



## IN THE HIGH COURT OF ESWATINI

### JUDGMENT

CASE NO: 119/10

In the matter between:

**REX**

**VS**

**MELUSI MHLONISHWA MAZIYA**

**Neutral Citation:** *Rex v Melusi Mhlonishwa Maziya [119/10] SZHC 192 [2018] (16 August 2018)*

**Coram:** **MAMBA J.**

**Heard:** 25 and 26 June 2018

**Delivered:** 16 August, 2018

[1] *Criminal law – Charge of murder or attempted murder requirements thereof stated – same save that for murder death must be the result or outcome. Intention in the form of indirect intention suffices for attempted murder as well.*

[2] *Criminal Law- Charge of Murder- Accused intending to maim his victim by shooting her with a shotgun. Victim killed in the process. Two (2) shots fired at victim. Accused must have*

*realised that in acting recklessly as he did he would kill the deceased. Guilty of murder on the grounds of indirect intention.*

- [1] ‘Heaven has no rage, like love hatred turn’d Nor hell a fury, like a woman scorn’d’. That was said by William Congreve, in **The Mourning Bride**. **Colley Cibber, in Love’s Last Shift**, basically said the same thing when he said: He shall find no fiend in Hell can match the fury of a disappointed woman! scorned! Slighted! Dismissed without a parting pang!

They could have been referring to a man; the accused in this case. He was jilted by his girlfriend. He felt betrayed. He unleashed his fury upon her. He shot and killed her in a fit of jealous rage. If he could not have her love she deserved to die, he reasoned.

- [2] The accused faces an indictment wherein he is charged on two counts. On the first count he is charged of murder that on or about the 9<sup>th</sup> of January 2010 at or near Ngulubeni Area in the Region of Lubombo he unlawfully and intentionally shot and killed one Notsile Simelane. The second count alleges that on the said date and place he unlawfully and intentionally attempted to kill one Ntombifuthi Sibandze by shooting her with a firearm.

- [3] On being arraigned he pleaded guilty to both counts. The court entered a plea of not guilty nonetheless.
- [4] The accused and Notsile Simelane (hereafter referred to as the deceased) fell in love with each other sometime in 2003. A child was born of their love affair. They were neighbours in the Lomahasha area but lived in their respective parental homes with their parents.
- [5] In 2008, the deceased was employed by Nomsa Gugu Mabila (PW3) as a trainee hair stylist in her salon at Ngulubeni area. During that year their relationship became strained. The accused suspected that the deceased was cheating on him and that her lover was occasionally seeing her at her place of employment. He constantly spied on her both at her place of employment and away from such place. At some stage he assaulted her and this resulted in her mother advising her to end the relationship with the accused.
- [6] At one stage whilst their relationship was strained he decided to commit suicide by ingesting an insecticide or pesticide used to control

grasshoppers. He failed in his attempts and his parents took him to a hospital in South Africa for medication. He states that on his return from South Africa in March 2008, 'I begged Nothile to change her mind since I loved her and (she) told me to pay a fine of a cow for assaulting her'. When she came to my homestead to collect our child to visit her I scared her and stabbed her on the arm and then I went back to South Africa. I was remorseful and telephoned her to apologise but she would drop the phone.'

- [7] After the death of the deceased's mother there appears to have been some sort of truce or reconciliation between the accused and the deceased. At one stage the accused financed the deceased's training course at the hair salon. This was, however, an uneasy truce as the accused harboured a deep seated mistrust of the deceased. The accused narrates the situation in the following words:

'On the 11<sup>th</sup> day of December 2009, I came back from Durban and asked her why it is that she knocked off at night and I understood that she could be working till late. She continued to knock off late. One day I decided to stand at a distance and watch her and then I phoned her and she said she was at the salon yet I was seeing her walking on the road alone. When it was dark she walked out of the

salon whilst on the cellphone... I phoned her and she said she was still busy at work and I could see her on the road. And then a car came and waited for her and she jumped in... I ran to the van and opened the door and pulled Nothile on the shoulder and she climbed down of the car and the car drove away. I asked why she lied that she loved me and that she was busy.... Her sister approached us and requested me not to hit Nothile and I said I would not. I told her not to do this because I loved her'

Such encounters or altercations between the two continued unabated for a long period of time. At one stage a report was also made to the police. Their love affair was on and off.

- [8] It would appear that the situation finally came to a head and that late in 2009, the deceased told the accused that she was terminating the relationship. He unsuccessfully begged for her forgiveness and offered to make certain compromises such as for instance, to allow her 'to knock off from work at 8 Pm or any hour it did not matter but if I could have her back since I love her and there was nobody I could love except her.'

