

IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO. 17/98

In the matter between

REX

VS

SIBUSISO SHONGWE

MILTON MAMBA

ROBERT SHONGWE

DALADI MALULEKA

VUSI SHONGWE

MACILONGO MAMBA

EPHRAEM MAMBA

NTOMBIFUTHI SHONGWE

SIPHIWE SHONGWE

SINDI KHUMALO

ZODVWA MAMBA

THOBILE TSABEDZE

BOY MAMBA

FANA MKHONTA

MFANZILE MALULEKA

STEPHEN TSABEDZE

Coram S.B. MAPHALALA - J

For the Crown MR. J. MASEKO

For the Defence MR. C. NTIWANE

RULING ON EXTENUATING CIRCUMSTANCES

Maphalala J:

At this stage of the proceedings the court is to determine whether or not there are extenuating circumstances in your case to escape the death sentence as prescribed by the provisions of the Criminal

Procedure and Evidence Act (as amended)). The accused persons before court have all been convicted for the murders of Mandlenkosi Shongwe (on Count one) and his wife (on Count two).

That the crown in the case in casu proved that you acted in common purpose when committing these offences. The court also made a finding of law that the accused persons are found guilty of these murders on the basis of *dolus eventualis* as opposed to *dolus directus*. The court

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invited both counsel to address it following the dictum in the Botswana case of *David Kaleletswe and others vs The State Criminal Appeal No. 26/94* cited with approval by the Appeal Court of Swaziland in the case of *Daniel Dlamini vs Rex Appeal Case No. 11/98*. The latter case I must add changed a long held approach in this division towards the establishment of extenuating circumstances where the onus rested on the accused persons to prove extenuating circumstances. The correct approach ushered by this decision of the Court of Appeal in its *ratio decidendi* briefly put is that it is the duty of the court to establish the existence or otherwise of extenuating circumstances.

In the present case there seem to be no difficulty that extenuating circumstances exist in respect of count one based on the belief in witchcraft. The crown rightly conceded in my view to be so. I am also satisfied that after looking at the evidence in its totality that to be so. The problem which presents itself which I put to defence counsel was in respect of the wife of the deceased in count one. I postponed the matter and requested counsel to address me on this difficulty I was experiencing. My difficulty is that can it be said that since Mandlenkosi Shongwe (count one) was branded a "witch" by the rebel group and by extension his wife should be branded as such? On the return day counsel submitted arguments on this point.

Mr. Ntiwane's submission on behalf of the accused persons is that when the court determines the existence or otherwise of extenuating circumstances in respect of an accused person it should take the subjective view. In fact Mr. Ntiwane is correct that this is the approach to be followed by the court.

This view was laid down in the (often cited) case of *Rex vs Fundakubi and others 1948 (3) S.A. 810* where the head notes in that case express the approach, thus.

"In deciding whether there are extenuating circumstances in a case of murder, no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused moral blame worthiness in committing it, can be ruled out from consideration. A belief in witchcraft entertained by the murderers and particularly the belief that the victim has caused the death of near relatives of the accused by witchcraft, will materially bear upon this question and should be considered".

In the body of above cited judgement Schreiner J A who wrote the majority judgement (where Tindall J A, Centlivres J A, Greeberg J A, and Davis A J A, concurred) held that the subjective beliefs of accused could definitely be taken as an extenuating circumstances, but that there were limits to this as in the case of ritual murders and where the whole family of a witchdoctor was wiped out in retaliation. One should not treat all these types of cases alike.

Mr. Ntiwane argued further that the wife to Mandlenkosi Shongwe (count one) was privy to some of the supernatural powers possessed by Mandlenkosi and the group perceived this to be so when they attacked the two in the manner they did. This, according to Mr. Ntiwane explains why the group did not attack Mduduzi, PW1, Nhlanhla PW3 and the two little children.

Furthermore, argued Mr. Ntiwane, when the group had killed the two people they went out of the homestead singing a victory song that they were going to lead trouble free lives as they had rid themselves of the "two witches". This according to Mr. Ntiwane is indicative of their state of mind when they committed these offences, which Mr. Ntiwane described as a "single transaction". He further fortified his

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submission on what he termed a "finding" by the court in its judgement where the court stated and in fact quoted PW1 verbatim that he mentioned "two witches". He also submitted that PW3's evidence is similar to that of PW1 in that she also mentioned that this group after the deed had been done also composed a song to the effect that they had killed "two witches". On this point he submitted that the court record will bear him out in this regard.

This, therefore, in essence is the view expressed by Mr. Ntiwane in this connection.

