



IN THE HIGH COURT OF ESWATINI

JUDGMENT

CRIMINAL CASE NO.249/13

In the matter between:

THE KING

AND

THANDO MAGONGO

MORRIS MNISI

Neutral Citation: *The King vs Thando Magongo and Another (249/13) [2020] SZHC (143) 30th July 2020*

Coram: MLANGENI J.

Last Heard: 24th June 2020

Delivered: 30th July 2020

Summary: Criminal Law – accused charged with attempted murder – complainant sustained multiple injuries but accused admitted to one stab wound – no corroboration on who inflicted the other stab wounds.

Assault committed after many hours of drinking alcohol and evidence showed that the complainant was troublesome and bellicose on the day, and that he is probably the one who started a series of events that culminated in him being stabbed.

Accused found guilty of lesser offence of Assault with intent to do Grievous Bodily Injury.

JUDGMENT

- [1] A drinking binge on the 4th May 2013, at Jubukweni area in the Hhohho region, ended in tragedy. One Mthokozisi Khumalo, the complainant in this matter, was stabbed multiple times on the back of the chest and side of the left thigh. He sustained lung, spinal cord and bowel injury. He became paralysed on the lower limbs due to the spinal cord injury and, at the age of 31, he was permanently restricted to a wheelchair for mobility. Such is the tragedy of alcohol abuse.
- [2] The accused, Thando Magongo, was co-charged with one Morris Mnisi, for attempted murder in that they acted in common purpose in unlawfully assaulting the said Mthokozisi Khumalo with intent to kill him. When the trial commenced on the 23rd June 2020 the Second accused, Morris Mnisi, was not in attendance. The court was informed that he had not been present in previous court appearances of this matter and it was apparent that he had evaded the tentacles of justice, at least for now. Because there was no evidence that he had been served with process for this day's attendance, a warrant of arrest was incompetent and, upon application by the Crown, a separation of trials was granted by consent of both sides and the matter proceeded against the first accused, Thando Magongo. He pleaded not guilty to the charge and the plea was confirmed by defence Counsel Mr. M. Mabila.

FORMAL ADMISSIONS

[3] At the commencement of trial some admissions were made on behalf of the accused in terms of the Criminal Procedure and Evidence Act 1938, as amended. The admissions made are as follows: -

3.1 The accused stabbed the complainant once.

3.2 The medical report on RSP 88 dated 23rd August 2013 was admitted by consent and marked "**Exhibit A**"

3.3 The pointing out by the accused of the assault weapon.

[4] In his evidence the accused described the weapon as a home-made dagger, with a handle, generally referred to as a Rambo knife. It is usually made from a wasted slasher or some like metal object and it is extremely dangerous. Because the pointing out was admitted, the exhibit was not handed in and the court did not get to see it.

[5] The Crown's case is based on the evidence of two witnesses, who include the complainant. PW1 was Sikhumbuzo Bertram Dlamini who resides at Jubukweni area where the crime occurred. He testifies that on the 4th May 2013 he came back from work and got to a Kubheka homestead sometime after 8:00 pm. At this home there was a shebeen which sold alcoholic drinks and food. At the homestead he found many people that were well known to him and he mentioned Morris Mnisi, Mduduzi Dlamini, Sandile Shongwe, Basizi Mngometulu, Bheki Malinga and one Ngwenya man. Shortly after his arrival there (he estimated about 5 minutes) the complainant came and greeted the lot. The complainant, according to this witness, attempted to pick up a bottle of beer to drink, this beer having been bought by the group that was found at the homestead by the two. The complainant was denied the opportunity to have a sip and, according to PW1, it was apparent that there was beef between the complainant and the others. At that stage Morris Mnisi who was initially co-

charged with the accused, stood up to confront the complainant but a fight was prevented by the timely intervention of those present. The witness proceeded in the following manner: -

“We then bought drinks and meat and moved to another place, a Dlamini homestead. Those who moved with me were all those I found at the Kubheka homestead. Mthokozisi Khumalo, the complainant, remained behind.”

[6] Further evidence by PW1 was that when they got to the Dlamini homestead they sat at an enclosure, colloquially referred to in the rural areas as **“sihhahha”**, and food was prepared. In the meantime drinks were flowing. The complainant who had been left behind at the Kubheka shebeen, then joined the others at the Dlamini homestead, apparently unexpectedly. He came straight into the enclosure. Morris Mnisi then stood up to confront him, a pot in which food was being cooked spilled and there was smoke in the enclosure. His evidence proceeded in this manner: -

“I left to pass water some distance away. When I finished I went back and saw Mthokozisi Khumalo lying down, bleeding and I called the police. He was lying face down, bleeding at the back.”

