



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**Criminal Case No: 165/10**

**In the matter between**

**REX**

**And**

**ZONKE TRADEWELL DLAMINI**

**1<sup>ST</sup> ACCUSED**

**BHEKUMUSA BHEKI DLAMINI**

**2<sup>ND</sup> ACCUSED**

Neutral citation: *Rex v Zonke Tradewell Dlamini and Bhekumusa Bheki Dlamini*  
(165/10) 2014 [SZHC] 02 (25 February 2014)

**Coram: OTA J**

**Heard: Trial commenced: 2 February 2012**

**Trial concluded: 20 January 2014**

**Delivered: 25 February 2014**

**Summary: Criminal Law and Procedure: Both Accused persons are charged jointly and severally on three counts of contravening Section 5 (1) of the Suppression of Terrorism Act No. 3 of 2008 (the Act); the essential elements of the offence are contained in Section 2 (1) and (2) of the Interpretation Section of the Act; petrol bomb or Molotov cocktail analysed; allegations of torture how treated; torture can be proved by production of medical evidence; pointing out process and admissibility of material evidence recovered therein; principles thereof; Section 227 (2) of the Criminal Procedure and Evidence Act 67/1938 as amended (CP&E) discussed; confession made by Accused persons to the police; guiding principles on how confessional statement should be obtained in terms of Section 226 (1) of the CP&E; evidence of confession though elicited in cross-examination remains prejudicial in the absence of a confessional statement and is thus legally inadmissible evidence; forensic expert opinion; guiding principles; absence of reasons expert opinion renders the opinion of little or no probative value; alibi defence how treated; unchallenged and uncontradicted alibi evidence deemed admitted; confession made by an Accused person in one case cannot be used simpliciter as evidence against an Accused person in another trial; held: Crown proved its case beyond reasonable doubt against the 1<sup>st</sup> Accused; 1<sup>st</sup> Accused is found guilty and convicted of the offence as charged in counts 1 and 2 respectively; held: Crown failed to prove its case beyond reasonable doubt against the 2<sup>nd</sup> Accused; 2<sup>nd</sup> Accused is found not guilty and is accordingly discharged and acquitted of the offence as charged in counts 1, 2 and 3 respectively and their alternatives.**

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

**“COUNT ONE**

- [1] Accused No.1 and 2 are guilty of the Crime of Contravening Section 5 (1) of The Suppression of Terrorism Act No. 3 of 2008.
- [2] In that upon or about 25<sup>th</sup> May, 2010, at or near Ebenezer in the Shiselweni Region, the said Accused persons each or both of them acting jointly and in furtherance of a common purpose did unlawfully and intentionally cause serious damage to property belonging to one Vusi Masuku, a Senior Police Officer, an act intended to intimidate the public, and did thus contravene the said Act.

**ALTERNATIVELY**

- [3] Accused No. 1 and 2 are guilty of the Crime of Arson.
- [4] In that upon or about the 25<sup>th</sup> May, 2010 and at or near Ebenezer area in the Shiselweni Region, the said Accused persons, each or both of them, acting jointly and in furtherance of a common purpose did unlawfully and with intent to injure one Vusi Masuku in his property, set on fire and thereby damage (sic) a certain house, being immovable property belonging to the said Vusi Masuku.

**COUNT TWO**

- [5] Accused No. 1 and 2 are guilty of the crime of Contravening Section 5 (1) of the Suppression of Terrorism Act No. 3 of 2008.
- [6] In that upon or about 7<sup>th</sup> June 2010 and at or near Ebenezer in the Shiselweni Region, the said Accused persons each or both of them, acting jointly and in furtherance of a common purpose did unlawfully and intentionally cause serious damage to property belonging to one Bheki Mkhonta, a Member of Parliament, an act intended to intimidate the public, and did thus contravene the said Act.

**ALTERNATIVELY**

- [7] Accused No. 1 and 2 are guilty of the crime of ARSON.
- In that upon or about the 7<sup>th</sup> of June 2010 at or near Ebenezer area in the Shiselweni Region, the said Accused persons, each or both of them acting jointly and in furtherance of a common purpose did unlawfully and with intent to injure one Bheki

**Mkhonta in his property, set on fire and thereby damage (sic) a certain house, being immovable property belonging to the said Bheki Mkhonta.**

**COUNT THREE**

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

**[9] In that upon or about 7<sup>th</sup> June, 2010 and at or near Ntabinezimpisi in the Hhohho Region, the said Accused person did unlawfully and intentionally cause serious damage to property belonging to one David Lion Shongwe, a Member of Parliament, an act intended to intimidate the public, and did thus contravene the said Act.**

**ALTERNATIVELY**

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

**[11] In that upon or about the 7<sup>th</sup> June 2010 and at or near Ntabinezimpisi area in the Hhohho Region, the said Accused did unlawfully and with intent to injure one David Lion Shongwe in his property, set on fire and thereby damage (sic) a certain house, being immovable property belonging to the said David Lion Shongwe.”**

[2] When the Accused persons were arraigned before this court, they pleaded not guilty to the charges proffered. Thereafter, a trial in which the Crown paraded a total of 15 witnesses and tendered several exhibits in proof of its case ensued. The Crown witnesses were extensively and exhaustively cross-examined by learned defence Counsel Advocate Sihlali. At the close of the Crown’s case, the 2<sup>nd</sup> Accused testified and called two other witnesses DW1 and DW2 respectively. Thereafter, the 1<sup>st</sup> Accused also testified and called two witnesses DW3 and DW4. At the close of the defence counsel on both sides filed closing submissions and also tendered oral argument in support of their respective stanze. I have carefully considered the totality of the submissions tendered and I will be making references to the issues raised therein in the course of this judgment.

[3] This being a criminal trial, it is pertinent that I first highlight the well known guiding principle which is that in a criminal trial the onus rest upon the Crown to prove its case beyond reasonable doubt. There is no onus upon the Accused to convince the Court of the truth of any explanation he gives. If the explanation given by the Accused is improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false see Tetuka Tetuka v The State Criminal Appeal No CLCGB-039-12, S V Shackell 2001 (4) SA 1 (SCA) at p12 para [30].

[4] Let me first consider the main charges of contravening Section 5(1) of The Suppression of Terrorism Act No. 3 of 2008 (the Act), where the Accused persons are alleged to have unlawfully and intentionally caused serious damage to property belonging to the three complainants, namely, Vusi Masuku, Bheki Mkhonta and Lion Shongwe, an act intended to intimate the public and thus contravened the said Act.

[5] Now, the essential elements of these offences are contained in Section 2 (1) and (2) of the Interpretation Section of the Act, which defines the term “terrorist act” as follows:-

- “(1) **an act or omission which constitutes an offence under this Act or within the scope of a counter- terrorism convention; or**
- (2) **an act or threat of action which**
  - (a) **causes**
    - (i) **the death of a person;**
    - (ii) **the overthrow by force or violence, of the lawful Government, or**
    - (iii) **by force or violence, the public or a member of the public to be in fear of death or bodily injury;**
  - (b) **involves serious bodily harm to a person**
  - (c) **involves serious damage to property**
  - (d) **endangers the life of a person**
  - (e) **creates a serious risk to the health or safety of the public or a section of the public**

- (f) involves the use of firearms or explosives
- (g) involves releasing into the environment or any part of the environment or distributing or exposing the public or any part of the public to:-
  - (i) any dangerous, hazardous, radioactive or harmful substance;
  - (ii) any toxic chemical
  - (iii) any microbial or other biological agent or toxic;
- (h) is designed or intended to disrupt any computer system or the provision of services directly related to communication infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;
- (i) is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services;
- (j) involves prejudice to national security or public safety and is intended, or by its nature and context, may reasonably be regarded as being intended to:
  - (i) intimidate the public or a section of the public; or
  - (ii) compel the Government, a government or an international organization to do, or refrain from doing, any act---”

[6] Let me now have regard to the totality of the evidence led in this case to ascertain whether the Crown proved its case beyond reasonable doubt against each of the Accused persons. It is convenient for me to do a detailed summary of the totality of the evidence led for ease of reference and for the avoidance of doubts in this judgment.

### **CROWNS CASE**

[7] PW 1 was Vusi Masuku a police officer. He was the Police Public Relations Officer and based at the Mbabane Police Headquarters in May 2010. He told the court that in this position his duty was to inform the public about activities pertaining to their safety and security. That on the day of the incident in May 2010, he was asleep in his government quarters in Mbabane at about 1a.m. He received a call from one Bonginkhosi Zwane who resides at his parental homestead at Ebenezer who informed him of a fire outbreak in one of the houses in his parental homestead in which he puts up during weekends and annual leave. PW 1 proceeded to his parental homestead at Ebenezer where he found a number of police officers as well as

members of the fire service and emergency unit. He found that the whole house, the rafters and tiles had collapsed. The debris of the rafters was smouldering and the fire department was trying to put out the glowing splinters. He made a round inspection of the site and discovered that the walls of the house had cracks. That he confronted Bonginkhosi who told him that he was able to remove a sofa and coffee table from the home but the rest of the items were completely burnt to ashes. PW1 enumerated the items that were burnt as the following: a double bed, base, some sofas four in all, 3 carpets, grass mats given to him during his marriage ceremony, clothing materials, shoes, jackets, trousers, one huge handy gas stove, a drawer for storage together with the cutlery. It was further PW1's evidence that he checked on his mother who was in a house adjacent to the structure that got burnt. He found her shivering and as a result she had to make an appointment with the doctor at the Raleigh Fitkin Memorial Hospital (RFM). That his mother died 8 days after the fire incident and that was one loss he really suffered as a result of the incident

[8] PW1 also told the Court that as the public relations officer he recalls other instances of fire in the country at that time even though he may not be too certain of the period that the fires occurred. That he recalled the fire incident that took place at Sandlene at the homestead of Siphofaneni a Member of Parliament. Another fire incident at the homestead of Mtsambama another Member of Parliament, then a fire incident at the home of another Member of Parliament Lion Shongwe. That there were many other fire incidents that were not readily at his finger tips.

[9] PW 1 told the Court that he knows the 1<sup>st</sup> Accused as an electrician. That 1<sup>st</sup> Accused has been in his parental homestead for more than five times because his late mother used to ask the 1<sup>st</sup> Accused to attend to some electrical problems at the parental homestead which also included the house which got burnt. He said that at

some point he personally invited the 1<sup>st</sup> Accused to make quotations in respect of a house which he had just constructed in his parental homestead. That he did not have any quarrels with the 1<sup>st</sup> Accused and that the 1<sup>st</sup> Accused did not have any quarrels with any of his family members. That the 1<sup>st</sup> Accused's family led a delegation the traditional way to his parental homestead to pay their condolences on the incident that had befallen the Masuku homestead. That the delegation did not meet him so they made an appointment to come on another date. That thereafter, Mr Kunene the spokesman of the delegation, informed him that they had come to mourn following the fire incident and also indicated that one person from their homestead had been arrested in connection with the incident but he did not delve much into it.

[10] Under cross-examination, PW1 told the Court that his homestead was burnt on 25<sup>th</sup> May 2010 and his mother was buried on 11<sup>th</sup> of June 2010. He told the Court that he met with the spokesman of the delegation Mr Kunene after his mother's burial. He said he never met with the delegation after his mother's burial or at anytime. He agreed that the 1<sup>st</sup> Accused was arrested on 11<sup>th</sup> June 2010.

[11] PW 2 was Thembi Shongwe, wife of late DavidLion Shongwe complainant in count 3. She stated hat the complainant was employed as a Member of Parliament for Mayiwane. She said that on the 7<sup>th</sup> June 2010, the day of the incident at night around I am, she was asleep with her husband and children. They heard some noise in their sitting room. That they went out of the bedroom to the sitting room and they found that the sitting room was burning. That they went outside and took some water and tried to put off the fire. That when they went outside her husband called the police and that they remained outside until the police arrived. That the fire damaged a window through which it entered the house. They found pieces of bottles and some sand on the floor. A curtain was damaged, sofas burnt, carpets burnt, a fridge

damaged and a mercedes benz car was damaged on the window.PW 2 further told the Court that she knows the 2<sup>nd</sup> Accused who is a relative of her husband's. She has known him since the time they were staying at Mhlume. That she does not know of any argument or quarrel between the 2<sup>nd</sup> Accused and her husband and she does not know of any bad blood between the 2<sup>nd</sup> Accused and any member of her family.

[12] Under cross-examination, PW 2 told the Court that she does not know what caused the fire in her home. She said that her community was one at peace with her late husband. That she is not aware of any community members who may have resented her husband because he was a Member of Parliament. She said she just saw her husband and the community members working together.

[13] PW 3 was Thamsanqa Shongwe a teacher who resides in Ebenezer. He told the Court that he knows the 1<sup>st</sup> Accused who is his cousin. He knows that the 1<sup>st</sup> Accused is a member of an association called ACAT and that he is also a member of a political formation. That on 7<sup>th</sup> June 2010, the 1<sup>st</sup> Accused came to his homestead at night whilst they were asleep. That the 1<sup>st</sup> Accused was then in the company of another person whom PW3 does not know. PW 3 told the Court that the 1<sup>st</sup> Accused and his companion spent the night in their homestead. That the 1<sup>st</sup> Accused and his companion left the following morning around 6 a.m. and that they went to board a bus known as Yithabantu and they did not say where they were going. It was also PW 3's evidence that he knows the Member of Parliament Bheki Mkhonta's house and that it is about 1km away from his home. He said he also knows the parental homestead of Vusi Masuku (PW 1) and that it is about 300 meters away from his home. That he lives with his grandfather which is about 65 metres away from 1<sup>st</sup> Accused's homestead. That the police arrived to search at his homestead on 8<sup>th</sup> June 2010.

[14] Under cross-examination, PW3 confirmed that he was asleep with Mbhekeni when the 1<sup>st</sup> Accused arrived. He also told the Court that ACAT is a money lending organization.

[15] PW 4 was Beatrice Shongwe who lives at Ebenezer. She told the Court that she knows the 1<sup>st</sup> Accused as her child because he is her younger sister's son and that the 1<sup>st</sup> Accused was staying with her prior to his arrest. That in May 2010 some police officers came to her home and introduced themselves as investigators. They then sought her permission to search the homestead starting with the house which was occupied by the 1<sup>st</sup> Accused, even though the police officers did not identify the house as 1<sup>st</sup> Accused's house. PW 4 told the Court that she granted the police officers permission to search the house. The police officers requested that she should go into the house with them. That inside the house the police officers looked at different kinds of papers as the 1<sup>st</sup> Accused is an electrician, a business man. She said after searching the 1<sup>st</sup> Accused's house the police officers also searched her own house in her presence. That she did not see anything taken by the police officers and they did not tell her that they have taken anything. It was also PW4's evidence that the police officers came back another day with the 1<sup>st</sup> Accused. She told the Court that the police officers again sought her permission to enter the house and that they also requested that she enters the house with them. PW 4 told the Court that the police officers informed her that they had come to take some clothings which 1<sup>st</sup> Accused had used and requested that she should ask 1<sup>st</sup> Accused. That when she asked 1<sup>st</sup> Accused he informed her that he had used the clothings at the Masuku homestead but he did not clarify what he used the clothings for.

[16] It was further PW 4's evidence that after she had granted permission to the police officers to enter the house, they all went into the house where the police officers took the clothings one after another after the 1<sup>st</sup> Accused had pointed at them. PW 4 told the Court that the police officers kept writing while inside the house and after they came out of the house, they asked her to sign. That she was very hurt at 1<sup>st</sup> Accused's response when she asked him of the arrival of many people in the homestead.

[17] Under cross-examination, PW 4 told the Court that she knows that 1<sup>st</sup> Accused used to do electrical work at the Masuku homestead. She also told the Court that 1<sup>st</sup> Accused normally uses a blue top and blue trousers whenever he is working. PW 4 said that she cannot recall how many police officers came to the homestead the first time because she was shocked as they had guns with them. She also said that when the police officers came back with 1<sup>st</sup> Accused that they were not as many as they were when they first came. She said she did not see how the police officers were handling the 1<sup>st</sup> Accused as she was shocked seeing him emerging in the middle of the officers. She said they were many people who used to assist 1<sup>st</sup> Accused in his work and they changed from time to time.

[18] PW 5 was 4625 Detective Constable Nimrod Motsa a police officer attached to the Pigg's Peak Police Station. He told the Court that he qualified as a scenes of crime Officer since 2008. That on the 7<sup>th</sup> of June 2010 he received a call from 4086 Detective Constable Du Point. That he proceeded to the scene of crime at the homestead of Member of Parliament, Shongwe. That on arrival at the homestead around 3am they waited for the arrival of the bomb disposal unit at the scene of crime. Then they started together on the investigation of the scene of crime around 5am. That MP Shongwe's house was damaged by fire. There was a small hole in

the window which was actually burnt. PW 5 took one photograph of that on the outside view and a photograph of the window which was actually damaged. He told the Court that he got inside the house and took a photo of where the bottle actually fell and there was damage on the tiled floor. PW 5 further testified that he was shown a grey mercedes benz motor vehicle registration No SD 188 YG parked on a verandah of the homestead. That the vehicle was damaged on the front left window and that he took a photograph of that. That he noticed a piece of cloth on a window sill near the motor vehicle and he took a photograph of that, after which he sealed the piece of cloth in a zacu bag. He said he also took a photograph specifically of the cloth on the window sill. It was further PW 5's evidence that behind the vehicle were some green bottle particles, white pieces of wax and some brown sugar which items he took a photograph of. He said he also took some samples of the wax, brown sugar and green pieces/particles of bottle and sealed them in three separate sealing bags. Thereafter, he left the scene of crime and handed all the evidence at the Pigg's Peak Police Station. The following exhibits taken from the scene of crime at the Shongwe homestead were admitted in evidence through PW 5 namely:-(1) Photo with green bottle – exhibit A (2)Photo with green bottle particles wax and brown sugar – exhibit A1 (3)Photo of the cloth hanging from the window sill – exhibit A2 (4)Photo of the grey mercedes benz – exhibit A3 (5)Photo of the window with a hole in it – exhibit A4 (6)Photo of the rear of the grey mercedes benz exhibit A5 (7)Photo of the side view of the homestead – exhibit A6 (8)Piece of khaki cloth measuring – exhibit B.

[19] It was further the evidence of PW 5 that on the 17<sup>th</sup> of June 2010, he received a call from Mr Fakudze to the effect that they arrested a suspect and needed a scenes of crime officer. PW 5 told the Court that consequently he proceeded to Buhleni Police post where he found Mr Fakudze with other police officers and a certain suspect whom he identified as the 2<sup>nd</sup> Accused already handcuffed. PW 5 told the Court that

Mr Fakudze cautioned the 2<sup>nd</sup> Accused and thereafter they proceeded to a homestead in the Mpofo area. Upon getting there they alighted from their vehicles and Mr Fakudze again cautioned the 2<sup>nd</sup> Accused and told him that he is still under caution. PW 5 stated that thereafter the 2<sup>nd</sup> Accused proceeded to a certain place in the homestead, where there is a water tank stand and near it he pointed at a trouser khaki in colour which was on the ground. PW 5 told the Court that he took a photo of the trouser and that 2<sup>nd</sup> Accused further picked up the trouser from the ground and PW 5 took a photo of 2<sup>nd</sup> Accused holding the trouser.

[20] It was further PW 5's evidence that he placed the trouser on the ground and discovered that there was a missing part. That he placed his directional arrow and took a photo of the missing part. He said that the trouser was taken by the investigating officer Mr Fakudze. The following exhibits which were taken from the 2<sup>nd</sup> Accused's homestead on the 17<sup>th</sup> of June 2010, were tendered in evidence through PW 5 viz: (1)Khaki trouser – exhibit A7 (2)Photo of 2<sup>nd</sup> Accused holding the khaki trouser – exhibit A8 (3)Photo of khaki trouser showing the missing part – exhibit A9

[21] Under cross-examination, PW 5 told the Court that the reason why they waited for the bomb disposal unit before commencing investigations at the Shongwe homestead was because the scenes of crime Commander, Du Point, told them to do so and PW 5 thought that was a good idea because he noticed fire and bottles at the crime scene. PW 5 told the Court that they started work at the crime scene at 5am and they used the natural light because it was clear then. He said notwithstanding the colour of the sky in exhibit A6, to which he was referred by the defence counsel, that it was clear at that time and they were able to see everything that had taken place on that day. He said he does not know why the family failed to switch off the light on the verandah

where the car was parked because it was already clear at that time. He agreed that the darkened window shown in A4 may not be a window that is burnt but a window smoked because of the fire. PW 5 however further maintained that the window was burnt because there is a picture showing that the fire came through that window. That he took the photos at the crime scene from 5am and finished at 6.30am. He said that the cameras they used for the photographs do not show the time and specific date when the photos were taken on the printed photos, however, if the photographs were not deleted the time and date would have shown in the camera itself, but he had already deleted the photographs pertaining to this incident which took place in 2010. He said he never thought that because the photographs came out without the date and time that he should have put such details together with the other details he put behind the photographs and that he had never seen that done in his experience.

[22] It was further PW 5's evidence that when they arrived at 2<sup>nd</sup> Accused's residence, the 2<sup>nd</sup> Accused was not ill treated. That 2<sup>nd</sup> Accused was in front doing everything and if he was ill treated he would have been crying. He said he does not know whether or not both Accused persons were beaten and tortured immediately after their arrest. However, on the day he saw the 2<sup>nd</sup> Accused, looking at him he had no injuries. He maintained that it was the 2<sup>nd</sup> Accused that led the police officers to the torn khaki trousers at his homestead and picked it up and that at the scene of crime on 7<sup>th</sup> June 2010 there was a piece of khaki cloth which could actually tell the police officers the meaning of the torn khaki trouser. PW 5 denied that there were enough police officers at the scene to surround the 2<sup>nd</sup> Accused's homestead. He insisted that there were only 5 police officers and he was the 6<sup>th</sup>. He said though the 2<sup>nd</sup> Accused was handcuffed and in front he was not being marshalled rather he was showing the police officers the way and he showed them the khaki coloured trouser.

[23] PW 6 was Bheki Sandile Mkhonta a Member of Parliament from 2008 to 2013 (now deceased). He was resident at Mtsambama in Hlatikulu. He told the Court that about afternoon on 7<sup>th</sup> June 2010 he received a call from the people who were at his homestead at Hlatikulu, where he did not sleep the previous night. The police informed him that there had been a break in and one of his bedrooms was burnt.

[24] PW 6 told the Court that he knows the 1<sup>st</sup> Accused. He said they live in the same community very close plus or minus 1km apart. That himself and 1<sup>st</sup> Accused have some relationship. The 1<sup>st</sup> Accused used to assist him in soccer games organized locally and PW 6 would give him some money for the teams. That he has never had any disagreement with 1<sup>st</sup> Accused. That he has no problems with the community as a whole that is why they voted him into office. That he also does not know of any disagreement or ill feelings of the 1<sup>st</sup> Accused against any members of his family.

[25] Under cross-examination, PW 6 told the Court that he was not renovating his bedroom at the time of the incident. He said he just put the items for the scaffolding in the bedroom. He said based on his relationship with 1<sup>st</sup> Accused, that he does not believe that 1<sup>st</sup> Accused could have burnt his house.

[26] PW 7 was 2750 Detective Sergeant Nhlanhla Mkhabela a scenes of crime officer. He said his role is crime scene examination, collection of forensic evidence, finger prints, search, lifting and photographing.

[27] PW 7 told the Court that on the 25<sup>th</sup> of May 2010 whilst on duty around 1am, he received a call that he should proceed to Vusi Masuku's house hence it was alleged

that there had been a bombing there. He said he arrived the scene of crime and he found police officers from the Hlatikulu police station already at the scene and they had cordoned off the scene. He said that they waited for the bomb disposal unit to arrive. Upon the arrival of the bomb disposal unit which included 3311 Thabetse they started investigation at the scene around 5.30am. He said that also present at the crime scene was Mr Fakudze who was part of the investigation team. In the course of the investigation he discovered that a room was set on fire with everything inside burnt to ashes. The items that were visibly burnt included a bed, some sofa chairs and clothings. PW 7 told the Court that they scanned around outside the scene of crime and at a window that was on the eastern part of the house, they found some brownish broken bottle glasses and when they scanned on top of the sill of the window, they also found some pieces of the same bottle. That it is the same window that was visibly smashed and some window pane broken on it and some fell on the window sill and inside.

[28] PW 7 further told the Court that he collected the exhibits which are the bottles, the pieces of cloth and the bottle neck and that he took photographs of these items. That he packaged these items at the crime scene, sealed them and took possession of them. He said he also photographed the house and searched for finger prints from the damaged window but nothing of significance was found. The exhibits tendered in evidence through PW 7 were as follows:- (1) Pieces of brownish bottle – exhibit C (2) Bottle neck with maize cock – exhibit C1 (3) Piece of grayish cloth – exhibit C 2 (4) Photograph of the Masuku homestead – exhibit D (5) Outside view of the burnt rondavel – exhibit D1 (6) Photograph showing the extent of the damaged window which it is suspected that the bottle was thrown through – exhibit D2 (7) Photograph of the bottle particles beneath the broken window outside the burnt rondavel exhibit D3 (8) Photograph showing the bottle neck with the cork exhibit D4, (9) Photograph

showing the inside of the rondavel exhibit D5 (10) Photograph showing another angle of the burnt rondavel – exhibit D6.

[29] It was further PW 7's evidence that on the 7<sup>th</sup> June 2010 he got a report of an alleged bombing at the homestead of Member of Parliament Bheki Mkhonta at Ebenezer. He arrived at the crime scene late around 18 hours where he found 2672 Inspector Mabuza together with other police officers from Hlatikulu. As he had to wait for the bomb disposal unit, PW 7 decided that the investigation of the crime scene should be done the following day on the 8<sup>th</sup> of June 2010. He left the crime scene cordoned off and under the supervision of 2672 Mabuza. PW 7 told the Court that by 7am on the 8<sup>th</sup> of June 2010 he was already at the crime scene together with 4022 Constable Vilakati and 4634 Constable Dlamini both from the bomb disposal unit. That also present at the scene was Mr Fakudze an Assistant Superintendent of police.

[30] It was PW 7's evidence that during the investigation at the crime scene, he noted that Mr Mkhonta's house was under renovation because there were no properties inside but there were scaffolds in one of the rooms. The window on the eastern part of the homestead was damaged and smoked. He noted some window pane debris and some brown bottle debris beneath the window from outside. On getting inside the house PW 7 noticed some brown bottle debris scattered all over the room and on top of the scaffolds. He also noticed that the walls were smoked and the scaffolds slightly burnt. The ceiling in the house was also smoked. That he took photographs of the scene covering the homestead, the damaged window, the debris of the broken bottle inside and outside and a piece of slightly burnt grayish coloured cloth which he found on top of the scaffolds. That he collected the slightly burnt piece of grey cloth and the debris of the broken bottle. He packaged and sealed them at the scene of crime. The debris of brown bottle was admitted in evidence as exhibit E. The

photographs which PW 7 told the Court that he took personally developed and processed and he marked them RCCI 505 of 2010 and labeled them alphabetically A-F, were admitted in evidence as follows:-(1)Photograph of the Mkhonta homestead – exhibit F (2)Photograph showing damage on the window which is also smoked – exhibit F1 (3)Photograph showing pieces of the broken window panes beneath the window outside – exhibit F2 (4)Photograph showing the slightly burnt scaffold arranged inside the house – exhibit F3 (5)Photograph showing the debris of the broken brown bottle inside on top of the scaffolds – exhibit F4 (6)A photograph of a slightly burnt grayish piece of cloth – exhibit F5.

[31] PW 7 further told the Court that a few days after the last incident the investigating team brought some items of clothings to him which included, a bluish pair of trousers, a multicoloured jacket, a grey rebook trouser and a bluish sweater. These items were admitted for identification purposes and marked ID1 to ID4 respectively. PW 7 also told the Court that all these items together with the other items seized from both scenes of crime were sent for forensic analysis. He said the slightly burnt pieces of cloth recovered from the Mkhonta homestead was not received back from the laboratory.

