



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Case No. 38/2011

In the matter between:

Somiso Mbhamali

v

Rex

Neutral citation : **Somiso Mbhamali v Rex (38/2011) [2013] SZSC 08 (31 MAY 2013)**

Coram : M.M. RAMODIBEDI C.J, S.A. MOORE J.A, E.A.
OTA J. A.

Heard : **3 May 2013**

Delivered : **31 May 2013**

Summary : **Murder - Extenuating circumstances found by judge - Appeal against sentence of 20 years imprisonment backdated to the date of arrest – Murder particularly gruesome – An apparently defenseless woman hacked and decapitated with a bush knife – Judge observed that murders of women prevalent and on the increase – Sentences of 20 years in similar cases (affirmed by the Supreme Court) considered by judge – Judge took into account the triad as well as the sentencing norms in Swaziland - Appellant's plea that 10 years of his sentence be suspended is rejected – Sentence of 20 years imprisonment well within the judge's discretion – Sentence of 20 years' imprisonment appropriate in all the circumstances of the case – Does not induce a sense of shock - Belief in Witchcraft – Guidelines for considering Belief in Witchcraft as a Mitigating Factor**

in computing an appropriate sentence - Appeal dismissed.

JUDGMENT

MOORE J.A.

Introduction

[1] As sometimes happens in the best regulated families, a discord festered between the appellant and an 'aunt', aged three score years and eight, to whom he was not connected biologically. She used to taunt him by calling him and his brother Emavezandlebe which means illegitimate or adulterous children. It will appear that the appellant felt that that nomenclature carried the same opprobrium as the English expression bastard.

[2] There was more than a sufficiency of evidence upon which Hlophe J. correctly found the appellant guilty of murder. I will therefore recite only those parts of it which bear upon the question of the appropriateness of the sentence passed by the High Court.

[3] This has become necessary because the appellant has challenged the Judgment on Sentence delivered by the trial judge on the following grounds:

- Ten years of the sentence should be suspended
- The sentence of 20 years was harsh and severe
- The sentence induced a sense of shock
- His plea of guilty showed sincere remorse on his part

- His plea of guilty showed great cooperation within the court.

The Offender

[4] Having satisfied himself that extenuating circumstances existed in the case before him, the judge then conducted the process of arriving at the appropriate sentence. He was 'alive to the fact that sentencing is a difficult part of any criminal trial, as the court has to maintain a delicate balance between the "too much" and the "too little"'. He considered and applied the triad which is a convenient short hand for the circumstances of the offender, the offence, and the public interest. The relevant mitigating circumstances relating to the offender were:

- His relative youth - 22 years of age
- His capacity for rehabilitation
- His previous good character
- The nagging 'provocation' by the deceased who kept on calling him a derogatory name
- His cooperation with the police
- His display of remorse at an early stage.

[5] These attenuating circumstances were counterbalanced by factors which did not redound to the credit of the appellant: which fell for entry on the debit side of his sentencing balance sheet, and which weighed heavily against him. These were:

- His failure to ignore the repetitive sobriquet
- His disrespect for his 'aunt' of advanced age

- His inexcusable reaction to being told that his brother's bone was going to be used against him
- His failure to resort to peaceful means - such as complaining to elders or to the police - of ending his aunt's calling him livezandlebe
- His flight to Mozambique after the murder, and his attempted escape to Natal before he was apprehended by members of the community.

The Offence

[6] The circumstances of the offence could hardly have been worse. Here was a hale and hearty young man in the prime of his life: at the age of induction to disciplined forces, or of fitness for manual labour, launching a brutal attack against an unarmed woman who could hardly be expected to defend herself, let alone mount a counter attack, or do the appellant any physical harm. He chose for his weapon of offence one of the most feared and lethal objects commonly available in Swaziland – the awful bush knife.

[7] The Report on Post Mortem Examination described the cause of death on page 1 in cryptic terms: "Due to multiple injuries." But pages 2 and 5, listing the five ante-mortem injuries which were observed upon the body of the deceased, tell a grim tale of the savage and merciless attack which the appellant mounted upon the hapless deceased. The list makes sad reading. I set it out, not to excite maudlin curiosity, but rather to illustrate that, taken together with all of the other grievous elements of this case, it affords ample justification for Hlophe J imposing a sentence of measured severity.

