



IN THE HIGH COURT OF ESWATINI

JUDGEMENT

CRIMINAL CASE NO.213/21

In the matter between:

REX

VS

LUYANDA MSHENGU MABUZA

Neutral Citation: *Rex Vs Luyanda Mshengu Mabuza*
SZHC (20th March, 2023)

Coram: DV KHUMALO A.J.

Heard: 21st February, 2023

Delivered: 20th March, 2023

Summary:

1. *Criminal Law & Procedure – Accused charged with murder, contempt of court and Contravention of Section 43 (1) of the Criminal Procedure & Evidence Act 1938.*
2. *Criminal Procedure – Accused pleads not guilty to murder and Contravention of Section 43 (1) of the*

Criminal Procedure & Evidence Act 1938 but guilty to contempt of court.

3. Law of Evidence – Onus and standard of proof in criminal proceedings – Held that the burden is on the prosecution and that it must prove the Accused's guilt beyond a reasonable doubt.

4. Criminal law & Procedure - Accused's defence must be put to the crown witnesses in cross examination failing which the court may declare it as an afterthought.

5. Law of Evidence – Admissibility of averments made in bail applications during trial proceedings – held that they are admissible in terms of Section 96(14) (c) of the Criminal Procedure & Evidence Act 67 of 1938 as amended.

6. Criminal Law – Self - defence - what constitutes – held the accused had not acted in self - defence when stabbing the deceased.

7. Criminal Law – Intention to kill – what constitutes – held that the accused had the necessary intention to kill and accordingly found guilty of murder.

8. Criminal Law – Contempt of court and escaping from lawful custody – held that the crown led sufficient

evidence to prove the accused's guilty hence found guilty as charged.

*9. Criminal Procedure – Sentencing – Principles involved
– accused accordingly sentenced to sixteen (16) years imprisonment on count 1, twelve (12) months imprisonment on count 2 and Two (2) years imprisonment on count 3. All sentences ordered to run consecutively.*

JUDGMENT

- [1] The accused person is charged with a total of three (3) criminal offences being murder, contempt of court and escaping from lawful custody. On the first charge is alleged that on or about the 10th May , 2021 and at or near Ngwane Park –Exchange area in the Manzini region, the said accused did unlawfully and intentionally kill Chenedu Okokwe and did thereby commit the crime of murder.
- [2] On the second charge, the accused is facing the offence of contempt of court in that upon or about the 8th September 2022 and at or near the High Court sitting in Manzini in the Manzini region, the said accused person having been duly warned to

appear in the High court in Manzini, did unlawfully and intentionally fail to appear before the said court and did thereby violate the dignity, authority and repute of the said court and did commit the said offence.

- [3] On count 3 the accused is charged with contravention of Section 43 (1) of the Criminal Procedure and Evidence Act of 1938 in that upon or about the 23rd December, 2022 and at or near KaKhoza area in the Manzini region, the said accused person did unlawfully and intentionally escape from the lawful custody of 7885 Constable Andy Bennet and thus contravened the said Act.
- [4] When the charges were read to the accused, he pleaded not guilty on counts 1 and 3 but guilty on count 2. The prosecution called a total of 10 witnesses in an effort to prove its case against the accused person. The first witness was David Okoro – a Nigerian national who is a resident of Fairview in Manzini. He told the court that the deceased was his friend and that they were together during the fateful night of the 10th May 2021 at the popular entertainment spot in Ngwane Park known as Exchange.
- [5] While they were sitting around the table, someone allegedly came and told the deceased that his car was blocking another

car. The deceased responded by promptly moving out to reposition his car. The witness later heard noise from outside and saw a group of people coming into the arena. When he came out, he saw the deceased bleeding from his chest and told him that he had been stabbed. The witness rushed him to hospital where he was later certified dead. He then passed the sad message to his countrymen. He did not see as to who had injured the deceased. It was put to the witness in cross examination that the accused person had not been carrying any weapon on the said night such that nothing was found in his pocket upon being searched.

- [6] Pw2 was Mancoba Khushu Dlamini of Fairview in Manzini. He is a friend to the accused person and they would allegedly spent most of the time together. This witness told the court that while seated at Exchange on the said night, the deceased stepped on his foot while passing. When he apologized, the witness could not accept his apology but he instead engaged him in a fight. The accused is said to have told the deceased to stop assaulting the witness. The deceased is alleged to have hit the witness who fell on the ground and become unconscious.
- [7] According to the witness, when he woke up, he saw the deceased moving away from him. As he moved away, he saw the accused person stabbing him on the chest and he later fell down. The witness described the accused's knife as having a

camouflage colour on its handle. He told the court that he knew the knife and the accused person would usually keep it in his possession.

