REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – GRAHAMSTOWN)

CASE NO. CC 20/12

In the matter between:

THE STATE

versus

BULELANI LATHA **1st ACCUSED**
AYANDA GQONGWA **2nd ACCUSED**

SENTENCE

KEMP AJ:

[1] The two accused pleaded guilty and were convicted of murder and a contravention of section 1(a) of the Witchcraft Suppression Act.[1] The second accused also pleaded guilty and was convicted of common assault.

[2] The accused are cousins. The deceased (aged 86) was the grandmother of both accused – the paternal grandmother of the first accused and the maternal grandmother of the second accused.

[1] Act No. 3 of 1957

[3] Besides the facts recorded in their section 112 (2) statements no other evidence was presented to the court by either the State or either of the accused. The only other facts the court has at its disposal are those placed before the court during argument in mitigation of sentence by Mr Solani, who acted on instructions of both accused.

[4] The first accused's version of events was as follows. He had previously stayed with the deceased although at the time of the murder he was staying with a friend of his in a shack in Aliwal North, where the murder took place. His aunt, the mother of the second accused, became very sick in 2010 and shortly before she died in 2011, she told the first accused that she had been bewitched by the deceased.

[5] On the day of the funeral he went to the deceased's house and as he entered her yard his leg became painful and the following day it became swollen. On telling a family member she told him that the deceased had told her that she would "get him" one day. He was then reminded about what his aunt had said. The accused felt that the deceased may have had a motive for bewitching him as he had once accused her of bewitching her children and she had been unhappy about that accusation.

[6] After the funeral the first accused approached a sangoma in an attempt to find out what had caused the pain in his leg. The sangoma also told him that he had been bewitched by the deceased, which is when the accused, as he put it in his statement, "decided to attack the deceased." Although the State accepted the plea explanation and it only mentions a decision to attack the deceased, and not a decision to kill the deceased, it seems from the surrounding circumstances to be a logical inference that the accused at that stage formed an intention to kill the deceased and that the murder was thus probably premeditated.

[7] I am bound however to make any findings against the accused on the basis that I am satisfied beyond any reasonable doubt that the findings are correct and am also bound to advise them, should I not agree with the facts recorded in their section 112 (2) statements, and afforded them the opportunity of establishing their averments that they acted without premeditation.[2]

[8] The first accused then bought 5 litres of wine and a bottle of brandy and went to fetch his co-accused. Whilst they were drinking he told the second accused of his decision to attack the deceased as he was of the view that she had bewitched him. According to him, the second accused never commented. It is not clear how much of the liquor they consumed. Although the first accused first said that they consumed the liquor he then said that they did not finish it. After they finished drinking they parted company, with the first accused going to the deceased's house and the second accused going to his home.

[9] When he arrived at the deceased's home the first accused asked her why she was bewitching her family and when she asked him what he was going to do he became angry and started to assault her. He hit her about five times with open hands on her face and kicked her all over her body. He then took a small metal bath and hit her over the head a number of times. He also used a plastic milk crate to hit her on the head. Counsel agreed that the metal bath weighed approximately two kilograms, as did the plastic crate. Both were available for inspection in court and although neither appeared to fall into the category of obviously dangerous weapons, the bottom edge of the bath appeared to have a degree of sturdiness that could no doubt inflict a relatively serious contusion or even a laceration if wielded with that purpose in mind.

[2]See in this regard *S v Cele* 1990 (1) SACR 256 (A) at 254 g-i

[10] From the post mortem report handed in by consent it appears that the deceased suffered two lacerations to the right of her head, a fracture to her skull and fractured ribs, although it is not indicated how many ribs were fractured, or what the extent of the lacerations were. It appears that the deceased first received some medical attention before she died. The lacerations were sutured but it is not known how many sutures were used. From an inspection of the sketch attached to the post mortem report it appears that there were two lacerations approximately 7 and 4 centimetres long above her right ear. The plastic crate was broken and would probably not have been capable of causing any serious injury on its own. The post mortem report indicated that the deceased died due to blunt trauma to the head and abdomen. As indicated, there was a skull fracture with subdural haematoma and about 800 ml of blood in the peritoneal cavity, with a laceration on the liver. Without the benefit of the doctor's evidence it is difficult to make any conclusions about the force used in the assault but it appears to have been a sustained and vicious assault resulting in numerous head and body wounds, especially for an elderly woman.

