



IN THE HIGH COURT OF SWAZILAND

Criminal case No. 236/2009

In the matter between:

**REX**

**VS**

**AMOS MBULAHENI MBEDZI**

Neutral citation: *Rex vs Amos Mbulaheni Mbedzi (236/2009) [2012] SZHC218 (2012)*

CORAM

MCB MAPHALALA, J

**Summary**

Criminal law – Extenuating circumstances in a murder charge – absence of premeditation and/or *dolus eventualis* may in a proper case constitute an extenuating circumstance – accused convicted of murder without extenuating circumstance – section 15 (2) of the Constitution invoked providing for the non-mandatory nature of the death penalty - accused sentenced to twenty five years imprisonment for each count of murder, twenty years imprisonment in respect of sedition, fifteen years imprisonment in respect of explosives, and six months imprisonment for contravening section 14 (2) (c) of the Immigration Act of 1982 – sentences to run concurrently and backdated to date of arrest on the 20<sup>th</sup> September 2008.

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JUDGMENT ON EXTENUATING CIRCUMSTANCES AND MITIGATION ON SENTENCE

17<sup>th</sup> September 2012

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[1] The defence urged the Court to find that extenuating circumstances exist in respect of the convictions of murder for the following reasons: firstly, that this Court in convicting the accused found that he had *mens rea* in the form of *dolus eventualis*; the defence argued that in such cases it has been held that extenuating circumstances existed. Secondly, that the court found that the accused had a direct intention of bombing the bridge and not to kill the deceased; and, that the bomb exploded prematurely due to human error and killed the deceased.

[2] Thirdly, the defence argued that the accused was not inside the motor vehicle when the bomb exploded, and that he was not handling the explosives as did the deceased. Fourthly, the defence argued that the accused did not physically detonate the bomb or pull the trigger but that the deceased caused their own deaths.

[3] The Crown argued that there are no extenuating circumstances in the case which would diminish the moral blameworthiness of the accused. It was argued that the totality of the evidence show that the accused acted in concert with the deceased; and, that it was irrelevant whether or not the accused was inside the motor vehicle or whether or not he pulled the trigger or physically detonated the bomb. It was further argued that the case of *Bhekumusa Mapholoba Mamba v. Rex* criminal appeal no. 17/2010 was distinguishable from the present case because in addition to a finding of *dolus eventualis* which the court held that it “may” constitute an extenuating circumstance in a proper case, the court also found that there was provocation; and, that the cumulative effect of these factors constituted extenuating circumstances.

[4] In *S v. Letsolo* 1970 SA (3) 476 (AD) at 476 - 477 the appellant was convicted of murder with extenuating circumstances. However, the trial judge sentenced him to death on two grounds: first, that he had a bad record of previous convictions. Secondly, due to the “particular brutality and heinousness of the murder” with which he was convicted. In light of the finding of extenuating circumstances, the appellate division reversed the sentence to one of imprisonment for life. The extenuating circumstances were that the appellant, when committing the offence, had been under

the influence of intoxicating liquor and possibly dagga; and, the fact that he was still young and immature.

[5] *Holmes JA* in concurring with the unanimous judgment of *Wessels JA* in setting aside the death sentence had this to say at pages 476 - 477:

**“Extenuating circumstances have more than once been defined by this court as any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard a trial court has to consider:**

- (a) Whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhaustive);**
- (b) Whether such facts, in their cumulative effect, probably had a bearing on the accused’s state of mind in doing what he did;**
- (c) Whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.**

**In deciding (c) the trial court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances,”**

[6] In *S v. McBride* 40/88 (1988) ZASCA 40 (30 March 1988), the appellant assembled and detonated a car bomb outside the Parade hotel in Marine Parade in Durban; the car bomb was strategically placed next to two bars in the hotel. The bars were filled to capacity since it was a Saturday evening, and the patrons were visible from outside. He had initially planned to detonate the bomb at the West Street outside Hyperama “to flatten that thing, destroy it” but the second accused persuaded him to detonate it at the hotel “because the people want white destruction”.

