IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 10/2014

In the matter between:

MFANUKHONA MAPONYANE MABUZA1st Applicant

ZIBUSE PETROS MABUZA2nd Applicant

And

REXRespondent

Neutral citation:*Mfanukhona Maponyane Mabuza and Another v Rex (Bail Pending Appeal) (10/2014) [2021] SZHC 59 (22 April 2021)*

CORAM:T.L. DLAMINI J

Heard:12 November 2020

Delivered:22 April 2021

[1]Criminal procedure – Bail pending appeal – Requirements thereof

Summary:*Applicants were convicted by this court for the attempted murder of one Congress Ace Mavuso – The applicants were held to have acted in common purpose – They*

were each sentenced to imprisonment for five years without the option of a fine – They noted an appeal against both the conviction and sentence – Following the appeal filed, the applicants have applied to be admitted to bail pending the hearing of the appeal – Requirements for bail pending appeal, viz., that the applicants have prospects of success on the appeal, and that they are not a flight risk, considered.

Held: *That upon consideration of the two requirements, the court is of the opinion that the applicants have very weak prospects of success on their appeal, if there are any. The application for bail pending appeal cannot therefore be granted. Application dismissed.*

JUDGMENT

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[1]The applicants appeared before this court as co-accused persons. They were tried for Attempted Murder, it being alleged that on or about the 19th January 2014 and at Lamgabhi area in the Hhohho Region, each or all of them acting in furtherance of a common purpose, did unlawfully and with intent to kill, assault CONGRESS ACE MAVUSO with a slasher and a bolted stick, and did thereby commit the crime of Attempted Murder.

[2]Their trial for the offence proceeded and seven witnesses were paraded by the crown whilst the defence led in evidence both applicants. This court found the applicants guilty as charged and the verdict was handed down on 08 June 2020. On the 24 July 2020 the applicants were each sentenced to a custodial sentence of five years. They then filed a notice of appeal against both the verdict and the sentence.

[3]The applicants noted four grounds of appeal, *viz*., that the trial court erred both in fact and in law by finding the applicants guilty of the offence of attempted

murder; that the trial court erred both in fact and in law by finding that the applicants acted in common purpose when no such common purpose was proved; that the trial court erred both in fact and in law by rejecting the defence of the applicants, namely; that the first applicant acted in self-defence while the second applicant was not proved to have participated in the commission of the offence; and that the trial court erred both in fact and in law by holding that the applicants had *mens rea* in the form of *dolus eventualis* when no such intention was proved.

[4]The applicants have therefore approached this court and seek to be admitted to bail pending the hearing of their appeal. It is settled law that an applicant who seeks to be admitted to bail pending the hearing of an appeal needs to establish that he is not a flight risk, and that he has prospects of success on the appeal. See **Phindile Gwebu v The King (42/2017) [2017] SZHC 65 (20 April 2017)** and **S v Williams 1981 (1) SA 1170**.

[5]The application for bail pending appeal is before the same court that convicted and sentenced the applicants. Naturally, a judicial officer who has convicted and sentenced an accused person may have a difficulty in finding and pronouncing that there is a reasonable chance that a different court would arrive at a different finding. This is so because the judicial officer is in some way called upon to review his judgment. It was however stated in the case of **S v Williams (supra)** that the consideration upon which the trial court is seen as a better forum for dealing with the bail application pending appeal is that "*there is a far better chance of an informed decision from the magistrate who has heard the case than from a Judge who has little knowledge of the facts*".

[6]Both applicants have deposed to separate founding affidavits notwithstanding that they together filed one notice of appeal and under the same case number. In their founding affidavits, both applicants state in their separate paragraphs 8 that they noted an appeal against the sentence imposed by the court *a quo*. The implication is therefore that the appeal is against the sentence and not the conviction. When I however look at the third ground of appeal, *viz*., that the court *a quo* erred by rejecting the defence of the applicants in that the first applicant acted in self-defence while the second applicant was not proved to have participated in the commission of the offence, I get the impression that the appeal is also against the conviction. Self defence is a complete defence that may result in an acquittal if proved on the evidence. Non participation in the commission of the offence may result in an acquittal as well. I therefore will consider the appeal to be in respect of both the conviction and sentence.

