IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal case No: 30/2016

In the matter between:

THANTAZA NKOSIYABEKWA SILOLO **APPELLANT**

VS

REX **RESPONDENT**

Neutral citation: *Thantaza Nkosiyabekwa Silolo v Rex (30/2015) [2016] SZSC 32 (30th June 2016)*

CORAM: **M.C.B. MAPHALALA CJ,**
S.P. DLAMINI JA,
Z. MAGAGULA AJA.

Heard **20th May 2016**
Delivered **30th June 2016**

Summary

Criminal Appeal – sentencing – appellant was charged and convicted by the court *a quo* of nine counts of contravening the Suppression of Terrorism Act and two counts of contravening the Public Order Act – appellant had surrendered himself to the police prior to his arrest – appellant pleaded guilty to all the charges - appellant further made a confession before a Magistrate as well as a Statement of Agreed Facts with the prosecution – legal principles governing sentencing considered - appeal against sentence succeeds to the extent that the appellant will serve an effective sentence of fifteen years imprisonment commencing from 15th April 2013.

JUDGMENT

M.C.B. MAPHALALA, CJ

[1] The appellant was charged and subsequently convicted by the court *a quo* of nine counts of contravening section 5 (1) of the Suppression of Terrorism Act No. 3 of 2008 as well as two counts of contravening section 11 (1) (a) of the Public Order Act of 1963. The appellant appeared before the court *a quo* as well as this Court in person and was not legally represented by an Attorney. The NOTICE OF APPEAL is dated 3rd July 2014 and addressed to the Registrar of the Supreme Court:

NOTICE OF APPEAL

I hereby humbly appeal for concurrence of my two 5 year sentence and 10 year sentence or if the Supreme Court finds it impossible to concur them, I implore the Supreme Court to reduce 5 years from my 10 year sentence.

These three sentences were imposed upon me by Justice Nkululeko Hlophe at the High Court on the 19th June 2013 for three offences

related to terrorist acts. The three sentences remained for me to serve after they had been concurred with eight other offences. I pleaded guilty to all these eleven charges levelled against me. Therefore, I honestly accept my conviction on all of them but only appeal against the harshness and severity of the totality of my two 5 year sentences and one 10 year sentence.

My main grounds of my appeal is that my 20 year sentence is too harsh for me to bear. In fact, it is more punitive than corrective, rehabilitative, restorative or reintegrative. In due course I will submit to the Supreme Court the Heads of Argument for my appeal. Please acknowledge receipt of this appeal at your convenience.

<u>GROUNDS OF APPEAL</u>

1. **The Judge erred in law and indeed by not showing sufficient leniency towards me when he sentenced me considering the degree and sincerity of the remorse that I had been demonstrating from the time I surrendered myself to the police up to the time I was convicted. The Judge himself stated that my remorse was sincere see page 81 paragraph 2 of my Court record). My voluntary surrender to the police, my voluntary honest co-operation with the**

law enforcing agencies of the country, the confession I made voluntarily and sincerely to the Judicial officer and my voluntary plea of guilty to all the charges leveled against me attest to the sincerity of my remorse. There are no greater or better ways of demonstrating sincerity of my remorse other than the ones stated above.

2. **The judge erred in law and indeed by not taking into comprehensive consideration the indisputable fact that my voluntary act of co-operating fully with the law enforcement agencies and the trial court was an act of voluntary crossing over from the side of injustice to the side of justice which is something that court as of law and justice itself require and encourage. It was grossly unfair and inconsiderate of the judge to subject me to such harsh sentence of 20 years in spite of my full sincere cooperation. The judge should have taken into consideration the fact that there is a possibility of me being subjected to various forms of illegal punishments in the form of revenge being waged against me by the agents of the political formations that was using me.**

It is an indisputable fact that they might revenge against me for my full co-operation with the police and the trial court from exposing their terrorist operations. My exposure of their terrorist acts, plans and intentions to the law enforcement agencies made the work of these National agencies easier in curbing their intended terrorist acts and in bringing order, stability and peace in the country, which are things that the country need the most.

3. **The fact that I had initiated the process of apologizing to my victims and reconciling with them should have necessitated a restorative sentence not a punitive one because it was an act of making things right with the people I had wronged. The judge himself said, my apology to the victims of my actions is in view the most important thing to do as a genuine expression of regret which should have a natural soothing effect on anyone wronged. See page 79 paragraph 1. The above mentioned process is still ongoing even today as I am determined to become a law abiding and productive citizen of the country again and live in peace and harmony with all members of society. I desperately need and humbly implore the Supreme Court to fully and sincerely co-operate with me in this regard by concurring my two sentences or by reducing five years from my 20 year sentence. When making**

things right with the people I wronged I even went to the extent to apologizing to the Royalty by offering them a cow, which they accepted and appreciated. Their act of accepting and appreciating the cow was, in Siswati, an act of accepting and appreciating my remorse and apology.

4. **The judge erred in law and indeed by not taking into consideration the fact that my immaturity and naivety contributed to my being easily recruited, manipulated, brainwashed and used by the political organizations that was using me. I attribute my change of heart and mind to God who is the one who touched my heart when I was in hiding in South Africa and brought me back to my senses and made me realize that the type of life I was living and the terrorist acts I was doing were against his will. God also showed me that he had a just and noble mission for me not the devil, destructive mission I was involved in. God wanted me to save lives through the gospel other than destroying lives through terrorist acts. I did mention this in the confession statement I made to the judicial officer, Magistrate Phathaphatha Mdluli.**

5. **Due to the fact that I am a first time offender with no record of previous convictions, criminally or politically, the judge should have sentenced me to a restorative way that gives me the opportunity to start life afresh. The 20 years sentence robes me of opportunity to start life afresh and to start my own family, therefore this sentence is inconsiderate and only punitive.**

6. **I am already fully rehabilitated and ready to restore back to society in the near future. What proves that I am fully rehabilitated and ready to be restored to the society is that ever since I came here in prison, I have no record of misconduct. I am engaged in all necessary correctional rehabilitative programmes which I believe can prepare me for living as a law abiding citizen of the country while I am in prison and also after my release from prison. On account of the grounds outlined above, I humbly, earnestly plead with the Supreme Court to grant my appeal in the spirit of restoration, edification and reintegration.**

[2] When the appellant was arraigned for trial before the court *a quo*, he pleaded guilty to all the charges. The appellant did not cross-examine the Crown witnesses who led evidence including those giving evidence

on the exhibits used in the commission of the offences. A Statement of Agreed Facts was signed by the appellant and Senior Crown Counsel representing the prosecution. I reproduce the full statement below:

STATEMENT OF AGREED FACTS

Thantaza Nkosikayibekwa Silolo (hereinafter referred to as the accused) stands charged with Eight (8) counts of contravening section 5 (1) of the Suppression of Terrorism Act No. 3 of 2008 and three (3) counts of contravening Section 11 (1) of the Public Act of 1963 as more fully outlined in the amended indictment dated 20th May 2013. He has pleaded guilty to all the charges, which pleas the Crown accepts. During the period between February 2008 and July 2011 the accused went on a spree of unlawfully bombing and burning various structures and places around the country. The details of how, where and why these crimes were committed are contained in the confession attached hereto which the imperatives of convenience, redemption of time and need to avoid repeating its contents, dictate that it be read as if specifically incorporated herein. The confession was freely and voluntarily made by the accused after he had surrendered himself to the police. By engaging in the spree of bombing and burning various

structures and places around the country, the accused specifically admits:

(a) In those acts where he is charged for contravening the Public Order Act of 1963 that:

(i) He wilfully and unlawfully destroyed or damaged the said properties or structures;

(ii) His intention was to impair the use or prevent the working of the said properties or structures for their intended use by the institutions listed in the charges.

