



**IN THE HIGH COURT OF SWAZILAND**

Criminal case No: 318/10

In the matter between:

**REX**

**VS**

- 1. SENZO NHLABATSI**
- 2. WANDILE DLAMINI**

Neutral citation:

*Rex vs Senzo Nhlabatsi & Wandile Dlamini (318/2010)*  
*[2012] SZHC167 (2012) July 2012*

**Coram:**

**M.C.B. MAPHALALA, J**

**Summary**

Criminal Law – first and second accused charged with murder – first accused also charged with rape – offence of murder premeditated – belief in witchcraft invoked as an extenuating circumstance - each accused convicted of murder with extenuating circumstances and sentenced to twenty-five years imprisonment – first accused also convicted of rape and sentenced to eighteen years imprisonment – first accused's sentences to run consecutively.

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**JUDGMENT**  
**05<sup>th</sup> JULY 2012**

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- [1] The first and second accused were charged with murder and it was alleged by the Crown that on the 21<sup>st</sup> August 2010 at Fumbizinhlwa area in the Shiselweni region, the accused acting in furtherance of a common purpose unlawfully and intentionally killed Mary Lungile Ginindza. They pleaded guilty to the offence and a plea of not guilty was entered on the record by the Court.
- [2] On the second count the first accused was further charged with the offence of Rape and it was alleged by the Crown that on the 21<sup>st</sup> August 2010 at Fumbizinhlwa area in the Shiselweni region, he unlawfully and intentionally had sexual intercourse with Mary Lungile Ginindza without her consent. He pleaded guilty to the offence.
- [3] Certain formal admissions were made by the accused in terms of section 272 of the Criminal Procedure and Evidence Act. Firstly, the post-mortem report was admitted in evidence by consent and it was marked Exhibit 1. The body of the deceased was identified by a police officer based at Hlatikulu Police Station as well as the deceased's son Amos Ginindza. The cause of death was due to multiple injuries. This is in respect of the Murder charge.

[4] The second formal admission was the forensic Report from the South African Police which was also admitted in evidence by consent; and, it was marked Exhibit 2. The report was prepared by Regina Cecilia Janse Van Rensburg, a Warrant Officer in the South African Police Service. Her findings were that the DNA result of the vaginal swab taken from the deceased matches the DNA result of the sample taken from the first accused. This is in respect of the charge of Rape.

[5] There was also a confession made by the first accused before Senior Magistrate Peter Simelane at the Nhlngano Magistrate's Court on the 25th August 2010. It was admitted by consent and marked exhibit 3. The first accused told the Senior Magistrate that he was arrested on the 24<sup>th</sup> August 2010 by Police officers based at Hlatikulu Police Station. He told him that he was making the Statement voluntarily, and, that no promise or threats were made to induce him to make the statement. He further stated that he was not assaulted by the police since the start of the investigations, and, that he had not suffered any injuries since he was arrested. The statement was duly signed by the Senior Magistrate, his Interpreter as well as the first accused.

[6] The statement reads as follows:

**“At around 1600 hours, there came my cousin Wandile Dlamini. He found me at home and said we should go out to drink beer on Saturday. Indeed we went out bought beer and drank. When I was drunk he then said he wanted to go to the old woman’s home. Indeed we set out for the old woman’s home at around 2100 hours. When we arrived at the old woman’s home we knocked at the door. She opened and we came inside.**

**After we had entered, Wandile then asked her why she was bewitching his family. The old woman asked him who he was alleging she was bewitching. Wandile never gave a reply but simply started assaulting the old woman, pressing her down and hitting her with a sjambok. Wandile was the one using the handle of a broom which I found in her house.**

**Whilst busy assaulting her, she cried asking us to stop so that she can tell us what actually happened. We stopped whereupon she then admitted that she was the one who was destroying the Dlamini family. We asked her what she actually did and she said that she’s the one that killed grandfather Simeon. We asked her about her other acts and she mentioned that she is the one that killed Wandile’s brother who was a teacher. She further admitted that there is something which she dug into the yard at Wandile’s home. Wandile then picked a car tyre there in the yard and set it alight. When the tyre was burning, Wandile said we should pull the old woman outside. We did that. When the woman was outside, we took the burning tyre and placed it on top of her. She pushed it away. Wandile then said I should remove the tyre from close to the old woman and I did so.**

