



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Crim. Case No: 252/2009

REX

and

JOSEPH BHEKI DLAMINI
MUZI BONGANI SIKHONDZE

1ST ACCUSED
2ND ACCUSED

Neutral Citation : Rex v Joseph Bheki and Menzi Bongani Sikhondze
(252/09) [2017] SZHC 103 (22 JUNE 2017)

Coram : Q.M. MABUZA PJ

Heard : 18/7/12; 19/7/12; 9/01/13; 6/2/14; 2/6/14; 12/6/14;
1/7/14; 22/9/14; 23/9/14; 24/11/14; 14/9/15; 15/9/15;
29/6/16; 5/10/16; 24/10/16

Delivered : 22 JUNE 2017

SUMMARY

CRIMINAL LAW - THE ACCUSED ARE CHARGED WITH THE CRIMES OF MURDER AND ROBBERY – ACCUSED FOUND GUILTY ON BOTH COUNTS.

JUDGMENT

MABUZA –J

[1] The accused persons stand charged with two counts of murder and robbery, it being alleged –

Count 1: That on or about the 17th January 2007 at or near Ekudzeni area in the Manzini Region the said accused persons acting together in furtherance of a common purpose, each or all of them did unlawfully and intentionally kill Themba Dlamini and did thereby commit the crime of murder.

Count 2: That on or about the 17th January, 2007 at or near Ekudzeni area in the Manini Region, the said accused persons either one or both of them acting in furtherance of a common purpose did unlawfully and with the intention of inducing submission by

Nelisiwe Gwebu to the taking by the accused persons of 2 Nokia cellphones 6111 grey in colour and kombi keys all valued at E3600.00 threatened the said Nelisiwe Gwebu that unless she consented to the taking by the accused persons of the said property or refrained from offering any resistance to them in taking the said property, they would then and there shoot her, and did then and thereupon take and steal from the said Nelisiwe Gwebu the said property, which was the property of Nelisiwe Gwebu or in her lawful possession, and did rob her of the same.

[2] When the charges were put to the accused persons they pleaded not guilty and Mr. Simelane confirmed the pleas to have been in accordance with his instructions.

[3] Nelisiwe Gwebu (PW1) testified that the deceased Themba Dlamini was her husband. They lived together at their marital home at Ekudzeni, near Matsapha in the Manzini district. She stated that on the 17th January 2007 while she and the deceased were asleep two assailants broke into their home. They were armed. When she and her husband tried to scream for help, the

assailants instructed them to keep quiet and proceeded to rob them of two silver grey Nokia 6111 cell phones valued at E1800.00. The assailants also made away with their kombi (minibus) keys.

[4] She says that when the assailants left the house the deceased grabbed a bush knife and followed them outside. Thereafter she could hear heavy footsteps running around the house as he chased them. Thereafter she heard a gunshot. As she was heavily pregnant she hid. While she was hiding the two assailants returned to the house to look for her and not finding her left to look for her in the surrounding fields. That is when she got a chance to raise an alarm and her neighbours came out to assist. They telephoned the police. Thereafter they all looked for the deceased whom they found dead in the yard. He had been shot. The police took him away.

[5] It was put to her in cross-examination that when she recorded a statement with the police she said that one of the assailants was carrying a pick axe. She responded that she had recorded that the assailants broke the house door using a pick. She revealed that she recognized one of the assailants as Mphilisi Manana.

- [6] The postmortem report {Exhibit B) which was handed in by consent records that the deceased died due to firearm injury. And that the bullet went in through the front of the chest, through right lung and liver and exited on the right side of the back.
- [7] PW5 was 2182 Detective Inspector Siphon Magagula who informed the court that he is a scenes of crime photographer. During 2007 he was stationed at Manzini Police Regional Headquarters. He testified that on the 17th January 2007 at about 5:00 a.m. he received a report that a murder had been committed at Ekudzeni. He proceeded there to the homestead of the deceased.
- [8] Upon his arrival he was shown the deceased who was lying outside the house, naked and facing down holding a bush knife in his right hand. The deceased had a wound on the right side of his waist. PW5 walked around the house and found an empty cartridge at the entrance of the kitchen which he photographed and collected.
- [9] He returned to the deceased and photographed the wound on the deceased. He turned the body face up and there was a wound on his chest which he

also photographed. Both wounds were gunshot wounds. It was apparent that pre-entry wound was the front wound and the exit wound the back wound.