(b) In those acts where he is charged for contravening Section 5 (1) of the Suppression of Terrorism Act No. 3 of 2008 that;

(i) He unlawfully committed terrorist acts by causing serious damage to properties and structures;

(ii) His acts endangered the lives of people who were occupants of the structures damaged.

(iii) Some of his acts involved the use of explosives and/or bombs;

(iv) His acts created a serious risk to the safety of some members of the public;

(v) His acts involved prejudice to national security of public safety and were intended to intimidate the public or a section of the public.

The accused is remorseful for his actions as exhibited in:

(a) Him voluntarily surrendering himself to the police;

(b) Him owning up to what he did as recorded in the confession he made;

(c) The pleas he entered for the charges he is facing.

The accused has been in custody from the 15th April 2013, the date on which he surrendered himself to the police. The following will be produced as evidence: Confession; photographs and items listed in Schedule "A" annexed hereto.

[3] The appellant surrendered himself to the police on the 15th April 2013 at the Ezulwini Police Post; from there the appellant was transferred to Mbabane Police Station. The appellant recorded a confession with Magistrate Phathaphatha Mdluli on the 16th April 2013 at the Mbabane Magistrate's Court. He assured the Magistrate that he was recording the confession freely and voluntarily without any undue influence, and, that he was not induced by threats of physical harm and imprisonment or promises of being released to record the confession. The confession was

recorded in the Magistrate's Chambers in the presence of the Court Interpreter Sibonginkhosi Mamba. The confession reads thus:

<u>Annexure A</u>

Whilst in the Republic of South Africa after fleeing from Swaziland due to the bombings at the Magistrate's Court, more particular in Manzini Magistrate's Court, I was taken by motor vehicle by Comrades Bheki Dlamini and Musa Ngubeni and placed at a house hiding from the police in Matsapha.

Then at night the two men came and this time in another motor vehicle they were then with Themba Mabuza and Roy Steenkamp and then took me to a place that I did not know, but somewhere in the Lubombo district at a house of the man I know as Penuel Malinga. I was hidden there whilst awaiting to hear if the police were still looking for me.

I stayed there for two (2) days and they then came back at night, Themba Mabuza and Roy Stenkamp and this time they took me to a house at a place I also do not remember well but there was sugar cane and very close to the border with South Africa. I slept at a house which belonged to the father or brother of Bheki Dlamini and it looked like a compound for Sugar cane workers.

On the following morning Bheki Dlamini took me to the informal crossings manned by the soldiers who search you and allow you to cross after asking to cross into South Africa. I then took transport to Johannesburg and there I was met by a member of Pudemo, Vusi Shongwe who took me to his house where I stayed with his family for a week.

After a week we were then joined by another man, Themba Shiba who was also fleeing from Swaziland. Vusi then took us to a house which he rented for us, a three (3) bedroom house, at Bothaville in the Orange Free State. We stayed there for a week and we were joined by another comrade Pius Vilakati who had fled earlier, but had stayed somewhere else. He came to join us in the house. We stayed for about three (3) weeks and we were then joined by more

men Reuben Van Vureen and Sipho Dube who were also fleeing from Swaziland.

So the five (5) of us stayed there and I was the commandant of the house, we did physical exercises, reading books on politics, but our political activities (umzabalazo wetfu) in Swayoco and Pudemo was very limited because were wee too far. As we stayed we had tensions of staying away from home, shortage of food, living under strict rules and laws, so some of us then decided they were not happy and wanted to leave the house. Pius was the first to leave and he was taken to Pretoria to his brother who stayed at a Catholic Training School. After he had left he then realized that he would not stay there, then he left to stay at Cosatu house, where there are SACP officers and SSN (Swaziland Solidarity Network). He then asked to be accommodated by the SSN and they agreed.

After about three weeks to a month Themba Shiba also wanted to leave as the place was full of Sesotho speaking people and he wanted to stay with Siswati speaking people. So he was allowed to leave to Mpumalanga where he is presently staying to date. So we were left in Bothaville, myself, Van Vureen and Dube were left in the house.

Because we then had food problems, Vusi Shongwe then moved us from there to a new house at Walkan, still in the Free State. We all four of us shared this house. The frustrations however, continued the food problems continued. We realized that Pius was living comfortably, we then asked to be released to be under the spokesperson of SSN in Johannesburg, Lucky Lukhele, so Vusi Shongwe agreed and took us there.

We stayed at Yorkville a walking distance to the SSN offices, if you did not want to take a taxi. They were then mainly busy with political activities (Umzabalazo) regarding Swaziland. We stayed there until 2012 when I decided to leave Johannesburg mainly I was not in good terms with Lukhele and the comrades. I was in charge at the Free State, I felt I was no longer above them in Johannesburg and they were then in a position to revenge for whatever ill-treatment I had put them through in the Free State.

Before I left we had planned to carry out an operation at former Minister of Foreign Affairs, Lutfo Dlamini, in the Northern Hhohho. We had arranged, myself, Dube and Vilakazi, with people inside Swaziland who would assist us on arranging material to be used for the operation.

We went through the fence into Swaziland. We had asked Sipho Dube to arrange transport with Majahonkhe Dlamini and another Msebenzi (Tebza) and another one Mthelisi Dlamini. Tebza was to provide transport to Luve. An empty 20 litre containers to be used for petrol and empty beer bottles to be used for making the petrol bombs.

Tebza took us to Luve to a Catholic Priest house, Pius, the owner of the house where we waited until night fall then we would start the job. Mthelisi Dlamini, then took us in the transport, myself Pius and Sipho Dube where we then rushed to Matsamo where we would get petrol. When we got to the petrol station at Matsamo it was closed. Then we went to Pigg's Peak where we bought the petrol and food. Then we went to the road to Mngungundlovu, a dirty gravel road towards the forests. We then started lighting the forest trees with petrol and fire as we went along.

Just as we were doing our work, we were then disturbed by a truck that came and we ran away. Then we went to a Chief's home which we had seen at Mgungundlovu and there we prepared our petrol bombs and I burned down two grass houses (rondavels) with fire.

We had also bought sprays which we used to write on the boards on the roadside, we wrote graffiti like, Viva Pudemo, Viva Swayoco, Phansi ngeTinkhundla, viva April 12th, because we were promoting April 12th in the SSN offices.