- [8] In cross-examination it was put to the witness that the accused had not been carrying a knife on the night in issue and that when they were searched upon entering the premises, no weapon could be found in the accused's pocket. It was also put to the witness that the deceased was stabbed by someone unknown who was part of the crowd. The witness on the other hand told the court that they were never searched when entering the premises and insisted that the deceased was stabbed by the accused and not by any other person.
- [9] Pw3 was Constable Sanele Malindzisa who is a scenes of crime officer. He told the court that on the 11th May, 2021 he was instructed to photograph the body of the deceased at the Dups morgue. He observed scratch marks on the shoulders and a stab – wound on the chest of the deceased. He then processed the photographs and presented them as an exhibit before the court. His evidence was not challenged in cross- examination.
- [10] Ncaba Ginindza testified as pw 4. He resides at Fair view in Manzini and is a friend of the accused person. His evidence was that he was with the accused person on the night of the 10th May, 2021 at Exchange. He told the court that he saw a foreign

man assaulting pw2 and the accused. According to him, the foreign man defeated both the accused and pw2. Once the fight was over, the accused is said to have stabbed the foreigner on the shoulder while the latter was walking away. The witness mentioned that the accused had produced his knife even earlier during the fight. He also observed that the foreign man was bleeding from the chest. The said foreigner was then taken to hospital – according to him.

[11] The witness was cross examined at length but was not discredited. He maintained that he witnessed the fight and identified the knife that the accused had been carrying. He conceded that the accused sustained an injury on his hand during the fight. It was however his evidence that the foreigner was only using fists and open hands during the fight.

[12] There was also evidence of pw6 Banele Lukhele of Mvutshini area. He is also one of the accused's friends. He told the court that a day after the Exchange fatality, he met the accused who told him that he had stabbed someone at the Exchange bar. He also mentioned that the accused person later surrendered a knife to the police. He later recorded a statement at the police station. It was however denied on behalf of the accused person in cross – examination that he ever admitted to have stabbed someone at the Exchange bar.

[13] Constable Allen Madlopha testified as pw7 and he is one of the investigators of this case. He testified that on the 23rd December 2022 he had gone to kaKhoza area to carry out investigations in respect of another case with other police officers including Constable Andy Bennet. Constable Bennet had to remain in the car as the others carried out the investigations. They encountered the accused person along the way and constable Madlopha arrested him for the case of contempt of court. They took him into their car and returned to pursue the investigations.

[14] Within a short while, they heard gunshot sounds which prompted them to return to where they had left the vehicle. They could not find the accused and Constable Bennet in the vehicle. Constable explained that he eventually found the accused person hiding inside waters further away from the car. He took him back to the car.

[15] Constable Andy Bennet who testified as pw9 confirmed the evidence of pw7 and gave more details on how the accused got to leave the scene. He told the court that while the accused was under his custody inside the car, he requested to be allowed to alight and to urinate. He allegedly allowed him but when returning him into the car, he allegedly jumped down and hooked the witness on the neck with the hand cuffs. According to the witness, the accused pressed him down and fled the

scene. When telling him to stop, he did not oblige. When telling a security officer at the scene to help in stopping the accused, the latter is said to have used force against him and continued to run away. He allegedly could not stop even when warning shots were being fired. He could not stop even when the witness shot him on the foot. He later directed Constable Madlopha to the direction taken by the accused and he came back with him.

It was put to the witness in cross-examination that the accused ran away because the witness threatened to shoot him to death - accusing him of being a menace. This was however disputed by the witness.

- [16] Vuyiswa Ndlangamandla testified as pw 8 and confirmed the evidence of pw 9. He is a security officer and he confirmed that he saw the accused urinating and guarded by a police officer. After passing them, he heard the police officer shouting and asking him to assist in getting hold of the accused person. The accused was running away according to him. When he tried to apprehend him, he hit him on the neck and fled the scene. This witness confirmed that the accused could not stop even when warning shots were fired including when the officer fired a shot at him. His evidence was not challenged in cross-examination.

