

THE STATE

Versus

MEHLULI TSHUMA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J with Assessors Mr J. Ndubiwa and Mr J.L.M. Zulu
HWANGE 8 JUNE 2022

Criminal Trial

B. Tshabalala, for the state
C. Muleza, for the accused

MAKONESE J: This matter brings into focus the negative impact of the deep rooted belief in witchcraft in a number of communities in our nation. In most African countries the belief in the occult, witchcraft and Christianity is interwoven in the social fabric.

Sometime in September 2019, the accused consulted a witchdoctor/hunter (commonly known as Tsikamutanda) who advised him that deceased, a 73 year old woman, was bewitching him and sucking his blood. The witchdoctor performed some rituals at accused's homestead that included the placing of pegs around the homestead and the sprinkling of salt. The accused was assured that the evil forces that were bedeviling him would be chased away. After the cleansing ceremony accused still had a firm belief that the accused was at the centre of his spiritual problems. Accused felt unwell and had sleepless nights. He had strange encounters. He saw in visions, strange creatures that looked like rats and tree leaves. Accused alleges that on a certain day he was struck by a sensation akin to an electric shock

when he tried to pick up a dead chicken. Accused consulted another prophet, for a second opinion, who confirmed that deceased was bewitching him.

On 23rd September 2019 at around 0200 hours accused observed deceased wandering about in a stand that he had cleared for the purposes of constructing a homestead. On the 25th of September 2019 at around 1100 hours accused saw the deceased passing by his homestead along a foot path. Accused claims he was at that stage in the company of his wife. He was leaving his homestead to report deceased for witchcraft at Inyathi Police Station. Accused avers that he was overcome with rage. He handed his wife a knobkerrie he was carrying, picked up a log and ran towards the deceased. Accused struck the deceased on the head and upper part of the body 6 times. The deceased asked the accused why he was assaulting her. The accused did not respond but continued with the assault. Deceased collapsed and died. Accused picked the broken pieces of the log he had used to assault the deceased with and placed them on her head. The accused avers that he struck the deceased in rage to punish her for bewitching him. He did not intend to cause death.

The accused is facing a charge of murder in contravention of section 47 (1) of the Criminal Law Codification and Reform Act (Chapter 9:23). The accused denies the charge of murder and tenders a plea of guilty with respect to the lesser charge of culpable homicide. The state rejected the limited plea and insists that accused had the requisite *mens rea* to cause the death of the deceased. The state produced a state outline which is now part of the record. It shall not be necessary to repeat the entire contents of the state outline. The state also tendered into the record a Post Mortem Report compiled by Dr Juana Rodriguez Gregori after an examination of the remains of the deceased. The report was compiled on 27th September 2019 and was filed under Report Number 979/978/2019. The Post Mortem reveals that the cause of death was:

1. severe brain damage
2. skull bone fracture
3. several head trauma

The confirmed warned and cautioned statement signed by the accused on the 25th of September 2019, the same day the offence was committed was also tendered as part of the state case. In his statement that accused states that:

“I admit to the allegation of killing the old lady that is Moddy Ndebele. When I woke up on Monday the 23rd of September around 2am and saw her in my garden. On the following day around 10 am I was struck by lightning when I was trying to pick a chicken which had died. It looks like I was not sleeping in my house at night, there are things that used to come which were like rats and tree leaves. There is witch-hunter who came to our village from Gokwe, he told me that old lady popularly known as MaNkomo was sucking blood together with a group comprising Charles’s mother, Makhanye’s mother, Tshamo’s father and an old lady who happens to be Rasta’s mother. On the 25th of September I met the old lady on my way to Inyathi where I wanted to report this matter. I then picked up a log by my gate and I started running towards her while she was going to fetch water pushing a wheelbarrow. I assaulted the old lady on the head before we even greeted each other. She asked why I was assaulting her but I did not respond. I assaulted her six times and she fell to the ground. I left her and proceeded to the bus stop to get transport which would take me to Inyathi where I wanted to report that I had committed an offence.”

The accused's defence outline which was prepared by his legal counsel mirrors his warned and cautioned statement. It shall not be necessary to repeat the contents of the outline of the defence case.

The state produced four pieces of log that were recovered at the crime scene. The combined weight was 1.710 kg. Accused admits that he used the log until it broke into pieces.

The State Case

The state led evidence from one single witness, Onias Ncube. He resides in Manjovana Village 2 Inyathi. He knew the accused as a neighbor. On the 25th of September 2019 at around 1100 hours he was on his way to a neighbouring village to do piece-jobs. This witness is a thatcher. The witness saw a wheelbarrow with two twenty litre containers. A few metres away the witness saw a female body lying unconscious. He did not recognize who the person was. The body appeared to have been assaulted with a log. There was a piece of log that had been placed on deceased's head. The witness went and reported the matter to Joyce Chibanda and Peggy Moyo. The trio went to the scene where they confirmed that it was indeed the deceased. The village head and police were called to the scene. Before leaving the scene the witness observed that the deceased had injuries on the head and that her clothes were covered in blood. The evidence of this witness was largely uncontested. He was a credible witness. He gave a clear narration of events as he perceived them.

The state sought formal admissions and applied to have the evidence of the under listed witnesses as it appears in the state outline admitted into the record in terms of section 314 of the Criminal Procedure & Evidence Act (Chapter 9:07) namely:

- (a) Singacho Ndlovu

- (b) Sgt Eunice Ndlovu
- (c) Dr Juan Rodriguez Gregori

The state then closed its case.