[10] Inside the house, he found a bullet head in a cupboard in the kitchen. He retrieved the used bullet head. He handed both the spent bullet and cartridge as exhibits. He handed in the photographs as Exhibit C1-12.

[11] During September 2009 the investigator Vusi Dlamini handed over to PWxxxx a firearm, a 9mm pistol. On the 23rd September 2009, PW5 sent these exhibits to the ballistic laboratory. The firearm was a Norinco pistol serial no. 801296. The firearm had a magazine with eight live rounds of ammunition.

[12] When PW5 was cross-examined he revealed that he found the body of the deceased forty metres away from the house and blood stains on the floor in the kitchen and outside on the wall. These are reflected on Exhibit photograph 8.

- [13] PW5 revealed that the firearm was only found and retrieved between 2007 to 2009. The ballistic tests were carried out after two years.
- [14] PW6 was 3399 Constable Vusi Dlamini who stated that during January 2007, he was stationed at Manzini Regional Headquarters under Serious Crimes Services (Lukhozi). He actioned the docket pertaining to the deceased. He processed the stolen cell phones through MTN. Following the print out he arrested Paul Savita (PW3) of Zimbabwe and Justin Chanda (PW3) of Zambia on the 3rd March 2009.
- [15] After cautioning them in terms of the judges rules, they revealed information that led to the arrest of Accused 1 and Accused 2. The two accused after cautioning revealed that the firearm was impounded by Siteki police. PW6 retrieved the firearm a 9mm Norincho pistol. Its serial number was 801296 and it was loaded with eight live rounds of ammunition. He handed it over to PW5 for further investigation. He identified the pistol, magazine and ammunition in court. He read out the serial number as 801296. He handed the exhibits into court as part of his evidence.

[16] He further testified that he did not charge PW2 and PW3 because they pointed out that the two cell phones were bought from the accused persons. He arrested the two accused persons and charged them for the murder of the deceased. He identified the accused persons in the dock as Joseph Bheki Dlamini (Accused 1) and Muzi Bongani Sikhondze (Accused 2).

[17] In his cross-examination of PW6, Mr. Simelane tried to show that it was the deceased who struck first as when he awoke he took a bush knife and attacked the suspects. However, the witness responded that according to PW1's evidence the suspects were already in the house when the deceased confronted them.

[18] The line of cross-examination further gave the impression that after the suspects retreated it was the deceased who then became the aggressor by following them outside and that is when he got shot in self-defence.

[19] PW7 was Nompumelelo Sisi Magagula. She testified that she knew Accused 1. They were lovers between 2005 – 2006. They had two children who passed away. She knew Accused 2 as Accused 1's friend. She lived at

Siphofaneni. So did both accused. Accused 1 rented a flat at Mahlabatsini in the Manzini District, near Phocweni Barracks.

[20] She testified that one day she was walking towards Siphofaneni town and she was stopped by a police mini bus (kombi). The police called her to the motor vehicle and asked if she knew the identity of the people in the motor vehicle. When she looked into the vehicle she saw Accused 1 and 2. She identified them. Accused 1 asked her to pack his belongings from his rented house and take them to his parental home. That the key to his rented house was with Sicelo Gamedze a friend of his. She agreed to do as Accused 1 had asked.

[21] Indeed she went to pack his belongings and while packing them found a firearm in the washing basket on top of the clothes clearly visible to all and sundry.

[22] She telephoned Sunday Sikhondze, an uncle to Accused 1 and asked what she should do with the firearm. He told her that she should keep the firearm and he would fetch it from her. She kept it for three days after which Sunday collected it.

[23] She described the firearm as blackish. She identified it in Court. She also did a dock identification of Accused 1 and 2.

[24] In cross-examination Mr. Simelane focused on the firearm suggesting that it may have been planted by the police. He asked PW7 if she knew that the house of Accused 1 had been searched by the police before she went to pack Accused 1's belongings. She agreed and stated that she heard about the police search after she had done the packing. She confirmed that when she got to Accused 1's house she found it untidy and the firearm was in plain sight. That if the police had got there before her they would have seen it.

