



IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Criminal Appeal Case No: 13/2022

In the appeal between:

REX

APPLICANT

And

NDUMISO LAWRENCE SHONGWE

RESPONDENT

Neutral citation: *Rex vs Ndumiso Lawrence Shongwe (13/2022) [2022] SZHC 41 (2022)*

Coram: **JUSTICE M. C. B. MAPHALALA, CJ**
JUSTICE S. B. MAPHALAL, JA
JUSTICE S. J. K. MATSEBULA, JA

Heard : 08th August, 2022

Delivered : 22nd September, 2022

SUMMARY

Criminal law – a belief in witchcraft – whether it should not be a complete defence to criminal liability in appropriate cases – this was a question of law referred to the Supreme Court by the court *a quo* in terms of section 17 of the Court of Appeal Act No. 74 of 1954 as amended;

Accused charged with murder and convicted of Culpable Homicide on the basis of the Homicide Act 44 of 1959 and sentenced to imprisonment for ten years without the option of a fine – the court *a quo* held that the legal precedent that a belief in witchcraft is unreasonable and irrational reflects the views of western civilization and does not reflect the norms and ethos of the people of the Kingdom of Eswatini; hence, the referral of the question of law to the Supreme Court for its decision;

Held that a belief in witchcraft does not constitute a complete defence to criminal liability, and, that there is no legal basis to change the current legal precedent;

Held further that in appropriate circumstances the belief in witchcraft could constitute an extenuating circumstance upon proof that the accused genuinely and honestly believed subjectively in witchcraft;

Held further that notwithstanding that a large section of the people of the Kingdom of Eswatini practised and believed in witchcraft, the crime of murder remains a very serious crime not only in this country but to the international community;

Held further that many innocent and defenceless victims of witchcraft cases have been brutally killed by accused persons who have taken the law into their own hands and not sought redress to the available legal remedies to resolve their disputes;

Accordingly, the belief in witchcraft does not constitute a complete defence to criminal liability, and, that in appropriate cases, it could constitute an extenuating circumstance where it is found that the accused honestly and genuinely believed subjectively in witchcraft.

JUDGMENT

M. C. B. MAPHALALA, CJ:

[1] The accused was charged with the offence of murder. It was alleged by the Crown that on the 4th day of January 2013 he unlawfully and intentionally killed Linah Shongwe. The offence was alleged to have been committed at Eluvinjelweni area in the Hhohho region. Upon being arraigned the accused pleaded not guilty to the charge of murder but instead he pleaded guilty to the lesser charge of Culpable Homicide; however, the Crown did not accept the defence plea.

[2] It is common cause that the accused found the deceased walking over his dagga field and carrying a few of the plants. The deceased had a dagga field as well within the vicinity. The accused was angry and he confronted the deceased. In turn the deceased threatened the accused with death by witchcraft that he would die before sunset or that he would not see the marula season. The accused took a wooden stick and assaulted the deceased causing multiple injuries to the deceased. The post-mortem report which was admitted in evidence and marked

Exhibit “A” confirms that the cause of death was the multiple injuries inflicted upon the deceased as a result of the physical assault.

[3] The injuries sustained by the deceased included lacerated wounds on the top of the head, behind the left ear and the left forearm; fractured bones on the chest with eight ribs, the left forearm as well as the contusion on the front and left side of the chest. Furthermore, and, in addition to these injuries the Pathologist found that the parietal bones, the left temporal bone and sphenoid bone were fractured. The chest bone and eight ribs on the left side were also fractured. The Pathologist concluded that the multiple injuries were the cause of death of the deceased. It is not in dispute that the accused had inflicted multiple injuries sustained by the deceased.

[4] The accused appeared before a Judicial Officer on the 7th day of January 2013 and consequently made a confession which was subsequently admitted in evidence and marked **Exhibit “ B”**.

