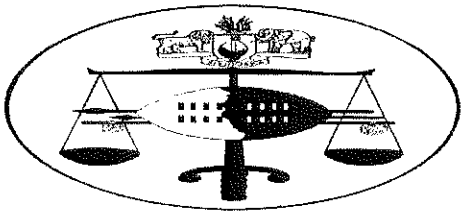

IN THE HIGH COURT OF ESWATINI

JUDGMENT

CRIMINAL CASE NO. 514/15

In the matter between:

REX

VS

1.NJABULO MTSETFWA
2.ZAKHELE NKAMBULE

Neutral Citation: *Rex Vs. NJABULO MTSETFWA AND ANOTHER SZHC 05TH MAY 2023)*

Coram: D.V. KHUMALO A.J.

Heard: 26TH APRIL, 2023

Delivered: 05TH MAY, 2023

Summary: *1. Criminal Law and Procedure – Accused persons variably charged with murder and*

malicious injury to property – both plead not guilty.

2. *Criminal Law – The Doctrine of common purpose – legal requirements thereof – held they were not satisfied in casu.*

3. *Law of evidence – Failure by an accused to testify in rebuttal of incriminating evidence against him – held that the court is entitled to draw an adverse inference against him.*

4. *Criminal Law - Intention to kill - requirements thereof - held that A1 had the necessary intention to kill.*

5. *Criminal Procedure – sentencing – principle of triad considered – mitigating and extenuating factors found to be existent - A1 sentenced to seventeen (17) years imprisonment without an option of a fine for murder whilst on count 2 he is sentenced to one (1) year imprisonment without an option of a fine.*

JUDGMENT

[1] The accused persons appeared before this court variably arraigned on two (2) criminal charges: being murder and malicious injury to the property. The first charge of murder involves both accused persons being alleged that upon or about the 2nd December, 2015 and at or near Makhwelela area in the Shiselweni region the said accused persons acting individually and or in furtherance of a common purpose did unlawfully and intentionally kill Reginald Busenga.

[2] The second offence involves only the 1st accused being alleged that upon or about the 2nd December, 2015 at or near Makhwelela area in the Shiselweni region the accused person did unlawfully and intentionally damage house windows valued at E300.00 the property of or in the lawful possession of Thulani Hlatshwako by hitting the said windows with a bush knife with intent to injure the said Thulani Hlatshwako in his property.

[3] When the charges were read to the accused persons they tendered pleas of not guilty. The prosecution adduced its evidence through five (5) witnesses in an effort to prove its case. The 1st witness was Sifiso Busenga – a resident of Makhwelela and a sibling of the deceased. His evidence was that he was with the deceased in his house during the night of the 2nd

December, 2015. According to him, soon after the deceased had left, he returned and reported that he had been hacked by A1 and A2. He was allegedly bleeding heavily from the head and other parts of the body.

[4] When enquiring as to what had caused his injuries, the deceased could not respond save to plead with him to rush him to hospital. By the time he was being driven to hospital, he was very critical and unable to talk. Upon reaching hospital, he was treated and referred to Hlatikhulu hospital where he was also treated and referred to Mbabane government hospital due to his critical state. He was placed at the intensive care unit for treatment, but succumbed to death two (2) days later.

[5] According to this witness, on the 3rd December, 2015 the police came and asked for the directions to the home of the accused persons which he provided. The police later emerged with both accused persons and Getrude Nzima who testified as pw 3 in this case. The accused persons allegedly pointed out a crate near the deceased's house. The crate was tendered as an exhibit to this court and it was in a fractured state. One of the accused persons had been carrying a bush knife according to him but he could not recall as to which of the accused was that. The witness later recorded a statement at the police station.

[6] During cross-examination of this witness, it was not disputed that A1 came to the home of the deceased. It was also not disputed that there was physical contact between A1 and the deceased. It was alleged on behalf of A1 by his attorney that A1 had come in peace at the home of the deceased to enquire from the latter as to why he had been harassing him. It was alleged that the deceased together with other people became violent against A1 which prompted him to use a crate and assaulted the deceased in an effort to thwart the purported attack. This was however refuted by the witness.