We then proceeded to the homestead of Lutfo where we threw petrol bombs, through the houses and open windows, tried to light some tractors in the yard, but they did not light. We also wrote graffiti, Viva Pudemo, Phansi ngeTinkhundla etc. When we had finished we then went back to sleep at the Catholic Priest's house. At about 16.00 hours on the following day Tebza then came to transport us back to the fence where we skipped into South Africa.

As I stated that after my stay in Johannesburg, I had recorded a song insulting the Monarchy and CDs insulting their Majesties, distributed them by blue tooth, internet etc. I also wrote a pamphlet which also insulted Royalty and their Majesties, also wrote forms through internet. These have been distributed as far as wide as the USA, called Strike.

My departure from Johannesburg was caused by my deteriorating relationship with the comrades who were with me at the Free State

who felt they wanted to take revenge on me for possibly perceived ill-treatment at the house in the Free State. Then I decided to come back to Swaziland through the Swaziland Consular Sigayoyo Magongo and another colleague, a Mr. Tsabedze, who arranged to have me comeback with a temporary passport after mine had expired.

This was in 2012 I had intended to wake up and see the president of Pudemo in the morning. Before that I called Wandile Dludlu for the President's Number, but he was very uncomfortable that I came back as I had too much information which would cause many people great hardship. So he suggested that I should go back to South Africa. The president also suggested the same, so I was then taken and accommodated at a house in Piet Retief. There I stayed with a Lukuleni family from Nelspruit but worked there in a hospital.

I stayed there until 14th April when I decided to hand myself over to the Swazi Police. The Lukuleni family is a church-going family and they attend the Alliance Church of South Africa (TACOSA) in Piet Retief.

They then introduced me to the church as I was no longer interested in church. My faith then got revived, and, as we went on I ended up being allowed by the Pastor to conduct some sermons. I was then tasked with being a Sunday school teacher, preaching and other church services. The church had a great impact in my life such that I then went back to accepting God as my saviour and my ways have changed greatly, such that I feel all that I have lost in God in the past has been revived.

After sometime as we prayed, I fast, it was revealed to me by God that if I wanted to live in peace with him I must first live in peace with people and everyone around me. I started communicating with my father and sent him several messages by cellphone. I also sent messages to all my comrades who I was not in good terms with and asked for their forgiveness for whatsoever misunderstandings we may have had. I thought my life as a freedom fighter was in accordance with God's principles as we have been fighting to liberate God's people from the oppression of an illegitimate government.

After apologising and asking for forgiveness from all the people around me, one day as we were praying God revealed himself to me that he wanted me to start a ministry in evangelism in Piet Retief, as

there were Swazis living there, but God revealed again that my evangelism would not move on as smooth as I thought as I still have my cases in Swaziland where I had insulted royalty, the King, and Queen by words and in writing. God also revealed that he was the one who installs and removes Kings and Rulers, and, if I took that work from him then I was fighting God Himself as He was the King of Kings and He was He who is.

Then on Sunday therefore after the service in Piet Retief, I skipped the fence into Swaziland and went to my girlfriend at Logoba. I then went to Ezulwini Police Post and told them of my words when I joined Swayoco and Pudemo in 2007-2008 and how I had wished to join the military wing of Pudemo as that would then bring the desired results of overthrowing the government or forcing it to surrender at least.

In that interest I had spoken to Themba Mabuza, chairperson of Swayoco Hhohho region with a view of joining the military wing of Pudemo. Mabuza indicated that he would take me to a camp in Mpumalanga where some soldiers were being trained to come back and overthrow the government.

But after some time this did not happen because he said they had a misunderstanding between himself as the recruiter, with the commanders of the training camp in Mpumalanga. Then he had then branched off to train his own in-house cadres. I was one of those whom he took for training. I was handed over to Zonke Dlamini who trained me on how to make petrol bombs, how to attack police stations for firearms, other military knowledge and intelligence and how to go about operations etc.

After this training then I enquired when this would start. There was a project called Rush Hour 2008 which was aimed at disturbing and sabotaging the 2008 elections so that the government would find it difficult to conduct such elections. Themba Mabuza did not give me the times, until I got impatient. I decided that on my own I would attack Parliament where there was a marquee elected there for a function. I prepared my petrol bomb and I threw it and it ignited and I ran away leaving it burning, I ran back home at Ezulwini which is not far away.

After burning the marquee a week after, I wanted to go to burn down the transformer or the electricity box next to the Parliament because there was going to be a budget speech. I am not sure if the

transformer or electricity box actually burnt down as I saw the fire burning by the side. The bottle must have bumped back and did not break but fell at the side and burnt formlessly.

As a person who was at the SBIS doing some games on air, I ended up igniting the control room which was partially burnt, but the fire was controlled. After two weeks I then went back this time I went at the back through a vent I poured the petrol and I tried to light the match, the air blew the match to my hands and gloves caught fire and ignited my jacket. I ran away and had to roll on the ground to extinguish my burning clothes.

The security at the gate smelled the petrol and they went to investigate what was causing the smell of petrol. I then decided to run away and went to ask for a lift back to Ezulwini. After that I was led to three men Mlondi Malinga who worked at an Insurance Company Surety and a Masangane and a Thabo and they were doing nursing at the Mbabane Institute. These two were the leaders of SNUS. I led three men to Swazi TV and attempted to burn down the Control Room and a vehicle which I thought was used for Outside Broadcasting. We had entered these by breaking a hole through fence. After the operation at Swazi TV then we ran away.

For sometime thereafter, I moved to stay in Ngwane Park and for sometime I did no operation. Some explosives were brought to the country from South Africa, and, I was one of those who was given some to use. I was asked by Themba Mabuza to come and plant some explosives at the Mbabane Magistrate's Court. I got into one of the toilets and planted two explosives which I left burning to explode later. After some time I went to plant a petrol bomb to a Senior Police Officer. After throwing the petrol bomb I then ran away back to the house I was staging the attack from at Mangwaneni the house of Sipho Dube another comrade. After that we went with Bheki Dlamini to a home of a police officer who was security (bodyguard) for the Deputy Prime Minister by the name of Roy or Row. I was then tasked to go to another house at Mpofu to bomb the house of an MP by the name of Elias Shongwe or Danger Shongwe he is now late. Themba Shiba was supposed to show us the explosives which had been assembled by himself and Bheki. In fact he was to give us the ingredients to use to assemble the explosives. I was in charge of the operation.

We bombed the house through a window and a Mercedes Motor vehicle which was parked in the yard and we left them burning.

After this operation I was tasked to go to Manzini Magistrate's Court. Bheki Dlamini had then added some explosives on the one which had been left after the Magistrate's Court in Mbabane.

Again I went into a toilet planted the explosives and I heard that the explosives went off at Manzini Magistrate's Court. It was then that I got to know that the police were out to arrest me and that was when I was moved into hiding, firstly, in Matsapha and then at Penuel's wife house. Other operations were at my place where I stayed at Ezulwini I used to distribute pamphlets against elections and also wrote graffiti encouraging people not to register for elections. I wrote such graffiti on the shop walls on the outside.

