

1995/06/29

THE STATE versus

1. BENHARD MUKOSO
2. HAINGURA AUGUSTINUS
- 3 LEONARD MURONGA

O'LINN, J

CRIMINAL LAW

SENTENCE:

Held 1: Belief in withcraft often exaggerated in cases of Murder.

Held 2: Such allegations should not be taken for granted and should be properly investigated whenever raised as justification or mitigation.

Held 3: The practicing of withdraft is a criminal offence in Namibia for decades. Such belief, if any, must be weighed against the need for the Court to protect not only the rights of accused persons, but the victims of crime, particularly the right of law-abiding members of society to the protection of their lives, their bodily integrity and their dignity in accordance with articles 5,6,7,8,12 & 25 of the Namibian Institution.

Held 4: The Namibian Courts will fail in their aforesaid constitutional duty to protect the victims of alleged witchcraft practices and to eliminate the continuation of such practices, if they persist with outdated cliches.

Held 5: The aim of punishment for these brutal and cowardly crimes, should be deterrance and retribution, with due regard to the aim of rehabilitation.

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

BENHARD MUKOSO

HAINGURA AUGUSTINUS

LEONARD MURONGA

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Nothing to
report on
communications
but see sent*

CORAM: O' LINN, J.

Heard on: 1994-08-16, 17, 18, 19 / 1994-12-01 / 1995-03-31
1995-06-09, 26, 27, 28, 29

JUDGMENT

O' LINN. J. : The accused no. 1 Benhard Mukoso and one Haingura Augustinus cited in the indictment as accused no. 2 and one Leonard Muronga cited in the indictment as accused no. 3 appeared before me on the charge that they were guilty of the crime of murder in that they unlawfully and intentionally killed Margaritha Joaquim Rukusu, a female person, by assaulting her with sticks on or about 8th March, 1993 at Bunya, Kavango West in the district of Rundu, as a result of which the said Margaritha Joaquim Rukusu died on 10th March, 1993 at Rundu in the district of Rundu.

State's case, and all I have to decide *today* is the guilt or otherwise of the accused no. 1 and 2. I may say that on reconsideration accused no. 3 was rather fortunate to escape *conviction*.

Accused no. 1 and 2 pleaded not guilty to the *main charge*. In this Court they were throughout the proceedings defended by Mr Potgieter for accused no. 1 and Mr Metcalfe for accused no. 2. Mr du Pisani appeared for the State. I must add that accused no. 1, although he pleaded not guilty to the charge of murder, pleaded guilty to culpable homicide, which is a competent verdict on the *charge* of murder.

Accused no. 1 also tendered a written explanation of plea which was handed in as Exhibit A and which reads as follows:

1. The incident occurred on 8 May at Bunya in the district of Rundu.
2. I assaulted Margaritha Joaquim Rukusu by beating her with a stick once on her head.
3. I assaulted her with a stick, Exhibit 1.
4. The said Margaritha Joaquim Rukusu died as the result of the injury that she sustained during the assault.
5. The content of the postmortem report is admitted as being correct.
6. The deceased sustained no further injury when she was transported from the scene where I assaulted her until such time as a postmortem was conducted on her.

I had no intention to kill the deceased but acted negligently.

Mr Metcalfe offered an oral explanation of plea in regard to accused no. 2 to the effect that accused no. 2 had dragged the deceased from her home because he wanted to speak to her about the fact that she was bewitching his wife. According to this explanation, accused no. 1 then started to beat the deceased with Exhibit 1 which is a branch of tree used as a pole. Accused no. 2 then attempted to stop accused no. 1 from beating her.

The postmortem report prepared by Dr McSoud was handed in by consent as Exhibit B. The chief postmortem findings are:

That the cause of death was brain injury. Furthermore that there was a fracture in the region her left temple. There was subdural haematoma in the left temporal region and congestion of the brain vessels.

Doctor McSoud also testified and said that great force was used in inflicting the injury.

All the accused had pleaded guilty before the magistrate and was questioned there. The proceedings in the magistrate's court was handed in by consent and marked Exhibit C. The following questions and answers appear from this Exhibit C. I will read it as question and answer:

Accused No.

Q • Has anybody persuaded you or threatened you to plead guilty?

A. None.

Q. Why do you plead guilty?

A. Because I'm the one who assaulted her.

Q. Did you kill the deceased on 8/03/93?

A. I do not know the date because when I have assaulted her she was taken to the hospital as is where she has passed away.

Q • Why did you kill her?

A. Because she is a witcher, she witched many people.

Q • Did you intend to kill her?

