



IN THE HIGH COURT OF ESWATINI
JUDGMENT ON SENTENCE

HELD AT MBABANE

CASE NO. 347/13

In the matter between:

REX

Versus

AARON KHOPHO MSIBI

Neutral Citation: *Rex v Aaron Khopho Msibi (347/20) [2020] SZHC 140 [2020]*
(23 July 2020).

Coram: M. LANGWENYA J

Heard: 18 June 2020; 23 June 2020; 9 July 2020; 15 July 2020; 23 July 2020

Delivered: 23 July 2020

Summary: *Accused found guilty of murder-belief in witchcraft a mitigating factor-triad of Zinn articulated-accused sentenced to twenty years imprisonment-period of imprisonment to take into account period accused in pre-trial incarceration.*

JUDGMENT ON SENTENCE

- [1] The accused was found guilty of the murder of his wife Sofonco Sibandze. According to the post-mortem report, the deceased was about sixty-six years of age when she was murdered by the accused. As so often in witchcraft-related killings, the victim in this case was an elderly woman¹. More often than not, witchcraft related killings are a manifestation of gender-related harm.
- [2] The accused gave evidence in mitigation of sentence. The net effect of his evidence is that he killed his wife as a result of cumulative emotional, psychological and mental pressure. In my assessment of the evidence, there is no doubt that the accused believed, rightly or wrongly, that his wife was bewitching him.
- [3] In our law, belief in witchcraft constitutes an extenuating circumstance and authority to this effect is legion².
- [4] The accused testified that he believes in witchcraft. He consulted *tinyanga* and was told that the deceased was bewitching him. It was the evidence of the accused in mitigation of sentence that the deceased would come to the home of accused's third wife when the accused and his third wife were asleep inside

¹ *R v Mhlanga* Criminal Appeal No. 12/07 [2007] SZSC 9 (14 November 2007); *Mbhamali v Rex* (38/2011) [2013] SZSC 8 (31 May 2013).

² *R v Fundakubi* 1948 (3) SA 810(A); *Dlamini & Others v R* 1970-76 SLR 42 (CA) at 43; *Peter B Dlamini v The King* CA 37/97; *Themba Enock Mabuyakhulu & Others v The King* CA 24/2000.

the house. The accused told the court that he never saw the deceased outside the said house.

- [5] During cross examination, the accused stated that after hacking the deceased with a spade, he did not offer assistance to her. Instead, he says, he went to the royal kraal because he was pained and his mind was all mixed up. The accused testified that he was remorseful.
- [6] The accused is a first offender. Until the age of sixty-eight years the accused had not had a brush with the law. The fact that the accused is seventy-five years of age and has led a relatively innocent life for the better part of his life will also be taken into account by the court. This court is enjoined to approach the sentencing of the accused with mercy as stated in *S v Rabie*³ where the court emphasised that the imposition of sentence should be approached with a 'humane and compassionate understanding for human frailties and the pressure of society which contribute to criminality.' This factor is deserving of some weight in mitigation.
- [7] The accused was arrested on 4 September 2013 and released on bail on 21 June 2016. He spent an effective two years, nine months and seventeen days in pre-trial incarceration. It is trite that the time the accused spent in pre-trial incarceration should be taken into account at this stage of the proceedings.
- [8] This court will also take into account the fact that the accused is a bread winner in his family.
- [9] In mitigation of sentence, the accused testified that on the day he murdered the deceased he had had no quarrel with her. He testified that on the days

³ 1975 (4) SA 855(A) at 866B-C.

preceding the commission of the offence charged he had a misunderstanding with the deceased. The accused also told the court that when he hacked the deceased with a spade, he was mentally disturbed. In my consideration of the accused's defence throughout this grim episode I have also scrutinized his own description (in the statement he made before a judicial officer) of the events leading up to the killing of the deceased. I was unable to find that the deceased had in any way provoked the accused in the plain and the ordinary meaning of the word. The accused cannot, therefore at this stage be said to have acted in the heat of passion which would have resulted in him losing self-control which would have prevented him from formulating the requisite intention.

