



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 176/10

In the matter between

REX

Crown

and

BONGINKHOSI INNOCENT MKHIZE

Accused

Neutral citation: *Rex v Bonginkhosi Innocent Mkhize* (176/10)
[2012] SZHC 155 (26 JULY 2012)

Coram: Mamba J

Heard: **05, 09 & 10 July 2012**

Delivered: **26 July 2012**

- [1] The accused faces three counts. On the first count he is alleged to have intentionally and unlawfully attempted to murder Tom Nyaweni whilst on the second count he is alleged to have attempted to Murder Lomhlangano Mashaya. Both offences are alleged to have been committed on or about 17th January, 2010, at Nkutjini area in the District of Shiselweni. The third count, which is a contravention of section 11 (1) of the Arms and Ammunitions Act 24 of 1964 (as amended) was allegedly also committed on the same date and area. There, it is alleged that the accused was found in unlawful possession of a .38 special revolver.
- [2] On being arraigned, the accused pleaded his innocence on all three counts. In all, the crown led eight witnesses in the quest to establish its case beyond any reasonable doubt. It is fair to say, I think, that save for the evidence of Pw6 and Pw8, the testimonies of the witnesses for the crown was not challenged or disputed by the accused.
- [3] At all times material hereto, the complainants on counts one and two were employed and working at Nkutjini Primary School. Pw 1, Tom Nyaweni was employed as a night-watchman or guard whilst his girlfriend, Lomhlangano Mashaya, who gave evidence

as Pw2, worked as a maid or domestic aide for one of the teachers at the school. It is common cause that these people were attacked by about two people on the night of 16th January, 2010 whilst they were in the house where Pw2 worked as a maid. The attack occurred at around 1.00 a.m.

[4] Pw1 testified that as a watchman, he would now and then leave the house they were in and go and inspect the school premises he was employed to guard. Lomhlangano was asleep in one of the 3 bedrooms in the house. First, there was noise from people outside the main door and later this noise was centred around one of the windows. Before Pw1 could make out who these people were and what they wanted, a window in one of the bedrooms was broken from outside. This was followed immediately by a breaking of a window in the Dining room. One of the persons outside put his hand through the broken window and was heard saying "here they are". Suddenly, a gun was fired into the house, through the broken window. No one inside the house was injured though.

[5] When one of the persons outside attempted to get into the house through the window, Pw1 tried to hit him with a knobstick and he retreated. Another shot was fired into the house in the direction

- of Pw1. He went down onto the floor making a distressed utterance, probably thinking he had been hit by the gunshot, but he had not been hit. He said he was blinded by the smoke that he thought emanated from the gun and he caused himself to move on his buttocks and hide under a table. He heard a voice from outside saying, "this one remains" and there was again a commotion in one of the rooms and a sound of gunfire.
- [6] When Pw1 regained his sight, he hurriedly proceeded to the room where there was a commotion and a struggle - between Pw2 and the gunman. He was armed with a knobstick and a bush or cane knife. He found Pw2 and the gunman struggling for possession or control of a gun and he hacked the gunman about four times with the bushknife on his upper body. This incapacitated or weakened him and enabled Pw2 to gain control of the firearm and push her attacker onto a sofa in a corner. He lay or set there helplessly, Pw1 watching over him.
- [7] Upon gaining control of the gun, Pw2 tried to shoot at the other person or persons who were outside the house but the gun apparently jammed or failed to fire a bullet. She got out of the house and one of the attackers threw a pick and hit her on her back. She ran away and went into the house of Pw3, Allinah

Mdluli to whom she related her ordeal. Meanwhile Pw1 remained in the house watching over the injured and helpless gunman. Pw1 told the court that the injured man repeatedly insulted or swore at him, causing Pw1 to assault him several times with a knobstick on his legs before he left him there and went to report what had taken place to his brother.

- [8] Both Pw1 and Pw2 were frank or candid enough to say they were unable to identify or recognise their attackers due to the lack of lighting in and around the house where the attack took place. Pw2 was, however, certain that she was able to recognise the voice of her stepson, Bongani Nobonga, also known as ZABHAWU, as being one of the persons who attacked them that night. He appeared to have been directing the attacks from outside and identifying Pw1 and Pw2 in the house. Bongani is not under trial in these proceedings but this evidence is relevant inasmuch as it seems to tie in or corroborate the evidence of Pw8 on the identity of the accused as one of the persons who attacked Pw1 and Pw2 on the night in question. I shall revert to this later in the judgment when I deal with the evidence of Pw8 and the accused. I also observe that Pw2 also told Pw3 immediately after the attack, that Bongani Nobonga was one of the culprits or attackers.