[7] It was contended on behalf of A2 in cross-examination that he could not hack the deceased because according to him, the deceased could not have possibly been attacked by two (2) people. It was not made clear whether or not A2 was with A1 when the deceased got injured at his home during the night.

[8] Pw 2 was Thulani Celumusa Hlatshwako of Makhwelela area. His evidence was that on the 2nd December, 2015 he was at the Busenga homestead with the deceased in a house when they noticed some people were peeping through the door. According to him, the deceased came to see these people. When he sooner came out, he allegedly found A1 and A2 hacking the deceased

with a bush knife. He told the court that A1 had been holding the deceased while A2 was hacking him with the bush knife. The incident took place during the night according to him. He mentioned that the source of light in the house was a candle since there was no electricity due to thunderstorm and lightening. He then reported the incident to his aunt who in turn called the police.

[9] This witness also testified that while asleep on the same night at his home he notified that someone was breaking his window panes and decided to come out of the house. When he got out he allegedly found A1 breaking his windows. When asking A1 about why he was doing that, he allegedly responded by saying that he had been looking for a certain Phila Simelane. A1 is said to have attempted to hack him with a bush knife, he blocked the blow – using a spear. He allegedly got hold of A1 and called (witness) his brother so that he could witness the presence of A1 and the damage he had allegedly caused. They then allegedly released him and reported the incident to the police.

[10] It was also put to this witness during cross – examination that A1 had come so that they could all be brought together so that they could amicably resolve their differences. It was contended that the witness, together with the deceased and others

confronted A1 with weapons. The attorney of A2 took issue with that the witness statement reflected that it had been recorded in 2020 and yet the incident had occurred in 2015. The witness response was that the incident was very old but according to him he made his statement soon after the incident.

[11] It was also put to the witness that he had contradicted himself in that in his statement made at the police station he alleged that it was A1 who actually hacked the deceased with a bush knife as opposed to what he said in court during his evidence. Further contention was that A2 was not present when the door got opened but he came later when he heard A1 screaming. The contradiction was not denied on behalf of A1. It was also not disputed by the witness in cross – examination that in his statement made at the police station he fingered A1 as the one who hacked the deceased with a bush knife, mush against what he mentioned in court.

[12] Another witness was Getrude Nzima of Makhwelela area whose evidence was that on the 3rd December 2015 she was approached by the police who were in the company of both accused persons and requested her to join them and to be an independent observer on what would unfold. According to this witness, the police drove into a Mtsetfwa homestead where A1's father handed a bush knife to the police. The police vehicle also

allegedly drove into a Xaba homestead where A1 gave a blue t-shirt to the police. They also drove into the Busenge homestead where according to her, a crate was handed to the police by pw1. Her evidence was not challenged in cross-examination.

[13] William Msibi testified as pw4. He is a resident of Ngwabi area. He testified in line with the evidence of pw2 – in that he was in the Busenga homestead on the 2nd December, 2015 during the night when he saw someone peeping through the door. He confirmed that the deceased came out to see as to who was peeping through but could not return. Others came out one after the other but could not return as well. He told the court that he later decided to go home. He learnt after some time that the deceased had been killed.

[14] The last witness was Mphotholozi Dlamini – the investigator of this case. His evidence was that he was assigned to investigate the case on the 3rd December, 2015. He arrested both accused persons on the same date and allegedly cautioned them in terms of the judges rules. They proceeded to the parental home of A1 where A1 allegedly gave him a bush knife. He also mentioned that both accused persons handed over to him clothes that they had been wearing on the night of the incident. It was also his evidence that he was shown a crate at the Busenga homestead.

[15] It was put this witness in cross-examination that it was A1's father who gave the bush knife to him and that there had been a delay in conveying the deceased to hospital. It was also put to him that statements were recorded in 2020 because the police wanted to temper and also to fabricate evidence against the accused persons. This was disputed by the witness who mentioned that the docket of this case once went missing and that when it got recovered, some statements were missing hence the need to record them afresh.

