

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

MOZWANDILE RANKALI
PHELESELE RANKALI
MOFEREFERE RANKALI
SEABATA MAFEREKA

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 20th day of November, 1989.

The four accused named above are charged with the murder of Mamotjejoa Nokotjoa who died on 1st March 1989 following assaults on her caused by sticks wielded by all the accused and a knife used by accused number two.

The entire preparatory examination record was admitted on behalf of all the accused by their counsel. It was conceded that minor differences exist between some of the depositions in the P.E. and the brief that the accused's counsel holds. However the court was assured by the accused's counsel that these discrepancies would not affect the tenor of the case.

The evidence of the following witnesses at P.E. was dispensed with as unnecessary for the determination of this case:-

P.W.5 Mamohlomi Rankali at page 7 of the P.E.
P.W.7 Simon Nokotjoa at page 9 of the P.E.
P.W.8 Tokelo Sofonia at page 10 of the P.E.

/P.W.9

P.W.9 Detective/Tpr Moqhobai at page 11 of the P.E.
P.W.10 D/Tpr Letsoepa at page 12 of the P.E.

and

P.W.11 Tpr Possa at page 12 of the P.E. record.

The court was asked to consider as relevant the
P.E. depositions of :-

P.W.1 Dr Pelletier
P.W.2 Lieketseng Rankali
P.W.3 Mamophomolo Nongotjoa
P.W.4 Mamokhatla Molotjoa
P.W.6 Mamoala Nongotjoa
and
P.W.12 Ndokazoe Nkotjoa

These depositions were accepted by the crown
read into the recording machine and made part of the
instant proceedings.

P.W.1's testimony at P.E. was that he examined the
dead body of the deceased and formed the opinion that
death had occurred two days before the examination.
He formed the opinion that death resulted from a massive
skull fracture behind the left ear. This fracture
resulted in brain damage. P.W.1 also observed numerous
other injuries the most serious of which was a stab wound
on the left lung which had collapsed. The head injuries
were caused by a blunt object while the one on the collap-
sed lung was caused by a sharp object.

P.W.2 is 12 years old. Having been warned to tell
the truth at P.E. she related her story which showed that
three of the accused are related to her. Accused number
2 is her father. Accused number 1 is her father's
brother while accused number 3 is her father's elder
brother. Accused 4 is a fellow villager.

P.W.2 attends school at Matobeng and is in class
five.

One day while P.W.2 was at school she fell ill.
Her teacher carried her into a class-room. Her fellow
pupils were sent to fetch her mother from home. The

/mother

mother came and carried P.W.2 home where she was made to sleep.

In her sleep P.W.2 saw the deceased and one Thembi standing before her and telling her to go with them to the mountain. In this vision the deceased was not wearing any shoes nor anything on her head. Thembi was wearing a dark blanket and an ugly hat. P.W.1 was afraid of the two who she says were wearing ugly dark clothes. She told her parents about this incident but was not certain if they had seen what she saw in their presence.

On the following day this vision occurred again to P.W.2 who saw the deceased wearing a dark dress, no hat, no shoes but this time carrying a knobkerrie while one Ntombazana Nokotjoa was carrying a black bucket full of black water. One of the characters in P.W.1's vision was carrying a stick used for stirring mealie pap. She drew water from the bucket and poured it on P.W.1's face.

These characters asked P.W.2 to go with them to the mountain. During the day they disappeared.

P.W.2 heard during the day that the deceased had died and thereafter she felt better.

She was never sent for any medical treatment.. She took some time before going back to school because she couldn't walk as her waist was painful.

P.W.3 testified at P.E. that the deceased was her aunt. This witness was at her home on 1st March 1989 when accused 1 called to her shouting that a mysterious occurrence should be seen by all. When P.W.3 came to Mathongoane's home she heard P.W.2 crying and saying Mamotjejoa the deceased was killing her. Accused 1 then asked that Edward the chief's secretary should detail messengers to go and call the deceased. The messengers went but came back shortly saying the deceased refused to come along with them because on a previous occasion

/when

when she had been called to Abraham's place in similar circumstances she barely managed to escape with her life.

