



IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter between:

Case No. 213/2021

THE KING

VS

1. MDUDUZI BACEDE MABUZA

2. MTHANDENI DUBE

Neutral citation : *The King v Mduduzi Bacede Mabuza and Another (213/2021) [2021] SZHC (, 2023)*

Coram : **M. Dlamini J**

Heard : **3rd March, 2023**

Delivered : **1st June, 2023**

common purpose : *where more than one persons set out to commit a crime, in the event their purpose is achieved, each perpetrator's unlawful conduct shall be imputed to the other [5]*

Constitution : *The constitution is the cornerstone upon which the three arms of government are established. It is the foundation*

which holds firm the State as it were. In the language of constitutionalism, the constitution is the grundnorm.[46]

Criminal Procedure and evidence : Failure to put the accused's version on the Crown's witnesses is viewed by the courts as an afterthought if later advanced in defence. [93]

Summary: The two accused persons served before their arrest as members of the House of Assembly. They stand arraigned in the main charge for the contravention of section 5(1) read with section (2)(2)(a)-(d) and (i) of the Suppression of Terrorism Act 2008 as amended, two alternative counts under the Sedition and Subversive Activities Act of 1938 and two counts of murder. Accused No. 1 is, in addition, charged with contravention of Regulation 4(3)(b) read with Regulation 4(8) of the Disaster Management Act, No: 01 of 2006. They each entered a plea of not guilty in respect of all the charges.

Common cause

- [1] Prosecutions' witnesses from PW1 to PW13, PW37, PW42, PW53 and PW54 all testified on various damages caused mainly through combustion, vandalism and despoliation at the hands of protestors. Each witness testified on a number of different scenes from the other occasioned in various parts of the Kingdom. Each witness tabled before court a photograph album of the damage observed. In all the four regions, none was spared from such violence. The evidence adduced at the instance of prosecutions by the seventeen witnesses related to havoc observed throughout the country post 24th June, 2021. There is further the evidence adduced by individual complainants who testified on various properties lost at the hands of demonstrators. These were PW26 and PW41,

PW27, PW28, PW29, PW30, PW31, PW33, PW35, PW38, PW49, PW50, PW51, PW55. By reason that all these witnesses were not subjected to cross-examination and the respective photo-albums were admitted without any objection, this evidence is common cause. The court stands to accept it therefore.

[2] It is not in dispute that the two deceased persons mentioned in Counts 2 and 3 respectively, firstly, were at the scene, namely, Nkwalini or Hilltop, Mbabane, Hhohho region on 29th June, 2021. Secondly, that the deceased were part of the protesters. Thirdly, they died as a result of a motor-vehicle passing through that route. Fourthly, the accused arraigned under Counts 2 and 3 were not at the scene of the accident or part of the protesters. The sketch plan drawn by PW23, Constable Fano Hlatshwako, is evidence of how the accident that led to the death of the two deceased persons transpired. The autopsy reports in respect of the two deceased persons by Dr. R.M. Reddy (PW24) is evidence of the injuries sustained by the two deceased and the cause of their death.

[3] The Crown presented four (4) videos during the trial of the accused persons. The identity of the persons appearing and making speeches in each respective video is not in dispute. Each video was correctly down-loaded from Face Book to the digital visual disc (DVD). The authenticity of what was down loaded is not in issue.

Common purpose

[4] **C.R. Snyman**¹ described the doctrine of common purpose by giving a clear example whose summary is that X sets out to commit a crime of murder against Y. If he is alone, it would be easy to ascertain that Y died as a result of a fatal blow inflicted by X. However, because the law insists that there must be

¹ "Criminal Law" 6th Ed. LexisNexis 2014, at pages 255-256

evidence of fatal blow on Y by X for the charge of murder to be sustained, X may decide to organise a group of persons to kill Y, for instance, by pelting him with stones. In such an instance, it would be difficult to prove whose stone exactly among the group inflicted the fatal blow on X. In fact X might decide not to throw any stone against X. He might take the role of calling out Y who would be in the comfort of his house to come out for the group to attack and kill him. In this way, X may be acquitted. Again among the group that pelted Y with stones, it would be difficult to show whose stone exactly inflicted the fatal wound. Put in the legal parlance, it would be difficult to establish a causal link in terms of the doctrine of causation. At the end, each person may be acquitted and yet the justice of the matter would be that Y died in the hands of the group including X who stood by and called out to Y. The administration of justice would be compromised under the doctrine of causation in instances where the crime was committed by a group. In order to address such injustice, the law provides for the doctrine of common purpose.

- [5] The doctrine of common purpose provides that where more than one persons set out to commit a crime, in the event their purpose is achieved, each perpetrator's unlawful conduct shall be imputed to the other. So that in the group which sets out to kill Y, X would be deemed to have inflicted the fatal wound even if the actual evidence is that X never threw any stone against Y. His role of calling out Y in order to exposed him to the larger group would be akin to inflicting the fatal wound if the larger group succeeds in killing Y. Similarly, in the larger group that pelted Y with stones, no individual would escape conviction on the ground that the stone he threw against Y could not have caused the fatal blow. This doctrine is premised on the presumption that each perpetrator gave the other an implied mandate to commit the intended crime. Writing on this doctrine

under the American law, Dressler pointed out that an individual participant to the crime forfeits his identity.² He is, in other words, yoked together with all the participants and therefore accountable for each participant's unlawful conduct. It is unnecessary that the perpetrators seat down and plan on their unlawful conduct. Common purpose may arise even at the spur of the moment or spontaneously.³

Analysis of the evidence

Indictment

[6] Count 1 reads: *

“Accused 1 and 2 are guilty of the offence of contravening section (5(1) of the Suppression of Terrorism Act 2008 read with Section 2 (2)(a) to (d) of the Act as amended.

In that during the month of June 2021, in the Hhohho, Manzini and/or Lubombo and/or Shiselweni Regions, the said accused persons, each or all of them acting jointly in the furtherance of a common purpose with Mduduzi Magawugawu Simelane (who is fugitive of Justice) did unlawfully commit a Terrorism Act by committing an act, attempted act or threat of action to wit by encouraging people in public statements to disobey the lawful banning by the Government of Eswatini of the delivery of petitions and/or to reject the appointment of the Acting Prime Minister and to thereby encourage civil disobedience which had one or more of the following intentions and/or consequences:

1. Death or bodily injury and/or

² See also N¹ at page 258 foot note 22

³ N¹ at page 258 para 4

2. *Serious damage to property and/or*
3. *Serious risk to the health of the public or a section of the public and/or*
4. *Endangering the lives of people and/or*
5. *Was designed or intended to disrupt the provision of essential services, such as police and/or civil defence and/or medical services.*

WHEREAS, as a consequence of the actions of the Accused, there were riots in all the Regions in the country. These riots caused loss of life, bodily injuries to people and destruction of private and public properties.

*And thus, the Accused persons did **CONTRAVENE SECTION 5(1) OF THE SUPPRESSION OF TERRORISM ACT 2008 READ WITH SECTION 2(2) TO (D) OF THE ACT AS AMENDED.***

FIRST ALTERNATIVE TO COUNT 1

*That Accused No.1 and Accused No.2 are guilty of **CONTRAVENING SECTION 4(a) READ WITH SECTION 3(1) (a) - (e) OF THE SEDITION AND SUBVERSIVE ACTIVITIES ACT, 1938***

In that on or about the 24th day of June 2021 and at or near Summerfield in the district/region of Manzini, Accused No.1 and Accused No.2, committed an act and /or acts with seditious intention to wit, by encouraging people in public statements to disobey a lawful banning order issued by the Government of eswatini and/or to reject the appointment of the Acting Prime Minister and by so doing:

1. *Brought into hatred, contempt or excited dissatisfaction against the person of His Majesty the King, and/or the Government of eSwatini as by law established; and/or*
2. *raised discontent or dissatisfaction amongst His Majesty's subjects or the inhabitants of eSwatini; and/or*
3. *brought into hatred or contempt or excited dissatisfaction against the administration of justice in eSwatini; and/or*
4. *Promoted feelings of ill-will and hostility between different classes of the population of eSwatini*

And thus the Accused persons are guilty of CONTRAVENING SECTION 4(a) READ WITH SECTION 3(1) (a) - (e) OF THE SEDITION AND SUBVERSIVE ACTIVITIES ACT, 1938.

SECOND ALTERNATIVE TO COUNT 1

That Accused No.1 and Accused No.2 are guilty of CONTRAVENING SECTION 4(b) READ WITH SECTION 3(1) (a) - (e) OF THE SEDITION AND SUBVERSIVE ACTIVITIES ACT, 1938

In that on our [sic]about the 24th day of June 2021 and at or near Summerfield in the district/region of Manzini, Accused No.1 and Accused No.2, committed and act and/or acts with seditious intention to wit, by encouraging people in public statements to disobey a lawful banning order issued by the Government of eSwatini and/or to reject the appointment of the Acting Prime Minister and by so doing uttered seditious words and thereby:

1. *brought into hatred, contempt or excited dissatisfaction against the person of His Majesty the King, and/or the Government of eSwatini as by law established; and/or*
2. *raised discontent or dissatisfaction amongst His Majesty's subjects or the inhabitants of eSwatini; and/or*
3. *brought into hatred or contempt or to excite disaffection against the administration of justice in eSwatini; and/or*
4. *promoted feelings of ill-will and hostility between different classes of the population of eSwatini*

*And thus the Accused persons are guilty of **CONTRAVEING SECTION 4(b) READ WITH SECTION 3(1) (a) - (e) OF THE SEDITION AND SUBVERSIVE ACTIVITIES ACT, 1938.***

Question

- [7] Turning to the case at hand under Count 1, the first port of call is to ascertain if there is evidence of the words inserted at the instance of the Crown as appears in the Count. These words are: “*encouraging people in public statement to disobey the lawful banning by the Government of Eswatini of the delivery of petition; reject the appointment of the Acting Prime Minister; encourage civil disobedience.*” The consequent question is, did such conduct result in any of, “*death or injury; serious damage to property; serious risk to the health of the public or section of the public; endangered the lives of people; and/ or was designed or intended to disrupt the provisions of essential services such as police and/or civil defence and/or medical services?*”

Crown's case – Count 1 and two alternative Counts

[8] The Crown relied heavily on the audio-visual video recordings which were played in court during trial. Their authenticity was not in issue. The characters therein were also not in dispute as already highlighted under the sub-heading 'common cause.' I must point out that on 7th December, 2021 both Counsel for the Crown and the Defence applied and agreed that the videos be relied upon instead of the transcripts of the videos.

[9] The first video that the court listened to was of a meeting that took place at S n' B Restaurant in Matsapha. It was the first meeting held at S n' B Restaurant. Accused No. 1 spoke as follows:

"As members of Parliament, may we first of all start by greeting the whole nation, those that are within the borders of the Kingdom and outside and as our supporters and our followers and the entire nation in different spheres. I'm saying let me take this opportunity as a Member carrying the mandate of the Swazis. [1]"

We have come to give the Swazis the true and real state of affairs. This follows that there are things we need to utilise but since Parliament this days is not functioning and as we speak today, our Parliament is not there. It sat for one day and was closed sine die. [2]"

As we sat yesterday, we got many messages that were circulating wherein the Acting Prime Minister published in the radio citing our names saying that we were misleading the nation. We are misleading the nation as we boys or messengers, sent by the nation are going around hunting the truth for the nation inside Parliament? He said we are misleading the nation. [3]"

We are now here to set the record straight to the nation. We are saying beautiful Swazis, it is normal when you are constructing something, there are those who would object to what you are doing. We should take note that what makes people to raise the objection is the truth. This is my second term in Parliament. I completed my term of five years. I was still learning a lot of things. I came to discover that there are things that when you are a Swazi have come for, you must make decisions for the benefit of the country. What has made us to stand up in this manner is to request on behalf of the nation for a Prime Minister elected by them.[4]

We have set down and noticed that the one who came by appointment does not become a Prime Minister for the nation or Swazis. He does not serve the interest of the Swazis. He finds himself having to serve where he comes from. He forgot about the people. Therefore as pioneers of the people who have sent us, we have decided or seen it proper that we should speak this, no matter our speaking will cause challenges to our lives and our families and those who support us.[5]

We found it apposite to stand up and speak for Emaswati. Therefore, I'm saying to you beautiful Swazis, we cannot mislead you. What we are talking about is something we know. As you see all those who defend, even if you can read the Sunday Times, anyone who has defended and check who he is. It is those who benefit through the appointing system. Even if you can go to those who were commenting on yesterday's newspaper. They benefit from the appointments. So we are saying we who have been elected by Emaswati, the Parliament of Eswatini should be similar to all other parliaments. It should be a fully-fledged parliament just like all other parliaments. Everyone in the political position in Eswatini should be a person of the will of the majority. That

is our aim to be here. Either by political parties or on individual basis, we have no problem with that.[6]

What we have a problem with is that Emaswati we should have a consensus. Those who are in authority should allow the Swazis to exercise their right to democracy to elect a person who will lead in their government.[7]

I'm speaking beautiful Swazis. I would be making a mistake as an Honourable of Hosea who for so many years of my life I do not know how to lie. We have come to set the record straight that I, myself, the newspaper published on Sunday which had a headline which was confusing the people saying that we do not want political parties. No. That is not the truth.[8]

What we are saying, we are requesting a Prime Minister who has been elected even Ministers who are there should be ministers who are elected. Swazis, may I tell you this, I am elected even if I can jump and be happy and host parties but when I eat, I remember those who elected me. So this is the first advantage of having an elected Prime Minister. I am elected. When you toyi toyi, I want to know what the Swazis are complaining about. This is the second advantage. As when I set there I will get to know what you are complaining about is genuine or not.[9]

Swazis, when I go to legislate, I will legislate upon laws that will benefit the country. [Inedible][10]

They want their own Prime Minister. Let's say that is not true. But I have been sent by the Swazis. They sent me to hunt. They gave me a knobkerrie. The instruction is for me to go and hunt a game. It is my mandate to go and hunt and come back with the game that will benefit the Swazis and the economy of the country. So when I have arrived there even if it was not the true Swazis like

he is saying I don't have a problem coming back to tell the Swazis that the game you instructed me to go and hunt I can't find it or capture it because there is a bridge that has been put before me so may I request your cooperation or assistance so that we can remove the bridge in order to capture the game. So the economy, beautiful Swazis, it is the duty of Parliament, the duty of Government and everyone in authority to make laws which will help.[11]

As of now, I don't want or have come to say what is happening in Parliament. But what has made me to stand up and fight for what is being wanted by the Swazis is that in Parliament there are Members of Parliament who are labeling us as sell-outs yet they are the ones who are sell-outs against the Swazis. They sell out Swazis.[12]

Even if we are legislating and we don't agree, there is what is called a caucus. This is where Swazis are buried. This is what made me to stand up and say it is not good that when you stand up to make laws and when we see that this law does not suit the Swazis or the current generation, then it is said, 'Go to the caucus.' There is a lot I can say pertaining to that. But what I understand, beautiful Swazis, we went to hunt. We do not want war. We don't want bloodshed or anything. But we want that each and every Swazi should give us an ear, listen to what we are saying and support what we are saying. Because what we are saying is not ours but is for changing the country.

[13]

I have given an example. May I make an example. There was a pot-hole this side of Malindza. The pot-hole in 2013, a kombi got into the pot-hole and consequences got involved in an accident with another vehicle. Many people died there. A lot of people died there about thirteen who died on the spot. After

the death of these people and because this Prime Minister was not elected, he couldn't run to the scene to check what has caused the death of the people. Yet in the other countries when there is such an incident, you see the leader descending from the seat running to see what is happening. Today, in 2021 the same pot-hole another vehicle got into the pot-hole. It is not yet closed. Who exactly is going to close the pot-hole as our government can't go to the people. Our government resides in Mbabane. Our government put a fan next to him whenever it is talking and is resident in Mbabane.[14]

Then other people died. It is then that they stood up because many lives were lost. We want to be a government that will be called and we respond. We want to be the government that will be called and go.[15]

We want to correct the Prime Minister. We are not saying the Swazis should elect us. We are saying the Swazis should get freedom. If he says the Swazis want what he is saying we can request for a platform to vote for what he is saying or what we are saying. They will choose what they want. That platform must be confidential. It should not be called the Sibaya (cattle bye – People's Parliament) and say a person should raise his hand. Take the boxes, like we do when we conduct elections and people should vote for what they want. Then we will get the answer how the Swazis will want to be governed. We are ready to be the boys of the Swazis until they get what they want.[16]

I say with those words, Swazis, let us not be confused. As Honourable, we have several years. We have seen things. We cannot mislead you. We can request from government who is in authority or in power who is now mandated by the constitution because we don't want to run away from that. The Constitution which is referred to by this person was designed by the Swazis that the King should have the power above it. We are not disputing that. What we

are saying is let us go back and review the laws that the Prime Minister should descend down like rain. Let us go back and review because our vehicle of democracy comes from the Constituencies and moves. The Constituency Council is elected by the majority. The Constituency headman is elected by the majority. Member of Parliament is elected. It is still the majority. When we come to the Minister, 'Sesiyasuka manje sesibeka bo Ministers. Sekukhetfwa Ndvunankhulu sekusuka umhlolo – we then appoint Ministers. When it is the election of the Prime Minister, then the unthinkable happens.' That is when we cry and say the Prime Minister is descending down to us like rain and seat on the chair – Prime Minister wehla njengemvula ahlale esitulweni. He is to lead the democracy. You cannot deliver when paired with a donkey and a mule as they are not of the same size. When I say mule and donkey, what do I say, Swazis? Those who know this, know it. The mule is taller than a donkey. So if the Prime Minister descends like rainfall, he finds himself a mule on top of us. We are now the donkeys because we came from the people. He feels that he comes from a hand which is above the law. So you cannot tell him anything. 'You will listen to me to what I'm saying. All that I'm saying, accept it. If you don't want it, leave it.' [17]

Beautiful Swazis, let the law be made in Parliament and end in Parliament just like all else. Let us not be that the law be passed in Parliament. It goes somewhere and it comes back having been changed. This is not democracy. We are requesting that the law be made in Parliament so that the elderly are paid in time. So and so gets whatever in time. It should not be a situation where the law has eyes. Then if it serves our interest, we legislate on it. [18]

Therefore, beautiful Swazis, as Members of Parliament that have been elected, we request that everyone in the House, if he is a mule, let him be a mule and if he is a donkey, let him be a donkey.[19]

So, I'm saying let me thank you Swazis. I may not know. To those offended, I say our sincere apology. What I'm saying before God and the world, whatever I'm saying, I will stand by it whenever. There is no day wherein I will backslide and sell you out. No matter how things can be very difficult. These days different things are happening. People are having this and that. But we are determined not to go back.[20]

I'm saying we are determined not to go back, to fight for you. The Swazis will be free. There would be freedom of speech. To end the killing of people where no one is arrested. End rape of people where no one is arrested. To end all the bad things which you find that some people are untouchable in the hand of the law. Therefore, I'm saying may the Lord bless on that amen.[21]

[10] Accused No. 2 also spoke. He stated:

*"We greet the Swazis. We are thankful that God has kept us that we should come even today to address the issue of the Honourable Deputy Prime Minister, the Acting Prime Minister to come out and use the national radio; that he would talk bad about us Honourable that we said speaking on behalf of the nation. We say let us clarify that as honourable, **the three of us**. Even if they have so much slandered us, even if they continue to slander or derogate us, we do not change from what we are saying. There is one thing a person, if you want to kill or distabilise that person, you remove his powers to be able to ask questions. So we are saying, Swazis, let us not lose our strength to ask if this is in this way, how could it be rectified? [1]*

*We honourable are of the view that having heard the views of the people, living with the elderly, living with the mothers, the youth and from our own observations that things are not done in order in the issue that the Prime Minister is chose the way he is. We see the need that same be rectified so that it be made possible that the **Prime Minister be elected by the people. Why do we say this?** It is because there is **no accountability on the part of the Prime Minister to the nation.** Especially when we talk about accountability, we refer to the tax payers' money. When we use it, we should be accountable to the people. With regard to utilizing those finds, it was spent here and whether it was necessary. As we speak, there is an issue with International Convention Centre. It transpired that there were toilets that were constructed for E280 000 each. We did not hear the head of Government standing up saying they were also surprised that there is a bathroom construction for E280 000 or saying, Swazis within two or three months we will be coming back to you with a report saying what has happened. Even today, none comes back saying how do you justify E280 000 when constructing a toilet. What we know is that you construct a whole house with E280 000.[2]*

This is what we are advocating for that we should have a Prime Minister whom when we ask this, he will respond. We see projects being overpriced. Even the International Convention Centre started with a low figure. Today it is escalating and it is not justified on how it is escalating. We are talking about other roads that are under construction. They start with a low figure and the figures escalate. They come with designs that have been added causing the project to escalate. That is why we want the Prime Minister to explain how the prices are reached. When you arrive at this price, exactly how much does your cement costs? We don't see government coming up saying there is somehow

abuse of State funds. That is what we are advocating for. Let us have a Prime Minister whom when we ask how the State's funds was used, he would explain, with regards to State's funds this is this and this.[3]

I will come to the projects that escalates and the debts we get into as a country. We get into the debts because we are failing to control expenditure with regards to other monies channeled. As we speak there is a budget for the King's office which is over E500m. Each time we don't get a report on what the E500m has been used for. So, we say we want a Prime Minister who will call an officer from the office and account what the E500m has been expended for. If there is an overspending, we should get an opportunity to ask. We may also say reduce this so we can have enough money to pay the elderly. Salaries, at least, should reach E1000 or E1200 and grant for the disabled, increased to E600 – E700. Money that would pump even the population because currently the strategy that we use as Government is not one we see can yield positive results in the next fifteen to twenty-five years. Why? There is a challenge in population. Our population needs to be pumped. How do you pump a population? By child support grants. So that when we hire foreign investors, there is a ready population. Those who want to invest billions in the country must see there is a population that is ready to support things that are produced or manufactured before being exported. So that is what we are advocating. [4]

So, we see money failing to be distributed evenly. It is sitting within a few minority. We see our education system being destroyed. How is it destroyed? It is being destroyed by the Honourable like the Acting Prime Minister. They are old. They can't forecast i.e. see where future jobs for our youth are. We are talking about technology. The technology will enable us to take the whole world. Jobs are available there. They would involve agriculture. Then we come and

we see the Head of Government not wanting to come with a proper plan that would show us that cellphones within the fifteen, ten or seven years we would be producing them here at home. So that they could be purchased within the country and also televisions that would be produced in the country, sold in the country and export them into other countries. We see ourselves not focusing much on programming and coding. As a country being able to support our children at secondary and high school. We advocate that we cannot just sit and watch when we see that the manner in which we can function and conduct elections to be the way that will make Swaziland to be proud of tomorrow.[5]

Moses was called alone. He was called for the children of Israel in Egypt. We have been called by God. Where has he called us? To open the minds of Swazis. We know that our education system together with the system that we have, political system of Constituency has sabotaged the minds of the people. They take advantage that the people do not have exposure. They take advantage that the people have not been well educated or trained. People have not been well educated on how they should govern themselves while at school level and how their taxes should be used while at school level. So ours is that we should go outside and open the minds of the people and teach the people that when we talk about governance, this is the governance that is expected. [6]

We know that our mothers and fathers in the past were not so well educated. What they committed themselves was because they were not so well educated or so open minded because of the environment they were living in at that time. So that if there is need, we can review the Constitution so that it can align with the current generation. We are guaranteed that we shall see our young people earning a better, being employed. Our children in the manufacturing industry have a minimum wage that is sound and teachers earn

better salaries. Police and soldiers and all civil servants and those in private sector earning better. We advocate for a political system that would allow for the economy to be driven by the public sector.[7]

We see what is happening. We see government leading the way, putting money, building hotels, pumping money. Yes, it is supposed to happen. But what we see government is moving very fast. We don't see many hotels emerging that are privately owned or private enterprises that are privately owned. So that is why we are saying let us stand up so we would open the minds of the Swazis. We want our fellow brothers who are in South Africa to return so that they can work here at home. The transport or trucking business should be resuscitated and function well. So we can be able to do the mining of coal. In that transport industry, our brothers in South Africa should be able to come and work at home. Mining sector, we should make it function in the manner that the jobs that shall be created shall be able to bring all the Swazis that are outside the borders. We are requesting those Swazis that are outside the borders who have skills in science and other sphere that are there to be ready to come back home to resuscitate the economy of their country.[8]

Swaziland has many opportunities. The only challenge is the political system. More specially as Swazis, we don't feel or perceive the government as our own. We have seen the government working, debating some Bills which were negotiated by the Prime Minister and we, as a majority, we said the Bill must not proceed. Why are we building new Parliament? Why do we put ourselves in debts? We are already in many debts. On the other hand, we are failing to have a strong tax base. When we refused that the Bill should not proceed, we saw the Prime Minister cornering us saying we should pass the Bill to build Parliament.[9]

So this is not the Prime Minister who is working for the people in the manner he is working now. We as Swazis want to feel we have the right and be given the full right that the Prime Minister who is elected by us who will be accountable to us.[10]

Thank you very much Swazis. May I also highlight that the Honourable Deputy Prime Minister is using the national radio to attack us as Honourable. He cannot be able to defeat the power of the internet. He cannot overcome the power of social media. We have experience in working with the social media and its power. Do not be surprised. Even if they look down upon us, we are on face book. We know how powerful social media is. Those that are on national marketing know that if you use the word of mouth, how powerful it is. We shall use a word of mouth and use social media. What we have, we shall sell or spread to many people in a short space of time.[11]