[32] Under cross-examination, PW 7 told the Court that though exhibit D (Masuku homestead) shows only a bed and a television stand, the sofas like most of the items were burnt beyond recognition. That he asked questions about the items that were burnt beyond recognition and he was told what they were by Mr Masuku. These included the sofas, but Mr Masuku did not inform him of the items which Bonginkhosi said he removed from the house. He told the Court that he found fire emergency personnel at the crime scene (Masuku) upon arrival there and they immediately left after putting off the fire. He clarified that what he meant by that he

scanned around the crime scene is that he looked around it with his eyes. That the finger prints found on the damaged window at the scene of crime were not of value because they do not qualify for such purpose. He however disagreed that they were not of value because they did not implicate the two Accused persons.

[33] He further told the Court that exhibit D1 to D6 were taken on the 25<sup>th</sup> of May 2010 around 5 – 5.30am but that there is no time or date indicated thereon because the gadgets used have no time and date settings. He disagreed that D1 was not taken around 5 to 5.30am because it was winter. He insisted that he was truthful about his evidence which he gave on oath. He stated that when he took the photographs he gave them specific reference numbers but that evidence slipped his mind. PW 7 agreed that he left the Mkhonta crime scene for 13 hours between 6pm and 7am the following day in the care of officer Mabuza who was given strict warnings to guard it. He agreed that since he did not examine the crime scene before leaving it in the care of Mabuza he would not know if anything was tampered with there. He insisted that even though Mr Mkhonta told the Court that his house was not under renovation, however, the photographs show cement going down the wall therefore the house was under renovation. He said his observation was that the metal in Mr Mkhonta's room had already been used as scaffolds as they were arranged against the wall and there was also some debris of cement visible. He insisted that the Reebok trousers is grayish in colour and not black.

[34] PW 8 was Selby Shongwe who lives at Mpofu. He is self employed, a brick maker. He told the Court that on 17<sup>th</sup> June 2010 whilst making bricks in the company of one Zwelithini, some policemen came with 2<sup>nd</sup> Accused to where they were making the bricks. PW 8 told the Court that he knew the 2<sup>nd</sup> Accused before that day because he used to see him in the community. That when the police came with 2<sup>nd</sup> Accused to

them the police asked them to stop work because the 2<sup>nd</sup> Accused had something to show to the police. Thereafter, 2<sup>nd</sup> Accused led them to the house where there is a water tank hanging on top of the house where they used for bathing. That he was then with the police and Zweli. That 2<sup>nd</sup> Accused showed a long khaki trousers to the police and the police took it. It was further PW 8's evidence that after taking the khaki trouser, 2<sup>nd</sup> Accused led them to his house, where he gave an overall and a pair of sneakers to the police.

[35] Under cross-examination, PW 8 told the Court that the 17<sup>th</sup> June was the third time the police were coming to them but he could not recall the other occasions. He said he could not recall whether the first time the police came to him was on 8<sup>th</sup> June. He also said he could not remember whether the second time the police came was on the 12<sup>th</sup> of June 2010. PW 8 also told the Court that 2<sup>nd</sup> Accused breeds chickens and pigs for a living. That if he remembers well there were 6 police officers with 2<sup>nd</sup> Accused when they arrived on the 17<sup>th</sup> and that if he remembers very well 2<sup>nd</sup> Accused was handcuffed in front. He said the police did not intimidate them. He stated that though 2<sup>nd</sup> Accused's hands were handcuffed in front he was able to point out items to the police. That when 2<sup>nd</sup> Accused pointed out the items he was not being questioned by the police, but did it voluntarily with no assistance from the police. He said 2<sup>nd</sup> Accused was in control of the situation when he led them into his house. He said that the khaki trouser was hung on the room on the water stand the last time he saw it. PW 8 further told the Court that he does not know anything about PW 5's evidence that the trouser was on the ground near the water tank. PW 8 said that 2<sup>nd</sup> Accused did not give anything to the police inside his house but that he showed the items to the police.

[36] PW 8 further stated that when the police first came to search the premises they were not with the 2<sup>nd</sup> Accused and that he does not remember if they took away anything. He said he was in shock because the police came and stopped them from work. PW 8 admitted that himself and 2<sup>nd</sup> Accused built a house together and that he spends a lot of time at 2<sup>nd</sup> Accused's homestead but he says that this does not form a relationship since they were just working at 2<sup>nd</sup> Accused's homestead. That he used to go to 2<sup>nd</sup> Accused's father to collect money to buy cements so may be that is a relationship. He said because of this relationship he will not betray 2<sup>nd</sup> Accused and that he was not betraying 2<sup>nd</sup> Accused by his evidence.

[37] PW 8 further told the Court that Member of Parliament Lion Shongwe is his uncle a brother to his father. He however denied knowing that on 7<sup>th</sup> June 2010 Lion Shongwe's residence was damaged due to fire. He further told the Court that the trouser found next to the water tank belongs to somebody who was working there but who had since gone away and not to 2<sup>nd</sup> Accused, however, that he cannot remember for how long the trouser was left there.

[38] PW 9 was 3311 Sgt Cecil B. Tsabedze stationed at OSSU and attached to the bomb disposal unit. He has been a police officer for 19 years and has been attached to the bomb disposal unit for 9 years. He attended the basic course in bomb disposal at the police college in 1998. Thereafter, he proceeded to Pretoria, South Africa, where he was awarded the certificate of competence in the field of explosives. Thereafter, he was involved in several workshops and has also facilitated some trainings in the field of explosives. He attended the scene of crime at the Masuku homestead at Ebenezer in the company of 4634 Constable D. Dlamini. He said they got to Ebenezer at 4.30am and they did not do anything because it was still dark. They started their investigation around 5.30am and were introduced into the place by 2750 Sgt

Mkhabela. They proceeded to the rondavel with SgtMkhabela and from his observation of the scene it was clear to him that a petrol bomb had been thrown through the window of the rondavel. He found a bottle of beer inside the rondavel which was already smashed by the time it was thrown through the window target. That having seen the pieces of bottle he tried to reconstruct the bottle. The base of the bottle was there but the top part was lying scattered outside the rondavel just adjacent to the window where it was thrown. The top part of the bottle was still closed with a maize cock. It was further PW 9's evidence that they then proceeded inside the house where they found the same pieces of bottle which were scattered inside the rondavel and they picked up those pieces of bottle. The items which were in the rondavel were completely destroyed by the petrol bomb. The ceiling was burnt and was removed from the base of the rondavel and had already fallen. That with the aid of their searching aids i.e. the swipes, they swiped on the window of the rondavel where they found some remainder of river sand. Some of the items which were partially burnt was the sofa and that there was a strong smell of petrol soaked into the sponge of the sofa. That somewhere within the top of the bottle a grey cloth was attached which was also in ashes, but there was a remainder of the grey cloth which was within the bottle head. That this brought him to the conclusion that a petrol bomb was used because a petrol bomb is a homemade incendiary weapon which if hauled through a target, the bottle is smashed through impact causing vapour which ignites with the droplets of the petrol forming a raging fireball, which causes fire that is accelerated during the process. That he can classify a petrol bomb as an explosive, which is defined as an unstable chemical compound in the form of solid, liquid or gas which when exposed to heat, shock and friction reaches detonation. That there are three types of explosives namely the commercial explosives used in the mining industry, the military explosives used in conventional wars and the homemade explosives i.e oblique improvised explosive devices (IED), under which petrol bomb falls. That when petrol is mixed with other chemical substances it forms a homemade incendiary weapon or device. That petrol just like gasoline and paraffin

which are substances which are capable of being burnt, are the incendiary substance. It produces more heat during the process when it is thrown through targets and that reaction instantly causes fire which does more havoc on items which have been caught by the fire.

[39] It was further PW 9's evidence that on 7<sup>th</sup> June 2010 he also visited the scene of crime at Ntabinezimpisi at the homestead of MP Shongwe. He was still in the company of 4634 Constable Dlamini. They arrived the crime scene at 3.30am and were introduced therein by Sgt P. Du Point who was with 4655 Constable Motsa from the scenes of crime department. Since it was still too dark they waited until 5.30am when it was clear and they started their investigation. That he made a walk through of the scene to analyse what actually happened. That he found the aftermath of two different scenario. The first was where a petrol bomb had been thrown into a big house through a window by the verandah. The second scenario was where an attempt was made at throwing a petrol bomb through a silver coloured mercedez benz reg. No SD 188 YG. The attempt was made through the left window of the mercedez benz, however, the petrol bomb never propagated. Just adjacent to the window in the 2<sup>nd</sup> scenario was a khaki cloth which was on the window sill of the house and there was also brown sugar on the window sill. The surrounding of the car was scattered all over with pieces of green broken bottle, white wax which was heavier at the back of the car. The target which was the left side window did not actually break but it was obvious that something had hit it, though it didn't fall apart. That assisted by the scenes of crime officer 4625 Motsa, he collected all the bits and pieces which were just lying on the ground. That the base of the bottle which was the container for the petrol was there. That petrol which was not consumed by the fire was smelling all over the place. They picked the pieces and gave it to Motsa for possession as the scenes of crime officer.

[40] PW 9 told the Court that he also made a walkthrough of the first scenario with the scenes of crime officer Motsa. That he found that a petrol bomb had been thrown into the big house through the big window by the verandah of the house. He found bits and pieces of a green coloured bottle which was much heavier at the inside of the building in the sitting room. That this gave him a clear indication that a petrol bomb was thrown from outside to the target falling inside and sending the raging fire which made a severe destruction of the items in the house. That by the window of the verandah next to the target he made some swipes and found some ashes. That inside the sitting room there were bits and pieces of broken bottle. That most of the household items in the sitting room were severely burnt. That judging by the aftermath he came to the conclusion that a petrol bomb had been used just as was used in Ebenezer. This is because due to the manner in which a petrol bomb is mixed it causes a faster destruction.

[41] Under cross-examination, PW 9 told the Court that there is no point of impact in the pictures contained in exhibits D 5 and D 6 even though the target was through that window because the petrol bomb is the incendiary which propagated the fire causing the destruction. He stated that what he meant by reconstructing the bottle at the Masuku homestead is that he tried to analyse the bottle in that the base and top were still intact given that they are harder. He further stated that the report of his investigation is in the criminal docket and that if the defence wanted it tendered in Court they should have asked for it. PW 9 stated that Mkhabela's evidence to the effect that everything inside the rondavel was burnt is not a lie, because the partially burnt sofa which he referred to in his own evidence was outside the rondavel and not inside it. He further told the Court that the term petrol bomb is a terrorist term, a generic word in the family of homemade explosives. He agreed that petrol will

normally and ordinarily ignite in whichever state for the purposes of arson or any other mild form of attack, however, it becomes a petrol bomb when it is mixed with other substances. He stated that the photograph contained in A3 does not show that a petrol bomb was thrown through the window of the mercedes benz because the bomb did not propagate. That even though officer Motsa testified that the window of the mercedes benz was damaged he was the scenes of crime officer who collected the debris relating to the petrol bomb which included, pieces of bottle, wax, brown sugar which were scattered all over the place as well as pieces of clothing. He maintained that even though the sky, as captured in A6, appears dark it was in reality already clear by 5.30am when he started his investigation at the Shongwe homestead though it was winter. PW 9 compared the surroundings in exhibits A6 and D1 which were taken 12 days apart and maintained that he could see everything when he did his investigation. He also expressed the view that it was probably the vision of the cameras used that gave the photographs different backgrounds. He confirmed that the fire in the homesteads was not limited to a specific part of the house. He stated that in the Shongwe homestead scenario 2, he gathered the broken green bottle, brown sugar, wax and the cloth which all constitute substance used in making a petrol bomb. He agreed that Mrs Shongwe was right in her evidence that there was also sand at the scene. But he failed to collect the river sand because it was burnt. He merely swiped it.

[42] PW 10 was Enoch Velakhe Kunene who lives at the Shiselweni area EndzedingKontjingila. He told the Court that he knows 1<sup>st</sup> Accused. That in the month of June, police officers came to his house asking to speak to him. That he left with the police officers to meet the other police officers who wanted to speak to him. PW 10 told the Court that when he got to the police officers they were many though he cannot remember how many and that 1<sup>st</sup> Accused was with them seated in front of them. That the police requested him, since he was an elder in the community, to go

with them, because 1<sup>st</sup> Accused had something he had to show them. That since 1<sup>st</sup> Accused was his nephew he asked him what happened and 1<sup>st</sup> Accused replied that there was something in the forest which he wanted to show to the police. That 1<sup>st</sup> Accused then showed them the way to the forest and they left for the forest with the police officers. He said 1<sup>st</sup> Accused was not handcuffed. That on arrival in the forest they found a 2litre container which the police took. PW 10 stated that he asked 1<sup>st</sup> Accused what the container was for and he replied that he was carrying it when they returned from the damage they did at the Masuku and Mkhonta homestead. He said prior to that day news about the damage done to the two homesteads was circulating. That people were talking about it and the mood of the community was that of shock about how the damage was done through bombings at the two homesteads. PW 10 told the Court that Mr Mkhonta is an MP and that he was shocked as to who would want to bomb Mr Mkhonta's homestead. PW 10 identified a 2litre container similar to the one they found in the forest.

[43] Under cross-examination, PW 10 told the Court that before he retired he had worked as a police officer (Senior Superintendent) before he joined the Swaziland Railways. He said the police did not know who he was before they came to him. He said his interactions with the police on that day did not last long maybe for half an hour. That he led a delegation to the Masuku homestead to talk about the damages to the homestead and not about the bereavement. PW 10 maintained that he could not tell from the photograph showing 1<sup>st</sup> Accused and himself if the 1<sup>st</sup> Accused was handcuffed. He said the photograph was taken in the field and that the grocery shop is far from there and it is below the grocery shop but that he does not know of a dump site in that area. He said 1<sup>st</sup> Accused told him in front of the police that he damaged the two homesteads. It was further PW 10's evidence that in his observation the container did not contain anything when it was retrieved from the forest. When a picture of the container was shown to PW 10 he agreed that it looked

like the container contained a liquid substance. He reiterated that members of the community were shocked because of the damage to the two homestead but that he does not know if anyone decided to leave to another community.

[44] PW 10 further told the Court that 1<sup>st</sup> Accused is an electrician. That he is a good person and he has never received any adverse report about him. That he knows of no problems which 1<sup>st</sup> Accused has with anybody in the community and that he did not even believe it when 1<sup>st</sup> Accused told him that he committed the offence he is accused of. Under re-examination, PW10 told the Court that he has no reason to lie against the 1<sup>st</sup> Accused.

[45] PW 11 was Majalimane Mandlakapheli Shabangu. He lives at Ntabunzimpisi area in the Hhohho region. He is the herdman of the area. He said MP Shongwe telephoned him in the morning hours to come and witness what he had just seen. He asked someone to accompany him to the Shongwe house. When they got there they found the MP with some police officers and the MP told him that his house had been bombed. PW 11 told the Court he made some observations after hearing that.

[46] PW 11 further testified that after the incident the mood of the community was one of severe shock because it was the first incident of its kind to happen in their community. He said they talked about the incident as men in the community and also went to the Umphakatsi. That the reaction of the Umphakatsi was to send someone to come and observe. PW 11 stated that they went to report to the Umphakatsi because the damage done will destroy the community; that the children will grow up learning bad habits; that people were shut up in their houses and that MP Shongwe and his family almost died. PW11 told the Court that the solution was

that the matter was with the police and the government. Nothing turns on the cross-examination of this witness.

[47] PW 12 was 2444 Detective Mxolisi Richard Mabuza scenes of crime officer attached to the regional headquarters. He told the Court that on 11<sup>th</sup> June 2010 he was on duty at Nhlangano and he received a telephone call from officer Fakudze who was at Hlatikulu police station. Mr Fakudze informed him that there was a suspect being interrogated and that he should come and take photographs. That on getting to Hlatikulu Mr Fakudze who was then with 1<sup>st</sup> Accused, introduced him to the 1<sup>st</sup> Accused as a police officer and informed 1<sup>st</sup> Accused that PW 12 was there to take photographs. That they then left for 1<sup>st</sup> Accused's homestead at Ekwenzeni after Mr Fakudze had cautioned the 1<sup>st</sup> Accused in terms of the Judges Rules. That on getting to the homestead the 1<sup>st</sup> Accused showed them his house. That he took a photograph of the homestead. This was admitted in evidence as exhibit G. That they went inside the house and 1<sup>st</sup> Accused showed them a grey trouser written rebook jeans. That he took a photograph of the rebook trouser. This was handed in as exhibit G1. That when they inspected the trouser they discovered that it was torn so they laid the trouser on the floor and PW 12 took a photograph of the trouser showing the torn part. This was admitted in evidence as exhibit G 2. That 1<sup>st</sup> Accused also showed them a balaclava and he took a photograph of that. The photograph was admitted in evidence as exhibit G 3. 1<sup>st</sup> Accused further showed them a pair of red scissors and PW 12 took a photograph of this, which was admitted in evidence as exhibit G 4. It was also PW 12's evidence that the 1<sup>st</sup> Accused also led them to the homestead of Beatrice Shongwe at Elukhalweni. He took a photograph of Beatrice Shongwe's homestead, which was admitted in evidence as exhibit G 5. That 1<sup>st</sup> Accused showed them a bag with gloves inside it and PW 12 took a photograph of that bag which was tendered in evidence as exhibit G 6. That 1<sup>st</sup> Accused also showed them a forest in the Elukhalweni area and PW 12 took a photograph of the forest which was tendered

in evidence as exhibit G 7. That inside the forest the 1<sup>st</sup> Accused showed them a white container on which was written parmalat. That PW 12 took a photograph of the container. He also took a photograph of the 1<sup>st</sup> Accused showing them the container. The two photographs were tendered in evidence as exhibits G 8 and G 9 respectively. He said they spent about 30 minutes with 1<sup>st</sup> Accused who was very cooperative with the police. PW 12 identified the grey rebook jeans, balaclava, the scissors, grey coloured gloves as well as 2 litre container.

[48] Under cross-examination, PW 12 told the Court that besides him and Mr Fakudze there were other police officers in the investigating team with them. That they were more than four in number. He said that apart from the investigating team other people were involved in the three places where 1<sup>st</sup> Accused led them for the pointing out. He stated that Mr Kunene was there when 1<sup>st</sup> Accused led them to the container in the forest. But that he does not know what Mr Kunene's role was. He was just there to take photographs and he took the photograph in exhibit G. He identified Mr Kunene wearing a blue jeans, together with 1<sup>st</sup> Accused as appears in exhibit G. This was at the scene where the container labeled parmalat was found.

[49] When it was put to PW 12 that the colour of the rebook jeans appearing in exhibit G 2 is black and the reason he can't identify it as black is because it has been there for sometime beaten by the weather, PW 12 replied that on the day the photograph was taken the reebok jeans was grey in colour as appears in exhibit G 2. He said that parts of the rebook jeans were torn and parts were cut. He stated that he does not know whether the pair of scissors was used to cut the rebook jeans. That even though 1<sup>st</sup> Accused was handcuffed at the back during the pointing out exercise he pointed out these items to them using his hands and head. PW 12 demonstrated to the Court how the 1<sup>st</sup> Accused pointed out the items with his hands even though they

were then handcuffed behind his back. He said he did not see when 1<sup>st</sup> Accused picked up the grey bag. He only took a photograph of the grey bag in the 1<sup>st</sup> Accused's hands. He said that when he took the photograph of exhibit G 8 the container contained nothing even though it was smelling of petrol. When it was put to him that 1<sup>st</sup> Accused did not volunteer the information at the pointing out without undue influence, PW 12 maintained that 1<sup>st</sup> Accused volunteered the information without any influence.

[50] PW 13 was 4634 Constable Phinda Dlamini a police officer attached to the bomb disposal unit. He is a bomb technician with knowledge in explosives. He acquired his knowledge from several institutions both within the country and outside and he has 6 years experience in the field of explosives. He told the Court that on 7<sup>th</sup> of June 2010 himself together with 3311 Tsabedze visited the crime scene at the Mkhonta homestead. Because it was already dark when they arrived the crime scene they told the Hlatikulu police to cordon off the scene until the following day. They started the actual investigation of the scene the following morning. He was with 3311 Tsabedze and 2750 Sgt Nkambule. That at the back of the house where they started the investigation, PW 13 noticed that there were broken glasses of window and a bottle brown in colour. The base of the bottle had some residue of sand. There was some sand on the window sill. That they got inside the house which was under renovation. This, PW 13 says is because there were scaffoldings in the house. That on the scaffoldings he observed a piece of cloth which was burnt. He also observed some pieces of bottle scattered all over the place which were blackened by smoke. The ceiling was also blackened by smoke. That there was also some residue of sand. There was a maize cock in the mouth of the bottle. That after analyzing the scene they came to the conclusion that the perpetrators of the crime used a *Molotov cocktail* which is currently known as a petrol bomb. This is a homemade incendiary device. He said this sort of device usually consists of a container, an incendiary, a piece of

cloth and it has to be lit before it can be thrown into a soft target, such as a window, so that it breaks. Because it has been lit the incendiary catches fire which can have a huge impact on the place which it has fallen. It is constructed in such a way that when it is thrown the incendiary with all the components scatter all over that place, sustaining the burning fire thus the things in the particular room catch fire and the whole room can be burnt. That an explosive is a mixture of chemical compounds which when exposed to heat, shock or fire reaches a certain stability in the form of energy. Thereafter, it detonates or burns. That a bomb is an explosive device which is made in a manner that when it is triggered by either shock, heat or waves it can explode. That it was the presence of the pieces of bottle, the sand, the cloth and the smell of petrol that made them conclude that the device used was a *molotov* cocktail. That the device was the bottle, the chemical was the petrol and the sand which was found in the base of the bottle was meant to sustain the burning fire after it had been smashed inside the room. That the suspect inserted the cloth in the bottle neck and covered it with the maize cock when it was thrown, the cloth pulled out and fell on the scaffolding where it was found. PW 13 identified the pieces of broken brown bottle, maize cock and grey cloth which were admitted in evidence as exhibits H, H1 and H2 respectively.

[51] Under cross-examination, PW 13 told the Court that the grey piece of cloth captured in the photo in exhibit F5 which was taken by Sgt Mkhabela is the same piece of grey cloth tendered in Court as exhibit H2. That himself and 3311 Sgt Tsabedze collected all the exhibits and gave them to Sgt 2750 Mkhabela. He said it is difficult to tell if the piece of cloth reflected in F 5 is of equal size with the piece of cloth exhibit H2. But that what he tendered in Court is the piece of grey cloth which was salvaged from the burnt ashes. When it was put to him that he did not pick up any piece of cloth from that scene of crime, PW 13 denied this. He said two pieces of cloth were found at the scene. One was completely burnt and the other one partially

burnt leaving a little piece. It was further PW 13's evidence that in whatever way petrol is ignited it will burn. That even though they left the scene for a whole night it was cordoned off and when they came back they met police officers at the scene. He does not know whether the scene was manipulated or interfered with in their absence. That even though they had left the scene for about 10 hours when they came back petrol was still smelling in the room from the broken bottles. He said the maize cock was right at the mouth of the bottle.

[52] PW 14 was Cornelia Elizabeth Bergh a Lieutenant Colonel in the South African police service attached to the forensic science laboratory as chief forensics scientist in the section. She tendered two forensic reports prepaid by herself exhibits K and K1. She also tendered a third forensic report prepared by one Eduan Pienaar Naude exhibit K2. The details of the forensic examination are contained in the respective reports. PW 14 also led oral evidence in support of these reports which it is convenient for me to refer to later in this judgment.

[53] Under cross-examination, PW 14 disagreed that her instructions were to carry out the forensic examination in terms of class characterization. She stated that she did physical and optical characterization and that she had to indicate the blue jacket and blue trousers in her report because they were exhibits handed to her which procedure required that she indicates in her report. That it is not possible to do a physical match of a burnt piece of clothing with other items of clothings. She said she carried out the instructions as contained in para 4 of exhibit K1 but could not find a physical match with the jeans trousers because the edges of the piece of fabric were burnt. She indicated that she did not state that in her report. She only stated the positive part of the findings in her report even though the report is one as every report has a negative and positive part. That because she could not do a physical match due to

the burnt edges of the piece of fabric, she went beyond to do physical characterization that are comparable. She also looked at the fibre, weave pattern and other physical characteristics. That she did not use a microscope in the report. She has a knowledge of textile, namely, weaving, patterns, identification and comparison of fibre. That the fibre in the pieces of fabric she examined was cotton. That she referred to the pair of jeans as brownish in colour in paragraph 3.2.1 of her report because that was how she observed the colour. She examined the exhibit and she has photographs of it. That people see colours differently. That she did not state in her report that the jeans was comparable with the same type of fibre which is cotton because she compiled her report as per standards and it was evaluated by another expert, however, in her report she indicated that it was of the same generic class which means that it is that same type of fibre. She stated that the fibre was pure cotton but cannot tell when it was manufactured or the type of dye used. That is the much she can say because she is not a textile expert.

[54] PW 14 further told the Court that physical match is when two or more pieces can be fit and matched together in the sense that one can tell without any doubt that they are part of each other. She however agreed that there is no absolute physical match and no absolute determination that a piece of fabric originated from the jeans. That she stated in her report that the physical characteristics of the burnt piece of cloth were such that it could be a part of the jeans, however, there is also a degree of certainty that it cannot be, that is why she used the words “could be” in her report. When it was put to her that her report is speculative and dangerous because she does not have the analytical technique to associate the fabric to any single garment, She agreed that fibre is mass produced and she cannot say that the burnt piece of cloth was definitely from the garment but she can say it could be from the garment. She stated that the exhibit she was required to examine in exhibit K is the same exhibit as is reflected in K1. That she observed the exhibit as a brown, brownish or brown coloured jeans.

That in exhibit K she used sterile microscope. That a polarized light microscope is used to determine the optical properties and that she used it to identify the fibres. That she used the sterile microscope to take out a few of the fibres and she placed it under the polarized light microscope, however, she did not give these details in her report because she was not asked to. That light microscopy is internationally accepted microscope by all forensic institutions worldwide for identification of fibres. The application is wide so it can be used for fibres and other things such as crystals, identification of explosives etc. That a sterile microscope can be used for trace evidence and debris. That microscope is used for magnification of small items to remove them. Macroscopic is used for big items. She agreed that microscope is also used for physical characterization of evidence such as gun powder residue. She said that the request in K1 was to perform a physical match and in K it was to see if the piece of cloth was comparable to the jeans. The two different procedures were adopted in the two reports. She said that a positive physical match is like a fingerprint without doubt and that she sometimes uses a sterile microscope for a physical match if the exhibit is very small. Whether the outcome is the same depends on the type of exhibit. That there is a similar outcome in K and K1. That she did not see or receive the exhibits in K2 but can only deal with the results which she can see on the photographs. She knows how the expert in K2 prepared his report which is by way of physical matching.

[55] PW 15 was 3004 Detective Asst Superintendent Sikhumbuzo Fakudze a police officer at the terrorism and organised crimes unit. The investigating officer in this case. He said that in 2010 a spate of bombings with explosives were recorded at Government officials homesteads and other Government structures. That the bombing at the Masuku homestead at Ebenezer was one of those. That this happened in the early hours of the 25<sup>th</sup> of May 2010. When he got the report he proceeded to the Masuku homestead. That when he got to the scene he found a rondavel house

roofed with tiles burning and the fire was profuse in the house at the time so much so that no one could enter the house. That there were other officers at the crime scene such as the scenes of crime officers led by 2750 Sgt Nkambule and officers from the bomb disposal unit led by 3311 Sgt Tsabedze. That since it was dark they cordoned off the scene until the following morning. That when he attended the scene the following morning he perceived the smell of petrol all over the place, and that almost the whole rondavel went up in ashes. That next to one of the windows he observed some glasses and a piece of cloth which was attached to a maize cock around the head of a bottle which also had the smell of petrol. That everything in the house was burnt to ashes and that the mother of Vusi Masuku died a few days after the incident. That the materials which were observed at the homestead were collected by the scenes of crime officers and bomb disposal unit and an inquiry opened at the Hlatikulu police station for the investigation of the matter.

[56] It was further PW15's evidence that another bombing incident involved the deceased MP Bheki Mkhonta which occurred on the evening of the 7<sup>th</sup> of June 2010. That he visited the crime scene together with scenes of crime officers and officers from the bomb disposal unit. That once again the scene was cordoned off until the morning of the 8<sup>th</sup> of June 2010 when they commenced investigations. That the house was under construction though it had been roofed. The window of one of the bedrooms was burnt. That the scenes of crime officers and the bomb disposal unit collected all the materials found at the scene.