[16] After closure of the crown's case, A1 closed his case without giving any explanation about his alleged involvement in the case. On the other hand, A2 testified on oath and denied involvement in the commission of the offences. It is trite law that the crown bears the burden to prove its case beyond a reasonable doubt against the accused person in criminal proceedings. See **S. vs Fourche 1974 (1) SA 96 (A).** See also **Bennet Tembe vs Rex – Criminal Appeal Case No. 18/2012 at pages 6-7.**

[17] In this regard, the prosecution also bears the onus to prove that even the explanation given by the accused person in his defence if any, is false beyond a reasonable doubt. See **S. vs Van As**

1991 (2) SACR 74 (w). See also **Zakhele Matsebula vs The King – Criminal Appeal Case No. 17/2008 at paragraph 21.**

[18] The prosecution in this case has relied on the doctrine of common purpose in an effort to prove commission of the offences by the accused persons. According to the doctrine of common purpose, where more than one person associate in a joint unlawful enterprise, each will be responsible for any acts of his fellow partners in crime falling within their common design or object. Prior conspiracy is not a prerequisite. The law recognizes that at times common purpose can arise spontaneously and as such the common purpose or intention to associate oneself with the criminal act can be inferred from the conduct of that individual.

[19] In the case of **Philiph Wagawaga Ngcamphalala & 7 others vs Rex – Criminal Appeal Case No. 17/2002 at page 3,** the court had the following to say in this regard:

> "The essence of the doctrine of common purpose is that where two or more persons associate in a joint unlawful enterprise each will be responsible for any acts of his fellows which fall within their common design or object.... The crucial requirement is that the persons must all have the intention to commit the offence.... There need not be a prior conspiracy. The common purpose may arise spontaneously nor does the operation of the doctrine require each participant to know or

foresee in detail the exact way in which the unlawful result will be brought about ..."

[20] This legal position was also echoed in the case of **Rex vs Sibusiso Shongwe and fifteen others – H/C Criminal Case No. 17/1998 at page 4** where the court added that existence of common purpose may be inferred from the conduct or behavior of the different participants in the criminal activity.

[21] In the case of **S. vs Magedezi & others – 1989 (1) SA at pages 705 -706** the court enlisted the legal prerequisites of common purpose as follows: -

1. The accused must have been present at the scene where the offence was being committed.

2. He must have been aware of the intended commission of the offence.

3. He must have been intended to participate in the criminal act.

4. He must have manifested his sharing of a common purpose with the perpetrators by performing some act of association with their conduct.

5. He must have the requisite intention to further the common object and must have foreseen the possibility of its furtherance but continued to perform his own role of association with

recklessness as to whether or not the intended criminal object ensued.

[22] The question is whether factual circumstances of this case meet the requirements of common purpose in light of the evidence tendered by A2 and the rest of the evidence adduced. A2 in his defence told the court that A1 came to him while he was asleep at night and told him that he was destined to the deceased's place to enquire from him and another man known as Thulas on what they meant when threatening to kill him. When allegedly trying to discourage A1 from doing that, he allegedly could not listen. After A1 had gone away A2 said he went to A1's father and reported how A1 had gone to the deceased's place to question him and Thulas about the alleged threats.

[23] According to him they agreed with A1's father to go and pursue A1 with the purpose of stopping him from meeting the deceased and Thulas. When they were out of the gate on their journey to get A1, they allegedly heard an alarm being raised. Believing that perhaps A1 was being attacked, he rushed to the direction where the alarm was being sounded. He allegedly shouted A1 by his name and he saw him coming to him. This was just before he could reach the deceased's home. According to him, there were other people who ran away when asking A1 as to what was happening. A1 allegedly told him that the people who were

running away wanted to kill him and they attacked him despite that he was trying to talk to them peacefully. After being rejoined by A1's father, they proceeded home and spent the night there as he was also related to A1's family.