[7]In support of the first ground of appeal, *viz*., that the court *a quo* erred by finding that the applicants are guilty of the offence of attempted murder, the applicants state in their founding affidavits that another court may find and hold that the conviction ought to be one of assault with intent to cause grievous bodily harm. In his testimony, the second applicant stated that during the fight that took place, he pushed away the first applicant and told him that he has killed the complainant. When asked about what he meant when he told the first applicant that he has killed the complainant, the second applicant responded by saying that he was shocked and terrified by the way that the complainant was bleeding. Officer 3518 Inspector Luke Dlamini who testified as PW7 stated that he rushed to the Mbabane

Government Hospital to ascertain the situation of the complainant. He found him bleeding and having gapping wounds. He was injured on his head, both arms, and that a finger had been cut off whilst another was hanging on the hand.

[8]Doctor Zebenguni Mkhatshwa who testified as PW6 stated that the complainant came to the hospital wearing clothes that were soaked in blood. He had a cut on the left hand and an extension tendon injury. He sustained a cut finger at the scene whilst another finger had to be amputated because it had a very deep cut that injured the inner vein and was rendered unable to function. She described these injuries as "*traumatic amputation of the second and fourth fingers of the right hand*". She also testified that the complainant suffered cuts on the head and left leg. The complainant had to undergo three operations, and one of these operations was to fix the complainant's extension tendon of the left hand together with a bone that was fractured. He was admitted at the hospital from 20 January 2014 to 04 March 2014. This is an admission period of six weeks. Three of these weeks were in the Intensive Care Unit (ICU).

[9]This certainly is evidence about a person who was almost killed and had to be admitted into the ICU. This is about a person who was assaulted to a point where he bled profusely, and was left lying helplessly on the ground. The bleeding was such that the second applicant said it caused him to be terrified. The complainant had to be admitted at the Mbabane government hospital ICU for three weeks, and another three weeks at a general ward. I am unable to see what consideration would another court make that would warrant it to see the assault inflicted upon the complainant, and the condition

that he was left in, to appear lesser than attempted murder. For this reason I am unable to appreciate that the applicants have prospects of success on this ground.

[10]The applicants also submitted that the trial court erred by holding that the applicants acted in common purpose as no such common purpose was proved. Their argument is that the trial court based its finding on the evidence of the complainant, PW3 and PW5 yet PW2 who was closer did not testify about the piece of evidence that they gave. They therefore submitted that the version of these witnesses could not be true.

[11]PW3 testified that he saw cattle inside the maize field of the applicants' homestead. He raised an alarm and called Khetsiwe and instructed her to go and drive the cattle out. He also testified that the first applicant responded and said that the owner of the cattle must come and drive them out. He then saw Bonginkhosi Maseko (PW2) driving out of the same maize field cattle that belong to his family. When he instructed him to drive out the other cattle as well, Bonginkhosi told him that he was instructed to only drive out cattle that belong to his family. He then heard the complainant shouting at Khetsiwe and telling her to drive out of the maize field the cattle but Khetsiwe did not go there. The complainant then came out of his homestead and walked down the valley. After the complainant had crossed the stream of the valley, he heard the second applicant calling the first applicant and telling him that they should meet. As the complainant drove the cattle out towards a gravel road that is near the homestead, and after a short while but now at a place where he could not see them, he then heard noise of people which suggested that these people were fighting. He then called the wife of

the complainant, and together with one Mrs. Simelane, they proceeded to see what was happening. They found the complainant lying down on his back in a pool of blood and facing upwards. When he asked the complainant about the blood, the complainant told him that he had just been assaulted by the first and second applicants whilst he was driving out his cattle from the maze field.

[12]PW5 testified that she saw Bonginkhosi Maseko (PW2) talking to second applicant just before reaching the maize field where the cattle were to be driven out from. After talking to the second applicant, PW2 then drove out of the maize field only the cattle that belong to his family and left those belonging to the complainant. The complainant then went to drive the cattle out of the maize field. On arrival, she heard the second applicant shouting and asking the complainant about where the cattle are grazing. The complainant apologized but the second applicant told him to count the maize plants that have been eaten by the cattle.

