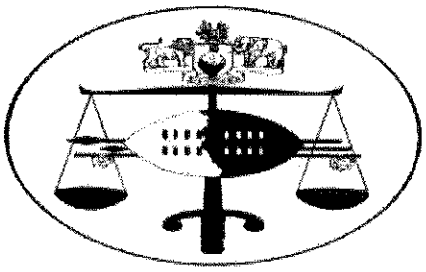

**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

Case No. 41/2020

In the matter between:

**THE KING** **Applicant**

**And**

**MAXWELL NKAMBULE AND ANOTHER** **Respondents**

**In Re:**

**THE KING**

**And**

**MAXWELL NKAMBULE AND ANOTHER**

**Neutral citation:** *The King v Maxwell Nkambule & Another (41/2020) [2024] SZHC 70 (8 April 2024)*

**CORAM** : **T. DLAMINI J**

**Heard** : 20 October 2023

**Delivered** : 8 April 2024

*[1]* *Criminal procedure – Amendment of indictment – Requisites thereof*

***Summary***: *At the close of the crown's case, the crown invoked s.154 of the Criminal Procedure and Evidence Act, 67/1938, and made an application to amend the indictment – the application was opposed by the defence, hence the court had to hear arguments on the application.*

***Held***: *That no prejudice will be occasioned by the respondent and the sought amendment is granted save in respect of counts eight, nine and ten.*

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**JUDGMENT**

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T. Dlamini J

[1] This is an on-going criminal trial in which twenty-four (24) crown witnesses have been led in evidence. The crown thereafter closed its case. It later filed a notice of amendment of the indictment. That was before the defence took to the witness stand. On the next trial date of 04 October 2023, the defence informed the court that the amendment of the indictment is opposed. I therefore heard arguments on this issue on 20 October, 2023. The crown is the applicant in these proceedings and the first accused, Maxwell Nkambule, is the respondent.

[2] A brief summary of the case is that the respondent was arrested with one Senzo Sithole and charges for murder, attempted murder, and contravention of the Arms and Ammunitions Act, 24/1964, and the Immigration Act, 17/1982, were preferred against them. The respondent was charged with eight counts, *viz.*, murder, three attempted murders, three counts of contravening the Arms and Ammunitions Act, and one count of contravening the

Immigration Act. Senzo Sithole was charged with seven counts, *viz.*, murder, three counts of attempted murder, two counts of contravening the Arms and Ammunitions Act, and one count of contravening the Immigrations Act.

[3] At the commencement of trial on 15 July 2020, the crown withdrew charges against Senzo Sithole who is Accused No.2. This was before they pleaded. Senzo Sithole was then introduced as an accomplice witness and testified as PW3. The respondent pleaded not guilty to all the eight charges preferred against him.

[4] In the affidavit filed in support of the amendment of the indictment, the crown states that Senzo Sithole outlined in detail how the offences were committed by the respondent, himself and one Xolani Nkosi who is still at large. The name of Xolani Nkosi does not, however, appear in the murder charge in count one, and in the attempted murder charges in counts two, three and four. It was the applicant's submission that the original indictment only indicated that the common purpose was between the respondent and Senzo Sithole yet the evidence shows that three people acted in furtherance of the common purpose. This is the discrepancy between the indictment and the evidence that the applicant is seeking to correct.

[5] The crown submitted that the charges preferred against Senzo Sithole fell away when it withdrew them yet those charges still appear in the original indictment.

