occupying two lanes. He reiterated his evidence that it was the accused who first hurled insults to them, and, they retaliated. He denied that he was carrying a gun, and,

further added that he could not even operate a gun. Similarly, he denied hearing the accused asking for his pistol from one of his passengers at the backseat. It is the evidence of PW9 that their driver Gugulethu Mngometulu blew the hooter because they had waited for a long time for the truck to move away from the road. He denied that they had chased after the VW Golf after the shooting.

[44] PW10 Mzwandile Dlamini was employed by A.G. Thomas Company in April 2012, driving a truck transporting Iron Ore from Ngwenya to Mpaka Railway Station. He testified that on the 27th April 2012, he was driving a truck from Mpaka to Ngwenya to load iron ore. Between 7 pm and 8 pm, at the overhead bridge at KaDake, he found a truck from Mozambique parked in the middle of the road; and, it was blocked by a VW Golf. The truck was transporting iron ore from Ngwenya to Mpaka in the same way as the truck driven by PW10.

[45] When the truck from Mozambique drove off, the VW Golf drove towards the second truck driven by PW10. The VW Golf occupied two lanes, and, its driver insulted him accusing him of depleting the iron ore and transporting it abroad; he did not respond. The driver of the VW Golf was drunk and was continuously drinking liquor from a bottle. A Volvo sedan arrived at the scene from behind his truck and blew a hooter as his truck

was blocking the road. He was able to describe and identify the driver of the VW Golf in Court as being the accused person.

[46] PW10 maintained his evidence under cross-examination. He denied knowledge of the subsequent conflict between the accused and the occupants of the Volvo sedan which led to the shooting. He further reiterated his evidence that the accused had insulted him but he did not respond.

[47] The accused gave evidence in his defence, and, he told the court that on the 27th April 2012, he met PW4 Mxolisi “Ca” Kunene, and they bought a bottle of whisky. Thereafter, they picked up PW3 Banele “Skimari” Mayisela at Hilltop Township in Mbabane. Together they visited Ngwenya Border Post travelling in his VW Golf; they sat at a restaurant and drank the bottle of whiskey. When it was finished, they couldn’t get another bottle of whiskey at Ngwenya Border Post. They drove to another bottle store around the Glass Factory.

[48] On their return, at the overhead bridge, they came across a truck driving to Salgaocar Iron Company. According to the accused, the truck was driving at a high speed, and, that he had to stop the motor vehicle fearing that it would be damaged because the truck would use both lanes when turning at

the T-junction towards Salgaocar. The truck was owned by A.G. Thomas Company with the same inscription written on the side of the truck. He signaled to the truck driver to stop, and, he asked him why he was driving fast to the extent of damaging the road. However, the truck driver did not respond.

[49] Another motor vehicle, a Volvo sedan arrived and stopped behind the truck. The occupants of the Volvo sedan started insulting him calling him a white man; they further asked him why he had stopped in the middle of the road. He insulted them in response; and, they were playing loud music in their motor vehicle. He told the court that the occupants of the Volvo sedan mistook him for a white man when they saw his light coloured skin. However, when he responded in Siswati language, they swore at him and further insulted him. He threatened to shoot them, and, they told him that they had their own guns as well.

[50] PW3 inturn loaded the pistol from the backseat and gave it to the accused. PW9 Mlondi Mthokozisi Xaba pulled something which looked like a rifle; hence, he put his arm outside the window and fired one shot to the small rear window of the Volvo sedan with the intention of scaring them. Thereafter, he drove the motor vehicle at a high speed towards Ngwenya Border Post; and, he was told by PW3 and PW4 that the occupants of the

Volvo sedan were chasing after them. He stopped his motor vehicle on a side-road and turned off his lights.

[51] The Volvo sedan came driving at a high speed and passed them. Thereafter, they turned back and drove on the highway towards Mbabane. He left PW3 and PW4 around Mbabane and drove to his residence at Bhunya Village. The accused admitted that he was intoxicated because they had drunk a lot of liquor with his friends. He contended that he was not aware that the occupants of the Volvo were soldiers because they were not in uniform. He denied any intention to kill them, and said he was merely scaring them.

[52] The accused further told the court that on the 19th May 2012, he went to Bhunya Police Station to discuss a traffic offence with the police which he had committed the previous day. During that discussion he was apprehended by C.I.D Police alleging that he had shot army personnel guarding a bridge at KaDake and, that Police from the Mbabane Police Station were looking for him. He was later fetched from Bhunya Police Station by police from the Serious Crimes Unit based in Mbabane. He was shocked by this allegation as he had not shot any soldiers guarding an overhead bridge.