[7] He further stated that there was moonlight and the fire was an additional source of lighting in the enclosure. I presume that the spilling pot may have drenched the fire and reduced its effect as a source of light at the time.

[8] I pause here to observe that it is a matter of enormous curiosity that the witness left the enclosure to urinate just as conflict erupted. He did not state how long it took him to urinate, a short distance away. By the time he came back the complainant was lying prostrate and bleeding at the back. It is probable that he has not told all that he knows about the events just before the physical conflict at the enclosure. It is hardly surprising that during cross-examination some useful evidence did come to light.

[9] Under cross-examination the witness confirmed that he does not know what transpired at the Kubheka homestead prior to his arrival on that night. He admitted, however, that he was aware that at the said homestead the complainant had arrived and chased some people away, brandishing a knife. He further admitted that he was aware that those who were chased away from the homestead by the complainant were Sigulumba and Machawe who ran to the bushes nearby. It was put to him that at the same homestead, while the patrons were basking in the light of sunset, leaning against a house wall facing the north, the complainant drew out a knife and scratched it along the wall just above their heads, and his answer was that he did not know that. The witness further stated that the complainant was drinking his own wine and not part of the bigger group. He was asked about prior incidents of common assault that were perpetrated by the complainant in the neighborhood and his answer was that the complainant used to have a bad temper **“but I heard that he had changed.”** He was further asked the following questions: -

Q: You cannot dispute that it was agreed that the group was to leave the Kubheka homestead because the complainant was troublesome and Mduduzi offered his homestead for the purpose of continuing with their fun.

A: It was like that, but we also wanted to go to a certain homestead where there was a traditional ceremony. At Mduduzi's home we were to prepare food to eat and thereafter continue drinking.

Q: At the Kubheka homestead food is available for sale, you can buy meat and they cook it for you if that is what you want?

A: That is correct. But the reason we left was the tension or quarrels that were there.

[10] It is of significance that the witness conceded that not only was the complainant generally belligerent on the day but he was at the centre of the tension that existed. It is obvious that his alleged act of scratching a knife along the house wall was an act of intimidation, if not sheer aggression.

[11] Further questions and answers during cross-examination follow below:-

Q: While you waited for the food the complainant arrived there and got inside the enclosure. He then asked: do you people know that I can spill your food?

A: He did

Q: Three times?

A: I don't remember very well.

Q: Using his foot he pushed the pot containing relish and it spilled?

A: Yes

Q: At that stage accused went out of the enclosure?

A: I cannot deny that

Q: Mduduzi asked the complainant why he was fomenting trouble to the extent of pursuing the group to this homestead?

A: Yes. He did this as he walked out of the main house.

[12] Further questions related to the accused's version of events, being that the complainant was armed with a knife when he arrived at this homestead, that the accused ran around the main house to avoid the complainant, then the accused fortuitously got hold of a sharp object somewhere in the yard and this is the object that he used to stab the complainant who had blocked his way of escape. To all of this the witness' answer was that he does not know that. It was put to the witness that when the other people realized there was physical conflict between the accused and the complainant outside the enclosure they then came to the scene and at that stage the complainant was not lying down, the accused immediately ran away. The witness answer was that when he came to the scene the complainant was already lying down. It was further put to the witness that the complainant was a feared bully at Jubukweni area who often brandished a knife and was ready to use it and his answer was that the complainant used to be like that.

Court: What made him to change?

A: I don't know.

[13] PW2 was the complainant himself. He stated that he knows the accused person and that they lived together and played soccer together at Jubukweni. On the 4th May 2013 he was at the Kubheka homestead (kaLizzie), together with other people. He did not mingle with the other people and he was minding his own business, watching soccer. He testified that at around 5:30pm the accused and some other people came. They included one Mduduzi Dlamini and Morris Mnisi and they were drunk. Then he had a brief chat with Mduduzi Dlamini who then offered him a bottle of beer to drink but Morris objected. An idea was discussed that the group would leave this place

and go to a traditional event in the vicinity but the complainant did not immediately follow the rest of the group. Later, the complainant left the Kubheka homestead and proceeded to Mduduzi Dlamini's homestead. Upon arrival there he found, to his surprise – according to him, that Mduduzi Dlamini was with the rest of the crowd which included the accused and Morris Mnisi. When he got to the homestead he went into the enclosure where there was fire. He proceeded in the following manner: -

“Then the accused stood up and went out as if to pass urine. I saw space to sit. Morris was on the other side of the fire. As I sat down Morris lunged at me and held me by arms, he pulled me outside. There was a pot of food on the fire. In the process the food in the pot spilled. We went outside. The accused had been outside to pass water. When he came back I felt him stab me at the back. Morris was holding me. Accused stabbed me until I fell down.....He stabbed me many times while Morris was holding me. I lost consciousness and don't know what happened afterwards. I gained consciousness in an ambulance.”

