

IN THE HIGH COURT OF SWAZILAND

REX

Vs

I. THEMBA MAZWENI MAMBA	2. DUMISANI MAVUSO 4.
3. MDUDUZI MNDZEBELE	MBUSO MNDZEBELE 6.
5. NGANONO DLAMINI	SIBUSISO MHLANGA 8.
7. SITATANYISWA DLAMINI	CELUMUSA MNDZEBELE 10.
9. BHEKI GAMA	SIZWE MAMBA 12. SICELO
II. MFANUZILE MASEKO	MAMBA

Criminal Case No. 133/2004

Coram

S.B. MAPHALALA - J

For the Crown

**MR P. DLAMINI (Senior Crown
Counsel)**

For the Accused

**ADVOCATE P. MNGOMEZULU (acting
as *pro deo* Counsel)**

REASONS FOR SENTENCE

22nd March 2007

[1] This is a case involving the belief in witchcraft and murder. It reveals a dark and sinister aspect of life in this country. An adult man was burnt to death such that his lower torso was completely burnt into ashes leaving only a grotesque upper body to testify to his existence as a direct result of ignorance and superstition.

[2] Before proceeding with issuing sentence in this case I find the words of a respected Judge of this court Rooney J in the High Court case of *The King vs Johannes Ndlovu and others - Criminal Case No. 30 of 1990* apposite where the learned Judge said the following:

"There is a constant belief in Swaziland that death by accident or as a result of illness is not a natural phenomenon. This is particularly so when the deceased is young. Explanations are sought outside the accidents of nature and credibility is given to the notion that such deaths are properly attributable to charms and spells initiated by the evil designs of others. It is believed that death may be contrived by witchcraft. The witches responsible deserve punishment and a search for their identity becomes the primary objective of the bereaved families".

[3] The three accused persons before court are part of a larger group where most of them have been found not guilty and acquitted by the court and these three accused persons are left to carry the can, as it were. They are all relatively young with ages ranging from 22 to 23 years. All three accused persons at the time they were arrested were in the lower standards in primary school. *Advocate Mngomezulu* argued in mitigation of sentence that the court ought to look at the accused background which is steeped in the belief in witchcraft such that they do not know any better. It was submitted

to the court by both counsel that in this case there are extenuating factors for accused to escape the death sentence and I agree with this submission.

[4] At this stage of the proceedings, the court has to pass an appropriate sentence. Three competing interests arise for the proper balance by the court. These are referred to in legal parlance as the *triad*. The nature of the crime, the interest of the society and the interest of the accused. According to Holmes JA in the case of *S v Rabie 1975 (4) S.A. 855 (A) at 862 (G)*:

"Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances".

Despite their antiquity these wise remarks contain much that is relevant to contemporary circumstances (they were referred to, with approval, in *S vs Zinn 1969 (2) S.A. 537 (A) at 541*) **"a judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and the pressures of society which contributes to criminality ..."**

[5] As I have stated above in paragraph [3] *supra* that in *casu* there are extenuating circumstances based on the belief in witchcraft for the accused persons to be sentenced to death. I have also taken into account that the present accused persons belonged to a larger group which left earlier on whilst the deceased was being tortured. These three accused persons as I said earlier in my judgment went the full hog until the death of the deceased.

This belief in witchcraft especially by young members of the community like the accused persons is the cause of all these problems. In the circumstances of this case and the personal circumstances of each accused person they are each sentenced to 10 years imprisonment without the option of a fine and the sentence is backdated to their dates of arrest.



S.B. MAPHALALA