[6] The crown submitted that it is common cause that the name of Xolani Nkosi does not appear in count one (murder) and counts two, three and four

(attempted murder counts) yet he participated in common purpose in those offences with the respondent and Senzo Sithole. Count one states that the respondent and Senzo Sithole are guilty of the offence of murder in that "*each or both of them acting jointly and in furtherance of a common purpose did unlawfully shoot one JOMO KHUMALO with a firearm and did thereby commit the crime of MURDER.*"

[7] The sought amendment is to make the charge to read that the respondent "*is guilty of the crime of murder*" in that "*the said accused person acting individually or jointly and in the furtherance of a common purpose with Senzo Sithole (Accomplice witness) and Xolani Nkosi (who is a fugitive of justice) did unlawfully and intentionally kill one JOMO KHUMALO and did thereby commit the crime of MURDER.*" Xolani Nkosi has been added as one of those who acted in common purpose with the respondent and Senzo Sithole. Also added is that they killed Jomo Khumalo 'intentionally'. The applicant submitted that the element of intention is missing in count one and needs to be inserted to show that the shooting was not only unlawful but also intentional.

[8] In respect of counts two, three and four (attempted murder counts), a similar amendment to that made in respect of count one is also made. The amendment is that the charge reads that the respondent *"is guilty of the crime of attempted murder"* in that *"the said accused person acting individually or jointly and in the furtherance of a common purpose with Senzo Sithole (Accomplice witness) and Xolani Nkosi (who is a fugitive of justice) did unlawfully and with intent to kill shoot"* the complainants who are mentioned therein *"and did thereby commit the crime of ATTEMPTED MURDER.*"

[9] Counts two, three and four are amended in a similar manner and only differ on the name of the complainant in respect of each count. Xolani Nkosi has been added as one of those who acted in common purpose with the respondent and Senzo Sithole, and that they so acted with the '*intention to kill*' as a further addition to the charge. The crown submitted that the allegation that only two people acted in furtherance of a common purpose is wrong because the evidence shows that there were three people involved. It therefore needs to be corrected to indicate that the respondent, Senzo Sithole and Xolani Nkosi acted jointly in furtherance of a common purpose when the three attempted murder offences were committed. The crown also submitted that the wording in the original indictment is wrong as the element of intent is referred as 'intentionally' instead of being referred as *"with intent to kill"*.

[10] In respect of counts five, six and seven the respondent is charged with contravening the Arms and Ammunitions Act. In respect of count five, he is charged with possession of twelve (12) live rounds of ammunitions, whilst he is charged with possession of a .38 special revolver and possession of three (3) live rounds of ammunitions in respect of counts six and seven respectively.

[11] The original indictment states that while the respondent was not the *"holder of a valid permit or license, he wrongfully, unlawfully and intentionally have in his possession"* the above mentioned items *"without a valid permit or license to possess such and thus contravened the said Act."* The amended indictment states that the respondent *"did wrongfully and unlawfully have in his possession"* the above mentioned items *"without a valid permit or license to possess such"*. The word *"intentionally"* has been removed.

[12] In respect of counts eight and nine as contained in the original indictment, the amended indictment shows that the crown has completely removed these counts from the indictment. These are counts preferred against Senzo Sithole alone. The crown submitted that the original indictment reflects that Senzo Sithole is Accused No.2 yet his title changed from that of being Accused No.2 to that of being the crown's third witness (PW3). The crown also submitted that the removal of these counts from the indictment is in line with the withdrawal of the charges against Senzo Sithole yet he still appears as Accused No.2, instead of appearing as the crown's third witness (PW3).

[13] Both counts eight and nine relate to a contravention of the Arms and Ammunitions Act. In count eight, Senzo Sithole is alleged to have, "*whilst not being a holder of a valid permit or license wrongfully, unlawfully and intentionally have in his possession a Black Norinco 9mm pistol without a valid permit or license to possess such and thus did contravene the said Act.*" In count nine, he is alleged to have, whilst "*not being a holder of a valid permit or license wrongfully, unlawfully and intentionally have in his possession four (4) live rounds of ammunition without a valid permit or license to possess such and thus contravened the said Act.*"

[14] In count ten of the original indictment, the respondent and Senzo Sithole are charged with contravening the Immigration Act in that "*upon or about 11th November 2019 ... the said accused persons each or both of them acting together in the furtherance of a common purpose did wrongfully, and unlawfully harbour one Xolani Nkosi whom they knew to be a person who had committed an offence by entering the country unlawfully.*"

[15] The amended indictment now attributes this offence to the respondent only, but acting in the furtherance of a common purpose with Senzo Sithole in harbouring *"Xolani Nkosi whom they knew to be a person who had committed an offence by entering the country unlawfully"*. The original indictment attributed this offence to both the respondent and Senzo Sithole, acting in the furtherance of a common purpose, in harbouring Xolani Nkosi.

