THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 090/2015

Reportable

In the matter between:

BUYELEKHAYA DALINDYEBO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Dalindyebo v S* (090/2015) [2015] ZASCA 144 (1 October 2015).

Coram: Navsa, Ponnan, Saldulker and Mathopo JJA and Baartman AJA

Heard: 21 August 2015

Delivered: 1 October 2015

Summary: Fair trial rights – complaint concerning delay in prosecution – held that largely due to conduct of appellant himself – complaint concerning inadequacy of legal representation rejected – accusation that trial judge acted irregularly by descending into the arena calling into question his impartiality unfounded – King, in

dealing with his subjects, committing criminal acts – actions deplored – setting fire to the houses of his subjects and severely assaulting young men alleged to have committed criminal acts – had it not been for medical intervention they would probably have died – defence that appellant could not be convicted of arson because the land on which the subjects lived belonged to him and the structures he had set fire to had acceded to the land rejected – a person could be guilty of arson if he sets fire to his own immovable property with the intent to injure another – appellant guilty of arson, kidnapping, assault with intent to do grievous bodily harm and defeating the course of justice – appeal in respect of severity of sentence dismissed – appellant held to be fortunate in not having had a lengthier sentence of imprisonment imposed.

ORDER

On appeal from: The Eastern Cape High Court, Mthatha (Alkema J sitting as court of first instance).

The following order is made:

(a). Save in relation to the conviction of culpable homicide and the consequent sentence, the appeal is dismissed.

(b). The conviction of culpable homicide and the sentence of ten years' imprisonment imposed in respect of that conviction are set aside.

(c). The order by the court below in relation to sentence is substituted as follows:

'1. In respect of the arson charges, namely Counts 1, 14 and 15, the accused is sentenced to FIVE (5) YEARS IMPRISONMENT in respect of each count.

2. In respect of the kidnapping charges, namely counts 5, 6, 7, 8, 9, 10 and 11, which is taken as one count, the accused is sentenced to ONE (1) YEAR IMPRISONMENT.

3. In respect of the charge relating to defeating the ends of justice by unduly influencing Mr Stokwana Sonteya to withdraw the arson charges, the accused is sentenced to ONE (1) YEAR IMPRISONMENT.

4. All the sentences referred to in paragraphs 1, 2 and 3 above shall run concurrently with each other, resulting in an effective sentence of FIVE (5) YEARS IMPRISONMENT in respect of all the aforesaid charges.

5. In respect of the assault charges, namely Counts 24, 26 and 28 the accused is sentenced to FIVE (5) YEARS IMPRISONMENT in respect of each count.

6. The sentences of five (5) years in respect of the aforesaid assault charges shall run concurrently with each other.

7. In respect of the charge relating to defeating the ends of justice by concealing the death of Saziso Wofa, the accused is sentenced to TWO (2) YEARS IMPRISONMENT.

8. The accused is thus sentenced to an effective term of TWELVE (12) YEARS IMPRISONMENT.'

JUDGMENT

Navsa JA and Baartman AJA (Ponnan, Saldulker and Mathopo JJA concurring):

Introduction

[1] Imagine a tyrannical and despotic king who set fire to the houses, crops and livestock of subsistence farmers living within his jurisdiction, in full view of their families, because they resisted his attempts to have them evicted, or otherwise did not immediately comply with his orders. Imagine the king physically assaulting three young men so severely that even his henchmen could not bear to watch. Imagine the same king kidnapping the wife and children of a subject he considered to be a dissident in order to bend the latter to his will. Consider that the king in question delivered the body of a subject, killed by his supporters, to a bereaved father, ordering the latter not to even

consider reporting the truth concerning the circumstances of his death to any authority and then fining the father of the deceased ten head of cattle because, so the King alleged, the son had brought shame to the Kingdom. If the State is to be believed, this is not a description of what occurred during medieval times but it is how the appellant, King Buyelekhaya Dalindyebo, treated his subjects at a time after South Africa became a Constitutional State subject to the rule of law. The appellant, on the other hand, would have this court accept that he was a caring and compassionate king who acted in the best interests of his subjects, in accordance with customary law and that his behaviour was beyond reproach. This appeal will determine which of the competing contentions prevail.

The convictions and sentences in the court below

[2] In the court below and before us the State's case against the appellant was as follows. The appellant, the Paramount Chief of the AbaThembu[1] in the Eastern Cape, who is also referred to as the King of that tribe, set fire to dwellings that housed three complainants, who were his 'subjects' and tenants, to secure their eviction when he considered that they had breached tribal rules. In all three instances the families of the people concerned looked on as their homes were set on fire. In that regard the appellant was charged with three counts of arson. The King was also alleged to have publicly assaulted three young men so brutally that some of the people present could not bear to continue to observe and had it not been for later medical intervention they might very well have died. The assaults were perpetrated, so the State contended, as punishment, without a trial, for criminal acts allegedly committed by the young men in question, being, inter alia, housebreaking and rape. It is common cause that one of the young men, Mr Lunga Pama, subsequently became mentally impaired. It is uncertain whether the impairment was caused by the assaults. In respect of the alleged assaults the appellant was charged with 3 counts of attempted murder and was convicted of the lesser offence of assault with intent to do grievous bodily harm. A fourth young man, who was alleged to have been party to the alleged crimes referred to above, was killed

[1] As recorded by the court below, the appellant derived his powers, duties and functions from the Transkei Authorities Act 4 of 1965 and his area of jurisdiction is regulated by the Black Administration Act 38 of 1927.

by members of the community who were supporters of and loyal to the appellant. The State contended that the assaults that led to the death of the fourth young man were perpetrated pursuant to the instructions of the King that he should be assaulted. In respect of this occurrence the appellant was charged with murder. The court below, however, found him guilty of culpable homicide. The appellant, so the State alleged, threatened and intimidated the father of the young man who was killed and in so doing sought to prevent criminal charges being laid in relation to the killing. The State also alleged that the appellant was guilty of acting with intent to defeat the course of justice by unduly influencing one of the complainants in the arson charge to withdraw the charge. These charges were brought under s 40*(a)* of the Transkei Penal Code Act 9 of 1983 (Transkei) (TPA) which reads as follows:

'40. Any person who –

(a) . . . does anything to obstruct, prevent, pervert or defeat the course of justice; or

. . .

shall be guilty of an offence. . . .'

On these two counts the appellant was convicted as charged. The appellant also faced seven counts of kidnapping. The State's case was that the appellant had deprived the wife and six children of one of his subjects of their liberty by forcing them to accompany him to the equivalent of a palace, 'The Great Place', in order to induce the husband and father to present himself there. The court below convicted the appellant of one count of kidnapping, notwithstanding that it accepted that he had deprived all seven individuals of their liberty in the manner described above.

[3] Thus, save for the charge of murder (on which the appellant was convicted of culpable homicide) and the seven counts of kidnapping, which were treated as one, the appellant was otherwise convicted of the following offences and sentenced as set out hereafter:

'1. In respect of the arson charges, namely Counts 1, 14 and 15, the accused is sentenced to FIVE (5) YEARS IMPRISONMENT in respect of each count.

2. In respect of the kidnapping charge, namely counts 5, 6, 7, 8, 9, 10 and 11, which is taken as one count, the accused is sentenced to ONE (1) YEAR IMPRISONMENT.

3. In respect of the charge relating to defeating the ends of justice by unduly influencing Mr Stokwana Sonteya to withdraw the arson charges, the accused is sentenced to ONE (1) YEAR IMPRISONMENT.
4. All the sentences referred to in paragraphs 1, 2 and 3 above shall run concurrently with each other, resulting in an effective sentence of FIVE (5) YEARS IMPRISONMENT in respect of all the aforesaid charges.
5. In respect of the assault charges, namely Counts 24, 26 and 28 the accused is sentenced to FIVE (5) YEARS IMPRISONMENT in respect of each count.
6. The sentences of five (5) years in respect of the aforesaid assault charges shall run concurrently with each other.
7. In respect of the culpable homicide charge, namely Count 31, the accused is sentenced to TEN (10) YEARS IMPRISONMENT.
8. In respect of the charge relating to defeating the ends of justice by concealing the death of Saziso Wofa, the accused is sentenced to TWO (2) YEARS IMPRISONMENT.
9. The sentence of two years imprisonment referred to in paragraph 8, shall run concurrently with the sentence of 10 years under the culpable homicide charge mentioned in paragraph 7.
10. It is ordered that five (5) of the ten (10) years imprisonment in respect of the culpable homicide charge mentioned in paragraph 7, shall run concurrently with the five (5) years imprisonment in respect of the assault charges.
11. The result of what I have said above is effectively the accused is sentenced to FIFTEEN (15) YEARS IMPRISONMENT.'

Reservation of questions of law

[4] The appellant appeals against the aforesaid convictions and related sentences with the leave of the court below. In addition, in terms of s 319 of the Criminal Procedure Act 51 of 1977 (the CPA) and at the instance of the State, certain questions of law were reserved by the court below. That, however, was not persisted with by the State on appeal.