[25] PW4 Velakubi Sikhondze testified that both accused are known to him. Accused 2 was his nephew being his elder brother's son. He testified that Sunday Sikhondze was a biological brother to him. Accused 2 had left a firearm with him on the instructions of Accused 2's girlfriend (PW7). He testified that the gun was later retrieved by the police who were in the company of Sunday Sikhondze. The firearm was marked Exhibit 1 (c); the spent bullet (Exhibit 1 (b)); the cartridge (Exhibit 1 (a)); unused bullets (Exhibit 1 (d)).

[26] The ballistic report (Exhibit A) was also handed in by consent. It was prepared by 3337 Harry Madonsela who was then a sergeant in the Royal Swaziland Police. He is also a ballistic expert. In the report he says that after running several tests, on the firearm, fired bullet and cartridge, he concluded that the firearm was used in the death of the deceased. The used bullet and used cartridge which were found at the deceased home came from the firearm. As indicated in Exhibit B, the spent bullet that killed the deceased exited his body and was found by PW5 at the scene of the crime. The unused bullets matched the spent bullet.

[27] In respect of Count 2, Justice Chanda (PW2) testified that during January 2007, he recalled that his friend Paul Savita (PW3) had telephoned him and informed him that they were at Mbekelweni selling cellphones at E500.00 each. Savita telephoned a friend who had a car to drive them to Mbekelweni. When they arrived at Mbekelweni they found three men who gave Savita two 6111 Nokia cellphones. After examining the cellphones Savita purchased them for E800.00. One of the cellphones had a sim card which still had airtime worth E3.00. PW2 took this sim card. They returned to Manzini town.

[28] PW2 says he then went on to the Mozambique hotel where he met a friend Joe Manda. Manda wished to telephone his girlfriend and PW2 gave him the sim card with E3.00 airtime to use. The police were able to trace the sim card via the calls. Early the following morning the police arrived at his home in the company of Manda and his girlfriend. The police took him to the police station where they questioned him about where he had gotten the sim card. He explained that he had taken it from one of the two cellphones that Savita had purchased from the men at Mbekelweni. He identified the two accused persons as two of the three men from whom Savita had purchased the two Nokia cellphones. He stated that he knew the accused persons from prior to the purchase of the two cellphones as they used to come to Savita but he did not know their names.

[29] Paul Savita (PW3) testified that during January 2007, he received a call from Accused 1 who informed him that he wished to sell to him two Nokia cellphones for E1,000.00 for both cellphones. PW3 called PW2 and they proceeded to Mbekelweni where Accused 1 was. Accused 1 was with Accused 2 and another unknown man. Accused 1 gave them the cellphones. They paid a collective E800.00 for the cellphones. They later sold the

cellphones for E1400.00 to a Zambian by the name of Mwanda who resides at Mobeni flats in Matsapha. After this transaction him and PW2 went to town to drink alcohol. While there they met Manda who requested PW2 to phone his girlfriend. PW2 complied and gave him the sim card with E3.00. The police traced the call and that is how they were able to later pick up PW3 for questioning which led to the arrest of Accused 1. He stated that the cellphones left with Mwanda to Zambia and that they were never recovered.

[30] Mr. Simelane tried to discredit the evidence of PW3 with regard to two different statements made to the police. PW3 admitted that the first statement that he recorded at the police station on the 3/3/2009 was incorrect and that the second one recorded on the 24/6/2009 was the correct one. Accused 1's defence was put to PW3 which was that Accused 1 merely called PW2 to inform him that there were cellphones for sale and not that he was selling them. PW3 denied this.

[31] PW3 also stated that both accused persons used to buy and fix cellphones at his (PW3) brother's shop and that he knew them from there. That both accused knew that PW3 also used to buy cellphones, fix them and resell them.

Defence Case

- [32] The defence case opened with Accused 1, (DW1) taking the witness stand. He testified that he did not know anything about the murder that he had been charged with. He also stated that he never committed the second count of robbery.
- [33] With respect to Count 2, he stated that he had given many cellphones to PW2, some of which were in good condition and others no longer working because PW2 specialized in cellphones.
- [34] He admitted that on the 18 January 2007 he gave PW3 some cellphones. Accused 1 says that on this day he was in the company of Accused 2 and Nhlanhla Shongwe. The cellphones were brought by Shongwe who wanted some money by using the cellphones as surety for E800.00 – E1,000.00 because he wanted to visit his mother in South Africa.
- [35] As Accused 1 did not have any money he gave Shongwe PW2's cell number and suggested that he phone him and ask him for help.