I may add that there were times when Themba Mabuza had introduced me to some South Africans who I learned were MJ. Dlamini, Jack Govender and Amos Mbhedzi who at the time I did not know who they were as they used code values. I only got to know about them after the Lozitha bridge incident and their real names. I then joined Umbane, the Swaziland People's Liberations Army which was headed by M.J. Dlamini code-named "JJ Maena" they trained us on the use of firearms, pistols, use, cleaning, service, safety etc. They also taught us to assemble, set explosives, time-bombs for

major explosions using dynamite, clocks, battering, but this training was not completed as they then died at the Lozitha incident. The training fell away. That is all."

[4] After conviction, the appellant was afforded an opportunity to mitigate the sentence. The appellant was born in October 1984, and, he is currently thirty-two years of age. The offences were committed between 2008 and 2011; and, in 2008 the appellant was twenty four years of age when he began committing these offences. Accordingly, the appellant pleaded in mitigation that at the time he committed these offences, he was still young and immature; hence, he was easily influenced to join the terrorist organizations.

[5] The appellant further told the court *a quo*, in mitigation, that he was remorseful for having committed the offences, and, that he had undertaken not to commit similar offences in the future in the event the court *a quo* gives him another opportunity to lead a normal life. He reminded the court *a quo* that he had voluntarily surrendered himself to the police, and, that he had co-operated with police investigations as well as the prosecution.

[6] Similarly, he argued that he did not waste the court's time but had pleaded guilty to the offences, signed a Statement of Agreed Facts as well as recorded a confession with the Magistrate. He pleaded with the court *a quo* to be lenient when passing sentence considering that his former organisation was hostile to him after he had surrendered himself to the police; his conduct is viewed by his former organisation as having placed the lives of its members in danger. Lastly, the appellant does not have previous convictions.

[7] The prosecution made submissions in aggravation of sentence; he observed that the appellant had committed very serious offences which endangered the security of the State, and further posed a serious danger to the lives and properties of the complainants. However, the prosecution conceded that no human life was lost during the bombings carried out by the appellant. Similarly, there was no physical injury to the complainants.

[8] The Learned Judge in the court *a quo* summarised the sequence of the commission of the offences in his judgment[1]:

> **"[2] In a nutshell, the offences against the accused can be amplified in the following manner; Counts 1, 2 and 3 were allegedly and respectively committed on the 25th May 2010, 7th**

[1] At para 2, 3, 4 and 5 of the judgment.

June 2010 and 10th June 2010 when the accused allegedly petrol bombed or planted explosives at the house of a Police Officer by the name of Joshua Dlamini at Nkwalini in Mbabane, a house belonging to one David Lion Shongwe at Timpisini Northern Hhohho and the Manzini Magistrate's Court building in Manzini.

[3] **On the other hand counts 4, 5 and 6 respectively referred to the burning and destruction of the Mondi Forests on the 21st July 2011; the petrol bombing and or burning of structures or houses at the Mgungundlovu Umphakatsi belonging to Prince Maduma on the same date and the petrol bombing or burning of a house and tractor belonging to the then Minister of State Mr. Lutfo Dlamini, on the 22nd July 2011.**

[4] **Counts 7, 8, 9 and 10 relate to offences allegedly committed respectively on the 19th February 2008; the 6th February 2008, the 21st February 2008 and the 2nd April 2008. These related respectively to the bombing of the Mbabane Magistrate's Court building; the petrol bombing of the Marque erected to house the opening of Parliament Ceremony; the bombing of a Swaziland Electricity Transformer at Lobamba in an endeavour to prevent the tabling and debating of the National Budget in Parliament and the bombing of the Swaziland Broadcasting and Information Services Building in Mbabane.**

[5] **The remaining count eleven (11) relates to the damage caused to the building belonging to the Swazi Television Station or the Swaziland Television Authority as well as to a Motor Vehicle belonging to the Outside Broadcasting Unit of the Swaziland Television Authority on the 21st June 2008.**

[6] It is worth mentioning that all the charges are permeated by an apparent deliberate act of destroying properties belonging to the State or those in which the State has an interest or those whose destruction would allegedly cause harm to the State. The latter case being the destruction, through burning down of the Mondi Forests Piggs Peak which amounted to economic sabotage. Prominent members of the public seen to be supporting the status quo were also targeted with their homesteads or properties either being bombed or damaged in one way or the other in particular through petrol bombs or fire."

[9] It is apparent from the evidence that the appellant's rights to legal representation were fully explained to him, and, he confirmed that he would represent himself. Similarly, the court *a quo* explained to the appellant the types of pleas permissible in law and their meanings; he pleaded guilty to all the eleven counts preferred against him.

[10] Thereafter, the Statement of Agreed Facts was admitted in evidence by consent together with exhibits comprising of photographs taken from the scenes of crime. The exhibits further included pamphlets written PUDEMO with political demands allegedly made as well as the basis behind the bombings. The exhibits also included material for

manufacturing the bombs. These exhibits were presented to the court *a quo* by the Crown witnesses as proof of the commission of the offences.

[11] It is apparent from the judgment that the court *a quo* took into account the triad when passing sentence[2].

> **"[44] Serious as the offences were, it is apparent that a lot of consideration had to be made as concerns the accused as a person and how he handed himself. My taking these factors into account should go a long way to ameliorate the harshness of the sentences to be imposed on him. Firstly, the accused person was visibly remorseful about his conduct. He not only surrendered himself to the police and started confessing his involvement in the commission of these very serious offences, an act that will most likely yield him perpetual vilification in certain quarters. He also did not waste the court's time during his trial. He apologized to all the victims of his actions, which in my view is the most important thing to do if it is a genuine expression of regret which should have a natural soothing effect, on any one wronged.**
>
> **[45] It was obvious from his looks that the accused is a relatively young man who has a long future ahead of him provided he had atoned with society. Accordingly, I was alive to the fact that the sentence I imposed on him should be one that gives him a chance in life. It is in the foundational principles of sentencing that the sentence a court passes should have mercy**

[2] Paragraphs 44 - 46 of the judgment of the court *a quo*.

as its concomitant and should not seek to break the offender. I tried the best I could to come up with such a sentence. This leniency should however be seen within the broader context of the matter, though.

[46] I had to take into account as well the fact that the accused was still unmarried and that he had a child who he said was dependent on him. Furthermore, although convicted of so many serious offences the accused had committed on various dates after carefully planning them, I still had to take into account the fact that he was a first offender from the point of view of a conviction and find an appropriate method to ameliorate the harshness of the sentence without venturing outside the criminal sentencing method. If the accused had been a previous convict, a higher standard would ordinarily be expected of him with regards the commission of the further offences, which was not the case in this case even though he was a repeat offender, broadly speaking. This come to the fore if one considers the number of serious offences he on his own admission committed."

