



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 155/2012

In the matter between:

REX

VS

MOSES MUZI LUKHELE

Neutral citation: *Rex v Moses Muzi Lukhele 155 / 2012 [2014] SZHC65*
4 April 2014

Coram:
MAPHALALA, J

M.C.B.

Summary

Criminal law – accused charged with two counts of attempted murder and one count of contravening section 11 (1) as read with section 11 (8) of the Arms and Ammunition Act 24/1964 as amended – held that there is no evidence that the accused acted in self-defence or that he was unlawfully attacked as alleged - held further that the Crown has proved *mens rea* in the form of *dolus eventualis* which suffices on a charge of attempted murder – accused convicted as charged and sentenced to five years in respect of each of the two counts of attempted murder and five years in respect of the unlawful possession of firearm – sentences imposed on the first two counts to run concurrently with the third

count – the period of four months spent in custody to be taken into account in computing the period of imprisonment.

JUDGMENT
4 APRIL 2014

- [1] The accused is charged with two counts of Attempted Murder, and, one count of contravening section 11 (1) as read with section 11 (8) of the Arms and Ammunition Act 24 of 1964 as amended. He pleaded not guilty to the two counts of attempted murder and pleaded guilty to the third count of unlawful possession of a firearm.
- [2] On the first count of attempted murder, the Crown alleges that on the 8th May 2012 at Phola area in the Shiselweni region, the accused unlawfully and with intent to kill shot Bongani Sibandze with a firearm. On the second count of attempted murder the Crown alleges that on the 8th May 2012 at Phola area in the Shiselweni region, the accused unlawfully and with intent to kill shot Linda Simelane with a firearm. On the third count the accused is charged with contravening section 11 (1) as read with section 11 (8) of the Arms and Ammunition Act No. 24 of 1964 as amended, and, the Crown alleges that on the 10th May 2012 at Nhlangano Police Station in the Shiselweni region, the accused not being a holder of a valid licence or

permit to possess a firearm, unlawfully possessed a Ruger 9 mm Pistol, with its serial number scratched.

- [3] Three formal admissions were made in terms of section 220 of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended; firstly, the Ballistic Expert Report was admitted by consent and marked Exhibit 1. The report was compiled by Harry Vusi Madonsela, a ballistic Expert employed by the Royal Swaziland Police and attached to the Ballistic section of the Forensic Laboratory at the Police Headquarters in Mbabane. According to the report, he examined the pistol in count 3 and found that it functions normally without obvious defects.
- [4] The second formal admission relates to the Medical Report of Bongani Sibandze who was shot in count 1 of the indictment. The report was admitted in evidence by consent and marked exhibit 2. He was admitted at the Mbabane Government hospital on the 8th May 2012 on the day of the shooting and the condition of his clothing was bloodstained. There was a gunshot wound on the left side of his face which is the entry-wound; and, an Exit gunshot wound on the left ear. Similarly, there were entry and exit gunshot wounds on the left leg which further caused a fracture of the left distal fibula.

[5] The third formal admission relates to the medical report of Linda Simelane who was shot in count two. The report was admitted in evidence by consent and marked exhibit 3. He was admitted at the Mbabane Government hospital on the day of the shooting, and, the condition of his clothing was blood-stained. There was a gunshot wound on his abdomen, which was the entry-wound and a gunshot exit-wound on the lumber spine. There was a further entry-wound on the left elbow and an exit-wound on the left forearm. There were also gunshot wounds on the left shoulder as well as another gunshot wound on the left thigh. He suffered a compound fracture of the left distal humerus.

[6] PW1, Bongani Sibandze testified that he knows Linda Simelane and they stayed together at Phola area. He also knows the accused from Mathendele Township in Nhlanguano; PW1 was the tenant to the accused. According to PW1, on the 8th May 2012, he was employed by a certain Khumalo woman to look after her home at Mathendele Township; the accused was the builder, constructing a house on the premises, and, Linda Simelane was assisting the accused.

[7] Subsequently, PW1's employer ordered the accused to stop building, and, PW1 and PW2 proceeded with the construction and completed a two-roomed house and further painted the rooms. On the 8th May, 2012, the accused arrived at the Khumalo homestead, and wondered who had built

the two-roomed house in his absence since he was the builder. The accused further blamed PW1 for driving a wedge between him and Mrs Khumalo which led to the termination of his construction contract with her. The accused further blamed PW2 for using his construction equipment during the building of the two-roomed house.

[8] A confrontation subsequently ensued between the accused, PW1 and PW2 in which the accused ended up shooting PW1 and PW2 with a pistol. PW2 closed the door to the shack house and the accused was locked out; however, the accused continued shooting at the door. PW1 managed to open the door and ran to the neighbours for assistance; they called the police who arrived at the scene promptly. Both PW1 and PW2 were taken by the police to Nhlanguano Health Centre for treatment; they were later transferred to Hlatikulu Government Hospital; and later Mbabane Government Hospital respectively. The extent of the injuries sustained by PW1 and PW2 are fully explained in Exhibits 2 and 3.