[7] The effect of the explosion was devastating; three persons were killed and eighty-nine injured. The hotel was badly damaged; other buildings in the vicinity

were also damaged which shows that the bomb was very powerful. The appellant and his co-accused were charged and convicted with many counts including murder.

[8] In respect of the murder conviction, the appellant argued that extenuating circumstances existed. The defence argued that the appellant's behaviour was caused by his active involvement in South African politics including participating in the students' uprising in 1976 which aimed at achieving better educational standards for blacks, his confrontations with the police during the students' unrest and demonstrations which angered and depressed him, his classification as a coloured and being forced to reside at a coloured township at Wentworth in terms of the Group Areas Act which was one of Durban's most poor and depressed communities, his association with his political active father who imparted to the appellant his hatred of white people as well as his subsequent escape to exile where he was trained guerrilla warfare and the use of bombs.

[9] The court rejected the reasons advanced by the appellant as constituting extenuating circumstances for the following reasons: first, that by placing the bomb, the appellant foresaw the death of the three white women; secondly, that the explosion of an enormous bomb which was capable of causing massive injury to a large number of people was a gross, callous and atrocious act; and, that the victims were people with families and a right to have their own vision of the future. Thirdly, that targeting and killing white people because of their skin for the sins of a government was morally reprehensible and racist.

[10] *Corbett JA* who delivered the majority judgment stated that in principle an appeal court cannot interfere with the finding of the trial court as to the existence or otherwise of extenuating circumstances in the absence of any misdirection or irregularity unless that finding is one which no reasonable court could have reached. At paragraphs 31 and 32, His Lordship stated the following:

**“...The burden of proving, on a balance of probabilities that there were extenuating circumstances associated with the commission of the murders rests upon the accused. In *Theron* (1984) ZASC I; 1984 (2) SA 868 (AD) at 878 *Rabie CJ* stated the following:**

**The determination of the presence or absence of extenuating circumstances involves a three-fold enquiry: (1) whether there were at the time of the commission of the crime facts or circumstances which could have influenced the accused’s state of mind or mental faculties and could serve to constitute extenuation; (2) whether such facts or circumstances in their cumulative effect, probably did influence the accused’s state of mind in doing what he did; and (3) whether his influence was of such a nature as to reduce the moral blameworthiness of the accused in doing what he did. In deciding (3) the trial court passes a moral judgment.... This and other similar formulations are no doubt helpful and conducive to clarity of thought on the topic, but they should not be treated as if they are statutory injunctions. What is essentially a flexible enquiry should not be so shackled.”**

[11] *His Lordship* went on to state the principles governing extenuating circumstances which he said are well-established. At paragraph 29 he stated the following:

**“As to what constitute extenuating circumstances, various descriptions have been given. In *Rex v. Fundakubi and Others* 1948 (3) SA 810 (A) at page 815, *Schreiner JA* quoted with approval a passage from the judgment of *Lansdown JP* in the case of *Rex v. Biyana* 1938 EDL which contained the following:**

**‘In our view an extenuating circumstance...is a fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner’s guilt. The mentality of the accused furnishes such a fact.... No factor, not too remote or too faintly or indirectly related to the**

**commission of the crime, which bears upon the accused’s moral blameworthiness in committing it, can be ruled out from consideration.”**

[12] In *S v. Ngoma* 1984 (3) SA 666 (AD) at 673 *Corbett JA* approved the case of *S v. Theron* (Supra) with respect to the three-fold enquiry when determining extenuating circumstances. His Lordship concluded as follows:

**“Having considered all the relevant circumstances, the youthfulness and immaturity of the appellant, his lack of education and unsophisticated background and the circumstances of the crime, and paying some regard to the fact that it was committed with *dolus eventualis*, I am of the opinion that the only reasonable conclusion is that extenuating circumstances were present.”**