[24] On the following day, he allegedly returned to his parental homestead to look for cattle and while still looking after cattle, he was approached by the police who asked him about what had happened on the previous night. He told the police that it was A1 who had gone to the Busenga homestead. He alleged that he told the police that he had gone there to tell A1 that his father was calling him and further instructing him to leave the patrons of that home alone.

[25] His further evidence was that the police assaulted and took him into their car where he found A1. They were allegedly taken to the police station where he was allegedly suffocated with a tube having been tried to a bench. A1 was also tortured according to him. After the said torture, the police told them to go with them to collect exhibits. They then proceeded to A1's home where A1's father was allegedly told by the police to hand over a bush knife at the instance of his son which he did. They also proceeded to the home of the deceased where the police were shown a crate by pw1 – a brother to the deceased. They were then taken back

to the police station where he was charged with attempted murder.

[26] It was A2's evidence that he could not identify the people who ran away including the deceased because did not reach the deceased's homestead. It should be noted that his evidence was not challenged by A1's attorney in cross-examination. He was however questioned at length by the prosecution in cross-examination who put it to him that he physically participated in attacking the deceased with A1 in light of the evidence of pw2. This was denied by the A2 who maintained that he never reached the deceased's home.

[27] Our law provides that all what is required from an accused person when faced with serious criminal allegations, is to give a reasonably probable explanation to rebut the incriminating evidence against him. See **Rex vs Mashesha Charles Nhlengetfwa – Criminal Case No. 113/2001 at page 10.** In this regard the accused person bears no onus to satisfy the court about the truthfulness of his explanation. In the case of **Rex vs Difford 1937 AD 370 at 373,** the court stated as follows in this regard:

> "It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation even if that explanation is improbable, the court is not

entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal..."

See **Rex vs Johannes Mfunwa Dlamini – Criminal Case No. 180/1999 at page 8.**

[28] The explanation by A2 that he did not go with A1 to the deceased's home on the night in issue and that he discouraged A1 from going there, has the effect of diminishing and rebutting allegation of common purpose against him. Pw4 also told the court that he saw one (1) person peeping through the door while with the deceased in the house. This tends to render A2's explanation reasonably probable that A1 may have been alone when setting foot at the deceased's home.

[29] In as much as pw2 told the court that he saw two (2) people attacking the deceased, his evidence is not conclusive in this regard. This is firstly because he conceded a material inconsistency in his evidence. He conceded that in as much as he had told the court that he saw A2 hacking the deceased with a bush knife while A1 was holding him, in the statement he had previously recorded with the police, he had mentioned that he saw A1 hacking the deceased with a bush knife while A2 had been holding him. Pw2 failed to give an explanation for this

inconsistency and contraction in cross-examination by the defence.

[30] The court also took into account that the incident took place at night when it was dark. Pw4 also told the court that they had been enjoying liquor while inside the deceased's house. The combination of the darkness and the drunken state of affairs on the part of pw2 did not give him the necessary ability to clearly see what had been happening outside and to identify the people involved. Even as regards the alleged pointing out evidence, none such evidence linked A2 with the offence. Evidence was shown that the crate was handed by pw1 to the police. Even the clothes that A2 produced could not link him with commission of the offence.

[31] It therefore follows that mush as A2's explanation may not have been convincing, it was reasonably probable in light of the foregoing facts. There is nothing to show that he shared common intention or object with anyone including A1 to have the deceased killed. The only seemingly direct and plausible evidence adduced by pw2 against A2 was flawed and unreliable as shown above. There is therefore no sufficient evidence to prove his guilt beyond a reasonable doubt. He is found not guilty – acquitted and discharged.

[32] Despite the fact that A1 gave no defence after the crown's case, the court will consider and examine what was contended on his behalf by his attorney during cross-examination of the crown witnesses. It was put to pw1 in cross-examination by A1's attorney that A1 came to the deceased's home on the fateful night and the purpose of the visit was to enquire from the deceased as to why he all along had been harassing him. It was alleged that A1 had come in peace but the deceased and his friends attacked A1 prompting him to use the crate in thwarting the attacks. He mentioned in that regard that he assaulted the deceased with the crate.