**We then departed leaving the old woman there. We went to sleep at Wandile's home. Very early in the morning before people were out and about we went past the old woman's home and noticed that she was still lying where we had left her. I then proceeded to my home and Wandile was going to the shop and I suppose from the shop he went back to his home. That is all what happened."**

[7] The second accused also recorded a statement before Senior Magistrate Peter Simelane, at the Nhlanguano Magistrate's Court. He told the Magistrate that he was arrested on the 24<sup>th</sup> August 2010 by Police officers based at Hlatikulu Police Station. He confirmed that the statement was made voluntarily, and, that there were no threats or promises that were made to induce him to make the statement. Similarly, he confirmed that he was never assaulted since his arrest and that he did not sustain any injuries pursuant to his arrest. The statement was duly signed by the Senior Magistrate, the Court Interpreter as well as the second accused. The statement was admitted in evidence and marked exhibit 4.

[8] The statement reads as follows:

**"It was on a Saturday evening at around 1900 hours. I came across my cousin Senzo Nhlabatsi. We discussed about the deceased old lady that she was giving us problems. We then decided that in order to confront this old lady we must take two beers. After we had finished drinking, we borrowed a sjambok from the place where we had been**

drinking. We were given one and we then decided to cross over to this lady's homestead.

We arrived to the old lady's homestead. Senzo knocked at the door and she opened for us. She was seated in the dining room. We then asked her why she was bewitching us because she had previously declared that all our affairs at home would not go according to plan and succeed. She never gave an answer but merely said we were busy playing jokes with her. That is when we started hitting her with the sjambok. Having started assaulting her she then confessed that she had killed my brother as well as my grandfather. She further confessed that she was responsible for the death of her husband.

We then ordered her to go and show us where she had put the muti at our home. She could not move as we had heavily assaulted her. We then continued to assault her and poured salt and water over her body. After she had completely lost strength, I then went and made a fire outside. I placed a car tyre on the fire so that it could catch fire. It caught the fire and we then caught and dragged her out of the house. She was still alive. I tried to take the tyre and put it around the old woman's neck but failed. Senzo also tried and he successfully hung the burning tyre around her neck. When I observed that she was burning, I ordered Senzo to remove the tyre from around her arm and he did so.

We then put out the burning tyre and the fire I had made outside. We went to my house to sleep. In the morning we woke up and I crossed over to Johannesburg evading arrest and Senzo returned to his home. On Tuesday I heard that Senzo had been arrested and this past Monday I decided to come back to Swaziland on my own. I submitted

**myself at the Manzini Police Station. I was then transferred to Hlatsi Police Station.”**

[9] PW1 Amos Ginindza, the deceased’s son, testified that he received a phone call that he must rush home where her mother resides, and that he had fallen when she was sweeping. When he arrived at home, between 8 am and 8.15 am, she found many people on the premises. He saw her younger sister holding the deceased next to a water tank. He came closer, removed her younger sister and discovered that his mother was burnt on the face and that she was already dead.

[10] The police subsequently arrived and asked him to move away from the deceased; her body was subsequently taken by the police to Nhlngano Funeral Parlour.

[11] PW1 further told the Court that when the deceased died, she was alone in the house and that their nephew who stayed with her had gone to her parental homestead at Mkhitsini area in the Shiselweni region. He confirmed that he was present during the post-mortem held at Mbabane Government Hospital, and, that he was able to identify her body.

[11.1] The defence did not cross-examine PW1.

[12] PW2 Nhlanhla Mkhabela, a police officer based at the Nhlangano Police Station in the department of Scenes of Crime testified that he received a phone call from Hlatikulu Police Station of a murder case committed at Fumbizinhlwa area, and, that he proceeded to the scene. On arrival he saw the deceased lying face down on the ground outside the premises of her home; she was wrapped in a blanket. He started investigations, examined the inside of the house and found various items broken such as brooms, mops, glasses and a bucket. The items in the house were upside down. The marks on the ground showing where the deceased was being pulled forcefully out of the house were visible.