A. Yes because she wanted also'to kill me.

Q. Did you *know* what you were doing was wrong?

A. It can be wrong, but it is not wrong because she wanted to kill me. She is finishing us up.

Q. On which part of her body did you beat her?

A. On the head.

Q. Did you *know* that you've committed a punishable crime?

A. Yes, but I just wanted to injure her so that she can stop with her way.

Accused No. 2:

Q. Do you understand the charge against you very clearly?

A. No, it is not very clear to me.

Q • What is not very clear to you?

A. Because I did not beat her or touch her. I was just stopping accused no. 1 not to beat her.

Q. Did you quarrel with her?

A. Yes but not that day.

Q. Is there any person influence you to plead guilty?

A. None.

Q What are you reason to plead guilty?

A Because of this offence of murder. Did

you kill the decease on 8/03/93? Yes.

Q Why?

A She was a witcher.

Q Did you intend to kill her?

A No my intention was just to beat her so that she can

stop with her way.

Q Did you know what you were doing was wrong? Yes.

A Did you know that you can be punished for that? Yes.

Q Where did you beat the deceased?

A I just pulled her, she was beaten by accused no. 1. ■

Q

A

n

Now it was common cause that Exhibit 1 is a branch or a trunk of a tree used as a pole in the frame of a traditional Kavango home made of sticks and/or branches of trees and with a corrugated iron door and that this pole is approximately 1M meters long and 8 centimetres thick at the thickest part, tapering down to approximately 5 centimetres on the thinnest side.

The State called Mrs Cecilia Kamunima, the daughter of the deceased as an only eye-witness. Thereafter the State closed its case. Accused no. 3 was discharged at the end of the State case. Only accused no. 1 testified on behalf of the defence. Accused no. 2 did not testify.

At the close of the case for the defence it was either common cause or not in dispute that:

7. The deceased died as a result of one heavy blow on the left temple region of her head inflicted by accused no. 1 with Exhibit 1, which caused a fracture of the skull in the left temporal region and caused a brain injury and congestion of the brain vessels.

8. Accused no. 2 ripped Exhibit 1 from the door frame and dragged out the deceased from the hut where she had been sleeping to a place outside the hut.

9. At or before accused no. 2 started dragging the deceased from her house, he put down Exhibit 1 on the ground.

10. From that position accused no. 1 picked up Exhibit 1 with one hand, took the thinner end of Exhibit 1 in both hands, lifted it up high in the air with both hands and brought it down with great force on the head of the deceased where she was kneeling after being dragged outside. After the blow deceased collapsed into a prostrate position on the ground.

5. After the accused had hit the accused as described

he was stopped by accused no. 2 and 3 from further assaulting the deceased.

11. After the assault, accused no. 1, 2 and 3 left the scene without in any way assisting the deceased.

12. None of the accused spoke to or questioned the deceased on the night of the assault.

13. All three accused had agreed prior to the assault to go to the deceased's house and to assault her, because, according to them, witch doctors had told them that the deceased was a witch and responsible for the death and illness of several members of the family. They did not have any prior agreement regarding the weapons, if any, to be used for the assault and the extent of the intended assault. There was a common purpose to this extent. There was also a common purpose in regard to the breaking open of her house by force and the forceable dragging of the deceased from inside her house to the outside for the purpose of assaulting her.

14. The deceased was related to the accused by marriage.

15. She was a frail old lady of 67 years of age.

Counsel for the State and defence agreed that both of the accused are guilty of a crime. But they differed as to the crime committed. The following matters were in dispute:

1. Ms Kamunima, the daughter of the deceased alleged that the deceased was first hit with small sticks

and thereafter with Exhibit 1. Accused no. 1 denies that any of the accused hit the deceased first with small sticks. 2. Mr Du Pisani contends that accused no. 1 must be found guilty of murder. As to intention he argued that intention at least in the form of dolus eventualis is present. As to accused no. 2 his original contention was that no. 2 is guilty of assault with intent to do grievous bodily harm. When the Court wanted to know why the accused should not be found guilty of Culpable Homicide, he agreed that there was no good reason why accused no. 2 should not be found guilty of Culpable Homicide. Mr Potgieter strenuously argued that accused no. 1 should only be found guilty of Culpable Homicide.

Mr Metcalfe argued that accused no. 2 should be only found guilty of assault with intent to do grievous bodily harm.

But when the Court put certain questions to him to elicit his reasons for contending that the accused is not guilty of culpable homicide, he changed his original submission and argued that the accused no. 2 can only properly be convicted of assault common.

As to accused no. 1, I have no doubt that this accused killed the deceased with the intention, at least in the form

of dolus eventualis, to kill. By dolus eventualis is meant that the accused at least foresaw as a reasonable possibility that the deceased, an old and frail person, could die as a result of a blow on the head with such a heavy branch or pole, wielded and brought down on her head with considerable force when she was sitting, bent forward and defenceless. The accused is an adult, was not drunk or unable to control his senses and emotions. The assault itself was deliberate and planned in advance. When the deceased slumped forward the accused wanted to continue the assault but at that stage he was stopped by accused no. 2 and 3 .