[9] All of the excerpts quoted above are from the confession statement that was made by the accused before a Magistrate on 11 January 2010. The statement was handed in by consent and marked as Exhibit B. The admissibility of Exhibit B is therefore not in issue in these proceedings. This Exhibit as I shall show below is a confession; an unequivocal admission of guilt by the accused in respect of both counts herein.

[10] Nomsa Mabila, the owner of the salon where the deceased was employed, testified that at about 4pm in the afternoon on 9<sup>th</sup> January 2010, the accused came to her place of business and found her seated next to the door. The accused asked for permission to speak to the deceased. The permission was granted by her and she accordingly notified the deceased about this request by the accused. She told the court that the accused was well known to her and the other workers in the salon. The deceased went to speak to the accused who stood just outside the salon next to the door but she immediately returned to her workstation and the accused left the salon. The accused quickly returned brandishing a firearm. The people in the salon took cover under the tables and mirrors in the salon but Pw3 later managed to run out of the salon and call for help from people in a nearby butchery business on the premises. She suddenly heard two sounds of gun shots come from the salon. The police were called and the

accused left the scene. The victims in count one and two herein were injured; the deceased fatally.

[11] The evidence of PW3 is materially or substantially corroborated by that one of Hloniphile Nyoni (PW4) and Ntombifuthi Nomcebo Sibandze (PW5) who is the complainant in count two. She told the court that she was shot with a firearm on her buttocks when the first shot was fired. This occurred as she tried to take cover under one of the tables in the salon.

[12] The post-mortem examination report compiled by Dr. Komma Reddy, the police pathologist was handed in as exhibit A. The Dr gave evidence as PW1. The post-mortem on the body of the deceased was conducted at Siteki on 12 January 2010 and the pathologist observed or noted the following three (3) ante-mortem injuries thereon:

- '1. An entry wound of 4x3.5cm, with inverted margins, present on the medial side of the left of the back in the upper 3<sup>rd</sup> portion which is 7cm from the midline and 122cm from the heel of the right foot.

2. An entry wound of 16x9cm, with the inverted margins, on the backside of the left forearm. Both the bones of the left forearms shattered. Muscles and blood vessels severed.
3. An exist wound 12x7cm, with inverted margins, on the front side of the forearm.'

The Dr came to the conclusion that the deceased died or the cause of death was due to firearm injury to the back side of the chest and left forearm. He also noted that the 5<sup>th</sup> to 8<sup>th</sup> ribs on the left side of the body were fractured.

[13] The investigation officer, 3214 Detective Assistant Superintendent Ezrome Simelane testified as the sixth crown witness. Together with other police officers they attended to the scene of the shooting where amongst other things, they retrieved two spent cartridges for a 12 Bore shotgun. The said cartridges were examined by an expert who concluded that they were fired from exhibit 1, which is a 12bore Calibre pump action shotgun model, Baikal, with serial Number 9932951. It is common cause that this fire-arm was pointed out to the police by the accused at his home on the day of the shooting. The said pointing out by the accused has not been challenged or put in issue. Again, nothing contained in the ballistic examination report compiled by Vincent Marvin Mbingo was

disputed. The report was accordingly admitted in evidence as Exhibit C. One important finding in exhibit C is that exhibit A is a self-loading gun, which is, however 'not capable of discharging more than one shot with a single depression of the trigger'

[14] From the above analysis of the evidence, it is plain to me that the empty cartridges that were found at the scene and which were fired from exhibit 1, were discharged from the said gun by the accused person under the circumstances herein described by PW3, PW4 and PW5. As already stated above exhibit 1 was pointed out to the police by the accused. In any event this piece of evidence is again not in issue. It has not been disputed by the defence.

[15] In his confession the accused states that after the deceased had refused to accept his apologies for the misunderstandings they were experiencing in their love-life and told him that their affair was over he 'could not get peace or rest.' He decided to take his father's gun from the safe and go and kill himself in front of the deceased at her workplace. Indeed he broke the padlock to the safe, took out the firearm and loaded it with two bullets or live ammunition and wrapped it in a bed sheet and inserted it in a cardboard box and set out for the salon. He placed the gun in an adjacent

semi-detached unfinished room near the salon and went inside to speak to the deceased once more still begging her to reconsider her position, but she refused. He then returned to where he had placed the gun. What then happened is the following:

‘I stood and looked at the gun and I felt like taking it and shooting myself inside the salon. I had not used a gun before. I went inside the salon not carrying the gun and asked her to come to me and she walked out and I apologised again. I asked her what she would say that I had killed myself and she said that she would not regret it and she walked into the salon. I then proceeded to the box with the gun.... I went (back) into the salon and I thought that if I kill myself she would continue with life enjoying herself since she said she won't regret it, I will go into the salon and shoot her at the feet so that she gets paralysed and other men would not approach her (and) she will be mine alone since I loved her.