Accused 1 then said he was going to fetch the deceased himself. Accused 1 was carrying a timber stick. He came to the deceased, held her by hand and told her to come along with him to Mathongoane's. He also asked if she didn't hear that she had been called. P.W.3 heard the deceased say that she was afraid because she had heard her name being mentioned apparently by people who had gathered at Mathongoane's which is only about 70 paces away from the deceased's home. Then accused 1 hit the deceased with the stick on the head. Accused 1's mother went to stop him from assaulting the deceased, and urged that resort should be had to the law. The deceased also said it would be advisable to have a Sesotho doctor called in order to smell out whoever was bewitching the child P.W.2. She also told accused 1 that she knew nothing about what was ailing P.W.2 and was not responsible for it.

Then accused 2 came to his house and entered it after dismounting from his horse and inquired what the matter was. He came out carrying a timber stick and made for the deceased's home. When the deceased saw him she ran into her house. Accused 2 roughly opened the door and forced his entry.

Accused 3 and 1 also entered following accused 2 in that order. The accused deny that Thonkozile stopped Mamohlomi when the latter went to stop the assault on the deceased.

P.W.3 also testified that after the stick clicks had stopped the accused came out of the house where the deceased had taken refuge, but accused 2 on coming to the door way took out a knife, opened it with his teeth and turned back into the deceased's house. It is at this stage that P.W.3 ran to her own home.

P.W.4 testified at P.E. that on 1st March 1989 she

/was

was at her home when headman Edward's messengers arrived. These were Banbilitje Nokotjoa, accused 4 Seabata Makeka and Leabua Mokhehle. These messengers were sent to the deceased who is P.W.4's mother-in-law. The messengers told the deceased that P.W.2 was mentioning the deceased's name, whereupon the deceased suggested that she would rather go if summoned by Chief David for she felt unsafe as she was not used to the family where she was being called to. P.W.4 testified that the deceased said she was afraid for her life because she nearly lost it previously when she complied with a similar command. Then accused 1 came and hit the deceased with the stick on the head. Banbilitje reprimanded him for assaulting a person at her own home. The accused's mother stopped him but Thokozile said the mother should have complied with the suggestion that she was to stay at her home for Thokozile wanted her brothers to finish the deceased off. This is denied by the accused.

P.W.4's evidence corroborates that of P.W.3 in all material respects. She testified at P.E. that the deceased suggested that a Sesotho doctor be called in order to determine if she was the one who was responsible for P.W.2's torment.

Then accused 2 and 3 arrived at the house where the child was kept. They dismounted their horses and after a short interval headed for the deceased's home. The deceased seeing them approach ran into her son's house.

Accused 2 told her to open and said she was a devil. He forced the door open whereupon accused 1 entered after him followed by accused 3. The door closed behind those of the accused who were in that house. Then P.W.4 heard the deceased cry amidst sounds of sticks. The door opened to let accused 4 in and closed behind him whereupon further sounds of sticks were heard.

Thereafter the four accused came out but accused 2 while at the foreground opened his knife and went back into the house where he stabbed the deceased and came out.

/P.W.4

P.W.4 found a pool of blood around where the deceased was lying. The deceased had wounds on the body and fingers. Each of the accused was armed with a timber stick similar to the ones observed before Court.

P.W.6's evidence is to a large measure the same as that of P.W.3 and P.W.4. She also testified at P.E. that the deceased said to Thongozile who had said the deceased should go and listen to P.W.2's utterances, that she was afraid to go there because accused 1 had already assaulted her.

P.W.6 also said when the accused came out after assaulting the deceased Thongozile asked them whether they had killed the witch and said that they should not leave the witch alive. She also testified in the court below that no people came to the deceased's rescue during the assaults and that afterwards the deceased was left lying there.

P.W.12 testified that three of the accused are his uncle's sons. The deceased was P.W.12's younger brother's wife. The deceased was about 65 years old.

In the afternoon of the fateful day P.W.12 heard accused 1 shouting and saying people should come and see an incident at Mathongoane's home. Mathongoane is accused 1's father.

P.W.12 went to that place and found P.W.2 who rose and ran towards the door shouting and crying "Mamohlejoa where do you take me to?"