Defence Case

The accused elected to give evidence under oath. The accused stuck to his defence outline. He admitted having assaulted the deceased with a log. He had been advised by a witch-hunter (Tsikamutanda) that deceased was bewitching him. Accused gave the impression that at the time he assaulted the deceased he had been overcome with rage. Accused stated that he had earlier seen the deceased near his homestead. Accused attacked the deceased without saying a word to her. Strangely, the accused confirms that before the deceased took her last breath she had asked why accused was assaulting her. Accused did not respond. It is not disputed that accused had met Tsikamutanda, the witch-hunter some days prior to this incident. When accused was told that deceased was bewitching him he took no immediate action. Accused could not explain why he did not take the matter to the village head or to the police. Accused does not deny that the attack on the deceased led to her demise. The accused was not a credible witness. When it was put to him that he intended to kill the deceased because he had been told that she was the source of his problems he simply said that he had made a mistake. The accused's defence is that he was overcome by anger and yet he spent some considerable time after the witch-hunter had pointed deceased as a witch, without him taking the matter to the village head.

**WHETHER THE ACCUSED LACKED INTENTION TO KILL BY REASON
OF BELIEF IN WITCHCRAFT**

It is my firm view in this matter that belief in witchcraft is not available to the accused as a full or partial defence to the charge of murder. I also recognize that large sections of the African communities in this country believe in witchcraft. The belief in the power of prophets and witch-hunters is very much a part of African culture both in urban and rural areas. Even in affluent communities the belief in the power and influence of witchcraft is embedded in African communities. Despite the apparent modernisation of the African community there is a long held belief that witches exist and that witchcraft is a practice that can affect human conduct and behaviour. In this jurisdiction a number of decided cases have dealt with the issue of witchcraft in different circumstances. See: In *S v Hamunakwadi* 2015 (1) ZLR 392 (H) the learned Judge raised the possibility that witchcraft- provocation can operate as a partial defence in a case of witch killing. In the matter before us, the accused did not raise the defence of witchcraft- provocation as a full or partial defence. In this case there was no suggestion that accused acted in the heat of the moment and whilst under provocation. It became clear when accused gave evidence that he could not explain what triggered his anger to the extent of confronting the deceased, without saying a word and striking her.

In *S v Chiurunge* HH 295-15 the learned Judge acknowledged the existence of a belief in witchcraft and took the belief in mitigation of sentence only as a mitigating factor.

In *S v Techu & Ors* HH 371-15 the court found as highly mitigatory that the accused was affected by his strong belief in witchcraft and thought that the deceased was a witch. The court found that the belief in the distinctive power of witchcraft appeared prevalent in their area.

In *S v Hahlekiye* HH 260-17 the court took into account that the accused's belief in witchcraft played a major role in the commission of the murder. The two accused persons severely assaulted an 86 year old man who later died. The old man was believed by the accused to have used witchcraft against the accused's family.

I have examined the provisions of section 101 of the Criminal Law (Codification and Reform) Act which clearly provide as follows:

“It shall not be a defence to murder, assault or any other crime that the accused was activated by a genuine belief that the victim was a witch or wizard, but a court convicting such person may take such belief into account when imposing sentence upon him or her for the crime.”

In the case at hand therefore, the belief by the accused that the deceased was bewitching him does not avail the accused with a partial or complete defence to the charge of murder. Even if the belief was genuinely held, by the accused on the facts before the court, such belief played little or no part at all in formulating accused's intention when he struck the deceased.

CONCLUSION

We are satisfied that when the accused dropped the knobkerrie and took a log and confronted the deceased, he intended to kill her. Accused was not reacting to anything at that stage. Accused was not overcome by anger but was determined to kill the deceased. He struck deceased 6 times on the head. The log broke into four pieces. The deceased had no chance of surviving the attack.

Accused is therefore found guilty of murder with actual intent as defined in section 47 (1) (a) of the Criminal Law Codification Reform Act (Chapter 9:23).

Sentence

The belief in witchcraft played a major role in the circumstances leading to the death of the deceased. I do agree with *Mr Tshabalala*, appearing for the state, that the accused was to a large extent the victim of the Tsikamutandas (witch-hunters) who go around the villages manipulating people and offering no discernible solutions to the people they purport to assist. Every citizen in the country has a Constitutional right to hold whatever belief they desire. This case however, reflects the clash between religion, culture and the belief in witchcraft and the supernatural. In assessing an appropriate sentence, *Mr Muleza*, appearing for the accused, urged the court to take into account as a mitigating factor accused's belief in witchcraft particularly his belief that deceased was causing his illness and spiritual problems. That accused is a first offender, who has admitted causing the death of the deceased. The accused has shown remorse and has indicated that he erred. Accused spent over 2 years in remand prison pending his trial. As against the mitigating factors, the court reiterates that the loss of human life at the hands of another shall never be condoned. Accused ought to have followed the law and reported the matter to his village head or the police. Accused took the law into his own hands. Accused armed herself with a log weighing close to 2 kgs and assaulted the deceased on the head several times. The log broke into 4 pieces. Accused left the scene and left the deceased to die. He clearly made a decision to end the life of the defenceless 73 year old lady. The attack on the deceased was brutal and callous. The accused showed no mercy to his victim. Even when the deceased enquired why the accused was assaulting her, the accused proceeded to assault her until she took her last breath. In terms of section 47 (4) (a) of the Criminal Code, the murder was committed in aggravating circumstances, and the appropriate sentence is a sentence not less than 20 years.

In the circumstances, and accordingly, the accused is sentenced as follows:

“Accused is sentenced to 20 years imprisonment.”

National Prosecuting Authority, state’s legal practitioners

Legal Aid Directorate, accused’s legal practitioners