[5] The court *a quo* found that when the accused committed the offence there was no other person who was present at the scene of crime. His

brother Sandile Shongwe who was PW1 was in the vicinity attending to his own dagga plantation but he did not witness the commission of the offence. PW1 only heard the deceased crying for help, and, he rushed to the scene of crime where he found the deceased crying helplessly and lying on the ground. The accused was standing next to the deceased carrying a wooden stick in his hand. The accused admitted to PW1 that he had physically assaulted the deceased with the wooden stick.

[6] The husband to the deceased, PW2 Phineas Shongwe, was called to the scene, and, he found his wife already dead. Upon inspection of the deceased's body he saw multiple injuries sustained by the deceased. During the trial PW2 denied knowledge that his wife practised witchcraft even though he was living with her as husband and wife. He confirmed that the accused was his brother's son, and, that they were related with each other. However, PW2 admitted that his relatives were accusing his wife of being a witch.

[7] PW3 Steven Shongwe, a traditional healer testified that the accused had asked him to accompany him to the Police station to surrender

himself for killing the deceased. PW3 had agreed to accompany the accused to the police station. Under cross-examination PW3 was asked whether he knew the cause of death of the parents of the accused, and, he denied knowledge of their cause of death. However, he alluded to the fact that he was aware of the threats made by the deceased to the accused's parents before they died. He also believed that the deceased practised witchcraft because of what she did to his family's fields; according to PW3 the deceased had taken crops randomly from each field. He believed that this was done for purposes of witchcraft.

- [8] The Crown closed its case after the Investigating Officer had handed the wooden stick as evidence by consent, and, it was marked **Exhibit "1"**. Thereafter, the accused gave evidence in-chief which was similar to the confession that he had made before the Judicial Officer. It is not in dispute that the accused was an orphan and that his parents had died when he was still very young. The accused believed that his parents had been bewitched by the deceased, and, he also believed that the deceased was capable of bewitching him.

[9] The accused admitted under cross-examination that when he physically assaulted the deceased, she was not armed with a weapon. His evidence under cross-examination that the deceased was carrying a sickle was challenged and rejected as an afterthought because it was never mentioned during his evidence in-chief. The accused was non-committal when it was put to him that he could have reported the death threats to the family elders rather than kill the deceased.

[10] The accused admitted that when his parents died he was still very young, and, that he could not substantiate the allegations that his parents were bewitched by the deceased; however, he insisted that he genuinely believed that the deceased was capable of bewitching him. His contention was that the physical assault on the deceased was impulsive, and, that he acted on the spur of the moment. It was put to the accused that the extent of the injuries sustained by the deceased presupposes that he had the requisite intention to kill the deceased.

[11] Subsequent to the physical assault the deceased fell to the ground and collapsed, and, consequently she became unconscious. The accused had assaulted the deceased on the head with the wooden stick and all

over the body several times. The extent of the multiple injuries sustained by the deceased are reflected in the post-mortem report.

[12] The accused and PW1 reported the incident to PW2 who was the husband of the deceased. Later the accused led PW2 to the scene of crime where they found the deceased dead. The deceased's son Sikhende Shongwe arrived at the scene with other people, and, he threatened to kill the accused to avenge the death of his mother. Fearing for his life the accused ran away from the scene and took refuge at the homestead of PW3 who was his uncle. He requested PW3 to accompany him to the police station to surrender himself for the killing of the deceased, and, PW3 agreed.

[13] After his arrest on the 5th January 2013 the accused led the police to the scene of crime where he pointed out the wooden stick which he used to physically assault the deceased; the police retrieved the wooden stick, and, it was subsequently admitted in evidence as an exhibit during the criminal trial. It is the evidence of the accused that his parents were building a house when the deceased made death threats to them that they would die before they could take occupation of the house; and,

indeed they died before they could occupy the house. It was not disputed that the accused genuinely believed that his parents died after being bewitched by the deceased. It was not denied that the accused genuinely believed that the deceased was capable of executing his witchcraft threats against him and consequently kill him. According to his evidence the death threats angered him, and, he was provoked to such an extent that he physically assaulted the deceased.