[13]PW2 testified that he ran to drive the cattle out of the maize field. Of note is that PW2 testified that he had been instructed by the complainant to go and collect cattle and bring them home. On arrival he was however told by the second applicant that the Mabuza homestead has its own rules. This was because PW2 wanted to climb over the fence instead of using the main gate to enter. The first applicant then came out of the homestead and told him to only drive out of the maize field cattle that belong to his family and not those belonging to the complainant. As he drove away the cattle, he saw the complainant walking down the valley and coming to drive out his cattle from the Mabuza homestead maize field. While proceeding and driving his

family's cattle away, he then saw the complainant driving his cattle out of the maize field. He then heard the first applicant asking the complainant about where he was driving the cattle to. He however did not hear the complainant's response as he answered in a low tone. As he proceeded driving the cattle away, he heard the first applicant's dogs barking and when he looked back he saw people fighting. The dog's bark was caused by the fight between these people.

[14]The complainant testified that on his arrival at the Mabuza homestead he found that the cattle which were in the maize field together with his cattle had been driven out and only cattle that belong to him were still inside the maize field. The second applicant came out of the homestead and directed him to count the maize plants that had been eaten by his cattle. The first applicant followed him from behind. Notwithstanding an apology that he extended to them, both applicants assaulted him. The first applicant was armed with a slasher while the second applicant was armed with a bolted stick, which weapons they used to assault him.

[15]The evidence of PW2 and PW5 clearly connects the second applicant to the scene at the time that the complainant arrived to drive his cattle out of the maize field. This is also confirmed by the evidence of the complainant. The version of the second applicant, that he was not there but had gone to drive his cattle to the grazing veld and came back to find the complainant and the first applicant already in a fighting mood is, on a balance of probabilities, untruthful. This version is without doubt, an afterthought. It was never put to the witnesses for the crown in order for them to respond and react to it.

[16]The evidence of PW3 that Khetsiwe who he sent and instructed to drive the cattle out but was refused by the first applicant who said that the owner must come to drive the cattle out, shows that the first respondent had a bone to chew with the complainant and therefore needed his personal presence. This became the case even after PW3 had heard the complainant shouting at Khetsiwe and instructing her to drive the cattle out. Khetsiwe did not do so, obviously at the instruction of the first applicant.

[17]I have no doubt that the evidence referred to above shows the execution of an illegal undertaking by both the first and second applicants. Common purpose, as defined in **Philip Ngcamphalala & Others v Rex (17/2002) [2002] SZSC 22**, was proved *in casu*. I do not see how another court would find differently given the facts testified to by four witnesses, *viz*., PW2, PW3, PW5 and the complainant.

[18]The applicants' argument concerning the evidence of these witnesses is that PW2 was closer and in a better position to hear than the other witnesses. What PW2 did not testify about, but which PW3 and PW5 testified to have heard, according to the applicants' argument, should be considered as untruthful, including the evidence of the complainant. As a matter of fact, the place where the homesteads are situated is a valley. It is a place that descends and ascends. The estimated distance recorded on the day of the inspection *in loco*, is inclusive of the distance that a person would walk when descending and ascending the valley. When members of the community talk, they are able to hear one another from either side of the valley. There is no sound basis, in my opinion, upon which, as the applicants' argument suggests, the evidence of PW3 and PW5 should be

untrusted. These witnesses were at a distance that allowed them to hear the verbal attacks that were directed to the complainant by both applicants. The place where PW3 was is much closer to the main homestead of the applicants where the assault took place nearby.

[19]It is important that I mention the fact that the evidence of PW2 doesn't indicate how far he was when he heard the first applicant's dogs barking and saw the people fighting. What is clear however, is that whilst he was driving his family cattle away, he saw the complainant walking down the valley. The complainant was still to walk up the valley. As PW2 proceeded driving his family's cattle away, he then saw the complainant driving his cattle out of the maize field. He then heard the first applicant asking the complainant about where he was driving the cattle to. No evidence was led however, to show how far PW2 was at that point in time from where the complainant and the applicants were fighting. It therefore is not a fact adduced from the evidence that PW2 was closer than these other witnesses in so far as hearing what the applicants and the complainant talked about. PW3 and PW5 were still within a hearing distance that allows a person to be heard when on the other side of the valley.

