IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE APPEAL CASE NO. 24/2000

In the matter between:

Themba Enock Mabuyakhulu	First Appellant
THWENTWE BHEJANE MYENI	Second Appellant
VUSI MBHAMALI	Third Appellant
LUBHOKO ABSALOM MABUZA	Fourth Appellant

And

THE KING	Respondent

Coram	LEON, JP; STEYN, JA BECK, JA

For Appellants	In Person
For Crown	Mr. S. Kubheka

JUDGMENT

LEON, JP

The four appellants appeared before the High Court charged with murder, it being alleged that on or about 17 June 1999 and at or near Mlindazwe area in the Shiselweni district, they each or all of them acting in common purpose did unlawfully and maliciously kill Mpiyonke Volovolo Shabangu.

Although it does not appear from the record, it appears from the judgment that all the appellants pleaded not guilty but they were found guilty as charged. The first and fourth appellants were each sentenced to 14 years imprisonment, the second appellant (a chief's runner who the trial court considered should be more severely punished) was sentenced to 16 years imprisonment, while the third appellant, a young man aged 20, was sentenced to 12 years imprisonment. All the sentences were backdated to the time of their arrest, namely, 17 June 1999.

The learned trial Judge has given a most lengthy and comprehensive judgment in this case which makes it unnecessary to repeat the facts in detail; it is sufficient if I deal with the matter more broadly.

The background to this case is that it involves witchcraft. The deceased was believed to have been a wizard who had been responsible for causing the death of one Guguza Mbhamali who is the father of the third appellant and the brother-in-law of the fourth appellant. He died on 17 June 1999 and it was on that day that the deceased was killed. Guguza Mbhamali had been sick for some while but it was common cause that the deceased had threatened that he would die and also that he had issued similar threats against the community as a whole including the appellants.

The appellants were all represented by counsel at their trial who admitted the identity of the deceased, the cause of death, and that each of the appellants had made statements before magistrates on 24 June 1999, the voluntariness of those statements being admitted. In those circumstances both the post-mortem report as well as the statements were handed in by consent.

The copy of the post-mortem report in the record is not very legible but it is set out at length in the judgment and the injuries there referred to are, in any event, support by the crown evidence to which I shall presently refer.

The post-mortem examination was conducted by Dr. R.M. Reddy who found that the deceased had died as a result of haemorrhage resulting from multiple injuries. Those injuries included a laceration of the left parietal and fracture of the left orbit temporal bone with subdural haemorrhage over the brain, a number of abrasions, and a number of penetrating wounds. These latter included one over the back of the right chest which was lung deep involving muscles, intercostals structures, pleura and seventh rib lung; one over the outer and back

of the left chest containing 950 mililitres of blood; one of the front chest 2 x 1 cm intestine deep. There were also penetrating wounds in front of the abdomen as well as penetrating wounds in front of the lower chest.

The post-mortem injuries described in the judgment are in general supported by the Crown evidence and reveal what must have been a savage and brutal attack upon the deceased.

The body of the deceased was discovered by Mrs. Hlope who saw a large rock lying on the head of the deceased. The head was fractured and the deceased was dead. The injuries were described in some detail by Obed Dlamini (PW3) who went with the police to inspect the body of the deceased. He testified that the deceased's body was covered with wounds which looked like knife wounds; there were multiple injuries from the stomach up to the chest, as well as injuries on the left side of the neck at the back. His head was covered with blood and his head was fractured near his left ear, the jaws were twisted and there were injuries on the shoulder. Somewhat similar evidence was given by the investigating officer Detective Sergeant Dander Dlamini (PW7).

I have referred to the injuries in some detail in view of the evidence of the appellants, to which I shall refer later, which was not only in conflict with their statements to the magistrates, but also sought to suggest that the attack was not a serious one.

In his statement the first appellant said that they had had a problem with the deceased and that they had killed him because he was bewitching them and had threatened to kill them. By "them" he referred to a number of people. They took the deceased to the Chief's runner and then to the Chief who ordered the deceased to leave the area but he did not do so. The deceased then threatened to kill their head, Mbhamali who later died. The deceased then threatened to kill the four appellants. During the funeral of Mbhamali they were informed by one Manwele Mabuyakhulu that she had given "muti" to Mbhamali such "muti" having been given to her by the deceased. They then killed the deceased as they feared for their lives. The statement of the second appellant is substantially the same. He added that they went looking for the deceased and "we then assaulted him until he died because we felt that if we did not kill him he would kill us as he had threatened. We did not intend to kill him. We were trying to save our lives." The statements of the third and fourth appellants are much the same; they both admit that the deceased died as a result of their assault upon him.