We know that the Honourable would come out and use chiefs so that the mind opening of the people cannot reach them, to make sure that such a message do not reach the people or elderly. But our grannies, we reside with them in our homes. It is our duty to open their minds so that they can see a Swaziland with a future.[12]

We as the youth, they look down upon. It is our duty to go out there and open our mouths to our grandfathers, grandmothers and sisters with whom we reside in our homes to give them a picture of Swaziland where we will see small business people being supported. By that money would be circulated and the Inner Council getting some salaries, moving from their homes to deliberate on the peoples' issues. Chiefs' kraal would be fenced and have clean water. That is what we are.[13]

We love the King and want him to be protected, be spared from all that is happening and that he is being painted. The King knows. He went to Uganda where he saw the Kabaki Kings how well they are catered for.[14]

So as people who have seen outside, we know how Kings are catered for. So our King will continue to be head of the country but we will continue with the work of the country. We will be building what he would be proud of in the next fifty years.[15]

We are ready that our population rise up to five million. We have strategies to pump it so we can attract foreign investors, create many jobs and make our tourism industry to perform well. We know what we are to do. It is not that we are confused in what we want to do. We are visionary three Members of Parliament. We know there are others in the House who are as visionary as us but they need to overcome fear. With fear, we cannot lead Swaziland to a promised better Swaziland of the first world status. We need to assist the King to attain that status. Thank you.”[16]

- [11] The next speaker was Mduduzi Magawugawu Simelane. He gave a very lengthy speech. Having ended his speech, Accused No.1 then invited Accused No. 2 to address the platform for the second time. Accused No. 2 spoke as follows:

“In conclusion as I add the last thing that we had a problem after COVID had surfaced. We had a problem that the price of petrol, electricity and other commodities have gone up as well in the shops. Salaries have not been raised. So, we are getting salaries that are suppressed in the sense that all the things that are up are drawing from the same salary that has not increased. Which means even if I was saving E500, I cannot save E500, will save E100. So, what does that mean? It means life no longer has a meaning. That is the reason why

we advocate for a Prime Minister who will be elected by the people. That Prime Minister will be in a position to see that when the situation is like this, he will then be in a position to see that the salaries of the people will have to be increased. He will speak to the private sector so that they raise the salaries. So that will make a person to enjoy the life God has brought him on earth. Now, it is like as we speak, it's like we are waking up to go and volunteer. You don't have a reason to go outside to go and work. [1]

Secondly, it is the issue of dagga. That is why we advocate for a Prime Minister who will be elected by the people. It's because there is industry for cannabis which has got billions in its market. So, with regards to that market, if we together with the legislation we are busy with, if it passes, it takes out those Swazis that are trying hard on the lower levels. Those Swazis will say that the industry is not viable but they are still trying even though it is illegal. If the legislation takes them out, the company will employ a few number of people. Like you find that the company employs forty to fifty people but it makes about E10billion or E100m or E500m in their yearly turnover. So if the industry some kind of money, it means the government will make better taxes.[2]

So, if we have a Prime Minister that is elected by the people, we want him to make sure that those companies we are granting such licenses are paying the correct taxes. He must make sure that they don't eventually declare less taxes as some companies do. Those companies we see that once they become successful, we hear that they are now run by so and so. They are no longer able to pay taxes because there are now people who are benefitting.[3]

We want this Prime Minister so that he can be able to cause the companies to pay the real and exact taxes and further once the taxes are collected they work and touch the lives of Swazis who are truly in need. It should not be a Prime

Minister even if such as thing is granted to someone who will say I don't mind so long as I get my salary.[4]

We want a Prime Minister who will be accountable to the people. So that if we get into that industry as a country of Eswatini, we should know that since we shall be collecting large sums of taxes such has good potential. It is projected that the industry at around 2030 and 2050 it would have grown into a high rate. We are talking about Germany who has passed a law that cannabis be legalized. So, if we get into that industry then we shall get high returns and we must be able to make sure that the taxes help the people. That is why we cannot sit and watch what we see today because we see that the current Prime Minister or appointed Prime Minister brought to us does not usually work for the people but works for propaganda.[5]

Brief summary of Accused No.1 and No. 2 speeches at S n' B Restaurant on 2nd June, 2021

- [12] From the above quoted speeches, it is clear that Accused No.1 and No.2 called for an elected Prime Minister.⁴ Accused No.1 extended the call for election even to the Cabinet Ministers and all political appointees⁵ as he so stated, *"Everyone in the political position in Eswatini should be a person by the will of the majority."*⁶ He later expressed on all Members of Parliament, *"What we are saying, we are requesting a Prime Minister who has been elected even ministers who are there should be Ministers who are elected."*⁷ They both outlined what

⁴ See para 4 and para 2 respectively of N

⁵ See para 8 supra

⁶ See para 6 supra

⁷ See para 8 supra

they considered to be the disadvantages of an appointed Prime Minister. Accused No. 1 informed his listeners, "*We have set down and noticed that the one who came by appointment does not become a Prime Minister for the nation or Swazis. He finds himself having to serve where he comes from.*"⁸ He proceeded to outline that the Government was away from the people as he gave an example of a pot-hole where a number of people died as a result. He expressed, "*Our government resides in Mbabane. Our government puts a fan next to him whenever it is talking and is resident in Mbabane.*" Accused No. 1 acknowledged that the government was so structured in terms of the provisions of the Constitution.⁹ He then lamented the appointees starting from the Prime Minister to the Ministers of the Crown. He bemoaned' "*When it is the election of the Prime Minister, then the unthinkable happens. That is when we cry and say the Prime Minister is descending down to us like rain and seat on the chair.*"¹⁰ He used a simile of a donkey (the elected) and a mule (the appointees) being paired together and pointed out that ought not to be. He also rejected that laws be assented to and informed the people that such law is then changed.¹¹ He concluded by pointing out that they were determined to "*fight*" and that, "*the Swazis will be free.*"¹²

- [13] Accused No. 2, just like Accused No. 1, identified the three of them as calling for an appointed Prime Minister.¹³ He then embarked on punching holes at the government. He complained about projects and that there was an over-

⁸ See para 5 supra

⁹ See para 16 supra

¹⁰ See para 16 supra

¹¹ See para 17 supra

¹² See para 20 supra

¹³ Paras 1 and 2 supra

expenditure. He made reference to the International Convention Centre costs of toilets and those from the King's office. He lamented that there was no accountability. Salaries were low. There was lack of evenly distribution of funds. He said that their mission was to open the minds of the people. On this, he stated that people like the Acting Prime Minister were destroying the education system. They were not focused and innovative contrary to them as they were visionaries. People like the Acting Prime Minister destroyed the economy. Accused No. 2 then announced, "*We see that the current Prime Minister or appointed Prime Minister brought to us does not usually work for the people but works for propaganda.*" He surprisingly also stated that the education system "*sabotaged*"¹⁴ the minds of the people and that their mission was to open their minds. He expressed with regard to the Prime Minister and immediately appealed for an elected one, "*So, this is not the Prime Minister who is working for the people in the manner he is working now.*"¹⁵

Deductions from Accused No. 1 and 2 speeches of 2nd June, 2021

- [14] Noteworthy in the speeches of both Accused No. 1 and No.2 is that both accused persons informed their hearers that there were ills emanating from the appointed Prime Minister and all political appointees and such could only be cured by "*review*" of the Constitution. Accused No. 1 also pointed out that they will '*fight*' and that "*Swazis will be free.*" The question which needs interrogation

¹⁴ Para 6 supra

¹⁵ See para 9 of N

is what exactly they meant by “*review, fight and Swazis will be free?*” How did they intend to achieve the ‘*review*’ or the ‘*fight*’ in order to have the Swazis ‘*free*’?

Meeting at Hosea Constituency on 5th June, 2021

- [15] In terms of video No. 2, the evidence is that a meeting of the people under Hosea Constituency took place on 5th June, 2021. Present in that meeting was, *inter alia*, Accused No. 1. He is captured as addressing the people. The following are his words verbatim (although translated into English language).

“Because it may ensue. What is this that will not ensue? Fellow citizens, you must differentiate. The monarchy is the monarchy. It does not change and you cannot fight over it. We are not fighting the monarchy. But we want the power to run ourselves as a government in us. Just like all the countries of the world. We have a king. They do have Queen Elizabeth in England. She is king with her family.

In Eswatini is it the same? Everything is governed almost the same as in England? Queen Elizabeth does not concern herself with politics. She sits like the Queen of England and is respected by all the people in England. She goes further to be respected by the Presidents of the world. Why? Because she doesn’t concern or involve herself with the issue of allocations that we are all allocating.

I’m saying, beautiful Swazis, honourable Gawuzela was saying he would come to greet you. He might end up driving. What I have come for in the constituency of Hosea, I’ve come to report that know that tomorrow they will leave another insult. Tomorrow they will raise another one... (inaudible).

The woman over there said there is a constitution. It is section 67(1) which she is referring to. The constitution which we should know, beautiful Swazi, is that the constitution is not above the law or should I say it is not above the people. The people are above the constitution. Some do not understand me.

The constitution is a paper. There's no way in which a paper and I have written it, becomes above me. I'm the one above the paper as the one who has written the paper. Let us not then put the constitution as a reason say the constitution says this. The constitution has been made by then those who were present during that time. Today is the time when this paper is below us. It is not living in line with us. Let it be torn and let there be a fresh paper made. So that it can go in line with the Swazis. The paper that has been made by me cannot be above me. There are papers in my boot. I can tear all those papers because they are not above me. I'm the one who is above those papers.

In short, I'm saying I am responding to that woman's issue, that the constitution is a one day thing. Because the Swazis that are in Parliament having been sent by you are representing the whole of Swaziland. So they can change it in one day, in one minute. The section 67(1). That is what we are requesting honourable Swazis.

May I set the record straight with regards to what has been said by Bhekisisa. Because I don't want you to be confused today. You must know what I'm saying. Once you elect the Prime Minister, the king gives him an order. No. That is not what we are saying. What we are saying is let the monarchy be at a distance (akakhweshe) or there. Let the people be there or aside or separated so that we will be able to respect our monarchy. Once you start interfering, we will find ourselves passing an insult that would go on the other side. Yet we do not intend to pass an insult to go beyond but we want the insult to go to the one

we have elected. So I'm saying let us clarify that. But we are still saying it is the constituency (Tinkhundla) system that we are talking about.

So, let me tell you this. You see the radio that insulted me, which was trying to insult us with Magawugawu. There is nothing that you can hear it saying about me which is good. Not even a single thing. It was told or barred from saying anything good about me. Once there is a mistake you must read and even cite his name but never mention anything good. That is why the radio is similar to the Prime Minister. There is a certain TV station in Eswatini. It is present even here. They cannot broadcast anything good. They will report this in the evening. You must watch it. There is Swazi TV. It is a Swazi TV of the Swazis. It will not broadcast here. Why? Because the Honourable is talking what today. He is speaking in the midst of the people. He is speaking with the people. No. You must not mention something good about him. Let us not be deceived by their media houses.

Let us speak the truth. Even if you can put the truth into a pit, it will always rise up. The truth even if you can put us into the pit, it will always rise up."

- [16] The Crown called to the witness box PW39, Inspector Mfanasibili Dlamini who testified that there was a constituency meeting at Hosea on the 5th June, 2021. They as police officers, gathered from the grape vines that there would be a meeting at Hosea. They called Accused No.1 who undertook to call them later. On learning that the meeting had commenced, they decided to attend. Testifying on the speech by Accused No. 1 at Hosea Constituency, PW39 stated:

"At around 1300hours or so, Mr. Mabuza who I suppose was the chairperson of the meeting then using his mic began to address the community

in which he welcomed everyone who attended the meeting and mentioned the agenda. He informed them that there were there to get their views on what was said in the media and elsewhere.

He informed them that the agenda was about the elected and appointed Prime Minister. He informed them that there were there to get their views on what they were saying themselves i.e. whether they were saying it is better to elect Prime Minister by the people themselves or one appointed by the hand that appoints, the king.

He mentioned that they themselves do not hate the king. They love the king so what they wanted was that the king should abstain from politics just like Queen Elizabeth who he mentioned that she is the king there and those that are politicians are politicians on the other side. So he mentioned that they do not want many hands to dish from one pot but one hand should dish in one pot.

He invited some views from the community on what they were saying themselves. They concurred with what their Member of Parliament had said. During that time there was one Bhekisisa, I've forgotten his surname, who put some questions on how this would. Would this take place as the very same person would put his hand even if the people appoint the Prime Minister, i.e. the constitution give him authority.

It was then that when Mr. Mabuza pointed out section 67(1) concerning this matter as that they wanted it nullified as it gives power to the king to appoint Prime Minister. He mentioned that this constitution was drafted and passed in 2005. It was now made by those people who were there at that time. He said another generation was living. That constitution suited the people who were present at that time and now it should be amended to suit the present generation.

He mentioned that this constitution was just like a paper. So the constitution is being crafted by people. So the constitution should not be above the people. If it is not above, it is like a paper. So it must not be above them.

He mentioned that the Prime Minister he was talking about should go about to telling all the constituencies around the country submitting to the people is what he is going to do for them and not the one appointed by the king as he only reports to the king and not to the people.”

- [17] The cross-examination of PW39 delved mainly on the person who organised the meeting. It was put to him that Vilane did. Further, that Accused No. 1 only responded to the grievances submitted by the people. It was disputed that Accused No. 1 advised the meeting of the agenda and that he was the chair.

Deductions from Accused No.1’s speech made at Hosea on 5th June, 2021

- [18] From the speech by Accused No. 1 as extracted from the video, it is clear that Accused No.1 advocated for a system where the King has no power in politics and he was selling this idea to the people that were present at Hosea Constituency. This is gathered from the extract: *“We are not fighting the monarchy. But we want the power to run ourselves as a government in us. Just like all the countries of the world. He was direct on this point as he later stated: “What we are saying is, let the monarchy be at a distance (akakhweshe) or there. Let the people be there or aside or separated so that we will be able to respect our monarchy.”* From the last sentence, it is clear that Accused No.1 informed the people of Hosea constituency that the King cannot be respected as long as he has a hand in politics. This point is in line with the contrast drawn by Accused No. 1 as he stated earlier, *“Queen Elizabeth does not concern herself with*

politics. She sits like the Queen of England and is respected by all the people in England. She goes further to be respected by the Presidents of the world." That was the gist of Accused No. 1's speech which could not be disputed following that when the video was running in court, Accused No. 1 identified himself as the person speaking without his Counsel's assistance. I must however, point out that nothing much could be drawn against Accused No. 1 in so far as Count 1 and the two alternative charges are concerned from this alone.

- [19] However, what raises the eyebrows against Accused No. 1's speech is what he says consequent to the above. He stated apparently in response to a question posed by one of the attendees who enquired on what then would happen to the Constitution as it recognises the offices of the impugned appointees. Accused No. 1 responded: *"The Constitution has been made by then, those who were present during that time. Today is the time when this paper is below us. It is not living in line with us. Let it be torn and let there be a fresh paper made. So that it can go in line with the Swazis. The paper that has been made by me cannot be above me. There are papers in my boot. I can tear all those papers because they are not above me. I'm the one who is above those papers."* Such a speech, I must say, leaves the hearer to wonder as to the manner in which Accused No. 1 intended the constitution to be 'torn.' The benefit of doubt in favour of Accused No. 1 is that he could mean that the Constitution ought to be amended. Such inference finds support from PW39 who testified that Accused No. 1 spoke about section 67(1) of the Constitution and pointed out that it needed to be amended.

- [20] The puzzle, however, does not end by the drawn inference. Accused No. 1 referred to the Constitution as a 'paper' just like his 'papers in (his) boot' which

could be ‘torn.’ The question is, what did he mean? Again, to his benefit, he is not a student of law in as much as he is a Legislature. To a student of law, the constitution cannot be a paper, let alone like papers in Accused No. 1’s boot or any motor vehicle’s boot for that matter.

- [21] Noteworthy though, is that Accused No. 1 informed the people of Hosea constituency that the Constitution cannot be above them following that it is a piece of paper. By any stretch of imagination, the Constitution cannot be below the citizens. Again, did Accused No. 1 say this because he was not a scholar in law? What exactly did Accused No. 1 convey to his listeners on the 5th June, 2021?

Second meeting at S n’ B Restaurant of 18th June, 2021-

- [22] The above poser leads me to a video recording on the second meeting held at S n’ B, Matsapha. According to Accused No.1’s testimony, this meeting took place on 18th June, 2021. According to PW62 uncontroverted evidence, the platform was the social media. Accused No.1 was the first to address the platform. He stated:

“May we take the opportunity to greet all the Swazis in their respective and different positions. Greeting the Swazis as a team which is now known what it is for or peculiar for. It would not be possible that Swazis would all know you. To mention that I’m still Mduduzi Bacede Mabuza of the constituency of Hosea.[1]

Today, we have come to greet the Swazis as people who are raised and sent to Parliament by the Swazis. While we were working along the way, the Swazis saw it proper that there is something that needs to be fixed in our system

in particular with regards to the main government which is in Mbabane, at cabinet.[2]

So I'm saying Swazis, may I say this some may quote us out of context and say we have said something else and yet we are not that. It is not about us therefore it is not about me. So, it is not even about any of us. But it is about the country and the concerns of Swazis. And if we can run away from that which we started speaking from Parliament having been sent by the Swazis, it will seem like we will be blind people. We would have made something we would not go by until the end. So, what we are going to say Swazis is not from us. But it is that as you know all of you. Swazis know who they have sent and that the talking then started with who.[3]

We had that privilege that everything that is being said reaches our ears. It comes in different angles. Let us take note of that. I am a Swazi, a natural Swazi by birth, through investment. I'm a fully-fledged Swazi, living in Eswatini my entire life. I cannot go out to tell the nation a lie. So, I'm saying what makes me to emphasise that it comes with all the Swazis is that if you read in other places and other newspapers and you hear how other people speak, they are trying to make a thing of the youth.[4]

The issue of the election of the Prime Minister: It is us who are seasoned in the system having been sent by the Swazis. It does happen that something is bad-painted. If you want to bad-paint something, it means you must apply paint on it. That is why they are trying to paint it that is the youth, they want this. The youth want to govern the old people. The youth want to do what?[5]

Myself, I never went to deliver a petition. But to me there comes old people and youth. To me there comes various people. They speak. Those are in high

authority and lawfully so. Those that are in certain ministries; that are here in Parliament. We are saying that we are not about me. It is not about Magawwugawu. It is not about TUCOSWA. It is not about SNAT, SNACS. It is not about Honourable Mthandeni. But it is us who have started the talks on this issue. [6]

So I'm saying that I should start with that beautiful Swazis. What we are saying Swazis. What we have come for today is that we have started to get views wherein Swazis are electing that the Prime Minister whom you say you want firstly, they are saying what would be the change. That is the question people have. What would be the change and how is it going to help the system? This is what is being said by the Swazis. How it will help the system that he Prime Minister be elected? How is he going to differ from the one who will be controlled? So, today, we have come in a way to respond to that kind of talk.[7]

The Prime Minister we are talking about, we are talking about the full democracy. We are not talking about half democracy. I will highlight, the issues are being raised by the Swazis in their different categories. Because I listen to you, whether you are from Senate, judiciary or a civil servant. I listen to you even if you are a granny on the street or from the market. So, I know the views of the Swazis. I listen to you even if you are a prince or princess.[8]

So, I'm saying, I will highlight that the Swazis are suggesting what. There are two. We as people who are in politics with regards to politics, it is my second term. I don't want to say to the Swazis this is politics yet I would be deceiving them. But I'm here to talk about politics that would be fully fledged politics. Even if someone from another country is looking for this and we will say here is our politics. It is fully-fledged. Because the one who is on top has collectively

come from us all. He went there through our will. That is what has brought us today. [9]

I'm saying two ways. There are other Swazis who are a minority who come to me. In the presence of the honourable, they are saying let four men be brought or maybe together with four women and be sent to the King and the king would then appoint one. This is the suggestion that comes straight from the group that is on the upper. It is, that says so.[10]

Others are saying let the king give them a certain number of people. Then they would elect from those and they would be of a certain surname. I will not hide, Swazis. They will be from the Dlamini families and the people would choose one from them. It is another suggestion of the Swazis. But I'm still telling you that those are the ones that are coming from the upper side most of the times. They are coming with this suggestion.[11]

There is the general public. They are saying what is this thing saying that you are taking us to? What would make those one not to be similar to this one? We are saying by cooperation of other Swazis who are well versed in the constitution and the laws of the country and all other issues of the country because it is not about me. There are a lot of people, the whole country, if I may state the truth is speaking now about this issue. We are saying so that the democracy will be complete. The country is governed through the constituency system currently. [12]

Now, the call that is there from Eswatini is that we want a Prime Minister that will be elected by the people. That is the call. It is the current one. We are saying now we cannot deviate from the current call and deliberate on something else. [13]

Today, we are going to talk about the current call and say go around. Look at all the petitions that have flooded the constituency centres. They do have the topic that says we want an elected Prime Minister. So how will we say the elected Prime Minister is elected? Honourable of Hosea, Swazis, is a Member of Parliament through the will of the majority of the people of Hosea. No one came and say now that you have put him in the forefront there are four let me then choose one. That is why the people of Hosea are proud of him today. Because they know that even if he can stray, he has been put there by us. Even if he can talk out of order, he is there through us. Even if he would become whatever, he went there through us. We have become the majority, us who have sent him there. That is fully-fledged democracy from the bottom constituency up until the election of the Member of Parliament.[14]

So, what we are saying even the Prime Minister, it is cheap, Swazis. It is not as expensive as you may think. The elections are held once in the country of Eswatini in the period of five years. So, with regards to the Prime Minister there will only be one line of distinction between him and Members of Parliament which when we were considering or scrutinising with other Swazis, but it is because it is not about me and because I've been the mouth piece when it started and then we were fine tuning it with other Swazis, we came to the view that let there be nominations at the constituencies as we normally nominate constituency's headman, constituency's council, the Member of Parliament in the Royal kraal. Then they compete in the various Royal Kraals up to the constituency.[15]

The Prime Minister: There are constituencies. Currently, we have fifty-nine. Let there be nominations at the constituency level. Let the Prime Minister not be nominated at the Royal Kraal level. But let the Prime Minister be

nominated at constituency level. On the nomination day maybe it would be by agreement. We are here to instil the view that it would be pure democracy which will represent the Swazis. We cannot put in which will not represent the Swazis. It is not the will of the Swazis.[16]

We are saying let him be nominated at the constituency level. Once he has been nominated at the constituency level, it is the Swazis who are going to say whether they nominate two men from the constituency who will have the highest number of votes on the first day of the nomination. Once they have the highest number of voter on the first day and once the Swazis see that here are the two men or two women, then the regions. Because as we are here, we are regions. We members, we meet at regional levels when we go there to approve requests. At regional level, like Sheselweni has fifteen constituencies, Lubombo has eleven constituencies, Manzini eighteen and Hhohho has got its own. If there are two in each constituency, it would mean Shiselweni will have thirty who would be nominated in the first stage.[17]

Then from there we will say we are going to Primary elections. How do we go to Primary Elections? Each and every region on the voting day, on the secondary election for the constituency headman, even the prospective Prime Ministers, are there. They are being voted for. Then there would be one candidate who was the highest in the entire region is identified. Once the candidate has been identified who was the highest in the whole region, he will stand for the secondary elections which is the final. Then if he stands for the secondary, he would be standing with his counter-parts from the three regions. If that particular individual has come from Shiselweni, that is where beautiful Swazis, government will come in and work in cooperation with the Swazis who are contesting to be Prime Minister who were victorious in each region. The

government would assist then as he does with our constituency headman and Member of Parliament when they go for elections.[18]

So, when we go for secondary elections, the government assist us by providing cars, instructing various Royal Kraals that they are coming today. Listen to them to what they will tell you. So, this is one because he is a Prime Minister, we cannot go to the Royal Kraals because they are so many. It would be upon government and the people what will be the agreed spot. Where government would transport them i.e. the four of them to go to Shiselweni. If we are going to King Sobhuza, it will be King Sobhuza. They will tell the country that I want to be Prime Minister and this is what I will do for the country. I will revive the economy in this way. I tell the world how I will assist the economy. To say that may be in Manzini this is what I will do or any other place relevant. Whether it is Mavuso Trade Centre government should provide transport for the people to access those areas to listen. People who are not in the campaign of the Prime Minister – because Swazis what I want to be clear or aware of is what we are speaking of is what is practical or being done. Government provides transport in a form of buses or trucks to transport passengers to their different destinations. So, as so in this circumstance government should provide transport for those who are going to vote for the Prime Minister so as in the process of that - so when the nation votes they would vote for a man or woman they have dearly heard or understood. Speaking on how they would assist the youth. How they would intervene in the education system or how they would assist in the economy and that the introduction of new business people how they would go about and if they are investors who need to be investing, how the strategy would go about. What assistance would it bring to them. Having done all of that and seen through it and the Swazis are satisfied by it. But in those

circumstances government will be providing transport for the particular event where they are all campaigning together. We cannot hid that every man would be standing up for himself as we do us Members of Parliament. When he feels that when he is at Hhohho he is longing for Mhlangatane then he should proceed to. But he feels that my desire is at Siphocosini, he will run to Siphocosini. Then that is his business. It does not involve the government.[19]