[9] Under cross-examination PW1 confirmed that he knew the accused, and, that he stayed at the accused's house which was being leased by PW2. Thereafter, together with PW2, they worked with the accused as his assistants in building Mrs Khumalo's home; however, she subsequently employed another builder to continue with the construction. To that extent

he denied that he is the one who drove a wedge between the accused and the owner of the house as alleged by the accused.

[10] It further transpired during cross-examination that when the incident occurred, PW1 and PW2 had long stopped working for the accused. According to PW1, the accused was failing to pay all their wages timeously; hence, they decided to stop working for him. PW1 further disclosed that when the incident occurred, he was staying at the Khumalo homestead at the instance of the owner of the house who had employed him to look after her home; and, PW2 was assisting the new builder in constructing the house. PW1 further disclosed that on the day in question, the accused had come to collect his construction tools since another builder had been employed by Mrs Khumalo. PW1 further disclosed that the reason for the termination of the accused's contract with Mrs Khumalo was that he seldom came to work because he was building many other houses at the same time.

[11] PW1 denied as alleged by the accused that together with PW2 they stopped the accused from taking his tools which were in the shack. PW1 further denied that they used the accused's tools in his absence in the construction of the two-roomed house. Similarly, PW1 denied that they

insulted the accused during the confrontation or that they advanced to the accused with the intention to attack him.

[12] PW2 Linda Simelane testified and corroborated the evidence of PW1 in all material respects. He confirmed that he worked with the accused as his assistant when building a house at the Khumalo homestead; during this time he was also leasing an apartment at Mathendele Township in Nhlngano belonging to the accused. He further confirmed that before PW1 was employed by Mrs Khumalo to look after her homestead, they were staying together with PW1 his leased premises.

[13] Similarly, PW2 confirmed that the accused arrived at the Khumalo homestead and found them together with PW1. The accused asked them to come with him to the shack where PW1 was staying and they obliged. The accused blamed PW1 for causing a wedge between Mrs Khumalo and himself which led to the termination of his building contract with Mrs Khumalo. Suddenly he took the pistol and shot at both of them; and, that he subsequently lost consciousness and only gained it the following day at Mbabane Government hospital where he had been admitted.

[14] PW2 testified that he stayed in hospital for three months, and that he was not fully recovered. He explained that he is unable to stand for a long time

as a result of a bullet which is still lodged in his thigh. He denied that they attacked or confronted the accused with PW1.

[15] Under cross-examination PW2 reiterated his earlier evidence that they did not assault or made threats to the accused. He further denied that they insulted the accused as alleged by the defence. Similarly, PW2 denied that PW1 took a hammer under the bed and threatened to assault the accused. PW2 further disclosed that the accused had invited them to the shack but remained on the door-steps from where he made the accusations and further fired the shots at PW1 and PW2.

[16] PW2 denied the existence of bad blood between him and the accused; hence, he was surprised when the accused shot him. He further denied advising Mrs Khumalo with PW1 to dismiss the accused and secure a new builder. Similarly, he denied that he was the assistant to the new builder at the time of the shooting.

[17] Detective Sgt Mkhabela of the Scenes of Crime Unit and based at Nhlanguano Regional Police Headquarters testified that he attended the scene with other police officers. Another police officer Constable Magagula had arrived earlier and had cordoned the scene with a view to preserve it. The scene was at the Khumalo homestead where there was a

shack and a newly built house. There was a pool of blood in the shack where the shooting is alleged to have occurred; a lot of things inside the shack were upside down. He noticed six bullet holes on the door to the shack as well as a bullet head on the doorstep of the shack. He found empty cartridges two metres away from the shack.

[18] Upon entering the shack, he noticed seven empty cartridges, and, he marked them for purposes of evidence in Court. He took photographs of the crime scene and further collected the exhibits, packed and sealed them. He found two bullet heads inside the shack. The pistol was taken by the investigating team from the accused and sent for ballistic examination.

[19] Detective Sgt Mkhabela handed to Court as part of his evidence, photographs taken from the scene. The first photograph shows the shack; it was admitted in evidence and marked Exhibit 4. The second and third photograph shows the inside view of the shack where empty cartridges were found; it was admitted in evidence and marked Exhibits 5 and 6. Exhibit 5 also shows bullet holes on the door. The fourth photograph shows blasting behind the door shack, and, it was admitted in evidence and marked Exhibit 7. The fifth photograph shows the damage caused inside the shack, and it was admitted in evidence and marked Exhibit 8.

