IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 165/10

In the matter between

REX

V

ZONKE THOKOZANI TRADEWELL DLAMINI	1ST ACCUSED
BHEKUMUSA BHEKI DLAMINI	2ND ACCUSED

Neutral citation: *Rex v Zonke Thokozani Tradewell Dlamini and Bhekumusa Bheki Dlamini (165/10)* [2012] SZHC 144

Coram: OTA J.

Heard: **19th June 2012**

Delivered: **10th July 2012**

Summary: **Application in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 67/1938, as amended (CP&E): whether credibility of witnesses, contradictions in evidence led and the two rules of logic when drawing an inference in Criminal Proceedings (R V Blom 1739 AD 188 202.3) hold sway in such an application.**

[1] The 1st Accused person **Zonke Thokozani Tradewell Dlamini** and 2nd Accused **Bhekumusa Bheki Dlamini**, are charged jointly and severally with three counts of offences. The charge sheet reads as follows:

COUNT ONE

[2] Accused No.1 and 2 are guilty of the Crime of Contravening Section 5 (1) of **THE SUPRESSION OF TERRORISM ACT NO. 3 of 2008.**

[3] In that upon or about 25th May, 2010, at or near Ebenezer in the Shiselweni Region, the said Accused persons each or both of them acting jointly and in furtherance of a common purpose did unlawfully and intentionally cause serious damage to property belonging to one **Vusi Masuku,** a Senior Police Officer, an act intended to intimidate the public, and did thus contravene the said Act.

ALTERNATIVELY

[4] Accused No. 1 and 2 are guilty of the Crime of Arson.

[5] In that upon or about the 25th May, 2010 and at or near Ebenezer area in the Shiselweni Region, the said Accused persons, each or both of them, acting jointly and in furtherance of a common purpose did unlawfully and with intent to injure one **Vusi Masuku** in his property, set on fire and thereby damage (sic) a certain house, being immovable property belonging to the said **Vusi Masuku** .

COUNT TWO

[6] Accused No. 1 and 2 are guilty of the crime of **CONTRAVENING SECTION 5 (1) OF THE SUPPRESSION OF TERRORISM ACT NO. 3 of 2008.**

[7] In that upon or about 7th June 2010 and at or near Ebenezer in the Shiselweni Region, the said Accused persons each or both of them, acting jointly and in furtherance of a common purpose did unlawfully and intentionally cause serious damage to property belonging to one **BHEKI MKHONTA**, a member of Parliament, an act intended to intimidate the public, and did thus contravene the said Act.

ALTERNATIVELY

[8] Accused No. 1 and 2 are guilty of the crime of ARSON.

In that upon or about the 7th of June 2010 at or near Ebenezer area in the Shiselweni Region, the said Accused persons, each or both of them acting jointly and in furtherance of a common purpose did unlawfully and with intent to injure one **BHEKI MKHONTA** in his property, set on fire and thereby damage (sic) a certain house, being immovable property belonging to the said **BHEKI MKHONTA.**

COUNT THREE

[9] Accused No. 2 is guilty of the Crime of **CONTRAVENING SECTION 5 (1) OF THE SUPPRESSION OF TERRORISM ACT NO. 3 of 2008.**

[10] In that upon or about 7th June, 2010 and at or near Ntabinezimpisi in the Hhohho Region, the said Accused person did unlawfully and intentionally cause serious damage to property belonging to one **DAVID LION SHONGWE**, a member

of Parliament, an act intended to intimidate the public, and did thus contravence the said Act.

ALTERNATIVELY

[11] Accused No. 2 is guilty of the Crime of ARSON

[12] In that upon or about the 7th June 2010 and at or near Ntabinezimpisi area in the Hhohho Region, the said Accused did unlawfully and with intent to injure one **DAVID LION SHONGWE** in his property, set on fire and thereby damage (sic) a certain house, being immovable property belonging to the said **DAVID LION SHONGWE.**

[13] When the Accused persons were arraigned before this court, they pleaded not guilty to the charges proffered. Thereafter, a trial in which the crown paraded a total of 15 witnesses and tendered several exhibits in proof of its case, ensued. Each of the crown witnesses was extensively and exhaustively cross examined by learned defence **Counsel Advocate Sihlali .**

[14] At the close of the crown's case, the defence via **Advocate Sihlali,** moved an application in terms of Section 174 (4) of the

Criminal Procedure and Evidence Act, 67/1938, as amended (CP&E).

[15] **Advocate Sihlali** prayed the court to discharged and acquit both Accused persons, on the grounds that there is no direct or circumstantial evidence led by the crown, upon which the court might convict the Accused persons. His take is that the Accused persons were taken for pointing out exercises a day after they had been respectively arrested, and after they had been interrogated and tortured. That the Accused persons have maintained consistently that they were tortured as is evidenced by their bail applications. Therefore, the pointing out exercise was not free or voluntary as required by law and should not be relied upon by the court.