[134] It is not disputed that the accused fatally assaulted the deceased on the pretext that she had threatened to bewitch and kill him before the setting of the sun, and, if not, before the marula ceremony which was a month away. The accused found the deceased in his dagga field and she was in possession of dagga trees which she had uprooted from the dagga field of the accused. The accused believed that the deceased intended to use the dagga plants to bewitch him.

[15] The accused also believed that the deceased had killed his parents after threatening that they would not sleep in the house which they were constructing. It was the evidence of the accused which was never disputed that he heard the rumours from family members that his

parents had been bewitched by the deceased. He admitted that he was still very young when his parents died and that he had no personal knowledge of the cause of their death. Similarly, PW1 who was the biological brother of the accused admitted under cross-examination that he was aware of the rumours within the community that his parents were killed by the deceased after she had bewitched them. What angered the accused was that he saw the deceased walking in his dagga field and she had uprooted some of the dagga plants from the accused's dagga field. When he advanced towards her, the deceased told him that he should not do what he was thinking of doing because he would die before the setting of the sun. She also said that he would not see the marula season. It was after receiving the death threats that he took the wooden stick and physically assaulted the deceased until she collapsed and became unconscious.

[16] During closing arguments it was argued on behalf of the accused that he was justified in defending himself because he was under attack from the deceased who was threatening to kill him in the same manner she had killed his parents. It was further argued that the attack was imminent, and, that the accused had no other means of defending

himself other than to fight back. However, the fallacy of this argument is that the alleged self-defence by the accused was not commensurate with the attack having regard to the multiple fatal injuries sustained by the deceased.

[17] Henriques J with Chetty J concurring in *Mtheleleni Pardon Nene v The State*¹ had this to say with regard to the plea of self-defence:

“ A plea of self-defence is usually raised in the context of immediate danger, such as that posed by an upraised knife. That physical situation is absent here, the apprehended danger being that of supernatural death. As to that the common law of South Africa in regard to murder and self-defence reflects the thinking of Western civilization. Hence in considering the unlawfulness of the appellant’s conduct his benighted belief in the blight of witchcraft cannot be regarded as reasonable. To hold otherwise would be to plunge the law backward into the dark ages. It follows that

¹ AR 65/2017 (2018) ZAKZPHC 46 (4 May) 2018 at para 8 -14

the appellant's defence Counsel's contention in favour of an acquittal cannot be upheld.

Of course in considering the moral blameworthiness of an accused's conduct as distinct from his legal culpability, his subjective belief in witchcraft may, depending on the circumstances, be regarded as an extenuating circumstance."

[18] It is well-settled in our law that private defence is available to an accused person who can show that he was under an unlawful attack which was in the process or imminent, and, that he was defending his life, property, dignity or sexual integrity; the act of self-defence was necessary to prevent the attack, and, that the act of self-defence was not only directed to the attacker but that the attack was commensurate, reasonable and proportionate to the circumstances. Furthermore, it is incumbent upon the accused to show that he did not have time to resort to a different less violent form of protecting himself and his interests against an attacker. The test is objective and the Court enquires

whether a reasonable person would have acted in the same manner in the circumstances.

[19] The Learned Counsel for the defence argued that the accused was provoked by the deceased, and, that he acted in the spur of the moment and in the heat of passion caused by the sudden and unexpected provocation by the deceased. Accordingly, it was argued that the accused was guilty of the crime of Culpable Homicide in accordance with the Homicide Act 44 of 1959 and not the crime of murder as alleged by the Crown.

[20] The Crown submitted during closing arguments that in this jurisdiction the law is settled that a belief in witchcraft is unreasonable, and, it does not constitute a defence to a criminal offence; and, that in appropriate cases a belief in witchcraft may constitute an extenuating circumstance. The Crown referred the Court to the leading witchcraft case in this jurisdiction of Benjamin Mhlanga v Rex² which was a unanimous judgment of the Court. His Lordship Ramodibedi CJ, delivering a unanimous judgment of the Court had this to say:

² Criminal Appeal No. 12 of 2002

“8. In what may be summed up as a somewhat bizarre account the appellant stated that the deceased had killed several of his relatives by witchcraft. These included his own father, his senior uncle as well as his brother. The three last mentioned persons had died before a witch hunt, which had already been conducted. The appellant was now the next target of the deceased

11. After considering all the evidence in the matter, the learned trial Judge found in my view, that the appellant’s belief in witchcraft constituted an extenuating circumstance

12. Reverting now to the question of sentence it is necessary to make a few observations. It is well-established that sentence lies primarily within the discretion of the trial court. In the absence of a misdirection resulting in a miscarriage of justice, this Court is generally loath to interfere with the trial

court's discretion in the imposition of sentence unless the sentence is grossly excessive.