Now I come to the crown's view. Mr. Maseko kicks against this proposition that the victim as a wife was privy to her husband powers but according to the crown she was an innocent party to the whole sordid affair. Mr. Maseko argued that although the killing took place relatively at the same time it cannot be said that it was a "single transaction" as Mr. Ntiwane would like us to believe but the facts of the matter was that after the group had hacked Mandlenkosi Shongwe his wife ran to hide inside a hut some metres from the initial attack. The group pursued her and hacked down the door, which she had locked and pulled it down and dragged her out and also hacked her several times with an assortment of weapons until she died. Mr. Maseko disagrees with Mr. Ntiwane that it was ever mentioned in evidence that the group when they left the scene composed this victory song mentioning "two witches" they only mentioned a "witch" referring to the husband. That it is not true that PW1 and PW3 mentioned the "two witches" and this is not reflected in the record. Even if that was so, the court is to look at the state of mind of the group before the commission and during the commission of the offence and not the state of mind of the accused after the commission of the offence. Further, Mr. Maseko argued that there is no evidence before court that the wife was privy to the supernatural powers of her husband. There is no scintilla of evidence to show that the group harboured the same feelings or suspicions on the wife as they obviously did on her husband. She was merely caught in a crossfire and she died for nothing.

These are the arguments advanced by both counsel in respect of the question I had put to them. I have also closely scrutinized the court record and I mindful that at this stage of the proceedings as propounded in the case of R vs Fundakubi (supra) that the court is to make a "value or moral judgement". I will start with the case involving Mandlenkosi Shongwe (pastor) it appears to me that is clear that there are extenuating circumstances based on the belief in witch craft. This fact has been conceded by the crown. I must say though, as an aside, that this aspect has always caused problems to the courts because although, on one hand, they wish to make some allowance for the fact that the accused was perhaps acting in putative self-defence and thought they were killing a "witch", they do not, on the other hand, wish to give credence to the superstitions of some of the rural folk. In the case in casu it is abundantly clear from the evidence that the group harboured very strong beliefs that Mandlenkosi Shongwe was bewitching them. As a result they related a number of maladies attributable to his supernatural machinations.

In respect of count one, I come to a finding that extenuating circumstances exist on the basis of the accused belief in witchcraft.

Now coming to whether there are extenuating circumstances in respect of the victim in count two, I have revisited the evidence in its totality and I propose to start dealing

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with the argument by Mr. Ntiwane that PW1 and PW3 mentioned that the song that the group sang after the killing mentioned "two witches" and therefore, extenuating circumstances ought to be found. I will also deal with my mentioning of the "two witches" in my judgement as pointed out by Mr. Ntiwane that this fortified his submissions that PW1 and PW3 mentioned "two witches" in their evidence. In this regard I have listened to the tapes, more particularly the evidence of PW1 and PW3. It does not appear that PW1 ever mentioned "two witches" either in his evidence-in-chief or in the cross-examination by defence counsel. The closest PW1 said something which may be construed to mean more than one "witch" although he did not use that word but according to the record he used the word "wizard" or rather the word was suggested to him by defence counsel as reflected in the following exchange between PW1 and

Mr. Ntiwane in cross-examination.

"Q: You said that they had flags? You said Daladi is the one who said that the house of wizards should be burnt?

A: I do not recall that.

Q: Did it actually happened or did you make it up?

A: It happened.

Q: Daladi said the house is full of wizards?

A: Yes

Q: What did you understand him to mean by that?

A: I do not know".

From this exchange one cannot say that this meant "two witches" in particular. In that respect Mr. Ntiwane's submission is incorrect. Neither did PW3 mention "two witches" in both her evidence-in-chief and in cross-examination. Clearly, the court made a patent error in referring to "two witches" instead of "a witch", especially, if one looks at the court's ruling in terms of Section 174 (4) of Criminal Procedure and Evidence Act (as amended) at page 4. With due respect to Mr. Ntiwane, the court never made a finding but was relating the evidence as deposed by witnesses. One makes a finding after considering a set of facts and from them makes a finding or a conclusion whether of fact or law. I mentioned that the group after the attack went away singing a song to the effect that they were going to lead trouble free lives as the had killed a witch. The whole flow of the evidence shows that it was the pastor who had been specifically branded a witch not the wife. I do not think it was proper for defence counsel to capitalise on such a patent error and go on to argue in a spirited argument, I must say, that the two witnesses did say that to gain an advantage for his clients. For the duty of counsel which he owes to the court, I wish to digress a bit and refer to the case of Barlow Rand Ltd vs Lebos and another 1985 (4) S.A. 341 where the well-known passage in the book by CH Van Zyl "The Theory of Judicial Practice of South Africa (Vol. 1), which was published as far back as 1921 and the following at page 42 was expressed;

