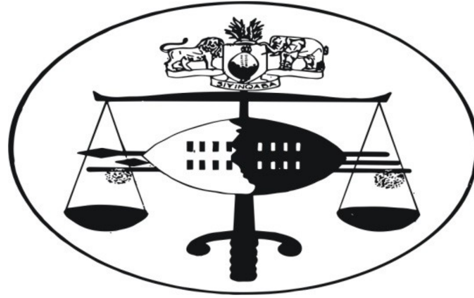


IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No. 199/2011**

In the matter between:

REX

v

NKOSINATHI KHUMALO

Neutral citation:	**Rex v. Nkosinathi Khumalo (199/2011) [2018] SZHC 266 (21 November 2018)**
CORAM	**J.S MAGAGULA J**
HEARD:	**12 December 2017; 14 December 2017 and 8 August 2018**
DELIVERED:	**21st November 2018**

Summary: ***Murder - Defence of intoxication - when available – dolus eventualis – proof of same.***

[1] The accused is charged with two counts of murder and three accounts of attempted murder as follows:

Count one

Under this count the accused is charged with murder it being alleged that:

> ***" Upon or about the 15th Sepetmber 2010 and at or near Hhelehhele area, in the Hhohho region, the said accused did unlawfully and intentionally kill ALWANDE KUNENE."***

Count two:

Under this count the accused is again charged with murder the prosecution alleging that:

> ***" ….upon or about the 15th September 2010 and it or near Hhelehhele area in the Hhohho region the said accused did unlawfully and intentionally kill ANDILE KUNENE."***

Count three:

On this third count the accused is charged with attempted murder the crown alleging that:

> ***"…………Upon or about the 15th September 2010 and at or near Hhelehhele area in the Hhohho region the said accused with the intent to kill, did unlawfully assault THANDI ZWANE."***

Count four:

On this count the accused is again charged with attempted murder it being alleged that:

> ***" …Upon or about the 15th September 2010 and at or near Hhelehhele area, in the Hhohho region the said accused with the intent to kill, did unlawfully assault NONDUDUZO DLAMINI*."**

Count five:

Under this fifth count the said accused is charged with attempted murder it being alleged that:

> ***" Upon or about the 15th September 2010 and at or near Hhelehhele area, in the Hhohho region, the said accused with intent to kill, did unlawfully assault PHAYI SHONGWE."***

[2] Upon arraignment the accused pleaded guilty to all charges. However as enjoined by law I entered pleas of not guilty in respect of the two murder charges. The crown then led two witnesses namely, THANDI ZWANE and LINDA KHUMALO.

[3] THE EVIDENCE

THANDI ZWANE (PW1) told the court that during September 2010 she was residing with about six grandchildren of hers which included ANDILE KUNENE, ALWANDE KUNENE (Since deceased) NKOSEPHAYO SHONGWE, NONDUDUZO DLAMINI, LINDELWA KHUMALO and LINDA KHUMALO (PW2).

[4] On the 15th September 2010 she knocked off from work at Lufafa Primary School and went home. In the evening the children went to sleep and she remained awake for a while reading her bible and praying. She eventually slept. As she went to sleep she heard the door banging loud. Upon, waking up she realized that it was the accused who was banging the door. The accused then knocked down the door and gained entry into the house where Pw1 and the children were sleeping. Pw1 was sleeping in a bed and the children were sleeping on the floor.

[5] The accused approached Pw1 and she managed to run out of the house. The accused pursued her and eventually caught up with her under an orange tree within the same homestead. The accused then stabbed Pw1 with a spear on the right arm and also on the right thigh and left her there. Pw1 did not see where the accused went to.

[6] Pw1 then crawled towards the kraal and when she was next to the kraal one of her grandchildren Andile Kunene came. She asked the child to get some water for her but the child went and never returned. This child was about three (3) to four (4) years at the time. Pw1 then crawled back to the house, took a Kanga and wrapped herself with it and went to her daughter, Thembi Khumalo's home. Thembi Khumalo's home was about two (2) kilometres from Pw1's home. Whilst at her daughter's home arrangements were made for her to be taken to hospital and she was eventually taken to the Pigss Peak Government hospital where she was admitted for three (3) days.