[17] Another witness was Constable Zakhele Sanele Simelane who testified as pw 10. He is one of the investigators of the case. He told the court that he received a report about the deceased's killing on the 10th May, 2021 and rushed to the scene where he found that the deceased had been conveyed to hospital. The suspect had also left the scene. On the following day he proceeded to Magwaza area where he found the accused with another male person in a car. He introduced himself and allegedly cautioned the accused person in terms of the judges' rules. He also asked to search the accused person to which he agreed. During the search he found a knife inside the accused's pocket, and took the accused with his partner to the police station. According to this witness, the accused also took him to a certain house belonging to one Phinda where he produced certain clothes.

[18] After the accused had been charged with murder by the witness, he successfully applied for bail and got liberated. Further evidence by this witness was that on the 29th August, 2022 the accused received a notice of trial informing him to appear in court on the 8th and 9th September, 2022 for trial. It was his evidence that the accused failed to appear in court such that a warrant of arrest got issued against him. He mentioned that the accused ended up being arrested by other police officers and got charged with contempt of court and escaping from lawful

custody of the police. It was denied during cross-examination of this witness that he ever cautioned the accused in terms of the judges' rules.

[19] After closure of the crown's case the accused person testified on oath. He told the court that he knew both pw 1 and the deceased from Fairview area. He also admitted having gone to Exchange place on the 10th May, 2021 in the company of pw2. He mentioned that after returning from buying some beers, he found pw2 involved in a fight with the deceased. When trying to separate them, the deceased allegedly assaulted him including stabbing him on the neck and hand. It was also his evidence that he grabbed the deceased's knife and used his jacket to bandage his neck to stop bleeding. He denied that he ever stabbed the deceased. He also denied having been carrying a knife on that night. According to him, he only took his knife when he got home as he feared to be attacked by the deceased's friends.

[20] The accused also denied that he escaped from police custody. He mentioned that the police officer who was guarding him grabbed him at the back and told him that he deserved to be shot with a gun. According to him, he was then inclined to run away in fear of being shot with a firearm. He allegedly heard gunshot sounds as he ran and he later stopped running when

he fell into a ditch due to pain. The police took him back to the vehicle and later to the police station.

[21] The accused was cross-examined at length by the prosecution. Contradictions and inconsistencies in the accused's defence were exposed during cross-examination. It was put to the accused that he was not being truthful when saying that the deceased was stabbed by someone from the crowd because he later mentioned that he never saw anyone stabbing the deceased. The accused was also exposed to be untruthful when he purported to have acted in self-defence and yet he had earlier denied to have ever stabbed the deceased. The prosecution also proved further inconsistency in the accused's evidence when he mentioned that the deceased stabbed him with a knife and yet in the affidavit he presented in court during his bail application, he alleged that the deceased had been carrying a bottle and he attempted to use it in stabbing him. He was in effect discredited in his defence.

[22] Our criminal law places the onus on the prosecution to establish and prove the guilt of the accused beyond a reasonable doubt. See **Bennet Tembe vs Rex - Criminal Appeal Case No. 18/2012** at **paragraph 10**. Also forming part of this obligation is for the prosecution to prove that that the version given by the accused in his defence is beyond any

reasonable doubt false. See **Zakhele Matsebula vs The King – Criminal Appeal Case No. 17/2008 at paragraph 21**. It should however be considered that proof beyond a reasonable doubt does not necessarily mean proof beyond a shadow of doubt. See **Rex vs Thandekile Malinga & 2 others – Criminal Case No.130/2007 at page 2**. The obligation on the part of the crown becomes satisfied if the evidence adduced is so strong against the accused such that it leaves only a remote possibility in his favour. See **Rex vs Masinda Cower Dlamini and 5 others – Criminal Case No. 77/2013 at paragraph 58**. The question is whether the crown has succeeded to discharge its burden in this case.

[24] This court has considered that it is not in dispute that the accused was present at the scene where the deceased met his death. There is no dispute that the deceased died as a result of a stab wound that penetrated his chest. The accused has not disputed physical confrontation with the deceased but he denied having ever stabbed him. He also denied having carried a knife during that night.

[25] The post mortem report revealed that two injuries were inflicted on the deceased - one on the chest and the second one on the shoulder. Both injuries appeared after the deceased had been involved in a physical confrontation with the accused. Evidence has shown that there was electricity light at the scene of the

incident. Pw2 and pw4 told the court that they saw the accused carrying a knife and they gave the same description of the said knife. Not only did they see the accused carrying the knife but they also allegedly witnessed the stabbing of the deceased by the accused person. Pw2 allegedly saw the accused stabbing the deceased on the chest while pw4 saw him stabbing the deceased on the shoulder. Indeed the injuries were acknowledged by the pathologist in his post mortem report.