[33] In effect, the allegations made about A1 during cross-examination of pw1 placed (A1) him at the scene where the deceased was fatally assaulted. Not only was A1 placed at the scene, but he also acknowledged to have had physical confrontation with the deceased. In that regard he alleged that he assaulted the deceased with a crate in self-defence. The

question is whether his purported defence meet the requirements of self-defence.

[34] In the case of **Rex vs Zwelithini Maqumbane Nkambule – Criminal Case no. 78/2012 at paragraph 39** the court had the following to say regarding self defence.

> "It is a trite principle of our law that a person may apply such force as it is reasonably necessary in the circumstances to protect himself against unlawfully threatened or actual attack. The test whether the accused acts reasonably in defence is objective; and, the force used must be commensurate with the danger apprehended and, if excessive force is used, the plea of self-defence will not be upheld."

See also the case of **Rex Moses Muzi Lukhele – Criminal Case No. 65/2014 at page 14.**

[35] Similarly, in the case of **Bhutana Paulson Gumbi vs Rex – Criminal Appeal Case no. 24/2012 at paragraph 15** the court stated the requirements of self-defence as follows:

"1. The accused had been unlawfully attacked and has reasonable grounds of thinking that he was in danger of death or serious injury at the hands of his 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"

[36] In the present case evidence has shown that the deceased, pw2 and pw4 were not carrying any weapons when going outside to attend to the person who was peeping through the door. It was not even suggested in cross-examination as to what weapons were in possession of the deceased and the others to make A1 reasonably believe that he was in danger of death or of being seriously injured at the hands of the deceased. A1 could not tell as to how he was assaulted. He never mentioned the weapon used and the spots on the body where he was assaulted.

[37] A1's case was seriously dented and dealt a fatal blow by his failure to testify in rebuttal. It is trite law that where evidence links the accused with commission of the offence, so as to require him to give an explanation, his failure to testify can properly be used as a factor against him. In fact, the court becomes entitled to draw an adverse inference that the failure

to testify is attributable to lack of a valid defence. See **S. vs Snyman 1968 (2) SA 582 (A) act 588.** Also see **S. vs Khoza 1982 (3) S.A 1019 (A) at 1043 C-D.** See as well **Eric Makwakwa vs Rex – Criminal Appeal Case No. 2/2006 at paragraph (9).**

[38] It has already been mentioned that the purported self-defense raised by A1 has the effect of not only placing him at the scene of the crime but also of showing that he engaged the deceased in physical confrontation. It was however remained not clear as to how A1 reasonably believed that he was in danger of death or of serious injury at the hands of the deceased and his friends, especially in light of the evidence that neither the deceased nor any of his friends was armed with any weapon when going out of the house. A1 also could not show through any explanation that the means he used in defending himself were not excessive in relation to the danger sought to be averted and that such means were the only or least dangerous whereby the danger could have been avoided.

[39] Circumstances of the case especially in light A1's conduct does not support the plea of self-defence by A1. A1 never went to the police station to report that he had been attacked by the deceased or his friends and that he had assaulted the deceased in self-defence. A1 could not even suggest the part of the body

where he was assaulted and the weapon used. There is nothing even to show that he got injured as a result of the purported assaults. Having said all the above, this court is enjoined to reject the claim by A1 that he injured the deceased in self-defence.

[40] It has been shown that the deceased died as a result of assault wounds sustained when he got attacked at his home. This court has already found that the evidence of pw2 was contradictory about the number and identity of the people who attacked the deceased owing to his drunken state of affairs and the unfavourable state of visibility on the said night. What is very clear is that A1 placed himself at the scene and admitted that he had physical confrontation with the deceased. Even though he alleged that he acted in self-defence, this court has already rejected that assertion as being false.