[7] Pw1 went home after she had been discharged but she did not find her grandchildren. Her elder son Vusi Khumalo reported to her that two of her grandchildren were dead an these were Andile Kunene and Alwande Kunene. Her said son also told Pw1 that Nkosephayo Shongwe and

Nonduduzo Dlamini had been taken to hospital. Nkosephayo spent two (2) days in hospital whilst Nonduduzo spent two (2) months in hospital. She had been seriously injured and not able to walk.

[8] Pw1 further told the court that she had not done anything to provoke the accused. She also testified that she clearly saw that the accused was carrying a spear and an axe as there was moonlight on the fateful day. The accused who is pw1's bilological son was staying in the same homestead as Pw1 save that he had his own house.

[9] Linda Khumalo (Pw2) told the court that during 2010 he resided with his grandmother (pw1) at Hhelehhele area. The accused as well as the minor children Nkosephayo Shongwe, Alwande Kunene, Andile Kunene and Nonduduzo Dlamini also resided in the same homestead. Pw2 also told the court that the accused is actually his uncle.

[10] This witness further told the court that on the 15th September 2010 the accused came home in the evening and hit the door breaking it in the middle. Pw1 who was sleeping in her bed asked the accused what he wanted. The accused responded by saying " It is you that I want." Pw1 then went to accused at the door and when she got outside the accused chased after her. Pw1 cried out for help and Pw2 went outside. Upon realising that accused was chasing after Pw1, Pw2 ran to report the incident to his aunt's place. His aunt is Thembi Khumalo, a daughter to Pw1. Pw2 estimated his aunt's place to be about one kilometre from their homestead. Pw2 found his aunt with her husband Sibhuluja Shabangu and he reported the matter. Soon after pw2 arrived at her aunt's place Pw1 also arrived. Pw2's father Vusi Khumalo was called and he took Pw1 to hospital.

[11] Pw2 spent the night at his aunt's place and only returned home the following day to take school uniforms. He was with his sister Lindelwa Khumalo. When Pw2 went into the house he saw a pool of blood and two kids with blood behind the door. The children were Andile Kunene and Alwande Kunene. Two other kids were under the bed and these were Nonduduzo Dlamini and Phayo Shongwe. He tried to wake the children up by calling their names and they did not respond. He then went back to his aunt's place to report what he had found.

[12] Pw2 's aunt, upon receiving the report took some men with her to inspect what had been reported to her. Upon confirming the report police were then called and they took the children to hospital after taking statements from the people they found there. Pw2 also told the court that Andile Kunene and Alwande Kunene died. Phayo Shongwe and Nonduduzo Dlamini are alive.

[13] During cross – examinination Pw2 was asked about the relationship between him and the accused before this incident and he stated that it was healthy. He further confirmed that it was the first time that the accused behaved in such a bizarre manner.

[14] Again in cross – examination it was put to Pw2 that the reason the accused behaved in this manner was that he had taken some traditional brew called ***"umcombotsi"*** as well as another drink called ***" mankanjane"*** and was therefore so intoxicated that he lacked the ability to appreciate what he was doing. In response Pw2 said ***" But he said he wanted granny [Pw1] It seems he had prepared to do what he did."*** It was further put to this witness that his granny [Pw1] never said that accused said he wanted her. In response Pw2 said he heard accused say that and he was closer to the door

where accused was. When it was put to Pw2 that accused never uttered those words, he insisted that he heard them.

[15] It was further put to Pw2 that the accused lacked any intention to kill or attempt to kill anyone on the day in question. Pw2 stated in response; ***" But from the manner he hit the door there was clear intention to do some harm."***

[16] As part of its evidence the prosecution handed into court exhibits as follows:

Exhibit A – Photographs depicting the two deceased children and the fatal injuries inflicted on their persons. The injuries are mainly on the heads of the victims and they appear to be inline with the evidence that they were inflicted by an axe. There are also two other children with injuries that do not appear to have been fatal.