[16] In terms of the amended indictment, count ten has become count eight. This is in light of the removal of counts eight and nine from the indictment, hence count ten was made by the crown to become count eight. The amended indictment was filed together with an amended composite summary of evidence. The applicant submitted that the composite summary still refers to Senzo Sithole as Accused No.2 instead of PW3 as the record of the proceedings indicate. It also submitted that the composite summary of evidence therefore needed to be corrected to indicate that Senzo Sithole is the crown's third witness and not Accused No.2 as the charges were withdrawn against him.

[17] It was submitted by the applicant that the amendment is made in terms of *s.154* of the *Criminal Procedure and Evidence Act, 67/1938 (the CP & E Act), as amended.* Section 154 is quoted below:

> (1) If, on the trial of any indictment or summons, there appears to be any variance between the statement therein and the evidence offered in proof of such statement, or if it appears that any words or particulars which ought to have been inserted in the indictment or summons have been omitted, or that any words or particulars which ought to have been omitted have been inserted, or that there is any other error in such indictment or summons, the court may at any time before judgment, if it considers that the making of the necessary amendment in such indictment or summons will not prejudice the accused in his defence, order such indictment or summons to be amended, so far as it is necessary, by some officer of the court or other person, both in that

part thereof where the variance, omission, insertion or error occurs, and in every other part thereof which it may become necessary to amend. (underlining is my own emphasis)

(2) Such amendment may be made on any terms as to postponing the trial which the Court thinks reasonable.

(3) The indictment or summons shall thereupon be amended in accordance with the order of the court and, after any such amendment, the trial shall proceed at the appointed time upon the amended indictment or summons, in the same manner and with the same consequences in all respects as if it had been originally in its amended form.

(4) The fact that an indictment or summons has not been amended as provided in this section shall not, unless the court has refused to allow the amendment, affect the validity of the proceedings thereunder.

[18] The test of whether or not the court should allow an amendment of an indictment is clearly specified in subsection (1). The court is to consider whether or not the amendment will cause prejudice to the accused in his defence. If it will cause prejudice, the amendment is not to be allowed. If however, no prejudice is to be occasioned by the accused in his defence, the amendment is to be permitted by the court.

[19] ***Her Ladyship M. Dlamini J*** in the case of the ***King vs Mduduzi Bacede Mabuza and Another (218/2021) [2021] SZHC 138 (30 June, 2021)*** cites ***Professor SA Strauss et al*** in giving a background to the amendment of an indictment. The writers stated that *"following a sequence of quashing of indictments and charges on the ground that a charge or indictment did not disclose an offence, the legislature promulgated a section which gives discretion to the court to amend the indictment or charge."* This was pre 1959. (see paragraph [12]). A promulgation by our own legislature is in *s.154* of the *CP & E Act.*

[20] The respondent elected not to answer the merits of the case but filed a notice, in terms of Rule 6 (12) (c), to raise the following points of law:

1. The proposed amendment is bad in law and objectionable in as much as it will be prejudicial to the Respondent at this stage of the trial, the Crown having closed its case and the defence having conducted cross examination of Crown witnesses being guided by the indictment as framed.

2. The proposed amendment is bad in law and objectionable in as much as the invocation of Section 154 of the Criminal Procedure and Evidence Act at this stage of the trial is inappropriate.

3. The proposed amendment is bad in law and objectionable in as much as it runs counter to the spirit of The Constitution of 2005.

4. The proposed amendment is bad in law and objectionable in as much as Section 154 was never meant to cater for situations beyond the pleading stage in a criminal trial.