[26] Both pw2 and pw4 maintained that they saw the accused stabbing the deceased. Pw4 emphasized that even though the electric lights were not so bright, he was able to identify the accused's knife and the stabbing because he was very close to the spot where onslaught took place and the available light was sufficient enough to enable him to see the knife and witness the attack. Both witnesses were friends of the accused person and they had no reason to lie against him. Pw2 had come with the accused at the event and they were sharing the same table. He would not have had any reason to falsify against the accused - his friend and to talk in favour of the deceased especially because the latter had assaulted him until he became unconscious. I therefore have no slightest doubt that the two (2) witnesses were telling the truth against the accused person.

[27] There was also evidence of pw6 who told the court that the accused confided to him that he had stabbed someone at the

Exchange Bar. Even though the accused denied this evidence in cross-examination, this court has considered the denial to be a bare one in light of the fact that pw6 was a friend to the accused and he stood to gain nothing by fabricating against the accused person. I have found this witness to be credible and his evidence to be true in that the accused confided to him that killed someone at the Exchange Bar. This court has no doubt that the 'someone' referred to by the accused to the witness was the deceased.

[28] This court has also taken into account that much as the accused told the court that the deceased was stabbed by someone from the crowd (during cross-examination of pw2) he changed during cross-examination by the prosecution and alleged that he did not see anyone stabbing the deceased. This was a material contradiction in the accused's version. Again, much as the accused had averred in his defence that he had never stabbed the deceased at any stage, he changed during cross-examination by the prosecution and conceded having stabbed the deceased – pleading that he stabbed him in self-defence. This was not only a contradiction on the part of the accused but was also an afterthought.

[29] It is trite law that the accused must put his defence to the crown witnesses in cross-examination failing which it may be

considered as an afterthought by the court when only disclosed at a later stage. See **S vs P 1974 (1) S.A 573**. Also see our local case of **S vs Dominic Mngomezulu and 9 others – Criminal case no. 94/1990 pages 17-18**. Had it been true that the accused had stabbed the deceased in self-defence, he would have put that to the crown witnesses in cross-examination instead of denying having stabbed the deceased and only raising self-defence in cross-examination by the prosecution.

[30] The accused person was also confronted with the averments he had made in the affidavit during his bail application where he alleged that the deceased had attempted to stab him with a bottle, much against what he stated during his defence in court (when he said that the deceased had used a knife). This was again a contradiction in the accused's version. It must be noted that the defence had objected to the reliance by the accused on the averments made by the accused during his bail application. The defence had contended that such averments did not form part of the proceedings as they had not been made part of the summary of evidence.

[31] This contention was dismissed by this court which pronounced that bail application proceedings form part of the criminal trial and can be relied upon by either party during the trial. It is common course that bail application proceedings are open

court proceedings where the accused *inter alia* avers to have a valid defence including disclosing such defence at times. The averments made in such application cannot be later disavowed by the deponent. They are by operation of the law forming part of the court record and they can automatically be relied upon by either party during the trial.

Section 96 (14) (c) of the Criminal Procedure and Evidence Act 67 of 1938 as amended reads as follows in this regard :

“...the record of the bail proceedings excluding the information in paragraph (a) shall form part of the record of the trial of the accused following upon such bail proceedings and where the accused elects to testify during the course of the bail proceedings the court shall inform the accused of the fact that anything the accused says, may be used against him or her at the trial and such evidence becomes admissible in any subsequent proceedings...”

[32] Even though the contention of self-defence by the accused has been raised as a belated afterthought by the accused, it is of essence for the court to enquire if the accused may have acted in self-defence when stabbing the deceased. In the case of **R vs John Ndlovu 1970-76 SLR 389 at pages 390H -391**, Nathan CJ stated the following on self – defence:

“... In the case of S vs Ntuli 1975 (1) SA 429 (A) which was followed in the recent case of S vs Motleleni 1976 (1) SA 403 (A) , it was said that a person may apply such force as is reasonably necessary in

the circumstances to protect himself against unlawful threatened or actual attack. The test whether accused acts reasonably in defence is objective. But the force must be commensurate with the danger apprehended and if excessive force is used the plea of self – defence will not be upheld...”

[33] Again, in the case of **Bhutana Paulson Gumbi vs Rex – Criminal Appeal No. 24/2012 at paragraph 15** the requirements of self-defence were stated by the court as follows;

“(1) the accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury at the hands of the attacker;

(2) the means he used in defending himself were not excessive in relation to the danger;

And

(3) the means he used in defending himself were the only or least dangerous means whereby he could have avoided the danger.”

