



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No. 137/2006

In the matter between:-

REX

and

MAGALEMBA RICHARD NXUMALO
SIKWAYO KOSHI MDLULI

Neutral citation: *Rex v Magalemba Richard Nxumalo & Another*
(137/06) [2012] SZHC 122 (... June 2012)

Coram: HLOPHE J

Heard: 02/04/12, 03/04/12,
23/04/12, 26/04/12

Delivered: 12th June 2012

For the Crown: Mr. B. Magagula

For the Accused: Mr. S. Magongo/ Mr. T. Fakudze

JUDGMENT

- [1] The accused persons were charged with the crime of attempted murder it being alleged by the crown that on or about the 16th July 2006 and at or near Bambitje area, in the Shiselweni District, both accused persons, whilst acting in furtherance of a common purpose, did unlawfully and intentionally assault the complainant, one Mphikeleli Sithole with a bolted stick and a spear with the intention of killing him.

- [2] When the charges were put to the accused persons they pleaded not guilty. They were at the time represented by Mr. Sikelela Magongo whilst Mr. Brian Magagula represented the crown. I must mention that the matter was postponed from time to time and that midway through the hearing of the matter, there ensued a dispute between Mr. Magongo and his clients which resulted in him withdrawing from the matter with Mr. Fakudze taking over, who ran with the matter to the end.

- [3] The evidence led by the crown reveals that on the 16th July 2006 at around 0530 hours the complainant, one Mphikeleli Sithole left his home to fetch what he says was his goat from a neighbour's homestead. It is not clear I must say, why he had to go that early to fetch a goat from a neighbouring homestead. What is clear however, is that at that time the area where both accused and the complainant stayed, was under a wave of "attack" from stock thieves who stole goats and cattle from the residents of the area which heightened the need for members of that community to form themselves into groups to control the spread of the scourge if not to eliminate it completely. This fact contributed significantly in my view to the unfortunate incident which resulted in the charges that led to this matter.

[4] It was whilst complainant was at that homestead that PW 2, Phila Dlamini, came to complainant's home looking for him and upon failing to find him there, he was directed to where complainant was, at the neighbouring home where he had driven and subsequently found him. and had driven there. Upon finding him there he had loaded the goat or goats (as the version conflicts whether it was one goat or more) onto his car which he then drove towards complainant's home. PW 1 and PW 2 are both in agreement that along the way they drove past one Sikwayo Koshi Mdluli, the second accused herein. They maintain he did not say anything to them as they went past him to the complainant's home where they dropped the goat even though he put it to them and maintained in his evidence he had asked for a stock removal permit from them to which the complainant berated him saying he was no police officer to be asking for same and did not stop the car nor produce the permit demanded. From then they claimed to have loaded maize bags on to the car at complainant's home and went to the nearby homestead of Lazi Sithole.

I must indicate that I am persuaded to accept PW 2's version at this point, at least as concerns the number of goats and loaded in the car as well as his having asked for the Stock Removal Permit. This I do because of the subsequent contradiction in the crown case as regards the number of goats loaded in the car. As regards the asking for of the Stock Removal Permit, I have no hesitation 2nd Accused would not have had to call upon the 1st Accused about the complainant's car as well as the fact that stock theft was prevalent in the area as well as the position then assured by 2nd Accused of a member of the local Community Police.

[5] It is whilst they were talking to the said Lazi Sithole that they were approached by the first accused, Magelemba Richard Nxumalo,

who asked from the children of the complainant he found seated on the bakkie of the car, parked a few metres from where the complainant, PW 2 and Lazi Sithole were standing discussing something among themselves, as to where the goats that had earlier been loaded in that car were.