[16] **Advocate Sihlali** also contended that the entire pointing out exercise was compromised by the presence of PW15, the Investigating Police Officer, as his presence in those circumstances was undesirable. And in any case, the pointing out exercise should not be relied upon to found circumstantial evidence which ought to exist irrespective of the pointing out exercise. That for the court to reach the conclusion that a prima facie case has been made out, the court must be able to draw

only one inference from the totality of evidence led, in line with the two rules of logic evolved in **R V Blom – 1739 AD 188 202-3.** But that is however not the position in this case, as the evidence led by the key crown witnesses are contradictory.

[17] The learned Advocate also took issue with exhibits K, K1 and K2 the reports of the forensic examinations conducted on materials found at the scenes of crime and those taken from the pointing out exercise in the Accuseds' homes. He condemned exhibit K1 on the grounds that the expert PW14, referred to the pair of jeans examined therein as brown, whilst other crown witnesses referred to a grey pair of jeans. That PW14 failed to follow her instructions by carrying out the examination in terms of individual characterization as opposed to class characterization. The result of exhibit K1 creates a doubt. It's not conclusive but speculative. That even under cross examination PW14 admitted that the piece of cloth examined could have originated from any other cloth and not the jeans.

[18] On exhibit K the Advocate complained, that PW14 referred to the colour of jeans therein this time as brownish . That even though PW14 did not use physical matching in this case, but used sterile microscopy and polarised light microscopy but she arrived at the

same result. Therefore, she arrived at the same result whilst examining the same materials using different methods in K and K1 respectively. That the reports are not conclusive and cannot be used to arrive at circumstantial evidence, which ought to be proved independently.

[19] Regarding exhibit K2, the learned advocate implored the court not to attach any weight to this exhibit as the expert who prepared the report, did not attend court to testify and be cross examined.

[20] Defence counsel also attacked the credibility of PW15 and urged the court to disregard his evidence as unreliable

[21] Finally the Advocate contended that though the 1st Accused does not deny making a confession, however, the said confession was not tendered in evidence before court, therefore, the evidence of PW15 on said confession does not assist the court. That the only reason why the confession was not tendered in evidence is because, in it, the 1st Accused alleged that he had been tortured.

[22] The learned Advocate therefore called upon the court to exercise its discretion in favour of the 1st and 2nd Accused persons as the

evidence led against them is so weak, that they have no case to answer.

[23] In Reply, learned crown counsel **Mr P. Dlamini** contended, that the Standard of proof called for at this stage is less than proof beyond a reasonable doubt. He called upon the court to disregard all issues raised by **Advocate Sihlali** on the question of contradictions and demeanor of witnesses, as they are issues of address at the conclusion of the trial.

[24] **Mr Dlamini** submitted, that though there is no direct evidence in the form of an eye witness account, there is however sufficient circumstantial evidence upon which the court, in the absence of contrary evidence, might convict.

[25] Counsel drew the courts attention to the evidence of the pointing out exercise by both Accused persons which he says was voluntarily made after the Accused persons had been duly cautioned according to the judges rules. Learned counsel contended, that since the Defence alleges torture prior to the pointing out exercise, they should have requested for a trial within a trial to establish this, which they failed to do. Therefore, the only common fact is that, the pointing out was voluntarily

done. Learned counsel contended, that the guilt of the Accused persons has been proven by the pointing out exercise, moreso as the defence did not dispute that the Accused persons led the police officers to their homes or that they pointed out the items shown to the court to them. There is also no allegation that these items were known to the police officers prior to the pointing out exercise. It is only the Accused persons who knew these items.

[26] On exhibits K and K1, Crown counsel submitted, that the result of these reports, to the effect that the items picked from the scenes of the crime could have come from the items picked out at the pointing out, put the two Accused persons at the scenes of the bombings. That under cross examination, PW14 the expert, made it clear that the use of the word ‘‘could’’ in the reports means that there is a greater possibility that the items found at the scenes of the bombings could have come from the items pointed out by the Accused persons during the pointing out.

[27] Learned crown counsel urged the court to disregard the contention of the defence on the question of the colour of the jeans in exhibits K and K1, as the identity of the pair of jeans is not in issue. He also urged the court to disregard the contention

of the defence on the issue of the method and equipments used in the forensic examination contained in exhibits K and K1, as this can only be challenged by the testimony of another expert.

[28] On exhibit K2, crown counsel contended that this report is conclusive that the piece of cloth found at the scene of crime in count 3, matched the pair of pants pointed out to the police officers by the 2nd Accused. That exhibit K2, shows that the piece of cloth and pair of pants pointed out are one. Counsel submitted that the crown has shown *prima facie* evidence in respect of 2nd Accused and Count 3 in this respect pursuant to Section 221 of the CP & E. Therefore, the court should disregard the prayers of the defence that exhibit K2 be disregarded.