I then unwrapped the gun from the bed sheet and went into the salon. When I got in the salon, all the people ran into the corner and lied down and I then pulled the gun and shot Nothile. The other people ran out of the salon and lied down and I could not contain myself and shot her for the second time and then I ran away with the gun and went home....’

After shooting the deceased the accused also contemplated killing himself but then thought against it or abandoned it.

[16] The various pointings out testified to by the police are also confirmed by the accused in his confession statement.

[17] From the above statement by the accused, it is clear that the accused initially resolved to kill himself at the salon in front of the deceased. The aim was to torture her by his death. However, the deceased told him that she would not be tortured by this or would not regret it. Because of this stand by the deceased he decided against killing himself but rather to shoot and maim or cripple the deceased so that no other man would approach or love her and she would be his and his alone. He then went into the salon to execute his plan. There he fired the gun twice aiming at her. She died due to these gunshot wounds. In the process PW5 was injured by the gun shots fired by the accused.

[18] At the time of the commission of the offences, the accused was 23 years old. He had not used a firearm or gun before. He was emotionally

troubled by being jilted by the only woman he loved. He felt let down and betrayed.

[19] The evidence shows or establishes that the accused had ample time or moments to reflect on what he wanted to do to the deceased. He wanted to cripple or maim her for life or permanently. Whilst he had never used a gun before, he certainly knew the basic operations of a gun. He was able to load it, aim it towards his intended victim and pull the trigger. He was definitely no slouch with a firearm. Whilst he may not have deliberately or directly set out or intend to kill the deceased, and for that matter injure those present in the salon, he must have realised that in firing the gun in the manner and under the circumstances described above he would cause the death of his victims. Having realised this, he nevertheless went ahead and fired with reckless disregard whether death occurred or not. That, in my judgement is sufficient intention to found or ground a verdict of guilty of murder; on the basis of *dolus eventualis* or indirect intention.

[20] In *Rex v Jabulani Vincent Mazibuko (260/2012) [2014] SZHC 350(15 September 2014)* this court stated the following:

‘[30] From the above, whilst I am unable to hold that the accused positively set out or intended to bring about the death of the deceased, I have no hesitation whatsoever that he must have realised that in striking him with the spade on the head as he did, the deceased might die as a result of those blows. Notwithstanding this realisation or foresight, the accused went ahead, regardless of the consequences of his actions, and assaulted the deceased. The deceased died as a result. Subjectively, the accused realised that he was not entitled to act as he did in this savage and cowardly manner.

In *Maphikelela Dlamini v R* 1979-1981 SLR 195 @198D-H the Court of Appeal stated as follows:

“The law in cases of this nature has been authoritatively laid down in Swaziland in the case of *Annah Lokudzinga Mathenjwa v R* 1970 – 1976 SLR 25. The test there laid down is as follows, and I see no reason for complicating the situation in this country in the manner in which it has been complicated in the opinion of many people in South Africa. In Annah’s case the law is stated as follows, at 30A: ‘If the doer of the unlawful act, the assault which causes the death, realised when he did it that it might cause death, and was reckless

whether it would do so or not, he committed murder. If he did not realise the risk he did not commit murder but was guilty of culpable homicide, whether or not...he ought to have realised the risk, since he killed unlawfully.’

My Brother Dendy-Young has referred to certain remarks and possibilities and appreciation of risks. At 30D of the judgment in Annah’s case to which I have referred the then President of this court, Mr Justice Schreiner said: ‘It has been suggested that a finding that a person did in fact foresee or appreciated a risk is not the same as a finding that a person did in fact foresee or appreciate the risk: I do not agree. It is not a question of law but of the meaning of words. I find it meaningless to say, He must have appreciated but may not have.’ In this statement of the law Caney JA on the same page concurred. Milner JA at 32 also concurred in this statement of the law although he disagreed in regard to certain other aspects of the case itself. He said this at p 32F: ‘I should like first of all to associate myself very strongly with the learned President’s view that when it is correctly held that a person ‘must’ have appreciated that his act involved a risk to another’s life, it is inescapable as a matter of English, that what is held is that the person did, in fact, appreciate the risk’. I thought it right to

mention these matters because for many years to my knowledge Annah's case has been followed in Swaziland and although I share the regret expressed by Mr. Justice Schreiner in Annah's case that there may be differences between the law as applied in South Africa, if differences arise they must be given effect to for, as was said by Schreiner P at p 29 of Annah's case, we are obliged to apply what we understand to be the law of Swaziland, even if divergence from the law of the foundation member of the South African Law Association is the result. I do not wish my concurrence with the result of this appeal as proposed by my Brother Young as being in any way a departure from the principles as laid down in Annah's case to which I have referred."