- [6] It is alleged that upon seeing the first accused talk to the children, the complainant moved away from where he was standing with PW 2 and Lazi Sithole and proceeded towards the first accused.
- [7] According to PW 1 and PW 2, the former enquired from the accused why he was asking from his children about the goats instead of asking from him as he was there. The first accused it is alleged did not answer that question but simply charged at the complainant, PW 1, claiming that he had always wanted him, whatever that meant. It is alleged that the two exchanged blows as a result of which Lazi Sithole intervened and tried to separate the two. According to PW 1 and PW 2, it was at the time of this intervention that the accused allegedly drew a firearm and tried twice to shoot the complainant without success. It was at this stage that the first accused is alleged to have called his son Bongani to bring him his weapons which were a bolted stick and a spear made from a bolted steel rod.
- [8] The first accused person whilst acknowledging the exchange of blows denies withdrawing a firearm and firing same at the complainant. I must say that neither the firearm concerned nor any cartridges which would have been emitted during the shooting incident were produced in court during the hearing of the matter and no sound reasons were put fourth why this was the case if the firearm had indeed been used. In fact I could tell from the evidence of the investigating officer he himself did not believe that

aspect of the story. I must comment further that the charges preferred against the accused persons make no mention of any firearm as forming the basis of the charges against the accused persons as opposed to the bolted stick and spear. The Police would not have failed to include the firearm as one of the weapons through which the offence was alleged committed if there was any credence to the story concerned.

[9] According to the complainant, when the first accused person's son came with the weapons requested of him by accused 1, he had already gone into PW 2's car where he had locked himself in. The first accused allegedly attacked him with the spear whilst he handed the bolted stick to the second accused who had by now arrived at the scene. It was during the scuffle that ensued that complainant got cut on the upper part of his arm with the spear, before he was allegedly assaulted by accused 1 and accused 2 with the bolted stick and the bolted part of the spear on both the head and around the eyes. According to PW 2, accused 2 hit the complainant on the head with the stick as accused 1 hit him on the head and face with the bolted spear. PW 2 further alleges that with the blow from the bolted spear that was landed on the complainant's eye area by accused 1, he had thought that the latter had died as he had seen him collapse and passed out.

[10] The complainant was then rushed to the Matsanjani Clinic where he was, after attendance, transferred to the Hlathikhulu Government Hospital. At the Clinic the complainant was attended by a certain Doctor Chikwana, who thereafter compiled a report. Explaining the report in court this witness contended that he attended to the complainant on the day in question from which he had gone on to prepare the report in question. He stated that the complainant had apparently been hit with a blunt object twice at

the back of the head, once on the front scalp and had been hit on the right eye bone, as well as sustained a deep laceration on the middle of the eyes and had further sustained another deep laceration on the upper right arm.

[11] The injuries on the face around the eyes were described as severe by the Doctor and specialist treatment was necessary particularly because the left eye of the complainant was destroyed or had become blind which is a permanent feature on the complainant to date.

[12] The accused person's version somehow differs from that of the crown witnesses. According to accused 2, he was going to the local stream to fetch sand, on the 16th July 2006 when he was passed along the way by PW 2's car, which had on it the complainant, PW 1, and two goats. As the car drove past him, it slowed down considerably because the road condition was bad at that patch. This gave him an opportunity to enquire from the complainant on whose side he was walking when the vehicle drove past him, as to where the stock removal permit for the goats being ferried or transported at that early part of the morning were.

[13] The said accused contends that he was answered by PW 1, the complainant, who rudely dismissed his question by asking who he was to be asking for stock removal permits as that could only be asked for by the Police or words to that effect. As they ignored him and drove away, Accused 2, contends that he called accused 1 on his cell phone and informed him that PW 1 and PW 2 were transporting goats in PW 2's motor vehicle and were not producing stock removal permits as was required of them. This he did because he was a member of the area's Community Police with accused 1. Those days their area was under a concerted theft of

stock by stock thieves who were stealing with impunity to the extent their livestock was threatened with extinction. Because of this threat they had decided to step up security measures. One of these measures was the requirement that whoever drove livestock in their area had to produce stock removal permit. This he contends was known to the complainant. I note that the complainant did not dispute this or put differently did not sound like one who did not know anything about the problem of stock theft or even the need to produce the stock removal permit than perhaps not to go along with the idea.