The issues

[5] Before us, at the outset, the appellant challenged his convictions on the basis that his trial was unfair. He contended that because his trial had commenced approximately 8 years after the events on which his convictions were based, he was

hampered in his ability to adduce and challenge evidence and asserted that this was in violation of his constitutional right to a speedy trial in terms of s 35(3) of the Constitution. The appellant also seemingly challenged the fairness of his trial on the basis that the many legal representatives that appeared on his behalf during the almost 5 years that it endured, failed to represent him competently and effectively. In this regard, he contended that they failed to challenge witnesses when they were supposed to. The appellant also accused Alkema J in the court below of unjustifiably descending into the arena with persistent questioning that amounted to repeated irregularities vitiating the trial. The prosecutor was also accused of cross-examining on bases that were factually incorrect and which, it was submitted on behalf of the appellant, ought to have been prevented by the court below.

[6] Furthermore, the appellant challenged the merits of his conviction. In relation to his convictions on the charges of arson, his principal defence was that the two houses he had admitted to setting on fire were his property and he could therefore not rightly have been convicted of arson. It is necessary to note that in respect of those two charges there was no dispute that the appellant had set fire to the houses concerned either directly, or by way of instructions to others. We pause to state that the charges of arson, because of the geographical location were brought in terms of the TPA. Before us the propriety of that course being followed was unchallenged.[2] In respect of the remaining charge of arson the appellant denied any involvement at all. In convicting him of the three charges of arson, Alkema J invoked the right to housing as set out in s 26 of the Constitution. It was contended on behalf of the appellant that the learned judge erred in doing so and consequently erred in convicting the appellant of arson.

[7] In challenging his conviction on the three counts of assault, the appellant contended that the court below had failed to take into account that in inflicting what he considered to be ‘light lashes’, he meant not to act in concert with his supporters who had already severely beaten the three young men who were subjected to the assaults, but had meant to avoid them being assaulted any further by his supporters. In respect of

[2] This was so because, in essence, it equated with the common law definition of arson.

his convictions on the counts of defeating the ends of justice, he contended that there had been insufficient evidence to justify the conclusions of the court below. Similarly, it was submitted that the evidence in relation to the kidnapping charges was wanting. In respect of his conviction of culpable homicide, the appellant contended that there was no evidence linking him to the actions of his subjects and/or supporters, who, it is common cause, had severely beaten the young man who had died as a result thereof. In respect of the sentences referred to above, the appellant's case was that they were shockingly disproportionate.

Fair trial rights – delay in prosecution

[8] First we turn to deal with the appellant's contention that, because of the lapse of time between the events and the commencement of proceedings in the court below, his trial was unfair. It is true that our Constitution dictates that criminal trials should begin and conclude without unreasonable delay. Section 35(3)*(d)* provides:

'3. Every accused person has a right to a fair trial, which includes the right –

. . .

(d) to have their trial begin and conclude without unreasonable delay.'

In *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC), para 20, the Constitutional Court, in examining a similar provision in the interim constitution, stated that '. . . a useful starting point is to establish why the right to a trial within a reasonable time was included as one of the specifically enumerated elements of a fair trial.' In para 23 the Constitutional Court considered that the enduring impact of a prosecution process may well jeopardize or impair the benefits of the presumption of innocence. Doubt will have been sown as to an accused's integrity in the eyes of his family, friends and colleagues. In addition to the social prejudice an accused is also subject to invasions of liberty that range from incarceration to onerous bail conditions to repeated attendance at court. The right to a trial within a reasonable time, so the Constitutional Court explained (para 24), '. . . also seeks to render the criminal justice system more coherent and fair by mitigating the tension between the presumption of innocence and the publicity of trial.' With reference to the American case of *Barker v Wingo, Warden* 407 US 514 (1972) at 532. Kriegler J sets out in para 25 of *Sanderson*

how a court should determine whether a particular lapse of time is reasonable. He says the following:

'[T]here is a 'balancing test' in which the conduct of both the prosecution and the accused are weighed and the following considerations examined: the length of the delay; the reason the Government assigns to justify the delay; the accused's assertion of his right to a speedy trial; and prejudice to the accused.'

[9] In drawing comparisons with foreign jurisdictions, the Constitutional Court in *Sanderson* (para 26) took note of the fact that the vast majority of South African accused are unrepresented and have no conception of a right to a speedy trial. It was also unrealistic not to recognise that the administration of our criminal justice system, including law enforcement and correctional agencies, were under severe stress.

[10] We now examine the facts in relation to the delay in the appellant's prosecution *and* we deal with the question of trial prejudice. We start by scrutinising in some detail, the events preceding the commencement of the trial. On 27 June 1995, Mr Stokwana Sonteya (Stokwana), laid a charge of arson against the appellant at the Bityi Police station. He alleged that the appellant had set fire to his house. On 4 July 1995, the appellant was arrested in respect of that charge and made a warning statement. On 28 July 1995, Mbuzeni Makhawenkwana (Mbuzeni) also laid a charge of arson against the appellant at the Bityi Police station (the second arson charge). He alleged that the appellant had set fire to his home on 20 July 1995, after removing his belongings and leaving them scattered in the veld. This, according to Mbuzeni, was a form of punishment because he had murdered someone on the King's land and according to the King had thereby brought disgrace upon the kingdom. On 30 July 1995 the appellant was arrested on that charge and made a warning statement in relation thereto. On 1 August 1995 the appellant failed to attend court in relation to his prosecution on the charge laid by Mbuzeni and the court consequently, on 14 September 1995, issued a warrant for his arrest. The evidence adduced on behalf of the State proved that the appellant had employed various means to ensure that the charges brought by Stokwana were withdrawn. Stokwana's evidence was that he had been approached by Chief Zwelidumile, who was also subject to the King's authority and part

of the hierarchical chain of command, and pressured to withdraw the charges. The chief asked Stokwana how he could even contemplate charging the King with criminal conduct. Wayiya, was also approached by the Chief who sought to prevail on him to get his brother, Stokwana, to withdraw the charges. As is becoming apparent from the evidence of the principal witnesses on behalf of the State, far from seeking his day in court, the appellant was doing his utmost to avoid it and in this regard was relying on a royal prerogative. On 10 August 1995, succumbing to the pressure, Stokwana and Wayiya withdrew the charges. It should be borne in mind that, at this stage, the King had set fire to Stokwana's house. Stokwana and his brother testified that they succumbed to the pressure because they wanted to avoid further ills being visited upon them by the King.

[11] In relation to the charge of the murder of Mr Saziso Wofa (the deceased) in respect of which, as described above, the appellant was convicted of culpable homicide, the following timeline is relevant. On 27 January 1996 the deceased, who was then 18-years old, died after he had been severely and brutally assaulted by members of the community who were also supporters of the King. According to witnesses for the State, the appellant was notified about his death and arranged for the body to be delivered to the deceased's father. The appellant accompanied the body and others to the deceased's father's homestead. There he instructed the father to make arrangements for a burial and ordered him to tell staff at the mortuary that his son had died of natural causes. According to the deceased's father, Mr Koto Wofa (Wofa), he was also warned not to report the matter to the police. Wofa testified that he complied with the appellant's order to present himself at the 'Great Place' that same afternoon. When he did, the appellant ordered him to pay a fine of ten head of cattle because of the disgrace his son had brought upon the King's land by associating himself with the criminal acts of the other three young men who had been assaulted as described above. If Wofa and the State witnesses are to be believed in relation to the events described above, then what is clear is a pattern of intimidation by the appellant to avoid having to deal with the legal consequences of his actions. Inspector Nelson Tobias Hakula (Hakula), branch commander at Bityi police station, had heard rumours about the deceased's death and

the assaults perpetrated on people who resided on the farm over which the appellant had jurisdiction and decided to investigate the matter. He paid Wofa a visit and subsequently, on 8 February 1996, obtained an exhumation order. The deceased's body was exhumed and an autopsy was performed. On 10 February 1996 Hakula caused a warrant for the appellant's arrest to be issued in relation to the murder of the deceased.

[12] On 1 May 1997, a date scheduled for the trial of the appellant in respect of the arson charge related to Mbuzeni's house, the appellant failed to appear in court. Instead of following the normal course of having a warrant issued for his arrest, the prosecution elected to withdraw charges. A number of witnesses, including members of the South African Police Services (SAPS), testified that the appellant was an influential figure and that senior police officials had intervened to ensure that he would not be prosecuted. At this stage it is necessary to record that, at the relevant time, not only was the appellant King of the AbaThembu, but he was also a member of the Provincial Legislature. Mbuzeni's evidence on why he did not pursue the arson charge is as follows:

'My Lord I abandoned that case as far as I know that was the end of the case, because I not was getting any assistance from the police.'

It is common cause that, subsequent to the events described above, the appellant's subjects were becoming increasingly unhappy about his reign and the manner in which he treated them and ultimately led protests against him.