[20] Under cross-examination he explained that he found three bullet heads or bullet projectiles, and eight empty cartridges. He further noted that from his investigations that the person was firing just outside the door to the shack. Similarly, he disclosed that when he arrived with his team, the victims had already been taken to hospital.

[21] Constable Cletus Magagula based at Nhlangano Police Station testified that he attended the scene of crime together with other police officers after they had received a report that two people had been shot. They were stopped along the way by people who were in the company of PW1. Thereafter, they were led to the Khumalo homestead. On arrival they found a person lying inside the shack on the floor in a pool of blood. When they tried to open the door, the person shouted that “Lukhele do not kill me”. The floor as well as the wall was full of bloodstains. They were told that the man was Linda Simelane. They found empty cartridges on the floor. They called an ambulance which transported them to Nhlangano Health Centre. He maintained his evidence under cross-examination.

[22] Detective Constable Simphiwe Ndlangamandla, the investigating officer, testified that on the 8th May 2012, he received a report of a shooting at Phola area in Nhlangano, and, he proceeded to the scene together with other police officers. They were met by scattered bullet heads and empty

cartridges. In the shack there was a person shouting for help. At the door there was a bullet hole. When they tried to open the door, the person inside the shack shouted and pleaded that Lukhele should not kill him; he was told that they were police officers.

[23] There was blood on the floor, and, they found Linda Simelane who had been shot lying in a pool of blood. The police drove Linda Simelane to Nhlangano Health Centre; thereafter, they called the Scenes of Crime personnel who arrived promptly and managed the scene. They further recorded statements from witnesses.

[24] After investigations they found that the accused was the suspect. They further found PW1 who was shot at a nearby homestead; he was transported to hospital together with PW2. They did not find the suspect on that day; however, on the 10th May 2010 at around 12 noon, the accused surrendered himself to the Nhlangano Police Station. The accused was in the company of his wife Thembi Matsebula. The accused was duly cautioned according to the Judges Rules, that he was not obliged to say anything but that whatever he said may be used as evidence in Court. The accused opted to say something to the police about the case and further handed his pistol to the police. He was asked to produce a permit to possess the pistol but he failed to do so. The firearm had no ammunition. He formally charged him,

and further detained him in custody. The firearm was sealed and sent for ballistic examination. The firearm was admitted in evidence during the trial and was marked Exhibit A; and, the empty magazine was also admitted in evidence and marked Exhibit B.

[25] Under cross-examination Detective Constable Ndlangamandla reiterated his evidence that when they tried to open the door to the shack, PW2 said “Do not kill me Lukhele”; and, that after introducing themselves as police, they forcefully opened the door. He further reiterated his evidence that PW2 was shot several times, and, that he observed injuries on the left thigh, left side of the stomach, left arm as well as the left shoulder. He conceded that the accused was remorseful when he surrendered himself to the police, and, that he did not interfere with police investigations.

[26] The accused gave evidence in his defence. He testified that on the 8th May 2012, he went to the Khumalo homestead to check if the owner of the home had purchased building material. According to the accused the owner had told him that he would advise him when she had purchased the building material. On arrival at the homestead, he greeted PW1 and PW2 and went to the house that was under construction. He discovered that the house was now complete, and, he enquired from PW1 who had built the house in his absence, and PW1 said it was built by him and PW2. He enquired where

they had obtained the tools for the construction, PW1 said that the tools were with the builder. He looked for his tools where he had left them but could not find them; he suspected that PW1 and PW2 were using his tools, and, he asked them to give him his tools and PW1 told him that he doesn't look after his tools, and, he further insulted him. According to the accused, PW2 was also present when he enquired about his tools. They were in the shack. He also asked PW2 for a particular tool, and, he insulted him and further told him that he should not ask him for his tools because he didn't stay at the Khumalo homestead.

[27] The accused further alleged that PW1 and PW2 then advanced towards him, and, he retreated outside of the house; PW2 carried a bushknife and advanced towards him. He shot PW2 on the arm once. PW1 took a hammer under the bed, and, he shot him on the left leg; PW2 closed the door, and, the accused moved out of the house but continued shooting at the door four times allegedly to scare them. Thereafter, he left the scene of crime; shortly thereafter, he received a call that he should rush to Ezulwini where he had applied for a job at Woodlands. He returned back to Nhlanguano on the 10th May 2012; he asked his wife to accompany him to the police station where he surrendered himself to the police, and, the police arrested him and took him into custody.

[28] The accused suspected that PW1 and PW2 had advised Mrs Khumalo to terminate his construction contract and engage another builder to complete the house; hence, the attack on PW1 and PW2. He contended that prior to the incident, he was in good terms with them and he had also worked with them as his assistants in the construction of Mrs Khumalo's house. He further contended that his contract was terminated after she had found him building a house for another person, and, she had accused him of absenteeism and abandoning her construction. There is no evidence that either PW1 or PW2 had any role in the termination of the accused's contract with Mrs Khumalo; hence, the suspicion held by the accused was unreasonable.