[41] Can it be said that A1 was with other people or another person when he assaulted the deceased? This court has already mentioned that it has rejected the evidence of pw2 to the effect that another person was involved in the attack. This was mainly due to the contradictory nature of pw2's evidence coupled with other factors such as unfavourable state of visibility and the drunken state of pw2 on the fateful night. It should be noted that A2 distanced himself from any participation in the assault

of the deceased when he testified in rebuttal. A2 was also not discredited during cross-examination by the crown. His main evidence was that A1 informed him when he was going to the deceased's home. There is nothing to show that A1 was in the company of any other person since A2 had remained behind according to his evidence.

[42] A2 mentioned that he only proceeded towards the scene when he heard an alarm being raised. In that regard he mentioned that he did not reach the scene. It must be noted that A2's evidence was not disputed on behalf of A1 in this regard in cross-examination of A2. It was never put to A2 during cross-examination by A1's attorney that A2 was ever present at the scene and he participated in the assault of the deceased. If A2 was present at the scene that he participated in the assault, it should have been put to him by A1's attorney during cross-examination. Instead, A1's version has tended to indirectly support that of A2 in that A1 said he acted in self-defence when assaulting the deceased with the crate. He never said or suggested that he was with another person when assaulting the deceased. There is therefore nothing in a form of evidence to show that someone else other than A1 assaulted the deceased. Even the people that A2 allegedly saw running away cannot be said to have played any role in assaulting the deceased because according to A2, A1 told him that these people had been

attacking (A1) him and not the deceased. Therefore, the contention by A1 in his closing submissions that it is not clear as to who inflicted the fatal blow is untenable. This is because as already alluded to above, had another person participated in the deceased's assault other than A1, the later should have put that to pw1 or to the other witnesses including to A2 in cross-examination.

[43] The only available and reliable evidence especially when glaring from what A1 said during cross-examination of pw1 is that the deceased died as a result of being assaulted with a crate and that evidence points to only A1 as the one who inflicted the injuries. The deceased ended up dying from those injuries. The question is whether A1 had the requisite intention to kill when the administered the assaults.

[44] In our law, a person harbours the intention to kill if he deliberately conducts himself towards another person in a manner he appreciates that may cause the death of that person and he nonetheless persists with such conduct, not caring whether or not death ensues. This legal position was stated in the case of **Mazibuko Vincent vs Rex 1982 -86 377 (SA) at 38** as follows: -

> "A person 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."

In the case of **R. vs Mndzebele 1970-76 SLR at 199** the court had the following to say on this subject:

> "...a person has the necessary intention to kill if he appreciates that the injury which he intends to inflict on another may cause death and nevertheless inflicts that injury, reckless whether death will ensue or not."

[45] This legal position has been followed in a litany of decided cases. See **Mbabane Tsabedze & Another vs Rex – Criminal Appeal Case No. 29/2011 at page 9.** See also **Malungisa Antonia Bataria vs Rex – Criminal Appeal Case No. 6/2014 at page 18**. See as well **Rex vs Sipatji Mandla Motsa – H/C Criminal Case No. 3/1999 at page 23.**

[46] It has already been mentioned that the deceased was not carrying any weapon when he got assaulted by A1. A1 did not even suffer any injury even though he alleges to have been attacked. He did not even mention the instrument used in assaulting him and the area of the body where the assaults were launched. On the other hand, he himself used a crate to assault the deceased. The nature of the injuries, their number and

location on the body including the state of the crate after the assault shows that the assault was heavy and severe.