[57] PW 15 also told the Court that in the morning of the same day 7<sup>th</sup> June 2010 there was another bombing in the homestead of the late MP Lion Shongwe in the Hhohho region. That he reached this scene of crime after it had been attended to by the other officers. He found it a dead crime scene.

[58] PW 15 further told the Court that there was a spate of other bombings around this period including that at the house of Superintendent Joshua Dlamini in the Hhohho region, the house of Inspector Gosusalus in the Lobamba area where explosives were used, one at the police quarters at the Buhleni police post, at the Mbabane and Manzini Magistrates Courts. He said all these bombings occurred within a spate of one or two months.

[59] That he was one of the investigating officers detailed to investigate the alleged bombings in the instant case. That they interviewed a lot of people around the country and based on his findings he arrested the 1<sup>st</sup> Accused on 11<sup>th</sup> June 2010 at the Ebenezer area. That he first introduced himself to the 1<sup>st</sup> Accused and then cautioned him in terms of the Judges Rules. Thereafter, 1<sup>st</sup> Accused was arrested and taken first to the Hlatikulu police station and then to Kaphunga police station where he was interviewed after PW 15 again cautioned him in terms of the Judges Rules. That 1<sup>st</sup> Accused opted to say something and he said something which was reduced down in writing. That 1<sup>st</sup> Accused further wanted to take the police officers somewhere and he was again cautioned in terms of the Judges Rules. The following day the 12<sup>th</sup> June 2010 the 1<sup>st</sup> Accused was again approached and cautioned but he insisted on taking the police officers somewhere and showing them something. 1<sup>st</sup> Accused eventually led them to some places one of which is Ekwenzeni his homestead. That in one of the houses 1<sup>st</sup> Accused pointed out to them a pair of grayish trousers which had some cuts on it, a pair of scissors and a hat. The scenes of crime officers who were then present took photographs of anything that the 1<sup>st</sup> Accused pointed out. That they then proceeded to another homestead at Elukhalweni also in Ebenezer, where the 1<sup>st</sup> Accused pointed out to them a scotch jacket dark in colour, a blue sweater top, a grayish pair of trousers, one khaki bag, cigarette lighter and one pair of

gloves. Thereafter, the 1<sup>st</sup> accused led them to a bush at Kontshingilaalso in the Ebenezer area near the home of Enoch Kunene who was requested to accompany them. That 1<sup>st</sup> Accused pointed out a 2 litre container whitish in colour. That in all these places that 1<sup>st</sup> Accused led the police officers to in the pointing out he was cautioned in accordance with the Judges Rules. Notwithstanding, he voluntarily pointed out those items. That the items seized were packaged and sent to the police headquarters for scientific comparison examination with any materials found during the investigation of this case.

[60] PW 15 further told the Court that on 16<sup>th</sup> June 2010 he together with his team arrested the 2<sup>nd</sup> Accused at the Logoba area. That 2<sup>nd</sup> Accused was informed of his rights and cautioned in terms of the Judges Rules. That 2<sup>nd</sup> Accused opted to say something. He said something which was reduced in writing. Thereafter, he was interviewed after he was again duly cautioned. That 2<sup>nd</sup> Accused again opted to say something which was reduced into writing. That 2<sup>nd</sup> Accused then wanted to show PW 15 and his team something and he was again cautioned in accordance with the Judges Rules. On 17<sup>th</sup> June 2010, 2<sup>nd</sup> Accused took PW 15 and his team to his homestead at the Mpofu area in the Hhohho region where they found two youngmen one with the surname of Shongwe. That 2<sup>nd</sup> Accused was again cautioned in terms of the Judges Rules. That at the homestead, just by the water tank in the yard 2<sup>nd</sup> Accused pointed out a pair of khaki or whitish trousers which had cuts on it. 2<sup>nd</sup> Accused further took them into the house where he showed them a grey trouser, blue top, black takkies and black wool hat. That all these items were packaged and sent to the Police Headquarters for scientific analysis. PW 15 identified all the items seized from all the pointing out exercise in this case and tendered the grey rebook jeans and container in evidence as exhibits L and L1 respectively. He further informed the Court that the khaki or whitish trouser was handed in as exhibit A9(actually A7)by Constable Nimrod Motsa. It was further PW 15's evidence that 1<sup>st</sup> Accused was

handcuffed through out the pointing out exercise which was to secure him from escaping or committing himself to any danger. 1<sup>st</sup> Accused was handcuffed at the back when they left the police station. But at the scene of crime he was sometimes handcuffed in front when he was showing them something and he also used his head and eyes.

[61] PW 15 also tendered two newspaper reports from the Swazi Observer and Times of Swaziland as exhibits M and M1 respectively. He tendered two photograph's seized from 2<sup>nd</sup> Accused's homestead as exhibits N and N1 respectively. Exhibit N is a photograph of the 2<sup>nd</sup> Accused with two other men and exhibit N1 is a photograph of the 2<sup>nd</sup> Accused with another gentleman. In N1, the 2<sup>nd</sup> Accused is holding a placard on which is inscribed the following words **"MSWATI STOP OPPRESSING BY CULTURE AND TRADITION"**. His companion is also holding a placard on which is inscribed the following words **"RELEASE ALL POLITICAL PRISONERS FOR A DECOMCRATIC SWAZILAND"**. PW 15 further told the Court that both Accused persons are members of SWAYOCO which is the youth wing of PUDEMO and the two organizations are proscribed as terrorists organisations in the country.

[62] Under cross-examination, PW 15 told the Court that one Alex Langwenya's home was also bombed in 2010 and that the said Alex is not a Government official. That he did not highlight this in his evidence in chief because he missed it just like he missed to mention the names of other Government officials who were also bombed. He insisted that when he arrived at the Masuku homestead the house was still on fire and that this was his observation. That when he arrived at the Masuku homestead he found Inspector Mabuza at the scene. That he cannot remember the exact time when they started work at the crime scene but it was between 5am and 6am and it was

already getting to daylight even though it was during winter. That it is possible to have daylight at the end of May which is the fall of winter depending on the area. That the fire was put out by the fire brigade even though it had diminished in momentum when they arrived but that he did not tell this to the Court in his evidence in chief. That he did not know what caused the fire at the Masuku homestead. This was the prerogative of the experts although it was suspected that certain explosives were used even though he did not mention the opinion of the experts in his testimony in chief. When it was suggested to him that Tsabedze and Nkambule who also attended the scene at the Masuku homestead did not mention that the house was still on fire when they arrived, PW 15 replied that he arrived at the scene first and that was his observation. He stated that he was informed by people at the scene that they tried to retrieve a few household items from the fire but most of it was burnt. However, he did not mention this in his evidence in chief where he stated that upon his arrival he found the house burning and everything in it was burnt, but that he was not telling lies in his evidence in chief because he saw no reason to mention the attempt to salvage the household items. Besides he did not see these things being done and could not tell the Court that sort of evidence which could be hearsay. He said its not correct that his failure to state the issue of the items retrieved in his evidence in chief shows that he does not have attention to details worth his 16 years experience. That in his evidence in chief he stated that almost the whole rondavel went to ashes and this is in the sense that the remains could no more be used. That his evidence under cross-examination to the effect that the structure of the rondavel was still there with cracks in it does not mean that he was lying in his evidence in chief. That he said in his evidence in chief that the Mkhonta house was under construction because of the scaffoldings in the house which were being used by the contractors but he does not know whether the house was under renovation or construction. He does not know anything about the fact that Mr Mkhonta disputed that his house was under renovation. He has only testified as to what he observed. That he interviewed Mr Mkhonta after the incident who told him that the

scaffoldings were in the house because they were putting ceilings in the bedroom but that he did not mention this is his evidence in chief.

[63] He said he went to the Shongwe homestead after the scene had been attended to. He found it as a dead scene. That this however does not mean that he was not the investigating officer of that scene because police work is not for individuals. They work in units. There were some officers who attended to the scene. He also interviewed some people at the homestead and discovered that some statements were already obtained and he obtained other statements after the interview.

[64] It was further PW 15's evidence that his findings from the investigation showed that 1<sup>st</sup> and 2<sup>nd</sup> Accused persons would know about the incidents. This, he said is because 1<sup>st</sup> Accused told some people in Ebenezer that in the face of the Masuku incident, the boys should take away from them all pamphlets and documents he gave them relating to SWAYOCO and PUDEMO and they should not mention that he had come with a certain guy to their homestead during the night of the bombings at the Mkhonta homestead. Among those boys was PW 3 Tamsanqa. That he was also informed that on the night of the 24<sup>th</sup> a certain man came to the 1<sup>st</sup> Accused's homestead at night and they disappeared and came back at midnight and early in the morning of the day the Masuku homestead was demolished the man disappeared. That later he got to know that the man was the 2<sup>nd</sup> Accused. That 1<sup>st</sup> Accused also alleged to the informers that he knows about the bombings at the Masuku and Mkhonta homesteads. That out of these informers it was only PW 3 that gave evidence and that he may not have implicated 1<sup>st</sup> and 2<sup>nd</sup> Accused in his evidence maybe because he stuck to the warning given to him by the 1<sup>st</sup> Accused not to do so. He said the other informers did not give him the same information as PW 3. They gave him other information all relating to the acts of the Accused persons. That he

will not disclose who these informers were. That PW 3 made a statement even though PW 3 did not state that in his evidence. He said PW 3's statement was not made available to the Court. When it was put to him that his version that he has informers is not true, PW 15 denied this assertion.

[65] PW 15 further told the Court, that it is not true that he played three different roles by being the officer that arrested the Accused persons, investigated the crime as well as being in charge of the pointing out. That all these functions combine as the role of the investigator. That it is common that the arresting officer is also the investigating officer. That he arrested the Accused persons without a warrant which is permitted by law if application for a warrant will occasion delay. This is in terms of the Criminal Procedure and Evidence Act as amended (CP&E). That he made a statement as an arresting officer after arresting both Accused persons. This statement is in his police notebook and that he did mention in his evidence in chief that he used his police notebook during his investigation and asked to refer to the notebook which forms part of the docket in the sense that the notebook is an official notebook and all recordings in it which form part of the case are part of the investigation which can be produced before the Court if required. The Court granted him the permission to refer to his notebook. That after he arrested the 1<sup>st</sup> and 2<sup>nd</sup> Accused he cautioned them and that the cautionary words were reduced into writing for the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons to sign even though he did not say so in his evidence in chief.

[66] PW 15 told the Court that on 11<sup>th</sup> June 2010, they arrested only 1<sup>st</sup> Accused. That on the same day they took PW 3, Mbhekeni Tsabedze, Themba Mamba and Ntokozo Dlamini but only for interview. That they were taken to Hlatikulu police station then onwards to Kaphunga police station. Kaphunga police station was given to the team to carry out the interviews because sometimes Hlatikulu police station is used as a

Court and they could not be accommodated there. That Kaphunga is not an isolated area. It is a densely populated area with a lot of homesteads around it. He denied that his reason for taking the 1<sup>st</sup> Accused to Kaphunga is because it is an isolated area and very conducive for torture. That 1<sup>st</sup> Accused would be lying if he testified that after arresting him they tortured him from morning to evening and isolated him from the other people he was arrested with. That 1<sup>st</sup> Accused was arrested in the midday and not in the morning. That 2<sup>nd</sup> Accused will be telling lies that he was tortured. That there was no reason to torture the Accused persons. That both Accused persons are telling lies about the alleged torture in their bid to evade their guilt of the offence and being sentenced for same. That he would not know why the Accused persons are now lying because they were proud of what they did even though he didn't say that in his evidence in chief. That his motive for taking both Accused for the pointing out not on the respective days of their arrest but in the morning after, was to give them the time to say whatever they wanted to say freely and flexibly.

[67] When asked to narrate what each Accused said to him, PW 15 replied that 1<sup>st</sup> Accused told him that he is a member of SWAYOCO and PUDEMO and he is against the governance system of Swaziland. 1<sup>st</sup> Accused stated that so not being happy with the system of government, they as members of SWAYOCO and PUDEMO met and decided to fight against the present government. That their chairman was Slovo assisted by 2<sup>nd</sup> Accused. The team was established to attack Government structures, Government officials which includes the police, MPS, Ministers and Chiefs. That they decided to start with the senior police officers and to manufacture some bombs made with petrol mixed with chemicals as well as explosives which will be brought in from other countries. The motive was to force a change of the governance system. They carried on with the operation and that he was the chairman of the SWAYOCO in the Shiselweni region and was tasked to carry out the operation of the bombings in that region. That he organized the

operation by buying petrol from filling stations and he met the 2<sup>nd</sup> Accused at his homestead in Elukhalweni where they prepared the explosives. That they used petrol, cloth which was cut from his trousers and a piece of maize cock. That with 2<sup>nd</sup> Accused they proceeded to the Masuku homestead where they lit the man made explosives and burnt the rondavel. He went back to his homestead at Ekwenzeni with the 2<sup>nd</sup> Accused who left early in the morning. That at the Mkhonta homestead he was joined by one Siphon who works at the Times of Swaziland. At the Mkhonta homestead they used the same system of bombing which was petrol, cloth cut from his trouser with a scissor. That 1<sup>st</sup> Accused was advised of his rights which included that such statement should be made before a judicial officer. He then requested to be taken to a Magistrate and PW 15 referred him to the general duty officers including the station commander of Hlatikulu and PW 15 believes that 1<sup>st</sup> Accused was taken to the Magistrate.

[68] PW 15 further told the Court that after the 2<sup>nd</sup> Accused was cautioned he also corroborated the statement of 1<sup>st</sup> Accused. That 2<sup>nd</sup> Accused told him that he is a member of SWAYOCO and PUDEMO and that they are trying to force the Government of Swaziland to change the governance system. That they met with some of the members and devised a strategy to coerce the Government for a change of its system. That he was in charge of the bombings at the Hhohho region and was involved in the bombings at the Masuku homestead where he was joined by 1<sup>st</sup> Accused. That he was the one with another member Du Point who bombed the Shongwe homestead using the method they used at the Masuku homestead and for this he cut a small cloth from his old trousers which has its remains left at home. That they struck the Shongwe homestead using a petrol bomb. That he was also involved in the bombings at the Buhleni police post. PW 15 stated that he had advised 2<sup>nd</sup> Accused of his rights specifically that such statement should be made

before a judicial officer and that 2<sup>nd</sup> Accused stated that he had no interest to go before a Magistrate. That it was enough for him to tell his story.

[69] PW 15 further stated that 1<sup>st</sup> Accused was taken to a Magistrate however he does not know what happened to the statement he made before the Magistrate. He said he could not testify as to the admissions of the 1<sup>st</sup> Accused in his evidence in chief since it is a confession and ordinarily inadmissible, however, since the defence elicited it in cross-examination he was at liberty to testify about it. That on 12<sup>th</sup> June 2010 the 1<sup>st</sup> Accused still insisted that he would like to go and show PW 15 something and PW 15 reduced this in writing but did not submit the statement in Court. That usually after the Accused makes a statement it is sent to the police to be filed in the docket. In this case the prosecutor required the docket on the day of the Accused's first remand and the docket was taken to the prosecutor. The statement was taken to the prosecutor on another day at which time PW 15 was away in Malawi attending a course. He denied that the reason why they did not take the 1<sup>st</sup> Accused for pointing out on the day of his arrest was because they wanted to coerce him into going for the pointing out.

[70] PW 15 stated that in exhibit G 6 taken during the pointing out exercise the 1<sup>st</sup> Accused was handcuffed at his back but that does not mean that his evidence in chief to the effect that 1<sup>st</sup> Accused was interchangeably handcuffed to the back and front is not true. That PUDEMO and SWAYOCO were proscribed as terrorists organizations following their implication in the bombings of 2008. That there was a gazette declaring them terrorists organisations and that the present Prime Minister also declared so through the media. That the import of terrorism as defined by the Suppression of Terrorism Act actually occurred in this case according to his investigation. That the pointing out was free and voluntary because it was done in

daylight and in the presence of public persons. If it was not free the Accused persons could have told these other people so. Evidence is involuntary if it has been induced by the Crown by threat or threat by a person in authority. That the evidence of the Accused persons in paragraphs 13 and 12 of their respective affidavits in support of their bail applications, to the effect that they were tortured, are afterthoughts and not true. That when they went to the 1<sup>st</sup> Accused's homestead 1<sup>st</sup> Accused told his aunt that he was involved in the bombings at the Masuku homestead and his aunt asked him why he did that because they are related to the Masuku's who have always given them help. That this is what transpired even though the evidence of 1<sup>st</sup> Accused's aunt did not directly implicate the 1<sup>st</sup> Accused in the crime. That the first time he went to the 2<sup>nd</sup> Accused's homestead he did not search any houses or harrass the youngmen he met there as is being alleged by the defence. He went there solely to plant or cultivate informers. That on the day of the 2<sup>nd</sup> Accused's arrest he did not search the house except that the 2<sup>nd</sup> Accused was arrested inside the house. Thereafter, 2<sup>nd</sup> Accused showed them some of his items which were seized and taken for further investigation. That one pair of shoes was shown to him but it is not true that he confiscated the item as alledged by the defence. That it is not true that after arresting the 2<sup>nd</sup> Accused he was first taken to the Manzini regional head quarters where he was kept until 1.30pm before taking him to Kaphunga. That what is special about Kaphunga police station is that they were well accommodated there and not that they had facilities for interrogation and torture which they used to good effect.

[71] It was further PW 15's evidence that there is a grocery store a short distance from where 1<sup>st</sup> Accused pointed out the white 2 litre container but that there is no dumping area behind the grocery store. That though there is a stream in that area it is far from where the container was placed. That the container was placed where there was grass and trees so there is no possibility that it was thrown there by wind and water. It was clear that it was placed there and it was clear that the 1<sup>st</sup> Accused knew very

well that the container was there. That he does not know of any rubbish up in that area from where the container could have been driven down by water and wind. That he got to know on the day of that pointing out that Mr Kunene was a police officer and he was called to the pointing out because he is a community member of the area and could be used as an independent witness of the pointing out. That it is standard police practice to involve members of the public as part of the investigation. That he did the same at 1<sup>st</sup> Accused's homestead by involving his Aunt in the pointing out even though he did not specifically state so in his evidence. They did not however take the Aunt for the pointing out of the container because she had informed them that she was not feeling well.

[72] PW 15 agreed that from the photograph in exhibit G 8 there was something in the container at the pointing out. He agreed that he did not open the container or smell it and it smelt of petrol, but says it was not the duty of the investigating team to open and examine the content of the container since it was going to be taken for examination. He said the container was packaged and sent for scientific examination but he did not receive a report. This notwithstanding he wants the Court to draw the inference that the container contained petrol. He said that he did not take the photographs he seized from 2<sup>nd</sup> Accused's house (N and N1) for examination to determine their authenticity therefore he cannot tell the Court that the photographs were not at any stage manipulated.

[73] PW 15 denied ever taking Mbhekeni Tsabedze into custody. He reiterated that he took him for interview on the 11<sup>th</sup> June 2010 around 8am. He denied arresting him at 4am. He stated that the preliminary interview was conducted at Hlatikulu until the Court was ready to use the place, then they moved to Kaphunga. That it is not true that Mbhekeni was handcuffed from his home to Hlatikulu police. He admitted that

the other people they took for interview were Ntokozo Dlamini, Tamsanqa Shongwe and Temba Mamba but stated that none of these people were put in custody. That there were around 6 police officers that went from Hlatikulu to Kaphunga to conclude the interview. It is not true that there were more than 14 police officers. He said that all the people taken for interview were given meals before and during the interviews. That it is not true that all these people including the Accused persons were not given food or water. That Mbhekeni and the others are not their informers. They were just people interviewed. He said he established a lot of information from Mbhekeni and the others which indicated to him that 1<sup>st</sup> Accused knows something about the matter. That it is not true that Mbhekeni and the others were released at 9pm rather they were taken to their houses in the afternoon of the same day. That it is not true that it was only at night just before they were released from custody that they given food. He denied that Mbhekeni and the others were treated as suspects. He reiterated that the Accused persons were not tortured or suffocated at Kaphunga and denied any knowledge of what suffocation does to the human body. It was further PW 15's evidence that he is bound by the Constitution in the performance of his duties and there are fundamental rights enshrined in the Constitution. PW 15 told the Court that the 1<sup>st</sup> Accused mentioned on the day of his arrest that he is suffering from epilepsy but he does not know of his present medical complaints. This, he says is because the Accused persons are not under his control but under the correctional services where they are well looked after. He stated that he does not agree that the 1<sup>st</sup> Accused developed persistent headaches as a result of his torture at Kaphunga because 1<sup>st</sup> Accused was never tortured. That it is possible that 1<sup>st</sup> Accused may be on medical treatment and goes for therapy every week but this could be because he is not used to staying at the remand wing. The only thing 1<sup>st</sup> Accused stated on the day of his arrest was that he is suffering from epilepsy.

[74] PW 15 agreed that there were other incidents of bombings in the year between 2005 and 2008. Some of these were carried out with commercial bombs. Others with petrol bombs. PW 15 further stated that he does not know the reason why the confession made by the 1<sup>st</sup> Accused to a judicial officer was not tendered in Court and denied that it was not tendered because 1<sup>st</sup> Accused reflected therein that he was tortured. He stated that if the 1<sup>st</sup> Accused was tortured he will not have been taken to a magistrate because he knows that there are certain questions that will be asked of him by the magistrate before recording the confession. That he can agree that after 1<sup>st</sup> Accused was arrested he was isolated from Mbhekeni and the others because they were not arrested. That it is not correct that 1<sup>st</sup> Accused's request to call his family after his arrest was refused. He denied that they took 1<sup>st</sup> Accused to a conference room where he sat on a bench facing more than 16 police officers standing in a semi circular formation. He denied that Mr Bhembe left prior to the torture after he punched 1<sup>st</sup> Accused in his left chin. He denied that the person who carried out the torture was Mr Mamba and also denied that Mamba stated that they should hurry with the torture before the 1<sup>st</sup> Accused's lawyers find out. That it is not true that 1<sup>st</sup> Accused was made to lie on a bench, his two hands were handcuffed underneath the bench, he was tied up with a rope from his ankle to his knees and 2 officers were assisting Mamba to control his head and that the bench was in the middle of the room. That it is not true that Mr Mamba used a tyre tube to suffocate the 1<sup>st</sup> Accused on his mouth and nose for about four times and that after the fourth time 1<sup>st</sup> Accused realized that he had urinated on himself as a result of the torture. That it is not true that Mamba indicated that the 1<sup>st</sup> Accused was not feeling anything and they changed the method of torture whereby Mr Mamba first put a thick plastic on top of 1<sup>st</sup> Accused's mouth and nose and thereafter covered it with the same tyre tube to ensure that 1<sup>st</sup> Accused does feel the effect of the suffocation. He denied it was then that 1<sup>st</sup> Accused agreed to all what the officers said because he could see that he would die. When shown some photographs alleged to be of Kaphunga police station and its surroundings allegedly taken on 17<sup>th</sup> June 2012, PW 15 disputed the authenticity of

the photographs and reiterated his testimony that kaphunga is located in a densely populated area because there will be no reason for the government to build a police station in an isolated area. He said that it is not true that Kaphunga was initially the OSSU headquarters and stated that OSSU headquarters came after Kaphunga.

[83] PW 15 told the Court that the Kontshingila area where Mkhonta's homestead is situated and Ntabunzimpisi area where the Shongwe homestead is located are more than 150km apart. He agreed that in his evidence in chief relating to 7<sup>th</sup> June 2010 he did not state that both Accused were conveyed in a vehicle. He also agreed that it is not possible for pedestrians to cover overnight a distance of about 150km. He agreed that there is no way both Accused persons could have been in the same homestead on the same night. He denied that in 2008 he was involved in a raid in which the 2<sup>nd</sup> Accused was taken into custody and released the following day.

[75] Under re-examination, PW 15 told the Court that he obtained statements from all the people interviewed. These statements were to help the prosecution so that they can be used as Crown witnesses. He stated that the assertions of the defence that his evidence lacks corroboration because he did not produce these statements is not true. This is because it is not his responsibility to produce those statements before Court. He stated that there has been only one conviction from the spate of bombings round the country since 2005 because the cases are still under investigation and some of the culprits absconded to neighboring countries. That after conducting his investigation he wrote a comprehensive report which content he has testified to orally in Court. There is therefore no reason for him to produce the report. He said he does not know why Mbhekeni Tsabedze and Temsa Mamba did not testify for the Crown.

## **DEFENCE 2<sup>ND</sup> ACCUSED**

[76] At the close of the Crown's case the defence first led the evidence of the 2<sup>nd</sup> Accused.

[77] In his defence, the 2<sup>nd</sup> Accused Bhekumusa Dlamini testified on oath and called two other witnesses namely, DW1 Zweli Mahlalela and DW2 Sicelo Mandlakayise Vilane.

[78] In his very lengthy evidence the 2<sup>nd</sup> Accused told the court that he resides at Matsapha Siphofaneni and his parental homestead is at Mpofo. He is a graduate, holds a BA Certificate in Social Sciences from the University of Swaziland. He worked as a full time volunteer with the foundation for Social Economic Justice prior to his arrest. The 2<sup>nd</sup> Accused told the Court that he was arrested in the early hours of the morning of 16<sup>th</sup> June 2010 between 7.00am and 7.30am at his home in Matsapha. He told the Court that the contingent of police officers who arrested him were led by the investigating officer Mr Fakudze. That upon their arrival the police officers did not introduce themselves to him as such. This notwithstanding, he was able to identify the investigating officer Mr Fakudze, whom he had a personal encounter with in 2008 when there were a spate of bombings reported in the media which led to numerous raids conducted around the country. The 2<sup>nd</sup> Accused alleged that his parental homestead at Mpofo was then raided and ransacked by police officers, who subsequently arrested and detained him at Mtemphusani police station at the Manzini region where he was interrogated by a team of police officers led by Mr Fakudze. The 2<sup>nd</sup> Accused told the Court that he had nothing to do with the bombings of 2008. He was released a day after his arrest. This was basically how he came to know Mr Fakudze.

[79] It was further 2<sup>nd</sup> Accused's evidence that when the police officers arrived at his residence on the 16<sup>th</sup> of June 2010, they attacked and severely beat him, hurled all sorts of insults at him accusing him of being responsible for the bombings that had been occurring around the country. That the police officers then proceeded to ransack and search the whole house, which search was conducted without his permission and without a search warrant and that the police officers took away his two pairs of shoes, namely, a black pair of shoes and green takkis. They also took a pair of grey wool gloves. He told the Court that before leaving the house with the police officers he specifically requested of Mr Fakudze to be given the opportunity to telephone his family or legal representative, as his cell phone was already with the police. Mr Fakudze however refused to grant his request. Thereafter, he was led by the police to a distance of about 400 meters where they had parked three police cars. His hands were handcuffed at his back and he was forced by the police officers to sit on the floor of the kombi rather than on a seat, which was a painful experience as both his hands were still handcuffed at his back. 2<sup>nd</sup> Accused told the Court that there were about 15 police officers present at the time of this incident.

[80] It was further the 2<sup>nd</sup> Accused's evidence that he was driven to the Manzini regional police headquarters where he was locked up in a filthy cell for about one hour and with his hands still handcuffed behind his back. He did not have a wash during this period. Thereafter, he was taken out of the cell to the car park where he boarded a white sedan police car driven by one officer named Clement Sihlongonyane. He was still handcuffed. It was further 2<sup>nd</sup> Accused evidence that he was driven in the sedan in the direction of Hlatikulu. Just after Mkhondvo river, towards Kaphunga a white police van was parked. 2<sup>nd</sup> Accused was transferred from the white sedan to the white police van and driven to the Kaphunga police station. That at Kaphunga police

station, he had to sit outside in the police van for about one hour before he was taken out of the van by the police officers who led him to the conference room where he found a contingent of about 12 police officers sitting in a semicircular formation. Mr Fakudze and Clement Sihlongonyane were part of the group. That there was a bench in front of the semi circular formation. The police officers asked him to introduce himself which he did. Thereafter, Mr Fakudze as leader of the investigation informed him that they knew everything about him and also knew that he was part of the bombings that occurred around the country. 2<sup>nd</sup> Accused told the Court that in response he told Mr Fakudze that he knew nothing about the bombings and that was when all hell broke loose and Mr Fakudze showed him a statement allegedly made by the 1<sup>st</sup> Accused person, in which Mr Fakudze alleged that he had been implicated. That the statement included a list of names, some of which he was familiar with. Namely, Slovo Shaw, Goodwill Dupoint, Thandza Silolo, Ruben Van Vuren. He told the Court that most of the people listed in the statement were members of the SWAYOCO. That he did not even know the handwriting of the 1<sup>st</sup> Accused to confirm whether indeed the statement was written by him or a fabrication by Mr Fakudze. However, he still maintained his innocence and that was what agitated the police officers.