[13] He noticed that there was a fire next to the body, and, he also noticed that there were marks on the ground from the fire to the body showing where the deceased was being pulled on the ground. There were pieces of a burnt tyre from the fire to where the tyre was eventually found.

[14] He photographed the body as it was covered by the blanket; then, he removed the blanket and noticed that the body was wearing a brown dress with an apron as well as a blue and white spotted skirt. All the clothes were around the waist, and her upper body was naked. There was a navy blue panty left at her ankles, and he suspected that it had been worn by the



deceased. The body had multiple assault injuries as well as severe burnt wounds on the upper body, face and hands. Her private parts were stuffed with sand. The inner part of her vagina was wet, and this led PW2 to conclude that she was sexually abused.

[15] PW2 swapped the vaginal area, packaged and sealed the DNA sample. He took a series of photographs of the deceased's body as well as the scene of crime. He took the clothes worn by the deceased including the brown dress, blue and white spotted skirt, apron and underwear; he packaged and sealed them for forensic examination.

[16] The following items were identified in the house as having been used in the commission of the offence: three pieces of a broken mob, four pieces of a broom, a broken ten-litre bucket, pieces of a broken bottle, a damaged electric kettle, a hammer with a reddish substance, used firewood, headgear found next to the body, a black piece of cloth found on the fire, a navy blue underwear found on her left ankle, a blue whitish skirt, a brown dress as well as an apron.

[17] During the post-mortem examination, PW2 asked the pathologist to draw blood and vaginal swab for further investigations; these DNA samples were intended to be compared with bloodstains which might be found on the

clothes worn by the accused; hence, clothes worn by the accused were subsequently taken for forensic examination in South Africa.

[18] On the 24<sup>th</sup> August 2010 PW2 was asked by the police investigating team to accompany them for further investigations. They were in the company of the first accused whom they introduced to him as a suspect in the case. Together they proceeded to his parental homestead where he produced a sjambok which was white and green in colour; he took it from underneath his bed.

[19] The first accused further handed to the police investigating team a black and white shirt and a blue T-shirt; the duty of PW2 was to photograph the scene as well as the items handed to the police. The camera card was later processed and photographs were developed. The photographs were admitted in evidence.

[20] Exhibit 5 was a photograph showing the front area of the deceased's homestead with the body covered with a blanket; exhibit 6 shows the dead body covered with a blanket; exhibit 7 shows the fire which was now extinguished; exhibit 8 shows the burnt tyre; exhibit 9 shows the naked body after the blanket was removed; exhibit 10 shows the naked body and in particular the assault injuries on the buttocks; exhibit 11 shows the navy

blue underwear on her ankle; exhibit 12 shows the multiple assault injuries on the back of the deceased's body; exhibit 13 shows injuries sustained by the deceased all over the body; exhibit 14 shows the severity of the burnt body; exhibit 15 shows the police entering the accused's house; exhibit 16 shows the first accused with a witness; exhibit 17 shows the blue T-shirt produced by the first accused; exhibit 18 shows a black and white shirt; exhibit 19 shows the accused pulling a sjambok from underneath the bed.

[21] From the second accused PW2 was given takkies, a brown pair of trousers, a golf T-shirt light blue in colour as well as blood samples. The items were packaged and sealed by the time the investigating team handed them to PW2.

[22] From the first accused, the investigating team obtained grasshopper brown shoes, a pair green trousers, a sjambok, a pair of socks and blood sample. All these items were taken for forensic investigation.

[23] PW3 Stanley Nxumalo a police officer based at the Serious Crimes Unit in Nhlanguano Police Station testified that on the 22<sup>nd</sup> August 2010, at about 08.30 am, he received a report of a person who had been killed at Fumbizinhlwa area at Sibetsamoya at a Ginindza homestead. They found the family mourning the death of the deceased. They saw the dead body

covered with a pink blanket; they removed the blanket and confirmed that she was dead.