[34] In the context of the case at hand, in as much as it can be said that the accused was under unlawful attack, he had no reasonable ground to believe that he was in danger of either being killed or seriously injured. This is because at the time he stabbed the deceased the fight was over and the deceased was walking away. Again, the means used by the accused in attacking the deceased were not the least dangerous. He used a knife against the deceased who according to pw 4 had only used fists and open hands to assault him. Therefore, the means used were not commensurate with the purported danger. The

accused also used excessive force by stabbing the deceased on the chest – a dangerous and critical area of the body where death could be reasonably anticipated. The plea of self-defence is therefore not available for him.

[35] The other question to be answered is whether the accused had the necessary intent to kill when he stabbed the deceased. In the case of **S vs Mnisi 1963 (3) S.A 188 (A) at page 192 F-G** the court defined intention to kill as follows:

“A person in law intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts reckless as to whether such death results or not.”

Similarly, in the case of **Mandla Mlondolozu Mendlula vs Rex – Criminal Appeal case no 12/2013** the Supreme Court expressed itself as follows on the question of intention to kill:

“In determining mensrea in the form of intention the court should have regard to the lethal weapon used, the extent of the injuries sustained as well as the part of the body where the injuries were inflicted. If the injuries are severe such that the deceased could not have been expected to survive the attack and the injuries were inflicted on a delicate part of the body using a dangerous lethal weapon, the only reasonable inference to be drawn is that he intended to kill the deceased.”

See also **R vs Jabulane Philemon Mngomezulu 1970-76 SLR 7 at C - D.**

- [36] Evidence was led in this case that the accused stabbed the deceased with a lethal weapon in a form of a knife. He targeted the delicate area of the body - being the chest. He ensured that he stabbed him on the left side of the chest where the heart is located. He could have not stabbed him at that dangerous area of the body and still expect him to survive. He therefore harboured the necessary intention to kill him and he succeeded in that regard. He is therefore guilty of murder.
- [37] It is common cause that on the charge of contempt of court the accused tendered a plea of guilty and the evidence of Pw 10 was undisputed on how the accused failed to attend trial notwithstanding that he had been served with a notice of trial – which led to issuance of a warrant of arrest against him. He gave no excuse for his failure to appear in court which demonstrated that he was in willful default of appearance. He is therefore found guilty as charged.
- [38] On the third charge the accused is alleged to have unlawfully and intentionally escape from the lawful custody of the police in contravention of **Section 43 (1) of the Criminal Procedure and Evidence Act 67 of 1938**. This provision reads as follows:

“(1) Any person who has been arrested and is in lawful custody but has not yet been lodged in any prison, gaol, police cell, or lock-up, and who escapes or attempts to escape from such custody shall be guilty of an offence and liable on conviction to imprisonment not exceeding two years”

- [39] It is a proved fact that the accused was under arrest and in the immediate custody of Pw9 at the time of the alleged escaping. It is also not in dispute that the accused ran away from the police officer and later got apprehended by pw7. The accused's defence was briefly that he escaped because the police officer told him that he deserved to be killed and threatened to shoot and kill him. His defence is in fact that he had a justification for running away and the sole purpose was to serve his life.
- [40] This court has taken into account that the sole reason for the accused to be taken out of the vehicle was to allow him to urinate - according to the evidence of Pw9. This was not denied by the accused. Pw9 told the court that the accused used force and bolted when he was getting back into the car. Undisputed evidence is that the first step taken by Pw9 after the accused had escaped from him, was to request pw8 to stop and apprehend him. Even after he had used force to go past pw8, pw9 did not shoot him but he fired a warning shot. He only shot at his leg after the accused had ignored the warning shot.

[41] This court has noted and found that had pw9 intended to shoot and kill the accused as he alleged, he would have done so immediately he escaped from him – even before he could reach pw8. The fact that he never fired a shot and requested pw8 to apprehend him, is proof that he harboured no desire to hurt or kill the accused. He wanted him to be retained unhurt. By firing a warning shot after the accused had forcefully gone past pw8, he demonstrated that he had no will or motive to hurt or to kill him. Again, by only shooting the accused on the leg after the latter had ignored the warning shot, the police officer was demonstrating that the purpose of the shooting was only to stop the accused from running and to have him arrested, as opposed to have him killed.