Then there would be the secondary elections. That is final. Their pictures would have circulated all over the country and the Swazis would have seen their candidates. Then on the final when the Swazis have seen the candidates, the final voting of the Member of Parliament should be together with the voting of the Prime Minister on that final day. On that day, you will be able to vote for the Member of Parliament, headman and Prime Minister. We've made the government for the people. I can promise you that it would the government for the people. That Prime Minister that would be elected amongst the four, no one can dispute that it is the people who elected him into that position, who is the will of the majority.[20]

That is what we have come for. Because you know that there will always be that one person who will be deputy Prime Minister. We've spoken about either four men or women who have been campaigning. If we see that this one has been the favourite at Shiselweni and that one in Manzini, when we amend our constitution that is then we will see if the Prime Minister would not elect one he has been campaigning with as his own Deputy Prime Minister. Because even that one who is among the four, Emaswati have confidence in him and they can handle a certain issue because Emaswati trust them.[21]

In short fellow Emaswati you cannot be well spoken in everything but what I'm saying is not personal to me. Is what Emaswati have sent me and what

Emaswati have sent me to bring this message forward. But this is what is being suggested. We are saying these suggestions between being given the people and being brought people these suggestions still maintain the current system. [22]

Yet in this one we are saying we want a government independent from the Royal family. There would be a separation between the two. I don't want to go about this one where we are saying the Royalty should not interfere with issues of Parliament. Where the Royalty is nobody should be brought to it. But the Royalty can bless the person if need be. Not that it is that one of the people among us has come through them. That would bring peace to the Royal family and peace to Emaswati. If we stand up and fight, we will do so among ourselves. So, I say to you Swazis, I might not be well spoken but brothers are here. But what I would like to emphasise to Emaswati is this, some would say who are the Bacede and the others who are they and they are telling themselves who are they. No. I'm not outspoken on the streets. I do get troublesome when I'm in Parliament because I do not want to be convinced by something which is not the will of Emaswati.[23]

May be others will try and criticise us. I will not run away from leading this until the end. Not to elect, to be elected to be Prime Minister but to lead it until it reaches the end as a person who is in Parliament having been blessed by the one who is in authority. I will not run away from it even if you can make that insult scarlet or black but as long as I know that those I serve behind me – those that I serve are the majority of Emaswati. Because, Swazis, we should be able to differentiate between serving a person and fearing a person. There are two different things that we need to know that rules the country of Eswatini right now. There is serving a person and fearing a person. I'm not the person who

wants to serve a person in fear. But I'm the person who wants to serve because I have the heart of the people I'm serving.[24]

That is all I appeal. We are not the candidates of the Prime Minister. We are the peoples who are campaigning that there should be freedom in Emaswatini to elect a person who can be the Prime Minister of the country. So, I would request that. As I'm concluding there is another matter I would like to introduce or that I would like Emaswati to be aware of because when you read the newspaper today it would be this, tomorrow a different this and next day something else.[25]

Maswati, as I have said, it is my second term in Parliament. I know how corrupt the system is because I'm a witness of the system. I've been in the system and I'm also a business man in this country for years. So I know how the system operates. So what is being done by Senators that you see in the Swazis today they swear at Swazis. They say it is not Swazis that deliver petitions but foreigners. People that have been paid. So that is where the corruption of the system is. It is able to create untruth and lies and even taunts you so that the person who has no access to the information sees you as a corrupt person. So I thought I should make that clear to the Swazis. Today they would tell you that they are soliciting for money. Bacede and his acquaintances are business people. There is no one who is unaware of that. I don't hide being a business man. So then suggesting that someone has been paid or bought they are creating the mind-set that Bacede has bought or is buying the people since I'm a business man. This thing is not all about Bacede. It is all about the nation. I cannot pay even one person to say what we are saying. I don't have money to pay people for their own thing or what belongs to them.[26]

These who are speaking fellow Swazis, are indeed being paid. They are the ones who have been paid but they are now saying you have been paid. They are the ones who have been paid because as he is a Senator he is there not being elected by you but he earns E50 000 like a person who has been elected by you and the benefits of allowances just like a person who has been elected by you. What exactly can he say because the person is protecting himself from that position he is in. What they say it is facing other direction is facing them but they are pointing it facing it to the people.[27]

I don't believe there is a single Liswati who got E5 000 for him to march. But he earned E49 000 and some change just for him to speak lies and deceive people because he was not elected by the people.[28]

So, I felt that we should make that clear. I'm not afraid of speaking the truth. Whoever wants to do anything in my life should do it. He must do it but I don't believe in lies. It is very disappointing to see a Swazi who knows that he is getting paid for lies to an extent that he goes and lies to the people who own this thing. This are lies that are corrupting the country,[29]

I'm saying now in conclusion, can I make a differentiation in this, because as we speak, we are the honourable Members of Parliament elected by the people. If I can tell you this that since we made a call for the Prime Minister, we hardly go to Parliament because we are talking what the people want. If we were agreeing with the corruption we would attend Parliament as usual. But today, we only sit for about ten minutes and Parliament is adjourned sine die. We shall be told when we will be called again. Just because we are talking about what the people want.[30]

So, that is why I want to differentiate to you Swazis that there are people who are telling lies, who are Senators who go to Parliament every now and then simple because they agree with that the Prime Minister should not be elected because they are also appointed as the Prime Minister is appointed. So, I thought I should bring this up to you Swazis and make this differentiation. The whole Senate as it is. Not even one Senate among them has been elected by the people. They are thirty of them and none of them have been elected by the people. The whole thirty people are earning over E48 000 for doing nothing and neither has been elected by the will of the people.[31]

Amongst the thirty people, twenty have been appointed, ten were elected by us as members of Parliament. They are not elected by the people. What do you expect them to say or speak on your behalf in Senate. That is why now they are saying you have been bought. Even the constituency centre is an animal to them. Even if you can ask them how does it look inside? They have no idea of what it is. He doesn't know even the structuring of the centre because he came to Parliament to ask the members to please elect him. Maybe the other one because he spends most of the time paying allegiance to the Royalty and resides by the Royal residence. Let them not disrupt us Emaswati. [32]

There are also people who are out just to accuse us, speaking about us. These are Regional Administrators. They suffer from the same fate. The same people who are Regional Administrators, not by qualifications but by favour. He has never been elected to the position. So, he cannot serve the nation he is suppose to. The Regional Administrator is supposed to be someone who has a heart for the whole region. If he is in Manzini, he is supposed to love the people of the region and treat them whole heartedly with passion. But when you approach then you hear them saying these people want to overthrow the regime.

Because he feels like his position we speak about the Prime Minister will perish. Because when you are calling for an elected Prime Minister he will call on everyone and say everybody must become like me. That is their fear. [33]

So, that is why I'm saying Swazis I'm giving you assurance. Those who were speaking in Parliament yesterday, the Senators, were in Parliament. But the people you elected to be in Parliament were not there. If you can recall back from March after the budget, we only went twice. Can you tell me are we the representatives of the people? And on the two occasions, only one of the days was spent insulting the youth being insulted by the Members of Parliament that they do not participate in election and this was one day. The other day didn't last even ten minutes. But you go because you will insult them. It will be published in the newspapers. Go and discuss it.[34]

So, I'm saying Swazis, don't be frightened. Don't be timid. We are a majority. Let us not get lost. We are a majority who is not living well as we are.[35]

Lastly, amongst the thirty, there are ten who are again appointed by the King in the House of Assembly. Those who are usually with the Prime Minister. They are ten as members. It's the same people that you will see in the published newspapers saying something different from us that we want an elected Prime Minister but they are the same ones you who discuss the same issue. The reason is that this person has been appointed, meaning, people who have entered Parliament are now forty who have just gone through by favour and not by the will of the majority. Forty getting paid like me but have not been elected by you as a nation. On top of that, there are ten who are appointed to become Ministers who are taken among us and made Ministers of the country. Currently, we have seven who are elected. They are just taken from among us. Because they are

also Ministers, some of them, the same favour not by qualifications or the will of the people. You read about them in the publication insulting other members and the nation and the people in the publication because they have been in power for years. [36]

I'm sorry to say Senate House. Go and search for yourself. It is a returning place for everyone who once held a high position. If you have been in the police force and when they have renewed your contract over and over again, you are taken there. Go and speak vanity there. Or if you were in the Correctional Services, you are taken there. Go to the committee or go wherever. Over two hundred people are getting paid for appointed position not because they have been elected by the people. I don't want to say more or talk more about the system. But what we plead for or request, we are requesting that the person who has been elected by the people be the Prime Minister. [37]

So, I don't want to get into that because if I can reveal how corrupt this thing is, you cannot believe Swazis. Because you were once a soldier, now you have been moved from the army to the committees because you are born of someone who is a particular individual. You get paid your salary from the army as well as the committee. I'm talking about something that exist. You can go and search for yourself. Currently, somebody has been promoted but if you can enquire where he is and when last they ever saw him at the army – has been promoted – but he is in the committees. I know he is in the committee but has been promoted. I read the paper in the morning having been promoted. In this country as long as we are Swazis and we are going to condone that, we will always see our elderly women in dire distress. We will see their structures being destroyed as they are immigrants in their own nation. As we condone that, we will see our children going without scholarships. As we condone that, we will

see children being attacked by tear gas. As we condone that, we will see our children being raped and those perpetrators be looked at who they are. As we condone that, we will see no development or progress in the country and incur debts we are already in right now, including the issue of Parliament. As to who debated that one? But it passed. Because I don't know which Swazis sent me. I don't know any of Emaswati who sent me or my colleagues next to me or who sent members of Parliament saying we are not getting uncomfortable with the current Parliament. That, please, go and build one which is worth E1.6billion. We don't know this Swazi, but this has happened.[38]

So, what we are saying is that we don't want to talk too much about the bad side of the system. The bad side of the system is too much. I've been there for years. I know exactly what I'm talking about. I'm not taking chances with what I'm saying. So, I don't want to dwell much on talking about a person or the bad side of the system. But what we are talking about is that what will build this country, make it productive and provide scholarships without looking at the bloodline, to be able to access life equally and that no one should be suppressed because you are born of so and so, this one should come at the police to get a promotion when he has recently joined the force that he should get a promotion; as long as we have such people. That is why the forces of the police or army are all those who are in authority in the Kingdom and members of Parliament. There are Members of Parliament who cannot take a phone and call Bacede because once he takes a phone and call me, he will receive a call from intelligence after that, asking him what were you speaking about over the phone with Bacede? This is the life we are living. We are not living in peace but we are living in fear. We are being intimidated and fearful. [39]

So, I'm saying today, fellow Swazis, can I just divert a little as I hear Emaswati are fighting with the police. I hear that Swazis feel that we should be fighting with the soldiers. They are not all of them. Our brothers, sisters and mothers are suppressed. It is the problem we are also in. In the House of Parliament where we are, the honourables do want to speak but they are suppressed. So it goes with the police force. Once you speak, you find yourself having lost your job the following day. Because you are not a Member of Parliament, the world would not know that you have been fired. Once you don't take the order that go and strangulate Bacede, you might find that tomorrow you are no more there. Because you didn't take the instruction and nobody will know you are no longer there. If you speak, you will be taken to have lost your mind. Yes, they will now say you have done something wrong.[40]

So, I'm saying to the soldiers and police, they are also Swazis. All these people in the army there is also suppression which is in that sector. There are people living high life and those that are struggling having low life. Just because you are not born by this line of blood. We are saying and what we are advocating for the change will let everybody to be free and live life like every citizen and become happy in the country.[41]

With these words, I'm saying to you Swazis, the honourable will assist us. We are not on our own. We are with SNACS and TUCOSWA. There was supposed to be available SNAT but unfortunately, SNAT is in another meeting that is far. [50]

That is that Swazis. We are working for the nation. We have been called by the nation to go to Parliament. So I plead with you Swazis. All of you.[51]

So, with those words, Swazis, we are saying we love you. I love you with my whole heart and I'm ready to be victimised and criticised and whatever is going to be done to me. I will not, I, Emaswati, I wish to give to you, they will deceive you saying we Bacede have fled. I will not flee this country. If I die, I will die here. If someone is going to kill me, he will find me in my house, on the road or wherever. I will die here. Because what I'm saying before God and the world, I'm not ashamed of it. If I will die for it, it's ok. [52]

So, I will run away from those who are planning to kill us or kidnap or do whatever they want to do? I will not run away from him. I will tell him that is your freedom because you have come to kidnap me or shoot at me because you want to but it's because you have a gun on your neck and you are afraid. [53]

So with these words fellow Swazis, I love all of you, either you are a soldier or policeman. What I'm speaking of I'm speaking of freedom for all Swazis as a whole not just for a few. May the Lord bless you." [54]

Accused No. 1's defence on his 18th June, 2021's speech

- [23] Testifying on the second meeting at S 'n B Restaurant, Accused No. 1 stated: *"We were at S n' B Restaurant Matsapha. It is more similar. This was the continuation of word following between MPs and the Acting Prime Minister. Some Swazis had started questioning why we should elect the Prime Minister rather than changing the country to be a Republic, calling for a president. This is where people were saying if you say we elect MP this is how we will elect the Prime Minister. We decided to clarify the manner in which the Prime Minister would be elected. I would like to explain that the views were received in our personal cellphones. We decided to create a web-page and a WhatsApp platform. We gave them a number where they would drop their views i.e. the*

People's Prime Minister and those that differ. So that when we talk about this issue we know where the majority falls. We also created a web-page: www.peoplesprimeminister. In this meeting Senators were now divided. They were saying we hear the issue but this is what we suggest. May I clarify that as people who were working with people, in this speech we do appear lobbying some people so that when we are going to raise the motion as we had debated it, it comes with positive outcome."

Summary of Accused No. 1's speech at S 'n B Restaurant on 18th June, 2021

- [24] From paras 5 and 6 of the above speech, the agenda for the press conference was clarified by Accused No. 1. It was about the Prime Minister. Accused No. 1 pointed out clearly that it was them, viz., Accused No.1, Accused No. 2 and Magawugawu that "*started the talks on this issue.*" The issue was about the election of the Prime Minister. Accused No. 1 pointed out that the purpose of the meeting was further to respond to questions raised by the public on their call for an elected Prime Minister.
- [25] The main question posed, as per Accused No.1 was on how different would an elected Prime Minister be to an appointed one. At para 8, Accused No.1 pointed out that an elected Prime Minister would be fully democratic as opposed to the other, who Accused No.1 described as "*half democratic.*"¹⁶
- [26] He pointed out that there were two different views. The first came from the minority. He defined the minority as those holding higher positions. He pointed out that the minority held the view that the King ought to have a hand in the issue of the Prime Minister. Relating to the second group, which he described

¹⁶¹⁶ Para 8 page 34

as the general public, Accused No.1 pointed out that group was posing a question on how the elected Prime Minister would be different as per para 12.

[27] At para 14, Accused No. 1 revealed that many petitions had already been delivered in the various constituencies. He further stated that all the petitions that had been delivered had one common topic, the demand for the election of the Prime Minister. I must pause here for a second and enquire how Accused No. 1 knew about the contents of the petitions as PW16 undisputed testimony under cross examination was that Parliament took a resolution that the petitions delivered should first be scrutinised by the Attorney General for purposes of classifying the issues before tabling them to Parliament. This witness pointed out under cross-examination again that as at date of his testimony before this court, the petitions were still in the office of the Attorney General. They were not submitted to Parliament. That as it may, what is important at this stage is the speech by Accused No. 1.

[28] Accused No. 1 then embarked on crushing the view, by his own speech, of the minority. He pointed out that he was a Member of Parliament by the majority will of the people of Hosea. He was never thereafter chosen among four people as suggested by the upper class. He expressed thereafter; *“That is why the people of Hosea are proud of him,”*¹⁷ (referring to himself, Accused No. 1) *today. Because they know that even if he can stray, he has been put there by us. Even if he can talk out of order, he is there through us. Even if he would become whatever, he went there through us. We have become the majority, us who have sent him there.* He then expressed about his own election; *“That is fully-fledged democracy from the bottom constituency up until the election of the Member of*

¹⁷ Para 14 pf speech

*Parliament.*¹⁸ He then advocated for a similar *modus operandi* in the process of the Prime Minister. He went into finer details on how the process would be. He expressly called for the exclusion of Royal Kraals in the nomination of the Prime Minister. He referred to this as “*pure democracy.*”¹⁹ Accused No. 1 informed the listeners that he was determined to defend what he was advocating for, no matter the circumstances. He then proceeded: “*There are two different things that we need to know that rules the country of Eswatini right now. There is serving a person and fearing a person. I’m not the person who wants to serve a person in fear.*”²⁰

- [29] He then embarked on his second agenda. It was about clarifying information against those who were saying that they were paying the people who were delivering petitions. He described such as lies which are part of the system. He pointed out that in fact, it was those who were spreading the incorrect information that were paid. He fingered Senate as he advised, “*So what is being done by Senators that you see in the Swazis today they swear at Swazis,*”²¹ before informing the platform that Senate were opposed to the matter of the election of the Prime Minister because they were in the same boat as the Prime Minister. They too, were appointed. He said, “[*S*]ince we made a call for the Prime Minister, we hardly go to Parliament because we are talking what the people want. If we were agreeing with the corruption we would attend Parliament as usual.”²² He expressed further in that regard: “*But he earned E49 000 and some change just for him to speak lies and deceive people because*

¹⁸ Para 14

¹⁹ See para 16 of speech

²⁰ At para 24

²¹ Para 26

²² Para 30

he was not elected by the people."²³ He again emphasised: *So, that is why I want to differentiate to you Swazis that there are people who are telling lies, who are Senators who go to Parliament every now and then simply because they agree with that the Prime Minister should not be elected because they are also appointed as the Prime Minister is appointed.*"²⁴ Determined to drive this point home, he repeated: *"So, I thought I should bring this up to you Swazis and make this differentiation. The whole Senate as it is. Not even one Senate among them has been elected by the people. They are thirty of them and none of them have been elected by the people. The whole thirty people are earning over E48 000 for doing nothing and neither has been elected by the will of the people."*²⁵ In brief, Accused No. 1 informed his listeners that not only do those who are not elected (particularly Senate) but appointed tell lies or untruth but they are paid for doing no work except to speak lies. The Prime Minister as an appointee too was not spared from this class of persons.

- [30] Endeavouring to be emphatic on the point about appointees, Accused No. 1 lectured his viewers that from the thirty Senate, twenty were appointed and ten elected by Members of Parliament. He then pointed out: *"They are not elected by the people. What do you expect them to say or speak on your behalf in Senate?"*²⁶ In short, Accused No. 1 told his listeners that by reason that the entire House of Senate was appointed and not elected by the nation, they should not expect anything that would serve their interest from them. He further stated: *"Even the constituency centre is an animal to them. Even if you can ask them how does it look inside? They have no idea of what it is. He doesn't know even*

²³ Para28

²⁴ *supra*

²⁵ Para 31

²⁶ Para32

the structuring of the centre because he came to Parliament to ask the members to please elect him. Maybe the other one because he spends most of the time paying allegiance to the Royalty and resides by the Royal residence."²⁷ From this extract, Accused No. 1 advised the viewers of the Swaziland News under Face Book page that Senate did not identify with the election forums as they had no clue on how it was structured or it looked like. They were in the position of Senate because they paid allegiance to Royalty and resided next to Royalty.

- [31] Accused No.1 then turned his attention to Regional Administrators. He pointed out that they were accusing them. He opined: *They suffer from the same fate.*²⁸ He explained why he was saying so, "*The same people who are Regional Administrators, not by qualifications but by favour. He has never been elected to the position. So, he cannot serve the nation he is supposed to. The Regional Administrator is supposed to be someone who has a heart for the whole region. If he is in Manzini, he is supposed to love the people of the region and treat them whole heartedly with passion. But when you approach, then you hear them saying these people want to overthrow the regime. Because he feels like his position we speak about the Prime Minister will perish. Because when you are calling for an elected Prime Minister he will call on everyone and say everybody must become like me. That is their fear.*"²⁹ From this portion, Accused No. 1 clarified that the Regional Administrators were not in their positions by merit but favour. They had no love for the people they were called to serve. They were threatened by the call for an elected Prime Minister on the ground that the elected Prime Minister would also call for elected Regional Administrators.

²⁷ supra

²⁸ Para 33

²⁹ supra

[32] Accused No. 1 proceeded to inform the listeners that as he was speaking, the House of Assembly was adjourned *sine die* whereas the House of Senate was sitting. He lamented that those who were elected by the people were prevented from doing business of the House whereas those appointed were not. Reverting to the number of persons appointed, he retorted: "*Lastly, amongst the thirty, there are ten who are again appointed by the King in the House of Assembly. Those who are usually with the Prime Minister. They are ten as members.*"³⁰ He highlighted that such were opposed to the notion that the Prime Minister ought to be elected. He expatiated on the ground: "*The reason is that this person has been appointed, meaning, people who have entered Parliament are now forty who have just gone through by favour and not by the will of the majority.*"³¹ He then lamented: "*Forty getting paid like me but have not been elected by you as a nation. On top of that, there are ten who are appointed to become Ministers who are taken among us and made Ministers of the country. Currently, we have seven who are elected. They are just taken from among us. Because they are also Ministers some of them the same favour not by qualifications or the will of the people.*"³²

[33] Accused No.1 then described the House of Senate as: *It is a returning place for everyone who once held a high position. If you have been in the police force and when they have renewed your contract over and over again, you are taken there.*"³³ He also pointed out that some of the people appointed come from Correctional Services. He further stated that Senate consisted of persons who once held high positions in the Kingdom. All these people were appointees who

³⁰ Para 36

³¹ *supra*

³² *supra*

³³ Para 37

were instructed, *"Go and speak vanity there."*³⁴ Clearly, Accused No. 1 maintained his position that the appointees, be in the House of Senate or Assembly were not doing any work which would benefit the people. The cabinet was not spared from this. He concluded, while emphatic that the Prime Minister must to be elected, *"Over two hundred people are getting paid for appointed position not because they have been elected by the people."*³⁵

[34] He then turned to the Committees. He pointed out that a person holds both his former position and gets promotion while serving in Committees. He is paid while he does not attend to his promoted position but to the committee. He singled out the army. From such conduct by the Government, Accused No.1 stated of what he viewed as its repercussions: *"In this country as long as we are Swazis and we are going to condone that, we will always see our elderly women in dire distress. We will see their structures being destroyed as they are immigrants in their own nation. As we condone that, we will see our children going without scholarships. As we condone that, we will see children being attacked by tear gas. As we condone that, we will see our children being raped and those perpetrators be looked at who they are. As we condone that, we will see no development or progress in the country and incur debts we are already in right now, including the issue of Parliament."*³⁶

[35] Accused No. 1, having stated that he was then addressing corruption, bemoaned the passing of a Bill in Parliament for the construction of a parliament structure. He wondered who had given Parliament the mandate to vote in favour of a new parliament structure. He then stated, *"The bad side of the system is too much."*³⁷

³⁴ supra

³⁵ supra

³⁶ Para 38

³⁷ Para 39

He also opined, "*This is the life we are living. We are not living in peace but we are living in fear. We are being intimidated and fearful.*"³⁸ He attributed the fear to that when a Member of Parliament calls him through his phone, Intelligence then visits that Member to enquire on what exactly he was discussing with him. He also pointed out that soldiers and police were suppressed in that once they express their idea, they lose their jobs.

Question

- [36] Having noted the speech by Accused No. 1, the question still remains, "How did Accused No.1 and his companions hope to have the constitution '*torn*'? Did he intend to go to Parliament to 'tear' it as it were? Or put directly, "How did Accused No. 1 and his accomplices intend to enforce the idea of doing away with the appointees or appointed Prime Minister?

Speech by Quinton Dlamini on 18th June, 2021 at S 'n B Restaurant

- [37] Accused No. 1 who was described by PW62 as the chair then invited the President of TUCOSWA (Trade Union Congress of Swaziland), Mr. Quinton Dlamini. Mr. Dlamini addressed the platform. He stated with regard to the Constitution that it was drafted and passed following demands by workers. The gist of Mr. Dlamini's short address was that the trio viz., Accused No.1, Accused No. 2 and Magawugawu should go back to Parliament and amend the Constitution. He categorically stated in this regard, "*In this matter, what does it*

³⁸ *spra*

mean to elect the Prime Minister? The issue of electing Prime Minister as Swazis- it means honourable ones, the constitution has to be amended."