[36] Ultimately Shongwe, Accused 1 and 2 met PW3 and the latter bought the cellphones.

[37] After three months Accused 1 and 2 were arrested. The police asked to search his house. They searched it thoroughly in the presence of Accused 1. No firearm was found. The police intimated that they were looking for Shongwe and a gun belonging to Shongwe. They did not find any firearm. Accused 1 was then taken to Siteki where he was locked up with Accused 2. They were accused of having committed crimes in the Siteki area. The police kept the keys to Accused 1's house and later gave them to Sicelo Gamedze to give to Accused's relatives.

[38] Accused 1 confirms the evidence of PW7 that she saw him at Siphofaneni in a police vehicle. He says that from Siteki the police had taken him to Siphofaneni being the area of his parental home. He confirms PW7's evidence of his request for her to go and pack his belongings from Mahlabatsini. That she would find the key with Sicelo Gamedze.

[39] He denied having murdered the deceased or having taken part in his murder.

[40] Under cross-examination he was asked why he did not tell PW3 that the cellphones belonged to Shongwe, he replied that at the time he did not think that they were stolen as they were being sold by his friend.

[41] He admitted that he sold cellphones both old and new. He ran a pirate taxi service and when customers failed to pay they left their cellphones with him as payment. He would later sell them to PW3. He denied that the cellphones sold to PW3 on the 18th January 2007 were stolen from the home of the deceased.

[42] He denied that the firearm that was found in his house belonged to him or that it was used by him to kill the deceased. He said that he did not know the deceased nor went to his house on the material day.

[43] Accused 2 (DW2) next gave evidence. He stated that Accused 1 sent him a “please call me” and he called him. Accused 1 wanted to see him and he agreed. Accused 1 arrived at his home at Ludzeludze with Shongwe. Accused 1 asked DW 2 to lend him E300.00 as he wished to help Shongwe. Accused 1 informed him that Shongwe had cellphones which he was selling

and if DW2 was interested he could buy one of those cellphones. He says that he did not have any money so he did not buy any cellphone.

[44] Accused 1 then telephoned PW3 and invited him to come and see the cellphones. PW3 came. After talking to Accused 1, PW3 took the cellphones. He says that he does not know how much PW3 paid for them.

[45] Accused 2 also confirmed the encounter with PW7 at Siphofaneni as well as the conversation that took place between her and Accused 1 that she go and pack his belongings at Mahlabatsini and take them to his parental home.

[46] Accused 2 denied robbing PW1 of two cellphones. He denied knowing the deceased nor having murdered him.

[47] During cross-examination he confirmed that he and Accused 1 were close. They grew up together at Siphofaneni and he considered Accused 1 to be a brother.

[48] Mr. Dlamini asked DW2 why Accused 1 did not ask for the loan of E300.00 during their telephone conversation instead of travelling all the way from Mahlabatsini to Ludzeludze to ask for the loan.

[49] The suggestion by Mr. Dlamini is that Accused 1 and 2 and Shongwe were all at Ludzeludze having committed the crime nearby at Ekudzeni. DW2 denied this suggestion.

[50] It was put to DW2 that the cellphones that were sold to PW3 were the ones robbed of from the deceased. He denied this. The defence case closed after the testimony of DW2.

Count 1

[51] In respect of Count 1 has the Crown proved its case beyond a reasonable doubt?

[52] The elements of the crime of murder are “the unlawful, intentional killing of a human being”

[53] The Crown has in my view proved that the deceased was unlawfully and intentionally killed. He was gunned down at his home at night while defending himself, his wife and his property.

[54] The defence advanced by the Accused is that the deceased chased them after they had left his house with a slasher. The suggestion is that they were defending themselves when they shot the deceased.

[55] The evidence that has been led by the Crown links the firearm and its bullets to the Accused persons. Exhibit A which is the ballistic report prepared by 3337 Harry Madonsela a ballistic expert. The ballistic report states that the used bullet and used cartridge which were found at the deceased home came from the firearm which was found in Accused 1's house by his former girlfriend PW7.

[56] She testified that after she found it, she phoned Accused 1's uncle Sunday Sikhondze for advice as to what to do with it. Sikhondze responded that she keep it for some days until he fetched it.