According to the evidence of Mkhetwa Myeni (PW1) the first and fourth appellants arrived at his home on the afternoon when the deceased was killed. They were carrying knobsticks which were bloodstained. They started to perform a "giya" or warrior dance saying that they had killed the deceased.

On the day in which the deceased met his death he was, according to the testimony of Obed Dlamini (PW3) at the latter's home. The appellants came looking for the deceased alleging that he had stolen a chicken. They took the deceased away with them. This was at about 1.30 pm. Later that afternoon, after a report had been made to him, he found the dead body of the deceased about three kilometres from his house. He knew that there had been complaints about the deceased insulting people, that the Chief had ordered him to leave the area but that he had failed to do so.

Mavela Mandla Mbhamali was PW4. According to his evidence he was at a shebeen on the afternoon of 17 June 1999. The first and fourth appellants arrived informing him that they had killed "Mpiyonke the witch", the fourth appellant adding that he had drawn his knife and had stabbed the deceased to make sure that he was dead. They were both carrying knobsticks.

He had heard about the trouble caused by the deceased and of his failure to leave the area despite having been ordered to do so by the Chief.

All the appellants were arrested and cautioned by the investigating officer (PW5). He testified that the first and fourth appellants each handed him a knobstick and a knife.

That, in brief, was the Crown case. Each of the appellants gave substantially similar evidence. They referred to the threats uttered by the deceased, the unsuccessful attempt to remove the deceased from the area, the death of Guguza following upon threats to his life by the deceased, the report on how Guguza met his death and finally the attack on the deceased. It is quite clear from all the evidence that they acted in concert. However, each of them not only endeavoured to minimise his role in the assault but they all claimed that the deceased was alive when they left him. The first appellant said that he hit the deceased once with a knobstick; the second appellant claimed that he had used a rock as did the third appellant; the fourth appellant testified that he used a knobstick. All denied that a knife had been used.

The evidence of the appellants that they had not killed the deceased is in conflict with their statements. Their evidence is also in conflict with what was handed over to the investigating officer, what the first and fourth appellants were said to have done and said after the event and in conflict with the medical evidence and the general probabilities of the case. In this regard I agree entirely with the learned judge *a quo's* approach to this part of the case. Having stated

that the appellants endeavoured to downplay the assault which they had inflicted, the learned judge went on to say:

> *"I reject their stories in this regard as false. What I do accept, ;however, and which is borne out by the Crown's evidence, was the fact that the accused persons believed that the deceased was a witch and had killed Guguza and was going to kill members of the community including themselves. I therefore have no hesitation in holding from the evidence and inferences that the deceased died as a result of assaults inflicted upon him by the deceased persons."*

At the trial various defences were raised in argument. The first was self-defence but the facts do not provide any basis for such a defence. Nor did or could the defence of necessity prevail. It was rejected *inter alia* because such a defence relates to a physical attack not a supernatural one. Moreover what the appellants did was not reasonable.

The last defence raised was of provocation and it is raised again in the grounds of appeal. It is claimed that the appellants should have been convicted of culpable homicide not murder. Such a defence was never suggested to any of the Crown witnesses. To the extent that the appellants rely upon the revelations made at the funeral of Guguza that the deceased had given some "muti" to a woman and that the "muti" had caused Guguza's death, this is not a case of "acting in the heat of passion caused by sudden provocation". Those words appear in section 2(1)(b) of the Homicide Act No. 44 of 1959 which lays down the circumstances under which an accused person charged with murder shall be guilty only of culpable homicide. To the extent that the provocation is alleged to arise from threats made by the deceased to the community including the appellants, it is reasonably clear from the evidence that they were uttered some time before the deceased was killed. For these reasons as well as those given by the learned trial judge, I am of the opinion that such defence must also fail.

It follows in my judgment that the appellants were correctly convicted of murder.

I turn now to the question of sentence. I repeat that the sentences were as follows:-First and Fourth appellants: 14 years imprisonment. The Second appellant (the Chief's runner) 16 years imprisonment; the third appellant, a young man aged 20, 12 years imprisonment.

