REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CC48/2016

In the matter between:

THE STATE

v

MKHOMBI XABA	**Accused 1**
THANDANANI REFERENCE QHOBHA DANISA	**Accused 2**
THABISILE FORTUNATE ZULU	**Accused 3**
BUHLE NTOMBI MTSHALI	**Accused 4**
SIMPHIWE MEHONI NDLELA	**Accused 5**
KHONZA JEREMIYA DLAMINI	**Accused 6**
HLEZIKALUKHUNI MAPHISA	**Accused 7**
MUNTUKAFAKWA ALBERT NDLELA	**Accused 8**

SENTENCE

Delivered: 03 July 2018

MBATHA J

[1] The accused were convicted of the murder of Mandla Sibiya (the deceased). Accused 8 was acquitted of murder but convicted of assault with intent to do grievous bodily harm in respect of the assault of Bathokozile Alexina Zulu. The murder convictions fall within the ambit of s 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 in that:

(a) The murder was committed by a group of persons acting in the execution or furtherance of a common purpose; and

(b) The death of the deceased resulted from, or is directly related to, any offence contemplated in s 1*(a)* to *(e)* of the Witchcraft Suppression Act 3 of 1957.

A court may deviate from imposing the prescribed minimum sentence if there are substantial and compelling circumstances that are persuasive enough and justify the court in doing so.

[2] The personal circumstances of the accused have been placed on record and I need not repeat them individually. I would however like to highlight that their ages range from 28 to 59 years and most are unemployed or have lost their employment as a result of their incarceration pending the trial. All the accused, save for accused 3, have been in custody pending trial since September 2015. The majority of the accused reside in KwaCibilili ward with the remaining accused residing in neighbouring wards falling under the KwaNgenetsheni Tribal Authority.

[3] The accused are all married or in recognised customary law marriages, save for accused 1, 2 and 5. Accused 1 has a four year old daughter who lives with her mother, accused 2 has a three year old daughter who lives with her mother and accused 3 has a five year old son who lives with his mother.

[4] Accused 6 is married and has seven children. Three are majors, two are nineteen years old and in grade 12 and the youngest is thirteen years old. The school going children live with the accused's brother in Madadeni where they are attending school. Only the thirteen year old receives support in the form of a child grant.

[5] Accused 7 is married to three wives and has ten children and ten grandchildren. His youngest child is two years old. His first wife is deceased. Accused 8 is married with three children between the ages of 14 to 18 years.

[6] When the court was addressed on sentence by the legal representatives of the accused, it became apparent that accused 3, 4 and 7 appeared to be primary caregivers. The court requested that they give evidence under oath only in respect of that aspect.

(a) Accused 3 stated that she has a fifteen year old daughter at a boarding school in Vryheid and that her daughter is an only child. She further stated that her young

niece lives with her and is in grade 5 at a local school. Though accused 3 lives with her husband in their home, he is not always at home. This meant that the two young children would return to a home where there was no primary caregiver if she was sentenced to imprisonment.

(b) Accused 4 is married and informed the court that she has three daughters. The youngest, who is twenty years old, suffers from epilepsy and she is responsible for her wellbeing.

(c) Accused 7 is married to three women. One of his wives, Ma Sibisi, died whilst the accused was in custody awaiting trial. It was not clear to the court as to who was responsible for the welfare of the deceased wife's children.

[7] Due to the inconclusive nature of this evidence, the court felt enjoined to follow the judgment of the Constitutional Court in *M v S (Centre for Child Law as Amicus Curiae)*,[1] where the court stated that '[i]n matters concerning children it is important that courts be furnished with the best quality of information that can reasonably be obtained'. This court therefore requested that probation officer reports on the circumstances of the aforementioned accused and their children be compiled and reported to the court.

[8] The first reports submitted by the probation officer were inadequate and as such, sentencing had to be adjourned for further reports. These reports have since been filed and the following information has been extracted therefrom:

(a) The probation officer's report in respect of accused 3 reveals that she has three children. Two of her children have always lived with her mother at her maternal home. Accused 3 is married and has a daughter with her husband who is at a boarding school in Vryheid. Her niece attends a local school. The report states that the child Thandile will have to be placed in the care of accused 3's maternal aunt should she receive a custodial sentence.

(b) With regard to accused 4, two of her daughters live with her maternal family. The youngest, Thandeka, who is 22 years old and suffers from epilepsy has been living with accused 4's maternal grandmother since her arrest. The report revealed that she is the primary caregiver to Thandeka.