[24] They called PW2, the Scenes of Crime Officer, and he came with police officers from Ukhozi Unit. PW2 took photographs of the deceased as well as the scene. There were multiple injuries on the deceased's body as well as burnt wounds on her upper body. There was also a burnt tyre next to the body as well as fire which was now extinguished. After investigations, the body was taken to Nhlangano Funeral Parlour.

[25] On the 23<sup>rd</sup> August 2010 PW3 together with Inspector Mabuza, Detective Constable Ngwenya, Detective Constable Dlamini went to the Shiselweni Forestry where they asked for the release of Mkhawuleni Dlamini and Senzo Nhlabatsi; they took them to the Hlatikulu Police Station for interrogation. The first accused led them to his homestead at Sibetsamoya area. They were joined by a community police of the area Harriet Kunene. At the homestead they also found members of the first accused's family.

[26] After introducing themselves as police officers, the first accused led them to his house where he produced a sjambok, a black and white long sleeve shirt, a grasshopper pair of shoes as well as soaks. They took these items, packaged them and later sent them for forensic examination. The first

accused was formally charged; and Mkhawuleni Dlamini merely recorded a statement and was later released.

[27] On the 25<sup>th</sup> August 2010 the first accused decided to record a confession with the senior Magistrate's Court Peter Simelane. The confession has since been admitted in evidence by consent and it is marked Exhibit 3.

[28] On the 31<sup>st</sup> August 2010 at about 1400 hours, he received a phone call from the Manzini Police Station saying that the second accused has since surrendered himself to the Manzini Police Station. He went there being accompanied by Constable Peterson Mavuso and Detective Constable Nonhlanhla Dlamini. They transported him to Hlatikulu Police Station.

[29] The second accused after being cautioned opted to say something which led PW3 to go to Thembisa Township in South Africa on the 2<sup>nd</sup> September 2010 together with Detective Sergeant Vilane and Detective Constable Zwane. They found Dumisani Mpanza who gave them clothes belonging to the second accused. The second accused subsequently confirmed that he was wearing the said clothes on the day of commission of the offence. The clothes consisted of a blue T-shirt, a brown pair of trousers as well as a pair of shoes. The clothes were packaged and sealed and sent for forensic investigation.

[30] The second accused later made a confession before Senior Magistrate Peter Simelane at the Nhlangano Magistrate's Court. The confession was later admitted in evidence by consent and marked exhibit 5.

[31] The items obtained from the first accused were later admitted in evidence. The sjambok was marked Exhibit A; the black and white shirt was marked Exhibit B, the socks were marked Exhibit C, the black shoes were marked Exhibit D and the pair of trousers was marked Exhibit E.

[32] The items taken from the second accused were also admitted in evidence. The pair of trousers was marked Exhibit F; the T-shirt was marked Exhibit G, and the pair of shoes was marked Exhibit H.

[33] The only question asked by the defence during the cross-examination of PW3 was how the accused conducted themselves during police investigation, and, the reply was that both accused were co-operative with the police.

[34] There was a Statement of Agreed Facts made by the first accused in respect of the second count. The statement was subsequently admitted in evidence in terms of section 272 (1) of the Criminal Procedure and Evidence Act and was marked Exhibit 21; and, it was duly signed by the Crown Counsel as

well as the Defence Counsel. Section 272 (1) provides that in any criminal proceedings, the accused or his representative in his presence may admit any fact relevant to the issue, and any such admission shall be sufficient evidence of such fact.