[12] Before passing sentence the court *a quo* observed that the offences were committed on different days, and, that they do not constitute the same transaction for purposes of concurrent sentences. However, the Learned Judge in the court *a quo,* exercising a judicial discretion, did not impose consecutive sentences in view of the peculiar circumstances of the matter. His Lordship took into account such factors as the appellant's

remorsefulness, general candour, the appellant's reformation of character and behaviour as well as his co-operation during the trial.

[13] When imposing sentence, the Learned Judge had this to say[3]:

> **"[53] Taking into account all the circumstances of the matter including the evidence tendered and the law on the subject-matter, I was convinced that the following sentence was the appropriate one in this matter:**
>
> **53.1 On counts 1, 2, 3, 5, 6, 7, 9, 10 and 11, the accused person be and is hereby sentenced to 5 years imprisonment on each such count.**
>
> **53.2 On counts 4 and 8 (the destruction of the Mondi Forests or Forests belonging to Peak Timbers (Pty) Ltd and the destruction of the Marquee for hosting the event of the opening of Parliament), respectively, the accused be and is hereby sentenced to 10 years imprisonment on each such count.**
>
> **53.3 Counts 1, 2, 3, 7 and 10 are (owing to their proximity to each other in terms of the dates of commission of the said offences) to run concurrently between themselves.**
>
> **53.4 Counts 4, 5 and 6 are (again owing to their proximity to each other in terms of the commission dates) ordered to run concurrently between themselves.**
>
> **53.5 Counts 8, 9 and 11 are (also owing to their proximity to each other in terms of the commission dates), to run concurrently between themselves.**
>
> **53.6 In order to temper with the possible severity brought by order 5 above only half of Count 8 shall be effective**

[3] Paragraph 53, 53.1 - 53.8 of the judgment of the court a quo.

for purposes of serving the sentence with the result that the sentence in the said count shall be treated as if it provided for the same sentence as counts 9 and 11, that is as if it provided for 5 years imprisonment.

53.7 Effectively the accused will in all serve a total period of twenty years in prison.

53.8 The effective date for commencing the serving of the whole sentence shall be the accused person's date of arrest which the evidence revealed to have been the 15th April 2013."

[14] It is apparent from the judgment of the court *a quo* that the Learned Judge exercised his discretion and ordered that certain sentences should run concurrently with others. Admittedly, the grouping of the sentences was based purely on the judge's discretion, and, it had nothing to do with the fact that the offences were committed as part of a single transaction. The Learned Judge was at pains to ameliorate the harshness of the effective sentence of twenty years in view of the mitigating factors when balanced with the interests of society as well as the seriousness of the offences committed. There is nothing wrong with this approach when considering that the Trial Judge was versed with all the evidence and further observed the demeanour of the appellant, and, then applied the triad.

[15] His Lordship Justice M.C.B. Maphalala JA, as he then was, in the case of *Elvis Mandlenkhosi Dlamini v. Rex*[4]:

"[29] It is trite law that the imposition of sentence lies within the discretion of the Trial Court, and, that an Appellate Court

[4] Criminal Appeal case No. 30/2011 at para 29.

will only interfere with such a sentence if there has been a material misdirection resulting in a miscarriage of justice. It is the duty of the appellant to satisfy the Appellate Court that the sentence is so grossly harsh or excessive or that it induces a sense of shock as to warrant interference in the interests of justice. A Court of Appeal will also interfere with a sentence where there is a striking disparity between the sentence which was in fact passed by the Trial Court and the sentence which the Court of Appeal would itself have passed; this means the same thing as a sentence which induces a sense of shock. This principle has been followed and applied consistently by this Court over many years and it serves as the yardstick for the determination of appeals brought before this Court. See the following cases where this principle has been applied:

- ***Musa Bhondi Nkambule v. Rex*** **Criminal Appeal No. 6/2009**
- ***Nkosinathi Bright Thomo v. Rex*** **Criminal Appeal No.12/2012**
- ***Mbuso Likhwa Dlamini v. Rex*** **Criminal Appeal No. 18/2011**
- ***Sifiso Zwane v. Rex*** **Criminal Appeal No. 5/2005**
- ***Benjamin Mhlanga v. Rex*** **Criminal Appeal No. 12/2007**
- ***Vusi Muzi Lukhele v. Rex*** **Criminal Appeal No. 23/2004"**

[16] His Lordship Justice M.C.B. Maphalala JA, as he then was, in the case of Mandla Mlondolozi Mendlula v. Rex[5] had this to say with regard to sentencing:

[5] Criminal Appeal case No. 12 of 2013 at para 36

"36. Similarly, it is trite that the sentence imposed as a punishment should not only fit the offender as well as the crime committed but it should further safeguard the interests of society. The public interest demands that deterrent sentences should be imposed not only to curb incidents of crime but as well as to protect law abiding citizens. However, the sentence should be proportionate to the offence and should not be manifestly unjust or excessive. In the exercise of his duties the judicial officer should be guided by the triad consisting of the crime, the offender as well as the interests of society. See the cases of *S. v. Zinn* 1969 (2) SA 537 (A) at 540[6]"

[17] The Lesotho Court of Appeal in the case of *Matsotso v. Rex*[7] had this to say:

"While no general rule can be laid down as to the circumstances in which the discretion to reduce sentence should be exercised, the nearest approach to the formulation of such a rule may be said to be that, the test is whether there was a proper exercise of discretion by the trial judge. In cases for example where a court in passing sentence has exceeded its jurisdiction or imposed a sentence which was not legally permissible for a crime, or been influenced by facts which were not appropriate for consideration in relation to the sentence, a Court of Appeal would have power to interfere. But where, as here, no such consideration enters into the matter it is not for the Court of Appeal to interfere with a sentence. Before so doing a Court of Appeal would have to be satisfied that a proper judicial discretion was not exercised by the court passing sentence".

[6] At page 540 G
[7] (1962-1969) SLR 367

[18] The Supreme Court of Swaziland in the case of *Mthaba Thabani v. Rex*[8] also dealt with the triad:

> **"6. . . . . It is of critical importance that the sentence of an Accused person should be premised on a thorough investigation of all the relevant facts surrounding the commission of the offence. The personal circumstances of an accused person obviously needs to be taken into account. However, the degree of his moral guilt is also dependent on the gravity of the offence as well as the mitigating and aggravating features of the offence. If the court process does not elucidate these factors, the court sentencing an offender may fail to do justice to an accused, or per contra fail to ensure the protection of the public".**

[19] His Lordship Justice Olivier Thompson JP delivering a unanimous judgment of the Court of Appeal of Swaziland, as it then was, in the case of *Thwala v. R*[9] said the following:

> **"Now sitting as a Court of Appeal, the ambit of the court's jurisdiction in relation to sentence is relatively restricted. This is because the question of sentence, the appropriateness of it, what particular sentence should be passed is primarily the responsibility of the trial court. On appeal it is clearly established that, in the absence of a misdirection or irregularity, a court of appeal will only interfere if, as it is sometimes expressed there is a striking disparity between the sentences which was in fact passed by the trial court**

[8] Criminal Appeal case No. 9/2007 at para 6.
[9] 1970-1976 SLR 363 at 363-364

and the sentence which the court of appeal would itself have passed. Sometimes the phrase "striking disparity has been displaced by the phrases 'startlingly inappropriate' or disturbingly inappropriate". These expressions all really mean the same thing. They are, one might say, more modern expressions of what used to be classified under the phrase 'sense of shock'.