(c) Accused 7 had three wives, however Ma Sibisi passed away in 2016 whilst he was in custody. She left behind three adult children and three grandchildren. Ma

[1] *M v S (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 9.

Khumalo has two minor children and Ma Msezane has five adult children and five grandchildren. The report reveals that accused 7 is responsible for the maintenance of his children and the grandchildren. However, he is not a primary caregiver to MaSibisi's children as they are adults.

[9] The court accepts that accused 3 and 4 are primary caregivers. When considering sentence where a primary caregiver may be sentenced to a custodial sentence, the court is enjoined to pay attention to the constitutional provisions of s 28 of the Constitution. I will return to this aspect later in my judgment.

[10] When considering sentence in general, courts are required to consider the guiding principles enumerated in the well-known judgment of *S v Zinn*,[2] commonly referred to as the *Zinn* triad. The court has to consider the crime, the offender and the interests of society. This means taking into account the seriousness of the offence, the personal circumstances of the offender and the public's interest. The court also has to consider the aims of sentencing being general deterrence, personal deterrence, retribution and rehabilitation of the offender.

[11] The provisions of the Criminal Law Amendment Act must also be taken into account, as the accused have been convicted of a crime which prescribes a minimum sentence of imprisonment. The approach to be adopted in this regard is clearly set out in *S v Malgas*:[3]

'What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.'

[12] In determining whether substantial and compelling circumstances exist, the following factors have been submitted by counsel for the accused: The accused are respected members of the community; they have families and are responsible for the wellbeing of their families; they are all first offenders except for accused 1 who has two

[2] *S v Zinn* 1969 (2) SA 537 (A).
[3] *S v Malgas* 2001 (2) SA 1222 (SCA) para 25.

previous convictions for assault, and, they have spent almost two and a half years in custody awaiting trial, except for accused 3 who was released due to ill-health.

[13] It is my opinion that the deceased would never have been killed had Induna Mtshali adhered to the law. Induna Mtshali called a meeting wherein community members were requested to make monetary contributions for him and his delegation to visit an isangoma in Swaziland. This was as a result of the police's finding that no one was responsible for the death of Malibongwe Ndlela, a child from the community, whose body was found hanged in the veld. His death was subsequently ruled a suicide. The collection of money from the community members made them feel a part of the fact finding mission to Swaziland and they assumed that it gave them a right to dispense justice as they wished.

[14] When Induna Mtshali returned from Swaziland, he did not advise the police as to what had been discovered. Instead he convened another community meeting and merely informed the police that this meeting was about the Ndlela child. He did not specify to the police that he was in fact going to disclose the names of the alleged killers of the Ndlela child, whom it was believed had been killed for witchcraft purposes. Induna Mtshali should have known that by so doing he was placing the lives of the alleged killers in jeopardy. The entire community of Cibilili and neighbouring communities were invited to attend the meeting. This was no ordinary meeting as minutes were taken regarding the conduct of the meeting. The minutes revealed that the alleged culprits were named including the deceased. It did not end there as the deceased was called forward to answer the allegations against him and was subjected to a trial by mob. When Induna Mtshali was called as a witness by the State, he told the court that he did not know what had happened at the meeting. It is my view that Induna Mtshali should not have convened any meeting in order to find the killers of the Ndlela child through the use of an isangoma, should not have led the delegation to Swaziland and should not have convened the meeting where the alleged killers were disclosed to the community.

[15] Induna Mtshali is not authorised by any law to "sniff out" culprits nor does he have any criminal law jurisdiction to deal with any criminal offenders in the community. In the book *The role of traditional courts in the justice system*[4] Madondo DJP states that even

[4] M I Madondo *The role of traditional courts in the justice system* (2017) at 43 para 87.

during the tenure of the Black Administration Act 38 of 1927, the position with regard to traditional leaders was as follows:

'The jurisdiction of the traditional courts is limited with regard to the nature and extent of punishment that they may impose. Such a court may impose fines not exceeding R100 or two head of large stock or ten head of small stock. *See s 20(2) of the Black Administration Act.*'

Furthermore, s 17(1) of KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990 read with the First Schedule of the Act states the offences that may not be tried by an Inkosi or Isiphakanyiswa. As such, Chiefs and Indunas do not have criminal jurisdiction in such matters, which includes murder, as in this case, where the deceased was accused of having killed the Ndlela child for witchcraft purposes.