[53] The accused disclosed during trial that he was tortured by the police and further denied a right to consult with his attorney during the interrogation. The torture is alleged to have continued until he urinated on himself. The police wanted the gun which he had used in the commission of the offence.

[54] The accused does not deny that on the day preceding his arrest, he was driving from Mhlambanyatsi to his residence at Bhunya village at night together with his girlfriend. When a traffic police motor vehicle signaled to him to stop, he increased the speed and outran the police. However, they pursued him until he was forced to abandon the motor vehicle on the side of the road and ran into the bush. He left his girlfriend in the motor vehicle; she was taken by the police together with the motor vehicle to the Bhunya Police Station. She was detained and released the next morning. He claims that he was not aware that it was the police who were pursuing him. From the totality of the evidence, this cannot be true.

[55] It is apparent from the evidence that the accused had hidden the pistol at the site where he had abandoned the motor vehicle. The accused led the police from the Serious Crimes Unit as well as traffic police to the bush looking for the pistol. PW5 and PW6 together with the media personnel were brought by the police to witness the pointing out of the pistol. The accused's girlfriend was also brought to assist the accused locate the site

where the pistol was hidden. The accused pointed out the pistol and the police took photographs of the scene. The contention by the accused that he didn't conduct the pointing out freely and voluntarily ought to be rejected in the circumstances.

[56] Similarly, the contention by the accused that he ran away from the police because he couldn't recognize them is not supported by the evidence. He contends that there were people who wanted to kill him to the extent of coming to his house at night. However, he contends that these people eventually identified themselves as police officers from the Intelligence branch. He further conceded that the motor vehicle which was signaling him to stop was flashing police lights and siren; and, it is apparent from the evidence that he was aware that this was a police motor vehicle.

[57] Under cross-examination the accused denied that he had insulted the complainants; and, he argued that it was the complainants who insulted him accusing him of parking in the middle of the road and blocking the flow of traffic. The accused further contended that the complainants also hurled insults at him that he was stupid. He contended that when the insults persisted, he threatened to shoot the complainants. However, the weight of evidence tendered shows that the accused was the one who was hurling insults at the complainants after the driver Gugulethu Mngometulu had

blown a hooter signalling to the truck driver to move away from the road. The accused further denied that he was blocking traffic at the overhead bridge; however, the Crown's evidence in this regard has not been disputed. He argued that he was merely admonishing the truck driver not to speed the motor vehicle as he was approaching a T-junction.

[58] The accused further told the court that he shot the complainants in self-defence because they had told him that they were carrying weapons as well and could shoot him. He further alleged that he had seen the muzzle of a rifle in the Volvo sedan and he felt threatened. However, he failed to dispute the Crown's evidence that none of the complainants was carrying a firearm. In addition the accused's defence as put to the Crown witnesses was that he had shot the complainants merely to scare them away and not to harm or kill them.

[59] PW3 Banele "Skimari" Mayisela and PW4 Mxolisi Kunene were passengers in the motor vehicle driven by the accused; however, they gave evidence against the accused and confirmed that he blocked the traffic at the overhead bridge, insulted the complainants and truck drivers, and, that the complainants were not armed. There is no evidence that the accused's life was threatened or that the complainants had provoked the accused.

Similarly, there is no evidence that the complainants were carrying weapons.

[60] The accused admitted shooting the complainants' motor vehicle and damaging the small rear window; however, he denied that the bullet had also hit and injured the two complainants. The accused contended that the bullet could not hit Mloni Xaba at the backseat because he was leaning forward. He further contended that the alleged shooting of Thokozani Nkwanyana was a fabrication on the basis that the bullet could not hit the rear window, the head-rest and then ricochet to hit Thokozani Nkwanyana on the front passenger seat.

[61] However, the accused did not dispute the Crown's evidence that the bullet hit the rear window, tore Mloni Xaba's jacket and further injured Thokozani Nkwanyana. Furthermore, the two medical reports of Mloni Xaba and Thokozani Nkwanyana were admitted in evidence by consent. In the circumstances the contention by the accused that he only hit the rear window and that the two passengers were hit by pieces of glass from the window cannot stand in light of the Crown's evidence. Similarly, the evidence of the ballistic expert was not denied particularly that the bullet-head extracted from Thokozani Nkwanyana's body was fired from the pistol pointed out by the accused in the bush.

[62] The accused's contention that he was merely scaring the complainants is not supported by the evidence on the basis that he directed the bullet at the Volvo sedan with knowledge that the four occupants were on board the motor vehicle. He did not direct the bullet in the air as a person who was merely scaring the complainants. It is apparent from the evidence that when the accused shot at the Volvo sedan, he foresaw the possibility that the complainants might be shot but he was reckless whether death or serious injuries ensued.