[81] Thereafter, he was assaulted by the police officer, who grabbed him and forced him to lie on the bench. One of the police officers tied him facing upwards unto the bench with a brown rope. His hands were handcuffed beneath the bench and the rope was tied from his feet to his chest. That one police officer came with a plastic bag containing a red coloured tyre tube which had been cut to cover a person's face. That one Sgt Mamba took the tyre tube and covered his nose and mouth with the intention of suffocating him. That Sgt Mamba would press the tube against his nose and mouth several times and when he was about to lose consciousness he would release the tube. 2<sup>nd</sup> Accused told the Court that that was a painful experience. It

was also 2<sup>nd</sup> Accused's evidence that his ordeal in the hands of Sgt Mamba was all along observed by the other police officers who continued to hurl insults at him, including Mr Fakudze and Sgt Sihlongonyane who were the most senior police officers there who managed the process.

[82] It was further 2<sup>nd</sup> Accused's evidence that the reason for the suffocation was to make him admit that he was responsible for the bombings committed around the country. When he maintained his innocence the police changed tactics. They produced a white surgical glove which Mr Mamba used to cover his mouth and nose. That this was a more severe form of torture and a more painful experience which he never wanted to undergo again or wish any human being to experience. That when he was about to lose consciousness Mr Mamba would release the surgical gloves and Mr Sihlongonyane who was carrying a kettle of cold water would pour the water on his face. The water was meant to prevent him from losing consciousness. This notwithstanding, he eventually lost consciousness and when he came to, he found himself sprawled on the ground. That as he was sprawled on the ground he realized that he had soiled himself. He was led to the toilet by a police officer where he cleaned himself. He had to throw away his underwear. It was a cold winter day and his clothes were wet from the water poured on his face by Mr Sihlongonyane and his own waste and he had to endure the cold. After cleaning himself 2<sup>nd</sup> Accused went back to the interrogation room, where the police officers ridiculed him hurting his dignity. 2<sup>nd</sup> Accused alleged that the police officers boasted about deaths which had occurred in police stations. They boasted particularly about the death of one comrade Ntokozo Nkosi who was shot by the police, and one comrade Siphon Jele who died at the remand centre. The police told him that he will be a part of the statistics if he did not admit. 2<sup>nd</sup> Accused told the Court that his life was in danger, he had to be very smart and had to admit to save his life. That after he admitted, the interrogation continued with the police officers questioning him about his

involvement with PUDEMO and SWAYOCO which is the Youth wing of PUDEMO. He told the Court that he is a member of the SWAYOCO and that is why he was targeted by the police.<sup>2<sup>nd</sup></sup> Accused testified that he informed the police that PUDEMO and SWAYOCO have never believed in violence as a political strategy. That he has never seen a PUDEMO or SWAYOCO document which advocates for violence and that is why Mr Fakudze who testified as PW15 failed to produce any documentary evidence showing that PUDEMO or SWAYOCO is a terrorists organization or advocates for violence.

[83] It was further <sup>2<sup>nd</sup></sup> Accused's evidence that after he admitted in order to save his life, the police wanted him to make a statement. He was then driven back to the Hlatikulu police station where Mr Fakudze and Mr Makhanya took him into their office. In the office he was placed in leg shackles and Mr Fakudze made sure that he wrote what the police wanted. He was threatened that he would be taken back to the Kaphunga police station for further investigation and torture if he did not co-operate. That consequently he wrote the statement. After writing the statement he was locked into a cell at the police station. He asked for the time from the police officer who locked him in and was told that it was 9pm. It was further <sup>2<sup>nd</sup></sup> Accused's evidence that between 7am when he was arrested and 9pm on that day, he was not given any food to eat. His clothes were still wet. Before he was locked in the cell he had requested that Mr Fakudze should allow him call his family or legal representative but Mr Fakudze refused. Thereafter, he was locked in the cell which he alleged was dark and filthy and littered with human waste. He had to endure the stench of the human waste all through the night and that there were a few blankets in the cell which were also filthy.

[84] 2<sup>nd</sup> Accused told the Court that on the morning of the following day being the 17<sup>th</sup> of June, 2010, Mr Fakudze came to the police station with his team. They drove him to his parental homestead at Mpofu. On arrival there, they met two youngmen, Selby Shongwe and Zweli Mahlalela both employed at his parental homestead. Upon their arrival at his parental homestead these two young men were present there, making bricks. He told the Court that prior to the 17<sup>th</sup> June 2010, the police officers had visited his parental homestead on the 8<sup>th</sup> of June 2010. They met Zweli at the homestead who reported the incident to the 2<sup>nd</sup> Accused. That Zweli informed him that the police officers searched the houses that were open in the homestead. They saw a tartared khaki trouser hanging on the fence next to the water tank. They asked Zweli about that and he told them that the khaki trouser was left there by somebody who was constructing a chicken shed at the homestead. The chicken shed was completed at the end of October 2009. The trouser was lying outside for approximately 8 months. That his mother also informed him that the police officers again visited the homestead on 12<sup>th</sup> June 2010. 2<sup>nd</sup> Accused said he had visited his parental homestead on the 11<sup>th</sup> of June 2010 to attend the funeral of one Bafana Mamba a community leader which was to take place on 12<sup>th</sup> June 2010 but the funeral was postponed. It was thereafter that the police visited the homestead on the 12<sup>th</sup> of June 2010 and spoke to his mother but they did not search any house on that day.

[85] 2<sup>nd</sup> Accused told the Court that on the 17<sup>th</sup> of June 2010 when he arrived at his parental homestead with the police officers, they met the two youngmen Zweli and Selby. The police officers introduced themselves to the two youngmen. Thereafter, they went straight to the khaki trouser hanging on the fence which they had seen previously on the 8<sup>th</sup> of June 2010. 2<sup>nd</sup> Accused told the Court that he did not point out the trousers to the police officers since he did not know what they were searching for at the homestead. He told the Court that the trouser was hanging on a fence

which is about 2 meters high and since he was handcuffed the police officers took the trousers off the fence and placed it on the ground. They then asked him to pick it up from the ground which he did and the police officers took some photographs, thereafter, they put the trousers in their plastic bag.<sup>2<sup>nd</sup></sup> Accused told the Court that the police officers then wanted to search his house. Since he did not know what the police officers were looking for, the police officers searched and then took a grey trousers, a blue top, a pair of red and black takkies, and a black hat. He stated that he never pointed out any of these items to the police officers. <sup>2<sup>nd</sup></sup> Accused further told the Court that he never saw Mr Fakudze take the two photographs tendered in evidence on the 17<sup>th</sup> of June 2010 (exhibits N and N1). He expressed the strong believe that the police took the photographs from his house, not on 17<sup>th</sup> June 2010, but during the raids in 2008 when they took a lot of his documents and books from his house.

[86] <sup>2<sup>nd</sup></sup> Accused further testified that after the police officers took the items from his house, they drove him back to the Hlatikulu police station where they took him straight to the conference room and asked him a few questions on how the PUDEMO and SWAYOCO intends to bring about political change. <sup>2<sup>nd</sup></sup> Accused reiterated that PUDEMO and SWAYOCO do not advocate for violence as a political strategy. Rather, they mobilize people in Swaziland to reject the present system of government because they believe it is undemocratic. They engage people to see the good fruits of a multiparty dispensation in a bid to create a multiparty democracy in Swaziland. They thus engage people to stand up for their social political rights.

[87] <sup>2<sup>nd</sup></sup> Accused told the Court that Mr Fakudze's evidence to the effect that PUDEMO and SWAYOCO are terrorists groups is not true. That Mr Fakudze's evidence that he was at a meeting at CMAC Offices in Nhlanguano with 1<sup>st</sup> Accused, Slovo and

other comrades where they agreed to carry out bombings around the country, is not true. That Mr Fakudze's evidence that Slovo was elected chairman of that group and 2<sup>nd</sup> Accused his deputy, is not true and that Mr Fakudze failed to present minutes of that meeting. 2<sup>nd</sup> Accused further told the Court that the Constitutions of both the PUDEMO and SWAYOCO are clear that all major decisions are taken at the National Congress convened by the National Executive Committee chaired by the president at that particular time. It follows that there was no way they could have convened the alleged meeting at Nhlanguano as stated by Mr Fakudze. This is because at the alleged time he did not occupy any position in SWAYOCO. He was not a member of the executive committee. He was elected as president of SWAYOCO in October 2010 after his arrest, prior to that he was chairperson of the SWAYOCO in the Lubombo region. The only time he occupied a senior position in SWAYOCO was between early 2008 and January 2010 as regional chairperson.

[88] It was further the 2<sup>nd</sup> Accused's evidence that he is expected as a member to abide by the organizational decisions made in SWAYOCO and PUDEMO, therefore, he would not go against the decision not to use violence as a political strategy. He was targeted by the police in this case because he is a member of the SWAYOCO. This, according to 2<sup>nd</sup> Accused is because out of all the youth political formations in the country, SWAYOCO is the only radical organization prepared to sacrifice for a better life of the youths of Swaziland. It was also 2<sup>nd</sup> Accused's evidence that the police questioned him about his relationship with the 1<sup>st</sup> Accused and he told them that he knew that 1<sup>st</sup> Accused was a member of the SWAYOCO the last time he met him. The last time he had any political engagement with the 1<sup>st</sup> Accused was at a SWAYOCO congress convened in May 2008. Apart from that he has never been in 1<sup>st</sup> Accused's homestead and the 1<sup>st</sup> Accused has never been in his parental homestead. .

[89] It was further 2<sup>nd</sup> Accused's evidence that the denial by the police that they were tortured is not true. He said that he knows all the victims of the bombings but he does not know Masuku and Mkhonta on a personal level. However, he knew MP Shongwe on a personal level as he was his father's relative. 2<sup>nd</sup> Accused also stated that he has never seen the Masuku or Mkhonta homesteads. He did not know where these homesteads were located but he knew the Shongwe homestead which was about 7 or 8kms away from his home and he had been there before as they are related. 2<sup>nd</sup> Accused further testified that on the 25<sup>th</sup> May 2010 he was at his parental homestead at Mpofu with Zweli and his grandmother. That though that date fell on a mid week, he had to rush to his parental homestead as was his custom, when there was a crisis with the piggery which he was then operating. For instance, when he needed to give medication to the animals, he had to rush home even in the middle of the week. 2<sup>nd</sup> Accused also told the Court that on the 7<sup>th</sup> of June 2010 at the time of the incident he was in his rented flat at Mhlaleni Manzini with his friend one Sicelo Vilane, who was attending a course in one of the colleges in Manzini and was thus staying with him from January 2010 up until the date of his arrest.

[90] 2<sup>nd</sup> Accused told the Court that Mpofu is in the far east and Hlatikulu is in the far west south of the country. That he does not own a motor vehicle, so he uses public transportation to go from point to point. That during the night there is no public transport. The latest transport from Manzini to Mpofu is by 5pm and the earliest transport from Mpofu to Manzini is around 5am. He told the Court that he had no reason to commit the alleged offences. He did not commit the offences and he will not be able to differentiate between setting fire on houses and bombing them. That Mr Fakudze's evidence to the effect that he was chairman of SWAYOCO and was tasked with the bombings are blatant lies.

[91] 2<sup>nd</sup> Accused told the Court that Mr Fakudze's testimony to the effect that they carried out the operation by purchasing petrol from different petrol stations and that he met the 1<sup>st</sup> Accused in his homestead where they prepared the petrol bombs are blatant lies. That he has no knowledge on making homemade explosives and that he never told Mr Fakudze any of these things. He denied ever telling Mr Fakudze that he was joined at the Mkhonta homestead by one Siphon who works at the Times of Swaziland. He denied Mr Fakudze's evidence that he and 1<sup>st</sup> Accused and other members were trying to change the governance system at the time and were in charge of the bombings of the Hhohho region. 2<sup>nd</sup> Accused denied ever having gone to South Africa to undergo military training as was alleged by Mr Fakudze. He said he never volunteered any of the information which Mr Fakudze alleged that he volunteered to him. He reiterated that Mr Fakudze took a written statement from him under duress.

[92] 2<sup>nd</sup> Accused also told the Court that Mr Fakudze's failure to produce the two informants whom he alleged had informed him about the 2<sup>nd</sup> Accused's activities and the bombings and his failure to produce any documents in proof, shows that Mr Fakudze was not telling the truth. The 2<sup>nd</sup> Accused further testifies that no DNA sample was ever taken from him after his arrest, no finger prints were taken from the scenes of crime and none of the witnesses testified seeing him at any of the crime scenes, this shows that there is nothing to connect him physically to the scenes of crime. That the forensic evidence does not support the allegation that he is guilty of the offence. This, 2<sup>nd</sup> Accused alleged is because the author of the forensic report exhibit K2 Mr Eduan failed to attend Court to testify and for his evidence to be tested under cross-examination. Secondly, the piece of greyish cloth taken from Mr Shongwe's homestead was not burnt. This conflicts with the testimony of the bomb

experts who alleged that the piece of cloth was used to detonate the petrol bomb by lighting it with fire. 2<sup>nd</sup> Accused expressed his belief that the grey piece of cloth was not originally from the grey pair of trousers taken from his homestead. His view is that it was planted at the scene of crime by the police officers in their bid to implicate him in the crime.

[93] 2<sup>nd</sup> Accused further denied ever acting jointly with the 1<sup>st</sup> Accused on the 25<sup>th</sup> of May 2010 as alleged in the charges. He never met the 1<sup>st</sup> Accused either on the 25<sup>th</sup> May or 7<sup>th</sup> June 2010. 2<sup>nd</sup> Accused told the Court that from his reading of paragraphs 4 to 6.2 of Ext K2 when juxtaposed with the photograph in exhibit A8, what is referred to in evidence as torn piece of cloth and torn trousers, have not been identified. The report does not refer specifically to the colour of the trouser or the colour of the torn piece of cloth.

[94] 2<sup>nd</sup> Accused agreed that he was present when the photograph of the trouser contained in A8 was taken. He stated that the trouser belongs to one Diki Dlamini who was constructing a chicken shed at his homestead in 2009, when Diki left he left the trouser there because it was too old. Since 2009 the trouser has been lying outside. No one was using it.

[95] 2<sup>nd</sup> Accused told the Court that he cannot identify any piece of cloth on the bottle neck of the photograph contained in exhibit D4, because the photograph is not clear. That exhibit N shows his photograph together with his two friends Themba Shiba and Maphevu Mamba and re-stated his belief that the photograph was seized by the police in 2008 and not on 17<sup>th</sup> June 2010. 2<sup>nd</sup> Accused further stated that the photograph contained in N1 was taken in South Africa in 2008 when they had gone

to deliver a memorandum to the SADC heads of state congress held in Sandton. The memorandum was specifically calling for the democratization of Swaziland and Zimbabwe. It was a joint activity of Swaziland and Zimbabwe who were demanding for change in their countries. It is not true as alleged by Mr Fakudze that the photos are related to terrorists activities. They were public protests. The words inscribed in exhibit N have no terrorists connotation. They are merely two political messages which were displayed publicly in South Africa.

[96] 2<sup>nd</sup> Accused told the Court that prior to his arrest he was working for the foundation for socio-economic justice which is an NGO. The NGO deals mainly with community based organizations, the core component of which was to help the organisations with capacity building in terms of democracy, constitutionalism and human rights. His job was to help with the education of these organisations. His job entailed going out to the communities where these organizations were located and filing reports with the project manager about their engagement with these organisations. His work as a member of SWAYOCO also entailed mobilizing the youth of Swaziland to stand up for their socio-economic and political rights. As an activist he would engage from time to time in community struggles and national protest actions with the sole objective of making the call for democracy in Swaziland loud and clear. He is not a terrorist. He is involved in community development.

[97] Under cross-examination, 2<sup>nd</sup> Accused told the Court that he has been a member of SWAYOCO for 7 years. He told the Court that before he was incarcerated in October 2010, two SWAYOCO regions had already nominated him to take the presidency of SWAYOCO. His election as president of the organization continued even though he was incarcerated. He agreed that it was his active involvement in SWAYOCO affairs that informed his election as president even in the face of his

incarceration. 2<sup>nd</sup> Accused further testified that their fight for change and better life in the society is not a physical confrontation. The fight involves raising the consciousness of the people about their situation, for instance why are they poor? That the cause of poverty in the country has been identified to be linked to the present political system which does not allow people to have political power and a government of their choice which will then address their socio-economic needs. It was further 2<sup>nd</sup> Accused's evidence that the present government is not democratically elected as most of the political parties in the country are proscribed. He stated that the government of Swaziland is the cause of the poverty of the people.

[98] 2<sup>nd</sup> Accused told the Court that he is aware that SWAYOCO had been declared a specified entity under the Suppression of terrorism Act 2008. He said he is not aware that it is an offence to be a member of such a specified entity. He said he did not enquire why SWAYOCO was specified because at that material time he did not hold any position in the organization. He became president of SWAYOCO in 2010, 2 years after its prescription. When it was put to him that SWAYOCO and other organisations were specified because they had knowingly committed terrorists acts, the 2<sup>nd</sup> Accused denied this. He maintained that SWAYOCO is not a terrorists organization.

[99] When it was suggested to the 2<sup>nd</sup> Accused that it was never put to PW15 that the admissions he allegedly made to him were not true, 2<sup>nd</sup> Accused denied this. He denied that he only disputed those admissions as a defence witness. He maintained that the admissions he allegedly made to PW15 were challenged under cross-examination of PW15. 2<sup>nd</sup> Accused told the Court that on 17<sup>th</sup> June 2010 when they went to his parental homestead, they spent between 30 minutes to one hour there and in the presence of Selby and Zweli. That he could not tell them about the ordeal he

suffered in the hands of the police on the 16<sup>th</sup> of June 2010 because the police officers were still there and he was not allowed to speak to them either privately or in the presence of the police.

[100] 2<sup>nd</sup> Accused told the Court that he first appeared in Court on 18<sup>th</sup> of June 2010. That on that day he did not tell the Court about his ordeal on the 16<sup>th</sup> of June because he was in shock and did not know where the police would take him after his arraignment. He said he was incarcerated into the correctional facility on the 18<sup>th</sup> June 2010 and he is aware that the correctional officers enquire into the health of their inmates. However, he never underwent any health enquiries by the correctional officers when he was admitted at the correctional institution. He did not also tell the correctional officers of his ordeal on the 16<sup>th</sup> June 2010 because he had his own fears. When it was put to him that he did not inform Selby, Zweli, the Court on his arraignment and the correctional officers when he was booked about his alleged torture because he was not actually tortured, 2<sup>nd</sup> Accused denied this.

[101] 2<sup>nd</sup> Accused told the Court that prior to 17<sup>th</sup> June 2010 he did not have any misunderstanding with Selby. He agreed that Selby testified that he pointed out the khaki trousers to the police and that the police did not frog march him into the homestead. 2<sup>nd</sup> Accused however told the Court that Selby's evidence was not true, even though he does not know why Selby would lie against him other than for fear of the police.

[102] 2<sup>nd</sup> Accused further testified that he first learnt that MP Shongwe's residence had been destroyed from the media. That must have been a few days after the incident. He did not go to the Shongwe's house to pass his condolences because traditionally

and culturally condolences are sent by senior members of respective families and he is not a senior member of his family. There were his grandparents and parents at that time.

[103] It was further 2<sup>nd</sup> Accused's evidence that the message he sought to disseminate through exhibit N1 was that a monarchy should never at any time use culture to deny people their God given rights, such as multiparty democracy which is the universal trend.

[104] Under re-examination, 2<sup>nd</sup> Accused told the Court that he thinks if he had told Zweli about his ordeal on 16<sup>th</sup> June 2010 he would have been assaulted by the police. He told the Court that on his first arraignment in Court on 18<sup>th</sup> June 2010 he did not take the stand to give evidence or testify. He was not given any chance to speak before Court to enable him inform the Court about his torture. Even if he was given the opportunity to speak in Court on that day he still wouldn't tell the Court about his torture because he feared for his life and this was also what motivated him not to inform the correctional services of the incident. 2<sup>nd</sup> Accused said this was especially in view of the death of comrade Siphos a member of PUDMO at the Sidwashini Correctional in May 2010, who was found hanging at the prison cells after only one night there. He also had a fear of the correctional officers whom he had seen before being indiscreet and violently dispersing protesters together with the police. The mandate of the correctional officers it is obvious did not end within the precinct of the correctional institutions but was highly policed just like the police. 2<sup>nd</sup> Accused stated that Selby Shongwe cried in Court when giving his evidence thus his belief that Selby was afraid of the police. He said he raised the issue of his torture in his bail application in 2010 which was filed a few weeks after his arrest.

[105] DW1 Zweli Mahlalela told the Court that he is resident at the 2<sup>nd</sup> Accused's parental homestead at Mpofo where he is an employee. He stated that on 21<sup>st</sup> May 2010, 2<sup>nd</sup> Accused came to his parental homestead to give medication to his chickens. Thereafter, he saw 2<sup>nd</sup> Accused when he was brought by the police even though he could not recall the exact date of the incident. That when the police arrived at the homestead he was in the company of Selby (PW 8) and the police found them laying bricks. The police said they must follow them. They followed them to 2<sup>nd</sup> Accused's house where the police took some clothes and put them in a bag. The police were with 2<sup>nd</sup> Accused in the house and DW1 was standing at the door. After they took the clothes one of the police officers pushed 2<sup>nd</sup> Accused with his baton saying that he had placed his father's picture on the wall. The police officer then uttered an insult. DW1 told the Court that the picture in issue was the picture of Mario Masuku. That thereafter they went outside and the police took a trouser hanging on a pole and put it down and told 2<sup>nd</sup> Accused to take it. 2<sup>nd</sup> Accused took the trouser and the police took photographs. Thereafter, they boarded their vehicles and drove off.

[106] DW1 further testified that this was not the first time that the police came to the homestead. He said the police were alone when they first came to the homestead. That on that occasion when the police officers alighted from the car, they surrounded the homestead. He said four of them who were left inside the car came out and asked them where 2<sup>nd</sup> Accused was. He said he was then with Selby and the police did not tell them why they were looking for the 2<sup>nd</sup> Accused. They told the police that they did not know where 2<sup>nd</sup> Accused was. The police officers started pulling them with their clothes. Thereafter, they entered into the house and searched but they did not find anything. He said after this incident the police never came back to the house again until they came with the 2<sup>nd</sup> Accused. That he agrees with Selby's evidence to the effect that when the police came to the homestead on 17<sup>th</sup> June 2010, they

stopped them from work. However, he does not agree with Selby that the police told them that 2<sup>nd</sup> Accused had something to show them.

[107] DW1 further testified that when the police were going away with 2<sup>nd</sup> Accused they told them i.e. DW 1 and Selby that they will be needed as witnesses. He further told the Court that when 2<sup>nd</sup> Accused came with the police he appeared to be shivering and feeling cold. When he looked at his eyes he could see that they were red because the 2<sup>nd</sup> Accused had been crying. DW1 further testified that he could see that the relationship between 2<sup>nd</sup> Accused and the police was not good because they were pushing him around whenever he was to do something and that 2<sup>nd</sup> Accused was doing what he was told.

[108] Under cross-examination DW1 told the Court that he does not remember calling the 2<sup>nd</sup> Accused to tell him that the police were looking for him because the incident took place a long time ago. That on the first occasion i.e. 8<sup>th</sup> June 2010 the police officers asked him about the khaki trousers on the wall and he told them the owner. He said he told the 2<sup>nd</sup> Accused about the incident when he came home but cannot recall the exact date. DW1 told the Court that he omitted to give this evidence about the khaki trousers in his evidence in chief because he was afraid as some of the police officers involved were in Court when he testified. When it was put to him that the reason why he failed to divulge this information is because it is a fabrication, he denied this. DW1 stated that he cannot remember whether he told the 2<sup>nd</sup> Accused that the police manhandled him when they visited the homestead. When it was put to him that the question of manhandling him was neither put to him or to Selby (PW 8) who he was with at the material time of the alleged incident or to the 2<sup>nd</sup> Accused, DW1 replied that he could say nothing about that.

[109] DW1 told the Court that 2<sup>nd</sup> Accused's evidence to the effect that when the police came to the house on the 17<sup>th</sup> of June 2010 they went straight to the khaki trouser is not true. He insisted that the police officers first went to the 2<sup>nd</sup> Accused's house before going to the trouser.

[110] DW1 testified that though the police officer were inside the house with 2<sup>nd</sup> Accused and he was outside the house by the door, he could see what was happening inside and would hear some of what was being said but not all because of the noise. He further told the Court that he does not know what made the 2<sup>nd</sup> Accused not to tell the Court that he was pushed with a baton by a police officer when he testified and that he thinks PW8 was afraid to divulge this information when he testified considering the way he was manhandled by the police when they visited the homestead. That the police officers came with 2<sup>nd</sup> Accused to the homestead in the morning around 8am and 9am and since it was the start of winter and at the Hhohho region, he could not dispute that 2<sup>nd</sup> Accused was shivering because of the cold as he was not wearing proper apparels – like a coat. He said the police allowed the 2<sup>nd</sup> Accused to pick up a coat from his homestead and wear it. This was after they freed one of his hands from the handcuff. This, DW 1 asserted happened after the police had retrieved the items from the homestead.

[111] DW1 further told the Court that he did not see who identified the items that were taken from 2<sup>nd</sup> Accused's house as he could not see everything going on in the house due to the fact that there were a lot of people in the house and they were walking up and down and obstructing his view. That 2<sup>nd</sup> Accused's red eyes could have been caused by other things other than the event of his crying. However, that was the only way he could describe the 2<sup>nd</sup> Accused's appearance when he testified in chief.

[112] DW1 denied that he had been schooled to testify as he did about the redness of 2<sup>nd</sup> Accused's eyes. He also stated that he could not dispute that even a late night's sleep could cause redness of the eyes.

[113] DW2 was Sicelo Mandlakayise Vilane. He told the Court that the 2<sup>nd</sup> Accused has been his friend since 2007. He said that on the day of the incident 7<sup>th</sup> June 2010 he was with 2<sup>nd</sup> Accused with whom he was staying in the same house at Manzini. That he started staying with the 2<sup>nd</sup> Accused from January 2010. That he is aware of the 2<sup>nd</sup> Accused's daily activities. That 2<sup>nd</sup> Accused works with an NGO and he used to wake up daily and go to work. 2<sup>nd</sup> Accused was also running a farming project back home.

[114] DW2 testified that 2<sup>nd</sup> Accused is a member of the SWAYOCO and that he does not have a good relationship with the police. This, DW2 says is because on one occasion when he was sitting with the 2<sup>nd</sup> Accused and four other friends of their's, they were picked up by the police and locked up at the Big Bend Correctional Services and tortured. Thereafter, a bad relationship developed between the 2<sup>nd</sup> Accused and the police and this is also informed by 2<sup>nd</sup> Accused's political beliefs which are not welcome by the elders of the country. That 2<sup>nd</sup> Accused is not the only victim of torture by the police. DW2 alleged that he has also suffered torture by the police and has no good relationship with them. In fact he does not like the police. DW2 testified that he does not know where 2<sup>nd</sup> Accused was on 25<sup>th</sup> June 2010.

[115] Under cross-examination, DW2 told the Court that he is a member of both the PUDEMO and SWAYOCO. There was no re-examination.