[16] In *S v Dalindyebo*[5] the SCA held that '[w]e are a constitutional democracy in which everyone is accountable and where the most vulnerable are entitled to protection'. This judgment reaffirms the judgment in *S v Makwanyane & another*[6] where O'Regan J stated as follows:

'. . .the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. . .'

[17] The Traditional Leadership and Governance Framework Act 41 of 2003 provides that traditional leadership must promote freedom, human dignity and the achievement of equality and non-sexism. Traditional leadership must enhance harmony and peace amongst people. Induna Mtshali failed to comply with this Act. He knew very well what was going to happen to the deceased, yet he did not request police support, save for the mandatory compliance that police officers be present. I therefore place the blame for the deceased's death squarely on his shoulders. As such, he should have been prosecuted in terms of s 1 of the Witchcraft Suppression Act. Induna Mtshali does not have the powers to hold a "criminal" trial in the guise of a meeting in terms of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005.

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[5] *S v Dalindyebo* 2016 (1) SACR 329 (SCA) para 59.
[6] *S v Makwanyane & another* 1995 (3) SA 391 (CC) para 326.

[18] Induna Mtshali acted contrary to Zulu Law and culture. The objective of customary law is to attain restorative justice. As stated by Madondo DJP in *The role of traditional courts in the justice system*:

'In pursuit to such an objective, restorative justice encourages dialogue between the offender and the victim, and facilitates the healing process. It achieves this objective by allowing the offender, the victim, their families and community representatives to address the harm caused by the offender's wrongdoing.'[7]

Even during the reign of the old Zulu Kings, it was only the King who had powers to order capital punishment for serious offences, not an Induna or individual person.

[19] It has been submitted on behalf of the accused that the belief in witchcraft is very strong in the community. This theatrical belief is often used by the people as an excuse for their criminal conduct. It is common knowledge that King Shaka and King Cetshwayo discouraged the use of izangoma as it encouraged the killing of innocent people. The Witchcraft Suppression Act was enacted to combat witchcraft practices in 1957. The purpose of the Act is to provide for the suppression of the practice of witchcraft and similar practices and applies to various categories of offenders, including any person who approaches a witchdoctor and hires him or her for the process of "smelling out" of a witch and any person who names or indicates another person as a witch or wizard.[8] This indicates that Induna Mtshali and the community had acted contrary to the law.

[20] It has been further submitted by counsel for the accused that the subjective belief in witchcraft should be viewed or considered as a mitigating factor. I have been referred to a number of authorities where witchcraft was regarded as a mitigating factor including *R v Biyana*,[9] *R v Fundakubi & others*[10] and *S v Nxele*[11] to indicate that the belief in witchcraft in the area should be taken as a mitigating factor. In *R v Fundakubi* the court stated as follows:

'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

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[7] Madondo *The role of traditional courts in the justice system* above at 7 para 10.
[8] See s 1 of the Witchcraft Suppression Act.
[9] *R v Biyana* 1938 EDL 310.
[10] *R v Fundakubi & others* 1948 (3) SA 810 (A).
[11] *S v Nxele* 1973 (3) SA 753 (A).

a belief in witchcraft is a factor which does materially bear upon the accused's blameworthiness I have no doubt. . . .'[12]

[21] In more recent judgments such as *S v Malaza*,[13] *S v Phama*[14] and *S v Latha & another*,[15] there has been a shift in the view that witchcraft should be considered as a mitigating factor based purely on that belief. It must be coupled with other factors, like acting under the influence of mob hysteria. However, it does not exonerate the accused from their actions. As early as the late 1940's the courts realised that these crimes needed to be curtailed. In *R v Fundakubi*, the court held that the deterrence factor should prevail more in sentencing on those found guilty of witchcraft practices and that excessive leniency be avoided.[16] The shift has been more pronounced in cases post the advent of the Constitution. In *S v Lukhwa en 'n ander*[17] the death penalty was commuted to life imprisonment. In *S v Motsepa en 'n ander*[18] the accused was sentenced to twenty two (22) years' imprisonment and in *S v Latha*[19] the accused were sentenced to fifteen (15) years' imprisonment.