[31] Vide also *Vincent Sipho Mazibuko v R*, 1982-1986 SLR 377 @380C-E" where the court had this to say:

"The real question before this court, and the question to which Mr Liebowitz devoted most of his submissions, is whether the only inference properly to be drawn from the evidence was that at the material time the appellant had the intent to kill the deceased. A person intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts

recklessly as to whether such death results or not. See *S v Mini 1963 (3) SA 188(A)* at 192 and *Annah Lokudzinga Mathenjwa v R 1970-76 SLR 25* at 30. To apply continual pressure to the throat or neck for a period of about four minutes is obviously an inherently dangerous act which is likely to cause death. Even the most dull-witted person must realise this and the appellant is certainly not that. In the absence of explanation, and in the present case none which was satisfactorily or acceptable was forthcoming, in performing such an act the assailant must be taken either as realising or recklessly disregarding its probable consequences. Indeed, the immediate effect on the victim of such pressure must be plain to be seen. While I accept that there is substance in Mr Liebowitz's submission that evidence of the appellant's subsequent behaviour – evidence which I find it unnecessary to recite – indicates that he probably had no intent to kill in the sense of a positive desire on his part to bring about the death of the deceased, there can, in my view, be no doubt that he had what has been termed constructive intent to kill.”

See also *R v Zwane Zenke, 1987-1995(4) at 207* and the judgment of this court in *R v Ndumiso Muzi Maziya, Case No.137/2008* judgment delivered on 14 March 2013 and the cases therein cited’

[21] From the above analysis of the facts and the applicable law, I accordingly find the accused guilty of the murder of Notsile Simelane, on the basis of indirect intention.

[22] I have already stated the facts on how the complainant on count two was shot and injured and I do not find it necessary to repeat these facts here, save for the following:

22.1 The accused had no intention to harm the complainant. His sole target was the deceased.

22.2 The shooting was not justified.

22.3 The accused fired the gun into a group of women or people who were huddled together under a table or tables inside a salon.

22.4 In shooting his victim or target, he must have realised that the panic stricken women in there would be injured by a direct bullet or one that has ricocheted.

22.5 The accused must have realised that a bullet injury would be fatal but went ahead and fired his gun recklessly not caring of the consequences of his actions.

[23] The requisite intention for the crime of attempted murder is the same as that required for murder as discussed above. In *Kruger v S (A347/2013)[2014] ZAWCHC 196 (17 December 2014)* the court had this to say at para 14:

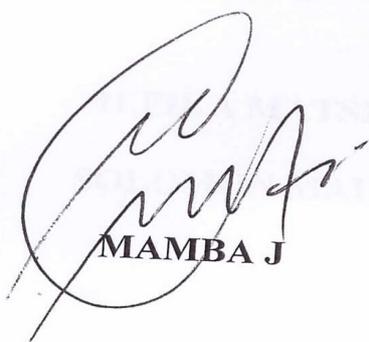
‘The elements of the crime of attempted murder are (i) an attempt (ii) to kill another person unlawfully (*actus reus*) (iii) with the intent to kill or with appreciation that the killing will be unlawful (*mens rea*). The state of mind required for attempted murder is the same as for murder. The difference lies in the *actus reus* – in the case of murder, the act allegedly perpetrated by the accused must have actually resulted in death. As is well known intent to murder includes a state of mind in which the accused foresaw the possibility of death and was reckless as to whether death ensued, i.e. *dolus eventualis* (See *S v Combrink 2012 (1) SACR 93 (SCA) para 17*). The same state of mind suffices for attempted murder (*S v Huebsch 1953 (2) SA 561 (A) at 567D-568A; S v Nango 1990 (2) SACR 450 (A) AT 457b-f...*’

[24] For the above reasons, the accused is also found guilty as charged in respect of count two.

[25] In summary,

(a) The accused is found guilty of the Murder of Nothile Simelane  
and

(b) He is found guilty of the attempted murder of Ntombifuthi  
Sibandze.



MAMBA J

**FOR THE CROWN: MS B. FAKUDZE**

**FOR THE DEFENCE: MS N. MABUZA**