[29] Learned Crown counsel further submitted, that PW15 was right not to place evidence contained in the confession of 1st Accused before the court, since the confession was not tendered in evidence. Counsel contended that however, once the content of the said confession was solicited from PW15 under cross examination and was duly narrated by PW15, it is now admitted and forms part of the evidence upon which the court can rely.

[30] Finally, learned crown counsel submitted, that all these proved facts exclude every reasonable inference save for one that can be drawn and that falls squarely on the two cardinal rules of logic in **R V Blom (supra)** Counsel therefore prayed the court to dismiss the application.

[31] Now, **Section 174 (4) of the Criminal Procedure and Evidence Act,** upon which this application is predicated, states as follows:-

'' If at the close of the case for the prosecution, the court considers that there is no evidence that the Accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him''.

[32] Local jurisprudence is agreed that the proper test to be applied by the Court in considering an application launched pursuant to the above legislation is:-

Whether at the close of the crown's case, there is evidence on which a reasonable man, acting upon carefully might or may and not should or ought to convict either for the offence charged or any other offence. For instance in the case of **Rex V Elizabeth**

Matimba and another Case No. 184/98, the court enunciated this test with reference to the celebrated case of **The King V Duncan Magagula and 10 others Criminal Case No. 43/96**, where it is stated as follows:-

'' This section is similar in effect to section 174 of the South Africa Criminal Procedure Act 51 of 1977. The test to be applied has been stated as being whether there is evidence on which a reasonable man acting carefully might convict ***(R V SIKUMBA 1955 (3) SA; R v AUGUSTUS 1958 (1) SA 75****, not should convict* ***(GASCOYNE V PAUL and HUNTER 1917 TPD 170 R V SHEIN 1925 AD)''****.*

[33] As the court correctly noted in **Rex V Magagula (supra),** our Section 174 (4) of the CP&E is in pari materia with Section 174 of Act 51 of 1977 of the Republic of South Africa which reads as follows:-

'' If, at the close of the case for the Prosecution at any trial, the court is of the opinion that there is no evidence that the Accused Committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty''.

[34] In interpreting this South African statute**, Hoffman and Zeffert** in the text **Classical Work on The Law of Evidence Act** state as follows in **pages 505-6**

'' The word ''no evidence'' in the Section 174 have been interpreted to mean no evidence upon which a reasonable man acting carefully may convict ***(R V Sheri 1925 ADG, S V Mthethwa and others 1983 (4) SA 262 (c) at 263-H.''***

[35] Similarly, in the case of **Rex V Elizabeth Matimba and another (supra)** the court referred to an article titled **''The Decision to Discharge an Accused at The Conclusion of the State Case: A critical Analysis, South Africa Law Journal page 286 at 287**, where the author **A st Q Skeen,** considered the implication of this Section as follows:-

'' The word ''no evidence'' have been interpreted by the courts to mean no evidence upon which a reasonable man might convict. The issue is whether a reasonable man might convict in the absence of contrary evidence from the defence and not what ought a reasonable man to do. If a prima facie case is established the Accused runs the risk of being convicted if he offers no evidence, but it does not necessarily mean that if he

fails to offer evidence the prima facie case will then become a case proved beyond reasonable adoubt. This may or may not take place. It sometimes happens that a court, after refusing an application for discharge at the conclusion of the state case, will acquit the Accused where he closes his case without leading any evidence. In other words, what a reasonable man might do does not equate with what a reasonable man ought to do. The test at the conclusion of the whole case is whether the state has proved the guilt of the Accused beyond a reasonable doubt. The issue as to whether there is evidence on which a reasonable man may convict is a matter solely within the opinion of the judicial officer and may not be questioned on appeal''.

[36] It is worthy of note that the interpretation of Section 174 (4) of our criminal statute, which I have detailed ante, is not peculiar to either the Kingdom or the Republic of South Africa. It cuts across to other jurisdictions. Thus in the Namibia case of **The State V Bendictus Diedericks and another Case No. 23/2007 at paragraph 5,** the court stated as follows:-

''[5] The authorities referred to are broadly agreed in their interpretation of Section 174

(a) *that the court has a discretion to discharge the Accused at the close of the case for the prosecution, if the court is of the opinion that there is no evidence that the Accused committed the offence charged or any offence of which he may be convicted on the charge.*

(b) *that the expression ''no evidence means ''no evidence on which a reasonable court acting carefully might properly convict''*

[37] Therefore, case law across national borders is agreed, that this court has a discretion to discharge and acquit the Accused persons at the close of the crowns case, if it finds that there is no evidence upon which it might properly convict or if it finds that the crown has not made out a *prima facie* case against the Accused persons.

[38] This is a discretionary power of the court, which the court must not exercise arbitrarily or capriciously, but judicially and judiciously upon fact and circumstances which show that it is just and equitable to do so.

[39] Now, the enquiry that arises for determination at this juncture is. Has the crown on the evidence led made out a prima facie case in proof of the elements of the offences charged or is there any evidence upon which this court acting carefully might convict the Accused persons..