One of the photographs depicts a stick and mud house with a shack on the side.

Exhibit B – This is a statement made by the accused to a judicial officer, Magistrate Ndumiso Shongwe on the 23rd September 2010. The statement reads:

> ***" I arrived at home at about 7:00pm from drinking spree. On arrival I found that my food was not in the room. Then I went to my mothers' house to ask for food. My mother asked what I wanted at this time of the night. I told her that I wanted food. She shouted at me and did not want to give me food.***

I asked why she was refusing because I normally did that and she gave me food. Eventually the door was opened and I got in and asked where the food was. My mother continued shouting at me. I told them that I was going to collect my spear and come back.

I went to fetch my spear from my house and when I came back I found that the door had been locked. I went back to my house to get an axe and I used it to break the door. After breaking the door I entered and stabbed my mother with the spear. She ran out of the house.

After she ran out I then attacked the children with the axe. After hacking the children I ran away to the forest.

That is all."

Exhibit C- is the post – mortem report of Alwande Kunene which records the cause of death as ***" Cranio – celebral injury."***

Exhibit D - is the post- mortem report of Andile Kunene which records the cause of death as " due to multiple injuries."

Exhibit E - is the medical report of Thandi Zwane which records injuries sustained being a 15 (fifteen) centimetre deep laceration on the right arm and a 3 (three) centimetre laceration on the right thigh.

Exhibit F- is the medical report of Nonduduzo Dlamini which records a 5 (ive) centimetre laceration on the parietal region of the scalp; as well as depressed skull fracture .

Exhibit G - is the medical report of Phayi Shongwe which records two deep lacerations on the body of the victim.

<u>Exhibit P1 and P2 -</u> are the spear and the axe respectively, used in the commission of the crimes.

All the exhibits were handed in by consent and thereafter the crown closed its case.

[17] The defence then opened its case with only the accused person testifying. In his evidence in chief the accused person stated ***inter arlia:***

> ***" I recall the events of the 15th September, 2010. I arrived at home in the evening. I was drunk having taken liquor. I took an axe and a spear and I stabbed my mother with the spear and I hacked the children with the axe. I then ran away on realising that they were hurt. I was however apprehended. They called the police to arrest me. I recorded a statement with a judicial officer at the Piggs Peak Magistrate Court.***
>
> ***I told the Magistrate that the borne of contention was that I wanted my food. Having spent about eight years in custody I am very hurt about the whole incident. I actually did not intend to kill anyone on that day."***

[18] During cross examination it came out that the accused was drinking with members of the community he usually drinks with on this day. He stated that he was drinking traditional beer (umcombotsi) mixed with another traditionally brewed substance called ***" Mankanjane."***

[19] The accused further confirmed in cross examination that he took the axe and the spear from his room. Accused was further asked:

Prosecutor: What was your intention of taking these weapons?

Accused: " To assault them".

Prosecutor: " Who in particular did you want to assault?"

Accused: " My mother"

Prosecutor: " What had the children you assaulted done to you?'

Accused: " Nothing save that I found them in my mother's room."

Prosecutor: You did intentionally and unlawfully kill Alwande Kunene."

Accused: " I had no intention but I was just angry."

Prosecutor:"You did intentionally and unlawfully kill Andile Kunene."

Accused: " It was a mistake and the fact that I was very drunk."

[20] The prosecutor further put it to the accused person that he did intentionally and with intent to kill assault his mother, Thandi Zwane, as well as Nonduduzo Dlamini and Phayi Shongwe. In response the accused person said he had no such intention but he was drunk.

[21] Upon being quizzed by the prosecutor if anyone forced him to drink liquor on this day, the accused replied in the negative. He stated that he has always been drinking alcoholic beverages.

There was no re – examination and the defence closed its case.

PSYCHIATRIC REPORT

[22] Before the commencement of the trial both counsel for the defence and the prosecutor approached me in chambers applying for an order referring the accused to psychiatric examination. They indicated that they both suspected

that accused person was not of a sound mind. I duly granted the order and the accused was referred to the National Pyschiatric Referral Hospital by the office of the Registrar of this court.