[13] The charges referred to above were only reinstated as a result of pressures being brought to bear by way of a complaint lodged with the Human Rights Commission by Mbuzeni from prison, where he was incarcerated because of his conviction in relation to the murder referred to earlier in this judgment and a complaint, apparently by way of a letter sent to the National Police Commissioner by one of the appellant's chiefs, Chief Jonginyaniso Mtitara. The existence of the letter was not seriously challenged in cross-examination. In January 2003, by directive of the National Commissioner, detective inspector Alfred Madolo, stationed at Tembisa in the North Rand started to re-investigate the charges and the events referred to above. The charges that had been

brought earlier must have been reinstated prior to the appellant's appearance in the court below on 8 November 2004 with further related charges added. We have no hesitation in accepting the evidence of the witnesses on behalf of the State in relation to the reasons for the delay in the appellant's prosecution. The complainants were justifiably terrified of the appellant. Even when they were desperate enough to report matters to the police they were met with the negative force of his influence and were pressurised into withdrawing whatever action they had taken to initiate a prosecution. We pause to record that Wayiya did not lay any charges nor did the father of the deceased. They were too terrified to do so.

[14] In the present case it is so that years passed between the commission of the alleged offences and the commencement of the appellant's trial. Much, if not all of that delay was caused by the appellant being obstructive and employing dubious means to thwart the administration of justice, including the intimidation of complainants. Pressure had to be brought to bear by the community for the prosecution to be reinstated.

[15] Having done all he could to avoid facing prosecution, the appellant attempted to turn his vice into a virtue. Very early on in his trial his counsel noted that he was now faced with the difficulty of fading memory and the possible loss of documentation. He also asserted that at least two crucial witnesses had died in the interim. He did not indicate who those witnesses were. Much later, whilst the appellant was testifying and under re-examination, he increased the number of witnesses who could have testified in support of his case to six potential witnesses, who, he informed the court, had all passed away. The first person he named he described as being his 'eye on the farm'. It is necessary, at this stage, to record that the farm, Tyalara, is where 'The Great Place' is located and is registered in the appellant's name. Tyalara is also the place where all the events on which the charges were based took place. The appellant named the other persons who had died but did not say on what aspects of the State's case or his defence he required their testimony.

[16] The only reference by the appellant to documentation that might have been lost, potentially causing him prejudice in his defence, was to occurrence book entries. Once again we were not told in what respect they were relevant and how they might have assisted the appellant in his defence.

[17] It is to be noted that a number of witnesses who testified on behalf of the State, to whom reference will be made later in this judgment, were witnesses tendered in terms of s 204 of the CPA, [3] many of whom had been loyal to the appellant. It also appears that a number of witnesses to the events that formed the subject of the charges faced by the appellant continued to reside on the farm and were available to both the prosecution and the appellant at the time of his trial. The appellant testified that he had made attempts to talk to potential witnesses. Some had said that they did not recall the events of that time, and others that they did not want to become involved. Importantly, the appellant admittedly himself played a central role in the events in relation to which he had been charged. The events were dramatic and were such that they would leave a permanent impression. In any event the record extends to over 3000 pages and scrutiny of it reveals that a vigorous defence was mounted and that the State witnesses were subjected to lengthy cross-examination. Loss of memory did not appear to impact on the appellant's defence. We could detect no prejudice.

[18] Significantly, the appellant's dilatory and obstructive behaviour continued after the commencement of his trial. He had successive and multiple legal representatives and, at one stage, elected to represent himself. It is clear from the record that he contributed in large part to the trial lasting almost five years. Exhibit 'DD' contained in the record lists trial postponements at the instance of the accused. They comprise a total of at least 34 postponements.

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[3] Section 204 provides that when the prosecution calls a witness who will be required to answer questions which may incriminate him or her with regard to an offence specified by the prosecutor, the court shall inform the witness that he is obliged to give evidence, that questions may be put to him/her with regard to the specified offence, that he/she will be obliged to answer any question notwithstanding that the answer may incriminate him or her and that, if he/she answer frankly and honestly all questions put to him/her, he/she shall be discharged from prosecution with regard to the offences specified or with regard to any offence in respect of which a verdict of guilty would be competent.

[19] To our minds, it is clear that the appellant had no interest in his trial being finalised. On the contrary, from the onset he attempted to avoid being prosecuted and thereafter focused on obstructing the finalisation of his trial. Insofar as his liberty is concerned, except for the briefest period of incarceration soon after the occurrence of the events in question, he has had the benefit of being freed on bail.

[20] In respect of alleged trial prejudice, it is to be noted that the witnesses on behalf of the State were cross-examined at length. Other than the ipse dixit of his legal representative referred to above, we could, despite our best efforts, not detect any hindrance or prejudice to the appellant in the conduct of his defence. Furthermore, even though threatening to call witnesses who, on his own and the State's version of events, were crucial to his defence, for example his sister, he did not do so. In our view, trial delay leading to an unfair trial, as the appellant's defence is entirely without merit.

[21] To sum up, the delay in the appellant's prosecution was caused largely by his own bad behaviour, including the fear he induced in his subjects and the influence he wielded in his area of jurisdiction. Insofar as prejudice is concerned, we could detect none.

The complaint that appellant was not competently represented during the trial

[22] We now turn to deal with the appellant's complaint that he was not competently and effectively represented. In *S v Tandwa & others* [2007] ZASCA 34; 2008 (1) SACR 613 (SCA) this court dealt with the constitutional right to be legally represented during a criminal trial and reiterated that the right to legal representation meant that it should be real and not illusory and that this translated into the right to a proper, effective and competent defence.[4] It said the following (para 7):

'Incompetent lawyering can wreck a trial, thus violating the accused's fair trial right. The right to legal representation therefore means a right to competent representation – representation of a quality and nature that ensures that the trial is indeed fair. When an accused therefore

[4] See para 7 *et seq*.

complains about the quality of legal representation, the focus is no longer, as before the Constitution, only on the nature of the mandate the accused conferred on his legal representative, or only on whether an irregularity occurred that vitiated the proceedings – the inquiry is into the quality of the representation afforded.' (Footnotes omitted.)

[23] We now embark on that enquiry. The appellant employed no fewer than 11 legal representatives. We have already made reference to the number of postponements granted by the court below at his instance. From his interaction with the court when he elected to represent himself and from his testimony it is clear that the appellant is no shrinking violet. He was not averse to dispensing with the services of a legal representative when he was unhappy with the manner in which his case was being conducted and on occasion for no apparent reason. When he did conduct his own defence he did not present as an unsophisticated litigant. Once again the appellant, in resorting to this defence, is attempting to turn a vice into a virtue. Under cross-examination the appellant repeatedly found himself in difficulty when counsel for the State asked why important issues which he was now testifying about had not been put by his legal representatives to witnesses who testified on behalf of the State. He responded by stating that he had instructed his legal representatives to do so but that they had failed him. These repeated responses led to one of his legal representatives requesting the court to release him from further representing the appellant. Given the appellant's strength of character and his very active and vigorous involvement in his own defence, it is highly doubtful that counsel would have acted without or contrary to his instructions, whilst he maintained a stoic silence. When, later in this judgment we deal with the credibility of witnesses, including the appellant's testimony, we will show that he was not averse to being economical with the truth. As stated in the preceding paragraph, a vigorous and extensive defence was mounted on behalf of the appellant. Cross-examination was extensive and such legal arguments as were required to be made as to the admissibility of evidence or in relation to any other issue appears to have been dealt with thoroughly and ably. This includes submissions that were made in relation to an application for a discharge at the end of the State's case in terms of s 174

of the CPA. As in *Tandwa* we find the appellant's complaint concerning the quality of his legal representation to be devoid of substance.

The complaint concerning the prosecutor

[24] In written heads of argument on behalf of the appellant, a number of instances were provided which it was submitted demonstrated that the prosecutor unfairly put questions in cross-examination which were factually incorrect and that Alkema J wrongly allowed. As pointed out on behalf of the State, at the relevant times the appellant was legally represented and the legal representatives were entitled to object and did. A running record was available and each party was entitled to refer to it and did. In any event, this complaint is unjustified. The State's version of events was put to a number of witnesses as, for example, that the community was terrified of the appellant. That differs from the appellant's perspective which is that he was kind and compassionate. This does not mean that the prosecutor was precluded from putting that view based on his assessment of the evidence presented by the State. This is one of the aspects on which the prosecutor is criticised. Another instance provided on behalf of the appellant is that the prosecutor put to witnesses that at material times the appellant was the paramount Chief when, in fact, his brother had been acting in his stead. The appellant was a member of the Eastern Cape Provincial Legislature and was away for extended periods but did return during weekends when he assumed the ultimate authority on Tyalara. We do not intend to deal any further with each instance referred to on behalf of the appellant save to state that this complaint is unfounded.

The complaint that the trial judge unjustifiably descended into the arena rendering the trial unfair

[25] We now address the appellant's complaint that Alkema J repeatedly and unjustifiably descended into the arena thereby rendering his trial unfair. In *S v Rall* 1982 (1) SA 828 (A) at 831A-F this court said the following:

'First, some general observations.