[40] It is an obvious fact that a judicious determination of this poser will entail a consideration of the totality of the evidence led by the crown. I will not however in considering the evidence led, embark on any winding assessment or analysis of the evidence with reasons, before reaching a conclusion. To travel this route, will entail a discuss of the evidence and the law and expression of opinion which is clearly undesirable at this stage of the proceedings, per adventure the Accused persons are required to enter into their defence.

[41] Now, before dabbling into the evidence led, since PW15, 3**004** D**etective Assistant Superintendent Sikhumbuzo Fakudze,** the Chief Investigating Police Officer, is a key crown witness, I find it convenient at this juncture to first address the contention of defence counsel, that PW15 is not a credible or reliable witness and the court should therefore not lend any credence to his evidence. **Mr Dlamini** replied that the credibility of PW15

should hold little or no sway at this stage of the trial and I agree with him. I say this because it is the judicial accord that at this stage, the credibility of witnesses play only a very limited role, and will play a role at all if there is a high degree of untrustworthiness that has been shown. **As Williamson J said in the case of S V Mpetha and others 1983 (4) SA 262 at 265 D-G.**

'' Under the present Criminal Procedure Act, the sole concern is likewise the assessment of the evidence. In my view, the cases of ***Bouwer and Naidoo*** *correctly hold that credibility is a factor that can be considered at this stage. However, it must be remembered that it is only a very limited role that can be played by credibility at this stage. If a witness gives evidence which is relevant to the charges being considered by the court, then that evidence can only be ignored if it is of such poor quality that no reasonable person could possibly accept it. This would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed. Before credibility can play a role at all, it is very high degree of untrustworthiness that has to be shown. It must not be overlooked that the triers of fact are entitled while rejecting one position of the sworn testimony of a*

witness, to accept another portion. See ***R V KHUMALO 1916 AD 480 at 484****. Any lesser test than the very high one which, in my judgment, is demanded, would run counter to both the principle and requirement of Section 174.''*

[42**]** Futhermore, in the case of the **State V Benedictus Diedericks and another (supra) paragraph 19**, the court held as follows:-

> *''[19] In this regard, three of the guidelines set out in the Nakale case are relevant. These are:*
>
> *a) that every case should be considered on its own merits*
>
> *b) that at this stage the credibility of the state witnesses plays a very limited role, and:*
>
> *c) ....''*

See **S V Stanley Nakale and two others Case No. cc18/2005**

[43] Similary, in the Lesotho case of **Rex V Teboho Tamati Romakatsane 1978 (1) CCR 70 at 73-4, Cotran CJ** said the following:-

‘‘ In Lesotho, however, our system is such that the judge------- is the final abiter on law and fact so that he is justified, if he feels that the credibility of the crown witness has been irretrievably shattered, to say to himself that he is bound to acquit no matter what the accused might say in his defence short of admitting the offence’’

[44] It is worthy of note that the foregoing position of the law was followed by Annandale ACJ (as he then was), in the case of **Rex V Mitesh Valob and others Criminal Case No. 188/04,** wherein his Lordship declared as follows:-

*‘‘ Likewise, I find myself in respectful agreement with the views of the learned Judge **Masuku J**, based to great extent on MPETHA (supra). The bottom line of this approach is that evidence of a particular witness is only ignored, for purposes of Section 174 (4) of the Act, when the credibility finding is so adversely and utterly destroyed that no part of his evidence can possibly be believed. At this stage of the proceedings, unless evidence that is relevant to the charges is of such poor quality that no reasonable person could possibly accept it, credibility of witnesses play a very limited role.’’*

See **The King V Duncan Magagula and 10 others, (supra)**

[45] In casu, let me say it straight away here, without the necessity of going into any analysis of the evidence of PW15, that having carefully considered the totality of his evidence (evidence in chief, cross examination and re examination) I do not think, irrespective of the vociferous attack on PW15's credibility and the probative value of his evidence, that his evidence is of such a poor quality that no reasonable person will believe any part of it. I do not think that his evidence is worth nothing than to be thrown into the gabbage bin, like a piece of unwanted meal, as is being urged by the defence. I am of the firm view, that the relevant evidence of PW15, to the charges before court, must be considered for the purposes of the Section 174 (4) application instant.

[46] Similary, the question of any contradictions in the evidence led by the crown is not one to be determined at this stage of the proceedings. I say this because there is authority to the effect that an application such as the one instance should not be granted simply because the evidence led contains contradictions. See **Herbstein and Van Winsen, Civil Practice of the Supreme Court of South Africa, 4th edition, at 682,**

Mershack Langwenya V Swazi Poulty (Pty) Ltd Civil Case No. 737/2009 at para 29, Marine and Trade Insurance Co. Ltd V Van der Schyff 1972 (1) SA at 38.