[8] The injuries listed in the Report are:

1. Cut wound over left side scalp to right eye obliquely present bone deep 16 x 2.2 cm. It involved skull with brain intracranial haemorrhage.
2. Cut wounds over left ear to face 13 x 2 cm, 12 x 2 cm. bone deep involved muscles vessels obliquely placed.
3. Cut wound below left ear to mouth 18 x 2.3 cm. bone deep involved muscles, lips, vessels, nerves, teeth, tongue.
4. Cut wound extending from left side front of neck upper region to right obliquely place 10 x 3.2 cm. involved muscles, blood vessels, nerves, trachea, esophagus, vertebral body surface.
5. Abrasion over buttocks 3.1 cm, 2 x 1.7 cm.

[9] In his sworn expert testimony, Dr. R.M. Reddy, an experienced Police pathologist, described the effects of the injuries he listed in his report. Each of the four wounds inflicted with the bush knife was fatal in itself. Cumulatively, they were even more so. The abrasion, which the Doctor characterized as aggressive, evidenced the final indignity suffered by the deceased as her buttocks crashed to the rocky ground upon which she lay inert as the appellant, vicious but cowardly, fled the scene.

[10] The Doctor's evidence, bolstered by graphic photographs, reinforces the prosecution contention that the killing of the deceased was the result of the appellant's deliberate intention to end her life. As Dr. Reddy noted, the blows were aimed and landed upon vital areas: the neck - severing it - upon the scalp, and upon the face between those points. They were all bone deep, which indicates that they were inflicted with much force.

The Public Interest

[11] The consideration of the public interest in this case is inextricably interwoven with the appellant's reliance upon a belief in the power of witchcraft. In his sworn testimony at the trial, he placed much emphasis upon the theory that, in a case of murder, an accused's belief that the victim could kill him by the power of witchcraft, afforded the accused either a complete defence to the charge, or reduced his culpability for murder to that for culpable homicide. Upon his conviction, so he argued, his belief that the deceased possessed powers of witchcraft, should operate as a powerful factor in mitigation of sentence.

[12] The appellant had testified:

- That his elder brother had passed away.
- That the deceased had told him that he should follow his brother without indicating which day this would happen.
- He had found a black cloth hanging on a house he was building.

- He was scared to go close since he did not know who had put the black cloth there.
- He thought he should stop building the house.
- He went to his sister in Mozambique.
- He fell sick in Mozambique but did not know where the sickness came from.
- When he returned to his shack he found that it had been burnt to the ground. He did not know who burnt it.
- The deceased told him that she had put skins in his shack and she would use the deceased bones.
- ‘After that I do not know what happened, I only realized after it happened I could no longer control my heart. I found I had already committed the crime.’

It is upon the flimsy materials listed above that the appellant invested the deceased with supernatural powers of such a degree that he would seek to justify killing her, or demand a reduced sentence, for what most right thinking members of the public would regard as a senseless and merciless crime.

[13] In the assessment of most right thinking members of society, the only ‘powers’ which the black cloth could wield in the circumstances described by the appellant, were to be tossed by the wind and drenched by the rain. The bone was no more powerful than to be deserving of decent interment.

Witchcraft

Contrary to popular misconceptions, the belief in witchcraft is not peculiar to Africa. It has plagued every continent on earth. But with the spread of electricity which literally banished the shadows in which ghosts and goblins lurked, and from which leprechauns did their mischief, the myths and legends surrounding witchcraft also paled before the enlightenment of learning, and the dissemination of scientific principles, which demystified the seemingly inexplicable, by reference to the laws of physics, the force of gravity, the rotation of the earth, and the action of the wind and waves. Today, such lingering beliefs in witchcraft as still exist must surely be found only amongst the charlatans and their gullible victims, or those who would use it as a pretext to do murder.

That said, however, the Huff Post World of the 7 May 7, 2013 reported that:

“In February, a mob (in Papua New Guinea) stripped, tortured and bound a woman accused of witchcraft, then burned her alive in front of hundreds of horrified witnesses in the city of Mount Hagan. O’Neil, (the Prime Minister), police and foreign diplomats condemned the killing.”

- [14] The question of witchcraft was amply discussed by Acting Chief Justice Sapire in **R v Dlamini** (115/1996) [1997] SZHC 14 24 November 1997. The learned Acting Chief Justice, while accepting that the accused may have had a belief in witchcraft, emphatically declared that “the law cannot recognize and does not recognize that, objectively speaking, witchcraft exists.” Starting from the universality of beliefs in witchcraft, Sapire CJ (ag.) stated that:

“Many people have in their histories a time when witchcraft was accepted as being true: but here we are nearly in the year 2000 the time is ripe for belief in witchcraft to depart from this world”

[15] If the time was ripe in 2000, it is even more so in the year 2013 when the education explosion and the scientific revolution are in increasingly full swing. But, despite the advances in learning and in materialism, a stubborn fascination for and, in some cases, an addiction to the occult still persists. That is why, in approaching cases involving witchcraft, courts must be careful to satisfy themselves first that beliefs in witchcraft are genuinely held, applying subjective criteria, and secondly to afford those beliefs only such weight as may be appropriate in the circumstances of each particular case. Courts have repeatedly found, as the judge did in this case, that a genuinely held belief in witchcraft could be treated as an extenuating circumstance.