According to the well-known *dictum* of Curlewis JA in R v Hepworth 1928 AD 265 at 277, which the learned Judge *a quo* obviously had in mind in his remarks quoted above:

"A criminal trial is not a game . . . and a Judge's position . . . is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."

Inter alia a Judge is therefore entitled and often obliged in the interests of justice to put such additional questions to witnesses, including the accused, as seem to him desirable in order to elicit or elucidate the truth more fully in respect of relevant aspects of the case. (Wigmore on *Evidence* 3rd ed vol 3 para 784 at 151-2.) And for that purpose, according to the learned author (*ibid* at 159), he may put the questions in a leading form –

"simply because the reason for the prohibition of leading questions has no application to the relation between judge and witness."

There the learned author differentiates that relation from the one between counsel and a witness he calls. Counsel is prohibited from putting leading questions to his own witness because of the risk that the witness may perhaps think that such questions are an invitation, suggestion, or even instruction to him to answer them, not unbiasedly or truthfully, but in a way that favours the party calling him. (Cf *Wigmore* para 769*; R v Ngcobo* 1925 AD 561 at 564; *R v A* 1952 (3) SA 212 (A) at 222C-D.) Ordinarily that would not apply to leading questions put by the Judge. Nevertheless, the putting of leading questions by a Judge should, I think, be subject to the limitations about to be mentioned.'

Later, in *Rall*, this court said the following (at 832C-E):

'A judge should also refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by the litigants. As Lord Greene MR observed in *Yuill v Yuill* (1945) 1 All ER 183 (CA) at 189B, if he does indulge in such questioning –

"he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation."

(See, too, the *Jones* case *supra* [*Jones v National Coal Board* (1957) 2 All ER 155 (CA)] at 159C-E.) Or, as expressed by Wessels JA in *Hamman v Moolman* 1968 (4) SA 340 (A) at 344E, the Judge may thereby deny himself –

"the full advantage usually enjoyed by the trial Judge who, as the person holding the scale between the contending parties, is able to determine objectively and dispassionately, from his position of relative detachment, the way the balance tilts."'

[26] The question presently being addressed is whether Alkema J breached any of the canons of good judicial behaviour. In this regard several references were made on behalf of the appellant in written heads of argument to the record of proceedings in order to demonstrate how the trial judge improperly entered into the arena beyond what is generally acceptable and how this supposedly impinged on the court's impartiality. The first is a reference to Alkema J intervening when counsel was cross-examining Stokwana's wife, Ms Nocingile Sonteya, about whether a statement to the police was consistent with her evidence. We have taken great care to consider that part of the record. In our view the judge was seeking to prevent unfair examination by pointing out that a distinction which counsel at that stage sought to draw did not exist. The second reference is to an instance when Wayiya was being cross-examined and was asked whether his deceased wife would, in respect of a particular event, have reacted in the same way as he would. Alkema J enquired of counsel whether Wayiya could rightfully be expected to answer that question. It is preposterous that that enquiry should form the basis of a complaint against Alkema J. The third instance complained of is where Alkema J asked of the appellant, whilst he was testifying, whether he was acquainted with legislation that regulated his position as head of his tribe and the administration of the area over which he had jurisdiction. The fourth was when Alkema J sought to obtain clarity from the appellant when he was testifying, about his evidence that the eviction by way of the setting on fire of the dwelling of Stokwana was at the instance of the community. We are at a loss to understand why these two instances form part of the complaint against Alkema J. We do not intend to deal with every instance referred to. Alkema J did indeed engage with witnesses, including the appellant, on a number of occasions. This was perfectly understandable, particularly since he was presiding over a trial that endured for many years and was attempting to keep abreast of the evidence adduced by scores of witnesses and to ensure that he maintained a grasp of the issues in dispute. If anything, Alkema J was extremely patient and indulgent throughout the trial. He took great care to ensure the appellant was legally represented. He erred on the side of caution by granting the appellant a great number of postponements in the

face of an obvious sense of frustration on the part of the State. The record proves that the learned judge's interventions were not tainted by any impropriety.

Synopsis of the evidence in relation to the arson and kidnapping charges

[27] In the present case, the trouble that ultimately led to the appellant's conviction on some of the charges referred to above, started with Stokwana's encounters with his monarch. The first event was that 170 of Stokwana's goats and approximately 80 of his sheep were impounded at the instance of the appellant on the basis that they had strayed beyond their normal grazing area and had wondered onto restricted areas which had been cordoned off to enable them to recover from the previous years' grazing. Stokwana denied this but in any event decided to start paying off the fine that had been imposed by the appellant to enable the release of his impounded stock. He paid R400 towards their release but still owed a substantial amount of money. His stock was released to him on the understanding that the balance owing in respect of a fine imposed by the King would be paid. In the intervening period, Stokwana's horse was impounded. According to him there was no justification for the horse being impounded, but he nevertheless made the journey to the 'Great Place' to pay the R20 release fee. At the time that he paid the fine, there was, according to Stokwana, an unpleasant exchange between himself and the appellant's sister which, he testified ended with her hurling insults at him.

[28] Stokwana testified that he had unsuccessfully attempted to borrow money to pay the balance of the fine. The State's case was that the delay in paying the fine as well as the allegation that Stokwana had taken his horse from the 'Great Place' by force invoked the appellant's ire and caused him to lead a march on Stokwana's homestead. According to the evidence of a number of State witnesses, including Stokwana's wife and others who had previously been loyal to the appellant, the appellant accompanied by a gaggle of his supporters arrived at the homestead and after ordering Mrs Sonteya to remove the family's belongings from the house, set fire to the main hut as well as to two others and to the kraal in which there were nine young lambs, including one that had only two legs. Witnesses testified that, the appellant also set fire to a small field of

maize, which Stokwana and his family maintained as part of a larger garden. Stokwana's wife testified that there was an amount of R200 hidden in a rafter of the main hut which was destroyed due to the fire. The amount of R200 was money that had been collected as part of the funds of a local crèche for which Stokwana acted as a treasurer. The nine lambs had all perished due to the fire. The entire maize crop was also lost.

[29] The appellant's version of events is that 'the community' was incensed at Stokwana's repeated grazing infringements and because he had failed to pay the remainder of the fine imposed and had been defiant by failing to present himself at the 'Great Place' when instructed to do so by the appellant. The community therefore decided to set fire to his homestead as a form of eviction. The appellant stated unequivocally that he had identified with the community's decision to set fire to Stokwana's homestead in order to compel his eviction. It was also undisputed that the homes of all of the complainants in respect of each of the arson charges had in fact been constructed by them using materials such as thatch and mud which were all resourced from the farm.

[30] According to a number of State witnesses, including Stokwana's wife the appellant had ordered the latter to accompany him to the 'Great Place' after he had set fire to the homestead. She had six very young children in attendance at the time, a number of whom clung to her physically. Mrs Sonteya testified that, accompanied by her children, she followed the appellant to the 'Great Place' and that some time after they had arrived there, the appellant told her that he had brought her along to compel her husband to present himself there. Mrs Stokwana testified that she had no choice but to follow the King because she feared him. The appellant, on the other hand, testified that he had not kidnapped Mrs Stokwana and the children but had merely offered food and shelter at the 'Great Place' as an act of compassion.

[31] Stokwana had been in the fields on the farm when he was informed that the appellant had set fire to his homestead. He borrowed a horse and rode towards his

home. He testified that he saw the flames and decided it best to report the matter to the police. He laid a charge of arson at the Bityi police station. According to Stokwana, the police advised him to spend two nights at the police station because they didn't have transport and considered it safer for him to do so.

[32] Mrs Sonteya testified that they were released the day after they had been taken to the 'Great Place'. Stokwana returned to his home with the police and he and his wife individually made their way to her maiden home which also fell under the appellant's jurisdiction as King of the tribe. They relocated only after obtaining permission from Chief Zwelidumile. Stokwana testified that a short while after he had laid the charge referred to above, Chief Zwelidumile instructed him to withdraw the charge. The Chief appeared aghast that Stokwana had even contemplated laying a charge against the appellant, their King.

[33] Wayiya testified that a sub-headman had approached him to persuade his brother to withdraw the arson charges against the appellant. Wayiya and Stokwana both testified that they discussed withdrawing the charge and had decided that it was in both their interests to do so. They were keen to avoid further evils being perpetrated against either or both of them. They attempted unsuccessfully to get the authorities to withdraw the charge. Thereafter they presented themselves at the 'Great Place' to ask the appellant to accompany them so that they might collectively persuade the authorities to withdraw the charge.

[34] On the same day that the charge was withdrawn Mbuzeni's house was set alight. The appellant admits that he led a group of his supporters to Mbuzeni's homestead. According to a number of witnesses who testified on behalf of the State, the group, on its way to Mbuzeni's house, passed by a number of young boys playing football. The appellant summoned them to Mbuzeni's house. Their slow response angered the appellant who punished them by causing them to repeatedly perform 'frog jumps'. Thereafter he instructed the boys to set fire to Mbuzeni's house. They followed the instruction because they feared him. Mbuzeni's house was set on fire only after it had

been emptied of its contents, which was left in the veld on the appellant's instructions. Mbuzeni's aged mother watched in horror as the house burnt to the ground.