5. The prosed amendment is bad in law and objectionable in as much as its effect would be to start the trial afresh contrary to the trite principle of law that there must be finality in litigation. At any rate the proposed amendment goes beyond the scope permitted by section 154.

6. The proposed amendment is bad in law and objectionable in as much as Section 154 is void for vagueness in view of its intractable language.

[21] I wish to first deal with the issue of the removal of counts eight and nine, which are charges preferred against Senzo Sithole, from the amended indictment, by the crown. In terms of the provisions of *s.234* of the *CP & E Act*, Senzo Sithole is to be freed and discharged from all liability to prosecution for these offences if he fully answers to the satisfaction of the court all lawful questions put to him while under examination. The court has not yet made that determination, and will do so after it has become privy to the evidence to be tendered by the defence as well. The crown therefore, has put the cart before the horse as it doesn't know the attitude of the court on

whether or not it considers Senzo Sithole to have answered all lawful questions put to him to its satisfaction. Senzo Sithole is therefore not yet freed and discharged from liability. The removal of the charges preferred against him is not permitted at this stage, and the amendment of the indictment is, to that extent, refused. The refusal extends to the amended count ten in so far as the count is dropped against Senzo Sithole.

[22] I terms of *s.154* of the *CP & E Act*, an indictment can be amended at any stage of the trial so long as a judgment has still not been delivered. Advocate Maziya for the defence, submitted that a literal interpretation of *s.154* "collides head on with the intention of the legislator which seems to be that this section was meant to apply before the taking of a plea, regard being heard to the context in which the section appears. He therefore urged the court to turn a blind eye to the literal meaning of the wording and adopt a liberal interpretation approach.

[23] In support of the above contention, Advocate Maziya submitted that s.154 appears under Part X and along sections 136 up to 161 which are meant to regulate court procedure before the commencement of a trial. As authority, he cited ***Kellaway's Principles of Legal Interpretation, 1995 Butterworths Publishers, at p.263*** where it is stated as quoted below:

> "... Roman Dutch Law writers, referring to 'headings' to sections of a statute and their relevance to interpretation, stated that **where the text of the law is uncertain as to meaning**, it should be read with the heading which covers it so as to indicate how the text should be understood..." (bold text is my own emphasis)
> (See also VOET "De Statutis" 7.2.1)

[24] He further submitted that these Roman Dutch authorities have been popularized by South African Courts from as far back as 1911, and cited the case of ***Chotobhai vs Union Government 1911 AD 24***, where ***De Villiers CJ*** stated that headings to different portions of a statute may be referred to for the purpose of determining the sense of any doubtful expression in a section of a statute ranged under any particular heading. (Underlining is my own emphasis) This approach, according to Advocate Maziya, was adopted six years later by ***Innes CJ*** in ***Turfontein Estates Ltd vs Mining Commissioner Johannesburg 1917 AD 419 at 431.*** He further submitted that it has been consistently followed and adopted in ***Bhagwan's vs Swanepoel 1963 (4) SA 42 (E) at 43; Van Rhyn vs Du Plessis 1974 (3) SA 605 (A); Mkrola vs Samela 1981 (1) SA 925 (A) at 934.***

[25] What is clear from the authorities relied upon by the defence is that a recourse to the heading in the interpretation of a statutory provision is made when the text of the law is uncertain as to its meaning or has a doubtful expression. In the ***Turfontein Estates Ltd*** (supra) case cited by the defence, ***Innes CJ*** stated that "*Where the intention of the lawgiver as expressed in any particular clause is quite clear, then it cannot be overridden by the words of a heading*".

[26] I find no uncertainty as to the meaning of the text or words used in *s.154*. The meaning is quite clear and certain. The section permits the amendment of an indictment at any time before judgment is delivered. From the submissions made, the position adopted by the defence is that it is unfair and prejudicial to an accused person to allow an indictment to be amended beyond the pleading stage, and worse, after the close of the crown's case.