[42] If the intention was to kill him, he would have shot him on the fragile or fatal areas of the body immediately he started to bolt. The manner in which the police officer conducted himself towards the accused did not demonstrate any motive or intention to shoot and kill the accused. On the other hand, by using force against pw8 and running away even upon warning shots being fired, the accused was demonstrating the intention to unlawfully escape and to evade justice. It is common cause that he started to run in the presence of pw8. When looking at the case objectively and reasonably, there was no way the police officer could have simply wanted to shoot and kill the accused especially in the presence of pw8 who was a security officer. In

light of all the foregoing, I find the explanation of the accused to be completely false and I find him guilty as charged.

SENTENCE

[48] It is settled law that sentencing is discretionary to the trial court and that such discretion must be exercised judiciously. See **Elvis Mandlenkhosi Dlamini vs Rex – Criminal Appeal Case No. 30/2011 at paragraph 29**. This may include taking into account all the material facts and circumstances of the case. In that regard the court may have to consider the nature and seriousness of the offence, the interests of the offender and those of the society. The court must then strike a balance between those competing interests in ensuring that the sentence passed is fair and just. See **Rex vs Majahonkhe Major Mazibuko and Another – Criminal Case No. 3/2002 at page 2**.

[49] This court has considered that the accused is a first-time offender. He pleaded guilty to one of the offences and saved the court's time. He was young at the time of commission of the offence and has a minor child to maintain. It has also been

taken into consideration that the accused had consumed alcoholic drinks on the fateful night. He told the court that he felt provoked when the deceased assaulted him while rescuing his friend. This court has however not overlooked the seriousness of the offence and their prevalence in the society – especially the crime of murder.

[50] Interests of justice enjoin the court to protect human life by passing appropriate and effective sentences in the face of escalating violent crimes. In the instant case the accused stabbed the deceased on the chest, not caring whether death ensued or not. He launched the onslaught when the deceased was no longer fighting. Such criminal conduct must be discouraged through appropriate sentencing. It must be however be considered that in as much as courts are entitled to pass deterrent sentences, they should also ensure that the sentence passed enables the offender to reform and be rehabilitated. See **Ntokozo Dlamini and Another vs The King - Criminal Appeal Case number 10/2021.**

[51] It is also trite law that before the court can pass sentence, it must indicate whether or not extenuating factors exist. See **Section 295 (1) of Criminal Procedure and Evidence Act 67 of 1938**. Also see **Mandla Tfwala vs Rex (supra) at page 8**. In the leading case of **S. vs Letsolo 1970 (3) SA 476 (A) at 476** extenuating factors were defined as facts bearing on the commission of the crime which reduce the blameworthiness of the accused as distinct from his legal culpability. Three factors must be considered being:

1. Whether, there are any facts which might be relevant such as drug abuse, immaturity, intoxication or provocation (the list is not exhaustive).
2. Whether such facts in their cumulative effect probably had a bearing on the accused's state of mind at the time he committed the offence.
3. Whether such facts are sufficiently appreciable to abate the blameworthiness of the accused.

[52] In this regard the court has considered that the accused was young at the time of the offence. It is trite law that youthfulness is an extenuating factor. See **Ntokozo Adams vs The King – criminal Appeal Case No.16/2010 at page 13**. Also see **Rex vs Mfanimpela Mlungu Mkhwanazi & two others – Criminal Case No. 211/2020 at page 10**. It is also trite law that intoxication is an extenuating and mitigating factor – even though same carries very little weight. See **Mbuso Siphso Dlamini vs The King – Criminal Appeal Case No. 34/2010 at**

paragraph 11. It has already alluded to above that the accused had consumed liquor when committing the offences. It has also been shown that the accused had been provoked at the time of the incident. Our law provides that provocation is also an extenuating factor. See **Rex vs Linda Nkosinathi Matsebula & another – Criminal Case No. 322/2017 at paragraph 25.**

[53] In light of all the foregoing, having considered all the facts and circumstances of the case inclusive of the personal circumstances of the accused, the mitigating and extenuating factors, interest of the accused and those of the society – and having struck a balance thereof, this court finds it fair and just to sentence the accused as follows:

Count 1 - Sixteen (16) years imprisonment without an option of a fine.

Count 2 - Twelve (12) months imprisonment without an option of a fine.

Count 3 – Two (2) years imprisonment without an option of a fine.

The sentences shall be served consecutively as they were committed as separate transactions. A total of Four hundred and eighty five (485) days – being the period spent by the accused in custody before liberation on bail shall be deducted from his sentence.



D.V. KHUMALO
ACTING JUDGE OF THE HIGH COURT

For the Crown: Mkhaliphi A.

For the Defence: Sibandze M.