[14] The conduct of PW 1 and PW 2 of refusing to produce the said permit yet they were transporting livestock so early in the morning rendered them suspicious. His suspicion was exacerbated by the fact that there was rumour in the area that the complainant was a suspect on stock theft which had led to him being chased away from a certain area he had established his home at before settling in the neighbourhood of the accused persons. It was because of the complainant's conduct and of the driver of the car they were travelling in that he had decided to call the first accused person as stated above.

[15] Upon receiving the report the first accused had run to the road and stood there waiting for the car to come which never happened because it had branched into complainant's home using another route which was not a normal one. He was thereat joined by second accused and the two of them had decided to wait for the car to no avail, until they parted ways.

[16] They had eventually decided to part ways with the second accused rushing to go to a nearby homestead where there was a traditional wedding (kuteka) that morning and at around that time. It was

whilst going there that he saw PW 2's car parked next to Lazi Sithole's home, with the complainant, PW 2 and Lazi Sithole standing not far from it. On the bakkie of the car were two of complainant's boys.

[17] Accused 1 enquired from the boys on the whereabouts of the goats that had been transported with the same van earlier on. It was whilst he was talking to the complainant's boys that the latter moved away from those he was with towards the accused from whom he enquired why he was talking to his children instead of him.

[18] From this question there ensued a scuffle which resulted in a fight between them. According to the first accused it was PW 1 who attacked him and hit him with a fist. He denies having uttered the words to the effect he had wanted him. He further denies having been the aggressor just as he denied having pulled out a firearm and tried to shoot at the complainant twice without success. He said if it were so, there should not have been failure to produce same as an exhibit as well as failure to at least produce in court the cartridges fired from the alleged firearm.

[19] The first accused further denied having fought and beaten complainant whilst acting jointly with the second accused. He alleged that he had only hit the accused once at the back of the head after the latter had fallen on to a tree stump which had injured him on the left eye after he had also fallen on top of the complainant whilst they fought over the knobstick which he said had been pulled by the complainant from PW 2's car and used to hit him by the complainant. He otherwise denied having called on his son Bongani to bring him his weapons comprising the bolted steel spear and the bolted stick.

- [20] The first accused avers that after the injury on the complainant he had left and gone to the other Community Police who transported him to the Hluthi Police to lay charges against the current complainant. He stated he was still awaiting the trial of the matter he reported to the Police.
- [21] He claimed to have surrendered the knobstick he was hit with which he claimed to have eventually used to hit the complainant with to the Hluthi Police Station.
- [22] From the facts before me, I have no hesitation that for some inexplicable reason, the complainant and PW 2 were ferrying or transporting goats which were dropped at the complainant's home.
- [23] I am convinced that from the evidence there had always been simmering tensions between the first accused and the complainant, which apparently led to the fight that ensued between the two of them. This tension I attribute to the suspicion the accused person and perhaps the community had about the complainant as regards stock theft.
- [24] I find that accused 2 did ask for the stock removal permit from the complainant and PW 2 as they drove passed him for the goats they were transporting. This is because the story of the accused persons on this aspect of the matter is more probable and impressive from that of the complainant. Furthermore PW 2 did not deny it ever happening but contended he could not recall. Furtherstill, I find as a fact that the area was at the time under massive or concerted stock theft as it was not disputed by the complainant. It is for this reason I am of the view it was

unreasonable of the complainant, an elderly member of the community, to refuse to cooperate with members of the community who were fighting stock theft. In this regard it should not matter in my view whether or not they were Community Police so long as what they did in preventing the theft of their stock remained lawful.

[25] Be that as it may I have no hesitation in finding that the accused were wrong however to take the law into their own hands through their assaulting those suspected of either being stock thieves or of cooperating with them which is what I am convinced was their perception of the complainant rightly or wrongly. I do not think that the law had failed them at any stage for them to behave in that manner.

[26] On how the complainant got injured, I am convinced that owing to what I described as simmering tensions between the first accused and the complainant, they had fought, as a result of which the first accused had called for his weapons which he later used on the complainant together with the second accused person. I reject the suggestion by the accused persons that the complainant was hit only once by the first accused with a knobstick taken from him. This is because it is not only against the evidence of the complainant but against that of PW 2 who struck me as a credible witness. Furthermore, there is no explanation how the upper arm of the complainant got lacerated from the version of the accused persons that no spear was used as opposed to that of the complainant and PW 2 that the said laceration was a result of a cut by the spear at the time the complainant had gone into PW 2's car for refuge. The version of the crown witnesses as regards the assault on complainant is further strengthened by the number

of injuries confirmed by the Doctor which the accused tried to down play irrespective of their glaring nature.