Accused 1 complained to P.W.12 that the deceased was refusing to come and hear what P.W.2 was saying.

P.W.12 advised accused 1 to ask Edward the chief's secretary who performs the chief's duties in the absence of the latter to order that the deceased be called. Edward then sent out the messengers referred to earlier. The messengers came back without the deceased.

/P.W.12

P.W.12 then advised accused 1 to take the matter to court. But accused 1 said he was personally going to fetch the deceased. His mother tried to stop him but he turned a deaf ear to her.

Accused 1 is said to have been very angry when he went to the deceased. P.W.12 followed him to the deceased 's home. On arrival there accused 1 said to the deceased "'Mamohlejoa lets go there" but she refused. Then accused 1 caught hold of her blouse and pulled her but she escaped. Then he delivered a blow with a stick. The blow landed on the hand with which the deceased was protecting her head. Accused 1 said again that she should come along with him but the deceased once more refused.

P.W.12 took the deceased into one of her huts and closed her in there. But her daughter-in-law opened the door and said "mother get out, I want you to die here at your home." Accused 1 asked her to go with him and when she refused he hit her on the head with a stick and she bled. P.W.12's attempts at saving the deceased were thwarted by Mamaoala who kept pulling her out saying she should rather die in her own home.

Then the other accused arrived in the order referred to above. P.W.12's story lends support to that given by P.W.4 and 6. He also said that accused 2 unclasped his knife and went back into the house when all others had come out except the deceased. When accused 2 came out later P.W.12 saw that the brown okapi knife that accused 2 was carrying was blood-stained. Accused 2 then collected two pieces of his stick, cleaned the knife by pulling it against his fingers, clasped it and went away.

Accused 1 gave his evidence under oath. He is aged 28 and is married with two children.

Accused one told the court that he heard the evidence saying he had assaulted the deceased and does not deny it.

/He .

He further said that P.W.2 fell ill and that she complained that the deceased was the cause of her illness. It is common cause that P.W.2 is accused 1's niece.

Accused 1 said this was not the first time that a complaint was raised about the deceased's causing peoples' illnesses.

The accused remembered an incident in which one Limakatso Mokhethi was involved. It appears that Limakatso complained that the deceased had caused lightening to strike her.

However accused 1 was quick to bring to the Court's attention that he was not present when the alleged incident took place. He only got to know about it through letters he received from home in Lesotho while he was at work in the Republic of South Africa. Thus accused 1 acknowledged that he hadn't the personal knowledge of this incident.

He went further to inform the Court of another incident which involved the deceased's witchcraft practices.

He told the court that a daughter of one of his brothers vanished in water. Men set about looking for the child. Accused 1 was among these men.

At the end of the fruitless search when the search party returned home the deceased asked whether they had secured the child and when told no, she said the child would never surface until and unless its parents had come home from Durban. Indeed the child appeared when the parents arrived. The accused said that this incident made him feel angry with the deceased for it became clear to him the deceased had caused the child's disappearance.

Accused one said he believed that the deceased was responsible for the disappearance of the child and furnishes a rather curious reason for so believing namely that the deceased when relating her story did not

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sit down but faced away from the people she was addressing as she stood at the door.

The other instance he related concerning the deceased's witchcraft involved the news the accused received from Thembi's child the granddaughter of P.W.4 'Mamokhatla. This child told accused 1 that he had been scarified under foot. The accused said that he discovered that he had been scarified while he was at the mines. He learnt from this child when he came home that the deceased had sent her from home to the mines in the Republic to scarify him under foot. He did not feel when the scarification took place nor did he see the child effect it. He did nothing about this incident but told the court that to date his feet are rotten underneath.

On the day of the instant incident accused 1 was at home. He testified that he was present in the house when P.W.2 complained that she was seeing the deceased. Accused 1 did not see the deceased though, nor did he hear her speak to P.W.2 who claimed the deceased was saying she should get ready to accompany her to the mountain with those dressed in ugly dark clothes like the deceased's.