[47] Even though the foregoing authorities relate to application for absolution from the instance at the close of the Plaintiff's case in civil proceedings, I see no impediments preventing them from applying with equal force where an application is made in terms of Section 174 (4) of the (CP&E). I say this because the issue that arise for consideration in the two applications in Civil and Criminal Proceedings, are the same. This is whether the crown or Plaintiff as the case maybe, has made out a prima facie case. The underlying consideration for excluding the question of contradictions at this stage is therefore, the fact that such a consideration will entail a detailed evaluation and assessment of the evidence led, followed by reasons and opinions which will invariably have the ill consequence of hamstruging the case for the Accused or the Defendant as the case may be, if he is called upon to enter into his defence.

[48] One last issue which I wish to visit before considering the substance of this application, is the contention of the defence, which was conceded by the crown, that the two rules of logic in

R V Blom (supra) should hold sway in this application. I beg with respect to disagree with the both sides on this issue. This is because the 2nd rule of logic in **R V Blom** presupposes that the crown should furnish proof beyond a reasonable doubt, which is not the standard of proof required at this stage of the proceedings. This is the position of the law as stated with clarity by the learned editors **P.J Schwikkard etal, in the text Principles of Evidence**, **3rd edition at paragraph 30.5.2**, under the Rubrics **Inferences in Criminal proceedings**, where it is stated as follows:-

> *In **R V Blom** it was said that in reasoning by inference in criminal case there are two cardinal rules of logic which cannot be ignored. The first rule is that the inference sought to be drawn must be consistent with all the proved facts, if it is not, the inference cannot be drawn. The second rule is that the proved facts should be such that they exclude every reasonable inference from them save for the one sought to be drawn, if these proved facts do not exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. This second rule takes account of the fact that in a criminal case the state should furnish proof beyond reasonable doubt. The rules as set out in **R V Blom** supra*

are not applicable when a discharge in terms of S. 174 of the CPA is considered'' *(underline mine)*

See **S V Cooper 1976 SA 875(T)**

[49] Now, Section 5(1) of the Suppression of Terrorism Act, No 3 of 2008, (the Act) under which the Accused persons are charged, states as follows:-

''

Any person who commits a terrorist act, subject to any other specific penalty provided for in this Act for that offence, shall be guilty of an offence and, on conviction, shall be sentenced to any period of imprisonment not exceeding twenty five (25) year or to such number of life sentences as the court may impose''.

[50] In Section 2(1) and (2) of the interpretation Section of the Act, the term ''terrorist act'' is detailed to mean the following:-

''(1) an act or omission which constitutes an offence under this Act or within the scope of a counter-terrorism convention; or

(2) an act or threat of action which

(a) causes

(i) the death of a person;

(ii) the overthrow, by force or violence, of the lawful

Government, or

(iii) by force or violence, the public or a member of the public to be in fear of death or bodily injury;

(b) involves serious bodily harm to a person

(c) involves serious damage to property

(d) endangers the life of a person

(e) creates a serious risk to the health or safety of the public or a section of the public

(f) involves the use of firearms or explosives

(g) involves releasing into the environment or any part of the environment or distributing or exposing the public or any part of the public to:-

(i) any dangerous, harzadous, radioactive or harmful substance;

(ii) any toxic chemical

(iii) any microbial or other biological agent or toxic;

(h) is designed or intended to disrupt any computer system or the provision of services directly related to communication infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;

(i) is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services;

(j) involves prejudice to national security or public safety and is intended, or by its nature and context, may reasonably be regarded as being intended to:

(k) intimidate the public or a section of the public; or

(l) compel the Government, a government or an international organization to do, or refrain from doing, any act---''

[51] Now, let me proceed to the evidence, to see if there is any evidence led by the crown upon which the court might reasonably convict the Accused persons at this stage of the proceedings, for the main offence or the alternative offence charged or any other offence.

[52] It is common cause in this case that there were fire out breaks in the three homesteads referred to in the charges before court on the 25th of May 2010 and 7th of June 2010, respectively. This fact is conceded by the defence counsel in his submissions before court.

[53] From the evidence led, the first fire outbreak which occurred on the 25th of May 2010, was at the homestead of (PW1) a Senior Police Officer, **Vusi Masuku** at Ebenezer. The second incidence took place on the 7th of June 2010 at the homestead situate at Mtsambama in Hlatikhulu, belonging to PW 6, **Bheki Sandile Mkhonta** a member of Parliament. The third incidence also took place on the 7th of June 2010, at Mayiwane at the homestead of the late member of Parliament, **David Lion Shongwe.**

[54] There is evidence from the crown to show that in the wake of these fire outbreaks, both the Scenes of Crime officers and

officers from the bomb disposal unit, which were inclusive of **PW5, 4625**, **Detective Constable Nimrod Motsa** (Scenes of Crime) **PW7, 2750 Detective Sergeant N. Mkhabela** (Scenes of Crime), **PW 9 3311 Sgt Cecil B. Tsabedze** (Bomb Disposal Unit), and **PW13 4634 Constable Phinda Dlamini** (Bomb Disposal Unit) visited and investigated the different scenes of crime and collected exhibits therefrom. The investigation was led by PW15.