[14] He was hospitalized at Mbabane Government Hospital for about three months.

[15] In cross-examination the complainant was reminded that on an earlier appearance in court he had issued threats to the accused, saying the accused is lucky that he, the complainant, is now condemned to a wheelchair otherwise he would get even with him, and that the complainant's mother admonished him about this. His answer was that he did dare the accused to come and finish him up, and that he

does not remember what else he said. The witness admitted that he recorded a statement to the Police on the 7th August 2013 while at Mbabane Government Hospital. It was put to him that in this statement he does not mention that he spent time at KaLizzie, where the other people were having drinks, and that the reason for this omission is that he was troublesome on the day. His response was that he was there earlier (at the Kubheka homestead) but then left to watch soccer at a nearby football ground. He admitted that he was having a drink at this homestead but he did not trouble anyone. He said that he does not remember drawing out a knife and chasing one Thobisa Sibandze and Jomo. It was further put to him that later on he chased Machawe and Sigulumba, using the same knife, and they ran to the thicket nearby. He denied this, adding that it is all fabrication, but he did not give any reason why anyone would create this against him. He denied that he ever carried a knife with him on the day and denied that he menacingly drew a line with the knife on the house wall, above the heads of the group that was leaning on the wall on a sitting position.

- [16] It is opportune to mention here that at a subsequent inspection in *loco* at Jubukweni area on the 24th June 2020 I was shown the Kubheka homestead (KaLizzie) and the wall that was allegedly scratched by the complainant's knife was shown to me by the accused. I observed fading but fairly visible scratches on the wall which were most probably made by a sharp-pointed and hard object. The lines of the scratches were irregular and asymmetrical and this suggests to me that there was significant energy when the lines were made. For the sake of certainty, I mention that during cross-examination defence Counsel made reference to a single line but at the inspection I saw several lines, as described above.

[17] It was put to the complainant that on this particular day he was drinking wine. His answer was that he was not drinking, but he subsequently admitted that he was in fact drinking. Surely, he has a reason for denying that he was drinking prior to the sad manner in which the binge ended.

[18] The witness admitted that having been left behind at KaLizzie, he subsequently went to Mduduzi Dlamini's home which is a distance of just above one kilometre and was surprised to find many people there - he was expecting to find Mduduzi only. The witness was informed that Sikhumbuzo Dlamini informed the court that upon arrival at the enclosure he (the complainant) threatened to spill the pot of food that was on the fire and his response was that this was an untruth. I mention here that it came out in the evidence that the complainant and Sikhumbuzo had a friendly relationship, and there is no apparent reason why the latter would create such an adverse story against his friend.

Court: According to your knowledge or subsequent understanding why were you attacked in that manner?

Answer: I still wonder even today. I and the accused were close, even at my home they know him.

[19] It was further put to him that Morris Mnisi held him by the arms after he had spilled the pot of food and he denied this. He further denied that after the accused had walked out of the enclosure he (the complainant) pursued him, brandishing an okapi three-star knife and added that at this stage his hands were being held. He also stated that the accused had a hand-made knife that he used to stab him and did not pick up a sharp object in the yard as stated by the defence. He

denied that other people joined the fray and were kicking and stabbing him after the accused had run away. He insisted that the one who stabbed him was the accused, and that he stabbed him many times. He further stated that Morris Mnisi was accidentally stabbed as well and this is what saved him from further injury, adding that he had warned Morris Mnisi many times against carrying a knife. It is apparent that this band of young men were in the habit of taking knives with them when they moved around. And there must be a reason for this.

[20] The Crown closed its case after the testimony of PW2, the complainant. The accused is the only witness that testified in defence. He mentioned several names of people who were at KaLizzie drinking spot prior to the group moving to Mduduzi Dlamini's homestead. He testified that the complainant was also there, and that he was very drunk on that day. Because the complainant was causing trouble the group decided to leave him and go to continue their fun elsewhere. They proceeded to the parental home of Mduduzi Dlamini where they made a fire and cooked porridge, after which they cooked relish. He proceeded to say that while they were cooking relish the complainant arrived and asked if they were aware that he could spill the pot. The witness further testified that at that stage he walked out of the enclosure, to avoid trouble, and his intention was to go away. According to this witness, as he stood up to go he was pursued by the complainant. The witness proceeded in the following manner: -

“At that stage I got a knife at Mduduzi’s homestead. As I ran he was blocking my way and I later stabbed him and ran away. We were facing each other. He had his own knife.....”.