Accused 1 then called people to come and hear what P.W.2 was saying about the deceased. Many people came. Accused 1 estimated that they could come to 60 in number. The village headman was represented at this gathering by Edward 'Muso. Edward then sent messengers to go and call the deceased to the place where P.W.2 was complaining about her. The deceased refused to come. Accused 1 decided to go and fetch the deceased. He told the chief's representative thus. He said he was not in a happy mood when he declared his intention to go and fetch the deceased. He said he was extremely angry.

Accused 1 came to the deceased who was sitting outside her house. He asked her to come along with him to hear for herself what P.W.2 said about her. The deceased refused to come saying she didn't know how to undo but could only do.

/Significantly

Significantly none of the crown witnesses who were present at this stage of the events made mention of what accused 1 claims the deceased said concerning this implicit admission by the deceased that she had in fact bewitched P.W.2 but was unable to undo the spells cast in bewitching her.

Accused 1 said it was immediately after the deceased uttered these words that he hit her with the stick. He denied that the deceased told him that it would be better if a Sesotho doctor were called to fathom if she was responsible for the child's troubles. I may just indicate that I reject accused 1's version in favour of the crown's not only in this respect but also reject accused 1's testimony to the effect that the deceased said she could only do but not undo.

Accused 1 admits the evidence that P.W.12 tried at least twice to stop him assaulting the deceased. He also told the court that his own mother pleaded with him when he left home intending to fetch the deceased and did not stop him when he was at the deceased's home where it was P.W.12 who was trying to stop him assaulting the deceased and no one else.

Accused 1 said that when P.W.12 stopped him he obliged and went to accused 2's home. This home was estimated at between 40 to 50 paces. I accept the testimony therefore that a person standing outside accused 2's place can see and hear all that takes place at the deceased's house. Yet none of the people gathered at accused 2's place came to the deceased's rescue even though they saw that she was attacked first by accused 1 and later by all the accused facing the charge for her murder.

It is accused 1 who reported to accused 2 about what P.W.2 was saying. Accused 2 also satisfied himself by listening to the child and hearing from her that the deceased was responsible for her ailment.

Then accused 2 followed by accused 3 went to the deceased's

/home

home where they were later joined by accused 4.

The deceased ran away when she saw accused 1 and 2 approach her home.

They forced their entry behind the deceased who had sought refuge in one hut and belaboured her.

Under cross-examination accused 1 said he knew the child who scarified him under foot. He said he subsequently discovered that she had scarified him; for the child told him she had been sent by the deceased to scarify him. Accused 1 said he was not in the habit of walking bare footed. The court took a look at the soles of accused 1's feet and saw that he had some irregular horny protuberances surrounded by some tender scars which are not inconsistent with attempts at crudely removing those horny or corn-like protuberances.

He also said in saying that the deceased should let herself be killed in her premises he understood 'Mamaoala to mean that she should in fact be killed for accused 1 knew that 'Mamaoala had difficulty begetting children and that the deceased was to blame for that. He was not aware though of any ill blood between the deceased and 'Mamaoala. However he knew that the deceased had taken away 'Mamaoala's panty.

It is regrettable that 'Mamaoala gave no evidence before this court for she might have thrown some light about what she meant by saying the deceased should not take refuge into one of the houses which according to one of the witnesses belonged to her son. Thus the possibility cannot be excluded that 'Mamaoala meant that the deceased should rather get killed in her own hut than in 'Mamaoala's.

Accused 1 told me that he didn't see this panty he was talking about. When asked who produced it he said a witch doctor Mohlahlo did. Asked if he himself saw it he said he never. Nor did 'Mamaoala complain to him that the deceased had taken her panty. Asked then from whom he heard that

/'Mamaoala's

'Mamaoala's panty had been taken by the deceased accused 1 failed to disclose the identity of his informer.

Accused 2's version is not different from accused 1's in material respects. He said he believed what P.W.2 was saying even though she is only 12 years old and that she appeared to be mental.

Under cross-examination he said his intention in going to the deceased's home was to call her to the child who was complaining about her.

He explained that he took a stick when going to call this 65 year old lady because he had been to Khohlong carrying it.