. . . . The most recent decision of the Appellate Division of the Supreme Court of South Africa is that of S. v. Giannoulis 1975 (4) SA 867 (A) in which it was said that in an appeal against sentence the court hearing the appeal should be guided by the principle that sentence is pre-eminently a matter for the discretion of the court that is, the trial court, and that an appeal court should be careful not to erode such discretion. There is also a further principle that the sentence should only be altered on appeal if the discretion has not been judicially and properly exercised; and, the criterion applied in relation to that is whether the sentence is vitiated by irregularity or misdirection or disturbingly inappropriate."

[20] The Court of Appeal Act[10] provides the following:

"On an appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed at the trial quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed, and, in any other case shall dismiss the appeal."

[10] No.74 of 1954

[21] The Criminal Procedure and Evidence Act deals with the issue of consecutive and concurrent sentences[11]:

> **"300. (1) If a person is convicted at one trial of two or more different offences, or if a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to such several punishments for such offences or for such last offence, as the case may be, as it is competent to impose.**
>
> **(2) If such punishment consists of imprisonment the Court shall direct whether each sentence shall be served consecutively with the remaining sentence.**
>
> **301. (1) If any person is liable by law to a sentence of imprisonment for life or for any period, he may be imprisoned for any shorter period.**
>
> **(2) Any person liable by law to be sentenced to pay a fine of any amount may be sentenced to pay a fine of any lesser amount."**
>
> . . . .

[22] Justice Moore JA delivering a unanimous judgment of the Botswana Court of Appeal in the case of *Thabelo Motoutou Mosiiwa v The State*[12] had this to say with regard to consecutive sentences:

[11] Sections 300 and 301 of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended.

[12] Criminal Appeal No. 124/2005 para 21 and 23.

"[21] As a general *principle,* consecutive terms should not be imposed

for offences which arise out of the same transaction or incident, whether or not they arise out of precisely the same facts. . . . A court may, however*, depart from the principle* requiring concurrent sentences for offences *forming part of* one transaction if there are *exceptional* circumstances. But a sentencer must *clearly identify the exceptional* circumstances upon which she or he seeks to justify the imposition of consecutive terms.

. . . .

[23] It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentencer's message should be *crystal clear* so that the full *effect of* deterrent sentences may be realized, and that the public may be satisfied that the court has taken adequate measures within the law to *protect them* of serious offenders. By the same token, a sentence should not be of such severity as to be out of all *proportion to the offence, or to* be manifestly excessive, or to break the offender, or to produce in the *minds* of the public a *feeling* that he has been unfairly and harshly treated."

[23] Chief Justice Livesey Luke CJ in *Gare v. The State*[13] had this to say:

"It is now well established that if the offences in respect of which an accused is convicted by a court arose out of the same transaction, as a general rule, the sentences should be made concurrent---.

[13] (1990) BLR 74 at page 76.

Another important general rule that should be mentioned is that the sentences imposed, whether concurrent or consecutive, should be so assessed that the total period of imprisonment should not be allowed to exceed what is proportionate to the overall gravity of offences''.

[24] Justice Moore JA delivering the unanimous judgment of the Supreme Court of Swaziland in the case of *Samkeliso Madati Tsela v. Rex*[14] had this to say:

"... .

The governing principle established by the authorities and by academic writers is that consecutive sentences are ordinarily permissible only if they relate to separate incidents or transactions."

[25] Similarly, it is clear from the authorities that where there is no direction from the court whether or not the sentencing will run consecutively, it is presumed that the sentences will run concurrently[15]. It is now well settled in our law that concurrent sentences are permissible where they relate to the same transaction[16] or where the offences are inextricably linked in

[14] Criminal Appeal case No. 10/2010 at para 12
[15] Simelane Dumsane 1987-1995 (2) SLR 200 at 201-202; Dlamini Makhokho v. Rex Appeal No. 27/1986
[16] Dlamini v. Rex Criminal Appeal No. 19/2011 at para 21-22; section 300 (1) and (2) Criminal Procedure and Evidence Act No. 67/1938 as amended.

terms of the locality, time, protagonists and the fact that they were committed with one common intent[17].

[26] Justice Moore in the case of *Dlamini v. Rex*[18] delivering a unanimous judgment of the Supreme Court had this to say:

> **"[28] In ordering sentences to run consecutively, courts exercise a discretion which, like all judicial discretions, must be exercised reasonably, judiciously and judicially, and not whimsically or capriciously. Furthermore, a trial judge must give reasons upon the record for the exercise of his judicial discretion, not only for the benefit of the parties concerned, but also for the assistance of an appellate court in enabling it to decide whether the judicial discretion of a lower court was properly exercised or not. The absence of the requisite reasons in the case before us, amounts to a material misdirection."**

[27] His Lordship Bosielo JA delivering a unanimous judgment of the South African Supreme Court of Appeal in the case of *Daniel William Mokela v. The State*[19] had this to say with regard to sentencing:

> "**[9] It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a**

[17] S. v. Brophy and Another 2007 (2) SACR 56 at para 14.
[18] Criminal Appeal case No. 19/2011 at para 28.
[19] Criminal Appeal case No. 135/2011 at para 9 -12 and 14.

sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served. The limited circumstances under which an appeal court can interfere with the sentence imposed by a sentencing court have been distilled and set out in many judgments of this Court. See *S v Pieters* 1987 (3) SA 717 (A) at 727F-H; *S v Malgas* 2001 (1) SACR 469 (SCA) para 12; *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA) para 11; and *S v Le Roux & others* 2010 (2) SACR 11 (SCA) at 26b-d.

. . . .

[10] There are a number of reasons which a sentencing court can legitimately take into account in this regard. One such ground is the cumulative effect of such sentences. It follows that a court of appeal can only interfere with the exercise of such a discretion by the sentencing court where it is satisfied that the sentencing court misdirected itself, or did not exercise its discretion properly or judicially. Absent such proof, the appeal court has no right to interfere with the exercise of a discretion by a sentencing court.

[11] I have already stated that the court below did not give reasons why it interfered with the order made by the regional magistrate in exercising his or her discretion for the sentences to run together. In the absence of such reasons we are unable to conclude that the regional magistrate did not exercise the discretion properly or judicially. In fact the order by the court below has the hallmarks of an arbitrary decision. It follows that the court below erred in setting aside the order by the regional magistrate for the sentence imposed in respect of count 2 to run concurrently with that imposed in respect of count 1. This is so because the evidence shows that the two offences are inextricably linked in terms of the locality, time, protagonists and importantly the fact that they were

committed with one common intent. (See, for example, *S v Brophy & another* 2007 (2) SACR 56 para 14).