[27] I will find as I should that there is a reasonable doubt on whether or not a firearm was used. This is because there is neither exhibit of the firearm nor the cartridges produced in this regard without any sound reason why that was the case if indeed a firearm had been used because at least cartridges should have been found and produced if the firearm itself could not be.

[28] As earlier indicated I am supported in this regard by the charges preferred against the accused given that they do not refer to any firearm having been used in the commission of the offence other than the knobstick and spear which are clearly spelt as having been used in the process. It seems to me it would be unfair for the accused persons to be found to have used a firearm when same was not the basis of the charges they faced. Of course their not being mentioned on the charges could be an indicator, the investigating officer himself did not believe such a story. There is therefore a reasonable doubt on whether or not a firearm was used and such a doubt should accrue to the benefit of the accused.

[29] Having found as I have above, has a case of attempted murder been proved on the evidence before me?

[30] In ***R v Mndebele 1970 - 76 SLR 198A*** it was held that in order to convict an accused person of attempted murder "it must be proved that in addition to a contemplation of risk to life plus recklessness, there was an intention (purpose) at least to injure the complainant."

[31] I am not convinced on the evidence led before me, that the accused persons contemplated a risk to life in the assault they effected on the accused. I however have no doubt that the accused persons did intend to injure the complainant and that in inflicting the injuries concerned they were reckless. That the foregoing is the case can be found from the evidence of the Doctor who attended to the accused, DR. Chikwana, PW 3, who does not however say that the injuries concerned were life threatening although he does attest to their being serious particularly the one on the left eye which he said had the potential of rendering that eye permanently blind.

[32] It is not all the time that serious injuries inflicted on a victim of an assault necessarily involve a risk to life as well as an intention to kill that person. This in my view is what makes the difference between attempted murder and assault with intent to do grievous bodily harm as distinct offences. It was in this consideration that Miller J put the position as follows in *S v Mbelu* 1966 (1) PH H176 (N) (as reported in P. M. A. Hunt's *South African Criminal Law and Procedure Volume II*, 1982 Juta & Co. at page 491) when he commented on assault with intent to do grievous bodily harm:-

"[H]owever one expresses it, it is at least clear that there must be an intent to do more than inflict casual and comparatively insignificant and superficial injuries which ordinarily follow upon an assault. There must be proof of an intent to injure and to injure in a serious respect."

[33] I have no hesitation that whilst there may not have been a contemplation of a risk to life in the matter at hand, there was however an intent to injure the complainant in a serious respect. Although the accused persons were charged with attempted

murder, the evidence does not in my view establish or prove such an offence but instead proves or establishes assault with intent to do grievous bodily harm, albeit a serious one. The question therefore becomes can someone charged with attempted murder be found guilty of assault with intent to do grievous bodily harm in law?

[34] Section 194 of the Criminal Procedure and Evidence Act 67 of 1938 provides as follows:-

“In other cases not herein before specified, if the commission of an offence with which the accused is charged as defined in the statutory enactment or statutory regulation creating the offence, or as set forth in the indictment or summons, includes the commission of any other offence, the accused person may be convicted of any offence so included which is provided, although the whole offence charged is not proved.”

[35] I have already indicated that although the evidence does not prove attempted murder it does prove assault with intent to cause grievous bodily harm, which in my view is inherently included in the offence of attempted murder particularly in the facts of this matter as the charge of attempted murder arose from serious assault of the complainant by the accused persons as I have found herein above.

[36] This being the case, and for the reason set out above, I find the accused persons not guilty of attempted murder but guilty of assault with intent to do grievous bodily harm, which is a competent verdict to attempted murder for the reasons stated above.

Delivered in open Court on this theday of June2012.

**N. J. HLOPHE
JUDGE**