In passing sentence the learned judge *a quo* after considering the fact that the appellants were illiterate men who believed in witchcraft particularly that the deceased would kill using his wizardry went on to say:-

> "*Having considered the above, there is nothing to gainsay the fact that the offence you committed is serious and was carried out in a brutal and ugly manner. I have also considered the fact that the court is now dealing with many cases resulting from a belief in witchcraft. On a few months ago I am aware of two such cases which were finalised.…… this is indication of how rife the practice is of people <u>at the slightest insinuation or belief that a person is a witch to resort to taking the law into their own hands and without even hearing the "accused's" side of the story, kill a person mercilessly" (emphasis added).</u>*

This is not such a case. There is no question in the present case of acting "at the slightest insinuation or belief" or of " not hearing the "accused's side of the story". Quite the contrary, In this case the deceased was a wizard, was genuinely believed to be such, and threatened to kill a number of people including the appellants and was believed to have been responsible for the death of the father of the third appellant.

I am disposed to think that the learned trial judge has misdirected himself on the question of sentence in the light of his remarks referred to above.

I am nevertheless prepared to assume in favour of the Crown that there has been

no such misdirection. I also agree that the court should not pass sentences which encourage a belief in witchcraft and encourage people to take the law into their own hands. Such a consequence would follow if inadequate sentences are imposed.

Despite what I have said above it must never be forgotten that there are infinite gradations of seriousness in every offence and some crimes are alike in name only. In my view this case of witchcraft can fairly be stated to be at the bottom of the scale. Not only had the deceased threatened to kill a number of people but he had remained in the area despite having been warned by the Chief to leave. Having remained in the area he continued his wicked activity of harassment and, moreover, the appellants had been informed on the day of the deceased's death that he had been responsible for the death of the father of the third appellant.

In the case of **PETER B. DLAMINI** vs **THE KING** (Criminal Appeal No. 37/97) judgment was given by this Court on the 22nd April 1998. In that case the appellant was convicted of murder and this Court confirmed a sentence of seven years imprisonment. The facts in that case are set out by Steyn, JA (when giving the judgment of this court) as follows:-

> *"The appellant believed that the deceased was a wizard. His belief had been fostered firstly by the death in succession of three of his relatives. He also believed that he would be the next to die. Secondly the appellant's conviction that the deceased was a wizard was further strengthened by the fact that the deceased had been pointed out as a wizard by witch-finders. Accordingly and after attending the funereal of the last of his relatives he armed himself with a container of petrol and*

proceeded to the home of the deceased".

In the course of his judgment Steyn, JA emphasised that the courts have an obligation to combat the prevalent belief in witchcraft in this Kingdom, and that in that case there was evidence of people being implicated by diviners.

> I respectfully agree that the courts do have the obligation referred to but it is interesting to note that in that case this court regarded a sentence of seven years imprisonment as being an appropriate sentence.
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> The present case is not on all fours with the abovementioned case but is somewhat similar and, as I have said, falls at the bottom of the scale.
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> I agree with the learned judge that the second appellant, who is supposed to assist in the keeping of law and order should be treated more severely than the other appellants and also that the third appellant should be given a lesser sentence (the most lenient sentence) than his three co-accused. I say this because of his youth and because it was his father who he genuinely believed had been killed by the deceased.

Sentencing an accused person is not an exact science but the court must do its best to balance the various and sometimes competing considerations of the crime, the criminal and the interests of society.

> Giving this matter the best attention that I can, I consider that the following sentences will meet the justice of the case.
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> The first and fourth appellants: 8 years imprisonment. The second appellant: 10 years imprisonment. The third appellant: 6 years imprisonment.
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> These sentences are strikingly different from those imposed by the trial court and justify the intervention by this court.
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> In the result the appeal against the convictions is dismissed and the convictions are confirmed. The appeal against the sentences is

allowed and the sentences are altered to read as follows:

"*Accused No. 1 is sentenced to 8 years imprisonment;*

Accused No. 2 is sentenced to 10 years imprisonment;
Accused no. 3 is sentenced to 6 years imprisonment;
Accused No. 4 is sentenced to 8 years imprisonment.

These sentences are all backdated to the time of the arrest of the appellants namely the 17th June, 1999.

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LEON, JP

I AGREE

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STEYN, JA

I AGREE

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BECK, JA