[12] I find it necessary to emphasise the importance of judicial Officers giving reasons for their decisions. This is important and critical in engendering and maintaining the confidence of the public in the judicial system. People need to know that courts do not act arbitrarily but base their decisions on rational grounds. Of even greater significance is that it is only fair to every accused person to know the reasons why a court has taken a particular decision, particularly where such a decision has adverse consequences for such an accused person. The giving of reasons becomes even more critical if not obligatory where one judicial officer interferes with an order or ruling made by another judicial officer. To my mind this underpins the important principle of fairness to the parties. I find it un-judicial for a judicial officer to interfere with an order made by another court, particularly where such an order is based on the exercise of a discretion, without giving any reasons therefore. In *Strategic Liquor Services v Mvumbi NO & others* 2010 (2) SA 92 (CC) para 15 the Constitutional Court whilst dealing with a failure by a judicial officer to give reasons for a judicial decision stated that:

'…Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process…'. See also *Botes & another v Nedbank Ltd* 1983 (3) SA 27 (A) at 28.

. . . .

[14] It is generally accepted that both the accused and the State have a right to address the court regarding the appropriate sentence. Although s 274 of the Criminal Procedure Act uses the word 'may' which may suggest that a sentencing court has a discretion whether to afford the parties the opportunity to address it on an

appropriate sentence, a salutary judicial practice has developed over many years in terms whereof courts have accepted this to be a right which an accused can insist on and must be allowed to exercise. This is in keeping with the hallowed principle that in order to arrive at a fair and balanced sentence, it is essential that all facts relevant to the sentence be put before the sentencing court. The duty extends to a point where a sentencing court may be obliged, in the interests of justice, to enquire into circumstances, whether aggravating or mitigating which may influence the sentence which the court may impose. This is in line with the principle of a fair trial. It is therefore irregular for a sentencing officer to continue to sentence an accused person, without having offered the accused an opportunity to address the court or as in this case to vary conditions attached to the sentence without having invited the accused to address him on the critical question of whether such conditions ought to be varied or not. See *Commentary On The Criminal Procedure Act* at 28-6D."

[28] Bosielo JA delivering a judgment of the full bench of the Supreme Court of South Africa in the case of *Director of Public Prosecutions v. Kwesta Mngoma*[20] stated the following:

"[11] The powers of an appellate court to interfere with a sentence imposed by a lower court are circumscribed. This is consonant with the principle that the determination of an appropriate sentence in a criminal trial resides pre-eminently within the discretion of the trial court. As to when an appellate court may interfere with the sentence imposed by the trial court, Marais JA enunciated the test as follows in *S v Malgas* 2001 (1) SACR 469 (SCA) at p 478 d-g:

[20] Criminal Appeal case No. 404/2008 at para 11.

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly in appropriate".'

[29] Marais JA delivering a unanimous judgment of the full bench of the Supreme Court of South Africa in the case of *Henna Malgas v. The State*[21] had this to say:

"[12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad

[21] Criminal Appeal case No. 117/2000 at para 12 and 13.

of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.

[13] Some of the courts which have wrestled with the problems which sections s 51 raises have sought to draw parallels between the latter process and the approach to be followed when applying its provisions. With respect, I consider the attempt to be misguided. The tests for interference with sentences on appeal were evolved in order to avoid subverting basic principles that are fundamental in our law of criminal procedure, namely, that the imposition of sentence is the prerogative of the trial court for good reason and that it is not for appellate courts to interfere with that exercise of discretion unless it is convincingly shown that it has not been properly exercised. The epithets ("shocking", "startling", "disturbingly inappropriate" and the like) that have been employed to drive that point home should not simply be appropriated indiscriminately for use in a situation which is very different."

[30] The learned Judge *a quo* did a great job in determining which of the offences will run concurrently and which of them will run consecutively. However, in view of the mitigating factors and the peculiar circumstances of this case, there is a need in my respectful and humble view to tamper with the cumulative sentence of twenty years, particularly, with regard to the sentences imposed in respect of counts four and eight. Such an exercise will further ameliorate the harshness of the cumulative sentence.

[31] The seriousness of the offences committed by the appellant is self-evident and not in doubt. The learned Judge in the court *a quo* was alive to the

seriousness of the offences committed by the appellant as is reflected in his judgment[22]:

"[40] It is nonetheless clear that the offences for which the accused person was convicted are very serious. These offences are an embodiment of terror, which has troubled the world so much resulting in the enactment of specific legislations to deal with the scourge caused by it so as to discourage it through deterring other would be offenders. The offences were committed intentionally after careful planning against those people perceived to be political opponents of the accused or those viewed as supporters of the State including those institutions or assets belonging to the State. They were carried out recklessly as to the extent or effect of the damage that would ensue from them. It was in fact clear that whether life was lost or not was not a consideration at all by the accused and his co-perpetrators. It is apparent it was out of sheer luck that no life was lost as a result. I mention this to underscore the point that the sentence I had to impose in the overall was to be deterrent geared so as to ensure that this kind of conduct is not allowed to gain ground in the country. I was clear that dialogue is an answer instead of violence which can easily get out of control as it easily triggers revenge which brings about a vicious cycle.

[41] It is also important to note that whereas all the offences, are serious in so far as they mainly concerned the use of explosives, there are those which were more serious because of what they were intended to achieve and those that had long

[22] Paragraphs 40-43 of the judgment of the court *a quo*.

term effect considering what resulted from their commission. One can best see this in such offences as the one that entailed the burning down of the Mondi Forests in Pigg's Peak which it was clear from the onset would result in massive job losses and a permanent scar on the country's economy. This was obviously a matter of economic sabotage. What resulted from is there for all to see as Pigg's Peak will never be the same after the saw-mill there closed down. Another equally serious matter would in my view be the offence related to the burning of the marquee in Parliament when considering what it aimed to achieve. There is no doubt it was aimed at derailing a very important event in the country's yearly calendar. This event envisages the assembling of not only the representatives of the people of Swaziland across the country and spectrum but everything who cared to witness the event from the highest authority to the lowest ranked member of the nation. It was apparent that just from this incident alone a new culture of violence at national events was setting in. A sentence that discourages it had to be imposed in my view, which is why imposed the one I did with regards this particular count.

[42] These offences in my view required to be dealt with a bit harsher and separately from all the others without detracting from the fact that they are all serious in their own right if one considered the sentences as suggested by the statutes violated.

[43] Otherwise from the nature of the offences as a whole, it was apparent that an unequivocal message had to be sent namely that such offences would not be tolerated as they can only hinder progress given that violence can only beget violence."