[9] The firearm that Pw2 got from her attacker was eventually handed over to Pw6 Detective Sergeant Sitsebe by her that morning. This firearm was tested by Police Officer 2418 Inspector Jabulani Gamedze, the Police Force Armourer on 19th January, 2010. He ascertained and determined that it was capable of firing a bullet and therefore in his words, "serviceable". Its serial number had been scratched off and or removed. It was handed in by Pw6 together with 4 (four) empty cartridges and one live round of ammunition as exhibit 1, 2 and 3 respectively. The empty cartridges and live rounds were found inside the revolver.

[10] Police officer Sitsebe, testified that, together with Police Officer 5427 he set out to Nkutjini Primary School from Lavumisa Police station in the morning on 17th January, 2010, in response to a report that a crime had been committed there. Before reaching the school they came across a man lying on the side of the road who was badly hurt. He was bleeding profusely and could barely talk. He was unable to walk too. He was injured on the back of his neck and head. He identified himself as Bonginkhosi Innocent Mkhize from South Africa. The police officers rushed him to Matsanjeni Health Centre and left him there with nurses

before proceeding on their journey or mission to Nkutjini Primary School. He told the court that this person was the accused. Sitsebe told the court that when the accused was taken to Matsanjeni Health Centre, he was not a suspect but thought to be only a distressed and helpless victim of crime.

[11] At the scene of crime, statements were taken from the complainants and Pw3. Several items including a greyish Adidas cap and a blue hat, a cream or light grey jacket and a pick-head were recovered from the scene. The cream or light grey jacket was blood-stained. Blood stains were also observed on the walls inside the house, on one of the broken windows, on the sofa and other furnishings inside the house. Pictures of the scene and discoveries thereat were taken by Pw5. Blood samples were also collected at the scene for forensic analysis or examination. (I shall return to this later in the judgment). The pictures referred herein were handed in as exhibit A1-A13 collectively.

[12] After receiving or taking statements from the complainants, the police then realised that the injured person found lying on the roadside was a suspect in the case under investigation. He had since been transferred from Matsanjeni Health Centre to

Hlathikhulu Government Hospital. He was arrested there and charged with the three offences I have referred to above.

[13] The medical report relating to the accused was handed in by Dr Tapiwa Chirina as exhibit B. It records that the accused was admitted at Hlathikhulu Government Hospital at about 8.00 a.m. on 17th January, 2010 as a referral from Matsanjeni Health Centre. He had reportedly admitted to the hospital staff that he had been drinking alcohol and had lost a lot of blood. He had sustained head and neck injuries. (See page 5 of exh B).

[14] The last crown witness was Ncamsile Delsile Nyaweni who gave evidence as Pw8. She is the daughter of Pw1 and is married to Bongani Nobonga. She told the court that the accused was her husband's friend and she had first met him in Alexander in Johannesburg when she visited her husband there.

[15] Pw8 testified that her husband's father died in 2006 leaving behind Pw2 and her husband. Pw2 was her husband's step-mother. Following the death of Bongani's father, Pw2 fell in love with Pw1. It would seem that Pw1 used to visit Pw2 at her home and spend sometime there. Bongani disapproved of this and openly told Pw2 about it and demanded that she vacates his late

father's house. Pw2 did not heed this call as on 16th January, 2010 she was still living in that house. She left the house at about 6pm and went to the teachers quarters where she worked. About two hours later Bongani telephoned Pw8 to find out where Pw 2 was. She told him where she was. Yet another two hours later, Bongani came home in the company of the accused.

[16] On arrival at home Bongani was carrying a bag. From this bag the accused produced a packet of sunlight powdered soap. Inside this packet was exhibit 1. He loaded it with about four or five rounds of ammunition and as he did so he was talking with Bongani. The gist of their talk was that they were going to kill Pw2. She was told not to say anything about this. When Pw8 told Bongani that her father, Pw1 was usually with Pw2 where she worked, Bongani bluntly informed her that if he was found there, he would be shot and killed together with Pw2; to permanently silence him from revealing or saying who had murdered Pw2. He assured her though that if Pw2 was found alone, she would be hanged in the house and left there to die alone. Bongani and the accused were drinking alcohol as all this took place in the house.

[17] At about 1.00a.m. Bongani and the accused set out for the house where Pw2 worked. Bongani was armed with a pick-head. The accused was armed with exhibit 1. After about 15-20 minutes Bongani returned to the house alone. He ordered her to take whatever property or possessions she needed to take from the house and that they should leave the house immediately. Upon enquiry by her, Bongani told her (Pw8) that the accused had been chopped with a bushknife by Pw1 inside the house where Pw2 worked. He told her that accused had been severely or badly hurt and was unable to walk. When she resisted leaving the house, Bongani threatened to kill her and she submitted to his demands. They left for Johannesburg. Bongani later went to Mozambique and she never saw or heard from him again.