[57] Indeed she kept it for three days after which Sikhondze collected it.

[58] PW4, Velaphi Sikhondze the father to Accused 2 stated that after collecting the gun from PW7, Sunday Sikhondze left it with him (PW4). PW4 said that he kept the firearm hidden in his home until the police in the company of the accused persons came for it. He retrieved it from its hiding place and handed it over to the police.

[59] The bullets and cartridge found at the deceased's home were tested by PW6, Harry Madonsela, the ballistic police expert. He testified that the spent bullet head that was found at the scene of crime was fired from the firearm that was found in the possession of PW4.

[60] The postmortem report (Exhibit B) stated that the deceased died due to a gun shot wound.

[61] It is my finding that it was the accused persons who unlawfully killed the deceased. It has been proved that the firearm belonged to Accused 1.

[62] It has further been proved that there was an intention to kill the deceased. The accused persons shot him because they wanted to stop him from chasing them.

[63] In my view two of them could have disarmed the deceased or even frightened him. There was no need to shoot to kill. The firearm is more lethal than a slasher and in shooting the deceased the force generated by a firearm is far more excessive than the use of a slasher.

re: Count 2

[64] PW1 testified that the two assailants who broke into her home on the 17th January 2007 robbed her husband and herself of two silver grey Nokia 6111 cellphones valued at E1800.00.

[65] PW6 testified that he actioned the docket pertaining to the deceased. He processed the stolen cellphones through MTN. Following the print out he arrested PW2 and PW3 who revealed to him information leading to the arrest of Accused 1 and Accused 2. PW2 and PW3 revealed that the two cellphones were purchased by PW3 for E800.00 from Accused 1 who was in

the company of Accused 2 and another unknown man. The transaction took place at Mbekelwni which was not far from the home of the deceased and PW1.

[66] The unknown man was identified by Accused 1 when he gave his evidence in chief as Nhlanhla Shongwe. Accused 1 stated that the cellphones belonged to Shongwe who sold them because he needed money to travel to South Africa.

[67] However, Shongwe was never called by the defence in order to verify Accused 1's story.

[68] I believe the evidence of PW3 that he purchased the cellphones from Accused 1 who robbed PW1 of them. Accused 1 has already been placed at the scene of the crime by his possession of the firearm that was used to kill the deceased.

[69] It is worth noting that when Accused 1 and Accused 2 advanced their defence through cross-examination they indicated that when the deceased was shot, they were defending themselves from him as he chased them with

a slasher. However, when they both gave their evidence in chief they denied any knowledge of the deceased's death. They further denied selling the cellphones to PW3 and stated that they were sold by Shongwe.

[70] I believe the evidence of PW3 that he purchased the cellphones from Accused 1. Furthermore there is evidence from PW3 that both accused persons used to buy and fix cellphones and that both accused knew that PW3 used to buy cellphones, fix and sell them. PW3 did not know Nhlanhla Shongwe and did not do any business with him.

[71] I am satisfied that the Crown has proved its case beyond a reasonable doubt against both accused persons in respect of both counts.

[72] In the event I find both accused persons guilty as charged and accordingly convict them.

SENTENCE

- [1] Mr. Dlamini for the Crown informed the Court that there were no records in respect of previous convictions for the accused persons.
- [2] He further submitted that there were aggravating factors as the deceased was fatally shot while defending his home and family after the accused got into his house. He submitted that the accused should have run away into the night and not shot the deceased. I agree.
- [3] On the other hand Mr. Fakudze in extenuation submitted that the accused did not set out to kill the deceased. They thought that they were protecting themselves when they shot him and that the murder was not premeditated. He says that the Accused, they panicked and acted on the spur of the moment. All that they intended was to ward off the attack and to that end fired once. They meant to scare the deceased to stop chasing them.
- [4] I accept Mr. Fakudze's submissions in so far as they relate to the existence of extenuation circumstances.

Re: Accused 1

[5] In mitigation he stated that Accused 1 was 41 years old and was 34 years old when this offence occurred. That he had 6 children when he was arrested but that two children had since then died and 4 remained.

[6] That the eldest child is 19 years old and the youngest child is 12 years old. That the children have suffered since his arrest as he used to provide for them as a driver of a for hire transport. That he attended school up to Form 2.