- [38] Mr. Dlamini proceeded to refer to the relevant sections dealing with the amendment of the provisions of the Constitution. He pin-pointed: *"Sections 245, 246 and 247, those are the provisions of the constitution that are dealing with the amendments."* He also advised the trio on the direct words they should utter while in Parliament: *"Speaker, there should be a bill amending the constitution so that the Prime Minister can be elected by Swazis', in order to start this process."* He proceeded, *"The Speaker should go to the King to say, 'Your Majesty, call a joint sitting in Parliament. They want to amend the Constitution.'"* Mr. Dlamini pointed out that the King will not resist such a call as whatever he does, it is in conformity with the provisions of the Constitution as he stated: *"There is nobody in this country who acts above the Constitution. Even their Majesties in as much as they are above the law but they have complied with the Constitution whenever they do whatever."* To drive the same point home over, Mr. Dlamini retorted, *"As TUCOSWA, we are saying now time has come. People have given a mandate to their Members of Parliament from their chiefdoms that they should have the Constitution amended so that the Prime Minister can be elected by the people. It may not be that only when you amend the Constitution the very same Members of Parliament that have been elected will be given other clauses by the electorate to say this is what you should also push in Parliament for the amendment. It is only when that has been done that is only when the Constitution would be amended so what would happen would be the desires of the Swazis as it happens in the constituencies."* Mr. Dlamini repeated the position of the King regarding his people, *"We shall recall that the King said that he loves the country and Emaswati. He cannot be the*

enemy of the very same people he leads.” He then assured them, “Once the Members tell the Speaker to make him (King) aware to tell the Speaker to call for a joint sitting, he (the King) will do so.” Mr. Dlamini concluded before thanking the people of the Kingdom, “The Constitution is part of our demands. Therefore, there is nothing sinister about us calling for change in the Constitution, that is, it must be amended.”

Accused No. 1’s response to Quinton Dlamini’s speech

- [39] Accused No. 1, having given the President of SNUS, Colani Maseko the platform decided to respond to the speech by Mr. Quinton Dlamini. Accused No. 1 laying the background of his response stated that he pitied those Swazis who did not want change or a *“Prime Minister who is for the people.”* He then stated, *“Some of them are right next to me. We pity you.”* He then proceeded, *“I will always be specific when I’m dealing with things. I don’t want to go about beating the bush. May I say about the issue of the Constitution that has been brought up by TUCOSWA. The Constitution was not drafted by fools, Swazis. It was written by ‘tihlakaniphi – crafty individuals.’ That is why at a certain time at Hosea, I asked that this Constitution, was it made by us? What is written, was it by us? As I sit with the Constitution, looking at it, it was written by ‘tihlakaniphi – crafty individuals’ who were at consesus when it was made.* Accused No. 1 then highlighted: *“If we could say TUCOSWA if we are now going to use this Constitution which came from Parliament, we are saying ‘inkhukhu ayitibilisele emanti itotihlutsa yona’ - ‘a chicken must itself boil water to unpluck its own feathers’ – ‘be an architect of your own destruction.’”* He repeated, *“Another person may not understand me but I’m saying a chicken should itself boil water to unpluck itself of its feathers.”* He then clarified, *“Because in the Constitution, a number has been mentioned which is impossible.*

He immediately then said, *"That is why Swazis must fill the streets and shout for what they want. Because the Constitution which we speak of, we are ninety-nine with the Senators. Forty of those people just came by grace. Fifty-nine came by election. So among the fifty-nine that came by election, the forty would never boil water to cook themselves because all the forty live by grace yet the Constitution also recognises them for it to change."*

[40] I must point out that Accused No.1's response was lengthy. He proceeded to state: *"I want to make it clear to every person who is a Swazi that we are not crazy. That is why we are talking on the streets. We are not talking madness. Why we are talking outside is because we have done all the research."* He then stated of the Constitution, *"This Constitution was made to enslave or suppress Swazis. I will say it. There are things that were included in it to enslave each and every Swazi whether that Swazi want to or not, something which you cannot turn around or reverse."* As though reminding his listeners that he was still responding to TUCOSWA's address on the amendment clauses, Accused No.1 stated, *"So, I thought I should say this TUCOSWA that a person should boil water to cook himself? It can never happen. It will never happen. Darkness would engulf the day. So, I'm saying here we have a number. I thought I would point this out to you, Swazis."*

[41] Accused No.1 continued in his speech, *"Nothing else would liberate us Swazis except that the Constitution, I even mentioned that when I was at Hosea, we made the Constitution. Those Swazis who made it at that time, I don't know whether they understood it. As to which people they were writing it for?"* He further pointed out, *"The only way of changing the Constitution is what the Swazis are doing now. Is what you are doing in your constituencies."*

Accused No. 1's defence on his response

[42] Accused No. 1 testified after being led in chief by his Counsel: *"It is said that you encouraged the multitude to up-rise against the decision that petitions are unlawful."* In response to this question, Accused No. 1 first gave an outline of his various positions in Parliament, which were, *inter alia*, that he was the chair of chairs. This position entailed that he was the head of not only the Government but the Prime Minister as well and that he chaired the Military Parliamentary Committee. He then gave a lengthy lecture on the whole process of conducting elections in the Kingdom. He went on to testify about his Constituency headman. He then testified:

"It is true that I raised the query whether Cabinet in terms of section 67(3) it was proper that Cabinet continue to lead the House and the country in 2020. I must say that when we arrived in Parliament after taking oath we undergo a workshop we are told that our operations would be guided by the Constitution. We are also given the Constitution and a Bible. After raising this motion, it called for the House to adjourn sine die. A committee led by the Speaker went to consult with the King. It returned with the report that the King has said he welcomes the issue and they would look at that issue.

On the 5th March, 2021 there was a motion raised by Marwick Khumalo of Lobamba Lomdzala Constituency which complained that the conditions of COVID 19 had been there for a long time without being eased. In that debate which was proceeding there was a serious outcry by MPs before me complaining about suffering of business due to non-relaxation of COVID 19 Regulations. All MPs were saying that the people should be given freedom on the COVID 19 Regulations. My time to debate came. I was number 37 or thereabout. It is where I realised that we should ask for amending section 67(1) as I saw that Parliament was working hand in hand with the King. We asked

to amend section 67(1) as that the Ngwenyama is not in the House whereas the Prime Minister would say he needs time to go and consult with the King. The difficulty was that when Parliament agrees with the request of the majority when they return from the King they say the King differs from what the majority wants.

Section 67(1) is the one that empowers the King to appoint the Prime Minister. I then asked that the Prime Minister be elected just like the other members of parliament. So that when it comes to His Majesty he will try by all means to influence him to agree with the MPs. This will make the Prime Minister to know that at the end of the five year term he will answer to the people."

- [43] Counsel for the defence asked Accused No. 1 on what the response of the other members of Parliament was. Accused No.1 proceeded to testify:

"On the debate date the response was silence in the House. While I was debating there was Prince Jomo who is another MP who said he did not understand me. I should clarify. I went on to explain. The Speaker gave me a chance to debate to the end. I sat down. While we were seated and Parliament business was on progress, some media houses especially those operating on social media had written that in a space of ten minutes reported that MP Hosea Bacede Mabuza stood up and asked for democracy. Even though I cannot dwell much on that, they said I requested for democracy and they spiced it.

When I left the seating of that day, all journalists requested to have an interview with me. They asked me to get deep into the debate on how I came to the decision that the Prime Minister should be elected. I asked them that they should take what I had debated as I was not ready for them more especially

because there was tension. After this motion there was a serious clash between myself that the one who was the Speaker. Speaker called me saying he requested me to see him in his office.

- [44] Accused No. 1 did not refute his speech of 18th June, 2021 at S n' B Restaurant. He merely outlined the background that led to the meeting and the gist of what was said. For this reason, I am bound to accept the verbatim words as expressed by Accused No. 1 at S n' B Restaurant on the 18th June, 2021.

Deductions from Accused No.1's response to Mr. Quinton Dlamini's speech at S 'n B Restaurant on 18th June, 2021

- [45] From the afore-going, it is now clear how Accused No.1 intended the Constitution to be "*reviewed*". How he was determined to "*fight*" and how "*the Swazis will be free*" as per his speech at S n' B Restaurant on the 2nd June, 2021. It is further clear how he intended to have the Constitution "*torn*" in terms of his speech at Hosea Constituency on 5th June, 2021. His expression at Hosea constituency that the Constitution was a mere piece of '*paper*' can now be explained from the responses to Mr. Dlamini's call to go back to Parliament and amend the provisions of the Constitution in accordance with sections 245, 246 and 247. He expatiated that the only way to bring about the intended change which was the elections of the Prime Minister and other appointees was by the people taking to the streets. According to Accused No. 1 amending the Constitution in accordance with the provisions thereto was a futile exercise as no person could cause his own downfall. He then called upon the people to '*fill*' the streets and also deliver petitions.
- [46] May I take a pause to adumbrate on the value of a constitution in any given democratic country such as ours. The constitution is the cornerstone upon which

the three arms of government are established. It is the foundation which holds firm the State as it were. In the language of constitutionalism, the constitution is the grundnorm. All other laws must align or be in consonant with it. In simpler terms, the constitution is the supreme law of the land. Supremacy of the constitution dictates that all organs of the State must fulfil its obligations and comply with its provisions. For if not, the rule of law which is the bedrock of the constitution would be in disarray, a situation which the administration of justice cannot countenance as it precipitates societal anarchy, mayhem and disorder. **Dipak Misra CJI**,³⁹ writing on the autonomy of the constitution, hit the nail on the head on this point as he postulated: *“Its inherent dynamism makes it organic and, therefore, the concept of —constitutional sovereignty is sacrosanct. It is extremely sacred and, as stated earlier, the authorities get their powers from the Constitution. It is —the source. Sometimes, the constitutional sovereignty is described as the supremacy of the Constitution.”*⁴⁰ The learned Justice then proceeded to refer to **Bhagwati J**⁴¹ on the obligations by the functionaries of the government: *“[I]n his concurring opinion, stated that the Constitution is suprema lex, the paramount law of the land and there is no department or branch of government above or beyond it. The learned Judge, proceeding further, observed that every organ of the government, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of its authority.”*⁴² The learned Judge concluded on the consecrated characteristic of the constitution: *“The*

³⁹ In *Kalpna Mehta and Others v Union of India and Others* [2018] INSC 441 (9th May 2018)

⁴⁰ *Supra* at para 13

⁴¹ In *State of Rajasthan and Others v Union of India and Others* (1977) 3 SCC 592

⁴² *N²²* at para 14

Constitution does not accept transgression of constitutional supremacy and that is how the boundary is set.”⁴³

[47] Turning again to the undisputed speeches, it is glaringly clear that the address by Accused No. 1 calling upon the people to ignore the provision of the Constitution as he so expressed by his metaphor, “*a chicken cannot itself boil water to unpluck its own wings*,” that “*the Constitution was framed by ‘tihlakaniphi – crafty individuals’*” and that the people must “*fill the streets*” in order to bring about his intended change from the appointment of the Prime Minister, including Senate, Members of the House of Assembly, Regional Administrators, to borrow from His Lordship **Dipak Misra’s CJI** expression, was akin to the ‘*transgression*’ of the supremacy of the constitution. In terms of Count 1, it was tantamount to ‘*encouraging civil disobedience*’ during the month of June, 2021.

[48] To further state that the appointees were so appointed because they resided next to Royal Residences and did not know even the interior, let alone the sight of the Constituencies; that they were doing nothing except telling lies and that they were paid to tell lies, including that they were told, “*go there and speak vanity*,” was akin to calling upon the people “*to reject the appointment*” of the appointees of which the Acting Prime Minister was not spared. This resonates well with Count 1. Similarly, the address that the Constitution must be ‘*torn*’ as it is a piece of paper just like the papers in his boot and that the Constitution could not be above the people, falls within the ambit of Count 1 of ‘*encouraging civil disobedience*.’

⁴³ N²² at para 16

[49] Accused No. 2 was present in this meeting. He too addressed the platform. He spoke as follows:

“I would like to greet you this afternoon. We have greeted each other this afternoon. I’m also going to be brief with my co-honourable and Student Union. With regard to what the honourable have said together with TUCOSWA we are saying what the people are saying. The Swazis are emphasizing the matter of being able to elect the Prime Minister so that they will be able to recall him if they do not want to work with him anymore. Or even when he does wrong and steal their money. When he is seen constructing his homes which are expensive using the peoples’ money. That is what we have arisen for and represent as honourable and those who are representing the students together with TUCOSWA and SNAT. [1]

We plead with you Swazis that your views should be directed to the WhatsApp line and the website provided. So that we can have a clear way forward. Views or ideas cannot function over one day. They need to be polished. We would also like to encourage the Acting Deputy Prime Minister so that let us all go to the media or radio station so that we can speak and open the mindset of the Swazis. The radio should not be used only as an instrument that would speak positively about government. Let us all be able to go there because the station is funded by our taxes. If it is funded by our taxes as well as Swazi TV is funded by our taxes. We all have the right as the people to hear if our views and the different views they also have. The views on our lifestyle in the country of Eswatini. So let there be no one who is going to overpower somebody else first because he has more power. [2]

In other democratic countries, such views are allowed to be heard and spoken. Previously we had heard other Prime Minister where the honourable

were allowed to the radio station. There would be conversations, different opinions and they would forge a way forward through that. But now if you are going to be autocratic we can see that now that the suppression gets even worse saying that the Swazis should not be informed in this life. So we plead that this way that the people are bringing up on how we are going to elect our Prime Minister should be the one where all are able to communicate well and that it travels through the media and all the media houses that we have. [3]

The Prime Minister that we are going to elect is going to assist with the problem that we have with Parliament. The Central Bank is refusing to state that this is not healthy for the economy because if we borrow a lot of money from outside and go to fetch this other money from outside it becomes costly for the Central Bank. That all the time the money that is printed out that is supposed to be circulating inside keeps on going outside instead of circulating within the economy. So when it keeps on being taken out, it costs money to print it and this incurs costs which come from us taxpayers, coming out from our pockets in order to cover the costs of printing that money. As we pay out the loan then the circulation of Emalangeni gets reduced. So when the circulation of Emalangeni reduces, it calls for the Central Bank to print more money which would cover the shortage of the Lilangeni that is at the bottom. This is expensive. It costs us a lot. There is a need. When the Swazis have spoken that we should go and elect. To elect our own Prime Minister to safeguard where we keep our treasures, being in the Finance Ministry. Because if the Finance Minister is still given, he will never serve the interests of the Swazis. We shall find ourselves in a problem as to how we will balance service delivery to the people and the debts that we keep on creating that will not end and the expenditure of the monarchy.[4]

So what does it call for us to do? To have a government that if it takes decisions that are not healthy for the economy that we soon react as Swazis. So that we speak up early and we pull him down if he is not doing well. Fetching material from India, kills our own manufacturing sector as a country. Yet our manufacturing sector should be the one that drives the economy. So when we fetch things that have been manufactured outside, bringing them home is not a good sign for a sustainable economy for any country.[5]

So what we are saying, fellow Swazis, do not fear. If you want to speak for your rights come out and fill the roads. Yes indeed this is your right. From the ancient times it is not just beginning with you. The kings of those times and the leadership, when we look at the history of the rights of the people, even in America, all over the world, yes all over, the government only heeds when there are demonstrations at ground level. But those demonstrations that you know should not have noise. The woman who are vendors should not have their properties stolen and those small businesses. There should be no vandalizing of buildings. That is when we would see how a police officer assault someone who is speaking for his right.[6]

We have seen in other countries even in the curfew that is shutting down everything in India. They packed the roads. Even with COVID that was present, farmers took tractors to the streets and they stayed for some weeks in the streets. Why even with the COVID curfew it was clear that the laws that were enacted in parliament that was to govern the lives of the farmers they were not happy about them. They took to the streets. The government realized that they need to address that problem. So COVID should not hold us back so that we can be suppressed. Last year we took out money from Parliament that was over E900 million that it should go and fight and meet up the needs that came up with COVID disorders.[7]

But when you look at the ground level you do not see the number of new vehicles that are revealed. It is not clear if we could first say they are fifty emergency vehicles. We could say that there is E45 million to assist small businesses. Who would say I have been assisted today from that money.[8]

We see that the COVID as one of the things that are killing us. Money has been looted which was supposed to better people's lives and safety from COVID. But today why? If the Finance Minister does not have the heart for the people and so as is the Prime Minister does not have heart for the people. Even though he may have the heart, if the appointing authority compromises the work he is doing we would find ourselves in the problem we are in fellow Swazis. [9]

Swaziland should be a country we could all be proud of and that our forefathers wherever they are lying, to see the Swaziland we are building now and for the future.

The ancient Kings had a beautiful dream about this country. They wanted to see all Swazis having homes, sleeping under roof where they would be sheltered from the cold. Having birds sleeping well. But today what is happening? They wished that people could have enough food so that they could be well fed. But today we see introduction of taxation in the world. We find ourselves now paying attention to monthly money to our leadership rather than that the taxes we are collecting, how does it develop the lives of the people. We used to look at better trade as something slightly better. When taxation was introduced we thought the people's lives will improve but we have seen that certain leaders have taken advantage that they now have all the power to put the whole hand where in the people's taxes or where the source of the people's tax which is not just a challenge we see in Swaziland only but in all of Africa and other countries. [10]

This calls that we as human on earth we should stand up and speak for our taxes. So that the country and everybody who exist in the world, everybody who lives in Eswatini should be proud of themselves. Fellow Swazis we are requesting that we do get your views through WhatsApp and that we should constantly pray and not only that we should pray because God has given us the mind, hands, feet and mouth. We should go outside and shout that we want our freedom as Swazis. May the Lord bless you, fellow Swazis.” [11]

Accused No. 2 defence on 18th June, 2021 speech

- [50] Accused No. 2 explaining the above speech testified in defence that he called for the election of the Prime Minister. He did this following the People’s Parliament’s views as expressed in the cattle byre by the people and also as raised by Minister Buthelezi in Parliament in 2013. He further called for accountability by government. He denounced violence as he hated it.

Analysis of Accused No. 2 speech

- [51] He too, like Accused No.1 was emphatic on the call for an elected Prime Minister. How? He invited the people to come out and fill the streets as he stated: *“come out and fill the roads.”* He encouraged them not to fear. He drew their attention to the incident by the farmers of India who disregarded the curfew during the COVID 19 pandemic as they *‘took to the streets.’*
- [52] Accused No. 2 pounced on the elected Prime Minister and Minister of Finance. He pointed out that they had no, *“heart for the people.”* He then went overboard and pointed out that even if they wanted to have a heart for the people, *“[T]he appointing authority compromises’* their work and for that reason they find themselves in the challenges facing the country. He once again did not spare

the ‘*leaderships*’ expenditure, adding that taxes are collected for their benefit instead of the people. He ended up by calling for the people to “*go out and shout for their freedom.*”

- [53] As highlighted above, it is not so much the calling of election or whatever but it is how this election or whatever is envisaged by the Accused persons herein that matters. We now know from Mr. Quinton Dlamini’s address directing them to go back to Parliament and comply with the provisions of the Constitution, namely sections 245, 246 and 247 as he expressly so mentioned, that the accused persons totally rejected such advice and audaciously called for the people to take to the streets. Accused No. 2 described the appointees as having no heart for the people and even if they could, the appointing authority compromised their work such that problems were then experienced in the Kingdom. This statement by Accused No. 2 is in line with Count 1 that they encouraged the people to reject the appointment of the Acting Prime Minister and encouraged civil disobedience.
- [54] The Crown has alleged that the accused persons acted in common purpose. The question is whether there is evidence of common purpose.
- [55] Applying the doctrine of common purpose and bearing in mind its element of proximity, it is evident that the accused persons all intended that the election of the Prime Minister and other appointees fall outside the purview of the Constitution. This was despite advice from the President of TUCOSWA, Mr. Quinton Dlamini. Their proximity to the unlawful conduct is deduced from their panel on 5th and 18th June, 2021 at S n’ B Restaurant, Matsapha and their speeches where they supported each other.

Meeting at Summerfield Hotel on 24th June, 2021

[56] I now turn to the meeting at Summerfield of 24th June, 2021. Again, as common cause, the platform was the social media. Accused No. 1 addressed the meeting as follows:

"To take this opportunity to thank Honourable Members that are here. I appreciate to meet again and greet the Swazi nation and all the viewers in Eswatini. Not just taking this opportunity but the matter we have come for is a matter we are dealing with. The matter of us working with our government and our governed.[1]

I am a Member of Parliament. As a Member of Parliament, I am representing Swazis, not only Swazis from Hosea but Swazis as a whole wherein the government would stand and take the country and lead it astray in a way that is not allowed by the Constitution. It is my job politically that I should have an opportunity to respond as the hope for Swazis. I have risen as a Member of Parliament, a Member of Parliament that will not allow the government that governs currently to mislead the Swazi nation by taking it to the forest, by taking us back to those times when we were governed by other people whom I may not want to mention by their type who would wake up in the morning and feel that there is a law it can promulgate. So, I am saying good Swazis, these days we are governed well. We are governed well under the Constitution. The Constitution cannot allow any person to wake up in the morning and do whatever which is in conflict with the Constitution. The matter that is most important, Swazis, is that we rose on that day and we spoke on that day that we want a Prime Minister for the people. We want a government that is independent, a government that is not tied or bound to Royalty; a

government that would not consult with Royalty; a government that is independent, standing firmly; a government that takes decisions which would enrich and prosper Swazis; a government that will open jobs where the entire youth would not lack employment due to the current government. We want a government that would rise and take care of the elderly who worked for this country for it to get liberated. We want a government that will know that Swazis are aggrieved as they respond to her. So we cannot allow, wonderful Swazis, that the current government rises and takes the country back where we were governed, that time we were to take directives and orders. [2]

As a member of Parliament of constituency in Eswatini, I am saying let me directly address the matter we have just received, spoken by Prime Minister. I am saying, may we please tell you without fear or favour, what is being said by the Honourable Prime Minister using parliamentary language, we would say, he is out of order. He does not have the power he says he has. Because the laws he should speak of in the radio firstly, no matter which conference he is conducting, it should be aligned with the constitution. Even Parliament does not have the power of enacting a law that would be in conflict with the Constitution. Let me say this Swazis, you do have to deliver petitions. It is constitutional. It is a right of the Swazis. It is in the Constitution.[3]

No one can have the power to tell you to stop. No one can have power to tell you to stop. The only thing he can do is to deploy the police, as he always does, to assault you if that is what they want to do, but cannot stop you or make you to be stopped, today, that you may go and exercise your right, i.e.; in the constituencies and deliver your grievances.

that Swazis eyes have been opened. So let us not allow him to continue to look down upon the Swazis and the entire nation of Eswatini. [8]

So with those words I am saying if we would not be very broad but what then here to tell you as Swazis and that as honourable who is inside the House of Parliament who speaks that we want change. Election of Prime Minister for the election of cabinet to be for the people, and government that is independent from the Royal family. We will never entertain what government has said on Monday. We are saying those who are with us should not entertain that. We are calling for a change. [9]

We did not go to request permission from government to deliver petitions. You cannot stop something you have not launched. You cannot come and say you are stopping a petition when he did not launch the petitions, when he now says he wants to stop the petitions. When did he tell us that go and submit petitions? Does he know the message of the petition? Does he know the issuing of the petition? Does he know the theme of the petitions? So wonderful Swazis, let us not be intimidated by this Government.[10]

I will proceed and say briefly on other things Swazis. You saw in the past Members of Parliament were banished yesterday from the radio. They were banished from Swazi TV. They were banned from all media stations and the Observer where it is spoken about us; where we are speaking. You saw there is a Member that had a platform in the Current Affairs - Breaking News. What is the problem that caused the Member to have the platform? It was going to praise the government. He was fine-tuned to speak well of the government and make it look good. They can never give me that platform. That I would say. 'Give me this platform that I can speak about this Government.' So, I'm saying, wonderful

Because the government that is saying what it is saying today and is the same government that is coming down like rain. It is the one we are talking about and delivering the petitions to; the one we are saying we no longer need. Is the one we no longer want. [4]

So then, I say wonderful Swazis, protesting is a constitutional right that you are expressing your grievances and oppression. Delivering a petition is a Constitutional right. You are submitting your grievance where you sent your Member of Parliament. There is nobody constitutionally who has a right to control you. [5]

I am saying Swazis having said that, I as a member of the constituency, elected by Swazis, we will not allow, as Members of Parliament, to be deceived by the Government. Because if the government wanted to say that, it should have come to Parliament and I don't see this Parliament could allow itself to be in conflict with the Constitution because in the Constitution delivering of petitions is included. So there cannot be any person who can have that power. [6]

Briefly, I am saying I pity him who is Honourable Acting Prime Minister that indeed he finds himself carrying the power of God where he can just wake up in the morning, wash his face and say my children now you stop eating; my children now you do not go to school; my children you see and not go anywhere. We cannot as a country be governed or headed like that.[7]

I am saying Swazis this that we have started can I please mention it like this today he likes it or not we will achieve it. What he is asking now it is signs to show you that it is there, right ahead. Because he is showing everybody that he is jumping and he is afraid because he sees

I realised that you had built a system that said, 'No what the Member of Parliament has said, in solidarity with the others in Parliament, we are in solidarity by taking our grievances to the Constituencies and to the other Members. Let us take this opportunity.' [13]

I would like to say what you do not know. We have been in caucus for five hours. What I like about the caucus is that all the Honourable Members of Parliament, the ones you sent, stood and spoke in one voice and said, 'Yes, we hear the Swazis want a government for the people.' Now we are here in darkness as government adjourned sine die. Because she hears that all the Members of Parliament except for two who were left behind who are diverting in view and those members of cabinet. The rest of the House stood up according to your petitions. So do not allow that someone tries to disrupt you that you do not now say your grievances to the members. We praise the Members of Parliament because today the Members of Parliament can see the light. We want a Government with the will of the majority. We want a government that will pay one person one salary, not two or three. We want, in Boards, all Swazis should enter and be a member by qualification and not because of your blood line. We want the universities to be headed by qualified people and not on how loyal you are to the system. We want an independent Government. We want to be headed by a Regional Administrator in Manzini who is of the will of the people; in Nhlengano who is the will of the people; in Hhohho who is the will of the people. We do not want to be headed by someone who comes down like rain. It is only rain that is brought down by God but we appreciate it because it rains in due season. But we do not want people who came like God. [14]

Swazis, it is the propaganda of the current Government who has governed in this fashion for years, oppressing Swazis, knowing that Swazis are afraid. In brief, I am saying Swazis you do not fear. We want freedom of every Swazi citizen.[11]

Can I now start on this one: I do not want us to leave each other behind. We hear that the others are trying to bring confusion. 'We and the political parties and everybody who is a Swazi, we are not any different.' What we are saying is, whether you are party or constituency, is either you are a student or whatever you are, we are saying, we want a government for the people. We want a government that is not bound to another. We want a government that is bound to the nation. That is what we are saying and there is nowhere where you will hear me saying I do not want a party or I want a party. What I am advocating for now we want a government for the people, an independent government.[12]

So briefly, young people we've struggled a long time under the same system of governance, without wanting to give you assistance as though it is not your right. Yet it is your right that as a young person you wake up and go to school and Government provides scholarship; Government to create job opportunities. There are people who are over ninety years and government is still renewing their contracts. But you are struggling to get employment because government is seated with people we can call crones – 'tindandavu.' They are seated and enjoying public funds. In brief, I am saying Swazis, may be if I can leave you out this thinking that there is someone who has power. I do not remember even once but I am the one who stood up sent by you and said we are requesting a government for the people. We are requesting a Prime Minister for the people. But I do not remember saying rise or stand and deliver petitions.