[35] As he had testified in relation to the setting on fire of Stokwana's homestead, the appellant stated that the community had decided to evict Mbuzeni by setting fire to his house. The community decided upon this course of action because Mbuzeni had killed someone he had suspected of being a witch and by doing so had brought disrepute to the appellant's kingdom. The appellant testified that he was concerned about Mbuzeni walking around Tyalara brandishing a firearm.

[36] It is common cause that at the time that Mbuzeni's house was set on fire he was being prosecuted in respect of the murder of the person he had killed. It is also unchallenged that at the time his house was set on fire, he was in employment in Gauteng and was informed about that fact telephonically. Mbuzeni denied that he had wandered through Tyalara wielding a firearm.

[37] Upon being informed that his house had been set on fire, Mbuzeni returned home and accompanied by his brother presented himself at the 'Great Place'. There, according to Mbuzeni, the appellant imposed a fine of six cattle for the former having brought disgrace to Tyalara. The appellant ignored Mbuzeni's protestations about being subjected to two forms of punishment, namely, whatever would ensue from the criminal prosecution and the payment of six cattle to the appellant. Mbuzeni's clan was also fined R50 per household. Mbuzeni did not pay the fine imposed upon him. His house was set alight on the same day and at approximately the same time as Wayiya's house which was in close proximity.

[38] As set out earlier, the appellant denied any involvement in the setting on fire of Wayiya's house. Witnesses on behalf of the State testified that there had been a meeting at the 'Great Place' to discuss Mbuzeni's position, at the end of which an announcement was made by the appellant that he would also evict Wayiya because he was 'hoarding' Stokwana's livestock on Tyalara.

[39] Wayiya testified that months after his house had been set on fire he encountered the appellant who then admitted that he had set fire to the house, but said that he had done so 'by mistake' and made an offer to rebuild the house. The following exchange between Wayiya and counsel on behalf of the appellant is worth noting:

'MR HOWSE: Right. Did he admit to you that he burnt your homestead?

WITNESS: I took it he was admitting when he said to me he was prepared to rebuild my homestead.

MR HOWSE: So did you take it from that statement of his that it was an admission?

. . .

WITNESS: He called me.

MR HOWSE: Yes but I am just trying to get what he said to you. If I understand you now correctly you say. All that he said to you is that he would help to rebuild your home, and from that you inferred or assumed that he was admitting burning it?

WITNESS: The reason why I presumed that he was admitting having burnt my homestead down, it is because when I put a question to him, as to what had I done to him, which deserved the burning of my homestead?

MR HOWSE: What did he answer?

WITNESS: He told me that I did nothing.

MR HOWSE:He then said he would assist you to rebuild?

WITNESS: Yes.'

The appellant's version of that conversation was that all he did was express his sympathy for the loss of Wayiya's homestead. He denied that he had admitted that he had set fire to Wayiya's house.

The evidence in relation to appellant's convictions of assault with intention to do grievous bodily harm

[40] It is now necessary to turn our attention to the evidence presented in relation to the charges of attempted murder, which resulted in the three convictions of assault with intent to do grievous bodily harm. It is common cause that the complainants in respect of the three charges were forcibly brought to the 'Great Place' by a rowdy group of the appellant's supporters. It is also undisputed that they were brought there because the

Tyalara community was incensed because it had been alleged that the three complainants and the deceased were guilty of housebreaking and rape. During that alleged crime spree they were said to have kissed a woman in front of her husband who was disabled and wheelchair bound. The last mentioned allegation appears to have been the one that caused the greater sense of outrage.

[41] One of the young men, Mr Malandela Sontanase (Sontanase), who had been accused of perpetrating the acts referred to in the preceding paragraph testified that he was assaulted by members of the community before he arrived at the 'Great Place' but not seriously and had sustained only minor injuries. Although Mr Derrick Mlandeni Ngcambu (Derrick), a headman and part of the appellant's chain of command as well as being a relative of his, did testify that the young men who had been brought to him en route to the 'Great Place', had been badly beaten. His evidence, however, is at odds with the evidence of at least one of the complainants and a number of other state witnesses.

[42] Derrick's evidence as well as the testimony of another loyalist and of two of the complainants, namely Sontanase and Mr Welile Duma (Duma), was to the effect that the appellant was the person responsible for the savage beating that the three young men were forced to endure. They described what had occurred as follows: The three young men were ordered by the appellant to undress and to perform 'frog jumps'. He then made the three of them lie naked on their stomachs. He then proceeded to viciously assault them with a sjambok. He beat them so severely that Derrick could not bear to watch and had to depart the scene for momentary relief. Those who continued to witness the beating, including the two victims, testified that he only stopped because he was physically exhausted.

[43] It is undisputed that the three young men were admitted to hospital the next day. Professor Hendrick Scholtz, who testified in support of the State's case, stated that had it not been for medical intervention the trauma caused by the beating would most likely have resulted in the death of all three.

The evidence in relation to the culpable homicide conviction

[44] In respect of the charge of murder it is necessary to consider carefully the foundations of the State's case. There was testimony by only one witness called by the State that after the three young men had been beaten, the appellant had announced to those in attendance that they had to bring the deceased to him the following day and that they should beat him as the others had been beaten. That was not corroborated by any other witness in attendance. It should also be borne in mind that the evidence of Sontanase and Duma was that they were not seriously beaten en route to the 'Great Place'.

[45] Derrick testified concerning the state in which the deceased was brought to his house by members of the community who had intended that he be taken to the appellant. According to Derrick the deceased had been very severely beaten and exhibited very obvious signs of being subjected to vicious physical abuse. The deceased's father had witnessed him being taken towards Derrick's house and appears to have been shaken by the state in which he had encountered his son.

Evidence in relation to appellant's conviction on the two charges of defeating the course of justice

[46] In relation to the first charge of obstructing or defeating the ends of justice, we have already referred to the evidence of Stokwana and Wayiya. Almost all of the witnesses on behalf of the State who had encounters or exchanges with the King, testified that he was a man who ruled by fear and intimidation and would brook no resistance.

[47] In relation to the pressure brought to bear on the deceased's father so as to ensure that he would not report the actual cause of the death of his son the evidence by a number of witnesses was that the appellant was emphatic that mortuary staff should be told that the deceased had died of natural causes and that the deceased's father had been instructed not to report the matter to the police. This was the basis of the second

charge of obstructing or defeating the ends of justice. It is necessary to record that one of the state witnesses, Ninzo Lizo Cimela, testified that, when the deceased's death was first reported to the appellant, the latter considered that the best course of action would be to throw the body in a nearby river. The elders in the community, however, thought this to be against the very basic fabric of customary law. In this instance, the appellant heeded their warning not to offend against tribal practice.

Approach of the court below

[48] Alkema J carefully considered the material parts of the evidence adduced on behalf of the State and took into account the appellant's version of events. The learned judge considered the evidence presented by the State in relation to the fear the appellant induced in his subjects as overwhelming. He recorded that a succession of witnesses expressed a deep fear of the appellant.

[49] Alkema J had regard to the evidence presented by witnesses on behalf of the State that there was a popular uprising against the appellant during 1996 by some members of the Tyalara community. Alongside that evidence was the testimony of the appellant that a few people he considered to have criminal tendencies had initiated an uprising and had placed his life in danger. He testified that he had sought the protection of a prominent family member, the former State President, Mr Nelson Mandela. According to other witnesses Mr Mandela placated the crowd by ensuring them that there would be no further evictions.

[50] Alkema J considered the testimony of witnesses for the State that disobedience of the appellant would result in physical harm and injury. He was persuaded that the evidence by Mr Wofa that he was too scared to report the death of his son to the police after being warned not to do so by the appellant to be true and as a result of which he initially refused to speak to any policeman when police investigations commenced, was credible. The court below concluded that the totality of the evidence presented a picture of the appellant as a King who ruled as a merciless despot.

[51] Alkema J accepted the evidence of witnesses for the State that the setting on fire of homesteads as a means of securing evictions, occurred solely on the instructions of the appellant. The learned judge was impressed by the evidence of Stokwana and his wife as well as with the evidence of Wayiya. Against their evidence and the totality of the evidence adduced on behalf of the State, the court below found the appellant to be a poor witness. Alkema J described him as follows:

'He was self-righteous, at times discourteous and even contemptuous to the court; he insisted in giving long and irrelevant explanations without answering questions; part of his evidence is so improbable that it may be rejected as false; his version of events seemed to change with every new legal representative he engaged; he testified to material events which were never put to any State witnesses; he often contradicted himself or refused to answer questions, or gave lengthy answers which were irrelevant to the question asked or gave incomprehensible answers. In many respects his evidence-in-chief contradicts in material respects with what was put to the State witnesses. In short, he made a poor impression on the court and we find his evidence suspicious in some respects and downright untruthful in other respects.'