[22] The question which arises is whether the belief in witchcraft should still be considered as a mitigating factor at this stage of our lives where s 11 of the Bill of Rights recognises that everyone has a right to life? In *S v Ndhlovu & another*[20] the court recognised that besides the subjective belief in witchcraft, certain factors need to be considered such as the level of education of the accused, relationships, if the crime was committed as part of a group, and, the primitive and rural background of such person. And that if the crime is committed with excessive cruelty, this should negate the mitigating factor. In *S v Motsepa* above, Kriegler JA imposed a sentence of twenty two (22) years imprisonment which was considered to be an effective deterrent sentence. The basic principles being that each case has to be judged on its merits in consideration of whether the belief in witchcraft has any merit on the offenders' blameworthiness.

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[12] *R v Fundakubi* above at 818.
[13] *S v Malaza* 1990 (1) SACR 357 (A)
[14] *S v Phama* 1997 (1) SACR 485 (E).
[15] *S v Latha & another* 2012 (2) SACR 30 (ECG).
[16] *R v Fundakubi* above at 819.
[17] *S v Lukhwa en 'n ander* 1994 (1) SACR 53 (A).
[18] *S v Motsepa en 'n ander* 1991 (2) SACR 462 (A).
[19] *S v Latha* above.
[20] *S v Ndhlovu & another* 1971 (1) SA 27 (RA).

[23] The fact that the law has placed such witchcraft offences under the Criminal Law Amendment Act, is an indication that the law is becoming increasingly less tolerant of the belief in witchcraft constituting a mitigating factor. The belief in witchcraft has been treated in the post constitutional dispensation as being of a lessor mitigating factor. I agree that a belief in witchcraft should not be considered as a mitigating factor at all. Some of the accused before court are educated, having attended high school. Those without a formal education have been exposed to religion. Furthermore, despite living in rural areas, the accused are aware that there is a legal system in the land.

[24] I do accept that in this case the belief in witchcraft played a part, but only to a very limited extent. It was aggravated by the involvement of the leadership who were in the forefront of “sniffing out the witch”. The role and involvement of Induna Mtshali gave the process credibility in the eyes of the community. A mob euphoria and excitement was created by the delivery of the outcome of “umhlahlo” (the naming the culprits by isangoma) which was sanctioned and supported by the Induna.

[25] The accuseds’ personal circumstances should not be looked at in isolation. One must also consider the aggravating factors. In this matter, the accused attended the meeting called for by the Induna armed with dangerous weapons such as cane knives, knobkerries and other weapons, which were used to kill the deceased. They failed to heed the Induna’s call to put dangerous weapons away. The deceased was killed in the most brutal, barbaric and horrific way by members of his community. He was stoned, hacked with cane knives and an attempt was even made to burn him whilst he was alive. The trauma suffered by the deceased’s family was palpable when the deceased’s mother testified in this court. The court vividly recalls the haunting wails of the deceased’s mother as she testified about the effect the killing of the deceased has had on her entire family. The deceased was killed by people who lived with him for no apparent reason. This was vigilantism at its worst form.

[26] A strong deterrent message must go out to those who wish to take the law into their hands, that vigilantism will not be tolerated. The KwaNgenetsheni Tribal Authority community is warned that the killing of a person in the belief that they are bewitched will result in imprisonment. The court will give sentences that will not only be regarded as a general deterrent to the community but as a deterrent to the accused as well, which will deter them from committing such crimes in the future.

[27] Having said all the above I have also had regard to the personal circumstances of all the accused. The accused were all law abiding citizens until the day of the meeting, save for accused 1 who has two previous convictions for assault. They all come from stable family backgrounds, they are breadwinners and some are primary caregivers. The accused have also professed to be practicing Christians. I have also taken into account the time that they have spent in custody as well as the role played by Induna Mtshali.

[28] In respect of those that I have found to be primary caregivers, I considered the provisions of s 28(2) read with s 28(1)*(b)* of the Constitution. I have accepted the probation officer's reports which confirmed that accused 3 and 4 are primary caregivers, in spite of the fact that their extended families have stepped in to care for their children. I have also considered that all the accused are breadwinners and parents to children who are dependent on them.

[29] In addition to the above, I have also considered the degrees of participation in the killing of the deceased by each of the accused before court. In this regard I have applied the determinative test espoused by Nugent JA in *S v Vilakazi*[21] where he states as follows:

'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 needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.' (Footnote omitted)

The purpose of sentence for convictions arising from vigilantism is deterrence. This has to be carefully balanced with regard to the interests of the offender. It is my view that this was an act of vigilantism which the courts have emphasised that it needs to be discouraged at all costs. It does not serve the interests of justice in making the making the offender an example but courts have encouraged that a sentence comprising of all the elements as enshrined in the *Zinn* triad be imposed on such offenders.