[20]It therefore is not a fact adduced from the evidence that PW2 was closer than the other witnesses when the assault on the complainant took place. It is also without any reasonable basis that what PW2 did not testify about, then testimony that brings in that missing aspect of the evidence should be considered as untruthful. I accordingly do not appreciate what the reasons would be for another court to hold the view that the testimony of the complainant, PW3 and PW5 is untruthful.

[21]The applicants also state as a ground of their appeal that the court *a quo* erred by rejecting their defence to the effect that the first applicant acted in self defence whilst the second applicant did not participate in the commission of the offence. The evidence alluded to in paragraphs [12] to [15] above show that the second applicant participated in the commission of the offence. The evidence that he was not there but was away driving his cattle to the grazing veld is proved untruthful by the evidence of PW2, PW3, PW5 and the complainant. His involvement and participation started from the moment that he also instructed PW2 to only drive out of the maize field cattle that belong to his family. This was a factual finding by this court because after having talked to PW2, indeed PW2 only drove out and left inside the maize field the cattle owned by the complainant. This was a way of forcing the complainant to personally come so that the applicants may deal with him because his cattle damaged their family maize crops, a wish that they fulfilled when he came. This is supported by the applicants' evidence to the effect that they warned the complainant many times about his cattle that keep on damaging their family maize crops.

[22]Based on the facts placed before this court, the applicants' stratagem was to disallow PW2 and one Khetsiwe from driving out of the maize field the complainant's cattle. This conduct, as a matter of fact, allowed the cattle more time to cause further damage in the maize field. In my view, the applicants' concern at this point was not about the damage caused to the maize crops but to get the complainant in order to teach him a lesson, as their testimony was that they had warned him several times about the damage that his cattle had caused to their family maize crops.

[23]Self defence, which the first applicant is pleading, cannot be sustained on the facts. In the case of **The King v Siboniso Simelane (187/2012) [2019] SZHC 68 (29 November 2019)** I cite the learned authors **Gardiner and Lansdown, South African Criminal Law and Procedure, Vol. II, 6th ed., page 1546**, where the following conditions are said to be required for self-defence to operate as a complete defence on a charge of murder or culpable homicide. These are; (a) *the accused must have been unlawfully attacked, and had reasonable grounds for thinking that he was in danger of death or serious injury*; (b) *the means used in self-defence must not have been excessive in relation to the danger apprehended*; and (c) *that the means used must have been the only method, or the least dangerous method, whereby the accused could reasonably have thought that he could avoid the threatened danger.* At page 1547, the authors add that "*where a man can save himself by flight, he should flee rather than kill his assailant … But no one can be expected to take a flight to avoid an attack, if flight does not afford him a safe way of escape*". Per **Nathan CJ,** as then he was, in **R v John Ndlovu 1970 – 1976 SLR 389**, "*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*".

[24]*In casu*, the first applicant came out of his parental homestead and verbally assaulted the complainant who was driving his cattle out of the maize field near the homestead. He was heard yelling at the complainant and asking him about where his cattle are grazing. PW2 testified that he saw the complainant driving his cattle out of the maize field. Immediately thereafter he had the first applicant's dogs barking. When he looked, he saw people fighting. PW5

testified that she saw the complainant placed in between the applicants and it looked like they were assaulting him. The facts suggest that the complainant is the one who was assaulted and not vice versa. The facts also show that the first applicant could have saved himself by flight, if indeed he was attacked. Instead, he assaulted the complainant to a point that he left him lying helplessly on the ground and bleeding profusely. This even made the second applicant to think that the complainant had been killed, hence he then related that opinion to the first applicant while the assault was still ongoing. The first applicant clearly used excessive force and a plea of self-defence cannot be upheld in his case. I therefore am unable to appreciate how another court could uphold that the first applicant acted in self-defence in the matter, hence I find no prospects of success.