[11] The first accused also saw his co-accused striking the deceased with open hands and kicking her several times all over her body. After he had finished assaulting the deceased he went outside, where he saw a police van. He went to it and handed himself over to the police.

[12] The second accused's version was that he was also told by his mother that the deceased had bewitched her and that is why she had become sick.

[13] He confirmed that the first accused told him, whilst they were drinking, that he was going to attack the deceased. He said that he then went home, as his child was with him. Whilst on his way home he met another lady who asked him to go to the deceased's house to borrow a

strainer. This co-incidence sounds so far-fetched as not to be reasonably possibly true. I seriously doubt whether the accused have fully disclosed their roles in the murder to the court. It sounds to me that they have tried to minimize their roles as far as the premeditation is concerned and concocted some story placing the second accused fortuitously on the scene at the precise time when the first accused launched his assault. As indicated above however, I am constrained to accept the facts as stated in the section 112 (2) statements, which accept that the second accused's arrival at the deceased's house was in fact fortuitous.

[14] According to the second accused, when he got to the deceased's house he found the first accused arguing about witchcraft with the deceased and saw him start to assault her, upon which he joined in the assault. After he had finished he went outside, where he met some family members who wanted to intervene, as the first accused was still assaulting the deceased. He prevented them from doing so by striking Thandi Latha, a fifteen year old girl, presumably the sister of the first accused, three times across the face. He said that he took part in the assault on the deceased because he believed that she had bewitched his mother.

[15] Whilst I have no doubt that the accused both believed the deceased to be possessed of some extraordinary and evil powers, and to be responsible for the death of the second accused's mother, I doubt very much whether the attack happened as spontaneously as they have attempted to make out. It appears that the first accused was the main instigator and planned the attack. He confirms that he decided to attack the deceased after consulting the sangoma. It is not clear how long before the attack that was. It appears to be clear that the first accused imbibed liquor in order to gain the courage to carry out the evil deed. Whether, under the circumstances, being under the influence of liquor is at all a mitigating factor, then becomes a rather moot point in his case. He

appears to have used the liquor as a tool to give him the courage with which to carry out the deed that he had planned. Neither accused indicated, as the accused in *S v Cele*[3] did, that the consumption of liquor led to their intoxication or reduced their moral blameworthiness. Their intention however appears to have been exactly that. The fact that they mention 5 litres of wine and a bottle of brandy seems to imply that they consumed a substantial quantity of it and as a result thereof were to some degree inebriated. It is unfortunate that so important a fact was not dealt with in more detail. I will accept that the accused were to a degree intoxicated.

[16] I am grateful to both counsel, who referred me to a number of authorities dealing with cases in which a belief in witchcraft played a role.

[17] Mr Solani, for both accused, relied mainly on *Phama v S,* [4] a case which Mr Henning sought to distinguish from other authorities he referred me to, on the basis that Jones J had not, in *Phama,* had regard to any of the other authorities available at the time, and that I should bear those authorities in mind when considering *Phama.*

[18] In *Phama,* the accused's cousin had sustained serious but apparently not overtly life threatening injuries in a motor accident and had died shortly thereafter in what the accused and his family regarded as suspicious circumstances, given that the injuries were not regarded by the accused as life threatening. The accused consulted a witchdoctor who persuaded him that the deceased was being held prisoner by a large snake in a cave in the mountains. Two friends of the accused, who had accompanied him, let it be known at that stage that they did not believe that the deceased could be brought back from the dead. The witchdoctor

[3] *supra*
[4] [1997] 1 All SA 539 (E)

subsequently informed the accused that it was the two friends who had in fact been responsible for the deceased's death. The accused fetched his unlicensed firearm, went to the two friends' house and shot them both. He was relatively illiterate although not regarded by Jones J "*as being a tribesman from a remote district completely cut off from the influence of modern civilisation.*" He was a taxi driver living in a suburban surrounding and did not believe that he or his immediate family were under any imminent threat. The killings appeared to be more an act of vengeance than a misplaced act of prevention or self-protection. He was sentenced to an effective term of imprisonment of twelve years. I am not persuaded that the fact that the learned judge never referred to any other authorities was proof that he misdirected himself in any way. On the contrary, he carefully analysed the facts and imposed what under the circumstances appears to have been an entirely appropriate sentence. It is also important to bear in mind that the sentence was imposed prior to the promulgation of the minimum sentencing legislation[5] on 13 November 1998.