[10] The accused informed the court that in years gone by, he had a misunderstanding with the deceased which culminated in her leaving her marital home. The misunderstanding was over the paternity of PW2. The accused denied the paternity of PW2. The deceased was away from her marital home for a period of eight years. She eventually returned after the family prevailed on the accused to forgive her. The accused lived with the deceased for a long time and built her a house which she refused to live in-so the court was told. Un-meritoriously, the issue of PW2's paternity was not raised in the course of the trial.

[11] It was the accused person's evidence that he is now seventy-five years of age and that he was sixty-eight years of age when he committed the offence charged. He informed the court that he now lives with disabilities presumably as a result of age. The accused is a polygamous man as he had three wives before the first wife died as a result of natural causes while the second wife was murdered by the accused. The accused lives with his third wife. He has

children with all his wives and is responsible for the maintenance of his family.

- [12] The accused called his wife to testify in mitigation of sentence. DW2 is Mantombi Eldah Masuku-Msibi. It was her evidence that the accused consults *tinyanga* and that he believes in witchcraft. She testified that the accused is a sickly person and often complains of a headache, painful knees and feet and a sore body. The accused once went to Nazarene hospital for his ailments but was never examined. DW2 confirmed the evidence of the accused that the deceased would indeed come to DW2's home while they were asleep and cough outside. However, DW2 never saw the deceased outside her house while they were asleep. It is her evidence that the accused informed her that *tinyanga* that he consulted told him it was the deceased who was bewitching him.
- [13] On a positive note, DW2 told the court that the deceased was a kind and generous person. The deceased would give DW2's children food which they ate.
- [14] The ailments that the accused suffers from, I think can be attended to at the correctional facility by doctors, nurses and other health personnel manning the correctional services.
- [15] That said, it is important to point out that the accused's personal circumstances should not be looked at in isolation. One must also consider the aggravating factors attendant to this matter. The deceased was hacked with a spade on the head by her husband. The trauma suffered by PW1-the grandchild-who witnessed the assault of his grandmother by his grandfather and was crying; and the trauma suffered by PW2 on hearing about the death of his mother

cannot be ignored. In a low tone full of sadness and in-between sighs, PW2 told the court how his family is poorer for the loss of the deceased. PW2 told the court how nonchalant the accused had been prior to the death of the deceased and continues to be towards the children of the deceased.

[16] Our society is plagued by violent crime. The killing of people has become common place. Women, and indeed older women are particularly vulnerable and the courts are called upon to protect this vulnerable group of women. If the sentence imposed is too lenient, members of our society would take matters in their own hands. It is incumbent on the courts to discourage the belief in witchcraft by imposing appropriately serious sentences in order to deter would be offenders. Needless to say, each case must be treated on its own merits.

[17] The offence committed is undoubtedly serious. The manner in which the offence was committed was particularly brutal. It calls for a severe sentence matching the serious nature of the offence. The victim received no mercy despite trying to flee from the accused-her husband-turned assailant. The deceased died due to injury to the head. Her frontal bone, left temporal bone, left parietal bone and occipital bones were fractured and the brain was disrupted. The deceased also had intra-cerebral bleeding.

[18] A strong deterrent message must go out to those who wish to take the law into their own hands, that this type of conduct will not be tolerated by the courts. Our society ought to be warned that the killing of a person in the belief that they are witches or wizards will result in imprisonment. The court will mete out sentences that will not only be regarded as a general deterrent to the

community but as a deterrent to the accused as well, which will deter him from committing such a crime in the future.

[19] It is hoped that as the accused takes his sojourn to the correctional facility he will have time to reflect about the error of his ways; that he will find it in himself to apologize to the children and family of the deceased for whatever that is worth.

[20] In the circumstances of this case, it is my considered view that an appropriate sentence would be the following:

[21] The accused is sentenced to twenty years imprisonment. This sentence will take into account the period of two years, nine months and seventeen days which the accused spent in custody prior to being released on bail.



M. LANGWENYA
JUDGE OF THE HIGH COURT.

For the Crown:

Ms B. Fakudze

For the Defence:

Mr P. Dlamini