[47] The deceased sustained a total of five (5) injuries located on several areas of the body including the upper body and lower torso. Most of all, dangerous areas of the body including the forehead and chest were targeted. By targeting these critical and sensitive areas of the body, A1 was demonstrating that he was reckless as to whether the deceased died or not. Again, to prove that he was reckless, he used a crate (being a utility composed of several planks put together). This was surely a heavy and dangerous weapon if used to assault a human being. A1 hit the deceased several times on different areas of the body including critical areas where death could be reasonably anticipated. He surely had the necessary intention to kill in a form of *dolus eventualis*. It is trite law that *dolus eventualis* suffices as legal intention. See **The King vs Sandile Mbongeni Mtsetfwa – Criminal Case No. 81/2010 at page 43.** See also **S. vs De Bruyn and Another – 1968 (4) SA 498 (A) 510.** It therefore follows that A1 is found guilty as charged with murder. Even as regards the crime of malicious injury to property, this court is inclined to draw an adverse inference against A1 especially in light of the fact that he could not give any reasonably probable explanation in rebuttal of the strong evidence adduced by pw2 against him. He is as well found guilty as charged on that count.

It must be acknowledged by this court that it did not rely on the alleged pointing out evidence adduced. This is because the bush knife allegedly pointed out by A1, was in fact produced by his father according to the evidence of pw3. Even the crate was handed over to the police by pw1.

SENTENCE

[48] It is *trite* 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 attendant 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. This sentencing procedure is known as the triad. See **S vs Zinn 1969 (2) SA 537 (A) at 540 (G).** See also **Rex vs Majahonkhe Major Mazibuko and Another – Criminal Case No. 3/2002 at page 2.**

[49] In this case the court has taken into account that the accused has no previous convictions. He has two (2) minor children to maintain. The court has been informed that he is all by himself in his homestead. It was mentioned in mitigation on behalf of the accused that he acted in anger as he felt provoked by the deceased and pw2. It was alleged that the deceased and pw2 had killed the accused's brother and that they were then threatening to kill the accused person. This court has however considered the seriousness of the offences and their prevalence in the society. The accused person acted in revenge and took the law into his hands in the process. He used a crate to brutalize the deceased and terminated his life.

[50] It is incumbent upon the courts in the face of escalating violent crimes, especially those involving loss of lives to pass effective sentences that will deter not only the offender but also other people who may be tempted to commit similar offences. Taking the law into one's hands and acting in revenge must be discouraged at all times. However, in as much as deterrent

sentences are desirable, the courts must as much as possible strive to pass sentences that will be blended with a measure of mercy and to enable the offender to reform and be rehabilated. See **Ntokozo Dlamini & Another vs The King - Criminal Appeal Case No. 10/2021.** See also **Rex vs Justice Teya Mavimbela – High Court Criminal Case No. 119/1998.**

[51] It must also be acknowledged 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.** It is also trite law that the onus to show existence or otherwise of extenuating factors lies with the trial court. See **Daniel Mbudlwane Dlamini vs Rex – Criminal Appeal Case No. 11/1998.** 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 the assertion that the accused harboured a belief that the deceased had killed his brother and was on course to kill him and pw2. The accused has termed this as provocation by the deceased. It is trite law that provocation is an extenuating factor. See **Rex vs Linda Nkosinathi Matsebula & Another – Criminal Case no. 322/2017 at paragraph 25**. It should however be remarked that the said provocation relied upon by the accused is frail as there was nothing much to substantiate it. In as much as the court has considered same as an extenuating factor, it has attached very little weight to it.

Again, when passing a sentence, it becomes necessary to consider the sentencing range in that given class of cases. The range in murder cases seems to be between 15 and 26 years. In the case of **Rex vs Lwazi Makhanya – Criminal Case No 23/2018** the court sentenced the accused to 15 years for a murder charge. In one of the most serious cases of murder being **Mxolisi Vs Rex – Criminal Case No.42/2012** the supreme court confirmed a sentence of 26 years imprisonment without

and option of a fine for murder. It should however be mentioned that stiffer sentences such as 26 years are reserved for the most serious murder cases.

[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, his interests including those of the society and having struck the necessary balance thereof, this court finds it fair and just to sentence the accused to seventeen (17) years imprisonment without an option of a fine for the murder charge on count 1. On count 2, the accused sentenced to one (1) year imprisonment without an option of a fine. The sentences shall be served consecutively as they were committed as separate transactions. A total of 49 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: Dlamini M.

For The Defence: Dlamini B. for A1 & Hlatshwako A. for A2