[13] In the case of *S v. Masuku and Others* 1985 (3) SA 908 (A) at page 913F, the five appellants who were all members of a prison gang, The Big Five, had been convicted in a circuit court of a member of a rival prison gang, and no extenuation circumstances having been found, were sentenced to death. It appeared from the evidence that the first appellant was the “Prime Minister” of the gang and had given instructions to the other appellants to kill the deceased. The Appellate Division found that no extenuating circumstances existed in respect of the first appellant; and, that the other appellants held subordinate ranks in the gang and had not taken any part in the decision to assault the deceased. The court further considered in respect of the other appellants that they were locked together for a period of twelve hours in a communal cell without effective communication with prison officers and being largely at the mercy of their fellow prisoners, and that this influenced their state of mind. These factors were seen as reducing their moral blameworthiness and constituting extenuating circumstances.

[14] *His Lordship Nicholas AJA* who delivered the majority judgment approved and applied the three-fold enquiry for determining the existence or otherwise of extenuating circumstances enunciated by *Rabie CJ* in *S v. Theron* (supra) at page 878. His Lordship further reiterated the principle enunciated by *Corbett JA* in the case of

*S v. McBride* (supra) that the question as to the existence or otherwise of extenuating circumstances is essentially one for decision by the trial court and that in the absence of misdirection or irregularity, an appellate court will not interfere with a finding that no extenuating circumstances were present unless it is one which the trial court could not reasonably have reached.

[15] His Lordship acknowledged that the appellants were guilty of murder on the basis of *mens rea* in the form of *dolus eventualis*; however, he held that this fact could not avail the first appellant as an extenuating circumstance on the facts of the case on the basis that his order to assault the deceased was a prolonged, brutal and agonizing assault. The fact that he didn't himself join in the actual assault does not in any way reduce his moral blameworthiness since he was the author of the crime.

[16] In the case of *S v. Ndwandwe* 1985 (3) SA 222 (AD) at page 227E – F, the appellant waylaid the deceased at a taxi rank and while the deceased was sitting in his taxi talking to a young girl, the accused walked up to him and shot him at close range. The evidence established that the accused committed the murder because he believed on good grounds as it later turned out that the deceased had been responsible for the assassination of one Dube, a former community leader and close friend of the accused; and was distressed by this fact; and because of his frustration at the fact that the deceased, whose conduct was brazen and provocative, appeared to be going unpunished. The trial court took account of these facts but also emphasized that the accused's crime was "a premeditated and cold-blooded assassination executed in furtherance of a plan which was formulated some two weeks previously, and held that there was no extenuation. On appeal this decision was reversed. Viljoen JA who delivered the unanimous judgment of the court stated the following:

**"As I read the judgment, it would appear that the court found that, because the factors which otherwise would have been extenuating, influenced the appellant to take the law into his own hands and, by a carefully planned stratagem, exact revenge for Dube's death, any extenuation was wiped out or neutralized. Such**

**reasoning postulates a weighing up of, or a comparison between the extenuating circumstances and the nature of the crime. In so doing the court *a quo*, in my view, misdirected itself. The inquiry is whether the factors which subjectively influenced the mind of the offender to commit the murder are extenuating or not; the manner in which he committed the murder is irrelevant.... The court should have found those circumstances to be extenuating. In *R v. Biyana* 1938 EDL 310 at 311 *Lansdown JP* said:**

**‘In our view an extenuating circumstance in this connection is a fact associated with a crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner’s guilt.’**

**It is therefore essentially a moral judgment.”**

[17] In the case of *S v. Sito and Others* (166/88) (1989) ZASCA 38 (30 March 1989) the appellants invaded the home of the deceased Elizabeth Klassen looking for Jimmy Klassen. They were a group of between ten to twenty people. The fourth appellant was carrying a container of petrol. After entering the house, one Crown witness, an occupant of the house, tried to take the container from the fourth appellant to prevent the house from being burnt; she was threatened with a knife by the fourth appellant. They did not find Jimmy Klassen in the house, and, the fourth appellant dragged Elizabeth Klassen from the bedroom to the living room; he poured petrol all over her body and on the floor and set her alight. She died in the process together with her three daughters. Whilst extenuating circumstances were found on the other appellants who received sentences of imprisonment; no such circumstances were found in respect of the fourth appellant.