[30] Accused 3, 4, 6 and 7 did not inflict the deceased's fatal injuries although they were the first ones to participate in the attack. Their roles were minimal and caused

[21] *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 14.

relatively minimal harm to the deceased as he managed to get up and run away. The court has also taken into account that accused 3 and 4 are primary caregivers. The court further observed that accused 3 and 4 showed compassion to the deceased's mother when she testified in this court, which I consider to be a sign of remorse. Accused 6 and 7 are of an advanced age, namely 60 and 58 years respectively, they are first-time offenders and have led a relatively innocent life. Accused 3, 4, 6 and 7 fall within the group of offenders who do not need to be removed from society but nonetheless need to be punished.[22] This court has approached the sentencing of all the accused with mercy as stated in *S v Rabie,*[23] where the court emphasised that the imposition of sentence should be approached with a 'humane and compassionate understanding for human frailties and the pressure of society which contribute to criminality'.

[31] The provisions of s 276 of the Criminal Procedure Act 51 of 1977 provide for various sentencing options. In consideration of sentence in respect of accused 3, 4, 6 and 7, this court has considered all possible sentencing options, including s 276(1)*(i)*, taking into account the seriousness of the offence committed. Having found that there are substantial and compelling circumstances persuading this court to depart from imposing the prescribed minimum sentence, I find that any kind of custodial sentence will not serve the interests of justice. I have also considered correctional supervision as a possible sentencing option in respect of accused 3, 4, 6 and 7, which is a community based sentence. The value of correctional supervision as a corrective measure cannot be overemphasised. However, taking into account that the aforementioned accused have already spent a considerable time in custody, that accused 3 suffers from major depression and hypertension, and that they suffered as a result of their pre-trial incarceration, I am of the opinion that they are not candidates for such a sentence. Taking these factors together with the other factors which I have alluded to into account, it is my view that accused 3, 4, 6 and 7 should not receive any further custodial sentences. Correctional supervision will also overburden them.

[32] Accused 8 was convicted of assault with intent to do grievous bodily harm. I have taken into account that he has been in custody for over two years whilst awaiting trial and that the complainant did not sustain very serious injuries. Though he was in the forefront in the witchcraft hunt, he did not assault the deceased. I therefore find that the

[22] *S v R* 1993 (1) SACR 209 (A).
[23] *S v Rabie* 1975 (4) SA 855 (A) at 866B-C.

time he has already served in custody is sufficient for the conviction of assault with grievous bodily harm.

[33] Regarding the other accused, accused 1's actions, namely tripping the fleeing deceased, striking him with a cane knife on top of his head, a blow which brought the deceased down and trying to set him alight contributed extensively to the death of the deceased. Accused 2's actions in striking the deceased on the head with a cane knife as he tried to get up, also significantly contributed to the death of the deceased. Accused 5, who struck the deceased with a cane knife on his upper arm and cut off two fingers from his left hand, also extensively contributed to the death of the deceased. These injuries are consistent with the injuries in the medical report that led to the death of the deceased. The State witnesses testified that accused 1 and 2 hid their cane knives when the Induna ordered that dangerous weapons be placed aside, which I consider to be an indication of intent to inflict harm with a dangerous weapon. Accused 1, 2 and 5 delivered the fatal blows to the deceased. Having considered all the relevant facts in this matter, the court is persuaded that there are substantial and compelling circumstances justifying its departure from imposing the prescribed minimum sentence for life imprisonment.

[34] Accordingly, I make the following order:

(a) Accused 3, 4, 6 and 7 are sentenced to three (3) years' imprisonment, wholly suspended for a period of five (5) years on condition that they are not convicted of any offence involving assault during the period of suspension.

(b) Accused 8 is cautioned and discharged.

(c) Accused 1, 2 and 5 are sentenced to twelve (12) years' imprisonment.

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Mbatha J

APPEARANCES

FOR THE STATE:	ADV ES MAGWAZA
FOR ACCUSED 1 – 3:	MR RJ SIVNARAIN
FOR ACCUSED 4:	MR VE NGWENYA
FOR ACCUSED 5, 7 & 8:	MR TJ BOTHA
FOR ACCUSED 6:	MR DR LATCHMAN