[35] The Statement of Agreed Facts provides the following:

**“Whereas the accused Senzo Nhlabatsi is indicted on a count of Murder together with one Wandile Dlamini for killing one Mary Lungile Ginindza. Senzo Nhlabatsi is the first accused and Wandile Dlamini is the second accused on the count of Murder. Senzo Nhlabatsi is further indicted on a count of Rape it being alleged that he raped the deceased, Mary Lungile Ginindza before she died.**

**Upon being requested to enter their pleas, Senzo Nhlabatsi pleaded guilty to the second count of Rape. The Crown accepts the plea and a statement prepared and signed by the Crown and the accused and or his Counsel is hereby presented to court to form part of the evidence.**

**And now the accused agrees that:**

- 1. upon or about the 21<sup>st</sup> August 2010 and at or near Fumbizinhlwa area in the Shiselweni region, the 1<sup>st</sup> accused Senzo Nhlabatsi did unlawfully and intentionally have sexual intercourse with the deceased Mary Lungile Ginindza without her consent.**

2. **The accused admits that he unlawfully and intentionally had forceful sexual intercourse with the deceased Mary Lungile Ginindza without her consent.**
3. **The DNA report (Exhibit 2) on the specimen taken from the deceased (vaginal swabs) and the specimen harvested from the accused Senzo Nhlabatsi, prepared by the Forensic Laboratory, South African Police Service, in Pretoria be submitted by consent to form part of the evidence.**
4. **Senzo Nhlabatsi pleads guilty on the count of Rape and accepts that he unlawfully and intentionally had forceful sexual intercourse with the deceased, Mary Lungile Ginindza before she died.”**

[36] The Crown closed its case; and, the defence also closed its case without leading evidence.

[37] On the basis of the formal admissions, the two confessions, the statement of Agreed Facts as well as the evidence of the Crown witnesses, the Crown has proved the commission of two offences beyond reasonable doubt. The first and second accused are convicted of the offence of murder; in addition, the first accused is convicted of the crime of Rape. Furthermore, the evidence shows that the offence of murder was premeditated; the accused deliberately drank alcohol in order for them to obtain “Dutch Courage” to commit the offences.



[38] The next question for consideration by the court is the existence or otherwise of extenuating circumstances in respect of the charge of murder. Section 295 of the Criminal Procedure and Evidence Act provides the following:

**“295. (1) If a court convicts a person of murder it shall state whether in its opinion there are any extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them:**

**Provided that any failure to comply with the requirements of this section shall not affect the validity of the verdict or any sentence imposed as a result thereof.**

**(2) In deciding whether or not there are extenuating circumstances the Court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs.”**

[39] In the case of *S v. Letsolo* 1970 (3) SA 476 (AD) at 476 G-H, *Holmes JA* stated the following:

**“Extenuating circumstances have more than once been defined by this Court as any facts, bearing on the commission of the crime, which reduces the moral blameworthiness of the accused as distinct from his legal culpability. In this regard a trial court had to consider:**

- (a) Whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication, provocation, belief in witchcraft;
- (b) Whether such facts in their cumulative effect, probably had a bearing on the accused's state of mind, in doing what he did;
- (c) Whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.

**In deciding (c) the trial court exercises a moral judgment. If it is yes, it expresses its opinion that there are extenuating circumstances”**

[40] This case was approved and followed by the Court of Appeal of Swaziland, as it then was, in the case of *Philemon Mdluli and Others v. Rex* 1970-1976 SLR 69 at 75D (CA).

[41] Isaacs JA, in the case of *Mbuyisa v. Rex* 1979-1981 SLR 283 at 285E, in delivering the unanimous judgement of the Court of Appeal of Swaziland, as it then was, said the following:

**“Both South African Courts and the Courts of Swaziland have held that extenuating circumstances means circumstances not too remotely or indirectly related to the commission of the offence which would reduce the accused's moral blameworthiness.”**

[42] It is trite law that the onus of proving the existence of extenuating circumstances rests upon the accused. See the cases of *Rex v. Enos*

*Khumbula Shongwe* 1977-1978 SLR 60 at 61F (HC); *Rex v. Maziya Mantolomane and Another* 1987-1995 (2) SLR 318 at 319H (HC) and *S. v. Diedricks* 1981 (3) SA 940 (C) at 943.