## **DEFENCE 1<sup>ST</sup> ACCUSED**

[116] The 1<sup>st</sup> Accused Zonke Thokozani Tradewell Dlamini testified on oath and called two other witnesses whom I shall refer to in this judgment as DW 3 and DW 4 respectively. 1<sup>st</sup> Accused told the Court that he is an electrician. That he is innocent of the offences charged. That on the 25<sup>th</sup> of May 2010 he was at his parental homestead at Egwenzeni which is in the Shiselweni region. He told the Court that Egwenzeni is about 7kms away from Ebenezer and that it is true that he is related to Vusi Masuku. He has never had any disagreements with Mr Masuku. He confirmed MrMasuku's evidence that he at sometime contracted him to electrify his house. That he first heard that the Masuku homestead had been burnt on the 26<sup>th</sup> of May 2010 and he was shocked just like other members of the community. He confirmed the evidence of PW3 that on 7<sup>th</sup> June 2010 he arrived with another man at PW3's homestead where he slept the night over until the following morning and he left. He told the Court that the other man was one Machea Dlundlu. He said Machea had asked him to help him with electrical practicals.

[117] He said he was arrested for these offences and charged on the 11<sup>th</sup> of June 2010 around 8am. On that day he left his home at Egwenzeni and proceeded to the homestead of Beatrice Shongwe at Elukhalweni to pick up his work tools. After that he proceeded to the bus rank at Elukhalweni near Beatrice's home. On getting there he found a kombi which had police officers seated inside. One of the police officers alighted from the kombi and asked him whether he was Zonke Dlamini. The 1<sup>st</sup> Accused answered in the affirmative. The police officer told him that he must go with him to the kombi. 1<sup>st</sup> Accused asked the police officer what he had done and the police officer replied that all he could say was that 1<sup>st</sup> Accused was arrested and he would hear the details of his arrest where they were going. That he obeyed and did as the police officer said. He told the Court that there were about 14 police

officers inside the kombi all male. That when the kombi was about to move he asked to make a call to his relatives but the police officers refused and took his cell phone from him. He also asked to make a call to the homestead where he was employed to work on that day but the police officers refused. Rather, they drove him to his work place where he reported to his employers about his arrest.

[118] Thereafter, he was driven to the Hlatikulu police station. He was taken to the conference centre at the police station where he found about 18 police officers seated in a semi-circular formation. He was given a chair by the police officers and he sat at the centre and one of the police officers, one Bhembe, started talking. Bhembe asked him to tell them who bombed the Masuku and Mkhonta homesteads and 1<sup>st</sup> Accused replied that he does not know. That at his response all the police officers started talking at the same time hurling all sorts of insults at him. They told him to stand up from the seat. They told him that they knew that he bombed the two homesteads all they wanted from him is who he was with. 1<sup>st</sup> Accused said he maintained that he did not know anything. Thereafter, all the police officers stood up, left the room and left him alone. That a short while later an elderly police officer (though he looked young) came into the room and told him to tell him the whole truth if not the other police officers will take him away to where the elderly police officer will not be able to help him. 1<sup>st</sup> Accused replied that he does not know what they were talking about. The elderly police officer then left and he was called to come out of the conference room. 1<sup>st</sup> Accused further told the Court that when he went outside in front of the police station, he found some of his relatives and one community member there, namely:- Ntokozo Dlamini, Mbhekeni Tsabedze, Thamsanqa Shongwe and Themba Mamba. 1<sup>st</sup> Accused told the Court that he was initially handcuffed together with Mbhekeni. Later Mbhekeni was handcuffed with one of the other relatives of his and 1<sup>st</sup> Accused was handcuffed alone behind his back. Thereafter, he was taken to the

white police van whilst the others were put inside a kombi and this was how he was separated from his relatives.

[119] 1<sup>st</sup> Accused told the Court that when he first saw his relatives in front of the police station he had tried to find out from them why they were there but the police intervened and stopped their conversation. It was further 1<sup>st</sup> Accused's evidence that they were all transported to Kaphunga police station in the different vehicles. That the distance from Hlatikulu to Kaphunga is 57km. Upon getting to Kaphunga he asked a police officer what the time was and he was told that it was 11am. That he was taken to the conference room at Kaphunga where he found about 20 policemen seated in a semi-circular formation. 1<sup>st</sup> Accused was seated on a bench. Bhembe the police officer then spoke to him telling him that they were not playing games and that he should tell them with whom he bombed the homesteads. 1<sup>st</sup> Accused gave the same reply he had given them at the Hlatikulu police station which is that he does not know anything about the offence. Bhembe told the other police officers to continue and he will come back to check on them. Thereafter Bhembe and 2 other officers left the room. 1<sup>st</sup> Accused testified, that at the departure of Bhembe another officer whom he later came to know as Mr Mamba, took over. Mr Mamba according to 1<sup>st</sup> Accused, asked him that since he was a martyr they were going to see how he would end as such and 1<sup>st</sup> Accused didn't understand why Mr Mamba was telling him that. That as Mr Mamba was speaking to him one of the police officers told Mr Mamba to hurry up before the attorneys hear. This, 1<sup>st</sup> Accused told the Court was said probably because before they departed the Hlatikulu police station for Kaphunga he had asked to speak to both his family and his attorneys but his request was refused. That the police officers then laid him on a bench facing upwards with his hands handcuffed beneath the bench. They used a rope to tie him up from his ankles to his waist. Mr Dlamini who was driving the kombi and whom he knew from football matches, held his feet, while Mr Mamba took out a tyre tube rectangular in shape, which he placed

over 1<sup>st</sup> Accused's eyes, mouth and nose in a bid to suffocate him. Mamba had stretched the tyre tubes and it was impossible for 1<sup>st</sup> Accused to breath as it was pressed against his eyes, nose and mouth. When the police saw that the 1<sup>st</sup> Accused was about to lose consciousness they removed the tyre tubes and questioned him. 1<sup>st</sup> Accused told the Court that he maintained his innocence and the police repeated the suffocating process.

[120] It was also 1<sup>st</sup> Accused's evidence that after a while the police expressed the view that the method employed to torture him was not effective, they then produced a plastic bag which they gave to Mamba. Mamba first put the plastic bag over 1<sup>st</sup> Accused's face and then placed the tyre tubes on top of it and pressed these items on his face a little longer than before. 1<sup>st</sup> Accused told the Court that he heard some sounds in his ears. When the police realized that he was about to lose consciousness they took the items away from his face. That because he maintained his innocence the police repeated this process several times until he lost consciousness. When he regained consciousness he discovered that he had wet himself. It was further the 1<sup>st</sup> Accused's evidence that for fear of being killed by the suffocation process, he admitted what the police wanted him to admit which is that he had bombed the Masuku and Mkhonta homesteads. He told the Court that the suffocation process lasted from 11am until evening. 1<sup>st</sup> Accused told the Court that once he started talking Mr Bhembe came back and led the interrogation session. He said that the other police officers intervened in the interrogation whenever he answered a question in a way they did not want. He thus answered all the questions in the way the police officers wanted him to. Thereafter, Mr Bhembe gave him a paper on which he had written some sub topics on how he was going to write his statement and cautioned him that he was to write what they talked about during the suffocation session and nothing else. That he wrote his statement which took a very long time because his mind was not in the right place.

[121] It was also the evidence of 1<sup>st</sup> Accused that the much he remembers of the statement he made at Kaphunga is that he is a member of PUDEMO and SWAYOCO. He joined the organization in 1996. That what led to the bombing of the two homesteads was a meeting held at Nhlanguano at the CMAC offices with five other people. That is where they took the decision to bomb government offices, police headquarters and the chiefdoms. That in his statement he mentioned the names of other members including Siza, Slovo, Havana and others. He stated that he does not know the surnames of all these people but they were given one region each namely Lubombo, Hhohho, Shiselweni and Manzini respectively. The last person was the co-ordinator who was co-ordinating the other members. 1<sup>st</sup> Accused told the Court that in his statement he indicated that the motive for the bombings was a speedy change of government. He also stated that he used petrol to bomb the Masuku homestead. He carried out the bombing together with Siza and that he was with Siphohle when he bombed the Mkhonta homestead. That he also enumerated in his statement the clothing items which he wore during the bombings which include the clothing items taken from his homestead and tendered in Court as exhibits, as well as a few others. 1<sup>st</sup> Accused enumerated these items as a black bag, a large green backpack, a black scotch jacket, navy blue wollen gloves, a pair of scissors with orange handles, a pair of black jeans of Reebok label and a maroon hat (a balaclava). It was further 1<sup>st</sup> Accused's evidence that after writing and signing the statement it was left with one police officer. Thereafter, they left for Hlatikulu.

[122] 1<sup>st</sup> Accused told the Court that Mr Fakudze's testimony to the effect that he was advised of his rights, particularly, that such confession should be made before a judicial officer is not true. He said that on Saturday the 12<sup>th</sup> of June 2010, the police officers told him that he had to go to a magistrate and make a confession. He said he did indeed see a judicial officer. That he informed the judicial officer that he was told to come and see him by the police officers. He narrated to the magistrate the

whole story about his torture at Kaphunga and the fact that he admitted bombing both the Masuku and Mkhonta homesteads due to the torture. 1<sup>st</sup> Accused told the Court that the magistrate wrote down everything at the end of which himself and the magistrate signed the statement. That Mr Fakudze's evidence that he requested to go to the magistrate is not true, because that was the first time he had ever been arrested and he did not know the appropriate steps to take.

[123] 1<sup>st</sup> Accused further told the Court that Mr Masuku used to engage him to do electrical work in his house. That the last time he did such work in Masuku's house was in the year 2006. It was also 1<sup>st</sup> Accused's evidence that on the 12<sup>th</sup> of June 2010 when he went to his homestead with police officers, he told Beatrice Shongwe that he had come to collect clothes he used at the Masuku homestead because that is what the police officers told him to tell the people at his homestead. He told the Court that he was forced to say that more especially because of the torture that he had suffered the previous day at Kaphunga, but that there was no truth in what he told Beatrice Shongwe. That when they arrived Beatrice Shongwe's homestead, he met her together with his son Musa Dlamini and Mbhekeni Tsabedze. They entered his house in that homestead with Mbhekeni and the police officers. The police officers took some of the items he had mentioned earlier in his statement namely a black bag, light green backpack, a scotch jacket, a blue sweater and blue wollen gloves. 1<sup>st</sup> Accused told the Court that since his hands were handcuffed behind his back he was using his head to point at these items and the police took photographs and that Mbhekeni was assisting to take those items and give them to the police. That Mr Fakudze was present through out the pointing out exercise. MrFakudze was also present at Hlatikulu when 1<sup>st</sup> Accused asked to be given the opportunity to phone his attorney and it was Mr Fakudze that replied as to whether 1<sup>st</sup> Accused gave the Mkhonta and Masuku homesteads the opportunity. Mr Fakudze was also among the

team of senior police officers who were with Bhembe and leading the team during the interrogation at Kaphunga.

[124] It was further the 1<sup>st</sup> Accused's evidence that quite apart from the pointing out at Beatrice Shongwe's homestead, he had first pointed out some items at his parental homestead at Egwenzeni on the same 12<sup>th</sup> June 2010. 1<sup>st</sup> Accused told the Court that when they got to his parental homestead the police told him that he must tell his mother that he had been arrested. Thereafter they entered the house and took a pair of scissors with orange handles and the maroon hat (balaclava). Then they proceeded to another bedroom being used by his nephew and younger brother and they took the black rebook jeans. He pointed at these items with his head and the police took photographs and then took the items. That the items taken from his homestead have no relationship with the offences with which he has been charged except that the police officers said he must show them the clothes he was wearing and that MP Shongwe's wife said nothing about him when she testified about the fire in her homestead on the 7<sup>th</sup> of June 2010.

[125] 1<sup>st</sup> Accused also testified that he knew 2<sup>nd</sup> Accused in the PUDEMO and SWAYOCO organisations way back in May 2008. They met at a SWAYOCO congress. He did not have any relationship with the 2<sup>nd</sup> Accused prior to that. From 2008 he was leading the youth section and he later joined the task of developing communities. He turned 35 years in 2008 and this is the limit of the age of a member of SWAYOCO. Later he was not active in the youth section because his age no longer permitted this. He was supposed to join the mother body PUDEMO but did not. He was thus distanced from the organization and that was the last time he was with 2<sup>nd</sup> Accused. After that he met 2<sup>nd</sup> Accused at the High Court on 18<sup>th</sup> June 2010

and they were both remanded at Sidwashini. From 2008 to 2010 he never met 2<sup>nd</sup> Accused.

[126] 1<sup>st</sup> Accused further stated that his treatment at the Kaphunga police station by the police officers violated his constitutional right not to be subjected to inhuman and degrading treatment as is guaranteed by Section 14 (1) (e) of the Constitution Act. He also told the Court that the incident that occurred at the Masuku homestead was common in the country but not common in his community at Elukhalweni. He said that around the year 2005 other SWAYOCO colleagues faced similar charges even though he is not sure they were charged under the Terrorism Act. 1<sup>st</sup> Accused told the Court that what happened to the victims of the bombings made him sad especially the case of the late MP Mkhonta with whom he had worked on football issues in his community from 2002 up to the time of his arrest.

[127] It was further 1<sup>st</sup> Accused evidence that when they returned to Hlatikulu from Kaphunga, he was locked in a filthy cell and that the police officers came to the cell several times during the night to wake him up and ask if he was well. The following day they proceeded for the pointing out exercise. He said that finger prints were collected from him on 12<sup>th</sup> June 2010 after the pointing out exercise but that none of the witnesses who testified identified his finger prints in their evidence. He said that no witness gave evidence that on 25<sup>th</sup> May 2010 and 7<sup>th</sup> June 2010 respectively, he was seen at the Masuku and Mkhonta homesteads.

[128] 1<sup>st</sup> Accused told the Court that from Beatrice Shongwe's homestead they went to a place next to a shop at Kamthokazi near Enoch Kunene's homestead and that is where they found the container of petrol. He said some of the police officers took

him to the forest whilst others went to call Kunene. They were joined by the police officers together with Kunene and they proceeded to the place, a small guava bush, and that is where they found the 2 litre container. That he can identify the people in exhibit G9 even though he could not name some of them. He could however identify himself and Mr Kunene in the exhibit. He said the area in the photograph is where they went with Mr Kunene and the police officers and found the 2 litre container. 1<sup>st</sup> Accused said that since his hands were handcuffed at his back he pointed to the container in the forest using his head and this was in the presence of Mr Kunene and the police officers.

[129] It was also the 1<sup>st</sup> Accused's evidence that Mr Fakudze's evidence to the effect that himself and the 2<sup>nd</sup> Accused were trying to change the government by force is not true. He said that Mr Fakudze's evidence to the effect that he is the chairman of SWAYOCO Shiselweni region and he was tasked to do the bombings, is not true. He has never been chairman of any of the SWAYOCO regions. Further that MrFakudze's evidence to the effect that he was buying petrol from filling stations to prepare the explosives is a mere fabrication. That Mr Fakudze is a corrupt officer in that he took an oath before Court to tell the truth and he lied by hiding from the Court what himself and his colleagues did to the 1<sup>st</sup> Accused at Kaphunga. Mr Fakudze also failed to produce to Court the two people from whom he alleged that he got information about the 1<sup>st</sup> and 2<sup>nd</sup> Accused person's activities. He did not even mention the names of the people from whom he said he got information about the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons activities.

[130] It was further 1<sup>st</sup> Accused's evidence that behind the shop which is located in the area where the 2 litre container was found is a rubbish pit as well as a dry stream leading to the bushes. That when it rains the rubbish goes through the dry stream to

the bushes where they found the 2 litre container. That he does not know how the 2 litre container got to be placed in the bushes, however, he thinks it went through the dry stream when it was full of water. That he had a good relationship with both Mr Masuku and Mr Mkhonta and was well known in his community as a reputable member of the society. This case marks his first offence even in the traditional structures. He was always involved in community projects and between 2008-2010 he was working at the community projects. That one of the community projects he undertook is called Lilima Swaziland which helps to curb poverty in the community areas.

[131] That he still suffers from severe headaches which he first suffered from a few days after he was taken to the Sidwashini Correctional Services. That the Correctional Services took him to the psychologist and they assured that he was suffering from migranes. At the end it seemed that he is epileptic and he has been suffering from this illness for a long time. Every month he has to go and visit his psychiatrist. It was during one of his visits to the psychiatrist that he told them about his severe headaches and that he has a problem with where he is kept and that he is given pain killers which do not help the headaches. He told them that he believes he got injured whilst the police officers were torturing him at Kaphunga. That the psychiatrist said they could not help him but could refer him to a neurologist. That they drafted a letter to the Sidwashini Correctional telling them to refer him to the Mbabane Government Hospital. That he was taken to the Mbabane Government Hospital where the neurologist scanned him and that was when the neurologist discovered that the headache was not migraine. The neurologist gave him a form to fill so that he could record the length of time the headaches lasted. That when he took the form back the neurologist told him that the headaches were not severe because they are not above seven. The neurologist stated that he was not going to give 1<sup>st</sup> Accused any medication for the headaches, however, that the 1<sup>st</sup> Accused should attend

physiotherapy, because his veins had been affected. That the hospital wrote a letter to the Sidwashini Correctional Services which was referred to the headquarters. After the letter came back from the headquarters he started the prescription of the neurologist. That prior to his arrest he never suffered from these headaches. He only had the epileptic seizures. He said that the headache is related to his arrest. That the health department at Sidwashini initially assured him that the headache was stress related but they later referred him to the neurologist when they discovered that the headache was not stress related. He said he tried to get the medical report relating to these headaches but failed. He was only able to get the report relating to the epilepsy. They insisted on a court order to initiate release of the report. He stated that during his arrest his mere admission that he is a member of PUDEMO and SWAYOCO triggered off his torture at Kaphunga. That he did not know that being a member of these organisations makes one an enemy of the police. That the only reason he had to suffer was because he admitted that he was a member of these organisations and was near the crime scene. He stated that he likes the ideology of PUDEMO and SWAYOCO which is to develop the country and which ideology seems to annoy the elders.

[132] Under cross-examination 1<sup>st</sup> Accused told the Court that after reaching the age of 35years and leaving SWAYOCO he never graduated to be a member of the PUDEMO. Notwithstanding, he still subscribes to the ideology of SWAYOCO and PUDEMO which is within him. He cannot depart from it. That he heard in 2008 through the media that PUDEMO and SWAYOCO were specified entities and the reason given was that they are terrorists organisations. That he knows Thandaza Silolo who he first saw at a congress in 2008. He can agree that Silolo was a member of their organization prior to 2008 but cannot confirm his membership as such after 2008. He was with Silolo at the Sidwashini Correctional Services and that he read in the newspapers that Silolo was arrested under the suppression of terrorism

Act. But that he cannot confirm that Silolo was a member of their organization as at when he was arrested and convicted for terrorist acts

[133] It was further 1<sup>st</sup> Accused's evidence that he could not tell his Aunt, Mbhekeni Tsabedze and Musa Dlamini who were all present at the pointing out in his Aunt's homestead of his torture and suffocation by the police because there was no time to tell them since he was under the instructions of the police.

[134] That he told PW 4 that he had come to collect the things he used in the Masuku and Mkhonta homestead because he was under the instructions of the police. He said that it is not all that he indicated on his statement that he was instructed by the police to say. He had prior knowledge of some of the issues. Such issues are that he has been a member of PUDEMO and SWAYOCO from 1996-2008, was selfemployed as an electrician as well as his full names. That even though the police officers did not tell him what answers to give to the questions they posed he however had to answer the questions in a manner acceptable to them because he had earlier been tortured. That at Ekwenzeni and Elukhalweni he pointed out his clothes not on the instructions of the police officers because he already knew the clothes. He said he cannot say whether the police had knowledge of the presence of the rebook jeans in his house, since they had earlier on visited his homestead on Tuesday and Wednesday and he was then arrested on Friday, but that he thinks they didn't know. He stated that the police did not tell him to list the black jeans in his statement. That the police did not tell him to list his clothes in his statement because he was the one who knew the clothes. He confirmed that G 9 was the black pair of jeans he pointed out to the police however PW 14's report referred to a brownish pair of jeans and the police referred to a grey pair of jeans. That his reaction to PW 14's findings that the piece of cloth found at the Masuku homestead was found to have the same characteristics

with the pair of jeans is that if the materials were manufactured the same way they could end up having the same characteristics. That the tear on the jeans is due to the fact that it is old. That he pointed out the scissors to the police officers because they asked him what caused the tear on the jeans. He admitted that he had already listed these items of clothings to the police before they saw the black pair of jeans at the pointing out. That he had highlighted earlier to the police that he used a piece of cloth, then they asked him what he used to cut the piece of cloth and he mentioned the pair of scissors. When it was put to him that the admission he made to the police was a true reflection of what transpired at the pointing out, 1<sup>st</sup> Accused denied this.

[135] It was further 1<sup>st</sup> Accused evidence that his biological mother and his girlfriend were present at the pointing out at his parental homestead. That the police instructed him to tell his girlfriend that he had been arrested but he did not do this because he could see that the police were mocking him. That he obeyed all the instructions given to him by the police except this one. That the police did not give him the opportunity to tell anyone at his parental homestead that he was tortured and that he had earlier asked for the phone to call his family and attorney and the police refused. When it was put to him that the reason why he did not tell anyone at this parental homestead including his girlfriend who he was given the opportunity to speak to of his alleged torture is because it never happened, 1<sup>st</sup> Accused stated that the police were mocking him when they gave him the opportunity to speak to his girlfriend and he decided not to take the opportunity. That his first Court appearance was at the Nhlangano Magistrates Court on 12<sup>th</sup> June 2010 and he narrated all that happened at Kaphunga. That 2<sup>nd</sup> Accused's evidence that they were arraigned before the High Court refers to when they first met after their arrest. That the 18<sup>th</sup> of June 2010 was his second appearance at the High Court. He had first appeared on the 13<sup>th</sup> of June 2010. That he never told the judge on the 18<sup>th</sup> of June 2010 that he had been tortured. When it was put to him that the reason why he did not tell the judge on the 18<sup>th</sup> June 2010 that

he had been tortured is because it did not happen, 1<sup>st</sup> Accused replied that he had earlier on narrated everything to the Nhlangano Magistrates Court on 12<sup>th</sup> June 2010. He said he was also not able to tell PW 10 that he was tortured because he was shocked. When it was put to him that the reason why he did not tell PW 10 who is his uncle and a respected member of the community that he was tortured is because he was never tortured, 1<sup>st</sup> Accused replied that this is not true.

[136] 1<sup>st</sup> Accused further confirmed that before he was booked into the Correctional Services his physical state of health was assessed and he told the officer that he has epilepsy. He did not tell the officer that he was tortured because the officer only asked him if he had any illness. He denied that he was physically healthy when he went to the correctional services. He stated that he was physically traumatized but that he did not tell the officer this because he discovered the pains after a few days. When it was put to him that the reason why he did not tell the correctional services about his alleged trauma is because there was no trauma since he was not tortured, the 1<sup>st</sup> Accused denied this. It was further put to him that his claim that he was tortured by the police is a mere fabrication, the 1<sup>st</sup> Accused replied that this assertion is not true as evidenced by the fact that his statement where he indicated the fact of the torture and his neurological report were never produced in Court by the prosecution. He agreed that there is no evidence whatsoever to support his allegation of torture. He confirmed that the community was very shocked in the wake of the bombing at the Masuku and Mkhonta homesteads. He stated that he did not go to access the damages at the home of Mr Masuku who is his relative and he did not extend any condolences to him, but denied that this is because he was behind the attacks. He also confirmed that he did not go to see the damages at the Mkhonta homestead and also sent them no condolences. He agreed that it was never put to PW 15 that his arrest was improper but denied that the reason why this was never put to PW 15 is because his evidence to this effect was an afterthought.

[137] 1<sup>st</sup> Accused also told the Court that in his statement he indicated that the motive for the bombing was to achieve a speedy change of government and that this was what they wanted in 2010. That at the time he was a full fledged member of the PUDEMO and SWAYOCO and their ideology was change in the way the country is governed although he does not know of the present ideology. He agreed that in terms of the ideology of the organisations he still wants change in the way the country is governed. That he will agree with any peaceful means to achieve this end. He is afraid of bloodshed and will not support a non-peaceful means in pursuing this goal. Thus, if the resolution of the PUDEMO and SWAYOCO was to use non-peaceful means to change the government then this will mark the end of his relationship with the organizations.

[138] Under re-examination 1<sup>st</sup> Accused stated that his purpose for listing the clothing items was because the police officers wanted to know which items of clothings he was wearing when he allegedly bombed the Masuku and Mkhonta homestead. He stated that the admissions he made were not of his own volition.

[139] DW 3 was Mbhekeni Tsabedze an electrician. He resides at Elukhalweni in the same homestead of Beatrice Shongwe with 1<sup>st</sup> Accused who is his cousin. That 1<sup>st</sup> Accused taught him to do the work of an electrician. That on 7<sup>th</sup> of the June 2010 1<sup>st</sup> Accused was at home the entire day and at night they all slept in the house together with Tamsanqa Shongwe and another boy whom 1<sup>st</sup> Accused came with around 8pm. He said that 1<sup>st</sup> Accused and the boy were from work. He said he cannot remember the exact date of his arrest but he recalls that whilst he was asleep during the night

around 4am police officers came and handcuffed him saying that they were looking for 1<sup>st</sup> Accused. DW 3 told them that he did not know where 1<sup>st</sup> Accused was. The police officers took him to the Hlatikulu police station. They put him in a room and while they were taking him out of the room he met 1<sup>st</sup> Accused. They were also other people with them namely Ntokozo Dlamini, Themba Mamba and Tamsanqa Shongwe. The police officers said that they were taking them to Kaphunga police station. They handcuffed him with 1<sup>st</sup> Accused but while they were walking to the vehicle they separated him from 1<sup>st</sup> Accused. He travelled to Kaphunga in a kombi together with Themba Mamba, Tamsanqa Shongwe and Ntokozo Dlamini. 1<sup>st</sup> Accused travelled in a separate vehicle. When they got to Kaphunga the police officers placed them in separate rooms. The police questioned them as to who bombed the Masuku homestead. He did not know so the police officers took him and Ntokozo and put them in a conference room where there was a large number of police officers and the police officers continued questioning them as to who bombed the Masuku homestead. The police officers were insulting them and even promised to beat them up. They stayed therefrom morning and had not eaten or drank anything. As around 7pm the police officers were still questioning them. Thereafter, they took them back to Hlatikulu police station. He said he did not see Zonke at all at Kaphunga.

[140] DW 3 further testified that when they returned to Hlatikulu police station, the police officers put the four of them inside the police station. The police wanted to buy food for them from a boy who was passing with a sack of food but he refused to eat the food. They stayed there for about 25minutes. The police officers then cautioned them that they must not go to attend the funeral at the Masuku homestead because the people there were going to kill them. Thereafter, the police officers used a van to drop them at home.

[141] DW 3 further stated that when he saw 1<sup>st</sup> Accused at the Hlatikulu police station, he was in a bad state and he was crying. He also stated that he was present when police officers came with 1<sup>st</sup> Accused to Beatrice Shongwe's house. That they came in a kombi which was full to capacity. 1<sup>st</sup> Accused was in the middle of the police officers and his hands were handcuffed. That the police officers sought permission from their Aunt to go into the house where they sleep. Their Aunt gave the permission and the police officers got into the house together with their Aunt. DW 3 heard his name being called and he proceeded to the house where the police officers told him that they were looking for 1<sup>st</sup> Accused's clothes. One of the police officers told him to go out of the house and stand by the door. He waited outside by the door. He stated that the police officers were talking even though he could not hear what they were saying. He said the 1<sup>st</sup> Accused was crying on that day and that when the police left they left with something which he cannot describe. That since he was standing by the door he could see what was happening in the house but not clearly as they were many people in the room and they were obstructing his view.

[142] DW 3 further stated that 6 days after his first interview at the Hlatikulu police station he was again called by the police to go back to the Hlatikulu police station to give a sworn statement. That the statement was written and read by the police in English therefore he does not know the content of the statement. Later they were subpoenaed to testify as Crown witnesses and they came to the High Court, but he does not know why he was not called as a Crown witness after all.

[143] Under cross-examination DW 3 told the Court that when he recorded his sworn statement that a police officer gave some papers to the commissioner of oaths which she read out softly and in English and he did not understand her because he does not speak English. He signed the statement because he was told to do so. That the

police officers warned them not to tell lies when they went to the High Court but they never issued the same warning when they recorded their statements at the Hlatikulu police station.