[29] The accused testified that when he shot PW1 and PW2, he was acting in self-defence, and, that he could not run away from them because he has an artificial leg. He denied that he had intention to kill them. Under cross-examination he conceded that he had shot both PW1 and PW2 with an unlicensed firearm. However, he argued that he had shot them in self-defence. According to the accused, he fired the shots when they advanced towards him, PW1 arrived with a hammer and PW2 with a bushknife. He conceded that he did not report the incident to the police immediately after the shooting but after two days. He also conceded that

after the shooting, he left them for dead and he did not assist them secure medical treatment.

[30] It is apparent from the evidence that the accused shot at PW1 and PW2 on suspicion that they had influenced Mrs Khumalo to terminate their construction contract; however, there is no such evidence before this Court. The extent of the injuries suffered by PW1 and PW2 are reflected in the medical report, and, they are very serious. There is no evidence that PW1 and PW2 had attacked the accused and that he was acting in self-defence. Furthermore, he did not fire one or two shots but eight shots; even after he had shot them and they had closed the door, he continued shooting at the door.

[31] In the case of *Rex v. Zwelithini Maqumbane Nkambule* High Court Criminal case No. 78/2012 at para 39, I had this to say:

“39. It is a trite principle of our law that a person may apply such force as it is reasonably necessary in the circumstances to protect himself against unlawfully threatened or actual attack. The test whether the accused acts reasonably in defence is objective; and, the force used must be commensurate with the danger apprehended, and, if excessive force is used, the plea of self-defence will not be upheld. See the case of *Rex v. Nhlase Anthony Nxumalo* Criminal Case No. 87/2010 and *Rex v. John Ndlovu* 1970-1976 SLR 389 (HC) at p.390.”

[32] His Lordship *Chief Justice Ramodibedi*, sitting in the Supreme Court of Swaziland, in the case of *Bhutana Paulson Gumbi v. Rex* Criminal Appeal No. 24/2012 at para 15 said the following:

“15. ... self-defence is only available if three requirements are met, namely, if it appears as a reasonable possibility on the evidence that:-

- the accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury at the hands of his attacker;**
- the means he used in defending himself were not excessive in relation to the danger; and**
- the means he used in defending himself were the only or least dangerous means whereby he could have avoided the danger.”**

[33] As stated in the preceding paragraphs, PW1 and PW2 did not attack the accused. On the contrary, it is the accused who unlawfully attacked them on suspicion that they had influenced Mrs Khumalo to terminate his construction contract with her. In the circumstances, the accused was not in danger of death or serious injury at the hands of PW1 and PW2; hence, there was no need for the accused to have shot them.

[34] I now turn to deal with *mens rea* in the form of intention. The evidence shows that the Crown has proved *mens rea* in the form of *dolus eventualis*, and this suffices for purposes of conviction on a charge of attempted murder. The accused foresaw and appreciated the risk of serious injury when he shot at PW1 and PW2 but he continued shooting and acted recklessly as to whether such injuries results.

[35] *Kotze JA* in the case of *Henwood, Thornton v. Rex* 1987-1995 (4) SLR 271 CA at 273 stated the following:

“A case in the Appellate Division of South Africa, R. v. Huebsch 1953 (2) SA 561 (A) at 567 establishes the correct principle as being:

“That it suffices for the prosecution to prove in a charge of attempted murder an appreciation that there is some risk to life coupled with recklessness as to whether the risk is fulfilled in death.’ ”

[36] In the circumstances I find the accused guilty of the attempted murder in respect of counts 1 and 2. Similarly, I find the accused guilty of count 3 in which he pleaded guilty to the charge.

[37] In mitigation of sentence the defence counsel contends that the accused is a first offender, married with two minor children and that his wife is sickly suffering from diabetes. She further contends that the accused showed remorse prior and after his arrest, that he surrendered himself to the police and further co-operated with the police during police investigations. On the other hand the Crown contends that the accused should be given a custodial sentence consistent with section 313 of the Criminal Procedure and Evidence Act as a deterrence to other would be offenders.

[38] The accused was arrested on the 10th April 2012 and released on bail on the 6th June 2012. His bail was terminated on the 6th February 2013 when the Court invoked section 145 of the Criminal Procedure and Evidence Act.

[39] Accordingly, the accused is sentenced to five years imprisonment in count 1 and another five years in count 2. Furthermore, he is sentenced to five years in respect of count 3. The three sentences in count 1, 2 and 3 shall run concurrently, which means that the accused will serve an effective sentence of five years; the four months spent in custody will be taken into account in computing the period of imprisonment.

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

For Accused

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