[18] As already stated, she was able to identify exhibit 1 as the gun that was in the possession of the accused on the night in question. From exhibit A1-A13 she was able to identify the pick-head carried by her husband, the jacket and cap worn by the accused that night and the hat worn by her husband.

[19] For his part, the accused denied his involvement in the crime or ever being present at the home of Pw8 on the relevant night. He said Pw8 was fabricating her evidence against him. He also

denied that Pw8 knew him or that he, the accused knew her. Pw8 was, however adamant and steadfast that her testimony was truthful and she had not lied about what took place at her home that night.

[20] After the evidence of Pw8, the crown applied from the bar to hand in what it termed or referred to as a forensic report of the blood samples taken from the scene and that which was extracted by a medical doctor from the accused whilst the accused was hospitalised at the Hlathikhulu Government Hospital. Counsel for the crown submitted that the maker or author of that report was in South Africa and, in terms of the provisions of section 221 of the Criminal Procedure and Evidence Act, 67 of 1938 such a report was receivable by the court (in the absence of such author). She said, rather blandly I thought, the state had no funds to procure the attendance of this witness. She did not say what efforts had been made by the crown to bring this witness to court to testify. His or her evidence was also not included in the summary of the evidence accompanying the indictment.

[21] The relevant section provides as follows:

Subsection 221(1) (a) would appear to be the closest to the matter under consideration herein:

“221 (1) In any criminal proceedings in which any facts are ascertained-

(a) by a medical practitioner in respect of any injury to, or state of mind or condition of the body of, a person, including the results of any forensic test or his opinion as to the cause of death of such person; or

(b) by a veterinary practitioner in respect of any injury to, or the state or condition of the body of, any animal including the results of any forensic test or his opinion as to the cause of death of such animal,

such facts may be proved by a written report signed and dated by such medical or veterinary practitioner, as the case may be, and that report shall be *prima facie* evidence of the matters stated therein:

Provided that the court may on its own motion or on the application of the prosecution or the accused require the attendance of the person who signed such report but such court shall not so require if-

- (i) the whereabouts of the person are unknown; or
- (ii) such person is outside Swaziland and, having regard to all the circumstances, the justice of the case will

not be substantially prejudiced by his non-attendance.

(2) Where a person who has made a report under subsection (1) has died, or

the court in accordance with the proviso to subsection (1) does not order his attendance, such report shall be received by the court as evidence upon its mere production, notwithstanding that such report was made before the coming into operation of this Act.”

[22] I refused this application and pointed out to Counsel that the evidence she sought to lead lacked the necessary link to and in the evidence already led. There was no evidence from any medical doctor that a blood sample had been drawn or extracted from the accused and what identifying mark had been placed on the specimen. Similarly, no such identification had been stated pertaining those blood specimen or swaps taken from the house at the scene of crime. This much is lacking in the evidence of Pw6; the scenes of crime officer who did the blood scraping or swaps at the scene. Because of this hiatus, the evidence sought to be led was irrelevant. There was no sufficient link between it and that already given by the crown witnesses.

[23] The only relevance one could find in the evidence sought to be led was to establish that the blood samples taken from the scene (in the house) were similar or the same or matched that blood sample drained or drawn from the accused at hospital. As already stated, the necessary link between those samples and the forensic analysis report sought to be led is totally wanting. The evidence is thus irrelevant and therefore inadmissible. And, in no way deciding the issue, I have grave doubts about the legality and admissibility of evidence of the results of forensic examination of a blood sample extracted or drawn from an accused person under or in circumstances such as the present. (Assuming of course that a doctor had testified on the matter).

[24] In refusing the application, it was pointed out to Counsel that it is a matter of such general notoriety which this court may take judicial notice of that personnel from South Africa, either as witnesses, Prosecutors or Judges are, year in and year out, a common or familiar feature in our courts and these are paid from the public purse or fiscus. Therefore, the economic reason advanced to justify the failure to bring this (prospective) witness to court is less than satisfactory. Every cent legitimately spent in

the pursuit of or in the quest for justice is, in my view, not a bad expenditure at all.

[25] In his defence, the accused denied that he was involved in the attack on Pw1 and Pw2 or that he ever possessed exhibit 1. He also denied that he was the person found by the police on the side of the road near Nkutjini Primary School and taken to Matsanjeni Health Centre.

[26] He told the court that on a Saturday in January, 2010 he left Johannesburg for Swaziland with three of his friends. Two of these were from Swaziland and the other one was from Natal (Kwazulu Natal). They were on a mission to buy dagga from someone in Swaziland. He did not know the person who was to sell the dagga to them and also had never been to the country before. They got into the country through the informal or illegal border crossing and once in Swaziland they travelled to Hlathikhulu where the dagga sale was to be concluded.