[25]In the notice of appeal, the applicants also state that the court *a quo* erred by holding that the applicants had *mens rea* in the form of *dolus eventualis*. In the case of **Director of Public Prosecutions, Gauteng vs Pistorius (96/2015) ZASCA 204 (3 December 2015), His Lordship Leach JA** states that *dolus eventualis* arises if the perpetrator foresees the risk of death occurring but nevertheless continues to act appreciating that death might well occur. He goes on to stress that "*the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent*".

[26]Legal authorities state that the intention of an accused person is to be ascertained from his acts and his conduct. See **Rex v Jollyand 1923 AD 176 at 187; R v Motsa (3/1999) [2000] SZHC 8 (08 March 2000); Shongwe v**

Rex (24/2011) [2012] SZHC 43 (30 November 2012). The conduct of the applicants for not allowing other persons to remove from the maize field the cattle belonging to the complainant and demanding that he should personally come to drive them out, and that when he did come, he was then assaulted to a point that resulted in him bleeding profusely and ultimately admitted first at the ICU and later at a general ward of the Mbabane government hospital, is an indicator of how brutal the complainant was assaulted and almost killed by them. He even had to undergo three operations. He also suffered what the doctor referred to as a 'traumatic amputation' of two fingers. The applicants never cared about what ultimately happened to the complainant as they left him helplessly lying on the ground and bleeding profusely. They did foresee that he might die due to the profuse bleeding that even shocked and terrified the second applicant, according to his own evidence, but they still left him lying down helplessly. No attempt was made by them to give him first aid. This leaves me unable to see how another court would find that there is lack of *mens rea* in the form of *dolus eventualis* on the part of the applicants given the authorities cited in this paragraph.

[27]For the aforegoing reasons, I am unable to find that the applicants have prospects of success on the appeal.

[28]This court also must establish if the applicants are not a flight risk. The applicants state in their founding affidavits that they will not abscond trial and will not interfere with crown witnesses. They also state that they will abide by all bail conditions and will not endanger public safety nor jeopardize the objectives or proper functioning of the criminal justice system. The first applicant further states that he has a minor child who is

dependent on him for support and maintenance, and that his continued incarceration is causing the child great prejudice. The continued incarceration has also caused jeopardy to his farming business. The second applicant states that he has eight (8) children who all depend on him for support and maintenance, and that his continued incarceration is causing them great prejudice. He further states that he is now unable to report to work for duty, and that he faces a dismissal for his continued absence, and will therefore lose his only source of income.

[29]The crown, on the other hand, submitted that the applicants have since been convicted and sentenced. Their release on bail will therefore undermine or jeopardize the public confidence in the criminal justice system.

[30]In as much as it is true that the applicants have now been convicted and sentenced by this court, I find it appropriate and important to mention that the second applicant religiously observed and complied with all his bail conditions until the trial was finalized. I have not been given any convincing reason why there is a belief that the second applicant is a flight risk when considering that the custodial sentence he was given is five years. Five years is not, in my opinion, a very lengthy imprisonment period to induce a person to flee, particularly when regard is given to the applicable remission of sentence in terms of **s.43 of the Prisons Act**. He is firmly rooted in the country and has a family to look after. I accordingly do not find him to be a flight risk.

[31]Now coming to the first applicant, I am unable to see any positive that weighs in his favour. On both the 6th and 7th of August 2019 the trial of their case could not proceed because the first applicant elected to remain at home instead of coming to court for continuation of their trial. I was informed by his attorney that he said he burnt his feet and cannot make it to court. No attempt was made by him for getting medical attention. I then issued a warrant for his arrest but then suspended its execution until midday of the following day. The condition that he had to meet was to get back to court but with a doctor's sick note. He failed to do so notwithstanding that I ordered him through his attorney to come to court on the following day with a doctor's sick note. I was then forced to make an order directing that the warrant for his arrest be executed. Indeed, he was eventually arrested and brought to court on 12 September 2019. On the backdrop of what I have just alluded to in this paragraph, my opinion is that the first applicant is a flight risk.

[32]On the totality of the evidence and conclusions I make in the paragraphs above, I am unable to appreciate that the applicants have prospects of success on their appeal. Based on the evidence, I am of the opinion that they have very weak prospects of success, if any. The application for bail pending appeal is therefore dismissed in respect of both applicants.

T. L. DLAMINI
JUDGE OF THE HIGH COURT