13. The learned trial judge duly took into account all the mitigating factors urged on the appellant's behalf including his personal circumstances. On the other hand the Judge, as he was entitled to do, attached due weight to the fact "murder remains a very serious crime". I should add that an innocent life was lost because of a misguided belief in witchcraft. Furthermore, the Learned Judge commendably did not lose sight of the interests of society in the matter.

14. It remains for me to point out 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."

[21] His Lordship Justice Mamba³ held that the precedent by our Courts that a belief in witchcraft is unreasonable and therefore not a defence is unfortunate and irrational because not only does it reflect the thinking of western civilization but it is not consonant and representative with current societal norms and ethos of the people of this country. He held further that our Law Reports are replete with stories of witchcraft and beliefs, and, that witchcraft practices are part of the daily lives of a significant section of our people. He urged the Court to take a realistic and practical approach to the belief in witchcraft in order to do justice to accused persons. It was his view that the threat of being killed by witchcraft was no different from the upraised knife, and, that the accused in such circumstances has no way of defending himself against the threat.

[22] Judge Mamba then invoked section 17 of the Court of Appeal Act⁴ and referred to this Court the question of law whether an accused's belief in witchcraft should not in appropriate cases constitute a complete defence to criminal liability.

³ Paragraphs 22, 28 and 29

⁴ Act No. 74 of 1954 as amended

[23] The Homicide Act⁵ provides the following:-

“2. (1) A person who:

(a) Unlawfully kills another under circumstances which but for this section would constitute murder; and,

(b) Does the Act which causes death in the heat of passion caused by sudden provocation as defined in section 3 and before there is time for his passion to cool;

Shall only be guilty of Culpable Homicide.

(2) This section shall not apply unless the Court is satisfied that the act which causes death bears a reasonable relationship to the provocation”.

⁵ Act No. 44 of 1959

3. (1) Subject to this section “provocation” means and includes any wrongful act or insult of such nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom such act or insult is done or offered”.

[24] Notwithstanding his observations to the contrary Judge Mamba convicted the accused of the crime of culpable homicide in terms of the Homicide Act⁶ on the basis that the accused was provoked by the deceased and that he acted on the heat of passion caused by the sudden and unexpected provocation by the deceased; and, that he had lost his self-control. Furthermore, His Lordship conceded that the

⁶ Act 44 of 1959

unanimous judgment of Benjamin Mhlanga v Rex⁷ was binding in this jurisdiction and that he was enjoined to follow the judgment on the basis of the principle of stare decisis.

[25] It is well-settled in this jurisdiction that a belief in witchcraft constitutes an extenuating circumstance in appropriate cases where there is overwhelming evidence that the accused genuinely and honestly believed in witchcraft. However, there should be sufficient evidence that the deceased threatened to kill the accused using witchcraft and that the accused honestly believed that the deceased was capable of carrying out his threats. **See the following cases:**

***R v Fundakubi 1948(3) SA 810 (A) *Dlamini and Others v R 1970 – 76 SLR 42(CA) at 43 *Peter B Dlamini v The King 37/97 CA 7 years *Themba Enock Mabuyakhulu and Others v The King 24/2000 CA 6 years to 10 years *Benjamin B Mhlanga v Rex Criminal Appeal No. 12/2007**

[26] Schreiner JA in Rex v Fundakubi quoted with approval the decision of Landsdown JP in Rex v Biyana 1938 EDL 310 where His Lordship

⁷ Supra

held that a belief in witchcraft constituted an extenuating circumstance. Schreiner JA delivered the unanimous judgment in which four other Judges concurred being Tindall JA, Centlivres JA, Greenberg JA and Davis AJA. The Court had been called upon to decide whether witchcraft constituted an extenuating circumstance to an accused indicted for murder.