[27] The Malawi case of ***The State v The Electoral Commission, Ex Parte: Friday Anderson Jumbe & 3 Others, Judicial Review Cause Number 38 of 2014*** is instructive on interpreting and applying statutory provisions. I find it most relevant for this case in light of the submission by Advocate Maziya that the provision is unfair and would result in injustices to the accused person. The court was called upon to determine two issues, viz., whether the Malawi Electoral Commission was entitled under the law to conduct a physical audit of the election results before announcing them, and whether or not the eight (8) days' time limit for publishing election results prescribed by *s.99* of the *Parliamentary and Presidential Act* can be extended by the Commission or the Court or Parliament. The latter question became relevant because there was an agreement between the Commission and political parties to do a physical audit of the election results before announcing them. This necessitated more time than the prescribed eight days for the results to be announced. Section 99 provides what is quoted below:

> *The Commission shall publish ... the national results of an election within eight days from the last polling day and not later than forty-eight hours from the conclusion of the determination thereof ...".*

[28] The first question was answered in the affirmative. The court held that the Commission was entitled under the law to conduct a physical audit of the election results before announcing them. On the second question, the court held that neither the Commission, the Court nor Parliament, can extend the time limit for publishing the election results other than to have the law amended first. In deciding this question, ***Kenyatta Nyirenda J*** of the Malawi High Court quoted ***Unyalo CJ*** of the Supreme Court of Appeal in ***Royal International Insurance Holdings Ltd v Gemini Holdings and Another [1988] MLR 318*** who stated what is quoted below:

*It is trite that the fundamental rule of statutory interpretation, to which all other rules are subordinate, is that where the words of a statute are themselves plain and unambiguous, no more is necessary than to construe those words in their natural and ordinary sense. In such a case the intention of the legislature is best declared by the words themselves.*

[29] His Lordship ***Kenyatta Nyirenda J*** underscored the above principle, and I entirely concur with him, by stating what I quote below:

*"...it is the duty of the court to accept the purpose decided on by Parliament. This applies even though the court disagrees with Parliament. It even applies where the court considers the result unjust, provided that it is satisfied that Parliament really did intend that result."*

[30] His Lordship proceeded to quote ***Lord Scarman*** in the case of ***Duport Steads Ltd v Sirs [1980] 1 WLR 142*** who stated what is quoted below:

*"...in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactment. In this field, Parliament makes and unmakes laws (and) the judge's duty is to interpret and apply the law, not to change it to meet the judge's idea of what justice requires... If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute."*

[31] I agree with Mr. Nxumalo for the applicant who submitted that this is a matter wherein the statutory provision under consideration is clear and unambiguous. It permits the amendment of an indictment at any time of the trial before judgment is delivered. It has been invoked by this court in cases such as that of the ***King vs Mduduzi Bacede Mabuza and Another (supra)*** and ***The King vs Moses Vusani Mvubu, Review Case No.124/2009***. The authorities are clear that where the words of a statute are themselves plain and unambiguous, nothing more is necessary than to construe them in their natural and ordinary sense.

[32] Advocate Maziya's position that the section was intended to apply before the taking of the plea is not in line with the wording of the section. The portion of the section which Advocate Maziya elected to bring to the fore is not the one being invoked in this application. He made reference to the words *"...the evidence offered in proof of such statement..."* in subsection 1 and submitted that these words can only mean the summary of evidence as well as the statements of the various witnesses to be called by the crown. His argument is that the summary of the evidence and statements of the witnesses to be called by the crown are processes that take place before the commencement of a trial. His conclusion is therefore that *s.154* can only be invoked before the commencement of the trial or before the accused enters his plea to the charges.