[18] The court approved and followed the three - fold enquiry of determining extenuating circumstances as enunciated in *S. v. Theron* (supra). *His Lordship Kumleben JA* who delivered the judgment of the Court at page 18 of his judgment quoted with approval *Corbett JA* in *S. v. McBride* (supra) at page 25 where the learned judge said the following:



**“I shall now endeavour to sum up the present state of the law on this aspect of extenuating circumstances. The nature of the murders... and the manner of their commission are factors which, while they cannot be regarded as per se excluding extenuation, are nevertheless relevant to the general enquiry as to extenuation. They may be relevant to the factual enquiry as to whether an alleged extenuating circumstance in truth existed or as to whether it actually influenced the accused; or they may be relevant as part of the web of circumstances associated with the crime which must be considered by the court when it passes its moral judgment and decides whether there exist circumstances which in the minds of reasonable men diminish the accused’s moral blameworthiness.”**

[19] In conclusion His Lordship in dismissing the appeal stated the following:

**“The court *a quo* correctly considered the question of extenuation in the light of these principles. It found that there were extenuating factors present, viz, some degree of immaturity, the emotional circumstances prevailing at the time and what the court described as the “group activity”. Nevertheless it considered that, having regard to the active role played by this appellant in what can only be described as particularly brutal murder, these factors did not reduce his moral blameworthiness.”**

[20] In the case of *S v. Tseleng* (578/88) (1989) ZASCA88 (17 August 1989) the appellant who was the second accused in the trial court appealed against a finding that no extenuating circumstances existed for his murder conviction. The first and second accused were charged with the murder of an elderly white couple who lived on a farm. They went to the farm to steal a safe during broad daylight. The first accused had previously worked on the farm. On their arrival at the house they were met by the couple at the entrance, they shot the couple at close range without uttering a word; thereafter, they fled without proceeding with their mission. The wife died instantly and the husband survived the shooting; however, he subsequently died of other causes.

The accused were charged with murder and attempted murder; in addition, the first accused was charged with unlawful possession of a firearm and ammunition. Both were sentenced to death.

[21] The second accused lodged an appeal against the finding of the trial court that no extenuating circumstances existed. *His Lordship Vivier JA* who delivered the unanimous judgment of the court found that the appellant in committing the murder had *mens rea* in the form of *dolus eventualis*; however, he held that the absence of a direct intention did not constitute an extenuating circumstance. He further rejected the submission by the defence that the appellant played an insignificant role in the commission of the offence, and, held that his assistance was essential to the success of the venture since the safe was big and heavy and could only be removed by both the accused.

[22] In the case of *S. v. Khundulu and Another* (127/90) (1991) ZASCA 15; (1991) 2 ALL SA 113 (A) (18 March 1991) the appellants were charged with housebreaking with intent to rob and murder, two counts of murder with aggravating circumstances as well as robbery. They had set out to rob a farm; accused 1 and 2 broke into the farm whilst the occupants were away and stole various items and put them in two suitcases which they found on the premises; accused 4 was hiding nearby for a lookout. They went out of the house to await the arrival of the occupants; immediately upon their arrival, accused 2 and 4 went into the house and accused 1 kept a look-out from a small building nearby.

[23] The couple were attacked and Mrs. Palvie was rendered unconscious after severe injuries and later died; Mr. Palvie was killed in the most gruesome manner. At an opportune moment, accused 1 joined accused 2 and 4 in the house. The three accused loaded the stolen items on the deceased's motor vehicle and drove to their township; after unloading the items they drove to a nearby cemetery where they set the motor vehicle alight and it was burnt. A hammer and knife found in the house was used to commit the murders.