[27] In *Rex v Fundakubi* Schreiner JA had this to say:

“ In our view an extenuating circumstance in this connection is a fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner’s guilt. The mentality of the accused may furnish such a fact. A mind which though not diseased so as to provide evidence of insanity in the legal sense, may be subject to a delusion, or to some erroneous belief or some defect, in circumstances which would make a crime committed under its influence less reprehensible or diabolical than it would be in the case of a mind of normal condition. Such delusion, erroneous belief

or defect would appear to us to be a fact which may in proper cases be held to provide an extenuating circumstance. . . . When we find a case like this where there is a profound belief in witchcraft, and that the victim practised it to grave harm, and when we find that this has been the motive of the criminal conduct under consideration, we feel bound to regard the accused as persons labouring under a delusion which, though important in any way to alter their guilt legally, does in some measure palliate the horror of the crime and thus provide an extenuating circumstance.”⁸

[28] In *Rex v Fundakubi and Others* a question of law had been reserved for the consideration of the Appellate Division whether a genuine and honest belief in witchcraft could constitute an extenuating circumstance where the accused was indicted for murder. The Court answered the legal question in the affirmative and further held that it was the function of the Court to determine the existence of extenuating circumstances in each particular case; and, that where the

⁸ At Page 815

Court finds extenuating circumstances the Court has a discretion to impose an appropriate sentence other than a death sentence.⁹

[29] Schreiner JA held that in considering whether extenuating circumstances exist the Court should have regard to the individual blameworthiness of the accused , and, that no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused’s moral blameworthiness should be considered. His Lordship emphasized that a belief in witchcraft is a factor which does bear upon the accused’s blameworthiness.¹⁰

[30] His Lordship Justice Schreiner then warned of the inherent dangers actuated by the belief in witchcraft, and, he had this to say:

“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 the existing penal legislation has hitherto failed to eradicate. Excessive leniency in dealing

⁹ At page 816 – 817

¹⁰ Page 818

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 suggested, if any such suggestion is necessary, that the imposition of suitably severe punishments should be made the occasion, not so much for expressions 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 suspicious 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 circumstances 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”.¹¹

[31] It is to be noted that a sentence of seven years was imposed in *Rex v Fundakubi* and in other murder cases where the belief in witchcraft was found to constitute extenuating circumstances. The range of sentences in such cases seems to be between five to twelve years. In *Themba Enock Mabuyakhulu and Three Others v Rex*¹², the Court of Appeal, as it then was, imposed on the four appellants sentences ranging from six to ten years. In *Peter B Dlamini v Rex* Criminal Appeal No. 37/1997 the Court confirmed the conviction of murder with extenuating circumstances and sentenced the accused to seven years. In the leading case of *Benjamin B. Mhlanga v Rex* (supra) a conviction of murder with extenuating circumstances was confirmed as well as the sentence of twelve years. In *S v Mokonto* (supra) the South African Appellate Division, now the Supreme Court of Appeal confirmed a conviction of murder with extenuating circumstances and

¹¹ Page 818 – 820

¹² Criminal Appeal No. 24/2000

the sentence of imprisonment of five years without the option of a fine.

[32] Justice Ramodibedi in Benjamin B Mhlanga (supra) found that an accused's belief in witchcraft constitutes an extenuating circumstance and confirmed the conviction of murder with extenuating circumstances and the sentence of twelve years. In his concluding remarks His Lordship had this to say:

“ . . . It behooves 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”¹³.