[21] The accused's evidence is that he came across the knife fortuitously, it was with kitchen utensils at a place outside the house where there was a water tap. His evidence is that as he ran away from the complainant other people were following him. When him and the complainant came face to face he (accused) stabbed the complainant on the left side of the middle body and ran away. He does not know what happened afterwards. He further stated that **“we were afraid of him because he is known for stabbing people. He once stabbed Dumisa Malaza.”** The knife that he used was a hand-made knife and it was handed over to the police.

[22] During cross-examination the witness reiterated that at KaLizzie drinking spot the complainant was a menace, threatening to stab people, that he scratched a house wall with a knife and Machawe and Sigulumba ran away. He further stated that when the complainant threatened to spill the relish and he walked out, Morris Mnisi was at the fire side. He ran away a distance of about 15-18 metres, as he turned back he was confronted by the complainant whom he stabbed next to the corner of the main house. The enclosure is a short distance away from the house. It was put to him that as they came face to face he (the accused) was not cornered and his answer was that they **“bumped on each other, I stabbed him, pushed him and ran away. I was not aware that he was coming in that direction.”** Below I capture some questions and answers during cross-examination.

Q: Why did you stab him?

A: To get him out of my way because I wanted to get away. When I stabbed him he gave way.

Q: The main reason you stabbed him was to make yourself a way to leave? Would I be correct that you were never attacked, you stabbed him to make your way?

A: Yes. I was running away from him when I came across him.

Q: When did you realize that the had a knife?

A: He had it KaLizzie. I also saw it at the Dlamini homestead, it fell down and he took it.

Q: PW2 says he never chased you, you stabbed him while Morris was holding him and you stabbed him at the back.

A: Not true. I stabbed him on the side

Q: The medical report “**Exhibit A**” shows several stab wounds, yet you say you stabbed him once. According to you what caused the other injuries

A: I don’t know.

[23] Upon re-examination, the witness said that the complainant was a danger to him as he was armed with a knife and was chasing him. He further stated that as there was commotion and other people were there, the other stab wounds on the complainant may have been inflicted by the other people.

[24] On the following day I conducted an inspection in *loco* at the scene of crime. Earlier on I noted that at the Kubheka homestead (KaLizzie) I observed the house wall which is alleged to have been menacingly scratched by the complainant with a knife. I also observed a thicket close to the house where Machawe and Sigulumba are said to have run into in the wake of the complainant’s belligerence. The scratch lines on the wall were asymmetrical and this suggests that the knife was probably scratching in different directions, a sign of sheer energy. I also observed the Dlamini homestead where the alleged crime occurred. This home is about 1-1.2 kilometres away from KaLizzie. At this home the accused showed me the spot where the enclosure

used to be, a short distance from the main house. I was also shown the spot where a tap of water used to be, some 15-18 metres away from the enclosure. The accused said that when he picked up the assault knife it was dark but there was moonlight.

[25] At the inspection in *loco* Crown counsel asked the following questions:-

Q: You have shown the court where you got the knife. So the knife belonged to the homestead. Why did you take it away with you when you left the house?

A: I cannot explain it. I was in fear. When I got home I put it in the tool compartment of a tractor.

[26] I am not persuaded by the accused's version that he came upon the home-made knife by chance at the Dlamini homestead. The commotion happened at a rural home, at night. It is said that there was moonlight but I have serious doubts that there was so much moonlight that the accused was able to be spot-on on something that he needed exactly at that time. The water tap where he alleges he picked up the knife is about 15-18 metres away from the enclosure, and about five metres from the furthest corner of the main house. When he left the enclosure it is not clear why he went straight to where he claims to have found the knife. Those home-made knives, commonly referred to by folk as Rambo knives, are weapons of mischief and it would be most odd to find one together with kitchen utensils as claimed by the accused. Moreover, it is clear from the evidence that this band of boys fancied carrying knives with them. On the basis of the foregoing I come to the conclusion that the accused had his own knife which he had with him on the day and it is the one that he used to stab the complainant.