[144] He agreed that he stated in his evidence in chief that when he saw 1<sup>st</sup> Accused at the Hlatikulu police station, 1<sup>st</sup> Accused was in a bad state and was crying, but that he does not know the reason why the 1<sup>st</sup> Accused was crying. He did not ask 1<sup>st</sup> Accused why he was crying. DW 3 also told the Court that his response to the questions to the police officers at Kaphunga as to who bombed the Masuku homestead was that he does not know. That the police did not beat him up because of this response. They did not suffocate him however they tortured him by insulting him and threatening to beat him up.

[145] When it was put to DW 3 that 1<sup>st</sup> Accused could not have been at home the whole day on 7<sup>th</sup> June 2010 as he testified because 1<sup>st</sup> Accused according to DW 3's evidence came back with an unknown boy to the house around 8pm, DW replied that 1<sup>st</sup> Accused was at home during the day but went to the neighbours in the evening. That he did not say this in his evidence in chief because he thought there is a difference between daylight and evening. He agreed that 1<sup>st</sup> Accused did leave the homestead on 7<sup>th</sup> June 2010, but stated that he left in the evening around 6pm and he was with the neighbours. He said he saw 1<sup>st</sup> Accused with the neighbours seated with his uncle. When it was put to him that he has told many versions of 1<sup>st</sup> Accused's whereabouts on 7<sup>th</sup> June 2010 because in his evidence in chief he told the Court that 1<sup>st</sup> Accused was from work when he came with the unknown boy, yet under cross-examination he told the Court that 1<sup>st</sup> Accused was at the neighbours seated with his uncle, DW 3 replied that 1<sup>st</sup> Accused had gone to his uncle's house to do some electrical work, thereafter, he sat down with his uncle and that the unknown boy was

with 1<sup>st</sup> Accused and DW 3 saw them. It was further put to DW 3 that it was not possible for him to see what was happening in another homestead at 6pm during winter, DW 3 denied this. It was also put to him that his evidence is a mere fabrication borne out of his hatred for police officers, DW 3 reiterated that he hates police officers however his evidence is not borne out of that hatred.

[146] Under re-examination DW 3 told the Court that if he is asked a question about the day he will assume that what is being referred to is daylight. He said that around 6pm in winter it was not too dark to see the neighbours house because there was electricity which was lighting the homestead.

[147] DW 4 was Ntokozo Mpendulo Dlamini lives at Elukhalweni area and earns a living assisting in constructions. He knows 1<sup>st</sup> Accused who is like a brother to him. He knows that 1<sup>st</sup> Accused was arrested but does not know why. He was at home on the day the 1<sup>st</sup> Accused was arrested. He told the Court that on that day around 4.30am police officers stormed their house. They were about 10 in number. They ransacked the whole house opening each and every document they found but they did not find anything. When the police officers finished they asked DW 4 about Themba Mamba's house and DW 4 led them there. Along the way the police officers were very violent to DW 4 shouting at him. When they got to Themba's homestead they shouted for him to come out. He came out and the police officers escorted both Themba and DW 4 to the Hlatikulu police station where they were put in a room. Whilst seated in the room he saw Mbhekeni Tsabedze passing by the passage and after a long time he also saw 1<sup>st</sup> Accused passing by the passage with police officers. Thereafter, the police officers took him into a room where he saw approximately 14 police officers and they gave him a chair to seat. The police officers asked him if 1<sup>st</sup> Accused has ever asked him to join the PUDEMO or to deliver or do anything and

DW 4 responded in the negative. They asked him if someone came to say that 1<sup>st</sup> Accused had asked him to bomb the Masuku homestead what would he say, he replied that the person would be lying. The police officers insulted him and sent him out of the room. After a while they called him back and posed the same question to which. He gave them the same answer and they again insulted him and sent him out of the room.

[148] Later they took them to a kombi. He was then with Mbhekeni and 1<sup>st</sup> Accused who were handcuffed together, as well as Themba Mamba and Tamsanqa Shongwe. They separated 1<sup>st</sup> Accused and Mbhekeni before they took four of them to a kombi. 1<sup>st</sup> Accused was in a different vehicle. They were all taken to the Kaphunga police station where they were put in different holding cells. After sometime DW 4 was taken to another room where he saw the same police officers that confronted him in the room at Hlatikulu police station. Among them was a certain Mr Fakudze. DW 4 said he got to know Mr Fakudze because he was the most violent of the police officers and even the other police officers would calm him down. At the conference room they asked him if he was a member of the PUDEMO, he denied this. DW 4 maintained that he is not a member of the PUDEMO and that he does not know if the other people he was arrested with are members of the PUDEMO. He said that the police officers later called him back together with Mbhekeni and asked them if 1<sup>st</sup> Accused had ever sent them to burn papers, to which they denied. That the police officers threatened to beat them severely. That after that a certain police officer called them to go and record a written statement. That whilst he was talking the police officer was writing down. When the police was done he asked him to read and then sign. He tried to read but the handwriting was very bad. Since the police officer was forcing him to sign he ended up signing.

[149] DW 4 told the Court that they left Hlatikulu around 9am and arrived Kaphunga around 11am. Around 6pm, on his way to the kombi to return to Hlatikulu he saw 1<sup>st</sup> Accused in one of the rooms surrounded by police officers. Though he did not notice what 1<sup>st</sup> Accused was doing but he could tell from his face that he was crying. Thereafter, himself Mbhekeni, Tamsanqa and Themba were taken back to Hlatikulu. Thirty minutes after they got to Hlatikulu, a certain boy came with some food. The police officers asked the boy to dish the food for them. Themba and Tamsanqa ate the food but Mbhekeni and DW 4 refused to eat it. That prior to that they had not been given any food or water the whole day. One and a half hours later he saw 1<sup>st</sup> Accused enter the police station and he was handcuffed. He could see that 1<sup>st</sup> Accused was in a very bad shape. They asked 1<sup>st</sup> Accused to take out his belt and shoes and they took him through the passage. Thereafter, the police van driven by one Mabuza took them to a nearby bus stop. Mabuza told them not to go to the Masuku homestead for the funeral and to be nearby because he will need them in future. He said later they came to Court where they saw police officers who threatened to deal with them if they lied in Court. He heard that the police officers picked some of the others to be Crown witnesses but that they never approached him.

[150] Under cross-examination DW 4 told the Court that he does not know where 1<sup>st</sup> Accused was on 25<sup>th</sup> May 2010 and 7<sup>th</sup> June 2010. He said that he heard that Mbhekeni also recorded a statement and that the statements were recorded at Kaphunga but that he does not know whether Mbhekeni also made a sworn statement at Hlatikulu. He stated that all he knows is that they were taken to Hlatikulu police station after 6 days.

[151] He said that when he saw the 1<sup>st</sup> Accused at Hlatikulu before they were taken to Kaphunga, that 1<sup>st</sup> Accused was normal. When it was put to him that Mbhekeni

testified that when he saw 1<sup>st</sup> Accused at Hlatikulu before they went to Kaphunga that 1<sup>st</sup> Accused was crying, DW 4 insisted that the 1<sup>st</sup> Accused was normal. That the second time he saw 1<sup>st</sup> Accused was when he was handcuffed with Mbhekeni and that was when he saw that 1<sup>st</sup> accused was distressed. When asked to comment on Mbhekeni's testimony that at that time 1<sup>st</sup> Accused was crying, DW 4 replied that it is only Mbhekeni that can testify to what he saw. However, in his two encounters with 1<sup>st</sup> Accused at Hlatikulu he never saw 1<sup>st</sup> Accused crying. That the police never suffocated or physically assaulted him at either Hlatikulu or Kaphunga. He said he was seated on the bench at the reception at Hlatikulu police station with Themba Mamba, Mbhekeni and Tamsanqa Shongwe when 1<sup>st</sup> Accused came back from Kaphunga with the police officers and that they all saw him. When asked what would be his comment to Mbhekeni's evidence to the effect that he last saw 1<sup>st</sup> Accused at Kaphunga, DW 4 replied that it is only Mbhekeni that can say what he saw. That it was around past 8pm when 1<sup>st</sup> Accused arrived at Hlatikulu from Kaphunga. He said it is possible for two people in the same place to see two different things. It is possible that though he was seated on the bench at the reception at Hlatikulu with Mbhekeni that Mbhekeni did not see 1<sup>st</sup> Accused when he came back from Kaphunga. He denied fabricating stories in order to assist 1<sup>st</sup> Accused who is his brother.

[152] Under re-examination DW 4 stated that when they were coming out of the room at Kaphunga two police officers spoke to him and Mbhekeni. One talked to Mbhekeni and another talked to him saying that both of them must record a written statement but that he did not see Mbhekeni record a statement because they were in separate rooms. He did not also see any of the others record a statement.

## **ANALYSIS OF THE EVIDENCE LED**

[153] Did the Crown prove its case beyond reasonable doubt?

### **CASE AGAINST THE 2<sup>ND</sup> ACCUSED**

[154] It is convenient for me at this juncture to first consider the case against the 2<sup>nd</sup> Accused person, Bhekumusa Bheki Dlamini. The Crown conceded that it did not adduce any evidence against the 2<sup>nd</sup> Accused in relation to counts 1 and 2 respectively and their alternatives. Having carefully considered the totality of the evidence adduced by the Crown in proof of its case, I am of the view that the Crown was well advised to concede this issue. The Crown has therefore failed to prove its case beyond reasonable doubt against the 2<sup>nd</sup> Accused in respect of counts 1 and 2 respectively and their alternatives. I find the 2<sup>nd</sup> Accused not guilty and accordingly discharge and acquit him of the offences as charge in counts 1 and 2 respectively and their alternatives.

[155] The case against the 2<sup>nd</sup> Accused as it stands, is, therefore, only in relation to count 3 and its alternative.

[156] Now, it is common cause that in the early hours of the morning of the 7<sup>th</sup> of June 2010, the house of the now deceased Member of Parliament, Lion Shongwe was burnt.

[157] Several items were destroyed in the house including, a burnt window with a hole in it. The window was the target through which the destruction was made. There was also burnt tiles, burnt household items and the damaged left window of a Mercedes Benz. It is common cause that the scenes of crime officers inclusive of PW5

Detective Constable Nimrod Motsa visited the crime scene. Constable Motsa took photographs of the damage done to the house as well as the Mercedes Benz as evidenced by exhibits A3 to A6 respectively. He also took photographs of a green bottle (exhibit A) green bottle particles, wax and brown sugar (exhibit A1) as well as a piece of khaki cloth (exhibit A6) which was found hanging on a window sill. The piece of khaki cloth itself was recovered from the crime scene and tendered in evidence as exhibit B. It is common cause that when PW5 investigated the crime scene he was in the company of officers from the bomb disposal unit, led by PW9 Sgt Tsabedze who confirmed the damage done to the homestead and the Mercedes Benz as well as the presence of the base of a bottle which he says was used as container for petrol, the top of the bottle which was closed with a maize cork, broken bottle pieces, as well as the piece of khaki cloth which was on the window sill. PW9 also confirmed the presence of some river sand at the crime scene as well as the smell of petrol. PW9 who is an expert in explosives and whose qualifications and experience were not discredited by the defence, told the court that bringing his empirical mind to bear on the substance found at the crime scene, he came to the conclusion that a homemade incendiary device known as petrol bomb which is an explosive, was used in the attack. He agreed under cross-examination that petrol will normally ignite at whatever state and can be used for arson or other forms of mild attacks. However, what makes petrol a component of a petrol bomb, like in the Shongwe case, is when it is mixed with other substance like the sand, wax and piece of cloth. In this state it causes a faster and more severe destruction. I cannot in any way fault the evidence of both PW5 and PW9. I find them credible, cogent and truthful witnesses. They were not only consistent in their evidence but corroborative in material respects. Their evidence was not shaken under cross-examination.

[158] The contention by the defence that their evidence should be disregarded as wanting in credibility and that the photographs taken at the crime scene should be disregarded

is clearly unsustainable. The defence never objected to any of the photographs or items recovered from the crime scene by these witnesses being tendered in evidence. The contention that it could not have been daylight between 5.30 am and 6 am in winter when the photographs were taken clearly goes to no issue. It does not detract from the substance of the photographs, which substance was for the court to observe and see the extent of the damage to the house in the wake of this incident. The photographs as is apparent, clearly show the items photographed and to which the defence did not object. Similarly, the absence of the time and date on the photographs as testified to by PW5 is due to the fact that the gadgets used by the scenes of crime officers for the photographs do not have the mechanism for indicating such. This was not disputed by the defence.

[159] Furthermore, the contention by the defence that there is no explosive known as petrol bomb must also fail. PW9 told the court that petrol bomb is a generic term, a terrorist term. This was confirmed by the evidence of PW13 another expert in explosives who testified in this case, albeit, in relation to counts 1 and 2 respectively. PW13 told the Court that a petrol bomb is also known as molotov cocktail. These two experts in explosives told the Court that this sort of device usually includes a container like the bottle, a chemical such as the petrol and a piece of cloth held in the mouth of the bottle by a cork which is lit before it is thrown into a soft target such as a window, so that it breaks catching fire which causes a faster and more intense destruction. PW9 and PW13 were clear as to the composition of petrol bombs, how they function and the extent of the devastation they can cause.

[160] The evidence of these experts is consistence with a mololov cocktail which is defined by Wikipedia, as follows:-

**“The mololov cocktail, also known as a petrol bomb, poor man’s grenade, fire bomb (not to be confused with an actual fire bomb) or just mololov is a generic name used for a variety of bottle based improvised incendiary weapons. Due to the relative ease of production, they are frequently used by amateur protesters and non–professionally equipped fighters in urban guerilla warfare -----  
----- A mololov cocktail is breakable glass bottle containing a flammable substance such as gasoline / petrol or a napalm –like mixture, with some motoroil added and usually a source of ignition such as a burning cloth held in place by the bottle’s stopper. The wick is usually soaked in alcohol or kerosene, rather than gasoline.**

**In action, the wick is lit and the bottle hurled at a target such as a vehicle or fortification. When the bottle smashes on impact, the ensuing cloud of petrol droplets and vapor ignites, causing an immediate fireball followed by a raging fire as the remainder of the fuel is consumed----” . (emphasis added)**

[161] From the foregoing apposite exposition, I come to the irresistible conclusion that indeed a petrol bomb or Molotov cocktail was used in the attack at the Shongwe house causing the destruction recorded thereat. I find that to be a fact.

[162] The poser is, did the Crown prove beyond reasonable doubt that the 2<sup>nd</sup> Accused is the culprit of the attack at the Shongwe homestead? The Crown alleges that the 2<sup>nd</sup> Accused is guilty. Since it is common cause that there is no direct evidence showing that the 2<sup>nd</sup> Accused was physically present at the said homestead at the material time of the incident, the Crown seeks to rely on circumstantial evidence. The circumstantial web in which the Crown sought to enmesh the 2<sup>nd</sup> Accused was spun by the evidence to the effect that after the 2<sup>nd</sup> Accused was arrested on the 16<sup>th</sup> of June 2010 and cautioned in terms of the Judges Rules, he was interrogated at both the Hlatikulu and Kaphunga police stations, thereafter, he voluntarily elected to lead the police to a pointing out exercise in his homestead at Mpofu. Consequently, on the 17<sup>th</sup> of June 2010, after the 2<sup>nd</sup> Accused was again duly cautioned by PW15 in accordance with the Judges Rules, he voluntarily led the police officers, which were inclusive of PW15 and PW5 the photographer, to his parental homestead at Mpofu,

where he pointed out to them the pair of khaki coloured trousers with tears and cuts, (exhibit A7) which was hanging on the fence. PW5 took photographs of the khaki coloured trouser (exhibits A8 and A9). Also seized from the homestead were exhibits N and N1. Exhibit N1 is a photograph showing the 2<sup>nd</sup> Accused and another holding placards emblazoned with political slogans. The Crown subsequently sent the khaki trousers together with the other items recovered from the scene of crime at the Shongwe homestead, to the Forensic Laboratory in South Africa for forensic analysis. This is inclusive of the piece of khaki coloured cloth allegedly found on the window sill at that homestead (exhibit B). The result of the forensic examination conducted on exhibit B and the khaki trouser is contained in the forensic report, exhibit K2, which was tendered through PW14 in terms of section 221 of the Criminal Procedure and Evidence Act (CP&E). The result shows a physical match of exhibit B to the pair of khaki trousers. Learned Crown Counsel Mr Dlamini thus urged the court to draw the inference from exhibit K2 coupled with the admissions allegedly made by the 2<sup>nd</sup> Accused to PW15, as well as exhibit N1 which carries clear political slogans and the fact that the 2<sup>nd</sup> Accused is a member of SWAYOCO a proscribed political entity which is opposed to the current government, that the 2<sup>nd</sup> Accused is the culprit of the bombing at the Shongwe homestead.

[163] The defence objected vehemently to the totality of the evidence relied upon by the Crown. At this juncture it is convenient for me to take the objection raised by the defence holistically as it relates to both the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons. To this end learned defence counsel Advocate Sihlali criticized PW15 the lead police investigator's evidence as unreliable and urged the court to disregard it. His take is that PW15 was not only inconsistent in his evidence, but is also a single witness on the merits of the case and cautionary rules should apply, yet his evidence stands uncorroborated. The learned Advocate detailed a litany of the uncorroborated

aspects of PW15's evidence to include, the failure of the other police investigators to attend court to corroborate his evidence as to the confession allegedly made to him by the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons, the failure of the Crown to produce the people who allegedly informed PW15 that the 1<sup>st</sup> and 2<sup>nd</sup> Accused are the perpetrators of the said crimes, the failure of the Crown to produce any confessional statements made to PW15 in this regard.

[164] Furthermore, PW15 lied on issues which are not material to the case, for instance, the fact that Kaphunga Police Station is in an isolated area. That PW15 had maintained that Kaphunga is in a densely populated area, however, the defence proved him wrong by going to Kaphunga and taking photographs which clearly show that Kaphunga Police Station is located in an isolated area which is tailor made for torture. PW15 also lied about the torture of the Accused persons at Kaphunga before the pointing out exercise. The defence maintained that it was the event of the torture that motivated the Accused persons to lead the police officers to the pointing out. Therefore, the evidence recovered from the pointing out exercise is clearly inadmissible. The fact of the torture was also raised by both accused persons during their bail applications and is thus not a recent allegation. That the failure of PW15 to tender in evidence the confession allegedly made by the 1<sup>st</sup> Accused to the Magistrate was also motivated by the fact that the 1<sup>st</sup> Accused had alleged therein that he was tortured. More to the above is that PW15 was present at the pointing out, and it is clearly undesirable for a member of the investigating unit to be involved in the pointing out. For this proposition the learned Advocate relied on **Schwikkard, Van Der Merwe et al** in the text **Principles of evidence, Third Edition page 353**. Therefore, PW15's evidence that both Accused persons acted freely and voluntarily during the pointing out and were warned in accordance with the Judges Rules is simply untrue as the Accused persons were tortured, fatigued and had to be submissive as they had no choice. The defence also took issue with the forensic

evidence exhibits K, K1 and K2 condemning them as unreliable. Let me first address the criticisms leveled at PW15 before I address the forensic exhibits.

[165] Now, there is no doubt that evidence procured during a pointing out exercise constitutes an overall confession by the Accused, therefore, the law demands that it must be made freely and voluntarily.

[166] Commenting on this principle of our law in my decision in **The King v Khetha Mamba Criminal Case No. 198/11 judgment of 11<sup>th</sup> September 2012 para 57 (unreported)**, I stated as follows:-

**“ 57 In the case of July Petros Mhlongo and Others v The King, Case No 185/92, the court made reference to the South African case of S v Sheehama 1991 (2) SA 860, where the court stated as follows:-**

**‘A pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out unaccompanied by any exculpatory explanation by the Accused, it amounts to a statement by the Accused that he has knowledge of relevant facts which prima facie operates to his disadvantage and it can thus in an appropriate case constitute an extra judicial admission. As such, the common law, as confirmed by the provisions of section 219 A of the Criminal Procedure Act 51 of 1977, requires that it be made freely and voluntarily.’”**

[167] The 2<sup>nd</sup> Accused raised the fact that the materials recovered from the pointing out were illegally recovered from his homestead. The recovery is illegal because according to him, he was severely tortured which led him to admit that he had the items in his house. But in this court the Accused person did not object to the admissibility of these items. He conceded and never alleged at the time that they were illegally obtained. The defence contented itself with the allegation of torture during cross-examination of the various Crown witnesses without challenging the

exhibits themselves. I am now being called upon after admitting the evidence to expunge it from the record on grounds that it is legally inadmissible evidence. There is no doubt that the court has the power, even at the judgment stage, to expunge admitted evidence if it is found to be legally inadmissible evidence. Therefore, the questions that arise at this juncture are:

- (1) Were the items recovered from the homestead of the 2<sup>nd</sup> Accused by illegal means?
- (2) Whether the items which were found in and recovered from the homestead of the 2<sup>nd</sup> Accused allegedly by illegal process and which are clearly relevant to the issue in this case should be excluded from being admitted in evidence because of the means of which they are alleged to have been obtained?

[168] I will start with answering the first question. The illegal means alleged is that 2<sup>nd</sup> Accused was severely tortured before he made the pointing out. It is therefore necessary to find out if this allegation was proved by the defence.

[169] Apart from the mere *ipse dixit* on oath that he was severely tortured, there is no other evidence showing such torture. There is no evidence to show that the 2<sup>nd</sup> Accused sustained any form of injury as a result of the alleged torture. I say this because allegation of torture is proved by production of medical evidence. PW8 and DW1 who saw the 2<sup>nd</sup> Accused on the 17<sup>th</sup> of June 2010 during the pointing out, a day after the alleged torture, did not tell the court of any injury on the 2<sup>nd</sup> Accused. The 2<sup>nd</sup> Accused himself did not produce any medical evidence of any injury sustained as a result of the alleged torture. He did not tell PW8 and DW1 of the alleged torture. There is no evidence to show that when the 2<sup>nd</sup> Accused was admitted into the Sidwashini Correctional Institution on 18<sup>th</sup> June 2010 that the Health Officers at the

Correctional Institution before admitting him therein, observed and recorded that he had any injuries due to the alleged torture. It is a notorious fact that the prisons policy is that all awaiting trial prisoners should undergo a health examination before they are remanded. I take Judicial notice of that. In fact, the established evidence is that the 2<sup>nd</sup> Accused did not even inform the Correctional officials of the alleged torture. He did not also inform the court of the torture on his first arraignment on the 18<sup>th</sup> of June 2010, just two days after the alleged torture on the 16<sup>th</sup> of June 2010. The first time this allegation of torture surfaced was during the 2<sup>nd</sup> Accused's bail application, in his founding affidavit prepared on 12th July 2010, about one month after the alleged torture. I am inclined to agree with the Crown that these circumstances show up the allegation of torture as a bare allegation, a recent fabrication and an afterthought.

[170] I believe the evidence of PW15 that he cautioned the 2<sup>nd</sup> Accused in accordance with the Judges Rules before the 2<sup>nd</sup> Accused freely and voluntarily led him together with others including PW5 to the pointing out exercise in his homestead at Mpofu. This evidence is supported by PW5 the scenes of crime officer who took the photographs during the pointing out. PW5 told the court that PW15 cautioned the 2<sup>nd</sup> Accused in accordance with the Judges Rules before they proceeded to his homestead at Mpofu. This evidence was not discredited under cross-examination. There is also overwhelming evidence from PW15, PW5 and PW8 Selby Shongwe, who is an independent witness, that the 2<sup>nd</sup> Accused led the police officers to the khaki trouser (exhibit A7) and pointed it out to the police officers who then took photographs of it. PW8 told the court that the 2<sup>nd</sup> Accused was in control of the situation when he pointed out the items in his homestead to the police. He was not frog marched by the police officers into the premises. That the 2<sup>nd</sup> Accused was not being questioned or intimidated by the police when he did this. I have absolutely no reason to disbelieve these witnesses especially PW8 who it is not disputed was

employed to make bricks at the 2<sup>nd</sup> Accused's homestead at this material point in time. There is no reason advanced by the defence why PW8 would fabricate or contrive such a story about the 2<sup>nd</sup> Accused. The suggestion by the defence that he was afraid of the police, a fear which according to the defence was informed by the fact that PW8 cried in court whilst testifying remains a bare allegation.

[171] The evidence of PW8 also contradicts that of DW1 Zweli who was also at the scene of the pointing out and who told the court that himself, PW8 and the 2<sup>nd</sup> Accused were intimidated and harassed by the police. In fact, according to DW1 the police actually hit the 2<sup>nd</sup> Accused with a baton and uttered insulting words at the photograph of Mario Masuku hanging on the wall. My difficulty, however, is that the 2<sup>nd</sup> Accused himself led no evidence of any assault with a baton by police officers or any insults being hurled at the photograph of his political father Mario Masuku during the pointing out.

[172] What I find standing out in its stark enormity further contradicting the allegation of torture or tense or unfriendly relationship between the 2<sup>nd</sup> Accused and the police officers during the pointing out exercise, is the fact that according to DW1's evidence under cross-examination, the police allowed the 2<sup>nd</sup> Accused who was scantily dressed for the cold winter weather to pick up a coat from his homestead and put it on and the police had freed his hands from the handcuffs to do this. This, to my mind, does not support the allegation of torture, harassment or unfriendliness of the police towards the 2<sup>nd</sup> Accused.

[173] Furthermore, while I agree with the learned defence counsel, with reference to **Schwikkard et al (Supra)**, that it is clearly undesirable for a member of the

investigation unit to be involved in the pointing out, this act by itself ,however, is not sufficient to exclude evidence which was found in and recovered from the house of the 2<sup>nd</sup> Accused, which evidence is clearly relevant to the issues in this case. There is nothing to show that the presence of PW15 at the pointing out either tortured the 2<sup>nd</sup> Accused or in anyway intimidated him as to support this conclusion.

[174] The debate about the fact that 2<sup>nd</sup> Accused was handcuffed during the pointing out process is neither here nor there and in my view does not in anyway taint the process or render it illegal . PW15 stated that the handcuffs were necessary to prevent the 2<sup>nd</sup> Accused from escaping or doing harm to himself. This, in my view, does not constitute flagrant and severe rights violation stemming from the deliberate conduct of the police as to render the pointing out illegal.

[175] Similarly, the allegation that Kaphunga Police Station is in an isolated area does not irresistibly translate to evidence of the alleged torture. It does not make Kaphunga Police Station a haven for torture. PW15's evidence to the effect that they used Kaphunga Police Station because they were well accommodated there since the Hlatikulu Police Station was being used as court premises was not disputed by the defence. It stands established.

[176] I find that the allegation of torture was not proved. It follows that the pointing out was not as a result of any torture. I hold that the pointing out was voluntary. Therefore, any items found in or recovered from the house of the 2<sup>nd</sup> Accused during the pointing out is not evidence obtained by an illegal means.

[177] Furthermore, my answer to the 2<sup>nd</sup> question which I raised in para [167] above, is that even if the pointing out process was illegal and the items thus recovered by unlawful means, so far as they are relevant to the facts in issue, this court can admit them. That is the law as propounded by section 227 (2) of the CP&E, which states as follows:-

**“(2) Evidence that any fact or thing was discovered in consequence of the pointing out of anything by the accused person or in consequence of information given by him may be admitted notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him”.**

[178] The paramount consideration in the admissibility of the said items is relevance. A fact is said to be relevant to the facts in issue, if it is directly or indirectly connected with the issue in the case and has a bearing on its resolution one way or another or seeks to throw light on the connection of the accused to the facts of the case. The relevance of the khaki trouser recovered from the pointing out *vis a vis* exhibit K2 to the issues *in casu*, cannot be over emphasized . The weight to be attached to such evidence is a matter for argument taking together the facts and circumstances of the case. It does not detract from its admissibility.

[179] In these premises I hold that there is no reason why I should expunge the said evidence.