Asked why he didn't leave the stick at his home via where he had gone before heading for deceased's he said he hadn't time to sit at home moreover he didn't trust the deceased. He said he didn't trust her because he had heard that she was a witch. He however conceded that the stick he was carrying could not prevent the deceased bewitching him.

He denied though that when setting out for the deceased's home he had already intended killing her. He was hard put to it to say why he felt he should use the stick when even he alone would have managed to overpower the deceased and if need be drag her bodily to where she had been asked to go.

Asked why accused 2 did not pull the deceased he said the deceased had gripped at the door and could not be moved. He however conceded that he did not tell his counsel this piece of fresh evidence in his defence. He admitted that he stabbed the deceased on the left side of her rib cage after all others had left the deceased and gone out. He said he was not aware that the stab wound was next to the deceased's heart region. He said that all the other accused had used sticks in assaulting the deceased and in such a manner that the sticks were even striking at each other.

/Counsel

Counsel for the crown pointed out that the accused had genuine belief in witchcraft. He asked the court to consider if provocation as laid down in the Homicide Amendment Proclamation played any role in the instant case.

I was referred to Rex vs Biyana 1938 E D L 310 at 311.

I was also referred to Mona & Another vs Rex C of A (CRI) No. 3 of 87 (unreported) at 6. I also had occasion to look at and consider S vs Fundakubi 1948(3) SA 810.

Mr. Mokhobo submitted that the attack was carried out in the heat of passion. He drew attention to the fact that the accused are related to the deceased. He pointed out that the deceased was belaboured with sticks because it was believed by the accused that she had bewitched P.W.2. Having considered the relevant provisions of our law on provocation Mr. Mokhobo submitted that the accused's acts do not bear any reasonable relationship with the offence hence provocation cannot avail the accused.

In response Mr. Magutu made reference to the famous New Salem Witches' Trials in 1692 which centred around the shrieks of little girls. He pointed to the irony in the cause for this tragic death now under trial, that it resulted from the hysterical shriek of the little girl Lieketseng aged 12.

Mr. Magutu made an impassioned plea to the court to try to get schooled in the meaning of witchcraft. He referred me to Witches and Historians Interpretation of Salem at 2 where it is asked of little girls who usually gave evidence resulting in the execution of witches once convicted: "Had the afflicted girls been lying, or were they actually the victims of some sort of hysteria?"

It appears that out of a close study of witchcraft in Salem the following points emerge:

- (a) Witchcraft was a phenomenon acted out at village level involving people on the lowest rung of the social ladder. The instant case can boast of no different ones.

/(b)

- (b) Unless one understands history sociology and psychology, full comprehension of the sincerity of believers in witchcraft cannot be possible.
- (c) Irrationality in human behaviour continues, despite the 20th Century's belief that it is the golden age of reason. When considering that the mass murder of six million Jews in Hitler's Germany was effected within four years it becomes clear that our sense of reason and justice calls for scepticism.

Indeed Mr. Magutu submitted that the dark aspects of our social and cultural life are bound to make us blush. He submitted that belief in witchcraft will out-live science and civilisation. Hence it behoves us to try to understand it. He pointed out that the Church deals with what ought to be and not with what is. He further pointed out that the body of sophistication which regards religion as the basis of our morality is itself regarded as superstitious.

I was referred to the works of Roger Hart; Witchcraft published by Wayland Publishers in London and G.P. Putnam's Sons in New York. At page 63 referring to the year 1199 as the mile stone which marks the start of the combat of heresy by the Holy office, Roger Hart says

"From that time until its decline in the late 1600's and early 1700's, the number of executions for witchcraft reached the appalling total of 100,000. Of these only 5000 or so took place in the British Isles; most took place in Germany, which was unrivalled in Europe for the barbarity shown to its accused. But France, Italy, Spain, Scandinavia and other parts of Europe, too, have a record of considerable injustice, prejudice and cruelty....

The history of witchcraft in France went back at least to 1398, when the University of Paris had declared that the witches' pact with the devil was not merely superstitious magic, but religious heresy."