[16] Even though Sapire CJ (ag) treated the belief of the accused in that case as an extenuating circumstance, he was nevertheless at pains to point out that:

“The courts have consistently tried to indicate not only to the accused persons but to the public at large that whatever belief you hold it is wrong to kill another human being and murder is the intentional killing of a human being for which normally speaking a person can be, himself, sentenced to death and executed.”

[17] The Acting Chief Justice was undoubtedly correct in articulating the truism that:

*“Each case has been decided however on its own merits. Each person is different. The matters influencing him are not the same in every case **but one thing, which emerges in all the cases, is that a substantial period of imprisonment has to be imposed.**....I do not know whether this experience is going to affect your belief in witchcraft. **I certainly hope that it will have the effect of impressing upon you that whatever your belief is, you still may not take the life of another person.** I cannot allow the message to go out in the country that **people who kill and come and say they did it because of witchcraft, whether it be true or not, that this entitles them to a lighter sentence or that the conduct can be condoned by the court in any way.** The deliberate taking of a human life remains murder. I must agree with the previous judgment in which Mr. Justice Dunn said ‘**I consider it proper for the courts to continue to impose sentences which will serve as a deterrent not only to the accused, but to other members of the community who might be affected and allow them to be so carried away with this belief in witchcraft.**’ Members of the community must be made to realize that this belief if taken to the extent of taking lives will not be tolerated.”* Emphasis added.

The judgment also made it clear that the Acting Chief Justice had steeled himself against lapsing into the error of passing an inadequate sentence.

- [18] Fast forward to November 2007. Notwithstanding the passage of time since 1997, a belief in witchcraft was still plaguing this nation in that year. Regrettably, it continues to do so even as this 21st Century develops its momentum into the future. In **R v Mhlanga** [2007] SZSC 9 Ramodibedi JA, as he then was, in the opening paragraph of his judgment, with which Browde and Tebbutt JJA agreed,

described the embrace of witchcraft as “an undoubtedly misguided belief.” In that case the appellant had killed his aunt Miriam because he believed, so he said, that she had been responsible for the deaths of several of his family members and that he thought that he would be her next victim. The victim in the case before us, be it noted, was also an aunt.

[19] At paragraph [14] of **Mhlanga**, this Court declared that:

“The phenomenon of people killing others because they believe them to be witches is ominous. Regrettably, it is a menace that continues to bedevil our jurisdictions in this part of the world.”

Ramodibedi JA referred to the case of **Peter B Dlamini v The King** (Criminal Appeal No. 37/97), and observed that:

“In the course of his judgment Steyn, JA emphasized 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” – evidently regarding the sentence in that case as being inadequate – “it is interesting to note that in that case this court regarded a sentence of seven years imprisonment as being an appropriate sentence.”

[20] Ramodibedi JA expressed his approbation of the above dicta in this way at

paragraph [15] of the judgment:

*“I discern the need to add my voice to those remarks. It behoves the courts to step up the fight against this evil belief in witchcraft **by imposing appropriately stiff sentences as a deterrent.** Each case must, however, be treated on its own merits.”* Emphasis added.

[21] The prevailing public disquiet concerning the continuing belief in and practice of witchcraft, was dramatically demonstrated on the morning of Tuesday 7th May 2013, as this judgment was being written, when the high circulating Times of Swaziland carried Banner headlines highlighted in red which read: **MAN CUTS OFF, FLEES WITH WOMAN’S BREAST.**

[22] Two subsidiary stories must be noted. In the first, referring to Lubulini Member of Parliament (MP) Timothy Myeni, the paper reported that:

“The legislator strongly believes that there is more behind the attack on Simelane than what it appears to be. Myeni said he was not aware of the matter but expressed shock immediately after this reporter narrated the story. “This is really shocking”, he said. “We have never heard of such at Lubulini and surrounding areas.”