[33] His Lordship Justice Mamba in the court *a quo* made a stinging and harsh criticism on the failure by the Supreme Court in Benjamin B Mhlanga (supra) to recognize that a belief in witchcraft may in appropriate cases constitute a complete defence to murder. The Learned Judge after sentencing the accused to ten years imprisonment

¹³ Paragraph 15

for Culpable Homicide referred a question of law to this Court for its consideration pursuant to section 17 of the Court of Appeal Act 74 of 1954 as amended. Section 17 provides the following:

“17. In addition and without prejudice to the right of appeal given by this or any other Act, a Judge of the High Court may reserve for consideration by the Court of Appeal, on a case to be stated by him, any question of law which may arise on the trial of a suit or matter and may give any judgment subject to the opinion of the Court of Appeal, and the Court of Appeal shall have the powers to hear and determine every such question”.

[34] This Court is not sitting as an Appellate Court but I am constrained to focus on the legal question referred by the Court *a quo* in terms of section 17 of the Court of Appeal Act. Otherwise I would venture to consider whether the Crown had proved the commission of the offence beyond reasonable and whether the sentence imposed by the

Court is appropriate and within the range of sentences in cases of this nature.

[35] It is common cause that the accused committed the offence on the 4th January, 2013. According to the judgment the trial was heard on the 1st July, 2019 and the judgment was delivered on the 2nd July, 2020. It is not disputed that when the judgment was delivered convicting the accused of Culpable Homicide with a custodial sentence of ten years, the accused had already spent a great period of time in prison. The accused was subsequently released from prison on the 2nd July, 2020. The question which arises is whether this Court should proceed and deal with the legal question referred to this Court since the accused has been released from prison. Some may argue that the question of law referred by the Trial Judge was both academic and moot and that the judgment of the Court will have no practical effect or result and that it should be dismissed.

See also the case of the President of the Republic of South Africa v Democratic Alliance and Others (2019) ZACC 35; Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925

(cc); South African Reserve Bank v Shuttleworth 2015 (5) SA 146
(cc);

[36] It is a fundamental principle of our law which existed before the dawn of our constitutional democracy in 2005 that Courts should not decide abstract or academic matters which do not have any practical effect either on the parties before the Court or the public at large. It is intrinsic in this principle that Courts of law exist to settle concrete controversies and actual infringements of rights and not to pronounce upon abstract or academic or hypothetical questions or give advice on differing contentions of law: there has to be an operative decision that has a practical effect on the persons before Court.

[37] Accordingly, every Court in exercising its powers is enjoined by law to consider whether any order it makes would have a practical effect on the parties before it or on others. However, it is well-settled that Courts have a discretionary power to entertain moot issues which no longer present existing or live controversies where the interests of justice demand. In determining the interests of justice the Court should have regard to the practical effect either on the parties or

others, the nature and extent of the practical effect which the order may have, the importance of the issue as well as the public importance of the issues.

[38] Justice Moore JA in *Somiso Mbhamali*¹⁴ issued a unanimous judgment confirming a conviction of murder with extenuating circumstances. The appellant had brutally killed the deceased and the report on post-mortem examination showed that the deceased had died “due to multiple injuries” inflicted with bush knife. The deceased was an old defenceless woman who could not defend herself against the brutal attack. The Court *a quo* had sentenced the appellant to twenty years imprisonment without the option of a fine.

[39] His Lordship Justice Moore JA in the case of *Somiso Mbhamali* cited with approval the leading case of *Benjamin B Mhlanga v Rex* and had this to say:

**“15. . . . in approaching cases involving witchcraft must
be careful to satisfy themselves first that beliefs in**

¹⁴ Criminal Appeal Case No. 38/2011

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, . . . that a genuinely held belief in witchcraft could be treated as an extenuating circumstance”.

. . . .

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 Honourable 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”.