[23] A report prepared by Dr Violet David Mwanjali of the said referral hospital was eventually filed. In the report the doctor states ***inter arlia:***

> ***" This letter serves to inform you that Mr Nkosinathi Khumalo is not known to our institution. He has never been attended to any other psychiatric institution before. He presented with no symptoms suggestive of any kind of mental illness. I perfomed thorough psychiatric evaluation and revealed that he is mentally stable.***
>
> ***It is my judgment that Mr Nkosinathi Khumalo is currently of sound mind and does not have any kind of mental illness. He is aware of the charges against him, two murder counts and three attempted murder counts and is not remorseful at all. He claims that he committed the offences while under the influence of alcohol and cannabis. He reported that at that time he had misunderstanings with the deceased and victims."***

The psychiatric report is dated 18th August 2017 and it would appear that the psychiatric examination itself took place on the 5th June 2017.

ANALYSIS OF THE EVIDENCE

[24] Considering the evidence in its entirety, there is no doubt in my mind that the accused did kill two minor children,Andile Kunene and Alwande Kunene by hacking them with an axe. The accused also assaulted his mother

Thandi Zwane by stabbing her with a spear and in the process inflicting two stab wounds; one on her right arm and the other on her right thigh. The accused also assaulted the two minor children also called Phayo Shongwe or Nkosephayo Shongwe as well as Nonduduzo Dlamini with both the spear and the axe judging from the injuries sustained by those victims. The injuries range from deep lacerations to a fractured skull in the case of Nonduduzo Dlamini. Phayi Shongwe suffered two deep lacerations.

[25] The defence did not appear to me to be challenging the killings and assaults by the accused person. The defence that appears to be raised is that the accused had no intention to kill the deceased. The reason why he killed them is that he was drunk and should not therefore be held responsible for his actions at the time. For the same reason, the defence's challenge on the evidence suggests, the accused had no intention to murder the injured victims and should not therefore be found guilty of attempted murder.

[26] I take particular note that when he appeared before the judicial officer in Piggs Peak, the accused mentioned that he *" arrived home at about 7 pm from a drinking spree."* At the Psychiatric hospital he told the doctor that en he " *committed the offences while under the influence of alcohol and cannabis."* When giving his evidence in court he stated that he had taken traditional brew (umcombotsi) mixed with another traditionally brewed intoxicating substance called ***" Mankanjane"***. I also consider his behaviour of attempting to kill his biological mother and his nephew and niece and actually brutally killing his two nieces. When I consider his actions coupled with his statements that he was drunk, I am inclined to conclude that the accused was not in his sober senses and was indeed possibly drunk as he alleges.

[27] On the other hand I note that he remembers vividly the time he arrived home and the things that he did upon arrival at home. I also note that he is not constant as regards the intoxicating substances he had taken. He told the court that he had taken two types of traditional brew mixed together being

" umcombotsi" and ***" Mankanjane".*** However he told the doctor that he had taken liquor and cannabis. I also take particular note that after he had committed the offences he ran away.

[28] The inconsistences in accused's evidence regarding the substances he had taken suggest to me that he is trying to make out a case that he was extremely drunk when this is not actually the case. I also note that when he appeared before the judicial officer he merely said he arrived home from a drinking spree; he did not make it appear like he was caused by drunkness to commit the offences. What stuck out as the cause of his actions when he appeared before the judicial officer was that he wanted his food. When his mother failed to give him food he then went into a rage and committed the offences with which he is now charged. I further note that he ran away after committing the offences. This tells me that he clearly appreciated the nature and in particular the consequences of his actions. Also the accused merely states that he was drunk and there is nothing to demonstrate to the court the level of his drunkenness. I also note that accused's evidence regarding the substances he had taken and the allegation that he was drunk is uncorroborated. He alleges that he was drinking with other people and none of these people have been called to corroborate his evidence.

[29] In the premises, whilst I am prepared to accept that the accused was possibly not in his sober senses, I reject any notion that he was so intoxicated that he did not appreciate the nature of his actions and the consequences thereof.