[33] A careful reading of subsection (1) of *s.154* speaks to four different situations upon which an amendment may be made. This can be done where *there appears to be any variance between the statement therein and the evidence offered in proof of such statement; or if it appears that any words or particulars which ought to have been inserted in the indictment or summons have been omitted; or that any words or particulars which ought to have been omitted have been inserted; or that there is any other error in such indictment or summons*. These are the four situations under which an amendment can be made in terms of subsection (1) of *s.154*. Advocate Maziya appears to have focused on the first situation yet the amendment is made in accordance with the second and third situations, *viz., if it appears that any words or particulars which ought to have been inserted in the indictment have been omitted; or that any words or particulars which ought to have been omitted have been inserted.*

[34] On the basis of the considerations made in the paragraphs above, the position and submission of the defence that the amendment contemplated in *s.154* of the *CP & E Act* is to be made before the commencement of trial or before a plea is tendered by the accused is rejected by this court. The amendment can be made even after the crown had closed its case, so long as the amendment would not cause prejudice to the accused. There is no legal reason why this court should turn a blind eye to the clear and unambiguous wording of *s.154* and allow the literal rule of interpretation to be overridden by the words of the heading, as Advocate Maziya suggested

[35] It was also submitted on behalf of the defence that permitting an amendment of the indictment to be made after the crown had closed its case would run counter to the constitutionally non-derogable right to a fair hearing prescribed under sections 21 and 38 of the ***Constitution of the Kingdom of Eswatini Act, No.001/2005 (the Constitution)***. Section 21 *inter alia* provides that a person shall be given a fair and speedy hearing; be informed in sufficient detail of the nature of the offence or charge in a language he understands; and given adequate time and facilities for the preparation of the defence. Section 38 provides that there shall be no derogation from, *inter alia*, the right to life, equality before the law and a fair hearing.

[36] I entirely agree with the Constitutional Court of the Republic of South Africa in the case of ***S v Basson 2005 (1) SA (CC)*** that the criminal law plays an important role in protecting Constitutional rights and values in our Constitutional State. The prosecution of murder is an essential means of protecting the right to life which is also not derogable in terms of *s.38 (a)* of

*the Constitution*. Acquitting the guilty because of a technical mistake in the drafting of the indictment would be a failure of the justice system, and would undermine the non-derogable right to life as well. The State has a Constitutional obligation to prosecute those offences which infringe the right to life. Section 154 was included, in my opinion, by our Parliament to ensure that criminal trials are conducted in accordance with the prescripts of the law and not overridden by mistakes in drafting indictments.

[37] Advocate Maziya submitted that 'the facilities' envisaged in *s.21* of the *Constitution* include an indictment. This is so because the indictment enables the accused to prepare his defence. It therefore means, according to Advocate Maziya's argument, that the accused has a right to be supplied with this facility before commencement of trial so that he would be in a position to formulate his defence. He submitted that it is this indictment that informs the accused of the defence that he is expected to formulate and put to the crown witnesses. He therefore argued that if the amendment would be allowed now after the defence had closed its case, it would prejudice the accused in that the testimonies of the witnesses who were not cross-examined would be accepted as unchallenged. He added that this unchallenged evidence had no need to be challenged because it was not in proof of the charges as framed in the original indictment.

[38] In my considered view, the respondent is fully aware, and has always been fully aware, of the facts upon which the amendments are based. In respect of count one, the amendment only added the name of Xolani Nkosi as another person who participated in the commission of the offence. The evidence of the crown witnesses mentioned the name of Xolani Nkosi throughout the trial.

In my opinion, nothing should surprise the accused about the addition of Xolani Nkosi in the indictment because Xolani's name was given in evidence in proof of the case against the accused.

[39] The charge of murder preferred against the respondent is clear and details that he faces a murder charge in that he unlawfully shoot Jomo Khumalo with a firearm and acted either alone or in furtherance of a common purpose with Senzo Sithole. Intention is an element of the offence that had not been stated in the indictment but that did not stop the defence from cross-examining the witnesses who tendered evidence about Xolani Nkosi.