[40] In his judgment Justice Mamba sitting in the Court *a quo* delivered a scathing attack on the current legal precedent that a belief in witchcraft is not a complete defence to a charge of murder but could constitute an extenuating circumstance in appropriate cases. He described this legal position as reflecting the thinking of Western civilization and eurocentric and not consonant with objective current societal norms and ethos of the people of this country. His Lordship’s contention is that the practices of witchcraft are part of the lives of a significant section of our people and that our law reports and local newspapers are replete with cases involving witchcraft. His further

contention is that “the suggestion that to regard a belief in witchcraft as reasonable would plunge the law backward into the Dark Ages is with due respect false and unreasonable in the context of the prevailing circumstances in this country. In his concluding remarks His Lordship contended that “in view of the overwhelming evidence of the rampant incidents of witchcraft in our society, it is the duty of the courts to take a realistic and practical approach to the question of witchcraft and people’s beliefs, norms and ethos thereon”. He argued that by so doing the Court would not be encouraging the practice of witchcraft or one’s beliefs in witchcraft but rather doing justice by addressing real and concrete issues rather than acting like an ostrich by burying its head in the sand and acting as if such phenomenon does not exist”. According to His Lordship the law and the Court will not eradicate witchcraft by simply wishing it away by saying a belief in witchcraft is unreasonable.

[41] Now I turn to deal with the question of law referred to by Justice Mamba in terms of section 17 of the Court of Appeal Act as amended whether one’s belief in witchcraft should not in an appropriate case constitute a complete defence to a charge of murder. It is a truism that

a section of our people believe on the existence of witchcraft and others practice witchcraft. Similarly, it is true that cases of witchcraft come to our courts on a regular basis; however, the belief in witchcraft does not justify that it should constitute a complete defence to a charge of murder. It suffices that a belief in witchcraft could in an appropriate case constitute an extenuating circumstance to the charge of murder or a mitigating factor in respect of sentencing. The tragedy of the belief in witchcraft becomes apparent when such belief is sought to be used as a complete defence to the crime of murder.

[42] It is common cause that many innocent and defenceless people have become victims of brutal and gruesome killings in this country and other African countries because of the belief in witchcraft. Various assortment of lethal weapons including spears, knives, bushknives, knobkerries, machetes and guns have been used to inflict multiple fatal injuries on defenceless victims fracturing their bones and skulls on the pretext that they are perceived to be practising witchcraft. Sight should not be lost to the reality that murder remains a very serious crime not only in this country but to the international community, hence, the existence of the International Criminal Court

of Justice in the Hague. It should be borne in mind that whenever a belief in witchcraft is pleaded as a defence to the charge of murder an innocent and defenceless victim is lost. This Court has on a number of occasions emphasized that people should not take the law into their own hands. The Criminal Justice System does provide for legal remedies to deal with all kinds of disputes. Courts have an obligation to impose deterrent appropriate sentences to curb the killing of innocent and defenceless people who are believed to be practising witchcraft against others.

[43] When dealing with witchcraft cases, our Courts should satisfy themselves that the accused genuinely and honestly believed in witchcraft applying the subjective standard, and, if satisfied to afford those beliefs such weight as may be appropriate in the circumstances of each particular case. It is now trite law that a belief in witchcraft which is properly established constitutes an extenuating circumstance. Similarly, it is well-established that sentence lies primarily within the discretion of the trial court, and, that in the absence of a misdirection resulting in a miscarriage of justice, the appellate court is generally loath to interfere with the sentence imposed by the trial court unless

the sentence is grossly excessive. In deciding the appropriate sentence the trial court is guided by the triad consisting of the crime, the offender and the interests of society.

[44] Consequently, I am not satisfied that the time has come for the belief in witchcraft to be a complete defence to criminal liability on a charge of murder in view of the brutal and gruesome killing committed by the accused persons on the pretext of a belief in witchcraft. The question of law referred by the Court *a quo* would therefore be answered in the negative.

[45] Accordingly this Court issues the following order:

- (a) A belief in witchcraft does not constitute a complete defence to a charge of murder

- (b) Where appropriate a belief in witchcraft would constitute an extenuating circumstance upon proof that the accused genuinely and honestly believed in witchcraft.

For the Crown : Crown Counsel Sibusiso Gama

For the accused : Attorney Machawe Dlamini

JUSTICE M. C. B. MAPHALALA
CHIEF JUSTICE

I agree

JUSTICE S. B. MAPHALALA, JA

I agree

JUSTICE S. J. K. MATSEBULA, JA