SUBMISSIONS AND THE LAW

[30] Both the prosecution and the defence have filed written submissions from which it appears to be common cause that the accused killed the two minor children. As regards the attempted murder charges it is also common cause that the accused did assault the three victims save that the defence seems to contend that the crown only led evidence in respect of PW1, Thandi Zwane and that there was no evidence led in respect of the other two minor victims. However even if there was no evidence led in respect of the other two victims, this would only affect sentence in my view as the accused pleaded guilty to all the charges of attempted murder.

[31] Mr S. Mdluli who appeared for the crown however contended that the evidence of Pw2 indicated that the injured children were found in a pool of blood in the same house where the deceased were found. Also, the argument goes, the accused himself corroborated this evidence when he said after assaulting Pw1, he then proceeded to the house where he assaulted the children. In any event over and above the ***viva voce*** evidence, three medical reports proving the assaults in respect of the attempted murder charges were handed in by consent of the parties. These are part of the evidence introduced by the crown in proof of the assaults by the accused in respect of the attempted murder charges. The children who were assaulted were not personally led because they are still minors.

[32] I am satisfied therefore that the element of ***actus reus*** has been satisfied in respect of all the charges preferred against the accused person. I now turn to the element of ***mens rea*** which is vigorously challenged by the defence. In order to streamline issues in this regard I think it is appropriate at this stage

to refer to the provisions of the Criminal Liability of Intoxicated Persons Act, 1938 (Act 68 of 1938).

[33] Section 2 of the said Act provides:

> ***" 2 (1) Subject to this section, intoxication shall not constitute a defence to any criminal charge.***
>
> ***(2) Notwithstanding subsection (1) intoxication shall be a defence to a criminal charge if by reason thereof the person charged at the time of the act or omission complained of, did not know that such act or omission was wrong or did not know what he was doing and –***
>
> ***(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person, or***
>
> ***(b) he was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission."***

[34] I have already concluded in my analysis of the evidence that the evidence does not reveal that the accused was so drunk that he did not know what he was doing. He was neither insane temporarily or otherwise. It is also the accused's evidence that he voluntarily consumed the liquor and actually contributed towards the purchase of same. The accused therefore does not qualify either under section 2 (2) (a) or (b) of the above – cited Act. Although I accept that he was possibly intoxicated at the time, his intoxication does not therefore constitute a defence under the Act.

[35] The next question then is whether or not the accused had any ***mens rea*** to commit the offences he stands accused of committing and if so, what type of ***mens rea*** did he have.

[36] Mr Mdluli contends in is written submissions:

> ***" The crown humbly submits that the accused had foresight of the possibility of the unlawful act resulting in death of the minor children. The children which the accused assaulted with the spear had not provoked him in anyway. The accused also confirmed during cross examination that the children did not provoke him. The accused had intention in the form of dolus eventualis to kill children."***

As regards the reason for the assaults upon the victims by the accused what seems to be appearing in all the different types of evidence produced before court is that the accused was angry because he did not find his food. He therefore decided to assault everyone in his mother's house not carrying whether death resulted or not.

[37] It is contended on behalf of the crown that the accused had intention in the form of ***dolus eventualis*** and I think correctly so. This concept has been defined in numerous cases, and other writings. A person has ***dolus eventualis*** if he foresees the possibility of his actions resulting in the death of someone but persists in it reckless whether death results or not. The test regarding foreseeability is a subjective one.

(see THANDI TIKI SIHLONGONYANE V.REX; CRIMINAL APPEAL NO 40/1997 (UNREPORTED) at pages 3-4 where Tebutt JA as he then was lists of the elements of ***dolus eventualis*** as follows:

> ***" 1. Subjective foresight of the possibility, however remote, of the accused's unlawful conduct causing death to another;***
>
> ***2. Persistance in such conduct, despite such foresight;***
>
> ***3. The conscious taking of the risk of resultant death, not carrying whether it ensues or not;***
>
> ***4. The absence of actual intent to kill."***