[19] In *Rex v Fundakubi and Others*,[6] the court found:[7]

"But it is at least clear that the subjective side is of very great importance, 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 in committing it, can be ruled out from consideration. That a belief in witchcraft is a factor which does materially bear upon the accused's blameworthiness I have no doubt; the language of LANSDOWN, J.P., in Biyana's case (supra) seems to me to state the position admirably."

The passage quoted by the court from *R v Biyana* [8] was the following:

[5] *Criminal Law Amendment Act* 105 of 1997
[6] 1948 (3) SA 810 (A)
[7] At p 818
[8] 1938, E.D.L. 310

*'I am not aware that any definition has been given by Parliament or the Courts of the term extenuating circumstances. 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 . . . <u>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 impotent in any way to alter their guilt legally, does in some measure palliate the horror of the crime and thus provide an extenuating circumstance.'</u> (*my emphasis*)*

[20] It is also important to bear in mind that the brutality employed in such an incident must be seen in context. As stated by Schreiner JA in *Fundakubi*:[9]

"The circumstances might, for instance, show that the accused consciously used unnecessary cruelty in bringing about the death of the victim. In this connection, however, it should be pointed out that the mere multiplicity of wounds caused to the deceased, though it may evidence brutality and savageness of outlook, is not necessarily proof of calculated cruelty. For, as was pointed out by Mr. van der Walt in the course of his valuable argument, the accused who believes in witchcraft may become so enraged against the person, who, he believes, has by the most diabolical methods destroyed the accused's children or other close relatives, that he is really beside himself and acts with all the unthinking fury that he might be expected to show towards a venomous snake that had bitten his child."

[9] At pp 819 - 820

[21] In *S v Malaza* [10] the accused consulted a witchdoctor in order to seek assistance with the difficulties he was having in finding a job and a woman. The witchdoctor advised him to drink the blood of a strong man and to bury his internal organs. A suitable victim was then identified by the accused and killed. The victim posed no threat to the accused, but was used simply to further his own selfish interests. There was no fear of the accused for the victim and the victim posed no threat to him or his family. The death sentence was confirmed on appeal to the Supreme Court of Appeal.

[22] In *S v Magoro & Others,*[11] a crowd of around a hundred people were encouraged by certain speakers to go to the village and burn certain witches. Petrol was poured over the deceased by the 4th appellant and she was set alight by the 1st appellant. She fled and managed to extinguish the flames but was followed and again doused with petrol. She was beaten, stoned, had a tyre placed on top of her and again set alight. Her anguished dying words were probably repeated by the deceased in the present case: "*My children, why are you killing me?*"

[23] The court accepted that the first appellant was heavily intoxicated at the time and had not taken part in the planning of the assault. He had a previous conviction of assault with intent to do grievous bodily harm, committed some seven years before. He was 35 years old and took over the leadership of the crowd and played a prominent role in the commission of the crime. The court also accepted his belief in witchcraft and that he had acted under the influence of mob hysteria and set aside the life imprisonment imposed by the trial court and replaced it with a sentence of 20 years.

---

10 1990 (1) SACR 357 (A)
11 1996 (2) SACR 359 (A)

[24] The third appellant's sentence of 14 years was confirmed. His actions had been less blameworthy but he had also played an active part in the attack. He had obtained petrol and a tyre, had doused the deceased with petrol and had hit her with a stick.

[25] The 4th appellant was 16 years old at the time and his sentence of 8 years imprisonment was confirmed on appeal. The 5th appellant's sentence of 10 years imprisonment was reduced to 7 years on appeal. Although he was only 14 years old at the time the offences were committed he had played a leading role in the planning and execution of the crimes, and was an intelligent person whose leadership was accepted by the majority of the crowd. Although counsel argued that the fact that he knew the deceased should count in his favour, in the sense that he would have been more likely to have been motivated by fear than the people who did not know her so well, the appeal court found that the contrary position was more likely, that the fact that he knew the deceased very well and frequently visited her cast his actions in a more reprehensible light.