[55] There is evidence from the scenes of crime officers and members of the bomb disposal unit who visited the Masuku homestead, that a Rondavel in the homestead was completely destroyed – the roof almost falling and the walls cracked after the attack on it. Everything was burnt in the house except a sofa and a night stand which someone managed to retrieve from the fire. That the house was smelling of petrol. That the scenes of crime officers recovered pieces of brownish bottle as well as a bottle neck with a maize cock and a piece of grayish cloth tucked in the bottle neck, from the scene. These were admitted in evidence as exhibits C, C1 and C2 respectively.

[56] That PW7 took a series of photographs of the items found at the Masuku homestead which included the homestead itself, burnt

Rondavel, damaged window, bottle particles beneath the broken window and outside the burnt rondavel, bottle neck with maize cock, as well as the inside of the Rondavel showing the burnt items, these photographs were admitted in evidence as exhibits D to D6 respectively.

[57] Further, there is evidence from the scenes of crime officers and the bomb disposal unit who investigated the scene of crime at the homestead of **Bheki Mkhonta** on the 8th of June 2010, after the fire outbreak that occurred there on the 7th of June 2010, that the Mkhonta homestead was under renovation and there were scaffolds in one of the rooms. That there was the smell of petrol in the house. That the window on the eastern part of the house was damaged when the bottle that ignited the fire was thrown through it. The window was smoked and the scaffolds slightly burnt. That there was brown bottle debris scattered all over the room, outside and on the window pane, which the scenes of crime officers collected. That there was also some residue of sand found in the base of a broken bottle and in the house. That they also collected a piece of cloth grayish in colour, and slightly burnt which was on top of the scaffolds. The debris of brown bottle found at the scene was admitted in evidence as exhibit E. PW7 took a series of photographs of the items found at the crime

scene which included the following: the Mkhonta homestead itself, damaged window, pieces of broken window panes beneath the damaged window, slightly burnt scaffolds, debris of broken brown bottle, piece of slightly burnt grayish cloth on top of the scaffolds. These photographs were admitted in evidence as exhibits F to F5 respectively.

[58] The scenes of crime officers also told the court that they found a bottle neck with a maize cock tucked inside it at the scene. The pieces of broken brown bottle, the maize cock and the grey cloth were admitted in evidence as exhibits H, H1 and H2 respectively.

[59] It is further the crowns case, that on the 7th of June 2010, PW9 from the bomb disposal unit, together with PW5 from the Scenes of Crime and some other Scenes of Crime officers investigated the homestead of the late MP **Lion David Shongwe** after the fire outbreak there. That petrol was smelling all over the place. That they found two scenarios of attack. The first one being where a petrol bomb had been thrown through a window into a big house. The 2nd one being where an attempt was made at throwing a petrol bomb through the left front window of a silver mercedez benz, which left the window cracked all over but the attack never propagated. That just adjacent to the window seal

in the 2nd scenario they found a khaki piece of cloth which was hanging from the window seal. That they also found brown sugar, pieces of green bottle scattered all over both inside and outside the house, wax, the base of a green bottle which was the cointaner of the petrol. That the scenes of crime officers collected all these items from the scene. That PW5 took photographs of the items found at the scene of crime which included the following:- a green bottle, pieces of broken green bottle, wax, brown sugar, grey mercedez benz car, the window with a hole in it as well as the khaki piece of cloth hanging from the window seal. These photographs were admitted in evidence as exhibits A to A6 respectively. The khaki piece of cloth measuring 30 meters in length and 155cm in width which was hanging from the window seal was admitted in evidence and marked exhibit B.

[60] PW9 and PW13 the officers from the bomb disposal unit, told the court, that based on all the items discovered at the three different scenes of crime of the 3 homesteads, i.e. the pieces of broken bottles, the maize cock in the bottle neck with the piece of cloth tucked inside, the smell of petrol, the sand, made them conclude that a home made incendiary device, which is a petrol bomb or molotov cocktail as the case may be, had been used to

propagate the fire in the attacks on the 3 homesteads. They also told the court that this is also evident from the intensity and speed at which the fire spread in the homesteads.

[61] More to the foregoing, is the evidence from the crown, that after concluding the Scenes of Crime investigation and after interviewing some people around the country, PW15 arrested the 1st Accused on the 11th of June 2010. That after cautioning the 1st Accused in terms of the judges rules, the 1st Accused opted to say something and also to take them somewhere. That on the 12th of June, 2010, PW15 again cautioned the 1st Accused, thereafter, 1st Accused voluntarily led PW15 together with other investigating police officers including PW12, **2444 Detective Mxolisi Richard Mabuza** scenes of crime officer, to various places. That the 1st Accused first led them to his homestead at Ekwendzeni. On getting there, 1st Accused led them into his house and pointed out the following items to them: – a grey trouser on which is written rebook jeans which had cuts and torns, a balaclava, and a pair of a red scissors. These items were seized by PW15 and his team. These items including the 1st Accused's homestead, were photographed by PW12. The photographs were admitted in evidence as exhibits G to G4 respectively.