I am sorry to say, 'To hell with our government.' I said yesterday when I spoke, no matter how much you can intimidate me I am not going back and what will silence me is that God will take my soul. I will not be silenced by that you are intimidating me. I will not reverse because you are intimidating me. What we can say Swazis, this one Swazis, which was fought for by our forefathers, our grandfathers and our fathers and fetched it from that nation cannot be governed as before. Let us stand up and do what is our right as per the Constitution. In those words can I take it today and end here. We will see when we have spoken. I bid good bye. [15]

Briefly Swazis, I'm saying, do not be intimidated. What was done by the Deputy Prime Minister is unconstitutional and unlawful. Constitution gives you right to deliver the petition. Constitutionally it is your right to exercise your right that you have not been treated well. Constitutionally it is your right to grieve in the way you are grieving that you want a certain government. [16]

Constitutionally, it is your right to stand up and be in the road at the time that you want and shout. Constitutionally, do not vandalise people's property. But we will never be stopped by the same government which is corrupt. That government is full of corruption. The strategy it is using by the same corruption it has ripped the country for years. They are full of corruption. We cannot tolerate it any more. Because they are protecting the corruption they are doing every now and then. They sit down and think how, can we take money from the people. That is the only thing they are doing. We cannot entertain it. As a politician, as a Swazi, as an individual, I stand for you Swazis. I cannot tolerate this. Thank you. In the name of Jesus, may the Lord bless you. [17]

I will ask that it proceeds to someone else. Will report that one of the honourable has headed somewhere but he is coming back. [18]

Crown's evidence on 24th June, 2021 event

[57] The Crown led the evidence of PW18, Thabile Mdluli. She identified herself as the Government Spokesperson of 2021. She testified that in June, 2021, the country had no substantive Prime Minister. The Deputy Prime Minister, Themba Nhanganiso Masuku held fort the office of the Prime Minister. Her short testimony was that on the 24th June, 2021, the Acting Prime Minister called for a press conference. She was present. The Acting Prime Minister, exercised his powers in terms of COVID 19 Regulations, section 19(2), Assignment of Responsibilities to Ministers Notice of 2015, the National Disaster Management Act and as the Minister for Police. She referred the court to a document which was at the end of her testimony marked as exhibit G with the approval of the defence. The summary of the Acting Prime Minister's address was that he banned delivery of petitions in the Kingdom. PW18 then handed to court a document she classified as a statement delivered by the Acting Prime Minister. She read the contents into the record. She confirmed that the Acting Prime Minister read exhibit G to the press conference.

[58] Under PW18's brief cross-examination, she confirmed that all the media houses were present at the press conference as it was her duty to contact them. The substantive Government Spokesperson was away in Dubai at that time. She had read exhibit G before the Acting Prime Minister delivered it. She did not contribute to its contents. She agreed to the question that as the Minister for Police, the Acting Prime Minister had the responsibility to ensure that there was

security in the country. Defence Counsel applied to recall this witness once he had the pieces of legislation PW18 testified upon.

- [59] PW18 was recalled by the defence. She was referred to Legal Notice 2015 and asked if it was the same Notice she referred to in her evidence-in-chief. She agreed. She was referred to Part C and asked if the Prime Minister then was Mr. Dlamini. She agreed. She was asked if there was a press conference then in June, 2020 when the then Prime Minister promulgated Part C. She said that she could not recall in as much as she joined the office of the Prime Minister in 2019. It was suggested to her that there were only thirty-three sections but then there was Regulation 52 in terms of the Acting Prime Minister. She confirmed that Regulation 52 was in terms of section 2. It was suggested to her that she knew nothing of what happened before exhibit G was delivered. She gave a positive answer.
- [60] PW58 was Detective Superintendent 3941 Thabo Hlophe. In June-July, 2021, he was based in Manzini as the Regional Crime Branch Officer. He testified that amongst other duties, he managed criminal activities in the region. In that period, there was petition delivery. On 15th June, 2021 at Kwaluseni Inkhundla, there was a petition that was delivered. During the process, the crowd delivering the petition pelted the Member of Parliament and the police officers with stones. Similarly at Kukhanyeni Constituency, the petitioners, having delivered the petition, then pelted the police with stones. They blocked the motor-vehicles on the road by burning tyres and putting stones. Consequent to the violence, on the 24th June, 2021, the Acting Prime Minister issued a Banning Order on petition delivery. The Acting Prime Minister explained that the reason for the Banning Order was due to the violence occasioned during the delivery of petitions and

that the protesters were not complying with COVID 19 Regulations during the process.

[61] PW58 proceeded in-chief:

“On the same date (24th June, 2021) I saw on social media Accused No. 1 and Accused No. 2. They were in a form of a conference and there was also Mduduzi Simelane and others.

I saw Accused No. 1 informing the masses that they should ignore the message by the Deputy Prime Minister. He stated that people should come in numbers and bring petitions to their various constituencies. He stated that what the Deputy Prime Minister was saying was unconstitutional. He stated that it was the masses’ constitutional right to go and deliver the petition to the various constituencies. He also advocated that they want an elected Prime Minister by the people who would hear and consider their grievances since he would have been elected by the people. He mentioned that they do not want a Prime Minister who comes down like a down fall imposed upon them. He encouraged the masses to come and deliver the petitions in their numbers.”

[62] PW58 testified that consequent, on the 28th June, 2021, in Manzini region, there was civil unrest whereby there was a group of protesters who were “*very unruly and violent*”. They were blocking the road with burning tyres. They would cause motorists to pay certain amount of money to pass where they had their blockage. They vandalized, burned and looted some stores. As this was happening, it was a very intense situation. It was hard even for the police to reach certain places. That was because of the blockages. When police came,

they were pelted with stones. The protesters were demanding for an elected Prime Minister.

- [63] In Manzini region, there were eight police stations. In Manzini police station, eighty-five (85) cases were reported, Matsapha police station, one hundred and fifty-eight (158) cases, Malkerns police station, twenty-nine (29) cases, Mafutseni police station, seven (7), Bhunya, eight (8), Mankayane, ten (10), Mliba, three while at Sidvokodvo police station, four (4). The total value of damages to property was about E17,831,819.86 (Seventeen million, eight hundred and thirty-one thousand, eight hundred and nineteen Emalangeni eighty six cents).
- [64] PW58 also testified, *“Leading up to the Banning Order, there were a lot of protests. After the Banning Order, there was civil unrest.” It became worst. There was unrest as there was burning of government structures, looting of stores and infrastructure burning.*” As police officers, it was difficult to cope up with their work. They had to divert all their man power to curb the situation. After 24th June, 2021, the protesters were to deliver a petition at Ngwempisi Constituency. They did show up but were blocked by the police.
- [65] On cross-examination, it was put to him that the conference he spoke about was at Summerfield. He replied that he was not aware of its place. He testified that he watched it alive on 24th June, 2021 and also on later dates. He confirmed the presence of the accused persons and other speakers which were suggested to him as TUCOSWA, SNUS and SNACS. He was referred to the transcript and asked on where exactly Accused No. 1 informed the people to ignore the Banning Order. He responded that Accused No. 1 said that no person can stop them from

delivering petitions and that in essence he was implying that the people should ignore the Banning Order. He stood his ground on this evidence. He was then taken to task for failure to arrest the people who were responsible for the damages and also those members of TUCOSWA, SNUS, SNACS who spoke at the conference. He replied that such was the discretion of the Director of Public Prosecutions. He was asked on the number of deaths during the unrest and he replied that about fifteen people. It was put to him that at Ntandozi Constituency, a petition was delivered on the 26th June, 2021. This witness responded that he was not aware of such.

[66] PW59, Detective Assistance Superintendent 3024 Sibusiso Dlamini testified that he was the Regional Crime Branch Officer based at Shiselweni region. On 24th June, 2021, the government banned delivery of petition in the constituencies for the reason that there was violence during the delivery of petitions. On the same date, Accused No. 1 issued a statement conflicting that of the Acting Prime Minister. He informed the public to continue delivering petitions as it was their constitutional right to do so. People adhered to what he said. They continued to deliver petitions. They became violent despite that he had told them not to be.

[67] On the 29th June, 2021, he received information that there was violence at KalaWuba, Hlatikhulu and Nhlangano. He decided to go to KalaWuba in the company of other police officers. At Sidzandlala road, they met a group of people who were protesting. They were carrying knob-kerrie and tree-branches. They negotiated with their leader, pleading that they should free the road as motorists were distracted. They manned KalaWuba area until 2000hours. They returned to Nhlangano via Hlatikhulu. They found the whole town in fire. They

reinforced police officers and chased away the looters. They arrived at Nhlangano. They found the town engulfed in fire. Nhlangano library was burning while the shopping complex, OBC and the Health Centre were down in ashes. Looters were still forcing their way into town. They chased them away. Access to any of the towns was difficult as the protesters blocked the roads with stones and tree branches. They caused other road users to pay for their passage. They retired at about 0300 hours. He found all the houses at the police camp broken. He compiled a report and the damage summed to about E171,504,273.00 (One hundred and seventy-one million five hundred and four thousand two hundred and seventy-three Emalangeni)

[68] On cross-examination, he testified that four people died as a result of the violence. On the perpetrators, investigations are still on going. Asked if he was aware that police shot at those people, he replied that it could be police officers who were business people who were protecting their businesses from being looted and destroyed. They used live rounds. He was taken to task for failing to enter in his report the statement by Accused No. 1. He maintained that he realised later that Accused No.1 statement was important to testify on in court after writing his report. He was asked if he watched Accused No. 1 making his statement and he answered in the positive saying that he watched him on face book on 24th June, 2021.

[69] PW60, Detective Assistance Superintendent 2944, Justice Mabuza was also Regional Crime Branch Officer for Lubombo region. He testified that it is common knowledge that on 24th June, 2021 the government banned the delivery of petitions. On 19th June, 2021, there was a petition delivery at Sithobelweni Constituency. The people who were to deliver the petition became violent as

they blocked the road. Siphofaneni police failed to control them. They called for a back-up from Big-Bend. It is then that they could control the crowd. On the 24th June, 2021 when the Acting Prime Minister issued an Order, banning delivery of petitions, Accused No. 1 also issued a statement encouraging the people to continue delivering petitions in a press conference where he informed them that it was their constitutional right to do so.

[70] A petition delivery was arranged for Siphofaneni Constituency for 26th June, 2021. In the company of other police officers, he went to Siphofaneni to stop the delivery of the petition. The people who intended to deliver the petition became violent. The time was about 1100 hours. The protesters blocked all roads leading to Siphofaneni town, using stones. As the day progress, they had to call for reinforcement of police officers from other regions. In the afternoon, the people started throwing stones against shops and motorists. They then burned tyres and threw stones against motorists, including shops. They could not reach other areas as the road was blocked. This led to the protesters looting shops.

[71] On 27th June, 2021, they visited homes to recover the looted items. They did recover some. He instructed Desk officers from the various police stations in his region to compile reports of the damage. They obliged. The reports reflected damages of grocery shops, Government motor-vehicles, delivery trucks and more. The total value was about E156,000,000.00 (One hundred and fifty-six million Emalangeni). He compiled one report and submitted it to court. It was admitted and marked exhibit U with the consent of the defence. The Banning Order was not complied with as the people were encouraged by Accused No. 1 to disobey it.

[72] He was cross-examined on whether the police used force to control the people on 19th June, 2021. He said that they used the riot platoon. It was put direct that the police were shooting them and he responded that they were not. He was referred to exhibit U and asked if any of the people were charged. He said, 'Yes'. He was asked if any was charged with arson and he said that none. It was put to him that Accused No. 1 never encouraged the protesters to continue delivering petitions except that he told them that it was their constitutional right to deliver petitions. He was adamant that whether he said so, it was akin to encouraging the people. He was cross-examined on why his report, exhibit U, did not reflect the evidence on Accused No. 1 statement of 24th June, 2021. He responded that when he wrote it, he concerned himself with incidents that happened at his region. He refuted the defence version that at Lubombo region people were killed by police using live rounds of ammunition. He however, pointed out that two people died at Lubombo on other dates where one was burning ESWADE motor vehicle and another through cutting an electric pole.

[73] The next witness was PW61, 3527 Assistance Superintendent Jabulane Madlopha. He was in charge of Hhohho region as the Regional Crime Branch Officer. His testimony was that in the month of June, there was delivery of petitions in the Kingdom. The petition delivery proceeded until there was violence in the country. On 24th June, 2021, Government took an initiative to ban petition delivery, citing violence and non-conformity to COVID 19 Regulations. On the same day, 24th June, a video circulated on social media. Accused No. 1 was talking in that video. He stated that no one can stop the protesters from delivering petitions because it was their constitutional right to do so.

[74] In the Hhohho region there was not much violence. However, after Accused No.1 had said that no one could stop the people from delivering the petitions, *'things got out of hand.'* At Msunduza on 25th June, 2021 people burned tyres. This spread all over the regions where the roads were closed by protesters. They stoned motor-vehicles, including Government's motor-vehicles. The situation was so much tense such that police officers could not access areas where help was needed. Many shops were looted and some burned down. This includes three constituency centres, namely Endzingeni, Mayiwane and Timphisi Constituencies. Some looters were arrested and prosecuted. The damage was estimated at above E26,000,000.00 (Twenty-six million Emalangen). He then handed to court a report which was admitted and marked exhibit V without any objection.

[75] On cross-examination, he was asked to clarify his statement to the effect that the Government provided alternative means of submitting petition. He explained that the Government did say that instead of people going to their Constituencies to deliver petitions, they should deliver the petitions on line by emails. He was asked why he failed to reduce the evidence against Accused No. 1 in his report. He said that it was not everything that he would say in court that needed to be in the report. It was said that his evidence implicating Accused No.1 is an afterthought. He refuted this. He was asked if there were people who were killed. He agreed and when asked if they died in the hands of police, he said that he did not know. He was asked why his report, exhibit V failed to include such killing, he replied that the purpose of exhibit V was to state the value of damage to property.

Analysis of Accused No. 1 address at Summerfield and Evidence of PW18, PW58, PW59, PW60 and PW61

- [76] A common thread runs across the evidence of PW18, PW58, PW59, PW60 and PW61s' evidence. It is that on the 24th June, 2021, the Acting Prime Minister issued a Banning Order against the delivery of petitions. The Banning Order was informed by violence and failure to comply with COVID 19 Regulations that accompanied delivery of petitions.
- [77] The evidence of PW58, PW59, PW60 and PW61 as police officers in charge of crimes in the regions of Manzini, Shiselweni, Lubombo and Hhohho respectively, goes further to implicate Accused No. 1. They all contended that on the 24th June, 2021, after the Acting Prime Minister had delivered the Banning Order, Accused No. 1 issued a statement through the social media platform, where he told the people to ignore the Banning Order by the Acting Prime Minister and continue to deliver petitions. They said that Accused No.1 informed the people that they should continue to deliver petitions because it was their constitutional right to do so.
- [78] Except the cross-examination of PW58, the defence contended against the evidence of PW59, PW60 and PW61 that their evidence implicating Accused No. 1 was not reflected in the reports which they handed in court as exhibits. PW59 responded that he had already submitted his report when he realised that the evidence on Accused No. 1 was vital. He missed including it in the report. PW60 stated that at the time of writing the report, he concerned himself with the crimes around his region. PW61 testified that it was not everything that he would say in court that he would reduce into writing. It was then suggested to

PW61 alone, *“This evidence of yours implicating Accused No. 1 is an afterthought.”* PW61 disputed that.

- [79] I must point out from the onset that the contention by the defence that the witnesses failed to include the evidence against Accused No. 1 in their reports handed to court was futile. The reason is that the witnesses presented to court their respective reports and not statements. A line of demarcation must be drawn between a report prepared by a witness and his statement. A statement by a witness in court contains the gist of his testimony while a report, in as much as it may contain what he will testify about, it does not amount to a statement. The inference drawn at the instance of the defence therefore that whatever the witnesses spoke about was an afterthought stands to fall. At any rate, the speech was presented in court for analyses.

Accused No. 1 defence evidence on the speech of 24th June, 2021 at Summerfield Hotel

- [80] It is apposite to turn to Accused No.1's defence at this juncture. The speech was not denied per se. Accused No. 1 testified in defence that he did not call upon the people to disobey the Banning Order. He merely advised them of their constitutional right to deliver petitions. He stated, *“There is nowhere in which I call for the people to go and deliver petitions. Even in the speech of 24th, what I said, I told the people about their constitutional rights which constitution I used when I took the oath of office. Accused No.1 then stated, “When I said ‘no one can tell you what to do,’ I was including myself in that speech. In the speech no one could tell you to go and stay, so I cannot then have power to tell them to stop or stay.”*

[81] Having stated the above, Accused No.1's Counsel posed, "*The banning of petition was unlawful, you say so?*" Accused No. 1 responded, "*I say so.*" His Counsel, as though cross-examining him, asked again, "*Do you agree it was lawful to ban delivery of petitions?*" He answered, "*I don't agree. First of all the delivery of petitions is guaranteed by the constitution. Secondly, the House had reached a resolution. Thirdly, the Acting Prime Minister should have followed proper channels.*" Explaining what he meant by that no person had the power to stop the people from delivering petitions, Accused No.1 stated, "*I meant here that there was a resolution in the House that all petitions should be delivered on the weekend of 26th and 27th. So every member who took an oath to be a member of parliament has no power to contradict the resolution of the House, no matter his high position in government. He has no right except in the House to change what has been taken as a resolution in Parliament.*"

[82] Accused No. 1 explained with regard to his utterances that the Acting Prime Minister was out of order, "*In this speech I meant exactly that he was out of order as he had no power to change the resolution.*" He then expatiated on the procedure the Acting Prime Minister ought to have followed if he intended to change the resolution. He stated, "*As per procedure, as per our resolution i.e. the House had made a resolution. If the Acting Prime Minister wanted to change the resolution he ought to have called Speaker and ask that the House convene. Once the Speaker is contacted by the Acting Prime Minister, he then calls the committee he works with. This is the sessional committee which includes me as chair of chair. If there is a change of resolution, then we debate on that issue together with the committee of seven members. If in that meeting i.e. between me and the Speaker and seven members there is no consensus, we vote. If the*

ones who say let the House be called have a majority, then we proceed and if the contrary, then not. If the change of the resolution was coming from Parliament, the Member of Parliament raises the concern. Then the chairman of that particular Member of Parliament would call the chair of chairs (i.e. Accused No. 1) that they see a need for the House to convene. The Chair of chairs calls the Speaker. The Speaker calls the sessional committee to deliberate on the issue. Another avenue the Deputy Prime Minister could have utilized, he could ask the Chair of the Police to meet with the portfolio of the Police Committee. He himself, Acting Prime Minister would lobby that committee. If they agree, that committee then lobby the sessional committee. That is the real reason the Prime Minister failed to follow that channel and that is why I say he was out of order.” Testifying on why he called upon the people not to be intimidated, Accused No. 1 clarified, “I was saying even if he could stop delivery of the petitions, the people should not be intimidated as what the people want would eventually be received i.e. election of Prime Minister.”

- [83] Dealing with the violence that eventually ensued in the Kingdom, Accused No. 1 stated, “There is no way between me and my co-accused as we were promoting peace to the elections. To me what caused the violence is the Deputy Prime Minister. We couldn’t foresee the violence. The Deputy Prime Minister blundered and did what was unlawful in the country. If anyone had told us that there was violence then we would have said that the Deputy Prime Minister was justified in banning the delivery.” Accused No. 1 explained that the violence that occurred at Kukhanyeni was because the Member of Parliament hid himself inside the constituency building and when the people intended to deliver the petition, he could not be seen. The people were therefore demanding to see their Member of Parliament in order to deliver the petition.

- [84] Driving the point home that the Acting Prime Minister issued an unlawful order, Accused No. 1 invited two Members of Parliament to testify in support of the same. DW3 was Timothy Bambelela-kuJesu Myeni. On oath, he testified that he was the Member of Parliament and he was on his third term. He was a singer, a Pastor and a businessman. He chaired the Tinkhundla Committee in Parliament. On the 21st June, 2021, in Parliament, they discussed delivery of petitions. Member of Parliament, Small Joe suggested that the matter be referred to caucus. They did deliberate on the matter in caucus. It was agreed that the House should wait for all fifty-nine constituencies to deliver petitions. The cut off date for delivering petitions was 26th June, 2021. The Speaker adjourned the House *sine die*. On 24th June, 2021 they were ‘*confused*’ as the Acting Prime Minister banned delivery of petitions whereas he was present in the caucus.
- [85] It was put to DW3 by the prosecutions’ Counsel: “*There was no contempt charges because there was no formal resolution taken in the House?*” DW3 responded, “*I spoke about caucus and the Speaker never formalized it when he assumed his seat.*” It was also put to him, “*Had this been a lawful order of the House and had the Deputy Prime Minister banned the delivery of petitions, without shadow of doubt, he would have been subjected to contempt proceedings?*” DW3 answered, “*I get that or hear what is said.*”
- [86] DW3 also testified in main that there was no violence reported during petition delivery. He had received a petition himself from his constituency at Nkilongi Constituency and it was peaceful. Confronted with the evidence of PW19 that there was violence during petition delivery, DW3 responded that PW19 was assaulted by his enemies and not due to petition delivery.

[87] Similarly the evidence by Menzi Vincent Zwane, DW4, who identified himself as a Member of Parliament under the Nhlambeni Constituency. He testified that on the 21st June, 2021, the Speaker made an announcement, passing condolences and commending Members of Parliament for receiving petitions. Following that there was disagreement, Small Joe suggested that they should proceed to the King, explaining that the King had stated that if there was disagreement in Parliament, they were at liberty to approach him. Member of Parliament Khumalo suggested that the matter be referred to caucus. The matter proceeded to caucus where a “*resolution*” was taken that petitions should be delivered until 26th June, 2021. He was shocked to learn that the petition delivery had been banned. He did not explain why he was shocked. Under cross examination, he insisted that the decision taken at caucus was binding and lawful. He further testified under cross-examination that he learnt of the Banning Order through the Member of Parliament’s whatsapp group. He was due to receive a petition. He received a call from Sidvokodvo police advising him that the Acting Prime Minister had banned petition delivery. He advised the protesters to deliver the petition at his home.

Legal point

[88] I must point out that the court heard for the first time when Accused No. 1 testified in defence that there was a resolution taken in caucus that petition delivery ought to be extended to the weekend of 26th and 27th presumably, June, 2021.

[89] The Crown, in an effort to disprove such assertions by Accused No.1, introduced the Hansard and put it to Accused No. 1 that there was no such resolution taken on the last day of Parliament before it was adjourned *sine die*. The Crown

queried Accused No.1's failure to instruct his Counsel earlier on this point as such evidence was not put to any of the Crown's witnesses, particularly PW 16 (Member of Parliament) who was present in Parliament on the last day or at least of PW18, the Government's Spoke-person. Accused No. 1 answered that he knew that his time for testifying in court would come. He would then have his day in court and narrate what transpired. This answer was unfortunate in two-fold. Firstly, it is not clear as to when Accused No. 1 anticipated his day in court as he instructed his Counsel to move a section 174(4) application, namely, discharge at the close of the Crown's case. Secondly, the trial procedure does not provide for such, as succinctly outlined under the law of evidence and procedure. At the close of the defence case, the Crown applied to re-open its case in order to counter the evidence by Accused No. 1 that the Banning Order by the Acting Prime Minister was unlawful as it was contrary to the resolution taken on 19th June, 2021. The Crown intended to establish that there was no such resolution taken by the House. The Court dismissed the Crown's application and pointed out that the reasons shall be given later. I duly state the reasons herein.