[52] Against that background he rejected the appellant's explanation that the decision to evict Stokwana and Mbuzeni by setting fire to their homes, was one reached by the community. In addition, the court below had regard to a number of state witnesses who denied that those acts carried the community's approval. Alkema J also took into account that the appellant did not present the evidence of a single member of the community to substantiate his version of events, when, in the face of overwhelming evidence on behalf of the State, one would have expected him to do so.

[53] The court below dealt with the appellant's assertion that the three young men were in fact assaulted by the community and not by him. Alkema J took into account the appellant's concession that punishment for the crimes the three young men were alleged to have perpetrated, were beyond his jurisdiction and a matter for the SAPS. The learned judge asked rhetorically why the appellant, as King, stood idly by and did not report the matter to the police? The court below concluded the appellant's explanation that the three young men had been assaulted by others was fanciful, nonsensical and incomprehensible.

[54] The court below accepted the evidence of Stokwana's wife that she and her children were ordered to go to the 'Great Place' after the homestead was set on fire, in order to secure her husband's attendance and thereby to compel him to pay the outstanding fine in relation to his alleged grazing transgressions. He rejected the appellant's contention that he merely gave the mother and children shelter out of compassion.

[55] In relation to the setting alight of Wayiya's homestead, the court below recorded that the State's evidence was circumstantial. Alkema J took into account that Wayiya's homestead was set on fire on the same day as Mbuzeni's hut. The court below had regard to the hearsay evidence of Wayiya's late wife, admitted in terms of s 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988, that she had reported to Wayiya that the appellant had arrived at the homestead with some men, ordered all the household effects and furniture to be removed and then set the huts alight. The court below stated that on its own no weight could be attached to that evidence. Alongside that evidence the court below took into account the evidence by Wayiya that the appellant had admitted that he had set fire to his house 'by mistake' and that the appellant had offered to rebuild the house.

[56] The appellant testified that there had been bad blood between Stokwana and his brother, Wayiya, and speculated that Stokwana was probably to blame for Wayiya's house being set on fire. According to Wayiya, he and Stokwana, at that time, were at the Bityi police station to withdraw the charge of arson against the appellant that had been preferred by the latter. Wayiya and Stokwana were adamant that there had been no bad blood between them.

[57] The court below considered the evidence of Derrick concerning a meeting that took place on 20 July 1995 to discuss Mbuzeni's eviction. According to Derrick, the appellant, at that meeting, announced that Wayiya's family was also to be evicted because Wayiya was harbouring Stokwana's livestock and the appellant had ordered

everyone to proceed to Wayiya's homestead. Derrick testified that he arrived at the homestead only after it had already been set alight. The court below took into account that Derrick had been a witness who was warned in terms of s 204 of the CPA. The court found that Derrick was not a good witness and that he was often vague and contradictory, but could find no reason for rejecting his evidence in relation to the setting on fire of Wayiya's house. Against all the circumstances set out above, the court below concluded that Derrick's evidence that the appellant had ordered the eviction of Wayiya and ordered members of the community to accompany him to the homestead, had a ring of truth to it. The court also took into account that there was a pattern to the manner in which the appellant behaved in relation to the setting on fire of the homes of Stokwana, Mbuzeni and Wayiya. The court rejected the appellant's evidence that he had accompanied men to Wayiya's homestead only after they had received a report that it had been set on fire and that he went there only to assist to douse the blaze.

[58] The court below, in rejecting the appellant's defence that in setting on fire his own property he could not be guilty of arson, said the following:

'[262] It is trite that when developing common law, including criminal law, the court must promote the spirit, purport and objects of the Bill of Rights. (s.39 (2) of the Constitution). Section 26 of the present Constitution (unlike the interim Constitution) provides that everyone has the right to have access to adequate housing. Sub-section 3 provides:

"No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances."

[263] I therefore have no doubt that, as our law stands today, arson is committed even if a person sets his or her own immovable property on fire with the intention of injuring another. By injury is not meant only patrimonial loss, but it also includes the depravation of another's constitutional rights to housing and not to have his or her home demolished or destroyed without an order of court.

[264] The defence that the accused set his own property alight must therefore fail.'

It is necessary to record that before stating what is set out above, the court below had regard to the development of our law in respect of the crime of arson and had regard, inter alia, to the decision of this court to *R v Mavros* 1921 AD 19 (A) and concluded that

a person could be guilty of arson if one sets fire to one's own property with the intention to injure another.

Conclusions

[59] We agree fully with the characterisation by the court below of the manner in which the King ruled. His behaviour was all the more deplorable because the victims of his reign of terror were the vulnerable rural poor, who were dependent upon him. Our Constitution does not countenance such behaviour. We are a constitutional democracy in which everyone is accountable and where the most vulnerable are entitled to protection.

[60] We agree fully with the court below in its characterisation of the appellant as a witness. We are in full agreement in relation to the factual findings by Alkema J concerning the charges of arson. That conclusion could safely be reached even without consideration of the evidence Wayiya's deceased wife tendered by way of the provisions of the Evidence Amendment Act. Insofar as there appears to have been a dilution under cross-examination, of Wayiya's evidence that there had been an admission by the appellant that he had set fire to the house, it is necessary to take into account that counsel on behalf of the appellant appeared to have accepted that there had been an offer to rebuild Wayiya's house. In our view, Wayiya's reasoning referred to in paragraph 39 above was justified. We can find no flaw in the reasoning leading to the conclusion that the appellant was involved in all three incidents.

[61] We now turn to consider the appellant's defence, namely that he could not be found guilty of arson because he had set fire to his own immovable property which, according to South African law, was not a crime. Simply put, we consider whether the crime of arson can be committed when a person sets fire to his own immovable property. The submission on behalf of the appellant was that the farm Tyalara on which the events in question took place was registered in his name and the structures which he had set alight had acceded to the land and therefore belonged to him and he could

thus not be convicted of arson since the offence cannot be committed when one sets fire to one's own property.

[62] A primary problem for the appellant is that whilst the farm is registered in his name, the restrictions contained in the title deed are significant. They are, inter alia, as follows:

'(II) That the piece of land hereby granted shall not be alienated or transferred unless the consent of the Governor to such alienation and the approval of the new holder, shall have been first had and obtained….

(XIII) That the piece of land hereby granted shall not be capable of being devised by Will, but upon the deceased of the Grantees shall devolve upon and be claimable according to the rule of primogeniture by one male person to be called the heir and to be determined by the Table of succession contained in Section 24 of the Glen Gray Act, 1894.'

These restrictions reflect that the land is held by the appellant as hereditary monarch for the benefit of his tribe and subjects. He may not alienate the land without State approval. In these circumstances he can hardly be heard to claim that the property is his to set to fire to at will. But even if one were to accept that he was the owner of the immovable property as conventionally contemplated, the problem that arises is that the development in our law, referred to in the paragraphs that follow, is contrary to the submission on his behalf, namely, that he could, with impunity set fire to the immovable property because he is the owner.

[63] As alluded to earlier, it was accepted by counsel on behalf of the appellant that for all intents and purposes a charge of arson in terms of s 40 of the TPA referred to above can be regarded as a charge in terms of the common law. According to J R L Milton in *South African Criminal Law and Procedure*:

'Arson consists in unlawfully setting an immovable structure on fire with intent to injure another.'[5]

C R Snyman states:

'A person commits arson if he unlawfully and intentionally sets fire to:

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[5] J R L Milton *South African Criminal Law and Procedure* Volume 2: *Common-Law Crimes* 3 ed (1996) at 777.

(a) immovable property belonging to another; or

(b) his own immovable insured property, in order to claim the value of the property from the insurer.'[6]

Snyman appears to contemplate that the only basis on which a person who sets fire to his own immovable property can be found guilty of arson, is when he does so in order to defraud an insurer. In other words, there is a very limited sphere within which setting fire to one's own immovable property can lead to criminal liability. The learned author is critical of that exception to the rule. He acknowledges that this court in *Mavros* has held that one could be guilty of arson when one sets fire to one's own immovable property in order to claim the value of the property from an insurer. However, he states the following:

'It would have been better to punish this type of conduct as fraud instead of arson, but the courts will in all probability not depart from the appeal court's view that such facts amount to arson and this is the reason the crime was defined above in terms including this type of situation.'