[62] Further, that from Ekwendzeni the 1st Accused took the investigating police officers to the homestead of **Beatrice Shongwe** (PW4) at Elukhalweni in Ebenezer. That at the homestead they met PW4 who is the 1st Accused's aunt. That they invited PW4 to go with them into the house where 1st Accused took them. That inside the house, 1st Accused pointed out the following items to them. A bag with a grey glove. PW12 took a photograph of the homestead of PW4 as well as the bag with the glove inside and these were admitted in evidence as exhibits G5 and G6 respectively.

[63] That from **PW4's** homestead, 1st Accused took them to a forest still around the Elukhalweni area, where he pointed out to them a two litre white container on which is inscribed the word parmalat. The two litre container was seized by PW15 and his team. That PW10 **Enock Vilakhe Kunene**, who is 1st Accused's uncle, was invited to witness and was present at the pointing out exercise in the forest. That PW12 took photographs of the forest, the white two litre container as well as a photograph of 1st Accused showing them the two litre container. These photographs were admitted in evidence as exhibits G7, G8 and G9 respectively. The pair of grey rebook jeans and the two litre

container were admitted in evidence as exhibits L and L1 respectively.

[64] It is further the crown's case that on the 16th of June 2010, PW15 arrested the 2nd Accused. That on the 17th of June after having cautioned 2nd Accused in terms of the Judges rules, the 2nd Accused voluntarily led PW15 together with other investigating police officer including PW5, to his homestead at Mpofu area, where 2nd Accused pointed out to them, a khaki or whitish trouser which had some cuts, which was near a water tank. That PW5 took a picture of the khaki trouser showing the cut parts which is admitted in evidence and marked exhibit A9

[65] Thereafter, 2nd Accused took them into his house where he pointed out to them a grey trouser, blue top, black takis and black wool hat. That PW8 **Selby Zwelithini Shongwe** was invited to witness and did witness this pointing out exercise. All the items pointed out by 2nd Accused were seized by the team of investigating police officers.

[66] It is further the crowns case, that the items recovered from the Scenes of Crime of the different homesteads which were attacked and the items seized from 1st and 2nd Accused at the

pointing out exercise, were sent to South Africa for forensic analysis. The report of the forensic analysis are contained in exhibits K, K1 and K2 respectively. Exhibit K and K1 were prepared by PW14, **Cornelia Elizabeth Berg,** a lientenant colonel, attached to the Forensic Science Laboratory in South Africa, Exhibit K2 on the other hand was prepared by one **Eduan Pienaar Naude**, a warrant officer who was attached to the Forensic Science Laboratory in South Africa. PW14 told the court that **Eduan Pienaar Naude** had since left the Forenisc Laboratory and relocated to West Africa. Exhibit K2 was tendered in evidence through PW14. The Defence called upon the court to disregard exhibits K, K1 and K2. Without the necessity of going into the contention of the defence on this wise which I have hereinbefore reproduced, I wish to state straight away here, that in terms of Sections 220 (4) and 221 of the CP&E such forensic reports as contained in K, K1 and K2 are *prima facie* evidence of the facts stated therein, and shall be received in evidence upon their mere production. For the avoidance of doubts those legislation state as follows:-

''

220 (4) *If any fact ascertained by any examination or process requiring any skill in bacteriology, biology, chemistry,*

physics, astronomy, or geography is or may become relevant to the issue in any criminal proceedings, a document purporting to be an affidavit made by a person who alleges in such affidavit that he is in the service of the Republic of South Africa or in the service of, or attached to, the South African Institute for Medical Research or any University in the Republic or any other institutions designated by the Prime Minister for the purposes of this section by notice in the Gazette, and that he has ascertained any such fact by means of any such examination or process, shall subject to subsection (5), on its mere production in such proceedings by any person, be admissible to prove that fact.

221 (1) *In any Criminal Proceedings in which any facts are ascertained:-*

(a) *by a Medical Practitioner in respect of any injury to, or state of mind or condition of the body of, a person, including the results of any forensic test or his opinion as to the cause of death of such person, or*

(b) by a Veterinary Practitioner in respect of any injury to, or the state or condition of the body of, any animal including the results of any forensic test or his opinion as to the cause of death of such animals.

Such fact may be proved by a written report signed and dated by such Medical or Veterinary Practitioner, as the case may be, and that report shall be prima facie evidence of the matters stated therein.

Provided that the court may of its own motion or on the application of the prosecution or the accused require the attendance of the person who signed such report but such court shall not so require if

(i) the whereabouts of the person are unknown

or

(ii) such person is outside Swaziland and, having regard to all the circumstances, the justice of the case will not be substantially prejudiced by his non attendance

(2) where a person who has made a report under Subsection (1) has died, or the court in accordance with the proviso to subsection (1) does not order his attendance, such report shall be received by the court as evidence upon its mere production, notwithstanding that such report was made before the coming into operation of this Act''.