Reasons for dismissing application by the Crown to re-open its case

[90] Hannah CJ⁴⁴ citing S v P⁴⁵ wrote:

"It would be difficult to over-emphasise the importance of putting the defence case to prosecution witnesses and it is certainly not a reason for not doing so that the answer will almost certainly be a denial... So important is the duty to put the defence case that practitioners in doubt as

⁴⁴ The King v Dominic Mngomezulu Crim Case No. 94/1990

⁴⁵ 1974 (1) SA 581 at 582

to the correct course to follow, should err on the side of safety and either put the defence case, or seek guidance from court.”

[91] The learned Chief Justice then referred to Phipson⁴⁶ as follows:

“As a rule, a party should put to each of his opponent’s witnesses in turn so much of his own case as concerns that particular witnesses or in which he had a share, e.g. if the witness has deposed to a conversation, the opposing Counsel should indicate how much he accepts of such version, or suggests to the witness a different one. If he asks no question, he will in England, though not in Ireland, generally be taken to accept the witness’s account. Moreover, where it is intended to suggest that the witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation... Failure to cross-examine, however will not always amount to an acceptance of the witness’s testimony, e.g. if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character or the abstention arises from mere motives of delicacy... or when Counsel indicates that he is merely abstaining for convenience e.g. to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all.”

[92] Failure to cross-examine a witness would in our law lead the court into making adverse inferences. Hannah CJ expatiated in this regard:

⁴⁶ Law of Evidence, 10th Ed para 1542

“It is, I think, clear from the foregoing that failure by Counsel to cross-examine on important aspect of a prosecution witness’s testimony may place the defence at risk of adverse comments being made and adverse inferences being drawn. If he does not challenge a particular item of evidence then an inference may be made that at the time of cross-examination his instructions were that the unchallenged item was not disputed by the accused. And if the accused subsequently goes into the witness box and denies the evidence in question, the Court may infer that he has changed his story in the intervening period of time. It is important that Counsel should put the defence story accurately. If he does not and the accused subsequently gives evidence at variance with what was put, the court may again infer that there has been a change in the accused’s story.”

[93] Since then, the principle as outlined by CJ Hannah has been part of our jurisprudence and correctly so, as we follow English law on admissibility of evidence and procedure. Failure to put the accused’s version on the Crown’s witnesses is viewed by the courts as an afterthought if later advanced in defence. Maphalala CJ neatly summed, *“It is trite principle of our law that the defence case should be put to the prosecutions witnesses otherwise the defence evidence would be considered an afterthought if disclosed for the first time during the accused’s evidence in chief.”*⁴⁷

[94] From the above principle, it was therefore clear that to allow prosecution to re-open its case would serve no purpose. I then dismissed its application.

⁴⁷ Nkosinathi Sibandze v Rex (31.2014) [2014] SZSC/19 (19th December, 2015) at para 15

Deduction

- [95] The evidence at the instance of Accused No. 1 and his witnesses therefore that the House resorted to a resolution to the effect that petitions be delivered until the weekend of 26th to 27th June, 2021 therefore stands to be dismissed for the reason that it was not put to any of the Crown's witnesses. This includes the evidence that the Acting Prime Minister ought to have followed either one of the three procedures outlined by Accused No. 1 in his defence. Such evidence was not put to the Crown's witnesses. In the end, the evidence that the Banning Order by the Acting Prime Minister was unlawful on the ground of the resolution and failure by the Acting Prime Minister to follow certain procedures if he intended to pass the Banning Order must be rejected as an afterthought.

Evidence of violence pre-Banning Order?

- [96] PW18, the Government's Spoke-person testified that the Acting Prime Minister was informed by violence which occurred during petition delivery and failure to comply with COVID 19 Regulations by the protesters in promulgating the Banning Order. The Crown led a number of witnesses to establish the violence before the enactment of the Banning Order.
- [97] PW14, 4152 Inspector Pointer Mfanizile Mngometulu under oath testified that in June, 2021 he was stationed at Manzini Police Station. On 19th June, 2021 he headed a team of four criminal investigation department officers and five general duty officers to Kukhanyeni Constituency. They were welcomed by Member of Parliament Malavi Sihlongonyane and the constituency headman Mr. Matsenjwa. The constituency building was locked. The person who had locked it was nowhere to be found. They negotiated an entry through the back gate with the assistance of an employee from World Vision. Inside the constituency

premises, each officer was deployed at a strategic position. The general duty officers occupied the rear area of the constituency while the CID officers manned the main gate and front of the constituency. He remained in the company of the Member of Parliament and the headman.

- [98] At around 9:00 am, they saw a group of young men gathering around the shopping area which was a distance from the constituency. They suddenly burst into a song. The group then proceeded towards Nkiliji, away from the constituency. It marched away for about a kilometer distance. At about 11:00 am, it returned and headed to the constituency's main gate, still in song. The group of protesters was about eight people in number. The protesters were carrying sticks, branches of trees and placards reading "*We want justice for Thabane*", amongst many. One of the songs sang was "*Dubula dubula*" - "*Shoot, shoot*". Another song was worded "*Ulawula kwekugcina Mswati, ulawula kwekugcina Mswati*" - *This is your last reign Mswati, this is your last reign Mswati*". One Sakhile Nxumalo posed as the director of the programme and as he invited speakers after speakers to address the gathering. Sakhile Nxumalo called upon Xolani Maseko, the president of SNUS, to address the gathering. Xolani Maseko challenged Member of Parliament Sihlongonyane to categorically state his position on the current issue. He challenged him to take the position of Accused No. 1 and Magawugawu. Many speakers were caused to speak. Thereafter, they requested to deliver the petition. They demanded to enter the premises of the constituency as they were by the gate. They were advised that the key to the main gate was missing. They demanded to know how he and others had entered. There was an argument to and fro on this issue which lasted for about twenty-minutes. During such argument, some protesters pelted them with stones. Some stones landed on the guard house which was inside the

constituency. PW14's group negotiated for calmness. At the end the petition was delivered. The protesters caused the Member of Parliament to sign for receipt. As they moved away from the main gate, they hurled insults at his group. They were also carrying bottles of beer, drinking from them. At about a distance of eighty to one hundred metres, they started fire on the road. They moved away to a further distance of about eighty to hundred metres which is at the main road where they made another fire, using old tyres. The fire started by the protesters in the middle of the road led motor-vehicles to be on stand still. The Station Commander who joined later, ordered his team to remove the fire from the road. As PW14's team proceeded to the bus stop to carry on the orders by the Station Commander, the protesters pelted them with stones and heaved them with insults. They first tried to negotiate for space in order to reach the fire. This was in vain. They then used canisters to open a route. Some of the protesters moved away while others remained adamant. Some of the officers removed the fire while others had to wade away the determined protestors who were continuously pelting them with stones. They also threw logs and sticks at them. Two of the officers sustained injuries.

[99] Sizwe Matsebula, one of the protestors, kept on encouraging the protesters to carry on pouncing on his team, advising them that the police would not shoot them. The police also continued throwing their canisters and grenades. The fire from the road was eventually removed for the flow of traffic. By then a backup force had been called from both Correctional Services and the Police Service.

[100] The protesters were relentless. Chief Mkhumbi approached in his motor-vehicle. Sizwe Matsebula spotted him and directed the protestors saying "*this is one of them that we are looking for.*" They pounced on him with Sizwe

Matsebula attempting to open the driver's door while the other protestors blocked its movements. The chief paved his way out in accelerated speed. In the process Sizwe Matsebula sustained injuries on his hands and cheeks.

[101] PW14's team rang the Emergency Service 977. Sizwe Matsebula and the other officers who had been injured were attended to. In the process of the protestors throwing stones at his team, Sizwe Matsebula's motor-vehicle sustained damage on its windscreen. Upon noting the damage, the other protestors decided to take their motor-vehicles away from the scene. The situation was then normalized. They returned to the police station.

[102] Under cross-examination, PW14 reiterated that Sizwe Matsebula was injured by the moving motor-vehicle and was attended by the personnel from Emergency Services. His motor-vehicle was damaged by stones pelted by the protestors. This followed a question posed to him as to what transpired to Sizwe Matsebula. He also pointed out that the protestors did try to force entry into the constituency by breaking the lock using a log but failed.

[103] PW15 was 2269 Superintendent Patrick Ginindza who told the court under oath that on 15th June, 2021 he was the Station Commander at Matsapha. He received a message to the effect that a group of young men were at Kwaluseni Constituency. They wanted to deliver a petition. He assembled few police officers and they proceeded to Kwaluseni constituency. He found all the members of the Constituency present, including Member of Parliament Mabhanisi Dlamini. He introduced his team and advised them of their mission. It was to maintain peace and order. PW15 enquired from Member of Parliament, Mabhanisi Dlamini if indeed he was expecting any persons. He said that he only

learnt through the media that there were people who would come to deliver a petition. PW15 advised the Member of Parliament to be ready to receive the petition. As he was attending to the members of the constituency, he received a report that there was a group approaching the constituency from Mhlaleni direction. He ordered that the gate be locked. The group approached the gate and demanded that it be opened. He declined. A certain gentleman in the surname of Simelane spoke on behalf of the group and handed over a copy of the petition to the Member of Parliament. The petition was read out. The group then told the Member of Parliament that they needed a response within fourteen days. The Member of Parliament advised the group that most of what was demanded was to be taken to various ministries. They would however receive the responses. They returned to the constituency building together with the Member of Parliament. While going back, the group pelted them with stones. They had to dodge them but some struck the constituency building. The group dispersed. The group that handed the petition was about two hundred people. They were wearing red T-shirts written EFF Swaziland. Most of the grievances as pertained in the petition read, was that the Member of Parliament was unproductive. Wandile Dlodlu, a Pudemo member was an active speaker. There were no violence except that the stones pelted landed on the roof of the Inkhundla. Under cross-examination he was asked what PUDEMO stood for. He replied that he did not know.

[104] PW16, Sibusiso Goodwill Mabhanisi Dlamini on oath told the court that he was a Member of Parliament under Kwaluseni Inkhundla. He testified that on 15th June 2021 he was at Kwaluseni constituency. The youth wanted to deliver a petition. He gathered such information from the social media. The youth ought to have come on 8th June but did not. Prior, he called the Regional

Administrator for Manzini and reported that the youth intended to deliver a petition. The Regional Administrator advised him to call the Station Commander and inform him. He also advised the constituency headman that as a committee they should arrive early. They did. They were soon joined by the Station Commander, PW15 and a team of about fifteen to twenty police officers.

[105] On this fateful day, the youth soon gathered by the main gate alighting from Kombis and Sprinters. They were more than a hundred in number. They watched the youth through the window as it was by the main gate. They heard noise where the youth wanted to assault the police. The youth also shouted, saying, "Why is Mabhanisi locking the gate yet we elected him." At that juncture, the Station Commander came and requested him and his team to go and meet the youth. They obliged except for the Secretary who stated that she was fearful. The Station Commander addressed the youth, inviting them to deliver the petition. Before delivering the petition, the youth heaved insults at him and the elders of the country *viz.*, the King and the Queen Mother. They accused him of selling them out to the King. They later rebuked each other saying they had not submitted the petition. They called one young man to read the petition. Wandile Dlodlu spoke, saying that if PW116 did not respond, they, as the youth, would bomb his homestead. Having received the petition, his team, including himself, moved towards the constituency building. As they were at a distance of about five metres away, the youth began to throw stones at them. The others dashed away. He could not due to his heavy body structure. The Station Commander saved him by shouldering him. They were all spared from being injured. They eventually left under police escort after the group had dispersed. Most of the grievances pertained to service delivery, the system of governance and the appointment of the Prime Minister. The youth also

complained about his speech which he made during the handover of a house, constructed by the Queen Mother. The house was given to an elderly of Kwaluseni. It was further PW16's evidence that most of the youth present were not from Kwaluseni Constituency. This was evident that when the youth first arrived at the gate it mistook one of the police officer for himself. The said police officer was similar to him in stature. Further, Wandile Dlodlu was also not under Kwaluseni Constituency.

[106] Under cross-examination, he was asked if he did lay a charge against anyone specifically, Wandile Dlodlu. He said that he only recorded a statement which if anyone was liable for an offence, the police would have charged him. He was never before subpoenaed to appear in court to testify about the events of that day before. He confirmed his evidence in chief that the group consisted of young people and that he had learnt through social media that they would deliver the petition. It was contended that if people wanted to submit their grievances, they ought to deliver a petition. He responded that such delivery of petition was something new. What is expected is that they should assemble at chiefdoms first and then to the constituency. When asked what he did with the petition, he replied that he took it to Parliament as it raised issues relating to the Central Government. Parliament said that petitions would be deliberated upon later. When asked if they had then deliberated upon them, he replied in the negative. He did make a follow-up and was advised that the petitions were in the office of the Attorney General for purposes of classifying the issues, before deliberations.

[107] When the defence Counsel indicated that he had completed his cross-examination, this witness then raised his hand. He told the court that his life was under severe danger as he had been threatened with violence should he come

to court and testify. On that note, the court handed him to the hands of the Director of criminal investigation department to handle him as a vulnerable witness.

[108] PW25, 8353 Constable Superintended Oscar Motsa under oath informed the court that on 19th June, 2021, he was based at Siphofaneni police station as the Station Commander. He received information from his superior that there would be a petition delivery at Sithobelweni. He arranged for a team of police officers and they all headed to Sithobelweni to ensure safety. He positioned some of his officers at Sithobelweni business centre. At about 1000 hours, he received information that there were certain persons gathering into a small group. It was led by Mphandlana Shongwe. The said group was burning tyres in the road. He and his team quickly proceeded there and dispersed it. The dispersed group then took the route to Sithobelweni Constituency. They followed it. At Sithobelweni Constituency, they found the Member of Parliament. By this time, the group was led by Velaphi Mamba who works for a non-governmental organisation. He was carrying the petition. He read it to the Member of Parliament before handing it to him. He engaged Velaphi Dlamini with regard to COVID 19 Regulations following that the group had no face masks. He also negotiated for order. The group, having delivered the petition, dispersed. There was a little bit of disturbances on the traffic flow as the protestors burnt tyres on the road.

[109] On the 26th June, 2021 he received a call from Themba Vilane. Many properties and shops were looted and burnt down at Siphofaneni. They were therefore very busy. Themba Vilane advised him that he had a truck which carried an excavator. This truck had to pass through Siphofaneni but was barricaded by protesters. Both the truck and the excavator were set on fire. He advised

Themba Vilane not to go to the scene as it was dangerous. They did try to remove the large stones barricading the road. They were however met with hail of stones thrown against them and some of the police motor-vehicles. Protestors were carrying placards and banners. They were inscribed “*Democracy for all; A peoples’ elected Prime Minister.*”

[110] On cross-examination he clarified that the protestors were a mixture of both old and young people. Mphandlana Shongwe whom he knew before fell under the old category and so was Velaphi Dlamini. There were about one hundred or so protestors. No one was arrested.

[111] From the evidence of PW14, PW15, PW16, PW25, PW58 and PW60, it is clear that there was violence experienced during petition delivery before the passing of the Banning Order on the 24th June, 2021. Glaring from the cross-examination of these witnesses who testified on pre-Banning Order violence is that the defence did not refute the evidence of such violence. However, what is of note is that Accused No. 1 testified in defence that had there been violence before the Banning Order, “*the Prime Minister would have been justified in passing the Banning Order.*” He insisted only in defence that there was no violence before the Banning Order.

[112] Now, the evidence adduced by Accused No.1 and DW3 that there was no violence during the petition delivery until the 24th June, 2021 when the Acting Prime Minister prohibited the delivery of petitions, stands to be rejected as such was not contested when the Crown’s witnesses, viz., PW14 (Kukhanyeni), PW15(Kwaluseni), PW16 (Kwaluseni) and PW25 (Sithobelweni) adduced their evidence on such. The evidence at the instance of Accused No. 1 and also

Accused No. 2 who testified similarly that the people were angered by the Acting Prime Minister by banning them from delivering petitions and therefore vented it by engaging in violence, stands to be rejected as an afterthought following that it was not put to any of the Crown's witnesses.

Analysis of the speech at Summerfield on 24th June, 2021

[113] What remains of me is to analyse the speech by Accused No. 1 at Summerfield Hotel in order to ascertain if it is in line with what was put to the Crown's witnesses, viz., whether Accused No.1 did not tell the people to continue delivering petitions but merely advised them of their constitutional right to delivering petitions. I ask this question because it was so contended by Accused No. 1 and was put to two of the Crown's witnesses.

[114] Accused No. 1 introduced himself as a Member of Parliament not only representing the people of Hosea Constituency but the entire nation as he stated: "*As a Member of Parliament, I am representing Swazis, not only Swazis from Hosea but Swazis as a whole.*"⁴⁸ He further described himself as the '*hope for Swazis.*'⁴⁹ He then defined his reason for the conference, "*I have risen as a Member of Parliament, a Member of Parliament that will not allow the government that governs currently to mislead the Swazi nation by taking it to the forest, by taking us back to those times when we were governed by other people whom I may not want to mention by their type who would wake up in the morning and feel that there is a law it can promulgate.*"⁵⁰ He then went straight to tackle the constitution as follows: "*[T]hese days we are governed well. We*

⁴⁸ See sub-para 1

⁴⁹ *supra*

⁵⁰ *supra*

are governed well under the Constitution."⁵¹ He then stated of the Constitution: *"The Constitution cannot allow any person to wake up on the morning and do whatever which is in conflict with the Constitution."*⁵² He then reiterated his speech at S 'n B of the 2nd and 18th June, 2021 as he said, *"[W]e spoke on that day that we want a Prime Minister for the people. We want a government that is independent, a government that is not tied or bound to Royalty; a government that would not consult with Royalty; a government that is independent, standing firmly; .."*⁵³ He concluded his introductory remarks, *"So we cannot allow, wonderful Swazis, that the current government rises and takes the country back where we were governed that time we were to take directives and orders."*⁵⁴

[115] The introductory remarks reflected above must be read in context to the previous speeches by the Accused persons herein and the statement by the Acting Prime Minister. In the present speech as highlighted above, Accused No.1 informed his audience which happens to be the nation that they had made a call for an elected government. They did not want a government where the Royalty or the appointees of the Royalty had a hand. Now, the Acting Prime Minister was an appointee. He then pointed out that the present Government had no authority to make any laws or orders by reason that it was still connected to Royalty or that it was not accepted by reason that there were appointees in it. He minced no words as he pointed out that this government was leading the nation to the 'forest',⁵⁵ and 'taking the country back'⁵⁶ in ages, whether in colonial times, it is not so expressly stated. From the introductory remarks at the instance of

⁵¹ supra

⁵² supra

⁵³ supra

⁵⁴ supra

⁵⁵ supra

⁵⁶ supra

Accused No. 1, it is reasonable to conclude that Accused No. 1 informed the nation that the current government was not worth listening to or complying with its Orders.

[116] Accused No. 1 reiterated his broad constituency as he says, "*As a Member of Parliament of the Constituency of Eswatini..*"⁵⁷ He then tackled the agenda of the conference as he states; "*[L]et me directly address the matter we have just received, spoken by the Prime Minister.*"⁵⁸ He immediately states, "*I am saying, may we please tell you without fear or favour, what is being said by the Honourable Prime Minister, using Parliamentary language, we would say, 'he is out of order.'*"⁵⁹ What matter had the Prime Minister '*said*'⁶⁰ and which has '*just been received*'⁶¹ by them? From the evidence of PW58, PW59, PW60 and PW61, it is the Banning Order of the same date as the address at Summerfield by Accused No. 1 and his companions. In brief, Accused No. 1 informed the nation that the Prime Minister was '*out of order*' in that he delivered a Banning Order yet he had no such powers. He continued to state that the Banning Order was contrary to the provisions of the Constitution. He pointed out that even Parliament had no power to enact such contradictory laws. He then announced. "*Let me say this Swazis, you do have to deliver petitions. It is constitutional. It is a right of the Swazis. It is in the constitution.*" He further stated, "*No one can have the power to tell you to stop.*"⁶² He repeats, "*No one can have the power to tell you to stop.*"⁶³ To drive the same point home further, he added, "*The only*

⁵⁷ Para 3 supra

⁵⁸ supra

⁵⁹ supra

⁶⁰ supra

⁶¹ supra

⁶² supra

⁶³ Para 4 supra

thing he can do is to deploy the police, as he always does, to assault you if that is what they want to do."⁶⁴ From this speech, it is clear that Accused No. 1 informed the nation through the social platform that the Acting Prime Minister had no power to issue a Banning Order. His act of passing a Banning Order was unconstitutional. Delivery of petitions or the people's grievances was provided for under the Constitution. To clarify the lack of power by the Acting Prime Minister, Accused No.1 informed the listeners that not even parliament had the authority to stop them from delivering petitions. In essence, he urged the people to continue delivering petitions. Accused No. 1 did not end by advising the people that they had a constitutional right to deliver petitions. He added another reason why they should not comply with the Banning Order. It was so stated by Accused No. 1, "*Because the government that is saying what it is saying today is the same government that is coming down like rain.*"⁶⁵ A government that is "*coming down like rain,*"⁶⁶ was explained by Accused No. 1 in his speech of 18th June, 2021 at S n' B Restaurant as the one by the appointees. He further stated of the '*government that is coming down like rain,*' "*the one we are saying we no longer need. Is the one we no longer want.*"⁶⁷ Having said that not even Parliament had the authority to stop the people from delivering the petitions and that the present government came down like rain, Accused No. 1 went overboard to say the current government was not desired by them.

[117] As if his hearers were hard of hearing, Accused No. 1 repeated, "*So then, I say wonderful Swazis, protesting is a constitutional right that you are expressing your grievances and oppression. Delivering a petition is a constitutional right.*

⁶⁴ supra

⁶⁵ supra

⁶⁶ supra

⁶⁷ supra

You are submitting your grievances where you sent your Member of Parliament. There is nobody who can control you."⁶⁸ He reiterated, "*So there cannot be any person who can have that power*". He uttered these words after pointing out that as Members of Parliament elected by the people, they could neither permit the Government to deceive them nor allow the Government to make such an Order as it was in conflict with the Constitution.

[118] On his quest to the people not to hid the Banning Order by the Acting Prime Minister, Accused No. 1 astoundingly expressed in addition: "*I am saying, I pity him who is the Honourable Acting Prime Minister that indeed he finds himself carrying the power of God where he can just wake up in the morning, wash his face and say 'my children, now you stop; my children, now you do not go to school; my children you see and not go anywhere.'*" In brief, by the Acting Prime Minister promulgating the Banning Order, Accused No. 1 described him as having God's power and was commanding the nation in whatever direction he desired as if it were his children. He then pointed out that such, they despised. He added that the Prime Minister was frightened as he realised that the eyes of the people had been opened. (These words are in line with Accused No. 2's speech at S n' B on 18th June, 2021 where he said that they (the trio) were to open the eyes of the people). He repeated his call for a government free of Royal appointees. He emphatically pointed out that they could not allow the Banning Order as he stated: "*We will never entertain what Government has said on Monday.*"⁶⁹ He specifically called upon his supporters to reject the same. He then expatiated, "*We did not go to request permission from Government to deliver petitions. You cannot stop something you have not launched. You cannot*

⁶⁸ Para 5 supra

⁶⁹ Para 9 supra

come and say you are stopping a petition when he did not launch the petition, when he now says he wants to stop the petitions. When did he tell us that go and submit petitions? Does he know the message of the petitions? Does he know the issuing of the petitions? Does he know the theme of the petitions? He then said, "So, wonderful Swazis, let us not be intimidated by this Government."

[119] Accused No. 1 went on to lambast the Government for failure to deliver on social grants and employment for the youth while '*crones - tindadavu*' continued to occupy employment posts. He repeated his call for a government that was not attached to anyone but the people. He then explained that when they were last in Parliament, they all spoke in one voice, calling for an independent government except for two Members who were absent, the appointees, including Ministers of the Crown. He then pleaded, "*So do not allow that someone tries to disrupt you that you do not now say your grievances to the Members.*"⁷⁰ He repeated his call which he made at S n' B Restaurant that all Regional Administrators must be elected. On this he then highlighted, "*We do not want to be headed by someone who comes down like rain. It is only rain that is brought down by God but we appreciate it because it rains in due season. But we do not want people who came like God.*"⁷¹ On that note, he remarkably uttered, "*I am sorry to say, 'To hell with our Government.'*" He went on to state his determination on the issue that no matter the amount of intimidation on his life, he will not retract from what he was advocating for. He then bade the nation good bye.

⁷⁰ Para 14

⁷¹ *supra*

[120] Surprisingly, having bade the people good bye, and as if suddenly awakening from his sleeping stupor, Accused No. 1 retorted, *“What was done by the Deputy Prime Minister is unconstitutional and unlawful. The Constitution gives you the right to deliver the petitions. Constitutionally, it is your right to exercise your right that you have not been treated well. Constitutionally, it is your right to grieve in the way you are grieving that you want a certain government. Constitutionally, it is your right to stand up and be in the road at the time that you want and shout. Constitutionally, do not vandalise people’s property. But we will never be stopped by the same Government which is corrupt. That Government is full of corruption. The strategy it is using by the same corruption it has ripped the country for years. They are full of corruption. We cannot tolerate it any more. Because they are protecting the corruption they are doing every now and then. They sit down and think, ‘How can we take money from the people?’ That is the only thing they are doing. We cannot entertain it. As a politician, as a Swazi, as an individual, I stand for you Swazis. I cannot tolerate this.”*⁷² Accused No. 1 then thanked and blessed the people. He ended by reporting that one of them had gone somewhere but he shall be joining them.