[26] Mr Henning argued that the fact that the deceased was the grandmother of both accused was an aggravating factor, as was the fact that she was an elderly and defenceless woman who was attacked in her own home by people who she should have been able to rely on to protect her. He argued that the fact that they were related to the deceased reflects negatively on their moral blameworthiness and pointed out that even on their own versions that it was a brutal and sustained attack.

[27] The first accused had a relevant previous conviction. He had been convicted of assault in 2006 and sentenced to a fine of R600 or twelve months imprisonment, wholly suspended for four years. The first accused was 29 years old and the second twenty three. Mr Henning argued that

they were therefore not youthful persons, although conceding that the second accused is somewhat younger. They were not illiterate people from deeply rural backgrounds, but were relatively educated young men who were both employed, the first accused as a panel beater in Aliwal North and the second accused at a casino in Cape Town. The first accused had a grade 8 level of education and the second a grade 12.

[28] Mr Henning argued that a degree of premeditation was apparent from the first accused's statement, even though the premeditation related to an attack, not a murder. He conceded however that he would be hard pressed to argue that there were no substantial and compelling circumstances present. The accused were relatively youthful, they appeared to have a genuine belief that the deceased had caused the second accused's mother to die, and they were under the influence of liquor at the time. Mr Henning also accepted that their intention to kill had been indirect.

[29] Mr Henning also referred me to *Director of Public Prosecutions, North Gauteng, v Thusi & Others,*[12] in particular where the court referred with approval to the following passage from *S v Swart*[13]

'[I]n our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.'

[30] When considering an appropriate sentence to impose when dealing with an offence falling within the ambit of the minimum sentencing

[12] 2012 (1) SACR 423 (SCA)
[13] 2004 (2) SACR 370 (SCA) at para [12]

legislation it is appropriate to begin bear in mind the admonitions of the Supreme Court of Appeal, in judgments such as *S v Malgas*:[14]

"Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances."[15]

[31] It is appropriate to bear in mind, as stated in *Malgas*[16] that it is no longer '*business as usual'* and to bear in mind the words of Ponnan JA in *S v Matyityi*:[17]

"Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order. "

[32] Nugent JA in *S v Vilakazi*[18] cautioned however that the prescribed sentences should not necessarily ordinarily be imposed.

---

[14]2001 (1) SACR 469 (SCA)
[15]at 477d-e
[16]Paras [7]-[8]
[17]2011 (1) SACR 40 (SCA) at para [23]
[18]2009 (1) SACR 552 (SCA)

*"It was submitted before us that in Malgas this court 'repeatedly emphasised' that the prescribed sentences must be imposed as the norm and are to be departed from only as an exception. That is not what was said in Malgas. The submission was founded upon words selected from the judgment and advanced out of their context. The court did not say, for example, as it was submitted that it did, that the prescribed sentences 'should ordinarily be imposed'. What it said is that a court must approach the matter '**conscious of the fact that the Legislature has ordained** [the prescribed sentence] as the sentence which should ordinarily **and in the absence of weighty justification** be imposed for the listed crimes in the specified circumstances'[19] (the emphasis in bold is mine). In the context of the judgment as a whole, and in particular the 'determinative test' that I referred to earlier, it is clear that the effect of those qualifications is that any circumstances that would render the prescribed sentence disproportionate to the offence would constitute the requisite 'weighty justification' for the imposition of a lesser sentence."*[20]

[33] Nugent JA further clarified the approach to be followed when interpreting *Malgas:*

"If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."[21]

[34] I am satisfied that the conduct of the accused in this case is not such that the minimum sentences would be appropriate. I am satisfied that in the words of Lansdown JP in *R v Biyana*,[22] the accused were labouring under a delusion which,

[19] Para 25 at part B of the summary of its conclusions.
[20]Para 16
[21]Para 25
[22]*supra*

"*though impotent in any way to alter their guilt legally, does in some measure palliate the horror of the crime and thus provide an extenuating circumstance*."