Mr. Magutu pointed out that although our rational system is said to be based on science the last executions for witchcraft in various parts of the world occurred but a day or so ago for hardly any can boast that the last execution of witches occurred more than three hundred years

/ago.

ago. For instance the last official execution for witchcraft in Germany was in 1775. The victim was Anna Maria Schwagel at Kemptan in Bavaria. The last execution for witchcraft in France was in 1745. The victim was Father Lovis Debaraz at Lyons. All witchcraft laws were repealed as late as 1787 in Austria. The last execution for witchcraft in England occurred in 1684. The victim was Alice Molland in Exeter. But the last trial was in 1712 when Jane Wenham was reprieved after actually being convicted of witchcraft.

At page 106 Hart says of Scotland :

"Between 1573 and 1722 more than four thousand men, women and children were executed for witchcraft north of the border. 'In no country did the witch-cult flourish more rankly, in no country did the belief persist more lately, in no country did the persecution of sorcery rage fiercer and the fires blaze brighter than in Scotland ..."

At page 101 the learned author in reference to James I says

"He found that convictions were too often based on unreliable children's evidence. The cases which brought about his change of heart included the Abingdon trials of 1605, where the accusations were made by Anne Gunter, a girl of fourteen; the case of the Leicester Boy, John Smith, in 1618, whose testimony resulted in nine hangings, and a similar case two years later, that of Bilson Boy, William Perry. A contemporary wrote:

'The frequency of forged possessions (i.e. by devils) wrought such alteration upon the judgment of King James that ... he grew first diffident of, and then flatly to deny, the workings of witches and devils as mere falsehoods and delusions."

At page 108 Hart says

"Witch delusions persisted in Scotland until well into the eighteenth century. In 1704, for example, the Pittenweem witch trial on the east coast of Scotland provoked mob violence, condoned by the authorities, resulting in the death of two accused witches. In June, 1727, Janet Horne of Dornoch was burned for having used her daughter as a flying horse. As late as 1773, the Associated Presbytery formally

/reaffirmed

reaffirmed its belief in witchcraft, a fearful tribute to the power of superstition only two hundred years ago."

Mr. Magutu thus submitted that the accused wanted justice to be done because their child was claiming that the deceased was responsible for her hysteria. When the deceased refused to turn up they decided to let her have a taste of what she had dosed to their child. He submitted that the accused were anxious to see justice done village style and felt angered when the deceased refused to comply with the chief's order. Mr. Magutu accordingly asks the court to acquit the accused of the capital offence.

I have heard all that was said for the accused by their counsel. I am of the firm view that they have committed murder on a defenceless woman. Their intention was borne out by the fact that they approached the deceased armed with the lethal sticks.

I accordingly find them guilty of murder as charged.

My assessors agree.

J U D G E.

ON EXTENUATING CIRCUMSTANCES

Much of what I was addressed on at the completion of the defence case appeared to me to be intended to serve as a basis for pleading that extenuating circumstances exist in this case.

Counsel for the accused contended that there was a genuine belief by the accused that the deceased had caused the ailment which had reduced P.W.2 to a state of hysteria and hallucinations; and that thus extenuating circumstances were present.

Indeed the crown conceded that there was this genuine belief by the accused that the deceased was responsible for P.W.2's behaviour and unwholesome condition. In R vs Fundakubi and Others 1948(3) SA 810 (A.D.) there is no doubt that in some circumstances a genuine belief in witchcraft extenuates. But in CRI. APP. No. 7/79 Piet Mdluli and Mandie Alfred Mdluli (unreported) at 6 Isaacs J.A. in a judgment concurred in by Maisels P. and Mahomed J.A. sitting in Swaziland said :

"The leading case in this Court is that of Mbombo Dlamini and Others vs R 1970-76 Swaziland Law Reports p. 42 (Court of Appeal). In this case Schreiner, P. said (at page 43)

'It is wrong to believe that belief in witchcraft can never constitute an extenuating circumstance but it is also wrong, even though it would be merciful, to say that belief in witchcraft always extenuates. It has been pointed out that there is broad distinction between murders resulting from a belief that the murdered person or his family or property was by witchcraft, and murders where there is no belief that the person murdered has done any wrong at all to the murderer, but where he is killed simply for the purpose of providing parts of his body for strengthening or aggrandising some other person, or group of persons. It is the unquestioned innocence of the person murdered that makes the second class of case so difficult to treat as extenuated. Of course there are other factors, like unnecessary cruelty, that may affect the decision...'