[121] Clearly, from the above, Accused No. 1 categorically called upon the people not to comply with the Banning Order. He made this call several times in his speech at Summerfield Hotel on the 24th June, 2021, the very same day of announcing the Banning Order by the Acting Prime Minister. He explained that the rationale was that the Acting Prime Minister’s Banning Order was unconstitutional and unlawful. This assertions he maintained in court when giving his defence. His Counsel asked him if the Banning Order was lawful. He repeatedly testified that

⁷² Para 17 supra

it was unlawful. The Government that had issued such Banning Order was not by the people as the Acting Prime Minister and Cabinet descended down *'like rain and God.'* The Government was corrupt. He was emphatic that the present Government was not wanted and he stated so several times. He then uttered, *"But we will never be stopped by the same Government which is corrupt."* He later expressed, *"To hell with this Government."*

Deduction

[122] It is imperative to point out that it is one thing to be critical of a government. It is another where Government engages, such as in the present case, on a ban on the ground to ensure safety and security of its people and a citizen stands up to inform the nation not to abide by that ban for the reason that the Government is not for the people or for whatever. It is not clear why Accused No. 1 found that the Government was unconstitutional and that it was made up of people who *"descended down like rain and God,"* when in his speech at S 'n B Restaurant on the 2nd June, 2021, he mentioned that the appointees were so appointed in terms of the provisions of the Constitution, and in his present speech expressed, *"These days we are governed well. We are governed well under the Constitution."*⁷³ What is clear however, is that by his very speech at S 'n B Restaurant on 2nd June, 2021 and at Summerfield on 24th June, 2021, he had no basis to so express to the nation. To further say that the Acting Prime Minister had no authority to promulgate the Banning Order in the light of Legal Notice No. 189 of 2015 was damning. The Acting Prime Minister's powers to promulgate the Banning Order were fortified by the fact that he was the Acting Minister for the Police Service responsible for security in the Kingdom as per

⁷³ See para 2 of speech at Summerfield at page 70

the uncontended evidence of PW18. What exacerbates Accused No. 1's case is that such speech was made after Mr. Quinton Dlamini expressly and directly informed Accused No. 1 and his accomplices to "*go back to Parliament and have the sections 245, 246 and 247 complied with.*" Instead of paying heed to such informed advice, Accused No. 1 preferred to openly defy them and used the simile, "*a chicken cannot itself boil water to unpluck its own feathers.*" The words uttered by Accused No. 1 saying, "*To hell with the Government,*" coupled with the words that the current Government was not wanted as it was not elected by the people therefore cannot, in the circumstance of this case, be ignored. The sum of the speeches by Accused No. 1 at Hosea Constituency on 5th of June, 2021, S n' B Restaurant on 2nd June, 2021 and 18th June, 2021 and Summerfield Hotel on 24th June, 2021 fall within the ambit of Count 1 and the first and second alternative charges to Count 1.

Accused No. 2

[123] Turning to Accused No. 2, I have already demonstrated from the speech at S n' B Restaurant on 18th June, 2021 that Accused No. 2 was implicated in terms of common purpose. His speech was aligned to that of Accused No. 1 as they both advocated for the election of the Prime Minister and other appointees by means outside the provisions of the Constitution.

[124] Now, turning to the speech at Summerfield, Accused No.2 was earlier on not present. He had gone somewhere according to Accused No. 1. However, in terms of PW58 unchallenged evidence, Accused No. 2 was present. In other words, he did later join the meeting. Accused No. 2 himself testified in defence that he was present at one point in time but did not say anything. It is common cause that Accused No. 2 did not deliver any speech or if he did, it was not

tendered as evidence before this court. Was Accused No. 2 in common purpose even though no speech by him was delivered? The court must interrogate the evidence serving before it in finding a response to this poser.

[125] PW19 was 4011 Detective Constable Sinikiwe Thwala. She was based at Mankayane Police Station. Her evidence was that on 26th June, 2021 she was detailed by her Station Commander, Mr. Nkambule to man a roadblock at Cana, KaNgwenya Road. They were to be on the look-out for any protesters and Accused No.2. The briefing by Mr. Nkambule was that such instruction was based on the Acting Prime Minister's Banning Order of 24th June, 2021, namely, that there ought to be no petition delivery. The roadblock was staged at 0730 hours. At about 1100 hours, Accused No. 2 approached the roadblock. He was stopped. She searched his motor-vehicle. While searching his motor-vehicle together with 8378 Constable Thwala, they were chatting with Accused No. 2. Accused No. 2 informed them that he was on his way to Ngwempisi Constituency to receive a petition. She then decided to report the matter to Sergeant Ngubane, the officer in charge. Sergeant Ngubane warned Accused No. 2 not to proceed to the Constituency. While Sergeant was talking to Accused No. 2, three elderly men approached Accused No. 2 to request for a lift to the nearby shops. Accused No. 2 asked the police to excuse him for a while in order to assist the elderly men. PW 19 continued to testify, *"The Member of Parliament took the three old men, undertaking to return to find a clear explanation on why he was prevented from going to receive the petition as he had been elected by the Ngwempisi people."* He did return and spoke with Sergeant Ngubane. She was a distant away by then. After that, she noted Accused No. 2 going away, taking the direction to the Constituency. After some few minutes, the Station Commander called them to come to the Constituency

and stop the roadblock. They responded. They found the road blocked with stones and burning tyres. A group of the youth was singing, insulting the King and demanding democracy. As they tried to clear the road for motorists, the group ran behind the Constituency where there were wattle trees. Immediately the forest was on fire. They condoned the Constituency, preventing the protesters from coming closer. However, on another day, the Constituency was gutted down with fire.

[126] Her evidence was not refuted under cross-examination except that details such as how many were the people in the group that were singing, whether there were any arrest and name of the people arrested and prosecution if any. She replied that some were arrested and following that she was not the investigator, she did not know their names and she could not tell how many protesters were there.

[127] PW 20, 4887 Sergeant Zanele Ngubane testified under oath. Her evidence was along similar lines as PW19. She testified that PW19 alerted her of the presence of Accused No. 2 and told her that Accused No. 2 had reported to her that he was heading to the Constituency to receive a petition as she was a distant away from her. She proceeded to Accused No. 2 and introduced herself. As he responded to her greetings, Accused No. 2 repeated the information given to PW19 that he was going to the Constituency to receive a petition. She advised Accused No. 2 that, "*The Government has announced that there would be no gatherings, no delivery or receipt of petitions in all the Constituencies in the country.*" At that juncture Accused No. 2 requested to take the three elderly men to eFakudze and that he would return to get an explanation on whether he was being blocked or let go from the roadblock. He did return. She repeated her words that the Government had announced that there would be no gathering,

submission or receiving of petitions. Accused No. 2 thanked her and left, taking the route towards the Constituency. After about fifteen minutes, the Station Commander instructed them to stop the roadblock and head to the Constituency while others to the road at Embeka. She went to Embeka, a place away from the Constituency.

[128] She was subjected to two questions. She was asked what she understood by the Government banning the delivery of petitions. She repeated the words she testified upon which she had informed Accused No. 2 of. She was asked if where he (Accused No. 2) was driving off, had to pass through the Constituency. She said that there were many routes he could have taken. Some cut through the Constituency and some away. Nothing further was put to this witness.

[129] PW19 and PW20 both testified that Accused No. 2 informed each one of them that he was heading to the Constituency to receive a petition. This evidence stood unchallenged. Further, PW19 testified that Accused No. 2 when leaving the roadblock at KaNgwenya Road, took the direction towards the Constituency. This evidence remained unchallenged. It was corroborated by PW20. Further, the unchallenged evidence of PW19 that few minutes later, the Station Commander called them to join him at the Constituency where she found a group of young protestors who when dispersed ran behind the Constituency, it shows that Accused No. 1, as he had so stated to PW19 and PW20, set out on the 26th June, 2021 to go and receive a petition despite a ban by the Government. In fact, Accused No. 2 in his defence, testified that he did proceed to receive the petition from his Constituency on the 26th June, 2021. He was however, prevented by the police. He did also point out that on the 24th June, 2021 he became aware of the Banning Order by the Acting Prime Minister. Why then proceed to receive

a petition in light of the ban of which he was fully aware? From this given set of facts, it is safe to conclude that Accused No. 2 was acting in terms of the speech by his accomplice, Accused No. 1 that the people should continue to deliver petitions as it was their constitutional right and that the Acting Prime Minister had no authority to stop them. His common purpose with Accused No. 1 is therefore deduced from his conduct of 26th June, 2021, namely, of proceeding to accept a petition despite a ban by the Government. This conduct is considered with the common cause evidence that he was present in the meeting at Summerfield on 24th June, 2021, as he joined his accomplices while the meeting was proceeding. This is evidence of proximity on common purpose. Considering his proximity and his subsequent conduct on the 26th June, 2021, it is safe to conclude that such fall squarely within Count 1 and the first and second alternative charges to Count 1.

Counts 2 and 3 - Murder

[130] The accused persons face two counts of murder. They each read:

"COUNT 2

*The Accused persons are guilty of the crime of **MURDER**.*

*In that upon or about 29 June 2021 and at or near Hilltop along Mbabane/Mahwalala public road, the said Accused persons did unlawfully and intentionally kill one **SIPHOSETHU MNTSHALI**, an adult male and did thereby commit the crime of **MURDER**.*

COUNT 3

*The Accused persons are guilty of the crime of **MURDER**.*

*In that upon or about 29 June 2021 and at or near Hilltop along Mbabane/Mahhwalala public road the said Accused did unlawfully and intentionally kill one **THANDO SHONGWE**, an adult male and did thereby commit the crime of MURDER. ”*

Common cause

[131] It is common cause as so suggested by the defence during cross-examination of some of the Crown’s witnesses that the two accused persons were nowhere at the scene of the crime when the two deceased persons died. It is also common cause as can be gleaned in the speeches by the accused persons that nowhere do they advocate for violence during the delivery of the petitions or put directory during their call for the people to “*fill up the street*” or should I say, as stated by Accused No. 1 at his Summerfield Hotel’s speech and Accused No. 2 at S n’ B as they each charged the nation, “*to stand up and be in the road at the time that you want and shout. [G]o out and shout for your freedom*” respectively.

Question

[132] The question is, why then did the Crown slam the present accused with the two counts of murder? The answer to the above poser lies in what the law terms as *dolus eventualis* – foresight or foreseeability. The inquiry is simple. Did the accused persons foresee the consequences of their action? Did they act recklessly despite foresight of the results of their conduct?

Foreseeability

[133] The court in **S v Sigwahla**⁷⁴ on a charge of murder laid down the proposition of the law with regard to *dolus eventualis*;

“The expression ‘intention to kill’ does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as dolus eventualis as distinct from dolus directus.

The fact that objectively the accused ought reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a bonus paterfamilias in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The factum probandum is dolus, not culpa. These two different concepts never coincide.”

[134] **Holmes JA**⁷⁵ enunciated the characteristics of *dolus eventualis* as follows:

- “1) Subjective foresight of the possibility, however remote, of the accused’s unlawful conduct causing death to another;*
- 2) Persistence in such conduct, despite such foresight;*
- 3) The conscious taking of the risk of resultant death, not caring whether it ensues or not;*
- 4) The absence of actual intent to kill.”*

⁷⁴ 1967 (4) SA 566 (A) at 570B-E

⁷⁵ **S v Bruyn & Others** 1968 (4) SA 498 (AD) at 510 G-H see also **Thandi Tiki Sihlongonyane v Rex** Appeal Case No. 40/1997 by Tebbutt JA at 5

[135] **Tubbut JA**⁷⁶ then expatiated:

“Subjective foresight like any other factual issue may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did so.”

[136] It is apposite to give a scenario of *dolus eventualis*. A sets out to rob a bank. The direct intention (*dolus directus*) is to commit a crime of robbery. If A carries a firearm along with him and pulls the trigger in the cause of committing the robbery, and this results in the death of an employee or customer of the bank, the law presumes A to have intended the results which would be murder of the employee or customer. His intention to kill would be classified as *dolus eventualis*. It will not assist A to say that he pulled the trigger against the deceased because he was resisting or hindering his commission of the crime. The inference drawn is that A foresaw that an employee or customer of the bank might resist his unlawful conduct and therefore he might pull the trigger to wade off such resistance and the resultant possibility of such lethal weapon might ensue.

[137] **Copperman J**⁷⁷, defining *dolus eventualis*, made reference to **Snyman**:

“[A] perpetrator acts with this form of intention if he directs his will towards a certain event but foresees that if he achieves this event there is a possibility that another result might ensue. However, he

⁷⁶ Supra at 6

⁷⁷ *Emily Vries v The State (A) (A15/2016) [2019] ZAFSHC 171 (19 September 2019)*

*does not allow himself to be deterred by the foreseen possibility and proceeds with his actual plan, indifferent as to whether the result may ensue. In the course of committing the act, the result which he foresaw does in fact ensue. In the eyes of the law he then has intention in respect of the result which ensued.”*⁷⁸

[138] The learned Justice proceeded with eloquence:

“It is trite that intention in a form of dolus eventuals relates to circumstances or consequences which the actor does not plan or desire but which, in the light of human experience can be expected to follow if the order proceeds with a planned course of action.”

[139] From the above therefore, the question becomes, did the perpetrator subjectively foresee the consequence of his unlawful conduct but was nevertheless reckless to its outcome? What guides the court on whether the perpetrator did foresee the outcome of conduct? Again **Copperman J** revealed, expatiating that it is a question of drawing inferences stated, *“In applying inferential reasoning, it can be reasoned that in particular circumstances the accused ought to have foreseen the consequences and thus must have foreseen and therefore by inference did foresee them.”*⁷⁹ He then drew from Pretorius’ case as follows: *“All of this was circumstantial evidence crucial to a decision on whether the accused at the time he fired the fatal four shots, must have foreseen and therefore, did foresee, the potential fatal consequences of his action.”*⁸⁰

⁷⁸ N⁵ at paragraph 44

⁷⁹ N⁵ at paragraph 49

⁸⁰ Supra

[140] Adjudicating on the same subject of *dolus eventualis*, **D Mlambo JP**⁸¹ articulated:

“The Supreme Court of Appeal reiterated the apt articulated test for dolus eventualis as follows: ‘The test for dolus eventualis is two folded: (a) Did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct and (b) did he reconcile himself with that possibility.....”

[141] The learned Judge referred to the second characteristic as ‘*volition element*’ which is said to be present when the accused ‘consents’ to the consequences foreseen as a possibility and he “*reconciles himself to it as he takes into bargain.*”

[142] Turning to the *case in casu*, the question again is, did the two accused persons foresee the death of the two deceased persons? If yes, were they reckless of the outcome?

Evidence adduced and its analysis

[143] The Crown called a number of witnesses to establish the death of the two deceased. PW32, Sikhumbuzo Wesley Hlophe took oath and testified that on 29th June, 2021 he was employed by the Motor Vehicle Accident Fund (the Fund) as a driver. He was directed to go to Mankayane. On his return, near Tonkwane, he was stopped by an on-coming driver who told him that the route to Hilltop was barricaded. He should use another route. He was however interested in seeing what was happening. He drove towards Mahhwalala and at

⁸¹ *Maarohanye and Another v S* 2015 (1) SACR 337 (GJ) (8 October 2014)

Mpolonjeni, he met up with a black motor-vehicle. A gentleman alighted from it and told him that should he give him a ride, he would assist him to go pass the blocked road particularly in the areas where the group was demanding money. The man took the passenger seat and he proceeded ahead.

[144] He reached the shopping complex. He was blocked. Some of the people demanded some money. Another approached him and slapped him. A large group approached. The group of people assaulted them. As the engine of the motor-vehicle was running, one of them attempted to remove the key from the ignition point. The central locking system was disturbed. He was pulled out of the motor-vehicle while the passenger was by then out. His employers asked where he was as the motor-vehicle had a tracking device. He explained the challenge. The passenger approached him and told him that he would negotiate with the group to have the key released.

[145] At first they attempted to start the motor-vehicle but failed. They were later able to. They spanned the motor-vehicle around the shopping centre. They then approached him demanding money in return for the motor-vehicle. Following that his left eye had swollen from the clap, the passenger suggested that he should drive the motor-vehicle. They drove away until by the circle where they found a road blocked. The driver pleaded with the people to let them go pass. Most of the people were known to the driver. They allowed them to pass until they reached Nkwadini bus stop. There were two other motor-vehicles negotiating passage from one lane following that the other was blocked with logs and stones. As they were trying to negotiate a passage, he suddenly heard the slamming sound of a bottle by his passenger side. That was followed by a

hail of stones. He ducked down and he heard the motor-vehicle he was in, skidding.

[146] The driver sped off heading to Emvakwelitje. When they were at Emvakwelitje, he noticed that he was bleeding profusely from the head. They negotiated their way through as the road was blocked by stones and burning tyres. He directed the driver to his workplace. He reached work and was attended by the nurse. He was then transferred to Mbabane Clinic. He was treated and discharged on the same day. His employer booked him in a hotel. He only went home the following day. The windscreen was broken and the top of the Isuzu double cab was dented as some of the people got on top of the motor-vehicle.

[147] There were people who were run over by the motor-vehicle as they were pelted with stones. The group also dispossessed him of his employer's cell phones and money of about E400.00. The motor-vehicle was DSD 356 CH. He was sober that day together with the passenger who later drove the motor-vehicle. The group that assaulted them insulted him saying that the Fund, which would sometime support the Ngwenyama tournaments, was misusing their funds by supporting useless things belonging to the King. He was disrespectful as he was at work while they were busy fixing the country. Some suggested that he should be burned while inside the motor-vehicle.

[148] His cross-examination was brief. He was asked as to the time when he was driving. He replied that it was around 1400 hours. He was asked if his motor-vehicle collided with other motor-vehicles. He replied that he heard about it although he did not witness it as he had bent down by the time the motor-vehicle skidded. He last saw the passenger on the day of the accident.

[149] PW21 was Bongani Njabuliso Sihlongonyane on oath testified that on the 29th June 2021, he was from town passing through Mahwalala. He met up with protesters just after passing the road hump at Mahwalala. The protesters stopped him and demanded money before he could pass. As he was preparing for that, an Isuzu motor-vehicle came in a high speed, apparently running away from the protesters who were demanding money from motorists. It knocked down about ten them. All he could observe was blood. As he intended to assist the injured persons, he attempted to open the door of his motor-vehicle to alight. He could not as his motor-vehicle was also knocked in the process. The same motor-vehicle had hit him while some of the knocked down protesters were leaning against his motor-vehicle. He eventually opened the door of his motor-vehicle and alighted. By that time, the protesters had loaded the injured protesters to another motor-vehicle which had been stopped for payment.

[150] He called the police and reported the accident. The police replied that they were unable to reach the place as the entire road had since been blocked. They advised that he should report at the police station. He did and his motor-vehicle was left behind for investigation. As he left the police station, he met with the driver of the Isuzu who was known to him.

[151] On cross-examination, he pointed out that he did not know how many the protesters were. He confirmed that the van that knocked the protesters was driving in a high speed and on that day the view was visible although a bit cloudy. He revealed that the driver of the Isuzu was intoxicated. Having knocked the protesters, he dashed off. He was a barber and the driver was his customer. He did not know if the driver was arrested although he had called him

to enquire if he was getting any help from the police with regard to the accident claim. The driver told him that he was advised by his employer then, the Fund to hide away from the people of Nkwalini who were vying for his blood. He identified the driver of the Isuzu as Musa Ntshalintshali. He has never been subpoenaed to testify against Musa. On re-exam he clarified that the passenger worked for the Fund and not Musa.

[152] PW22 was Getty Lilian Dlamini, on oath told the court that on 29th June, 2021 she was excused from work following that there was a riot. She decided however to remain at work until the noise subsided. She left work only at 1400 hours. Her route passed through EEC (Eswatini Electricity Company), Emvakwelitje. As she was proceeding home, she found that she had to pass certain points where she had to pay in order to pass through. At the first point, she paid few coins. As she proceeded she came across a group of people, some lying on the ground and injured.

[153] The group ordered her to reverse her motor-vehicle. At first she did not understand the reason. She realised later that they wanted her to convey the injured persons to hospital. She obliged. They loaded the injured persons in the back of her van. One of them came in and told her that he would drive her motor-vehicle. He drove to hospital, Mbabane Government. At the hospital they waited for a short time before they attended to the injured persons who were about two or three. They drove home. The driver continued to drive her motor-vehicle and on the pay points, they were allowed to move without paying. The driver was part of the protesters. PW22 was not cross-examined.

[154] PW23 was 4697 Constable Fano Hlatshwako. He testified under oath that he was based at Mbabane Police Station. On 29th June, 2021, he was amongst the police officers who received a report that there was a collision between a motor-vehicle and people at Nkwalini. Following that there was turmoil in the country as protestors were blocking roads and pelting motor-vehicles with stones, they could not proceed to Nkwalini. They again received a second report to the effect that the people involved in the accident had been transferred to Mbabane Government hospital.

[155] In the company of his colleagues, he drove to Mbabane Government Hospital. He gathered that six people had been injured by an Isuzu double cab van which belonged to Sincephetelo (the Fund), registered DSD 356 BH. The driver was recorded a statement. On inspection, the motor-vehicle was found to be damaged. Its window screen was shattered with the rest of the windows broken. It was evident that the damage was caused by pelting of stones. Those injured were Siphosethu Mntshali, Thando Shongwe, Mancoba Gama, Sikelela Manyika and Celumusa Xaba. Five of them were admitted. After a week or so he received information that Thando Shongwe had passed on. A day after the said message, he received another similar message that Siphosethu Mntshali was also deceased.

[156] On the same date, 29th June, 2021, after the protestors were dispersed by OSSU officers, in the company of other officers, they drove to Nkwalini at the scene of the accident. He drew a sketch plan. He also invited the examiner of motor-vehicles to attend to the inspection of the Isuzu double cab. He obliged and wrote a report.

[157] He proceeded to embark on his investigation on the accident. He found that all six persons knocked by the motor-vehicle were within the perimetres of the road. There were other motor-vehicles that were damaged in the process *viz.*, a corolla motor-vehicle driven by Bongani Sihlongonyane, and a Toyota Yaris by Sithembile Mkhonta. The statements recorded from the three drivers pointed that the driver of the Isuzu was running away from the protestors who were a threat to him. He was in a company of a passenger who was an official from the Fund.

[158] Following that there was no order or law sanctioning the protestors, he did not charge any of the drivers of negligent driving or culpable homicide. When asked if the driver of the Isuzu was drunk, he testified that both the driver and the passenger were sober. Under cross-examination, he conceded that he was not present during the accident. He interviewed the driver of the Isuzu after about half an hour after the accident. He proceeded to the scene of the accident three hours later. He explained that the driver of the Isuzu was, after the accident, admitted to Mbabane Clinic following injuries he sustained after he was assaulted by the protestors.

[159] PW21, Sihlongonyane never met the passenger of the Isuzu on the day of the incident. This was a response to a question in cross-examination to the effect that Sihlongonyane had testified that both the driver and passenger were drunk on the day of the accident. The Isuzu double cab was brought to the police station by another official from the Fund while the driver was a passenger. He observed that the driver who was the passenger was sober. He was taken to task for failing to charge the driver of the Isuzu. He maintained his reasoning and

pointed out that at any rate the ultimate decision maker on who should be charged rested with the office of the Director of Public Prosecutions.

[160] He maintained his statement read to him to the effect that the conduct of the injured pedestrian was unlawful because there was no law sanctioning them to conduct or engage in a march or protest. He further maintained his statement read to him under cross-examination that he therefore described the conduct as 'unlawful' because they conducted themselves in a manner that constituted a source of danger to the people or motorists who were using the road at that time. Further, that they ought to be charged for offences such as for placing objects that impede or block the flow of traffic which were the rocks, stones, burning tyres and tree stumps.

[161] He was further referred to paragraph 10 of his statement which was read in cross-examination as, *"Currently there are three of the knocked people that are admitted at hospital and upon their discharge they are supposed to be charged for conducting themselves in a manner that constitutes a source of danger to themselves and other people using the road and placing objects that impede or disturb the flow of traffic"*. He confirmed the statement as authored by him.

[162] From the evidence attested to by PW32, PW21, PW22 and PW23, it is not disputed by the defence that the two deceased in Count 2 and Count 3 were part of the protesters who were disturbing other road users, mainly, motorists. They had caused only one lane to be used by all the motorists on that day. Logs, stones and rocks had been placed on the other lane. The protestors created pay points for the road users. They were collecting money. The Isuzu motorist was running away from the protesters when they knocked some of them. This was

after they had earlier been dispossessed of the Isuzu at another pay-point by protestors. The only bone of contention at the behest of the defence was that it is the protestors themselves that ought to have been charged as can be deduced from PW23, the investigator's cross-examination.

[163] Following that the deceased did not die at the scene of the crime but spent some days in hospital while under the care of doctors, the Crown led the evidence of the medical practitioner that attended to them before their demise.

[164] PW40, Dr. N. Nkonda on oath pointed out that he was a duly qualified medical doctor attached at the Government hospital Mbabane in the orthopedic department. He studied in Russia in 2006 and qualified as medical doctor in 2012. He began practice in 2013 as a general practitioner.