Myeni, who is also the lead singer of Ncandweni Christ Ambassadors Gospel Group, further expressed his wish that the assailant may be quickly apprehended so he could face the law. He further said the incident has embarrassed the whole constituency which he described as a peaceful place.”

[23] In the second, the paper reported that:

“Siteki – Chairman of the Elections and Boundaries Commission (EBC) Chief Gija has said reports of people disappearing and others being murdered during elections time were disturbing.

Chief Gija was asked to comment on the issue of Malita Simelane. He said such reports were a sign that a lot of Swazis still believe that a human body part brings luck.

He labeled such beliefs as superstitious adding that elections hopefuls should know that elections cannot be won by using muti or human parts. “It would be really unfortunate if the attacker wanted the woman’s breast for muti purposes so as to enhance his chances of winning the elections. To me ritual murders are barbaric and satanic at the same time, since as Christians we know what brings luck to a human being,” Chief Gija said.

He said as the EBC they condemn such incidences because such reports are an embarrassment to the country.”

[24] The stories on the Times newspaper must be viewed against the background of previous reports indicating that the practice of witchcraft in Southern Africa is not confined to such harmless pastimes as wishing upon a star, or tossing coins into a fountain. They must also be viewed against the background of Botswana cases to which reference will be made presently, and reports of body parts being harvested from victims while yet alive. The belief that persons who have the misfortune of being born Albinos produce muti of a superior quality, has led to attacks on such

persons in Swaziland and other parts of Southern Africa. The risk to such persons has been regarded as being sufficiently serious to warrant their protection by the police in certain cases.

[25] A horrific panoply of the evils flowing from a belief in witchcraft, coupled with a correspondingly misplaced credulity in the efficacy of muti, are to be found in the Botswana case of **Gadiwe v The State** [2007] 1 BLR 375 (CA). In that case the judgment of the Court was delivered by Zietsman JA, a former Judge of this Court, with the concurrence of Moore and Twum JJA who are currently members of this Court. The Concise Oxford Dictionary defines muti as “traditional African medicine especially that based on the use of herbs or parts of animals”. It originates from the Zulu *umuthi* ‘plant or medicine.’ As will emerge shortly, the animal which some believers in witchcraft use in creating their muti is none other than *Homo sapiens*, the human person. See also **State v Nkani** 1979- -1980 BLR 196 (CA); **Kogadi v The State** 1996 BLR 23 (CA) **Sekobye v AG** [2006] 1 BLR 270 (CA); **Popo v The State** [2007] 2 BLR 696 (CA).

[26] In **Gadiwe**, the appellant was found guilty in the High Court on two counts of murder. In respect of each count, extenuating circumstances were found to be present. **On each of the two counts, the appellant was sentenced to imprisonment for life.** The facts of the matter revealed that the brutal murders of two innocent young people were carried out by a man motivated by a firm belief in witchcraft. His previous murder his own father arose out that belief. He had put

poison, referred to as ‘traditional medicine’ into his father’s food. For that murder he had been imprisoned until 1989. Efforts to rehabilitate him, which in all probability were made by the Correctional Service, failed to exorcise his deep-seated belief in witchcraft which the Concise Oxford Dictionary defines as “the practice of magic, especially the use of spells and the invocation of evil spirits.”

[27] In his statement before the High Court the chilling details of his belief in, and practice of witchcraft, emerged in this way:

- Prolonged use of traditional medicine caused him to become chronically annoyed and angry. It gave him a craze to take persons’ lives.
- In 1997 he had meetings with several people who had problems they wanted solved.
- They decided that muti was required and that the muti would have to contain human flesh.
- He was chosen to obtain the human flesh, to make the muti, and to distribute it to the various people concerned.
- For this he would be paid P1500:00.
- He obtained human flesh with which to process his muti by murdering a 12 year old boy.
- He cut the throat of the boy, cut off one of his hands, and removed some of the flesh from his right thigh.
- He then cut the flesh into small pieces and placed the flesh, together with other muti, into match boxes which had written on them the names of the persons to whom they were to be delivered.
- He had a lover named Nunu Odiile. She had written the names on the matchboxes.
- He thereafter murdered her.

- He then delivered the match boxes containing the muti to his 'clients' by burying them in their yards.
- He threw the boy's hand into a pit latrine where it was found by the police.
- He had delivered some 48 boxes.
- Not unnaturally, the occupants of the yards in question denied involvement in any muti transactions with the appellant.
- The Botswana Court of Appeal found on the evidence that the murders committed by the appellant were cruel and brutal in the extreme.
- All of the injuries found by the medical examiners were ante-mortem.
- A psychiatrist who examined the appellant found him fit to stand trial.
- The psychiatrist also found in the appellant a strong belief in the power of witchcraft.