[67] Exhibits K, K1 and K2 are therefore prima facie evidence of the facts stated therein, and I am thus inclined to countenance these exhibits at this stage of the proceedings, where the enquiry is whether a prima facie case has been made out by the Crown. See **Army Commander and another V Bongani Shabangu**. **Appeal Case No. 42/2011 paragraph 19 and 20.**

[68] Now, in exhibit K, PW14 was required in paragraph 3 to compare a piece of partly burnt fabric (3.1.3) with a brownish pair of jeans (Reebok) 3.2. This examination was in respect of items recovered from the Scenes of crime and a pair of rebook jeans (exhibit L) seized from the 1st Accused's house during the pointing out exercise.

[69] The result of the examination carried out in K is detailed in paragraph 6 therein as follows:-

‘‘ *6.1 The fibres of the piece of fabric described in paragraph 3.1.3 and the fibres of the fabric of the pair of jeans as described in paragraph 3.2 are comparable regarding their morphological characteristics and generic class.*

6.2 The physical properties (e.g leave pattern, color and the degree of soiling) of the piece of fabric as described in paragraph 3.1.3 and the fabric of the pair of jeans as described in paragraph 3.2 are comparable.

6.3 The piece of fabric described in paragraph 3.1.3 could originally have been part of the pair of jeans described in paragraph 3.2 (see photograph 1).’’

[70] Similarly , by way of physical matching, in K1, PW14 was required to compare two pieces of partially burnt fabric (3.1.1) recovered from the scenes of crime, with one brown colored pair of jeans (3.2.1) (exhibit L) seized from the 1st Accused’s house

during the pointing out exercise. The result of the examination is contained in paragraph 6 of K1 as follows:-

‘‘

6.1 Due to the fact that the edges of the pieces of fabric (ENM-2) as described in paragraph 3.1.1 were burnt, it was not possible to make a physical match.

6.2 The physical characteristics of the pieces of fabric (ENM-2) as described in paragraph 3.1.1 are comparable with those of the pair of jeans (MM-1) as described in paragraph 3.2.1 and could therefore originated from it.’’

[71] Also in exhibit K2, **Eduan Piennar Naude** was required to determine whether a physical match could be made between the torn piece of cloth (exhibit MTN1) as described in paragraph 3.1.4, and the torn pair of pants (exhibit SF-1) as described in paragraph 3.2.3. It is worthy of note that exhibit MTN1 is the khaki piece of cloth 30m length 155cm in width which is admitted in evidence and marked exhibit B. This piece of cloth was recovered from the scene of crime at the homestead of the late **MP Lion David Shongwe**. The torn pair of pants (exhibit SF-1) is the pair of khaki trousers (exhibit A9) with cuts which the

2nd Accused pointed out to the investigating police officers at his homestead.

[72] The result of the examination is detailed in paragraph 6 of K2 as follows:-

‘‘

6.1 The torn piece of cloth (exhibit MTN-1), as described in paragraph 3.1.4 formed a physical match with the torn pair of pants (exhibit SF-1), as described in paragraph 3.2.3

6.2 The torn piece of cloth (exhibit MTN-1) was originally part of the torn pair of pants (exhibit SF-1)’’

[73] Finally there is evidence from PW10 **Enock Vilakhe Kunene and PW11 Majacemane Mandlakapheli Shabangu,** that the incidence of the attacks on these homestead shocked the communities. **PW11** told the court that the shock was such that people were in fear and shut up in their houses.

[74] Even though the Accused persons allege that they were tortured upon their arrest and prior to the pointing out exercise, there is however no proof of this allegation at this stage of the proceedings.

[75] In the light of the totality of the crowns case detailed ante, without the necessity of any analysis or evaluation of the evidence led, I come to the inescapable conclusion, that the crown has made out a *prima facie* case against each Accused Person warranting an answer from them. The evidence showed a definitive nexus between the Accused persons and their alleged offences. The Accused persons have a case to answer. This application therefore fails. In coming to these conclusions, I have carefully refrained from evaluating the evidence led by the crown, giving reasons or expressing opinions, in other not to compromise the defence. As **Roper J** said in **R V Kritzinger and others 1952 (2) SA 401 (W) at 406-G,**

‘‘ *I do not think it is expedient for me to give reasons, because this would involve a discussion of the evidence and of the law, and it is undesirable that I should commit myself to any expression of opinion upon these matters before the defence is entered upon’’.*

[76] On these premises, I make the following orders:-

1) That the application in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 67/1938, as amended, be and is hereby dismissed.

2) That 1st and 2nd Accused Persons be and are hereby called upon to enter into their defence.

For the Crown: P. Dlamini (Crown Counsel)

For the Accused Persons: Advocate C. Sihlali instructed by

Ms M Da Silva

Delivered this the ……………..day of ………………………

in open court

OTA J

JUDGE OF THE HIGH COURT