[35] The provisions of the Witchcraft Suppression Act have given me some difficulty. The accused pleaded guilty to a contravention of section 1(a) thereof, which reads as follows:

Any person who-

(a) imputes to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard;

…

shall be guilty of an offence and liable on conviction-

(i) in the case of an offence referred to in paragraph (a) or (b) in consequence of which the person in respect of whom such offence was committed, has been killed, or where the accused has been proved to be by habit or repute a witchdoctor or witch-finder, to imprisonment for a period not exceeding 20 years;

(ii) in the case of any other offence referred to in the said paragraphs, to a fine or imprisonment for a period not exceeding ten years;

[36] The accused would therefore fall into the category of offenders liable to a term of imprisonment for a period not exceeding 20 years, as the person in respect of whom the offence was committed was killed. I believe that the section was promulgated in order to provide for the situation where persons accused another person of being a witch or a wizard in circumstances where they would not have been criminally liable at common law, but whose imputations led to the death or injury of the person imputed to be a witch. In this case they killed that person and

are going to be punished for that offence. To sentence them to a lengthy period of imprisonment in respect of both offences would seem to me to amount to punishing them twice for the same offence.

[37] Mr Henning suggested that I have regard to the sentencing options provided for in subsection 1(a)(ii), which provides for a sentence of ten years if another offence was committed in respect of the person imputed to be a witch or wizard.[23] I think however that the soundest approach would be to punish the accused in respect of the murder and then to take into account that sentence when I consider what sentence to impose in respect of subsection 1(a). Mr Henning suggested that a sentence of ten years with five years suspended would be appropriate for the first accused, and eight years for the second accused in respect of that offence.

[38] I believe that I would be duplicating the punishment I intend imposing for the murder if I were to do that and intend imposing a relatively nominal sentence in respect of subsection 1(a), considering as I have indicated above, that I am of the view that the primary purpose of the section is to punish people whose utterances have resulted in other people killing or injuring the deceased.

[39] The accused pleaded guilty and although it is not clear when the second accused was arrested, Mr Solani indicated, without objection from Mr Henning, that he handed himself over to the police. They both appeared to make a relatively clean breast of their involvement. Although I have no doubt that they embellished certain aspects of their involvement and glossed over others I do not think that that means that they have not displayed any remorse. They both appeared to be of the view that the deceased was a threat to their and their families' well-being. It appears on

[23]Although the Act refers only to a "wizard" and contains no definition thereof, it appears to be accepted that the term covers both the male and female versions of the word – See *S v Mafunisa* 1986 (3) SA 495 (V)

the admitted facts that the second accused was persuaded to take part while they were drinking, and it is quite likely that his will was rendered more pliable as a result of the dual effects of the elder first accused's persuasion and the liquor.

[40] I am of the view that the accused are candidates for rehabilitation and whilst bearing in mind the abhorrent nature of the offences, the views of the Legislature, and the principles of sentencing enshrined in *S v Zinn,*[24] I am of the view that the sentences I am about to impose will be just and will give effect to the competing interests I have to try and balance.

1. The first accused is sentenced to:
    a. Twenty years imprisonment in respect of count 1 - murder.
    b. Eighteen months imprisonment in respect of count 3 – a contravention of section 1(a) of the Witchcraft Suppression Act 3 of 1957.
    c. Five years of the sentence imposed in respect of count 1 is suspended for five years on condition that the accused is not convicted of the crime of murder committed during the term of suspension.
    d. The sentences imposed in respect of counts 1 and 3 are ordered to run concurrently with each other.
2. The second accused is sentenced to:
    a. Fifteen years imprisonment in respect of count 1 - murder.
    b. Three months imprisonment in respect of count two – common assault.
    c. Twelve months imprisonment in respect of count 3 – a contravention of section 1(a) of the Witchcraft Suppression Act 3 of 1957.

[24] 1969 (2) SA 537 (A)

d. Five years of the sentence imposed in respect of count 1 is suspended for five years on condition that the accused is not convicted of the crime of murder committed during the term of suspension.
e. The sentences imposed in respect of counts 1, 2 and 3 are ordered to run concurrently with each other.

3. No determination is made in respect of section 103 (1) (g) of the Firearms Control Act No. 60 of 2000 in respect of either of the accused.

_____

L D KEMP

ACTING JUDGE OF THE HIGH COURT

Matter heard on	:	7 and 8 May 2012
Sentence imposed on	:	9 May 2012
Counsel for the State	:	Mr N Henning
Counsel for the Accused	:	Mr Solani