[165] On 29th June, 2021 he admitted Siphosethu Mtshali at ward 10. His historic condition was that he was hit by a motor-vehicle. He had a head injury and was fractured on both legs. His injuries were a life threatening, more particularly the head injury which was severe. He was put on advanced trauma support. They could not intervene therefore. Mtshali died on 8th July, 2021. He perused the post mortem report and testified that the finding by the pathologist were consistent with his observation.

[166] Turning to Thando Shongwe, Dr. Nkonda testified that he too arrived at the hospital on 29th June, 2021. He noted that he had a history of being knocked by a motor-vehicle. He had a visible laceration on the upper arm and left ankle. His left leg was fractured. His injuries were potentially fatal.

[167] On Thando Shongwe's treatment, he testified that he was resuscitated and put to an incubator. He was taken straight to the Intensive Care Unit (ICU). He died on 6th July, 2021. He did peruse the post mortem pertaining to Shongwe and the findings of the pathologist were consistent with his observations.

[168] Under cross-examination, he explained that Siphosethu Mnthali was brain dead, namely a diffusion of the axonal brain injury. An operation could not be done on him therefore. They put him on oxygen and administered pain killers on him in order to make him comfortable. On 1st July, 2021 he examined Shongwe. His condition was severe. He was admitted to the Intensive Care Unit (ICU). He had arrived on 29 June, 2021 and was taken straight to ICU. He attended to him the following day. He was said to have been hit by a motor-vehicle. He was resuscitated and taken to an incubator and ICU. Although he underwent treatment, he died on 6th July 2021. His injuries were potentially fatal. He perused the post mortem report and testified that its findings were consistent with his observation.

[169] Under cross-examination, he was asked as to what caused Mntshali's death. PW40 replied that the scan conducted on him reflected that there was a tearing of the brain's long connecting nerve fiber (diffuse axonal injury). As doctors therefore, they could do nothing on him as he was already brain dead. It was impossible to operate him. He was however put on oxygen and given pain killers. On Shongwe, he stated that following the results of the Glasgow Coma Scale (GCS) his consciousness was very low. He had multiple bleeding in the brain. At ICU, he was attended by several doctors. They assisted him by respiratory management.

[170] PW47, Dr. Nomonde Alice Dlamini on oath, testified that she was a Surgical Doctor having obtained her qualifications in Russia in 2016. She examined Siphosethu Mntshali on 2nd July, 2021 at about 0900 hours at the Government hospital. He was a male with apparent age of about twenty years old. He was unconscious. His pupils were not responding to light. The GCS read six out of fifteen. He had surgical dressing on both legs which were clean and dry. A computed tomography (CT) scan was ordered. The report reflected multiple blurred injuries on the brain. He had been admitted two days prior. Based on the result of the GCS and the CT scan, it was apparent that no medical intervention could be done on him. She handed to court exhibit N1 as her report.

[171] On Shongwe she testified that she saw him on 5th July, 2021 at 0930 hours at Mbabane Government Hospital. He was about twenty-eight years of age. He was at ICU on ventilation. His GCS was at three out of fifteen. He was only covered with bed sheet linen. He had abrasion on his head, hypotonia on the arm and left ankle. He was fractured on the right distal radius and right temporal. A CT scan noted right temporal structure with multi-dense injuries. It was a severe head injury. Surgical intervention would have made his conditions severe. She handed her report which was marked N2.

[172] On cross-examination, she was asked on when do they operate. She said when the GCS indicates eight and above. Where there are multiple injuries, they rely on medication. The GCS detect three areas *viz*, eye open, movement of body and verbal response.

[173] The next witness was PW48, Dr. Chi-Cheng Tu. He was the doctor who co-signed exhibits N1 and N2 with PW47. Nothing different from what PW47

testified in court turned on his evidence. Following that he was not cross-examined, it is unnecessary that I capture his evidence.

[174] From the evidence of the three doctors who attended to the deceased persons, it is not in issue that both deceased sustained severe injuries. Beside respiratory management, nothing much could the doctors do.

[175] PW24 was R.M. Reddy, the Pathologist. He stated his qualifications which were not made an issue. He presented to court his pathological analysis of the deceased persons namely Mtshali and Shongwe. He submitted the said reports which were admitted and marked exhibits H1 and H2 respectively without any objection from the defence. Under cross-examination, he was made to read to the record both reports.

[176] PW24's post-mortem report on Siphosethu Mntshali reflects that he was aged twenty-one years of age and a male. He died following multiple injuries. He described his injuries as follows: "1. *Scab formed wound right eye brow 3cm x 2cm forehead 5.9cm x 2.2cm.* 2. *Scab formed wound over back of left upper region 3.2cm left hand 2.7, 1.2cm contusion left lung upper lobe 7.1cm area.* 3. *Laceration over right leg 4m x 2.1cm fracture leg bones effusion blood in soft tissues.* 4. *Laceration over left leg 2cm x 1.7cm with fracture leg bones effusion blood in soft tissue.*" The pathologist observed that Mntshali had a 'brain oedematous.' His larynx, trachea and bronchi were congested. His pleural cavities were 'adherent to the chest wall on the right and congested with consolidation changes.' His internal abdomen such as pancreas, liver, gallbladder, spleen, kidneys and renal organs were all pale.

- [177] PW24 report states that a body of about twenty-five years old, male was identified as Thando Shongwe. On Thando Shongwe's cause of death, PW24 opined that it was due to multiple injuries. He defined the injuries as: "1. *Sutured wound over scalp 7cm length with contusion scalp 6.3cm, fracture skull intracranial haemorrhage over brain.* 2. *Sutured wound over chest 3.2cm right muscle deep and right arm 12cm length muscle deep, forearm 11cm area.* 3. *Scab formed abrasion right groin 11cm x 4cm, laceration thigh 2cm x 1 cm muscle deep with fracture leg bones effusion blood in soft tissues.*" He further observed that his face was pale with blood clot on the ear. His larynx, trachea and bronchi were congested. His right lung was congested and edematous. His internal organs such as liver, gallbladder, biliary, spleen adrenals right and left, kidneys renal pelvis right and left were pale.
- [178] From the evidence of the medical practitioners, including the post mortem, it is clear that the deceased died as a result of the injuries sustained. The history presented to the medical doctors more particularly, PW40 and PW47 that they were knock down by a moving motor-vehicle corroborates the evidence by PW32, PW21, PW22 and PW23. As already demonstrated, their material evidence was not disputed under cross-examination.
- [179] From the above evidence, the court must accept that Thando Shongwe and Siphesihle Mntshali died as a result of the Isuzu motor-vehicle which was running away from the protestors. On this note, it must be at the backdrop that the protesters were so present at the scene by virtue of a call made by the accused persons on the 24th June, 2021 at Summerfield that the people must '*fill up the streets*' and not hid to the Banning Order by the Acting Prime Minister. However, the question still remains, did the accused persons foresee the death of the deceased? If yes, were they reckless to the outcome?

Did Accused No.1 and No.2 foresee the death of the protestors?

[180] The Crown led a number of witnesses on the above question. These were PW14, PW15, PW16, PW 25, PW 58 and PW60.⁸² These witnesses testified on pre-Banning Order violence experienced in the Kingdom during petition delivery. Their evidence remained unchallenged as already highlighted above.

Deductions

[181] For purposes of clarity, it is apposite to recapture the summary of their evidence. PW14 testified that the violence occurred on 19th June, 20221 at Kukhanyeni Constituency. PW15 and PW16 testified that the said violence occurred at Kwaluseni Constituency on the 15th June, 2021. Their evidence on the pre-Banning Order violence remained unchallenged. PW25 who attended petition delivery at Sithobelweni Constituency on 19th June, 2021 testified that although no violence was seen during the petition delivery except that tyres were burned on the road which caused a temporal hindrance to the flow of motorist, COVID 19 Regulations were not complied with as the group failed to put on masks. Again, this piece of evidence was not challenged.

[182] PW18 testified that the Acting Prime Minister issued the ban on petition delivery citing violence and failure to comply with COVID 19 Regulations during the delivery of petitions. Her evidence was not challenged in this regard. Exhibit G, the Acting Prime Minister's statement (Banning Order) which was admitted without any objection, reads partly:

"These protests have degenerated into disorder and violent scenes in several instances, putting the lives of citizens, public and private property in danger. We have seen some protestors deliberately provoking the

⁸² Their evidence is captured at pages 95 to 102 herein

police who have continued to restrain themselves under serious provocation and attacks.

We should always be cognizant of the fact that Police serve to maintain law and order, and to protect us, including our property, from criminals who induce fear and commit heinous crimes such as murder, rape, armed robbery, house-breaking, amongst others.

This kind of unruly behavior is unacceptable and cannot be allowed to continue without consequence. Our Tinkhundla system, as encapsulated in the Constitution, ably provides the structures and procedures to be followed when raising concerns at community or constituency level. Delivering petitions is not one of them.

All political systems have checks and balances set intentionally to maintain law and order, and none of them allow uncontrolled and violent engagements.

It is disheartening to observe the flagrant disregard of the rule of law, the result of which has been the breach of the Constitution, Public Order 2017 and the COVID -19 Regulations as variated from time to time.

In light of the above, Government has reached the decision to stop with immediate effect the delivery of petitions to Tinkhundla Centres.

It has become apparent that this exercise has created a breeding ground for anarchy and has been intentionally hijacked to sow seeds of division among emaSwati in complete disregard of public safety, the rule of law and COVID-19 Regulations.

This comes at a time the country is at the brink of a third wave of the deadly COVID-19 pandemic. We have observed protestors deliberately ignoring COVID-19 regulations thus threatening their own lives and those of others. Yesterday, the country recorded the highest number of new infections in three months for the second day in succession, signaling that we are edging dangerously close to another uncontrollable outbreak.

The rise of COVID-19 infections is of great concern to His Majesty's Government. Every responsible liSwati has to stand up to the challenge and adhere fully to the COVID-19 prevention regulations and protocols and avoid any situation that tends to expose them to a risk of infection.

The full might of the law will take effect to anyone who will continue to ignore the rule of law.

There will be zero tolerance for all who will break the Public Order Act and the obtaining COVID-19 Regulations. Currently, we are in the process of reviewing these regulations as we have a duty to protect emaSwati from the rampaging virus and save lives.

Government remains receptive to all concerns raised by the public through the appropriate forums and in full compliance with the law, in particular the Public Order Act and COVID-19 Regulations. Our Constitution guarantees freedom of expression and fully embraces orderly consultation and engagement."

[183] Much time was spent during cross-examination of Accused No. 1 on the question of whether there was violence pre-Banning Order. Accused No. 1 flatly denied any form of violence emanating from the delivery of petitions. DW3 who testified in favour of Accused No. 1 pointed out that there was no violence

during petition delivery and that the violence that was evident after the Banning Order was so precipitated by the Acting Prime Minister who denied the people their constitutional right to deliver petitions. However, when pressed further by prosecution on this question, he preferred to answer, *“Let me not be drawn to this question.”*

Question

[184] Did the accused persons foresee violence? The test is in the pudding.

Analysis

[185] Turning to Accused No. 1 defence, he testified:

“I think about 9th May, 2021 there was circulation in the media about the missing of certain gentleman called Thabane Nkonyane. Between 14th to 16th, there was a demand by the university students, demanding justice for Thabane delivering petition. I received calls saying we should come and join them to deliver the petition as we do what they have sent us to do in Parliament. We should join them at Sigodvweni for delivery of the petition. The time was about 11:00 a.m. They asked me to come with other Members of Parliament who were doing what the people wanted. I said they should give me time. I would return to them.[1]

I called other MPs i.e. Marwick, A2 and Magawugawu and others. We took a decision that it wouldn't be proper for us to go and deliver the petitions as petitions are delivered to us as we would take the concerns to Parliament and debate it.[2]

Two days later we decided that it was good that we go to the Nkomonye homestead and pass our condolences as we had been contacted. When we

arrived, we learned that the Nkomonye family suspected that police were involved. After this, we set to make a press conference to openly pass our condolences to the family, students and nation that were affected by this issue. While at Nkomonye, the Nkomonye family invited us to the memorial service. Between 18th to 20th May the one acting Prime Minister had heard that there would be a memorial service at Fairview, St. Paul's sport ground to be held on 21st May, 2021. The Prime Minister issued a statement whose statement I'm not sure of. He emphasised on the conditions of COVID 19 and the number of people gathered and said that there would be police officers. This was his first statement which drew attention. [3]

We honoured the invitation i.e. Timothy MP, A2, Simelane Magawugawu and myself. We found the people seated on the sports ground while the memorial service was in progress. Before completion of 20 minutes to an hour, in fact, when I arrived I found police officers from OSSU department. When I arrived by St. Theresa I saw them drinking and they tried to hide themselves as I stopped to pause as my house is in town. Those same police officers came in three trucks. At that time we had sat down near mourners inclusive of the mother of the deceased. When they arrived they entered with their vehicles and took one and blocked the gate. One motor vehicle came on the side of the mourners and another to the people. Tear gas was fired. We are not aware if by the teargas they were targeting us or the mother as the tear gas were thrown at us. The police threw teargas to Simelane Magawugawu's car. The people ran away. I had changed my car. We got into the car and drove away.[4]

I think it was then when I took my phone asking the Prime Minister what was wrong. Mthandeni Dube during that time was interviewed by the journalists where he criticized the way the Government was working.[5]

Towards the end of May, in the evening I can't recall the date, I tuned on the radio and found the Prime Minister speaking, talking about Mthandeni calling him by name. Around 30th May or June first, I received a call from the Constituency headman Richard Vilane telling me if I listened to the news. I told him I couldn't. He said he had listened to the news. The Prime Minister was saying he was requesting the people from Hosea, Ngwenpisi and Siphofaneni that they should not elect Mduduzi Mabuzza, Mthandeni Dube and Simelane. He was saying they should not be elected because they are determined to overthrow the Government." [6]

- [186] From the above speech at para 4, Accused No. 1 mentioned that there was a form of violence when they were at the memorial service of Thabani. This memorial service was sometime in May. Accused No. 1 later on in his testimony gave details of the violence as he was led in chief by his Counsel: *"What are your views on violence?"* He responded; *"When I refer to violence which happened on delivering petition, it is that when we were delivering this speech, we did know anything about violence on delivering petitions. We stated that we do not support violence or promote it. Someone may ask saying we can see that there is violence. What we see is that the police threw tear gas to the playground that is on 21st May 2021 at the memorial service and between 14 and 16 at KaKhoza shot someone in the eye. They were going to deliver petition, that is, justice for Thabane."* His Counsel again asked, *"What about damage to property?"* Accused No. 1 retorted: *"Even then it is the same. We do not support vandalizing and destruction of peoples property. We said so as after the person was shot, people were very angry as they hi-jacked the truck which was conveying sugar and started helping themselves on the sugar. In conclusion, we*

said we don't support the destruction of other people's businesses or property or anything that may cause one to suffer or his life be backward."

Deduction

- [187] The deduction of what Accused No. 1 said in his defence in chief, points to one direction. It is that Accused No. 1 was fully aware of violence during the petition delivery. He testified of violence during the memorial service of Thabane where the people had to run away and he had to get into his car and abandon attending the memorial service. He explained that during the petition delivery on justice-for-Thabane, the police shot a person in the eye and the people reacted by hijacking a truck full of sugar. This evidence must be considered with Accused No. 1 speech at Summerfield where he adumbrated about the Acting Prime Minister, *"The only thing he can do is to deploy the police, as he always does, to assault you if that is what they want to do."* This again is evidence of a high likelihood of violence occurring during the delivery of petitions.
- [188] Further, it must be considered that Accused No.1, still at Summerfield Hotel, advised the people that no one had the power to tell them to stop delivering petitions, not even Parliament. This was because it was their constitutional right to do so. The Government was unconstitutional as it was not elected by the people but *'came down like rain.'* The Acting Prime Minister, by issuing the Banning Order was commanding the nation as if it were his children and was leading the nation to a forest. This words and many others uttered by Accused No. 1 planted acrimony among the listeners and the Government. Violence as a result of such words therefore became apparent. His call that there should be no violence was muzzled by such utterances, or should I say, that call not to engage in violence in light of such words in his speech was indication that he

appreciated that the people might turn to anger and thereby cause violence. His denial in his defence of any violence before the Banning Order finds no support. It stands to be rejected at law.

[189] Turning to Accused No. 2, I have already demonstrated above that the Crown's witnesses testified of violence in some of the areas during petition delivery. Their evidence was not refuted or challenged on behalf of the defence. I have already stated that the court is compelled in this circumstances to accept it as against Accused No. 2 as well.

[190] The Hansard was presented to court. It was admitted and marked by consent of both parties as exhibit Z2. From it, the House of Assembly sat on the 21st June, 2021. The Speaker stated:

“Honourable Member, I would like to make this announcement, which I feel will affect us all as Honourable Members from the office of the Director, Honourable Members, following what was being done in our respective Constituencies, where petitions were delivered, let me start by thanking all of you to whom petitions were delivered, I thank the way in which you handled the issue. Further, I would like to state that even though this happened, we do not condone it, we do not encourage it and we further saw how much it affected you. There was cyber-bullying and harassment and I say as Speaker, I wish to extend to [sic] sincere apologies for such an unfortunate state of affairs. I also like to further state that the Tinkhundla system of governance does not encourage this but it encourages that we follow the proper channels. The way in which the petitions were delivered in those constituencies, in my view, undermines the operation of the Tinkhundla system, Tinkhundla does not operate in that spirit Honourable Members. It is appropriate to say that, is inappropriate that

harassment and bullying be directed to you Honourable Members in the manner it was."

[191] Accused No. 1 in his evidence-in-chief testified on what the Speaker said on that day, *"When he was making his remarks, he spoke about the issue of petitions. He passed his condolences on receiving petitions and that what he can say it was UnSwazi to bring petitions."*

[192] From the remarks by the Speaker as captured above, he did point out that there were instances of harassment and bullying during petition delivery and the condolence was directed to those Members of Parliament who were the victims of such violence. DW4 testifying on behalf of Accused No. 1 stated in chief that the Speaker passed condolences to some of the Members of Parliament. Why condolences? The Hansard reflects, for the violence experienced during petition delivery. The bullying and harassment are a form of violence.

[193] Exhibit Z2 (the Hansard) also reflects Member of Parliament Musa Kunene who submitted that a certain Member of Parliament was actually assaulted during petition delivery. He stated:

"We say Mr. Speaker, the youth has spoken, they came to us, but we say, the manner they are adopting of delivering the petitions if you look at it Mr. Speaker they are after someone's head. We saw in another Inkhundla where the Honourable Member was even assaulted. We are the ones who will die and when you look at their petitions, they reflect the truth, we can't ignore that. There is no medication in hospitals, road conditions are terrible, no water in other constituencies, it is bad Mr. Speaker."

[194] Member of Parliament Marwick Khumalo also expressed while urging the Speaker to allow the House to debate the issue:

“Even though Honourable Speaker you said you were withdrawing the announcements, word will get out that you paid your sympathies to us when we came crying to you saying we are being attacked outside. You sympathized with us yet the fire outside is one we brought with us into the House.”

- [195] The remarks of the two Members of Parliament, Musa Kunene and Marwick Khumalo, are a testimony that the issue of violence during petition delivery was noted in Parliament on the 21st June, 2021. The evidence at the instance of Accused No.1 that no one in the House including the Deputy Prime Minister, (PW16), Malavi Sihongonyane who had by then received the petitions ever said that there was violence during petition delivery, stands to be rejected therefore.
- [196] There is another reason why his evidence of no violence pre-Banning Order must be rejected. It is that PW16 testified in court that he was pelted with stones and was served by the Station Commander (PW15). This portion of evidence was not disputed. In law, Accused No. 1’s testimony that there was no report of violence on the 21st June, 2021 is an afterthought.
- [197] It is therefore safe to conclude this enquiry in that, to subsequently call for continuation of delivery of the petitions therefore especially in light of the Banning Order was akin to a call for furtherance of the violence that was evident during petition delivery. In this instance, it sums to foresight of the violence and recklessness of the results that ensued as evident under Count 2 and Count 3. The evidence presented therefore dictates that the two accused persons arraigned before court cannot escape Counts 2 and 3.

Count 4

[198] The Count reads, “*Accused No.1 is guilty of the offence of CONTRAVENING REGULATION 4 (3)(b) READ TOGETHER WITH REGULATION 4(8) OF THE DIASTER MANAGEMENT (CORONA VIRUS - COVID-19) REGULATIONS 2020 UNDER THE DISASTER MANAGEMENT ACT 01/2006*

In that upon or about 5 June 2021 and at or near Hosea area near Shiselweni Region, the said Accused did unlawfully and wrongfully fail to keep a register as required by the Regulations for any gathering and sanitize participants in a gathering he had convened and did thereby contravene the said Act”⁸³.

Question

[199] Before attending to the enquiry on whether Accused No. 1 failed “*to keep a register and sanitized the participants,*” the first port of call is to ascertain if he “*convened*” a gathering.

Crown’s Evidence

[200] The Crown led PW39 whose evidence was captured above. Of note from the evidence of PW39 is that he received information on the date of the meeting that there would be a meeting at Hosea Constituency. He called the Accused who confirmed that there would be a meeting but he would revert to him later. Accused person never called until he heard that people were beginning to gather around the constituency and that accused was already at the constituency. It is then that PW39 assembled his team and proceeded to the meeting. Accused No. 1 addressed the meeting at about 1300 hours. PW39 proceeded to testify about

⁸³ Pages 6 of the book

the speeches made therein. He also mentioned that the people were not sanitized.

Analysis

- [201] On cross-examination by the defence that the meeting was organised by Vilane, (DW1), PW39 responded that he was not aware as to who organised the meeting. PW39 however, insisted that Accused No. 1 was in charge of the meeting as he was the first to address the meeting by outlining the agenda and welcomed the people.
- [202] From the answer by PW39 that he was not privy to the organiser of the meeting, the conclusion is that there was no evidence adduced on behalf of the Crown on Accused No. 1 convening the meeting. Further, DW1, Sibusiso Vilane testified in court that he was the organiser of the meeting a Hosea Constituency on the 5th June, 2021 as it was so contended against PW39. It is noted that PW39 insisted under cross-examination that Accused No. 1 was in charge of the meeting. However, the evidence that he was in charge of the meeting does not translate into saying Accused No. 1 was the convener of the meeting let alone the defence adduced by Accused No. 1 and DW1. Worse still, in this case, there was no corroboration of PW39's evidence despite that it was refuted by the defence from the onset. For this reason alone, Accused No. 1 must be acquitted of this charge.
- [203] There is a second reason why Accused No. 1 must be acquitted under Count 4. It rests at law. The charge facing him reads that he '*convened*' the gathering. In terms of the enactment under which he was charged, viz., Legal Notice No. 80 of 2021 citing the Disaster Management (Coronavirus (COVID-19)) Regulations, 2020, Regulation 4(3) reads: "*A person in charge of a community gathering or a wedding ceremony shall –*". Accused No. 1 was charged for

convening and not being in charge of the gathering. The uncorroborated evidence by PW39 was aligned to the enactment but the indictment read was not in accordance with the prohibited act. I appreciate that the Crown at the close of its case thereafter sought for an amendment. This court declined the amendment for reasons advance then. The reasons still stand. What is of relevancy at this juncture is that Accused No. 1 stands to be acquitted on Count 4 and so be it.

Defence legal point on indictment

[204] In their submission, the defence raised that Count 1 was defective in that it lacked certain averments or allegations. The defence authored in this regard, *"The charge, as framed, does not contain the necessary allegations that an act, attempted action or threat of action were committed."*

[205] First and foremost, I must point out that an accused person who objects to an indictment as defective such as in the present case, in terms of the law, ought not to take a plea. **Prof. SA Strauss** writing on this procedure and with reference to **R v Moosa**⁸⁴ eloquently expressed, *"Formal objections to the indictment or charge must be taken before the accused has pleaded, not afterwards."*⁸⁵ In Moosa's case, the court declined an application to quash the indictment on the ground that the wrong Act and section had been cited. The court held that accused ought to have raised his objection before pleading. Similarly, *in casu*, the accused persons ought to have moved an application in terms of section 152 or 153 of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended. They ought to have given notice to the Crown for an exception or quashing of the indictment.

⁸⁴ 1924 TPD 441

⁸⁵ Criminal Procedure" University of South Africa, 1976, at page 178

[206] Secondly, looking at the ground raised by the defence, there is nothing amiss about the indictment herein. Both accused persons were fully informed of the charge to meet in court. I see no basis that there is some allegation missing from it. The acts complained about are clearly outlined in each count. Whether they are of political, religious or ideological, the inference can easily be drawn from the wording in Count 1.

Conclusion

[207] In the final analysis, I enter as follows:

[207.1] Count 1: Accused No. 1 and Accused No. 2 are found guilty;

[207.2] First Alternative to Count 1: Accused No. 1 and Accused No. 2 are found guilty;

[207.3] Second Alternative to Count 1: Accused No. 1 and Accused No. 2 are found guilty;

[207.4] Count 2: Accused No. 1 and Accused No. 2 are found guilty;

[207.5] Count 3: Accused No. 1 and Accused No. 2 are found guilty;

[207.6] Count 4: Accused No. 1 is acquitted and discharged. /



M. DLAMINI J

For the Crown: G.J. Leppan assisted by T. Dlamini, instructed by Director of Public Prosecutions

For the Defence: J.L.C.J van Vuuren SC, assisted by B. J. Simelane instructed by Ben J Simelane Attorneys