[24] The trial court found that the accused had planned to commit the robbery; and, that they foresaw the death of the deceased from the beginning of their joint enterprise as a reasonable possibility that one or both of them would be killed. The first and fourth accused were convicted, *inter alia*, of murder without extenuating circumstances, and sentenced to death.

[25] The court found aggravating factors to exist. Firstly, the attack was premeditated; secondly, the murders were committed during a robbery; thirdly, the deceased were very old; fourthly the attack was savage, horrifying and very painful in light of the photographs taken from the scene; fifthly, that murderous attacks committed on elderly couples living in isolated places was on the increase.

[26] In an appeal against the finding by the trial court that no extenuating circumstances existed, the court accepted that there was no direct intention to kill the deceased but that *mens rea* in the form of *dolus eventualis* existed. However, the court dismissed the submission by the defence counsel that in the absence of direct intention, the court should find that extenuating circumstances existed. In coming to this conclusion, the court placed emphasis on the aggravating factors. The court further rejected the argument relating to the poor background of the appellants, their lack of education as well as their upbringing in a violent township as extenuating circumstances in light of the brutal nature of the murders.

[27] The Appeal Court of Botswana in the case of *Koitsiwe v. The State* (Criminal case Appeal No. 1 of 2001) (2001) BWCA 20 (20 July 2001), *Tebbutt AP* approved and applied the South African Appellate Division cases of *R. v. Fundakubi and Others* (supra) as well as *S. v. Letsolo* (supra). At paragraphs 12 - 13 of his judgment, His Lordship stated the following:

**“Premeditation or the absence of it can be a very important factor in assessing an accused person’s moral guilt .... In South Africa, when the question of extenuating circumstances was still a factor in murder cases, it was held that**

**where the accused’s intention was one of *dolus eventualis*, in a particular case, in light of all the circumstances, the absence of the aim (direct intention to kill) might constitute an extenuating circumstance.”**

[28] The Supreme Court of Swaziland in the case of *Bhekumusa Mapholoba Mamba v. Rex* criminal appeal no. 17 of 2010 approved and followed the South African Appellate Division case of *S v. Letsolo* (supra) at 476 with regard to extenuating circumstances.

[29] In the *Mapholoba* case, the appellant hit the deceased with a bushknife which he was carrying to cut logs for building his house. He found the deceased washing her clothes in a river. The deceased was his girlfriend from 2003 until her death on 13 August 2005. After greeting the deceased and asking her to accompany him to a soccer match, she told him that she was ending their relationship; she further told him that she had aborted his child because he could not maintain it since he was not employed. The appellant testified that he became angry; as a result, he hit the deceased with the bushknife and she sustained fatal injuries. The trial court convicted him of murder without extenuating circumstances.

[30] The Supreme Court found that the appellant was provoked. *His Lordship Ramodibedi CJ* who delivered the unanimous judgment of the court stated the following at paragraph 12:

**“The correct test in so far as extenuating circumstances are concerned is not whether or not the provocation is commensurate with the resultant violence. The real question is whether the provocation had a bearing on the appellant’s state of mind, subjectively speaking, in doing what he did and whether such provocation reduced his moral blameworthiness as opposed to his culpability. This involves a moral judgment.”**

[31] His Lordship further quoted with approval the decision of *Rex v. Fundakubi and Others* (supra) that “no factor, not too remote or too faintly or indirectly related to

the commission of the crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration”.