[180] I now turn to the contention that PW15's evidence should be rejected for his failure to produce as Crown witnesses, his informers or the other police investigators in whose presence the 2<sup>nd</sup> Accused person allegedly made confessions to him, therefore, his evidence stands uncorroborated. Firstly, let me observe, that the suggestion that

PW15's evidence can only be corroborated by the evidence of other witnesses is certainly not the position of the law. It is trite that corroboration can be founded in the form of circumstantial evidence. Therefore, where direct and indirect evidence lead to only one irresistible inference, then the Court will draw that inference. Secondly, it is the duty of the Crown to conduct its case in whichever order it deems fit. It is not duty bound to call every witness it has to testify. The Crown can bring the number of witnesses it feels are sufficient to prove its case. The discretion is entirely the Crown's. In any case, calling the other police officer to corroborate the evidence of PW 15 on the confession made to him by the 2<sup>nd</sup> Accused would have amounted to an academic exercise. I say this because evidence of the confession which the 2<sup>nd</sup> Accused person allegedly made to PW15 was elicited in cross-examination by the defence. Such evidence, as rightly observed by learned Crown Counsel, is ordinarily inadmissible. Before me in court the 2<sup>nd</sup> Accused is still denying commission of the offence. There is no evidence that he confessed to the police. The confessional statement is not tendered. Even though the 2<sup>nd</sup> Accused went ahead to tell the court that he did admit the crime to the police officers and also gave some details of the admission, he however maintains that he gave the statement under duress. It is my view that whatever he said amounts to nothing since the statement was not tendered. The voluntariness of such a confession which is part of the requirement of the proof of guilt of the Accused has not been established by the Crown who did not even bother to tender the confessional statement. It is important to call to mind at this stage what the law says about how to obtain a confessional statement in terms of section 226 (1) of the CP&E which prescribes as follows:-

**“(1) Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced in writing or not), be admissible in evidence against such person:**

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**Provided that such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto:**

**Provided further that if such confession is shown to have been made to a policeman, it shall not be admissible in evidence under this section unless it was confirmed and reduced in writing in the presence of a Magistrate or any Justice who is not a police officer---**(my emphasis)

[181] Since a confessional statement in terms of section 226 (1) of the CP&E did not form part of the Crown's case at all, the evidence of PW15 regarding the 2<sup>nd</sup> Accused's confession at the police station, which confession is adverse to his case, was prejudicial and thus inadmissible.

[182] In **Callis v Gunn (1963) 3 All ER 677 at 680 Lord Parker CJ** stated the power of Judges in criminal cases to reject all prejudicial evidence and evidence unfairly obtained. Similarly, in **R v Sang (1980) AC 402**, The House of Lords held that a Judge has a general discretion to exclude admissible prosecution evidence on the ground that it is prejudicial in nature and might result in the Accused being denied a fair trial. As the case lies, PW15's evidence on the confession remains prejudicial in the absence of any official confessional statement at all in the Crown's case and is thus rejected. This rendered nugatory the course of calling the other investigating officers who also allegedly witnessed the alleged confession to attend court and also advance inadmissible and prejudicial evidence.

[183] On the question of the Crown not calling the informers, it is common cause that PW 3 was one of the informers. It is also pertinent that I observe here that some of the other informers who were arrested and interviewed by the police in connection with

the alleged offences, though not called as Crown witnesses, eventually testified in this trial for the defence as DW3 and DW4 respectively.

[184] I now turn to the forensic report exhibit K2. The Crown implores the court to deduce from exhibit K2 that the 2<sup>nd</sup> Accused was the architect of the bombing of the Shongwe homestead. The defence objects to exhibit K2 condemning it as lacking in probative value due to the fact that its author did not testify and there is no basis demonstrated therein for the opinion. The question here, is, can the court hold as it is being urged by the Crown, that exhibit K2 is proof beyond reasonable doubt that the 2<sup>nd</sup> Accused committed the alleged offence?

[185] There is no doubt that expert opinion can be admitted as evidence. It is one of the recognized means of proof in our law. But it is trite that the law does not regard it as conclusive proof of the facts upon which opinion is expressed. Even in science, opinion scientific evidence is the least in weight. Science itself has little regard for analytical scientific opinion. There is more preference for empirical and evidence based findings. The court is thus not bound to accept it hook, line and sinker as conclusive proof of that fact. It is not a magic wand. The court has a duty to consider the opinion and the reasons upon which it is based to find out its cogency and reasonableness in the circumstances of the case. It does not require another expert opinion to determine this. The court can reading such opinion form its own decision on the opinion. If it arrives at the decision that the opinion is unreasonable it can refuse to rely on it. It is therefore important that the reasons that formed the subtractum of the experts opinion should be availed to the Court, although there is no hard and fast rule laid down in this respect. Much will depend on the nature of the issue and the presence or absence of an objection to the expert's opinion.

[186] I have carefully perused exhibit k2 and all that it tells us in para 6 thereof is the following:-

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

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

[187] There is no doubt that the conclusion reached by Eduan Pienarr Naude the forensic analyst who prepared exhibit K2 is that the piece of khaki cloth, (exhibit B) recovered from the Shongwe homestead formed a physical match to the torn khaki trousers (exhibit A7) which the 2<sup>nd</sup> Accused pointed out at his parental homestead. My difficulty, however, with exhibit K2 is that it constitutes merely a one sentence report declaring a match without explaining more. The process used by the analyst is explained in one sentence. The analyst did not give any reasons as a basis for his opinion. So there is no foundation in his report for his opinion. The opinion here is like offering a mathematical answer to a mathematical equation without showing the workings that led to the answer. I say this because exhibit K2 does not tell us of the method, procedure, results or material employed in the forensic examination. All it states in para 5 thereof is:-

**“During the execution of my official duties I examined the exhibits as described in paragraph 3, through a process that required skill in physical matching”.**  
(emphasis added)

[188] It was after the foregoing observation that the analyst detailed the conclusion in para 6 which I have hereinbefore set forth in para [186] of this judgment. The analyst

omitted to detail what “**a process that requires skill in physical matching**” is or entails. This state of affairs required that the analyst should attend court and explain himself as to how he arrived at his conclusion that “**the torn piece of cloth (exhibit MTN -1) was originally part of the torn pair of pants (exhibit SF-1)**” This is because, as correctly submitted by Advocate Sihlali, garments are generally cut from a huge bale of material. Once the cloths are made and distributed world wide, it is highly improbable that one can conclusively say that a piece of cloth originated from a particular item of clothing because it could have originated from another item of clothing belonging to someone else. This informs the need for an explanation as to how the forensic analyst arrived at his conclusion .This is however not such a case. The analyst who is said to have left the forensic laboratory and could not be traced did not attend court to explain. Exhibit K2 was tendered through PW14 Elizabeth Bergh, who categorically declined to elaborate on the exhibit save to assert that it was prepared by way of physical matching. She failed to support her opinion with valid reasons. It is important that I stress here that PW 14 also stated categorically under cross-examination that there is no absolute physical match and no absolute determination that a piece of fabric originated from a particular item of clothing.

[189] It is therefore difficult to assess the correctness or reasonableness of exhibit K2 in the absence of its basis. In my view, an opinion or conclusion without any basis is perverse. As the learned authors **Schwikkard et al** observed in **The Principles of Evidence Third Edition, para 862**

**“If proper reasons are advanced in support of an opinion, the probative value of such opinion will of necessity be strengthened. In Coopers (South Africa) (Pty) Ltd Eutsche Gesellschaft fur Schadlingshekampfung Mbh it was said:**

**“[A]n expert’s opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert’s bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the**

**process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert”**

[190] Similarly in the case of **Harrison Odiawa v Federal Republic of Nigeria (2008) LPELR, 4230**, the Court held that expert opinion evidence can be discarded where it is apparently illogical and unreasonable or where the expert fails to provide enough data analysis or basis to support his conclusion.

[191] Then, there is the case of **Owale v Shell Petroleum Development Company Limited (1997) NWLR Part 480, 148 at 183**, where the Court of Appeal held as follows:-

**“The duty of an expert is to furnish the Judge with necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his own independent judgment by the application of those criteria to facts provided in evidence. The duty of an expert is to utilize his skill or knowledge to bring out and demonstrate features or characteristics of the subject which the uninitiated or unlearned might not otherwise understand so that such revelation will guide laymen. So at all times he must clearly state the reason for his opinion. It follows therefore that where an expert fails to clearly state the reason or scientific basis for his opinion the Court is at liberty to refuse to accept his testimony or opinion.”**

[192] The above statement was adopted in **Wowo and Another v Sidi Ali and Others (2009) LPELR, 5106**. See also **ANPP v Ousman (2008) 12 NWLR part 1100, 1 at 72-73**, **Azur State (1993) 6 NWLR pt 299 pg 302** and **Fasugba V IGP 1964 2ALL NLR 15**.

[193] Finally in **Amosun v INEC and Others (2010) LPELR 4943**, the Court of Appeal held that expert opinion evidence must accord with commonsense or be consistent with normal happenings, if not the Court is not bound to accept it, but has a duty to

reject it. See also **Amu v Amu (2000) 7NWLR part 663, 164 at 174 Adlakun v Oruku (2006) ALL F WLR part 308, 1360 at 1373.**

[194] Against the backdrop of the foregoing very persuasive authorities, I am inclined to agree entirely with Advocate Sihlali when he contended in para 25.9 of the Accused's written submission, that the probative value of the expert's opinion contained in exhibit K2 is compromised in these circumstances. For this reason I do not think I can rely on this opinion. More so as there is another proved fact in this case which does not support the deduction advanced by exhibit K2.

[195] I say this because, the Crown's case is to my mind further compromised by the fact that the evidence led by the defence put the 2<sup>nd</sup> Accused in his house at Manzini at the material time the offence was committed, far away from the crime scene where exhibit K2 sought to place him. This is because the 2<sup>nd</sup> Accused raised the defence of alibi. The canon on the defence of alibi is that when an Accused person intends to rely on alibi as his defence, he is required to notify the police of such defence in advance of his trial. This is necessary in order to enable the police to investigate into that defence. Accordingly, when the Accused pleads an alibi to the charge when put to him, the duty is on the Crown to negative that alibi by adducing evidence proving that the Accused was in fact in the area where the offence was committed and not where he claims to have been at the time of the crime. This notwithstanding, the duty of proving the whole case beyond reasonable doubt in the end rests squarely on the shoulders of the Crown whether the notification of the alibi is given or not. See **Mcebisi Magadla v The State [2011] ZASCA 195. Vusi Roy Dlamini v The King Appeal Case No. 3/99.**

[196] *In casu*, the 2<sup>nd</sup> Accused did not raise the defence of alibi during his plea and did not notify the Crown of the defence. He raised it for the first time in his defence whilst giving evidence in chief on the 2<sup>nd</sup> day of April 2013. This state of affairs, as I have abundantly recounted above, did not derogate from the duty of the Crown to prove its case beyond reasonable doubt. See **Steven Malcom Musiker v The State [2012] ZASCA 198**, where the court observed thus:-

**“----- Once the appellant raised the alibi defence, that alibi had to be accepted unless it was proved to be false beyond reasonable doubt. That did not happen. The evidence of the appellant’s wife that he was at home at the time of the incident was not challenged. The Magistrate was faced with the evidence of two state witnesses who placed the appellant at the scene of the incident and the appellant’s own evidence, together with that of his wife which placed him at home. In effect the Magistrate was faced with two mutually destructive versions. This being the case:**

**‘The Magistrate had no sound reason to prefer the evidence of the complainant (and Mabena) to that of the appellant “(Petersen vs S[2006 Jol 16092 (SCA) para 8’ ”.**

[197] The foregoing decision appears to be on all fours with the instant case. I say this because Advocate Sihlali raised the issue that the Crown did not challenge the 2<sup>nd</sup> Accused nor his alibi DW 2 on the alibi defence and did not contradict the evidence led on that. The learned Crown Counsel Mr Dlamini replied that it was sufficient that he put it to the 2<sup>nd</sup> Accused and DW 2 that all what they said in Court were false.

[198] I have carefully and calmly looked at the evidence of the 2<sup>nd</sup> Accused and DW 2 in chief and during their cross-examination. It is glaring that the prosecuting Counsel did not ask them any questions concerning their evidence in examination in chief

stating that the 2<sup>nd</sup> Accused was not near the scene of crime at the material time of the incident. They detailed particularization of where he was, the time and who he was with. To this end the 2<sup>nd</sup> Accused told the Court that on the morning of the 7<sup>th</sup> June 2010 at the time when this incident took place, he was in his flat at Mhlaleni Manzini with DW 2 who had been living with him in the said flat from January 2010 up until the date of his arrest. DW 2 for his part confirmed this evidence and told the Court that he was with the 2<sup>nd</sup> Accused in the said flat on 7<sup>th</sup> of June 2010 when this incident occurred. These witnesses also led evidence on so many other issues. Learned Crown Counsel by telling these witnesses that all they said are lies is submitting that that amounts to cross-examination of the witnesses on all the points that they gave evidence. I do not think that that submission is correct.

[199] It is trite that cross-examination must be direct in point. It must be clear that the cross-examiner seeks to test the veracity of the evidence on a particular issue. The cross-examination to the effect that all that the witnesses said are lies is evasive and does not challenge specifically the evidence on each issue. Such form of cross-examination without more goes to confirm that the Crown has no specific answers to that evidence. I am therefore minded to agree with the learned defence Counsel that the evidence of the witnesses raising the defence of alibi is not challenged or contradicted in cross-examination. The essence of cross-examination is to test the veracity of the witnesses and as it is often said the sky is the limit as to what questions can be asked in cross-examination so long as the questions are not meant to annoy or embarrass the witness.

[200] As it is, I hold that the evidence of alibi, was not challenged in cross-examination. Where evidence is given in examination in chief by a witness on a point and the evidence is not challenged or contradicted by cross-examination the law is that the

adverse party who failed to contradict or challenge the evidence will be taken to have accepted that evidence as the truth and the evidence is thus taken as established. It is inexorably apparent from the totality of the foregoing that the alibi evidence must be taken as established and I so hold. Therefore, notwithstanding the forensic evidence contained in exhibit K2 which I have adjudged to be of little probative value, I accept the alibi evidence as possibly true. As the court observed in **S v Liebenberg 2005 (2) SA CR 355 (SACR) para 14.**

**“(0)nce the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution’s evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false”**

[201] Similarly, in **Steven Malcom Musiker v The State (Supra) at para [16]**, the court made the following condign remarks:-

**“-----Where a defence of an alibi has been raised and the trial court accepts the evidence in support thereof as being possibly true, it follows that the trial court should find that there is a reasonable possibility that the prosecution’s evidence is mistaken or false. There cannot be a reasonable possibility that the two versions are both correct. This is consistent with the approach to alibi evidence laid down by this court more than 50 years ago in R v Biya 1952 (4) SA 514 (A). At 521 C-D Greenberg JA said:-**

**‘If there is evidence of an accused person’s presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is reasonable possibility that alibi evidence is true it means that there is the same possibility that he has not committed the crime’.**

[202] Following from the above, the alibi defence which I have found to be possibly true, has created a doubt in my mind as to the guilt of the 2<sup>nd</sup> Accused person. The proven facts do not point irresistibly in one direction which is the 2<sup>nd</sup> Accused’s guilt.

[203] In the light of the totality of the foregoing, I find that the case for the Crown which is based on circumstantial evidence, has fallen foul of the cardinal rule of logic laid down in **R v Blom 1939 AD 188 page(s) 202 – 3** which states that:-

**“In reasoning by inference there are two cardinal rules of logic which cannot be ignored:-**

- 1. The inference sought to be drawn must be consistent with all the proved facts: if it is not, the inference cannot be drawn.**
- 2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn: If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”**

[204] I thus find that the Crown has failed to prove its case beyond reasonable doubt against the 2<sup>nd</sup> Accused. I find the 2<sup>nd</sup> Accused not guilty of the offence as charged in count 3 and its alternative, and accordingly discharge and acquit him of the offence as charged in that count.

### **CASE AGAINST THE 1<sup>ST</sup> ACCUSED**

[205] The Crown insists that it has proved its case beyond reasonable doubt against the 1<sup>st</sup> Accused in respect of Count 1 and Count 2. The Crown also relied on circumstantial evidence.

[206] With respect to Count 1, it is common cause that on the 25<sup>th</sup> of May 2010 a house in the parental homestead of PW1 Vusi Masuku a top Government official by virtue of the fact that he then held the position of the Police Public Relations Officer caught fire. This was early in the morning around 1am. The whole house, the rafters and tiles collapsed. Several of the household items were burnt including a double bed,

base, four sofas, 3 carpets, grass mats, clothing materials, shoes, jackets, trousers, one huge handy gas stove, a drawer for storage together with the cutlery.

[207] Scenes of crime officers inclusive of PW 7 Sgt Mkhabela as well as members of the bomb disposal unit led by PW 9 Sgt Tsabedze visited the scene of crime at the Masuku homestead. During their investigation they found a brownish beer bottle which was smashed with a maize cock still in the bottle neck together with a piece of burnt greyish cloth. (exhibits C, C1 and C2). There was also the remainder of river sand and the smell of petrol everywhere. PW 9 told the Court that the presence of these substance led him to the conclusion that a petrol bomb was used in the attack at the Masuku homestead. I have no reason to doubt this evidence in view of the fact that it is the same component of substance that were used in the attack at the Shongwe homestead in Count 3 which I have hereinbefore exhaustively analyzed and concluded that they inexorably lead to the result that a molotov cocktail or petrol bomb had been used in the attack see paras [159] - [161] above. I will not unduly burden this judgment with any additional analysis of this issue, save to emphasise that this type of explosive is consistent with the type of raging fire which caused the level of destruction to the Masuku homestead as evidenced by the photographs, exhibits D to D6, taken by PW7 at the homestead during their investigation. I find it as a fact that a petrol bomb was used to attack the Masuku homestead.

[208] It is the case for the Crown that all the items recovered from the Masuku homestead exhibits C-C2 were collected and sent to the Forensic Laboratory in South Africa for forensic analysis.

[209] In respect of Count 2 it is common cause that in the evening of the 7<sup>th</sup> of June 2010 the homestead of PW 6 Bheki Sandile Mkhonta another top government official who was then the Mtsambama Member of Parliament caught fire. The homestead was extensively and seriously damaged. Scenes of crime officers inclusive of PW 7 as well as officers from the bomb disposal unit including PW13 4634 Constable Phinda Dlamini investigated the scene of crime. The investigating officers observed pieces of broken brown bottle scattered all over the scene as well as the smell of petrol. There was a bottle base which had some residue of sand. They also observed a partially burnt brownish cloth on top of the scaffolds as well as a piece of greyish cloth which was tucked into a bottle neck with a maize cock. (exhibit H, H1 and H2) PW 7 also took a series of photographs showing the damage to the homestead which is evidenced by exhibits F to F5 respectively.

[210] After analyzing the scene the investigators came to the conclusion that a molotov cocktail or petrol bomb was used in the attack. This finding is consistent with the bombing at the Masuku and Shongwe homesteads in view of the composition of the explosives used which bear no repetition. I accept it. I thus find it as a fact that a Molotov cocktail or petrol bomb was used in the attack at the Mkhonta homestead. It is also common cause that the scenes of crime investigators gathered up the exhibits found at the crime scene and sent them to South Africa for forensic analysis.

[211] It is proved that on the 11<sup>th</sup> of June 2010, PW 15 and his team of investigating officers arrested the 1<sup>st</sup> Accused. The Crown's case is that after duly cautioning the 1<sup>st</sup> Accused in accordance with the Judges Rules, PW 15 and his team interviewed him at both the Hlatikulu and Kaphunga police stations and the 1<sup>st</sup> Accused not only made admissions to PW 15, but also on the 12<sup>th</sup> of June 2010 of his own volition, led the police to three places on a pointing out process, namely, his parental homestead

at Ekwenzeni, Beatrice Shongwe's (PW4's) homestead and the forest at Elukhalweni. At his parental homestead he pointed out a pair of torn or cut grey or blackish jeans with rebook label (exhibit L) amongst other things. At the forest he pointed out a whitish 2 litre container labeled parmalat (exhibit L1). PW 12 took photographs of all the items recovered from the 1<sup>st</sup> Accused during the pointing out including the photographs of the rebook jeans (exhibits G1 and G2 respectively) as well as the photographs at the forest where the white 2 litre container was found (exhibits G7, G8 and G9 respectively.)

[212] It is common cause that all the items seized from the scenes of crime at the Masuku and Mkhonta homesteads respectively, as well, as those recovered from the pointing out exercise were sent to the Forensics Laboratory in South Africa for forensic analysis. The forensic report in respect of Count 1 is contained in exhibit K and that in respect of Count 2 is contained in exhibit K1. These two reports allegedly implicate the 1<sup>st</sup> Accused in the crime. The Crown urged the Court on the totality of the evidence led to hold that it has proved its case beyond reasonable doubt and find the 1<sup>st</sup> Accused guilty of the offence as charged in Counts 1 and 2 respectively or their alternatives.

[213] The defence challenged the evidence of the Crown on the same grounds advanced in the case of the 2<sup>nd</sup> Accused, namely, that PW 15 is not a credible or reliable witness. I adopt my reasons and conclusion reached on this issue when analysing the case of the 2<sup>nd</sup> Accused and hold that PW 15 is a credible witness.

[214] In the same vein, I find that the confessional statement allegedly made to PW 15 and his team by the 1<sup>st</sup> Accused is prejudicial evidence in the absence of a signed

confession tendered in evidence by the Crown. I adopt my analysis and conclusion while dealing with this issue in the 2<sup>nd</sup> Accused's case. I thus reject the confession made to PW 15 as legally inadmissible evidence.

[215] Furthermore, the allegation of torture raised by the 1<sup>st</sup> Accused as being what motivated him to go for the pointing out process, was also largely tailored along the same lines as that raised by the 2<sup>nd</sup> Accused. As I have hereinbefore stated when dealing with the case against the 2<sup>nd</sup> Accused, generally, an allegation of torture has to be proven by the production of a medical report. In this case, the 1<sup>st</sup> Accused specified that he visited a neurologist as a result of the torture. He did not produce his medical report but rather applied to Court to order the hospital to produce the neurological report. His application was granted and the Court ordered the neurologist to produce the report.

[216] In consequence of this order, a Medical report dated 6<sup>th</sup> July 2012 and signed by one Dr Violet Mwanjali was forwarded to this Court. In the report the good Doctor states as follows:-

**“RE: MR ZONKE, HOSPITAL FILE NO. OP. 1310/10**

**I received informed consent from Mr Zonke to deliver this report to you concerning his mental health condition.**

**The aforementioned is a known patient with epilepsy, no psychosis. He has been adhering well to medications and the last time he had an epileptic attack was in 2009 (information from patient and his mother Beatrice Shongwe).**

**He has always been of sound mind according (sic) his medical record and he is aware of court proceedings and for (sic) the crime he has committed. He is absolutely able to stand for the trial.”**

[217] I have carefully scrutinized the report and there is nothing therein that indicates that the 1<sup>st</sup> Accused suffered any torture, rather it states that he is an epileptic. Even though the 1<sup>st</sup> Accused admitted that he is epileptic, he however contended that this was not the report he was expecting from the neurologist. The 1<sup>st</sup> Accused did not bother to subpoena the neurologist or the psychiatrist whom he alleges that he sees every month to come and testify on the issue. The record of the alleged physiotherapy sessions which the 1<sup>st</sup> Accused is alleged to attend from time to time as a result of the injury allegedly sustained due to the torture was not also produced in evidence. There was nothing stopping the defence from subpoenaing both the neurologist and physiotherapist or psychiatrist as the case may be, to testify on their behalf but they failed to do so. In these circumstances, the only evidence of mental health challenges is that from the National Psychiatric hospital evidencing that the 1<sup>st</sup> Accused is epileptic. This does not constitute medical evidence of the alleged torture but is consistent with the evidence led by the 1<sup>st</sup> Accused which is to the effect that when he was booked into the Sidwashini Correctional Services on the 18<sup>th</sup> of June 2010, and was examined by the health officials there as per procedure, he told them that he was epileptic. He did not tell them that he was tortured or that he sustained any injury as a result of the alleged torture. There is no evidence to show that the health officials observed or recorded any injuries on the 1<sup>st</sup> Accused suggesting such torture. The allegation that the 1<sup>st</sup> Accused developed the headaches a few days after his admission into the correctional services is also not substantiated. In fact, 1<sup>st</sup> Accused told the Court that he reported the headaches to the health services at the correctional institution who conducted preliminary health examinations before referring him to the neurologist. The Court is however not availed of any such medical record.

[218] The foregoing appears to me to support the Crown's case that the 1<sup>st</sup> Accused only complained of being epileptic when he was booked into the Correctional Institution.

He was not tortured and did not sustain any injury as a result of any torture. This state of affairs is also supported by the fact that the 1<sup>st</sup> Accused did not tell any of his relatives at the three different scenes where the pointing out process was held, which was a day after the alleged torture, that he had been tortured.

[219] At his parental homestead he did not tell his mother or his girlfriend (with whom he has a baby) who were all present at the pointing out that he was tortured. This is notwithstanding the evidence by the 1<sup>st</sup> Accused's own showing that he was actually given the opportunity to speak to his girlfriend. The police had asked the 1<sup>st</sup> Accused to tell his girlfriend of his arrest. This was in my view a golden opportunity to tell his girlfriend of the alleged torture. The 1<sup>st</sup> Accused failed to utilize the opportunity. The contention that he did not speak to his girlfriend because he felt the police were mocking him does not in anyway justify his failure to tell his girlfriend at this point in time of the alleged torture.

[220] Then there is the pointing out that followed at the homestead of Beatrice Shongwe (PW 4). 1<sup>st</sup> Accused did not tell PW 4 who is his aunt or DW 3 Mbhekeni Tsabedze who is like his son and who were both present as independent witnesses at the pointing out, that he was tortured. Similarly, at the pointing out in the forest the 1<sup>st</sup> Accused did not also tell his uncle Enoch Kunene (PW 10) who was present at the pointing out, of the alleged torture. PW 4 and PW 10 told the Court that 1<sup>st</sup> Accused freely led the police to the different spots where he pointed out the items to them. He was not tortured or forced to do so. It is also proved that DW 3 and DW 4 were arrested in connection with these offences and taken to Kaphunga police station together with the 1<sup>st</sup> Accused. DW 3 and DW 4 told the Court that they were not physically tortured by the police even though they denied knowledge of the crime. Even though DW 3 stated that when he saw the 1<sup>st</sup> Accused at Hlatikulu before being

taken to Kaphunga he was in a bad state and crying, this evidence was contradicted by DW 4 who told the Court that he saw the 1<sup>st</sup> Accused at Hlatikulu before he was taken to Kaphunga and he also saw the 1<sup>st</sup> Accused in the night around 8pm when he was brought back from Kaphunga and he never saw the 1<sup>st</sup> Accused crying on any of those occasions. None of these witnesses testified to seeing the 1<sup>st</sup> Accused tortured or observing any injury on him that would suggest such torture. The first Accused did not tell any of these witnesses of the alleged torture.

[221] Furthermore, even though the 1<sup>st</sup> Accused alleged that during his first arraignment before the Nhlangano Magistrates Court on the 12<sup>th</sup> of June 2010, that he informed the Court of the alleged torture, this however remains a bare allegation in the absence of the Court record demonstrating this fact. This is because such allegations can only be proved by the production of the Court record. The defence failed to produce the Court record. It is also an established fact that the 1<sup>st</sup> Accused failed to raise the allegation of torture during his arraignment at the High Court on 18<sup>th</sup> June 2010. The first time this allegation saw the light of day was in the founding affidavit for the bail application which was sworn on 12<sup>th</sup> July 2010, about a month after the incident. I reject the allegation of torture as a recent fabrication and an afterthought. I accept the evidence of PW 15 that after he duly cautioned the 1<sup>st</sup> Accused, he voluntarily led the police investigators to the pointing out process.

[222] I come to the inexorable conclusion in the light of the totality of the foregoing that the defence has failed to prove the allegation of torture. I hold that the pointing out was free and voluntary. The items taken or recovered during the pointing out were not therefore through an illegal means and are admissible.

[223] With respect to the forensic evidence, I have hereinbefore noted that the Court is required to be more active gatekeepers in ensuring the reliability, cogency and reasonableness of such evidence. This inquiry can be carried out by the Court without the necessity of another expert opinion. Now, the Forensic reports exhibits K and K1 were prepared by PW 14 Cornelia Elizabeth Bergh who is a Lieutenant Colonel in the South African service attached to the Forensic Science laboratory in South Africa, as a chief Forensic Analyst.