[38] What poses difficulty in deciding whether there was ***dolus eventualis*** or ***culp***a is the subjective foresight required in ***dolus eventualis***.There is a ***dolus eventualis*** if the accused actually foresaw that death would result from his conduct. In the SIHLONGONYANE case (supra) Tebutt JA states at pages 4-5 :

> ***" In the case of dolus eventualis it must be remembered that it is necessary to establish that the accused actually foresaw the possibility that his conduct might cause death. That can be proved directly or by inference, i.e if it can be said from all the circumstances that the accused*** <u>must</u> ***have known that his conduct could cause death, it can be inferred that he actually foresaw it. It is here, however, that the trial court must be particularly careful. It must not confuse " must have known" with " ought to have known." The latter is the test for culpa. It is an objective one."***

[39] Tackling the question of how to prove ***dolus eventualis,*** Teblutt JA cites with approval a passage in the South African case of S.v. SIGWAHLA 1967 (4) SA 566 AD where Holmes JA states at page 570 E:

> " ***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 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."

[40] Dealing with facts in the Sigwahla case (supra) Holmes JA proceed a page 570 G-H – 571A:

" In the present case the salient facts are that the Appellant was armed with a long knife which he held in his hand; that he advanced upon the approaching deceased; that as he came up to him he jumped forward and raised his arm and stabbed him in the left front of the chest; that the force of the blow was sufficient to cause penetration for four inches and to injure his heart; and that there is nothing in the case to suggest subjective ignorance or stupidity or unawareness on the part of the appellant in regard to the danger of a knife thrust in the upper part of the body. In my opinion the only reasonable inference from those facts is that the appellant did subjectively appreciate the possibility of such a stab being fatal. In other words I hold that there exists no reasonable possibility that it never occurred to him that his action might have fatal consequences ….It is true that he had consumed six bottles of " kaffir beer," but this did not prevent him from knowing what he was doing ….. and there can be no question that appellant was reckless whether or not death ensued from his action."

[41] ***In casu*** the accused armed himself with a spear and an axe and used these weapons to hack to death two very minor children who had not provoked

him in any manner. There is no suggestion that the accused was ignorant, insane or so stupid that he could not foresee that if these weapons or any one of them is used to strike in particular the upper limps of a human being death may result. The fatal injuries were mainly on the head and it seems the axe was used to inflict such. Although the accused maintains that he had taken some traditional brew, and I accept that he was possibly drunk, there is nothing to suggest that he did not know what he was doing.

CONCLUSION

[42] For the foregoing reasons I come to the conclusion that the accused person did have intention in the form of ***dolus eventualis*** to kill the deceased children. I also find that the accused intended to murder the victims in counts three to five. In the premises I find the accused:

(i) guilty of murder as charged in counts one and two;

(ii) guilty of attempted murder as charged in counts three to five.

EXTENUATING CIRCUMSTANCES

[43] Mr Dlamini who appeared for the accused person submitted that the fact that the court found that the accused only had intention in the form of ***dolus eventualis*** as opposed to ***dolus directus*** is in itself, an extenuating factor.

Also throughout his evidence the accused maintained that when he got home he was drunk and when he did not get food he went on a rage and then committed the crimes he has now been convicted of committing. Although the anger coupled with drunkenness could not avail the accused as a defence, in my view they do count as extenuating factors. It is my finding therefore

that there are indeed some extenuating circumstances in this matter. I take particular note however that although the accused got angry, the deceased and injured children did nothing to cause the accused to be angry. Maybe the accused's mother (Pw1) had some duty to provide him with food but certainly not the children.

SENTENCE

[44] As enjoined by law, in determining the sentence to be imposed upon the accused person I take it into consideration the triad being the nature of the offence and its prevalence, the interests of the community and the circumstances of the accused person.

[45] Regarding the nature of the offences committed by the accused, they include what I consider to be the worst of all crimes; the taking of human life. The sanctity of human life cannot be overemphasized and it ought to be held in high esteem by all. This is the worst crime of all in my view and unfortunately it is rising at an alarming rate in our society.