[40] I take note that as a matter of fact, any association between the respondent and the said Xolani Nkosi was denied by the defence. Crown witnesses including Senzo Sithole, PW12 (MTN employee) and PW23 (police chief investigator) were extensively cross-examined on the association that allegedly existed between the respondent and Xolani Nkosi. So intense was the cross-examination such that PW12 was recalled to the witness stand to clarify phone calls that were made between the respondent's cell phone number and a South African registered cell phone number on 10 November 2019 at around 20:13 hours. These phone calls appear in EXHIBIT 'H'.

[41] Again when it was time for the police chief investigator, PW23, to be cross-examined, the defence motivated an application that was agreed to and granted. A request was made for a record of the proceedings to be transcribed and referred to because PW23, as the police chief investigator, will be cross examined even on the evidence that was tendered by all the other crown witnesses. It therefore is disingenuous, in my view, for the defence to submit

that it did not cross-examine some other crown witnesses concerning the role played by Xolani Nkosi because the original indictment did not include Xolani in the commission of the offences preferred against the respondent.

[42] The court would have been greatly assisted in the determination of the prejudice to be occasioned by the respondent had the defence specifically mentioned the witnesses they would have cross-examined more, or would have not allowed to leave the witness stand without being cross-examined.

[43] It was submitted on behalf of the respondent that there is no justifiable reason why the applicant seeks to amend the indictment so late in the proceedings given that charges against Senzo Sithole were withdrawn in July 2020. The inescapable inference, according to the respondent's representative, is that the crown was investigating its case during the course of the trial. Now that the crown has realized that the evidence led is not in line with the charges as framed, it seeks to effect the amendment in order to get a conviction since the witnesses have already gone without being cross-examined.

[44] My position regarding the defence submission that crown witnesses have already gone without being cross-examined is articulated in paragraphs [40] and [41] above. I wish to add that it is in the nature of amendments that by seeking to make them, the crown will always be hoping to lower or reduce the chances of an acquittal, and conversely, increasing those of a conviction.

[45] It is my finding and conclusion that there is no prejudice to be suffered by the respondent from the amendment of the indictment that is being sought by the applicant. The name of Xolani Nkosi is not a new name in these proceedings

but has been mentioned by the witnesses several times, particularly the accomplice witness Senzo Sithole from the commencement day of the proceedings. Evidence in the form of video footage extracted from the homestead of the respondent was played before this court and the said Xolani Nkosi was pointed out by the accomplice witness whilst they were at the homestead of the respondent. The accomplice witness testified in detail how they went to pick up Xolani Nkosi from the Republic of South Africa and how they executed an instruction given to them by the respondent to kill Jomo Khumalo. There is therefore nothing that should prevent the name of Xolani Nkosi from being added to counts one, two, three and four of the indictment.

[46] It is also my finding and conclusion that no prejudice will be suffered by the respondent when the word intentionally is added to count one. Intention is a requisite to be established in a charge for murder. Intention is proved by evidence and the proof is not, in my opinion, validated by the fact that it was stated in the indictment because an indictment for murder presupposes the possession of intention to kill.

[47] On counts two, three and four, it is my finding and conclusion that replacing the word *"intentionally"* with the words *"with intent to kill"* does not change the particulars for the charge of attempted murder. The offence actually presupposes that the intention to kill was present.

[48] On counts five, six, and seven, the deletion of the word *"intentionally"* from the indictment will not prejudice the respondent as nothing is being added.

[48] On counts five, six, and seven, the deletion of the word *"intentionally"* from the indictment will not prejudice the respondent as nothing is being added.

[49] The removal of counts eight and nine as per the amended indictment is refused as it is irregular. The removal of these counts is pre-maturely executed by the applicant when it actually is the court that must decide and then pronounce on whether or not the accomplice witness is freed and discharged from liability. This is also true with count ten in which the offence is now attributed to the respondent alone yet it previously was attributed to both the respondent and Senzo Sithole.

[50] For the above, I allow the amendments sought in respect of all the counts but enter a refusal in respect of counts eight, nine and ten.

**T. DLAMINI**
**JUDGE**

For applicant: Mr. M. Nxumalo
For respondent: Advocate L. Maziya instructed by Nzima & Associates