[64] J R L Milton, deals with the development of our law in relation to the crime of arson.[7] The learned author points out that, at an early stage, our courts had to decide whether arson in South African law was the arson of English law, in which event the setting on fire of one's own property was not a crime. *Brandstichting* of the Roman-Dutch law was such that one could be punished for setting fire to one's own property. With reference to the restriction in South African law, of limiting arson to the setting on fire of immovable property the author submits that the restriction was influenced by the concept that the purpose of the crime was to protect rights of habitation. He submits that the preferable view is that the crime exists to protect, amongst other things, economic interest in property and that there is no persuasive or compelling reasons to restrict the ambit of the crime to the burning of habitation. In dealing with the question whether one can commit arson in respect of one's own property, the author states that there is some Roman-Dutch authority for the proposition that an owner who burns his own property

[6] C R Snyman *Criminal Law* 5 ed (2008) at 548.
[7] J R L Milton (op cit) at 778 *et seq*.

with intent to injure another commits arson.[8] Over a century ago in *R v Hoffmann; R v Saachs & Hoffman* (1906) 2 Buch AC 342 at 346-347, the court said the following:

'Where a person attempts to set fire to the house of another person he is guilty of an attempt to commit arson, whether there is any intent to fraudulently obtain insurance money or not. Where a person burns his own house, the question whether he is guilty of "brandstichting", or arson, must, under our law, depend upon the further question whether the deed was done with the object of injuring others (*Van der Linden*, 2, 4, 7). If the object be to defraud an insurance company the intent would certainly be to injure another so as to bring the offence within the definition.' A decade and a half later, this court, in *Mavros*, said the following (at 23-24):

'The facts alleged in the indictment therefore amount to *brandstichting*; but that it is said is not the crime charged; the term arson does not cover *brandstichting* and the facts laid do not constitute arson. The judgment in *Rex v Enslin* (2 App. Court, p. 69), no doubt supports that contention. The accused had been convicted of arson for wrongfully and maliciously setting fire to certain stacks of barley, the property of another person with intent to injure the owner. The Cape Court of Appeal quashed the verdict, holding that whether or not Enslin might have been convicted of "*brandstichting"* he could not be convicted of arson. It was argued for the Crown that the word "arson" had been used as the nearest English equivalent for the *incendium* or *brandstichting*. But that argument found no favour with the Court, which applied to the language of the indictment its limited English meaning. The judgment was delivered by De Villiers, C.J., who some years later would appear to have modified his views. In *Rex v. Hoffman* (2 A.C., p 346), he employed the term *brandstichting* and arson as synonymous expressions. His remarks in the later case were *obiter* merely; but they are not consistent with the reasons in *Rex v. Enslin*. I do not think we should follow Enslin's case and give to the word "arson" in the present indictment its strict English interpretation. Because I am satisfied that arson is in South African practice used to denote the corresponding, but somewhat wider, crime of our law. When an indictment charging a Roman-Dutch law offence is drafted in English, it is convenient, if not necessary, to describe the offence by the English word which most accurately denotes it. And the use of such a word need not carry with it the consequences which would accompany it in an English indictment. Now "arson" is the nearest equivalent to *brandstichting*; it is the word which would certainly be used in translating into English a Dutch indictment charging the latter offence. In every translation which I have been able to consult I find that the offence of *brandstichting* is described as arson, and I do not know how else it would have been possible to describe it. It is

[8] In this regard, see the reference to the authorities at 779.

not strange, therefore, to find the statement made in a very careful textbook that arson is employed in South African indictments to denote the wider crime of *brandstichting (Gardiner and Lansdown,* p. 1162). In my opinion it was so employed here. And that being so, the point reserved must be answered in favour of the Crown, and the conviction must stand.'

In the passage immediately preceding the above excerpt, Innes CJ said the following (at 22):

'In my opinion, therefore, we should sanction that procedure by holding that the crime of *brandstichting* is committed by a man who sets fire to his own house wrongfully, maliciously and with intent to injure or defraud another person.'

The word 'or' in the last mentioned passage is disjunctive. It would thus seem that Snyman interpreted the decision in *Mavros* too narrowly. Simply put, the effect of the decision is that one can be guilty of arson when one wrongfully and/or maliciously sets fire to one's own immovable property either with the intention to injure another person or to defraud another person.

[65] In *S v Van Zyl* 1987 (1) SA 497 (O) the appellant, a builder, had been convicted of arson after having burnt down a house which belonged to him but which had been inhabited by the complainant. The conviction was contested on the basis that the common-law crime of arson did not extend to a person burning down his own immovable property. The court, after having examined the old authorities and modern academics who took a view that supported the appellant, held that arson can be committed where a person sets fire to his own immovable property with the intention to prejudice the property interests of another person.

[66] In an article entitled 'The nature of the crime of arson in South African Law', Professor S Hoctor, [9] in essence agrees with the approach adopted by Milton referred to in para 27 above. In her concluding remarks she states the following:

'As Milton points out, the argument that the owner and occupier of a house is free to burn it down if he chooses to do so is problematic.

. . .

[9] Shannon Hoctor 'The nature of the crime of arson in South African Law' (2013) 19(2) *Fundamina* 321.

Although the act of destroying one's own property may not be unlawful in itself, it may be submitted that, as with the crime of extortion, the intention with which the accused acts will serve to convert an ostensibly lawful act into an unlawful one. This fits with the assessment of Carpzovious and Moorman in the *Mavros* case regarding the centrality of the actor's intent, and that "the essence of crime is the intent with which the act is committed". It may further be noted that since *dolus eventualis* would suffice for the purposes of liability, provided that the accused foresaw the possibility that in setting fire to his or her own property, damage could result to the property of another, and proceeded reckless of such possibility, liability for arson could ensue.' (footnotes omitted)

We endorse the views espoused by Milton and Professor Hoctor referred to above. The conclusions reached by them are in accordance with the decision of this court in *Mavros.* Having regard to the factual findings referred to above the compelling conclusion is that the appellant set fire to each of the complainants' homes with the intent to injure. The conviction on the three charges of arson was thus well founded.

[67] In respect of the appellant's conviction on the charge of kidnapping, we agree that the appellant's version that he was acting out of compassion is implausible and can be rejected out of hand. It is a twisted mind that first deprives a mother and her infant children of the comfort of a home by torching it, inducing fear and trepidation, and then suggests that he acted out of compassion in offering them shelter and food, after ordering them to accompany him to the 'Great Place'.

[68] In dealing with the attempted murder charges which involve the assaults on the three young men, the court below recorded that the appellant had disputed the extent of his involvement in the assaults. Alkema J noted that the appellant testified that when he first saw the three young men in a hut at the 'Great Place' they already been brutally and severely beaten by their captors. He took into account that the appellant had testified that they were so savagely beaten that '[n]o sane person would have assaulted those three young men given their condition at that stage. According to the appellant he had applied three light strokes over their buttocks in an attempt to appease the community and prevent them from being killed.

[69] It is necessary to set out in some detail what was stated by the court below in relation to the appellant's version of events:

'[269] This court has no hesitation in rejecting the version of the accused as palpably false. As in the case of the burning of the homesteads as a means of evicting the entire families from Tyalara, he again seeks to hide behind the faceless community. I do not intend to repeat the criticism of the accused's explanations in this regard, but merely refer to some aspects relevant to those particular events.

[270] Firstly, the allegation that it was the community who had assaulted the three victims, fly in the face of the weight of the evidence before the court. Derrick's evidence that the three had only been lightly assaulted by their captors is corroborated by the victims themselves who testified. Whereas there is no doubt that they were also assaulted by their captors, the overwhelming weight of the evidence is that it was the accused who inflicted the most serious injuries.

[271] Secondly, Derrick's evidence that he ordered the assaults to cease after the three were brought to his homestead the previous evening is confirmed by the victims who testified that they were not further assaulted after being taken to Derrick's homestead the previous day.

[272] Thirdly, the three victims were taken on foot to the Great Place the following day. After they were assaulted at the Great Place they were unable to walk, and Malandela was forced to stay overnight. The other two were transported. If they received the major injuries before taken to the Great Place, they would have been unable to walk there.

[273] Fourthly, it is improbable in the extreme that they were assaulted by the community at the Great Place after they got there and before the accused arrived. According to the victims themselves, it was the accused, and not the community who ordered them to undress and prostrate themselves on the floor. They were so savagely beaten by the accused that Derrick, a chief and loyalist to the King, could bear it no longer and left the hut. The accused confirms that Derrick left the hut, and testified that he went outside to speak to Derrick whilst Ninzo continued with assaults inside. The evidence shows clearly, in our view, that the assaults did not receive the approval of the community present, and there is no support whatsoever for the accused's contention that it was the community, and not him, who inflicted the most serious injuries.

[274] Fifthly, the evidence is overwhelming that no subject of the King would dare to disobey his orders. Anyone doing so ran the risk of his or his family's homestead being burnt down and evicted. The accused ruled with fear and trepidation. Ninzo testified that he will cut the throat of a person with a knife if so ordered by the King, and this sentiment was confirmed by many State witnesses, including the accused's own confidant (*"informer"*) Derrick. To suggest against the

weight of this evidence, as the accused attempts to do, that he was unable to put a stop to the assaults by the community on the three victims, or that they would have disobeyed his orders if he had instructed them to stop the assaults, is simply so improbable to be incredible.

[275] Sixthly, and despite being given numerous opportunities by the court, the accused was unable to explain why it was necessary for him to continue with the assault, even with *"light punishment"* given the serious condition of their state of health when he saw them (*"no sane person would continue to assault them in view of their medical condition)."* His explanation, if in fact it can be said to be an explanation, that he did so to appease or pacify the community, or to prevent them from further assaulting or even killing them, is so incredible that it defies belief. On his instructions, no one touched the personal belongings and effects of those whose huts were burnt down and whose belongings were placed outside the huts before the acts of arson, not even Mbuzeni's own mother. Why would they defy his orders to cease the assaults? What stopped the accused from ordering the assaults to cease? To suggest that it was his fear for the community, is beyond belief.