[43] *Schriener JA* delivering the unanimous judgment of the South African Appellate Division in *Rex v. Fundakubi and Others* 1948 (3) SA 810 at pages 818-20 stated the following:

**“That a belief in witchcraft is a factor which does materially bear upon the accused’s blameworthiness I have no doubt...**

**But it is of importance to emphasise that the prevalent belief in witchcraft is a very great blight upon the native peoples of the Union, which existing panel legislation has hitherto failed to eradicate.... Excessive leniency in dealing with cases, where such a belief has led to the commission of cruel crimes, often against the weakest members of the community, may conceivably help to delay the disappearance of such belief. Not that great reliance can be placed on the severity of punishment alone to get rid of the evil; but it may be suggested, if any such suggestion is necessary, that the imposition of suitably severe punishment should be made the occasion, not so much for expression of sympathy with the accused, as for public admonition or reprobation of those criminally foolish persons who allow themselves to be induced by utterly unfounded suspicions of innocent persons to commit the most savage murders....**

**It is of course obvious that the recognition of a belief in witchcraft as an extenuating circumstance in murder is very liable to be abused.**

**Persons in a position of some authority may use the process of “smelling out” to destroy a rival and acquire his property. Under the cloak of a belief in witchcraft all sorts of private ends may be sought to be gained through the killing of another.”**

[44] This case was approved and applied by the Court of Appeal of Swaziland as it then was, in the case of *Sipho Isaiah Lukhele v. R* 1970-1976 SLR 164 at 165 (CA); *Majaheni Simon Ngwenya v. R* 1970 – 1976 SLR 126 at 127 (CA) and *Benjamin B. Mhlanga v. Rex* Criminal Appeal No. 12/07. The Crown did not dispute the evidence of the accused that they genuinely believed that the deceased has bewitched members of the second accused’s family; and, it is trite law that a belief in witchcraft constitutes an extenuating circumstance. Accordingly, the first and second accused are convicted of murder with extenuating circumstances.

[45] In mitigation of sentence the first accused submitted that he was twenty-three years of age when the offences were committed; that he pleaded guilty to the offences charged, that he has three minor children to support as well as his mother; and, that he was a first offender.

[46] The second accused is a first offender; he was thirty-two years of age when the offence was committed; that he pleaded guilty to the offence charged, he has two minor children to support as well as his family.

[47] However, the Crown made submissions in aggravation of sentence. It argued that the murder was premeditated; and, that the first and second accused set out to kill the deceased. The defence did not dispute the evidence that the accused drank alcohol in order to get “dutch courage” to commit the offence.

[48] The Crown further argued that the Court should impose a suitably severe punishment in order to eradicate the belief in witchcraft. I may add that many innocent people have been killed in this country on suspicion of practising witchcraft; hence, the Court should not be excessively lenient in dealing with such cases.

[49] I have considered the triad, that is the personal circumstances of the accused, the interests of society as well as the seriousness of the offence committed. This was a very brutal murder committed against a defenceless old woman. Not only was she brutally assaulted all over her body but she was severely burnt on the upper part of her body. As if that was not enough, the first accused later raped her whilst she was still in agony of being brutally assaulted, tortured and burnt.

[50] This country has seen a sharp increase in murder cases of people who are killed on suspicion of being witches; and, this Court has a Constitutional duty to protect society against the perpetrators of these crimes.

[51] It is now established in this jurisdiction that the range of sentences for aggravated rape offenders range from eleven to eighteen years. There is no dispute that the rape committed against the deceased falls under that category. See the cases of *Mgubane Magagula v. Rex* Criminal Appeal No. 32.2010; *Melusi Maseko v. Rex* Criminal Appeal No 43/11; *Friday Magagula v. Rex* Criminal Appeal No. 44/2011; *Sikhumbuzo Mazibuko v. Rex* Criminal Appeal No. 46/2011 and *Mbuso Blue Khumalo v. Rex* Criminal Appeal No. 12/2012.

[52] Accordingly, the first and second accused are each sentenced to 25 years imprisonment in respect of the first count of murder. The first accused is further sentenced to 18 years imprisonment in respect of the count of rape. The two sentences in respect of the first accused will run consecutively because the two crimes did not constitute a single transaction, but they were committed on two separate occasions.

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**M.C.B. MAPHALALA**  
**JUDGE OF THE HIGH COURT**

For Crown  
For Defence

Attorney Absalom Makhanya.  
Attorney Ian Du Pont