The learned Isaacs A.J. then proceeded as follows:

/"In

"In the case of R vs Fundakubi & Others Schreiner J.A. (as he then was) said (at page 819)

'There may well be other cases in which it would be proper for the jury or the Court to decline to bring in a finding of extenuating circumstances even where the belief in witchcraft is certainly present. The circumstances might, for instance, show that the accused consciously used unnecessary cruelty in bringing about the death of the victim"

In Mdluli above the Court of Appeal failed to find any extenuating circumstances in respect of the 1st Appellant.

But the Lesotho Court of Appeal in C of A (CRI) No 3 of 87 Mona and Mona vs Rex (unreported) Schutz P. sitting with Mahomed and Trengove J J A. found that extenuating circumstances existed and relying on Fundakubi at 819 said at 10:

"Not that great reliance can be placed on the severity of punishment alone to get rid of the evil (murders resulting from a belief in witchcraft); but it may be 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 suspicions of innocent persons to commit the most savage murders."

Unlike in Mdluli where one of the appellants was shown to be under the influence of the other, in the instant case each of the accused appears to have played his part voluntarily without invitation by any other to join in the fatal assault.

Accused four was no relative of any of the accused or of P.W.2 for that matter. He is portrayed in evidence as the man who came in last without any suggestion that his participation was required and joined forces with the three others who were belabouring the defenceless deceased.

His case stands in stark isolation therefore from

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what might have influenced the other accused to carry out the barbaric assault on the deceased.

The attitude of the court should accordingly come out in the wash when coming to sentence. However it cannot be ignored that deceased's refusal to obey the chief's order to come and be denounced publicly as a witch fanned the pent up resentment against her.

The potential provocation the witchcraft had on the minds of the accused is a factor that cannot be ignored. Clearly P.W.2 though so young, is already superstitious. She must have got the belief in witchcraft from her parents. So the crown can scarcely argue that the belief by the accused was not genuine. See R vs Nathane LL.R. 64.

Schutz P. said in Mona at 11

"The retributive and deterrent aspects of sentence must play an important part in this case."

Unlike in Mona where the victim on whom the deceased were alleged to have practiced witchcraft had died from that practice in the instant case the alleged victim of the deceased's evil spells is still alive. In fact it seems to me that taking into account the heat waves which characterise the climate of this country around early March and the fact that many people are said to have crowded her parents' house, thus making the room atmosphere intolerably close, it is small wonder that P.W.2 was perspiring in the manner described by accused 2 and also that she was even delirious.

I am not unmindful of Fundakubi at 819-820 where it is said

".... 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

had bitten his child."

The court is entitled to take a serious view of the fact that there was an element of self help in this matter. The accused decided to administer instant justice on the deceased despite the suggestion by a parent of one of them and by P.W.12 that the matter be taken to court. It behoves the court therefore to record its disapproval of the conduct whereby the aggrieved party takes the law into his or her own hands.

It has been pointed out though that belief in witchcraft is more than likely to outlive rationality and science. It is however heart warming that even before Lesotho had reached the degree of sophistication it has reached today King Moshoeshe I had accepted that belief in witchcraft could only perpetuate untold harm in his nation and accordingly decreed that witches should be removed from their villages instead of being executed. This is heart warming because even though Lesotho was labouring in darkness at that time the civilised nations of the world were nonetheless executing witches through use of Judicial machinery.

Regard being had to the social milieu of which the accused and indeed the witnesses for the crown also are products and the bona fide belief that the deceased had bewitched P.W.2 and the fact that it was common knowledge that the deceased was a witch I find that extenuating circumstances are present in this case.

Accused 1 is sentenced to 14 years' imprisonment.

Accused 2 is sentenced to 13 years' imprisonment.

Accused 3 is sentenced to 13 years' imprisonment.

Accused 4 is sentenced to 16 years' imprisonment.

My assessors agree.

J U D G E.

20th November, 1989.

For Crown : Mr. Mokhobo

For Defence: Mr. Maqutu.