Re: Accused 2

[7] That Accused 2 is 39 years old and was 32 years when this offence occurred. That he has 2 young children who are in primary school. He used to do piece jobs by helping construction of houses. That he attended school up to Form 1.

[8] He submitted that in passing sentence the Court should give the accused a second chance to come back to society in order to bond with their children.

[9] I was advised that Accused 1 was arrested on the 20/6/2009 in respect of this offence. And that Accused 2 was arrested on the 22/06/2009 and was

granted bail on the 1/9/2009 and remained out on bail for three months before he was arrested for another offence. Accused 1 was never released on bail for this offence.

[10] Mr. Dlamini in response challenged the submission made by Mr. Fakudze that the Accused panicked. He stated that the firearm was something that the Accused always carried on their nefarious outings so that they could use it if ever they got into trouble and did not panic.

[11] In considering sentence I find that there were extenuating factors as set out by Mr. Fakudze.

[12] I have also taken into account mitigating circumstances as set out above especially the fact of bonding with their children.

[13] I have also taken into account the nature of the crime. The use of a firearm was brutal and final. The murder of the deceased was not necessary. It could have been avoided. As a result of the deceased's death his wife was left without a provider companion and helpmate. She was pregnant at the time and their child will grow up without a father.

[14] The firearm was also used in Count 2. The use of a firearm causes a victim extreme anxiety because it is not an ordinary weapon. It is so serious that the mere pointing of a firearm to a victim is a crime in our law. I consider Count 2 to be very serious and the sentence I shall pass is meant to indicate to would be criminals that the courts view the use of firearms for committing crimes in a very serious manner.

[15] I have to also consider the interests of society which expects the courts to pass deterrent sentences to stop would be offenders in their tracts should they contemplate committing any crime.

[16] I have also factored in the provisions of section 15 of the Constitution which states:

Protection of right to life

15 (1) A person shall not be deprived of life intentionally save in the execution of the sentence of a court in respect of a criminal offence under the law of Swaziland or which that person has been convicted.

(2) The death penalty shall not be mandatory.

(3) A sentence of life imprisonment shall not be less than twenty five years.

[17] In the circumstances, the accused are sentenced as follows:

Count 1

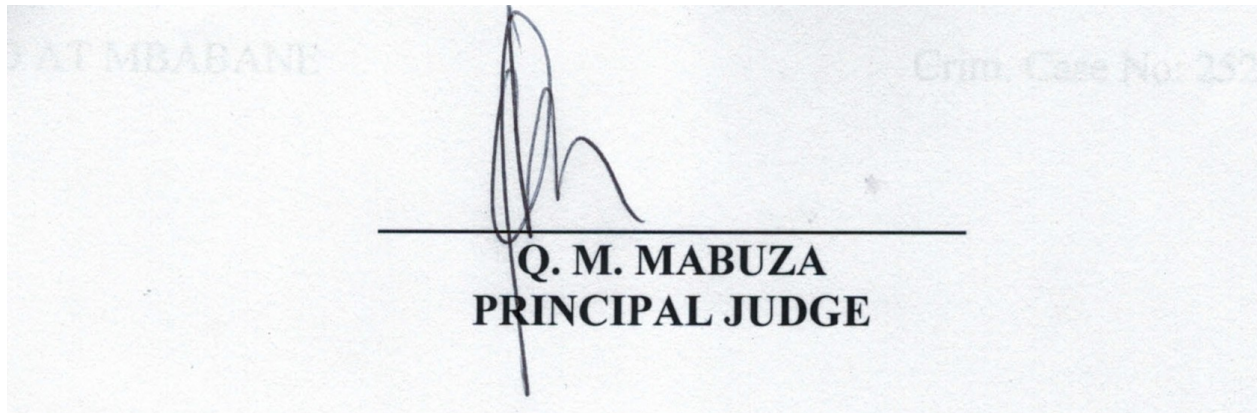
The accused persons are sentenced to twenty five (25) years imprisonment each. The sentence in respect of Accused 1 is backdated to the 20/6/2009.

Count 2

The accused persons are sentenced to five (5) years imprisonment each, without an option of a fine.

[18] Three months are to be deducted from the sentence of Accused 2.

[19] The sentences in respect of Count 1 and Count 2 are ordered to run concurrently.



For the Crown : Mr. S. Dlamini
For the Accused : Mr. T. Fakudze