[27] On the basis of the evidence that I have heard, I make further findings of fact as follows: -

27.1 The complainant was an aggressive person and he was feared by his peers in the community.

27.2 On the fateful day the complainant was on the warpath, and he had a knife in his possession.

27.3 Because the complainant was causing trouble at the Kubheka homestead the bigger group left him there to pursue their fun at the Dlamini homestead.

27.4 Complainant subsequently showed up at the Dlamini homestead and continued fomenting trouble. He started a series of events that culminated in him being stabbed.

[28] The accused has admitted to stabbing the complainant once, on the left middle side of the body. According to **“Exhibit A”** which is form RSP 88, the complainant has **“multiple stab wounds on posterior.....of chest and lateralleft thigh.”** And indeed the doctor made several marks on the left thigh which represents injuries which are close together. If the accused stabbed the complainant on that spot only once, it raises the question as to who inflicted the other stab wounds on that same spot. The complainant’s testimony did not throw any light on this aspect, his evidence being general and to the effect that his hands were held by Morris Mnisi while the accused stabbed him several times.

[29] The complainant also sustained several stab wounds on the backside, below the shoulders. The doctor’s marks show at least four wounds, in close proximity with each other. This clearly suggests that when

the complainant was stabbed at the back the assailant was behind him and he (the complainant) was being restrained by somebody else and had limited movement. On this basis I accept the evidence of the complainant that at some point in time his hands were held by Morris Mnisi while the accused was stabbing him. This, coupled with the accused's unconvincing account of how he came face to face with the accused at the corner of the main house and stabbed him, clearly demonstrates that much of what actually happened there remains untold.

THE LAW

[30] It is trite that in criminal proceedings the onus, throughout, is upon the Crown to prove all the elements of the crime beyond reasonable doubt. In this particular case the accused has admitted to stabbing the complainant once. It would obviously have been useful for the Crown to bring corroboration of the complainant's evidence that all the stab wounds – on the backside and on the side of the body – were inflicted by the accused. It's failure to do so has a telling effect on its case, and in the conspectus of the matter it remains uncertain who inflicted the rest of the stab wounds on the body of the complainant. Given that there were many people at the scene of crime, this scenario is quite odd. I observed earlier that it is a matter of curiosity that PW1 walked out of the enclosure just before the confrontation started and returned just after it had ended. In my view there is much that this witness is not telling. In the circumstances the accused's liability can only be determined on the basis of the one stab wound that he has admitted. The fact that he may have inflicted other stab wounds is, in the absence of corroboration, subject to reasonable doubt.

[31] The question that I need to determine is whether or not the admitted act of stabbing meets the legal requirements for attempted murder. In

the case of REX v JAMES MANDLA MKHALIPHI¹ the Learned Judge, quoting from the erudite judgment of Schreiner JA², articulated the legal position in the following words: -

“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.”

Similar words are used in the case of THORNTON HENWOOD v REX³, and the Supreme Court, in the case of SIBUSISO KUKUZA DLAMINI⁴, made the following observation: -

“The appellant used an inherently dangerous weapon to stab the deceased and used ‘strong force’ to inflict the injury. He clearly must have appreciated that there was a reasonable possibility of risk of life involved in his action and was reckless as to the consequences.”

[32] In my view the accused’s action clearly falls within the rubric outline above and, in the absence of a defence recognized in law, he stands to be convicted. In his defence he stated that he came face to face with the complainant at a corner of the house and stabbed him **“to get him out of the way”**. During cross-examination it was put to him that he was not under attack and he answered in the affirmative.

Q: Would I be correct that you were never under attack, you stabbed him to make you way?

A: Yes. I was running away from him when I came across him.

¹ (351/2011) [2012] SZHC 161, 31st May 2012

² Rex v Huebsch 1952 (2) SA 561 at p567.

³ 1987-1995 SLR 271 at p273

⁴ Criminal Appeal No. 39/2010 at para 24.

[33] It was only in re-examination that the accused stated that the complainant was a danger to him, and even then he said nothing to elucidate or support this. It is settled that where the Crown has led evidence that establishes a criminal offence the onus is upon the accused to advance a credible defence, and in my view the accused has not succeeded in doing so and is accordingly convicted. However, I am mindful of the totality of the circumstances under which this crime was committed, especially the generally bellicose behaviour of the complainant on the day and that it was most probably his provocative actions that precipitated the bloody conflict. I am guided by Section 184 (1) of the Criminal Procedure and Evidence Act 1938, as amended, to find the accused guilty of the lesser offence of Assault with intent to cause Grievous Bodily Harm, and it is so ordered.

MLANGENI J.

DATE

For the Crown: Mr. Phakathi

For the Accused: Advocate M. Mabila