"Now, these general remarks may be said to be axioms applicable to all professions and callings of life, but still it is with regard to legal practitioners that they have mostly occupied the attention of the Courts and of the public. The origin and development of these principles, I

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shall now endeavour to illustrate. Some of the duties of an attorney are by lawyers better understood than can be fully described. There are many canons of duty which have not yet been in print but (apply) not only to oneself and to one's client, but also to the Bench and to the public. This duty on the part of an attorney is not a servile thing; he is not bound to do whatever his client wishes him to do. However much an act or transaction may be to the advantage, profit or interests of a client, if it is tainted with fraud or is mean, or in any way dishonourable, the attorney should be no party to it, nor in any way encourage or countenance it. Better far to part with such a client forever, though he may have been till then 'the goose that laid the golden eggs'. 'Honestly' in law, as in everything else, is always and after all, 'the best policy'. The law exacts from an attorney uberrima fides - that is, the highest possible degree of good faith. He must manifest in all business matters an inflexible regard for truth. There must be meticulous accountancy, a minute high sense of honour and incorrigible integrity".

Mr. Ntiwane's argument has no merit on the face of the evidence.

On the question of whether the actions of the group constituted a single transaction, in my respectful view

on the facts before me I am inclined to agree with Mr. Maseko that this is not so. This group after hacking Mandlenkosi and satisfying themselves that he was dead (they thought). They proceeded to pursue his wife who had run away and hidden in a certain hut within the homestead. They hacked the door down and pulled her out of the hut and butchered her to death. There is no evidence at all that the wife had anything to do with her husband's activities of witchcraft. In my view it is not enough that since she was Mandlenkosi's wife she ought to have died the way she did. In fact, there is evidence that some time back before the incident she went to offer her condolences to the relatives of the woman who had died in a car accident, an incident which was attributable to Mandlenkosi's supernatural powers. To me she appears to have been a peacemaker in the whole unfortunate event.

I therefore, find on the basis of the above-mentioned reasons that there are no extenuating circumstances in respect of the second count that is the murder of the wife.

S.B. MAPHALALA

JUDGE

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SENTENCE

Before passing sentence in this case I wish to make a few remarks more particularly in respect of Count one. I must say that this offence that you committed is a heinous offence. Although the court has found there are extenuating circumstances based on your believe of witchcraft nevertheless that makes it a grievous offence. I am well aware of your personal circumstances, which were related when you were giving evidence-in-chief. Your are relatively young people, and you are more or less related to each other and also to the deceased person in some way or the other, and that you also got children that you are to support, but you must also not forget that the victims of your acts also had children to look after. We heard a very chilling account here in court related by PW1 Nhlanhla Shongwe when he told the court what would happen to them after the death of their parents. He told the court that the two small toddlers or little children are now cared for by his grandfather who was old and might die anytime. The future of these children as well is bleak. There is also an uncanny aspect to this case, that is you are all proclaimed Christians, and that you believe in the teachings of Jesus Christ. You went further to produce a cassette which is now popular in the Zion circles, but you still have such a dark sinister belief in witchcraft. These two are two different ways of life. Christianity is a way of life or witchcraft practice is another way of life. These two do not come together in fact the one fight the other it is a contradiction for one to believe in both of them. This offence that you committed on this man was a very gruesome offence looking at the manner in which it was committed. If you look at the extent of the injuries on his body a cold sweat runs down ones spine. A man was killed in front of his wife and children in such a merciless fashion, surely the court has got to intervene in this instance and impose a harsh sentence in respect of this Count.

I am going to sentence each one of you to life imprisonment backdated to the date of your incarceration.

Now I come to Count two that is in respect of the wife. In respect of this Count as I found that there are no extenuating circumstances I am therefore bound by Section 296 of Criminal Procedure and Evidence Act, that is the court is enjoined it has got no alternative but pass a sentence which is prescribed under Section 296 the sentence is spelt out under Section 297 the sentence is that of hanging.

Judge: Before the court passes this sentence the court would like to know whether each one of you would want to say anything?

Accused no. 1 nothing from accused no. 1. Accused no. 2 nothing from accused no. 2. Accused no. 3 nothing from accused no. 3. Accused no. 5 nothing from accused no. 5.

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Accused no. 7 although I was present I did not commit any of these crimes.

Accused no. 8 I did not lay my hands on any one of these people, which are involved in this two counts, yes I admit that I was present at that homestead.

Judge: Anything else? Non My Lord.

In terms of Section 297 of the Criminal Procedure and Evidence Act (as amended), you are hereby ordered to be returned to your place of safety, where you will kept until the day on which you will be hanged by the neck until you are dead.

May the Lord be with your Souls.

S.B. MAPHALALA

JUDGE