In view of the matters set out above, the Botswana Court of Appeal came to the unanimous conclusion that the sentences of life imprisonment on each of the two counts of murder by the trial judge were not excessive. The appeal was accordingly dismissed and the sentences ordered by the trial court confirmed.

[28] Having rightly concluded that a heavy sentence was warranted in this case, Hlophe J then set about the task of finding the appropriate level of severity. He sought to do so by invoking the principles of parity and proportionality in sentencing. He examined three cases of homicide where sentences of 18, 18 and 25 years respectively were ordered by the Court. He described the cases of **Bhekumusa Mapholobo Mamba v Rex** Criminal Appeal No. 17/2010 and **Rex v Muzi Sandile Ntshangase** Criminal Appeal No. 436/2011 as crimes of passion and regarded them as deserving of a less severe sentence than that of 25 years

imposed in **Rex v Ntokozo Adams** Criminal appeal No. 140/2006 following the appellant's conviction for murder. He considered that the case before him was not a crime of passion and that the sentence should not be ameliorated on that ground. This is how he justified the sentence of 20 years imprisonment at paragraph [5] of his Judgment on Sentencing:

“Considering the circumstances of the matter as revealed by the evidence, particularly the gruesome manner in which the deceased, an apparently defenceless woman, was decapitated and hacked to death with a bush knife together with what I found to be the direct intention by the accused, I sentenced him to twenty (20) years imprisonment.”

[29] Had he considered the case of **Samukeliso Madati Tsela v Rex** [2011] SZSC 13 (31 May 2012) the judge would have had the benefit of the Appropriate Range of Sentences for offences of Murder in Swaziland which I had identified by a tabular analysis of sentences sanctioned by this Court over the period of ten years 2002 – 2011. He would also have observed how this Court dealt with three cases which were as egregious as the one before him. They were:

- **Xolani Zinhle Nyandzeni v Rex** [2012] SZSC 3 (31 May 2012) – A gruesome murder by the appellant against his own brother in the course of which he literally cut off his head completely with a knife. – 25 years imprisonment.

- **Ntokozo Adams v Rex** [2010] SZSC 10 (30 November 2010) – Multiple stab wounds unleashed on a woman who was eight and on half months pregnant were gruesome in the extreme. The foetus she was carrying also died. – 20 years imprisonment.
- **Simelane & another v R** [2011] SZSC 61 (30 November 2011) – Appellants beat an elderly woman all over body with burning fire wood and kicked her. Post Mortem Report showed multiple injuries which covered the whole of her body. The frontal bone and left temporal bone were fractured. – 20 years and 18 years imprisonment of the 1st and 2nd appellants respectively. The second appellant had played a supporting role in the affair.

It is nonetheless clear that Hlophe J exercised his sentencing discretion in a manner that cannot be faulted. That discretion, properly exercised cannot be usurped by this Court. Sentencing lies entirely within his province. This court can only interfere if the trial judge had committed some serious violation of sentencing law or principle. He has done none of these things. His sentence of 20 years imprisonment must remain, therefore, undisturbed.

[30] For the sake of completeness, it must be recorded that the appellant's plea that 10 years of his sentence be suspended fails to clear the hurdle of section 313 read together with the Third Schedule of the Criminal Law and Procedure Act No.67/1938 which excludes the offence of murder from the sentence suspending regime.

CONCLUSION

[31] Despite public revulsion surrounding the many gruesome cases of murder which have reached this Court arising out of a belief in witchcraft, it appears that, in the absence of some sudden and dramatic evolution in human nature, cases of this kind are likely to come before us within the foreseeable future. This Court, where the Hon. Chief Justice now sits in this case, wishes to restate the warning given by him in **Mhlanga**, that henceforward, this Court will impose appropriately stiff and deterrent sentences in cases of this kind. I also restate his assurance that each case will be treated on its own merits.

[32] It follows from what has just been said, that whereas a genuine subjective belief in witchcraft may continue to be treated as an extenuating circumstance, the time has certainly come when the efficacy of that plea as a factor in mitigation of sentence has diminished to the vanishing point.

ORDER

It is the Order of this Court that:

- i. The appeal against sentence is dismissed.
- ii. The sentence of 20 years imprisonment imposed by the trial court is confirmed.

S. A. MOORE
JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

E.A. OTA
JUSTICE OF APPEAL

For Appellant : In person

For Respondent : Mr. M. Nxumalo