[63] The contention by the accused that the pistol belonged to PW3 Banele "Skimari" Mayisela, and, that he was given the pistol by PW3 to shoot at the complainants is not supported by the evidence. PW3 denied being in possession of the pistol or that the pistol belonged to him, and the accused did not dispute that evidence. PW3 told the court that the pistol belonged to the accused and that evidence was not disputed.

[64] Furthermore, the contention by the accused that after the shooting, he gave back the pistol to PW3 cannot be true on the basis that when the traffic police stopped him, he abandoned both his girlfriend and his motor vehicle and ran away to the bush. Subsequently, after his arrest, he was able to lead the police to the same bush where he pointed out the firearm hidden in the

bush. PW5 and PW6 together with members of the media witnessed the pointing out of the pistol by the accused.

[65] The accused's explanation that he ran away from the police, because he did not believe that it was the police who were stopping him cannot be sustained. Whilst he contended that his house was being frequented by unknown people who wanted to kill him, he conceded under cross-examination that the said people were police officers from the Intelligence branch. He admitted that they followed him because he was at the time a political activist. On the day he escaped from the traffic police, he was fully aware that he was being stopped by the police. He stated in his evidence in-chief that a police van flashed lights signaling him to stop but he increased speed and eventually abandoned the motor vehicle. It is apparent that the accused knew that the police were looking for him after the shooting incident at the overhead bridge.

[66] The Crown has proved the commission of both counts of Attempted Murder as well as the contravention of section 11 (1) read with section 11 (8) of the Arms and Ammunition Act 24/1964 as amended. It is apparent from the evidence that the accused blocked the two trucks and insulted the truck drivers without any provocation. When the complainants arrived at the overhead bridge, they found that the accused had blocked the traffic. They

waited for a while with the hope that the accused would stop blocking the traffic. Seeing the delay, Gugulethu Mngometulu blew the hooter, and, this in turn infuriated the accused. He drove to the complainants and insulted them without any provocation. There was a heated exchange of words between the accused and the complainants which led to the shooting of the complainants by the accused.

[67] The accused's life was not in danger on the ground that the complainants were not armed with any weapon, and, they did not attack the accused but had remained quietly in the motor vehicle. In the circumstances the accused did not shoot the complainants in self-defence. Similarly, it is apparent from the evidence that the contention by the accused that he wanted to scare the complainants is not supported by the evidence on the basis that he directed the bullet to the motor vehicle fully aware of the presence of the complainants. The small rear window was shattered, and, the bullet proceeded to tore the jacket of Mlondi Xaba and bruising his chest. The bullet continued and injured Thokozani Nkwanyana who was seated next to the driver of the motor vehicle; and, he was seriously injured on his right arm. The bullet had to be retrieved from his arm by the doctor in hospital.

[68] When the accused shot at the complainants, he foresaw the possibility of death or serious injuries being sustained by the complainants; however, he was reckless whether death or injuries ensued. In the circumstances the accused is convicted of the first count of Attempted Murder. In the case of *Rex v. Mandla Eric Mkhonta* Criminal Case No. 422/2010, at para 31, I had occasion to state the law with regard to the offence of attempted murder as follows:

“31. It is now trite law that in order to support a conviction for attempted murder, there need not be a purpose to kill proved as an actual fact. It is sufficient if there is an appreciation that there is some risk to life involved in the action contemplated coupled with recklessness as to whether or not the risk is fulfilled in death. Only *mens rea* in the form of *dolus eventualis* is required for purposes of attempted murder, and, *mens rea* in the form of *dolus directus* is not required.

See: the case of *Rex v. Huebsch* 1953 (2) S.A. 561 (A) at 567 as well as *Henwood Thornton v. Rex* 1987 – 1995 SLR 271 (C) at 273.”

[69] As stated in the preceding paragraphs, the Crown has also proved that the accused is guilty of contravening section 11 (1) as read with section 11 (8) of the Arms and Ammunition Act 24/1964 as amended. The ballistic report was admitted in evidence by consent, and, it confirms, inter alia, that the

bullet which was extracted and retrieved from Thokozani Nkwanyana's arm was shot from the same pistol which was pointed out by the accused in the forest. The Crown has proved beyond reasonable doubt that the pistol used in the commission of the offence was at all material times hereto in the possession of the accused. Accordingly, the accused is convicted of the second count of contravening section 11 (1) as read with section 11 (8) of the Arms and Ammunition Act 24/1964 as amended.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Crown

Senior Crown Counsel
Macebo Nxumalo

For Accused

Attorney Noncedo Ndlangamandla