[32] His Lordship in the court *a quo* further emphasized the fact that society expects and is entitled to be protected by the courts by imposing sentences upon the offenders which would send a proper message that such offences would not be tolerated.[23]

> **"[47] Another one of the matters to be considered in sentencing are the interests of society. It does not need to be emphasized that society expects to be protected so as to be able to live in peace without being intimidated and unduly caused to live in fear by anyone.**
>
> **[48] This protection that society expects, and is entitled to, can only be guaranteed by the courts through imposing sentences that send a proper message that offences that temper with this entitlement are not going to be treated lightly and are to be discouraged to appropriate sentences.**
>
> **[49] As was indicated in *R v Zinn 1969 (2) SA 537* and several other judgments of this court and the Supreme Court, I cautioned myself against imposing a severe or harsh sentence just as I had to warn myself against passing a sentence embodying misplaced pity as was observed in *S v Rabie 1975 (4) SA 855 (A).***
>
> **[50] As is clear from the indictment, the offences were intentional and deliberately committed on different days and therefore do not form part of what is known as "the same transaction", which often dictates whether sentences attaching to such offences have to run concurrently or consecutively. Strictly**

[23] Para 47 – 50 of the judgment of the court *a quo*.

speaking sentences imposed for such offences often have to run consecutively which is to say one after the other."

[33] The personal circumstances of the appellant persuade me to reduce the effective sentence of twenty years slightly with a view to further ameliorate the harshness of the sentence. It is common cause that the appellant surrendered himself to the police and further co-operated with the police and the prosecution. The appellant recorded a confession as well as a Statement of Agreed facts, both documents which were decisive in the conviction of the appellant. The appellant was not only remorseful for committing the offences but he risked being killed by his former combatants for having surrendered himself to the police, signed a Statement of Agreed Facts and recorded a confession with the Magistrate. He pleaded guilty to all the offences and deliberately avoided cross-examining the Crown witnesses. His conduct demonstrated that he has completely reformed and was bitter towards his past. Similarly, the appellant was relatively young and immature when he committed the offences; clearly, at his age, he could easily be influenced to join the violent groups which carried out the bombings. The fact that the appellant was a first offender without previous convictions cannot be overemphasized.

[34] Incidentally, the Learned Judge in the court *a quo* was alive to the personal circumstances of the appellant in his judgment[24]:

> **"[38] I was alive to the fact that sentencing is a difficult part of any criminal trial and that I had to impose a sentence that maintains the delicate balance between the three main competing interests being those of the accused, those of society and the crime itself. These interests are referred to as a triad.**
>
> **[39] It is by now established in our law that a sentencing court should not approach that exercise in a spirit of anger in order to avoid losing the middle ground often referred to as the delicate balance that should be maintained between the competing interests which should be upheld at all times. I had this consideration uppermost in mind as I passed the sentence I considered appropriate in each particular count.**
>
> **[44] Serious as the offences were, it is apparent that a lot of consideration had to be made as concerns the accused as a person and how he handed himself. My taking these factors into account should go a long way to ameliorate the harshness of the sentences to be imposed on him. Firstly, the accused person was visibly remorseful about his conduct. He not only surrendered himself to the police and started confessing his involvement in the commission of these very serious offences, an act that will most likely yield him perpetual vilification in certain quarters. He also did not waste the court's time during his trial. He apologized to all the victims of his**

[24] Para 38-39, 44-46, and 50-52 of the judgment of the court *a quo*.

actions, which in my view is the most important thing to do if it is a genuine expression of regret which should have a natural soothing effect, on anyone wronged.

[45] It was obvious from his looks that the accused is a relatively young man who has a long future ahead of him provided he had atoned with society. Accordingly, I was alive to the fact that the sentence I imposed on him should be one that gives him a chance in life. It is in the foundational principles of sentencing that the sentence a court passes should have mercy as its concomitant and should not seek to break the offender. I tried the best I could to come up with such a sentence. This leniency should however be seen within the broader context of the matter, though.

[46] I had to take into account as well the fact that the accused was still unmarried and that he had a child who he said was dependent on him. Furthermore, although convicted of so many serious offences the accused had committed on various dates after carefully planning them, I still had to take into account the fact that he was a first offender from the point of view of a conviction and find an appropriate method to ameliorate the harshness of the sentence without venturing outside the criminal sentencing method. If the accused had been a previous convict, a higher standard would ordinarily be expected of him with regards the commission of the further offences, which was not the case in this case even though he was a repeat offender, broadly speaking. This come to the fore if one considers the number of serious offences he in his own admission committed.

[50] As is clear from the indictment, the offences were intentional and deliberately committed on different days and therefore

do not form part of what is known as "the same transaction", which often dictates whether sentences attaching to such offences have to run concurrently or consecutively. Strictly speaking sentences imposed for such offences often have to run consecutively which is to say one after the other. I was convinced that despite this principle there were peculiar circumstances in the matter as brought about by the accused person's remorse and general candour and reform which would necessitate that there be no fixed adherence to the above stated principles.

[51] **It was with this consideration in mind that I found myself having to group together certain offences as those which had proximity to each other in terms of their occurrence and treating them as part of the same transaction. This I did to ensure firstly that the remorse and cooperation shown by the accused at the hearing of the matter and even prior counts for something tangible in his favour. I also tried as best I could to avoid imposing what could easily be termed an oppressive sentence if I had to stick to the fixed principle whether or not the offences were part of the same transaction. I therefore had to devise a way to ameliorate the possible harshness of the sentence. How I approached the matter is evident from the orders set out below.**

[52] **Before pronouncing on the sentences I imposed on the accused I must mention that there are limits beyond which the courts can go in the imposition of appropriate sentences. It may as well be that beyond that point, the Laws of the country envisage acts like those of pardon which can only be granted by other lawful national structures whose considerations may be different from those of the courts. I**

say all this because of the extent to which the accused went urging this court not to impose a custodial sentence in view of his remorse and co-operation exhibited in court as well as given to the law enforcement agencies. I can say whilst I perhaps understood, it is time I have to act within the precincts of the applicable law in imposing an appropriate sentence."

[35] Consequently, the Learned Judge sentenced the appellant in respect of counts 4 and 8 to ten years imprisonment on each count but suspended half the sentence in count 8 to five years imprisonment. His Lordship further ordered that count 4, 5 and 6 should run concurrently. The appellant was sentenced to ten years imprisonment in respect of count 4 on a charge of contravening section 5 (1) of the Suppression of Terrorism Act No. 3 of 2008. However, on a similar charge in counts 1, 2, 3, 5, 6, 7 and 10, the appellant was sentenced to five years imprisonment in respect of each count; and, the sentences were ordered to run concurrently. Accordingly, it is only fair and just that the sentence in count 4 should also be reduced from ten to five years imprisonment.

[35] In the circumstances the following order is made:

1. The appeal succeeds to the extent that the sentence in count 4 is set aside and replaced with a sentence of five years imprisonment.

2. The other orders made by the court *a quo* are hereby confirmed save for order No. 53.7 which is hereby set aside and replaced with the following order:

The accused will serve an effective sentence of fifteen years imprisonment commencing from the 15th April 2013.

_____

M.C.B. MAPHALALA
CHIEF JUSTICE

I agree: _____

S.P. DLAMINI
JUSTICE OF APPEAL

I agree: _____

Z. MAGAGULA
ACTING JUSTICE OF APPEAL

Appellant in Person
For Respondent: Senior Crown Counsel M. Nxumalo

DELIVERED IN OPEN COURT ON 30th JUNE 2016