[32] At paragraph 13 of the *Mapholoba* case (supra), His Lordship stated the following:

**“It is further of crucial importance to a determination of extenuating circumstances that the court *a quo* found that this was a case of *dolus eventualis* as opposed to *dolus directus*. Now a finding of *dolus eventualis* as opposed to *dolus directus* may, in a proper case, constitute an extenuating circumstance. In casu I consider that *dolus eventualis* coupled with provocation constitute extenuating circumstances.”**

[33] At paragraphs 15 and 16 His Lordship stated the following:

**“15. Now it is well-settled that the absence of premeditation, depending on the circumstances of each case, may constitute an extenuating circumstance.**

**16. All things being considered, I am satisfied that extenuating circumstances existed in the matter by virtue of a cumulative effect of provocation, *dolus eventualis* and lack of premeditation...”**

[34] Section 295 of the Criminal Procedure and Evidence Act No. 67 of 1938 provides the following:

**“295. (1) If a court convicts a person of murder it shall state whether in its opinion there are any extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them:**

**Provided that any failure to comply with the requirements of this section shall not affect the validity of the verdict or any sentence imposed as a result thereof.**

**(2) In deciding whether or not there are any extenuating circumstances, the court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs.”**

[35] The task faced by this court is to determine whether there are extenuating circumstances present in this matter. Such a determination involves an inquiry whether there were facts or circumstances at the time of the commission of the offences which could have influenced the accused’s state of mind in committing the offences; and, whether such facts did influence the accused’s state of mind in doing what he did. Furthermore, whether such influence was of such a nature as to reduce the moral blameworthiness of the accused.

[36] It is apparent from the evidence that there was no premeditation in the commission of the two counts of murder; there was no *dolus directus* in the killing of the deceased. The accused was convicted on the basis of *mens rea* in the form of *dolus eventualis*. The direct intention of the accused was to bomb the bridge.

[37] It is a trite principle of our law that the absence of premeditation, depending on the circumstances of each case, may in a proper case constitute an extenuating circumstance; hence, it doesn’t follow that in all cases of *dolus eventualis*, extenuating circumstances would be found to exist. It is apparent from the authorities cited above that *dolus eventualis* on its own does not suffice unless it is accompanied by other facts bearing on the commission of the offence which reduce the accused’s moral blameworthiness. The fact that he was not inside the motor vehicle during the explosion or that he did not physically detonate the bomb are irrelevant in light of the totality of the Crown’s evidence that the accused acted in concert with the deceased. In terms of the evidence, the bomb exploded due to human error, and, it was not detonated voluntarily by any person. I am unable to find any extenuating circumstances in this matter.

[38] The Mapholoba case (supra) relied upon by the defence is distinguishable from the present case on the basis that in addition to the “*dolus eventualis*”, the court found that there was provocation on the part of the appellant which had a bearing on the appellant’s state of mind in doing what he did and which reduced his moral blameworthiness. In addition the Supreme Court stated that a finding of *dolus eventualis* “may” in a proper case constitutes an extenuating circumstance; the implication is that *dolus eventualis* does not in all cases constitute an extenuating circumstance.

[39] Section 296 of the Criminal Procedure and Evidence Act provides that the sentence of death shall be imposed upon an offender convicted of murder without extenuating circumstances. However, section 15 (2) of the Constitution provides that the death penalty shall not be mandatory. This court has a discretion whether or not to impose a death penalty, and such a discretion has to be exercised judiciously. Taking into account all the circumstances of this case, I am persuaded that this is not a proper case in which I should impose a death penalty. In particular the evidence proves that the direct intention of the accused was not to kill the deceased but to bomb the bridge.

[40] In mitigation of sentence the defence submitted the following factors: first, that the accused is forty-eight years old; secondly, he is married with three minor children to support; thirdly, he is a first offender; fourthly, that his children stand to suffer for any punishment imposed by the court; fifthly, that the accused has been a good member of society prior to the commission of this offence, and, that he was actively involved in the liberation struggle against apartheid in South Africa. The defence urged the court to impose sentences which would run concurrently in respect of the five counts because they arose from the same transaction. The court was further urged to backdate the sentences imposed to the date of the accused’s arrest.

[41] In aggravation of sentence, the Crown argued that the crimes for which the accused was charged were very serious, and, that their seriousness outweighs the

personal circumstances of the accused. He highlighted the aggravating factors of the offences committed including the intention of the accused to bomb the bridge, the amount of explosives found in the car boot, the extensive damage caused by the explosion as well as the fact that the accused being a foreigner was engaged in violent revolution to overthrow the State.