[27] Once in Hlathikhulu, his Swazi friend, Sibusiso telephoned the person who was to sell the dagga to them. After waiting for about one hour the person arrived and the deal was concluded. He and his friend Bhekie bought dagga for E5000.00 whilst

Sibusiso and Xolani (the Swazi friends) bought a gun from the dagga dealer. The seller left them in the street with their purchases. Whilst the accused was examining the fire arm in the dark, using light from a mobile telephone, a motor vehicle approached and Xolani advised him to hide the gun, suspecting that the said motor vehicle was a police vehicle. Indeed it was.

[28] The Accused and his companions ran into the darkness of the night, with the accused following the others. The Police chased after them and after running for some distance the accused fell down. He rolled on the ground and in the process got injured on his head and some sharp object cut him on the right side of the neck. The Police caught him still in possession of the gun. He was taken to Hlathikhulu Government Hospital, arrested and charged with the possession of the firearm and also for being in the country illegally.

[29] Exhibit 1 is not the firearm he was in possession of, he said.

[30] He also submitted a statement he made before a judicial officer after his arrest. This statement is similar to his evidence in court and was recorded on 26th January, 2010.

[31] The evidence against the accused is, in my judgment quite straight forward and simple. First, he was found by Pw6, a Police Officer, on the roadside towards Nkutjini Primary School. He was injured and unable to walk. The Police did not suspect then that he was involved in the attack on Pw1 and Pw2. He was rescued and taken to Matsanjeni Health Centre and from there transferred to Hlathikhulu Government Hospital for treatment. On being rescued by the Police on the roadside, he said he was Bonginkosi Innocent Mkhize, from South Africa. These are the names under which he is being tried herein and he has not disputed that these are his names.

[32] Also not disputed by him are the Hlathikhulu Government Hospital records that indicate that he was admitted at that hospital as a referral from Matsanjeni Health Centre. It is also not insignificant that these records indicate that the accused was admitted at the hospital in the morning at around 8.00 whilst he, the accused appears to suggest that he was arrested by the Hlathikhulu Police in the evening or at night and taken to Hlathikhulu Government Hospital because of the injuries he had received whilst fleeing from the police. He said he had to view the gun bought by his Swazi friends with the aid of light from a mobile telephone.

[33] The evidence stated or outlined above may be circumstantial or indirect or inductive. There is however, direct and very strong evidence in the testimony of Pw8, Ncamsile Nyaweni. She told the court that she knew the accused from Alexander and that on the night of 16th January, 2010 he came to her home in Nkutjini in the company of her husband, Bongani Nobonga. He was armed with exhibit 1. The accused and her husband discussed between themselves their plan or mission to kill Pw2. It is also noteworthy that her husband had telephoned her earlier and enquired where Pw2 was. Both the accused and her husband set-out on their mission to kill Pw2 at about one of the clock in the morning. The accused was armed with exhibit 1, which had four or five rounds of ammunition loaded in it. Pw8 was also able to describe the items or cloths worn by the two men and some of these items were later recovered from the scene of crime and positively identified by her in court. Significant also is the fact that when Bongani returned to the house, he was alone. Even ignoring or discounting what Bongani reported to Pw8, about what had happened to the accused, the accused was found injured in the area by the police. The injuries he sustained or had, their nature and location, were similar to those inflicted on the culprit and described by Pw1.

[34] This evidence places the accused person at the scene of crime and on a mission to murder Pw2 at the crucial or relevant time; ie when the complainants were attacked. Pw8's husband was heard by Pw2 directing operations from outside when the attack took place. The hat he wore and pick he was armed with was found at the scene. The gunman was injured and dispossessed of the gun by his victims. He was left at the scene injured and incapacitated. Both Pw1 and Pw2 were unable to identify the gunman but I have no doubt that the man picked up on the side of the road in that area was the accused and this is the gunman who had attacked the complainants in this case. What the accused said in his statement before a magistrate is nothing but a self-serving previous consistent piece; consistent with his evidence in court. It is false.

[35] The accused has made a bear denial of the evidence of Pw8. He said Pw8 was lying against him and so was Police officer Sitsebe. These witnesses, infact all the witnesses led by the crown, gave their testimony in a very straight forward and matter of fact manner. They were credible witnesses. In the face of all this overwhelming evidence against the accused, the version given by him in his defence cannot reasonably possibly be true. It is

false and it is hereby rejected. The accused is found guilty as charged on all three counts.

MAMBA J

For Crown:

N. Masuku

For Accused:

In person