[46] In so far as the circumstances of the accused person are concerned I was told that he is now thirty – nine (39) years old. He was unemployed at the time of the commission of the offences and there was no evidence that he has any children. He has pleaded guilty to the charges of attempted murder and I was told that he is a first offender. Mr Dlamini implored the court to give the accused person a chance to see if he cannot reform. I do take all these circumstances of the accused into account.

[47] Finally, on the interests of the community, I must say that the killing of a human being by another will always send shockwaves amongst members of the community. This becomes worse where there is absolutely no reasonable

explanation as in ***casu.*** The two minor children aged about six years were innocently sleeping and had not done anything to provoke the accused. The fact that he did not find food when he got home had nothing to do with them as they had no duty to provide him with such and were in fact not capable of providing him with food.

[48] A person who kills other people for no apparent reason does not deserve to live amongst other people. This is for the simple reason that nobody knows who his next victim will be. Such a person does not need any reason to kill another. Every member of his community is therefore a potential victim. So long as he is around people will live in a state of fear of being attacked and killed by him. Surely society ought to be excused of such elements.

[49] During submissions counsel referred me ***inter arlia*** to the case of ELVIS MANDLENKHOSI DLAMINI v. REX (30/11) [2013] SZSC 06(31 May 2013) where M.C.B Maphalala JA as he then was cites with approval a passage in the Botswana court of appeal case of **Bogosinya v. The state (2006) 1 BLR CA** at page 6 where Ramodibedi JA as he then was states:

> ***" It is equally important to bear in mind that punishment should fit the offender as well as the crime while at the same time safe guarding the interests of society. It is thus a delicate balance which should be undertaken with utmost care. In this regard it is important to remember the age –old caution not to approach punishment in a spirit of anger. The justification of such a caution, as one seems to have read, lies in the fact that he who comes to punishment in wrath will never hold the middle course which lies between too much and too little."***

[50] In the Elvis Mandlenkosi Dlamini case (supra) M.C.B Maphalala JA as he then was also cites with approval a passage in the South African case of S v. Rabie 1975 (4) SA 855 (AD) where Holmes JA states at p. *866:*

> ***" A judicial officer should not approach punishment in a spirit of anger because being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand from him. Nor should he strive after severerity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressure of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."***

[51] From the above –cited legal authorities I understand that whilst the manner in which certain crimes are committed and their nature will no doubt tend to raise emotions, when it comes to determining punishment the court should put aside all emotions and objectively consider an appropriate sentence. The court should seek to give appropriate weight to all the elements that have to be considered, namely the nature of the crime, interests of society and circumstances of the accused. In some cases one or more of these elements may have to be given more weight

than the other or others depending on the circumstances of the case. The important thing however is that they all have to be taken into account and each given the weight that it deserves.

[52] I have endeavoured to give appropriate weight to all the three elements of the triad. I have come to the conclusion that the following sentences are appropriate in the circumstances and I sentence the accused accordingly.

(i) On account one, the murder of Alwande Kunene, the accused is sentenced to thirty – five (35) years imprisonment without the option of a fine.

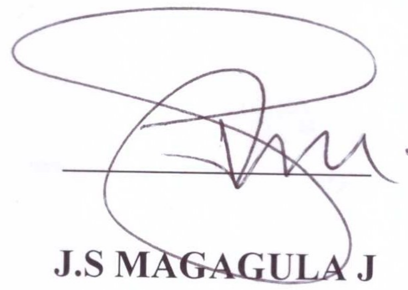
(ii) On account two, the murder of Andile Kunene, the accused is sentenced to thirty-five years imprisonment without an option of fine.

(iii) On account three, the attempted murder of Thandi Zwane, five years without an option of a fine.

(iv) On count four, the attempted murder of Nonduduzo Dlamini, five (5) years imprisonment without the option of a fine.

(v) On account five, the attempted murder of Phayi/Phayo Nkosephayo Shongwe, three (3) without the option of a fine.

All the sentences shall run concurrently and they shall be reckoned from 22nd September 2010 which is the date on which the accused was arrested.



J.S MAGAGULA J

For the Crown S. Mdluli

For the defence L. Dlamini