[224] Her qualifications and experience which were not shaken or discredited under very exhaustive cross-examination by Advocate Sihlali, are detailed respectively in paragraph 2 of each of these reports as follows:-

**“2 My qualifications and experience are as follows:**

**2.1 I am in possession of a B.Sc degree from the University of the Orange Free State.**

**2.2 I have twenty seven (27) years experience in physics and microscopy. I have sixteen (16) years practical experience in forensic science.**

**2.3 I have attended numerous courses and workshops, (both locally and internationally), in a variety of disciplines, including:**

**2.3.1 Scanning Electron Microscope (SEM) Maintenance Course presented by Protrain (UK) Anaspec at the CSIR in 1997.**

**2.3.2 Scanning Electron Microscopy and Electron Diffraction Course presented by the University of Pretoria in 1998.**

**2.3.3 FBI Trace evidence school presented by the FBI at the Forensic Science Laboratory in 1998.**

**2.3.4 FBI Introduction the Hairs presented by the FBI at the Forensic Science Laboratory in 2000.**

**2.3.5 Project Approach to Special Investigations in the SAPS presented by the SAPS at the Forensic Science Laboratory in 2001.**

**2.3.6 Supervisors Role in Counter Terrorism investigations presented by the FBI in 2003.**

**2.3.7 Applied Polarised Microscopy course presented at the McCrone Research Institute (USA) in 2004.**

**2.3.8 FT-IR Course presented by Perkin Elmer at the Forensic Science Laboratory in 2004.**

**2.3.9 Advanced Forensic Microscopy presented at the McCrone Research Institute (USA) in 2007.**

**2.4 I have conducted more than 2286 forensic investigations, in a number of disciplines, including trichology, primer residue, fibre identification and comparison, physical matches, comparison of buttons and comparison of ropes and cords.”**

[225] In exhibit K, PW 14 was required in paragraph 3 to compare a piece of partly burnt fabric (3.1.3) with a pair of jeans, reebok described therein as brownish, (3.2.). This examination was in respect of items recovered from the scene of crime at the Masuku homestead and a pair of reebok jeans (exhibit L) seized from the 1<sup>st</sup> Accused’s house during the pointing out exercise.

[226] The result of the examination is detailed in paragraph 6 of exhibit K as follows:-

- “6.1 The fibres of the piece of fabric described in paragraph 3.1.3 and the fibres of the fabric of the pair of jeans as described in paragraph 3.2 are comparable regarding their morphological characteristics and generic class.**
- 6.2 The physical properties (e.g weave pattern, colour and the degree of soiling) of the piece of fabric as described in paragraph 3.1.3 and the fabric of the pair of jeans as described in paragraph 3.2 are comparable.**
- 6.3 The piece of fabric described in paragraph 3.1.3 could originally have been part of the pair of jeans described in paragraph 3.2 (see photograph I)”**

[227] Having carefully perused exhibit K, I am of the firm view that the opinion of the expert contained therein is cogent and reasonable in the circumstances of this case. I say this because PW 14 carefully detailed the method and analytical technique used in arriving at her conclusion in para 5 of exhibit k as follows:-

- “5. During the execution of my official duties, I examined the exhibits as described in paragraphs 3.1.3 and 3.2 through a process that requires skill in fibre examinations and microscopy. The analytical techniques utilized by me included:**
- 5.1 Stereo Microscopy: This is an internationally recognized technique used for optical observation at variable magnification;**
    - 5.1.1 The instrument which was used is a Leica MZ Apo Stereo microscope.**
    - 5.1.2 The process as a whole, as well as the interpretation of the results, requires knowledge of microscopy.**
    - 5.1.3 Stereo Microscopy is used to compare physically observable properties of substances e.g. shape, size and colour.**
  - 5.2 Polarised Light Microscopy. This is an internationally recognized light microscopy technique.**
    - 5.2.1 The instrument which was used is a Leica DMRP Polarised Light Microscope.**
    - 5.2.2 The process as a whole, as well as the interpretation of results, requires knowledge of microscopy.**
    - 5.2.3 Polarised Light Microscopy is used to determine the optical properties of substances for the identification thereof.”**

[228] PW 14 also attended Court and elaborated on the methods, procedures or techniques used in arriving at her conclusion. Her evidence was subjected to the rigours of cross-examination. She maintained that in exhibit K she used sterile microscope. That a polarized light microscope is used to determine the optical properties and that she used it to identify the fibres. She said she used the sterile microscope to take out a few of the fibres and placed it under the polarized light microscope and that is how she was able to identify the fibre and reach her conclusion. This according to PW 14 is because polarized light microscopy is a universally accepted microscope by all forensic institutions for identification of fibre. The application of this sort of microscope is so wide that it can be used not only for fibre but for other things such as crystals, identification of explosives etc. She also considered the weave pattern and the degree of soiling which were all comparable to the rebook jeans. She said

she used the phrase “could originally be part of the pair of jeans” in recognition of the fact that cloth is generally mass produced. However, the use of the word “comparable” in the report shows that the piece of cloth is highly likely to be from the rebook jeans. The contention by the defence that PW 14 used the wrong technique in this report is unsustainable. In my considered view PW 14 remained consistent, cogent and credible. Her evidence was not shaken under cross-examination. I accept the expert opinion as contained in exhibit K.

[229] Similarly, in para 4 of exhibit K1, which relates to evidence recovered from the Mkhonta homestead, PW 14 was requested to examine the exhibits as described in para 3 in order to determine:-

**“4.1 whether the exhibits as described in paragraph 3.1.1 form a physical match with the exhibits as described in paragraphs 3.2.1, 3.3, 3.4 and 3.5”**

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

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

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

[231] One of the grounds upon which the defence criticizes this report is that PW 14 failed to follow the instructions given to her in paragraph 4 thereof to do a physical match. The defence further alleged that PW 14 failed to do individual characterization as instructed and rather did class characterization. The defence contended that logic dictates that the credibility of the outcome is compromised where the correct procedure is not followed.

[232] To my mind this contention by the defence holds no water. I say this because in exhibit K1 as well as in her oral evidence in Court, PW 14 made it categorically clear that she proceeded on her official duties by examining the exhibits through a process that requires skill in physical matching as she was instructed in para 4. However, due to the fact that the edges of the piece of fabric were burnt, it was not possible to make a physical match. She thus, with her wealth of experience decided to do a physical characteristics of the piece of fabric with the rebook jeans though not instructed to do so. In my view her ability to manover and diversify her duties in these circumstances is what makes her an expert. It should go to her credit and not to her discredit. In her analysis she found the piece of fabric to be comparable in characteristics with those of the pair of jeans and concluded that it could therefore have originated from the rebook jeans. In this process she compared colour with colour, fibre with fibre, the weave pattern, the weight of the fibre and the degree of soiling which was also comparable. PW 14 indicated that she has knowledge in weaving, pattern, identification and comparison of fibres. That she is an expert in fibre identification and comparison, physical matching and comparison in patterns.

[233] PW 14 also countered the contention by the defence that the conclusion to the effect that the piece of cloth could have originated from the same trouser is wrong, because cloth is generally mass produced, by her assertions that that is why she used “could ” in the report. This, she says is in recognition of the fact that cloth is generally mass produced. PW 14 remained consistent and credible throughout her evidence which was not discredited under cross-examination.

[234] Furthermore, the grouse of the defence with the colour of the rebook jeans as described in exhibits K and K1 as brown, brownish or brown in colour is a none issue. The identity of the jeans was never in issue. In any case, PW 14 took

photographs of the rebook jeans which she examined. These photographs form a part of the record. I have carefully perused the rebook jeans appearing in these photographs and I find that it is the same rebook jeans (exhibit L) which was seized from the 1<sup>st</sup> Accused's house. Furthermore, the correct colour of the jeans has been an issue of debate throughout the proceedings though I find that in whatever colour it is described, that all the parties referred to the same rebook jeans (exhibit L). PW 15 and PW 12 referred to it as a grey or greyish trouser. PW 14 referred to it as brown or brownish jeans. The 1<sup>st</sup> Accused insists that it is a black coloured pair of rebook jeans. This was what prompted the line of cross-examination of PW 12 by Advocate Sihlali with reference to exhibit G2 the photograph of the rebook jeans taken by PW 12 at the pointing out, as follows:

**“Q: You said that the Accused went inside his house and showed you a grey trouser.**

**A: yes.**

**Q: (Shows exhibit G2 to PW 12) is that a grey trouser.**

**A: Yes it is grey.**

**Q: I put to it to you that that colour is black, the reason why you can't identify that it is black is because it's been there for sometime beaten by the weather.**

**A: On the day I took the picture in G2 it was grey to me.”**

[235] The foregoing is a clear acknowledgment by the defence that the reason why there is a disparity in the colour of the jeans is due to its exposure to the elements over a long time which affected its original colour. In any case as correctly stated by PW 14 people see colours differently. I therefore hold that the rebook jeans examined by PW 14 in exhibits K and K1 respectively, is the same pair of rebook jeans (exhibit L) recovered from the 1<sup>st</sup> Accused's house.

[236] Furthermore, Advocate Sihlali urged the Court to disregard the Forensic exhibits merely because learned Crown Counsel Mr Dlamini stated in Court that he was unable to follow the evidence of PW 14. I cannot subscribe to this proposition. I say this because I have hereinbefore held the expert opinion cogent, credible and reasonable in the circumstances of this case. In any case, the learning is that even in extreme cases where expert evidence is so technical that the Court is not in a position to follow the exact reasoning of the expert or observe the specific points of identification, great emphasis will be placed upon the general repute of the expert's profession and the absence or presence of possible bias. Once the Court is satisfied that the expert evidence can be accepted, it gives effect to that conclusion even if its own observation does not positively confirm it. See **Principles of Evidence by Schwikkard et al (supra ) pg 862.**

[237] I have hereinbefore detailed the impressive qualifications and experience of PW 14 in para [223] above. She elaborated on this during her testimony in chief. Her evidence as I have already noted was not discredited in cross-examination. More to this is that according to the unchallenged and uncontradicted evidence of PW 14, these reports were verified by another expert.

[238] In the final analysis, I find exhibits K and K1 respectively cogent, reasonable and reliable in the circumstances of the case. I accept these expert opinions. Though they do not constitute proof beyond reasonable doubt that the 1<sup>st</sup> Accused committed the offence as charged in Counts 1 and 2 respectively, however, they support the other proved facts in the case and are consistent with the inference which the Crown contends should be drawn.

[239] I say this because it is proved beyond reasonable doubt that the 1<sup>st</sup> Accused also pointed out exhibit L1 the 2 litre container in the forest. The contention by the

defence that the container could have been blown or swept into the forest by either wind or water is clearly unsustainable. The question is if this were so how then did the 1<sup>st</sup> Accused know of the presence of the container in that part of the forest as to motivate him to lead the police officers directly to it and point it out. The story told by the defence just doesn't add up. It is so improbable as to be incapable of belief. I accept the Crown's case that the 1<sup>st</sup> Accused knew that the container was there because he placed it there. This is supported by the evidence of PW 10 the 1<sup>st</sup> Accused's uncle to the effect that at that pointing out the 1<sup>st</sup> Accused told him that there was something in the forest which he wants to show to the police officers. 1<sup>st</sup> Accused also told PW 10 that he was carrying the container when he came from the damage they had done to the Masuku and Mkhonta homesteads. It is pertinent to observe here that the 1<sup>st</sup> Accused also told PW 4 Beatrice Shongwe his Aunt, when he led the police to the pointing out at her homestead, that he had come to collect the clothes he used at the Masuku homestead. This evidence was not shaken under cross-examination of these two witnesses. All that was suggested to PW 10 was that the 1<sup>st</sup> Accused will come to Court and deny the allegation. It is beyond dispute that the evidence of the 1<sup>st</sup> Accused whilst testifying in chief, where he sought to suggest that he said these things to PW 4 and PW 10 because the police forced him to say so, is clearly an afterthought. A recent fabrication. That version was never put to these witnesses under cross-examination nor was it ever put to the police investigating officers who testified, especially PW 15 the lead police investigator. In any case, there is no evidence to show why PW 4 and PW 10 who are 1<sup>st</sup> Accused's blood relatives would want to contrive such magnitude of story against him and implicate him in the crime. I thus reject the defence and accept the case for the Crown.

[240] I am also inclined to draw the inference from the totality of the evidence tendered that indeed the container exhibit L1 was the vehicle used to convey the petrol to the

different crime scenes. The contention by the defence that no evidence was led by the Crown to the effect that the container contained petrol is not in consonance with the evidence on record. Even though PW 15 told the Court that the container was sent to South Africa for forensic analysis, however, no forensic report was received in relation to it, the photograph of exhibit L1 which was taken by PW 12 at the pointing out and tendered in Court as exhibit G8 clearly shows that the container contained a liquid substance. This is buttressed by PW 12's evidence under cross-examination to the effect that when he took the photograph of the container as contained in exhibit G8, the container was smelling of petrol. The evidence that the container was smelling of petrol was not challenged or contradicted by the defence but was in fact confirmed by the 1<sup>st</sup> Accused who referred to the container in his own evidence, as the container of petrol. This leads me to the irresistible inference that indeed the container was used by the 1<sup>st</sup> Accused to carry the petrol. That is the only reasonable deduction to draw in the circumstances of this case. I find that to be a fact. In coming to this conclusion, I am mindful of the inconsistencies that appeared in the Crown's case with respect to the container. Though exhibit G8 clearly shows that the container contained a liquid substance when the photograph was taken during the pointing out, the Crown witnesses PW 10, PW 12 and PW 15 told the Court that the container was empty when it was recovered from the forest. PW 10 could not also remember whether the 1<sup>st</sup> Accused was handcuffed or not during the pointing out though the other Crown witnesses told the Court that he was handcuffed.

[241] I attribute these inconsistencies to the lapse of time between when the pointing out took place and when these witnesses testified. These inconsistencies to my mind are not sufficient to derogate from the truthfulness of the witnesses. As I stated in my decision in **Rex V Nhlonipho Mpendulo Sithole Criminal Case No. 370/11 para 45**

**“---It is my considered view that with the lapse of time between when this incidence occurred and when these witnesses testified, the witnesses cannot be expected to recall precisely all the minute details of the incidence. This is because human memory does not improve over time but deteriorates. As the Court held in State v Goganneskgosi (1980 B.L.R 133 (HC) at 140 B-C.**

**‘For an inconsistency to be material, such inconsistency must in my view, be of a material nature, capable of turning the result of the case one way or the other. For there could hardly be any witness of truth if the principles were otherwise, since in nine cases out of ten, witnesses are called upon to give evidence upon matters about which they have witnessed or given statements months or even years before. In such cases, the possibility of minor slips, which may be in conflict with their previous statements cannot be ruled out. But that should not necessarily make them untruthful’ ”**

[242] Similarly, in **Kenneth Gamedze and Others v The King Criminal Appeal No. 1/2005 page 11**, the Court made the following apposite remarks:-

**“It is well known to our Courts that there are frequently some inconsistencies in the evidence of two or more witnesses. Witnesses hear and see events from different perspectives. Then too, their evidence is usually given months or even years later after the events when their memory of them has faded to some extent, particularly in regard to some minor details of them.”**

[243] Then, there is the very instructive pronouncement of the 18<sup>th</sup> century philosopher **Dr William Paley**, which is as follows:-

**“I know not a more rash and philosophical conduct of the understanding than to reject the substance of a story by reason of some diversity of the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. This is what the daily experience of the Courts of justice teaches. When accounts of a transaction come from the mouth of different witnesses, it is seldom that it is not possible to pick out apparent real inconsistencies between them. The inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression on the minds of the judges. On the contrary a close and minute agreement induces the suspicion of confederacy and fraud”** (replicated in *Mlifi V Kligenberg* 1922 (2) SA 674 (LCC) at 697 para 80 per Meer J with reference to a lecture by Nicholas JA (published in 1985 SALJ at 32).

[244] The substance of this particular pointing out is that the container of petrol was recovered from the forest. This was not disputed by the defence. The

inconsistencies in the evidence of the witnesses which I recounted above do not diminish this.

[245] Furthermore, it is also common cause that the homestead of Vusi Masuku is just about 300 metres away from the homestead of PW 4 Beatrice Shongwe which is also about 1 kilometer away from the house of the late MP Bheki Mkhonta. These homesteads are near enough in my view, and are within a walking distance from one another. The Crown led evidence through PW 3 Thamsanqa Shongwe to show that the 1<sup>st</sup> Accused was not at home during the evening or night of the 7<sup>th</sup> of June 2010 when the Mkhonta homestead was bombed. PW 3 told the Court that whilst they were asleep at night in PW 4's house with Mbhekeni, DW 3, the 1<sup>st</sup> Accused came to the house with another boy whom they did not know. 1<sup>st</sup> Accused and the boy slept in the house and left around 6am in the morning to board a bus. This evidence was not challenged by the defence. In fact the 1<sup>st</sup> Accused admitted this evidence. He confirmed the testimony of PW 3 that on the 7<sup>th</sup> of June 2010 he arrived at PW 4's homestead at night with one Machea Dlodlu where he slept the night over and left the following morning. He alleged that Machea Dlodlu had asked him to help him with electrical practicals. The problem I have with this evidence, is that the defence did not put it to PW 3 that the 1<sup>st</sup> Accused was coming from work with Machea Dlodlu. It is in my view clearly an afterthought. A calculated attempt by the 1<sup>st</sup> Accused to perfect his defence.

[246] My view on this issue is fortified by the conflicting evidence advanced by DW3 on just where the 1<sup>st</sup> Accused was on the night of the 7<sup>th</sup> of June 2010. In his evidence in chief DW3 told the Court that on the said day the 1<sup>st</sup> Accused was at home the entire day and at night they all slept in the house together with Tamsanqa Shongwe and another boy whom the 1<sup>st</sup> Accused came with around 8pm. He said that the boy

and 1<sup>st</sup> Accused were from work. However, under cross-examination it was put to DW 3 that 1<sup>st</sup> Accused could not have been at home the whole day as he testified because, by DW 3's own showing, the 1<sup>st</sup> Accused came back to the house with an unknown boy around 8pm, DW 3 replied that 1<sup>st</sup> Accused was at home during the day but went to the neighbours in the evening. That he did not say this in his evidence in chief because he thought there is a difference between daylight and evening. He agreed that the 1<sup>st</sup> Accused did leave the homestead on 7<sup>th</sup> June 2010, but stated that he left in the evening around 6pm and he was with the neighbours. He said he saw the 1<sup>st</sup> Accused with the neighbours seated with his uncle. When it was further put to DW 3 that he has told many versions of the 1<sup>st</sup> Accused's whereabouts on the 7<sup>th</sup> June 2010 because in his evidence in chief he told the Court that the 1<sup>st</sup> Accused was from work around 8pm when he came with the unknown boy, yet under cross-examination he told the Court that the 1<sup>st</sup> Accused was at the neighbours seated with his uncle, DW 3 replied that 1<sup>st</sup> Accused had gone to his uncle's house to do some electrical work, thereafter, he sat down with his uncle and that the unknown boy was with the 1<sup>st</sup> Accused and DW 3 saw them. This evidence is in conflict with that of the 1<sup>st</sup> Accused who never made any mention of being in his uncle's house on the day in question. Surely, if this were so the 1<sup>st</sup> Accused would have mentioned it in his evidence or at least put it to PW 3. This is however not the case. I agree with the Crown that the evidence led by the defence on the whereabouts of the 1<sup>st</sup> Accused on the night of the 7<sup>th</sup> of June 2010, is contradicting and thus unreliable. I reject it.

[247] Since it is proved that the 1<sup>st</sup> Accused was at some point not in the house on the night of the 7<sup>th</sup> of June 2010 when the Mkhonta homestead was bombed, and that he returned to the house in the course of the night in the company of a stranger, the only logical inference to draw is that he was out bombing the Mkhonta homestead. This is also consistent with the result in exhibit K1 and the admissions he made to his uncle, Enoch Kunene (PW 10) during the pointing out process in the forest, when he

told his uncle that he was carrying the container of petrol (exhibit L1) when they came from the damage they had done to the Masuku and Mkhonta homesteads. I find this to be a fact.

[248] The forensic expert opinions coupled with the other pieces of evidence which I have carefully analysed above lead me to one irresistible inference, which is that the 1<sup>st</sup> Accused was involved in the bombing of both the Masuku and Mkhonta homesteads. I find that as a fact.

[249] It cannot be gainsaid from the totality of the above that the Crown has proved beyond reasonable doubt, pursuant to subsections (c) – (d) of Section 2 (2) of the Act, (reproduced in para [5] above) that by carrying out the bombings in the two homesteads, the 1<sup>st</sup> Accused was engaged in an act which involves serious damage to property, which endangered the life of people a fact which is inherent in the nature of the offence itself and which involved the use of the petrol bombs which are explosives.

[250] I now turn to the intention of the 1<sup>st</sup> Accused as espoused by Section (2) (j) of the Act which bears repetition at this juncture as follows:-

**“ 2 an act or threat of action which**

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

**(i) intimidate the public or**

**(ii) compel the government, a government or an international organization to do, or refrain from doing any act”.**

[251] Since the provisions of the statute are disjunctive and not conjunctive once there is evidence establishing any one of the above events in Section 2 (2) (j) of the Act, that is either (i) or (ii), the offence under Section 5 (1) of the Act has been proven.

[252] In proving that the bombings carried out by the 1<sup>st</sup> Accused were intended to compel the government, a government or an international organization to do, or refrain from doing any act in terms of (ii) above, the Crown relied on certain random bombings of top governmental officials houses and governmental institutional that happened around the same period, in support of its case. The reliance on those bombings is flawed because the Crown, whose case is that the bombings in the case instant were part of the general scheme of the proscribed organisations (PUDEMO and SWAYOCO) to carry out a series of bombings of government facilities to force a change in governance or government, has to produce evidence to show

- (a) That such bombings took place.
- (b) That it is the objective of the proscribed organizations to generally carry out those series of bombings to realize that change.
- (c) That those bombings took place as part of that general scheme.
- (d) The identity of those who carried out the bombings as members of the proscribed organizations.

[253] There is no evidence before this Court specifically establishing any of these points. The Crown failed to tender the manifesto of the proscribed organizations in evidence to establish that their objective is to achieve change in the governance of Swaziland through violence. There is no doubt that from the evidence it is generally known that certain bombings took place around this period. Such general knowledge cannot

amount to specific evidence of specific bombings, who carried out the bombings, and why all the bombings were carried out. It is important that the Crown takes its case out of the realm of such general knowledge by providing concrete evidence of the alleged events and the identity of the perpetrators in this case.

[254] Furthermore, it is not enough to produce a judgment in a case i.e the case of **Rex V Thandaza Silolo Case Number 170/13**, where an accused person admitted responsibility for one or two of the bombings and admitted that it was done in pursuance of the enterprise of the proscribed organisations to carry out many bombings to compel a change in governance. The Crown urged the Court to rely on Silolo's confession in that other case to reach the conclusion that the 1<sup>st</sup> Accused orchestrated the bombings *in casu*, also in furtherance of the objects of the proscribed organisations. This is clearly inconceivable. I say this because it runs contra to the spirit of section 228 of the CP&E which states in clear and unambiguous words as follows:- **“No confession made by any person shall be admissible in evidence against any other person”**. Similarly, the rest of the admissions made by Silolo in his evidence in that other case cannot also be relied upon in this case. The said convict Silolo, should have been called as a witness in this case to testify and be cross-examined by the defence. That was not done. His testimony in that case is of no probative value here, because it has not been subjected to the crucible of cross-examination in this case. It is obvious that he is available but he was not called or summoned as a witness by the Crown. His previous statement in another case can only be used, even in his presence, where he testifies and there is need to contradict him with his previous inconsistent statement in the other case. So even if he had been called and testified as a witness, such previous statement cannot be tendered as a matter of course except in the circumstance mentioned above. So as it is the use of such testimony made in another case will be prejudicial to the 1<sup>st</sup> Accused and violate his right to prior or advance notice of the case against him and amount to an ambush

or backstabbing to say the least. It is a gross violation of the right to fair hearing. The reliance on such previous statement of a person not called as a witness to convict an Accused person would bring the administration of justice into disrepute.

[255] More to the above is that it would even be more wrong to simply rely on a judgment convicting Silolo in another case, to convict the 1<sup>st</sup> Accused in this case. The 1<sup>st</sup> Accused was not on trial in that case and was not a party to that case and so that judgment should not affect or bind him. Such an approach will amount to a very bizzare method of adjudication. The use of such judgment in that manner cannot be justified as a judicial precedent. Such a judgment can only be used as judicial precedent in the present case where the facts as established by the evidence in this case are similar with the facts in the precedent case. That is not the situation here. In the present case no evidence has been led to establish the facts which were established by evidence in the previous case. It is the proposition of the most bizzare kind to suggest that the evidence that established certain facts in the previous case in which the 1<sup>st</sup> Accused was not tried nor participated in any form should be introduced in the present case and used to convict the 1<sup>st</sup> Accused in the form of judicial precedent. I reject this proposition.

[256] The 1<sup>st</sup> Accused has admitted that he used to belong to the proscribed organization (SWAYOCO) and that the objective of the organization which is still within him is to effect a change in governance or government. He however persistently denied that the *modus operandi* of the proscribed organization is change of governance through violence. The Crown had the burden to lead evidence to prove that the bombings by the 1<sup>st</sup> Accused was done on behalf of the organization in furtherance of the objective of the organization to effect a change in governance through violence. The mere fact that the 1<sup>st</sup> Accused is or was a member of the proscribed organizations

does not establish this fact. There is no evidence establishing this fact. The charge against the 1<sup>st</sup> Accused is not membership of a proscribed organisation. The charge against him is for setting fire and causing damage to the Masuku and Mkhonta homesteads.

[257] For the above reasons, I find as a fact that the Crown has failed to prove that the bombings were done with the purpose of compelling a change in governance or government.

[258] However, in terms of (i) above, there is evidence that the bombings intimidated the public. The ordinary grammatical meaning of the word “*intimidate*” by **Websters Comprehensive Dictionary (Deluxe encyclopedic ed)** is

- “(1) To make timid; cause fear in; cow;
- (2) To force or restrain by threats or violence”

[259] The Crown has established through the evidence of PW1 and PW 15 that these incidents were widely reported in the media. There is evidence from PW 10 who is an elder of the communities where these offences were committed that these bombings shocked the communities. PW 10 told the Court that the news of the bombings at the Masuku and Mkhonta homesteads was circulating and that the mood of the community was one of shock as to how the damage was done through bombings. He was particularly shocked at the bombing at the Mkhonta homestead because Mr Mkhonta was an MP and PW 10 wondered who would do that to him. The 1<sup>st</sup> Accused also confirmed in his evidence, that the news of the bombing at these homesteads was circulating and that the community was very shocked about the bombings at the two homesteads.

[260] There is also the established fact that the mother of Vusi Masuku was so shocked (the evidence is that she was shivering) as a result of the bombing at the Masuku homestead, that she had to see a doctor the following day. Mr Masuku's mother passed away 8 days after the bombing and according to Mr Masuku this was one real loss he suffered as a result of the incident. This was not disputed by the defence. I find it as a fact that the totality of the foregoing acts constitute intimidation of the public. These are horrifying acts which obviously disturbed the emotions or minds of the community and instilled fear in them. That the incidents also prejudiced national security and public safety is inherent in the general circumstances of the offence itself. The Crown thus proved beyond reasonable doubt that the 1<sup>st</sup> Accused carried out the bombings at the two homesteads with the intention to intimidate the public.

## **CONCLUSION**

- [261] (1) The Crown has proved its case beyond reasonable doubt against the 1<sup>st</sup> Accused in counts 1 and 2 respectively. I therefore find the 1<sup>st</sup> Accused guilty of the offence as charged in Counts 1 and 2 respectively. The 1<sup>st</sup> Accused is accordingly convicted of the offence as charged in both Counts.
- (2) The Crown has failed to prove its case beyond reasonable doubt against the 2<sup>nd</sup> Accused in counts 1, 2 and 3 respectively and their alternatives. The 2<sup>nd</sup> Accused is found not guilty of the offence as charged in Counts 1, 2 and 3 respectively and their alternatives. He is accordingly discharged and acquitted of the offence as charged in those Counts.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS**

**.....DAY OF .....2014**

**OTA J**

**JUDGE OF THE HIGH COURT**

For the Crown : P. Dlamini  
(Senior Crown Counsel)

For the 1<sup>st</sup> and 2<sup>nd</sup> Accused : Advocate C. Sihlali  
(Instructed by attorney M. Da Silva)