[42] In arriving at a proper sentence, I have to balance the personal circumstances of the accused, the interests of society as well as the seriousness of the offence. In the case of *S. v. Kumalo* 1973 (3) SA 697 (AD) at 698A, *Holmes JA* stated the following:

**“Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.”**

See also *S v. Rabie* 1975 (4) SA 855 (AD) at 862G and *S. v. Narker and Another* 1975 (1) SA 583 (AD) at 586C.

[43] *Hofmeyer AJA* in the case of *S. v. De Maura* 1974 (4) SA 204 (AD) at 208E stated the following:

**“The question of mercy, which may legitimately play an important part in deciding upon the proper sentence to impose, should be seen primarily in contradistinction to and as a corrective for any tendency towards callous or arbitrary vindictiveness in the sentencing of offences. The consideration of mercy should not justify any suspicion of a desire to condone or minimize serious crime.”**

[44] *Corbett JA* in *S v. Rabie* 1975 (4) SA 855 (AD) at 866A stated the following:

**“A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from**



**firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.”**

[45] It is against this background that I intend to approach sentencing in this case. Undoubtedly, the accused is a middle aged man with a family to support. It is equally true that society expects courts to deal with crime in an even-handed manner. Similarly, the offences for which the accused is convicted are serious with aggravating circumstances.

[46] This country is a sovereign State governed by the dictates of the Constitution of 2005. Section 2 thereof provides that the Constitution is the Supreme law of Swaziland and that if any law is inconsistent with this Constitution, that other law shall to the extent of the inconsistency be void; it further provides that the King and Ingwenyama and all the citizens of Swaziland have the right and duty at all times to uphold and defend this Constitution. Subsection (3) provides that any person who by himself or in concert with others by any violent or other unlawful means suspends or overthrows or abrogates this Constitution or any part of it, or attempts to do any such act or aids and abets in any manner commits the offence of Treason.

[47] Sections 245, 246 and 247 of the Constitution provide for the amendment of the Constitution and the procedures to be followed. This implies that citizens of this country have the right to advocate by lawful and peaceful means any Constitutional and political changes as envisaged by the Constitution. I cannot agree more to the statement of *Cameron J* in the case of *Holomisa v. Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 608 that the success of any Constitutional venture depends upon robust criticism of the exercise of power. However, this statement is a far-cry from the violent revolution advocated by the accused and his companions.

[48] The accused was properly charged under the Sedition and Subversive Activities Act partly because he is a foreigner and could not be charged with Treason as

envisaged by section 2 of the Constitution and partly because he is not subject to our Constitution and partly because he does not bear allegiance to our Constitution. The fact that the accused is not a citizen of this country but convicted of Sedition and Subversive Activities as well as the unlawful possession of explosives intended to bomb the bridge constitute aggravating factors which the court cannot overlook. The evidence shows that the explosives found in the car boot could assemble a total of thirteen different bombs. Similarly, this is another aggravating factor which shows that the accused and his companions had several other targets to destroy in the country.

[49] Accordingly, I sentence the accused as follows:

- (a) In respect of the third and fourth counts of murder, the accused is sentenced to twenty five years imprisonment in respect of each count.
- (b) In respect of the first count relating to the Sedition and Subversive Activities Act, the accused is sentenced to twenty years imprisonment without an option of a fine.
- (c) The accused is further sentenced to fifteen years imprisonment without the option of a fine in respect of the fifth count of unlawful possession of explosives
- (d) In respect of the second count relating to the contravention of section 14 (2) (c) of the Immigration Act of 1982, the accused is sentenced to six months imprisonment.

[50] The sentences imposed in respect of all the five counts will run concurrently; and they will be backdated to the date of his arrest on the 20<sup>th</sup> September 2008.

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

For Crown  
For Defence

Senior Crown Counsel Sikhumbuzo Fakudze  
Attorney Leo Gama