[276] Finally, on the accused's own version, he realized that the community may kill the three victims if they were to be released from his custody. Yet, he is unable to give any meaningful explanation why, instead of administering *"light punishment,"* he did not refer the three to the police for investigation or to a medical clinic for treatment after their capture. The three were in any event released by him after the assaults. He agreed that he had no jurisdiction over the suspected crimes allegedly committed by them. His only explanation, if it can be termed an explanation, is that it was *"people's justice"* or *"jungle justice."* But even if it was, he could not explain why the crimes, including the assaults on all four and the death of Saziso, was never reported to the police.

[277] There are a number of other unsatisfactory features in the evidence of the accused which warrant it to be rejected as untruthful, but in view of my remarks above coupled with those earlier in this judgment, I do not believe it is necessary to further burden this judgment with such irregularities. It suffices to repeat that this court has no hesitation in rejecting the version of the accused as far-fetched and false insofar as it differs from the State version in relation to the assaults on the three victims.'

[70] We are in agreement with the essence of what was stated by Alkema J as set out in the preceding paragraph.

[71] In respect of the murder charge Alkema J took into account that the deceased was implicated as the ringleader in respect of the offences alleged to have been committed with the other three young men. It is true that it was undisputed that the appellant had issued an instruction that the deceased be brought to the 'Great Place'. The court below accepted that there was no evidence that the appellant himself had assaulted the deceased. Alkema J accepted that the appellant was not even present when the deceased was assaulted. It was common cause that the deceased had died as a result of severe assaults on him perpetrated by members of the community. The court below considered the appellant's involvement in intimidating the deceased's father so as to cause him not to report the matter to the police as being inextricably bound to the question of his guilt in relation to the death of the deceased.

[72] The court below took into account the testimony of Mr Mthata Xoko who was the only witness that testified that when the appellant issued the instruction that the deceased be brought to the 'Great Place' he also issued an instruction that the deceased should be assaulted 'in the same manner that had happened to . . . his co-suspects' before being brought to the 'Great Place'. The court below took the view that Mr Xoko was a credible witness and accepted his evidence. Alkema J concluded that the evidence shows that the appellant expected the community to assault the deceased after they had captured him and reasoned that having issued the instruction he ought to have foreseen the death of the deceased. Alkema J concluded that the appellant's negligence caused the deceased's death and that he was thus guilty of culpable homicide.

[73] Mr Xoko was the only witness who testified that this instruction was given. The other State witnesses denied this and testified that the instruction was that the deceased should be brought to the 'Great Place'. In any event, as recorded above, the other three young men had not been severely assaulted before they were brought to the 'Great Place'. For these reasons the culpable homicide conviction cannot stand and as Counsel for the State accepted before us it falls to be set aside.

[74] In relation to the counts relating to the intent to defeat the course of justice, first, the court below held that the evidence clearly showed that the appellant had directly and indirectly exerted pressure on Stokwana to withdraw the arson charge. The court below added that it was clear that the appellant had also used others to exert pressure on Stokwana to withdraw the charge.

[75] In respect of the appellant's actions in relation to the father of the deceased, the court below said the following:

'It [the charge] relates to the accused's instruction to Koto Wofa not to report the death of his son Saziso to the Police; to falsely inform the mortuary that Saziso had died of natural causes; and not to consult an attorney or obtain legal advice. I have no doubt that this offence has been established on the evidence. The instructions were coupled to threats of eviction if not obeyed.'

[76] We can find no flaw in the reasoning and conclusions by the court below as set out in the preceding two paragraphs. The convictions on those two counts were fully justified.

[77] As a final note on the merits, a recurring theme in the defence raised by the appellant was the astonishing submission that it should be understood that the appellant was acting in the best interest of his people and by resorting to his brand of justice he was merely seeking to protect them from outside influences and upholding customary law. In this regard the appellant would do well to have regard to what was stated on behalf of the State by Professor Digby Sqhelo Koyana, namely, that customary law demanded that a King ensures the maintenance of law and order, protects the life and security of his people, act compassionately with due regard to the dignity of his subjects. More importantly, our constitutional order will not countenance the kind of conduct the appellant was guilty of.

[78] It is now necessary to turn our attention to the appellant's contention that the cumulative effect of the sentences imposed was too severe. It is also necessary to consider the impact on the effective sentence of the setting aside of the culpable homicide conviction.

[79] It will be recalled that in respect of the counts of arson the appellant was sentenced to five years' imprisonment on each count, but the sentences were ordered to run concurrently. In addition, the sentence of one year's imprisonment imposed in relation to the kidnapping charge and the sentence of one year's imprisonment imposed in respect of the conviction of defeating the course of justice relating to the pressure exerted on Stokwana were also ordered to run concurrently with the five years' sentence imposed in respect of the arson convictions. Having regard to the callous manner in which the acts of arson were perpetrated, as well as taking into account that the appellant involved members of the community in perpetrating those deeds, the sentences might well be considered to have been too lenient. This is especially so if one considers that the kidnapping of Stokwana's wife and children followed upon the setting on fire of their home and demonstrates a particularly callous mind set.

[80] In respect of the appellant's convictions of assault with intent to do grievous bodily harm, it is necessary to remind ourselves that the beatings, in full public view, continued until the appellant was exhausted and had it not been for medical intervention, the three young men would probably have died. The appellant was sentenced to five years' imprisonment in respect of each conviction and the sentences were ordered to run concurrently. The appellant is extremely fortunate not to have been sentenced to a far longer period of imprisonment on those counts.

[81] In relation to the pressure exerted on the deceased's father not to report the true circumstances of his son's death to the police or any other authority, the appellant was sentenced to two years' imprisonment and it was ordered to run concurrently with the sentence of 10 years' imprisonment imposed in respect of the culpable homicide conviction. Considering the insensitive manner in which the deceased's father was dealt with when the body was delivered to him and the further indignity that he had to endure when he was fined because it was said that his son had brought dishonour to the King, the sentence imposed can hardly be described as severe.

[82] What remains to be considered is the effect of the setting aside of the culpable homicide conviction and the related sentence. The sentence of two years' imprisonment imposed in respect of the pressure exerted on the deceased's father can no longer run concurrently with the sentence imposed in respect of the culpable homicide conviction. Five years of the ten year sentence in respect of the culpable homicide conviction were ordered to run concurrently with the sentences imposed in respect of the three convictions of assault with intent to do grievous bodily harm. It was on that basis that the effective sentence imposed by the court below was 15 years' imprisonment. As is more graphically demonstrated by the substituted order set out hereafter, the falling away of the culpable homicide conviction and the related sentences result in a new effective sentence of 12 years' imprisonment. The appellant's contention that the effective sentence is too severe is thus rejected. The lesson that cannot be emphasised enough is that persons in positions of authority such as the appellant are obliged to act within the limits imposed by the law and that no one is above the law. The Constitution guarantees equal treatment under the law. The appellant behaved shamefully and abused his position as King. The period of imprisonment he is to serve is no more than just deserts for what, given his position of authority, are after all particularly heinous crimes.

[83] For the reasons set out above, the appeal succeeds only to the limited extent set out in the order that follows:

(a). Save in relation to the conviction of culpable homicide and the consequent sentence, the appeal is dismissed.

(b). The conviction of culpable homicide and the sentence of ten years' imprisonment imposed in respect of that conviction are set aside.

(c). The order by the court below in relation to sentence is substituted as follows:

'1. In respect of the arson charges, namely Counts 1, 14 and 15, the accused is sentenced to FIVE (5) YEARS IMPRISONMENT in respect of each count.

2. In respect of the kidnapping charges, namely counts 5, 6, 7, 8, 9, 10 and 11, which is taken as one count, the accused is sentenced to ONE (1) YEAR IMPRISONMENT.

3. In respect of the charge relating to defeating the ends of justice by unduly influencing Mr Stokwana Sonteya to withdraw the arson charges, the accused is sentenced to ONE (1) YEAR IMPRISONMENT.

4. All the sentences referred to in paragraphs 1, 2 and 3 above shall run concurrently with each other, resulting in an effective sentence of FIVE (5) YEARS IMPRISONMENT in respect of all the aforesaid charges.

5. In respect of the assault charges, namely Counts 24, 26 and 28 the accused is sentenced to FIVE (5) YEARS IMPRISONMENT in respect of each count.

6. The sentences of five (5) years in respect of the aforesaid assault charges shall run concurrently with each other.

7. In respect of the charge relating to defeating the ends of justice by concealing the death of Saziso Wofa, the accused is sentenced to TWO (2) YEARS IMPRISONMENT.

8. The accused is thus sentenced to an effective term of TWELVE (12) YEARS IMPRISONMENT.'

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M S Navsa

Judge of Appeal

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E D Baartman

Acting Judge of Appeal

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