The deceased was left late at night dead or dying at the spot without any medical attention. No. 1 as well as 2 and 3 left without giving any assistance of any sort. Any person who in such circumstances testify that he or she did not intend to kill, did not even foresee the reasonable possibility of death resulting from such a barbarous assault, is simply lying. The accused's denial of intent is therefore rejected as false beyond all reasonable doubt. It follows that accused no. 1 must be found guilty of murder.

Accused no. 2 had a common purpose to at least seriously assault the deceased and to gravely damage her property. He was a person who broke down a door of the house where the deceased had been sleeping. He dragged her outside the hut into the night, for the purpose of an assault. The murder weapon, the dried branch or pole supporting the door, was wrested from the door frame, taken outside by accused no. 2

and placed on the ground at the scene of the killing within reach of accused no. 1. It was then when accused no. 1 picked up this pole with both hands, lifted it above his head and brought it down on the head of the hapless victim. This act took place in the presence of accused no. 2 and 3. Neither accused no. 2 nor no. 3 did anything to prevent accused no. 1 from hitting the deceased with this weapon of death. They did not explain that they were unable to do so, and I find that they were in a position to prevent the killing if they had wished to do so.

If it was not for the fact that accused no. 2 assisted by no. 3 prevented accused no. 1 from further assaulting the deceased, I would have had no hesitation in convicting also accused no. 2 of the crime of murder. A reasonable person in the position of the accused no. 2, would have foreseen at least the possibility of death resulting from his own acts, as well as his joint acts with the other accused, to assault the deceased in the execution of a common purpose. Accused no. 2 was at least negligent in not ensuring that the planned assault did not cause the death of the deceased. This negligence at least contributed to the death of the deceased.

There is an alternative basis for the conviction of accused no. 2 of Culpable Homicide. This basis is that accused no. 2 failed to act positively to prevent the death of the deceased in circumstances in which there is a legal duty to act positively. The Court after hearing argument at the previous session mero motu raised the issue of the relevance

or otherwise of a legal duty to act positively in certain circumstances.

At the resumption of the hearing today, only Mr Metcalfe for accused no. 2 addressed me on the issue. He referred me to an article in the 1975 South African Law Journal at 361, where it was stated by Boberg, PQR that the failure to act positively to prevent a crime or offence in certain circumstances can result in liability for a crime where there is a legal duty to act. I've not had the opportunity to peruse the said article, but I fully agree with the categories allegedly set out in that article, of conduct which could result in criminal liability for failure to act positively. Those categories are the following according to this article referred to by Mr Metcalfe.

16. Prior conduct.
17. Control of dangerous objects.
18. The relationship between the parties.
19. Public office or calling.
20. Statute.

Mr Metcalfe also referred the Court to the case of Minister of Police v Ewels which dealt with a delict, but in which it was emphasised that a legal duty to act positively may be regarded by a court as existing, when in the Court's opinion the broad view of the community, or the broad norms of the community would be to regard such a duty to exist in a certain set of circumstances. Snyman in his work, Criminal Law, 2nd edition at page 50, also deals with this aspect,

and in my respectful view sets out the position lucidly and correctly as follows:

"For the purposes of the law an omission does not mean doing nothing, but failure to act positively in circumstances in which there is a legal duty to act positively."

"A legal duty is not the same as a moral duty. It is generally accepted that there is a legal duty to act positively in the following instances, (which cannot always be completely distinguished from one another but may overlap)

- a. Statute may place a duty on somebody to act positively. For example, to complete an annual income tax form, or not to leave a scene of a car accident but to render assistance to the injured and report the accident to the police.
 - b. A duty may arise from agreements.
 - c. A duty may arise where a person accepts responsibility for the control of a dangerous or a potentially dangerous object, and fails to control it properly. In *Fernandes* for example, X kept a baboon and failed to repair its cage properly. With the result the animal escaped and bit a child who later died. X was convicted of culpable homicide.
 - d. A duty may arise where a person stands in a protective relationship to somebody else.
- For

example a parent or guardian has a duty to feed a child. A protective relationship must also exist when somebody accepts responsibility for the safety of other people. For example the leader of a mountain climbing expedition, or someone looking after a baby, or a lifesaver at a swimming pool or a beach.

- e. A duty may arise from previous positive act, as where X lights a fire in an area where there is dry grass. And then walks away without putting out the fire to prevent it from spreading. This type of case is sometimes referred to as an omissio percomissionum, since the omission follows upon a commission or positive act which created a duty to act positively. The landowners also deal with a certain duty which may arise by virtue of a certain office.
- f. A duty may sometimes arise by virtue of the fact that a person is the incumbent of a certain office. Thus a medical practitioner is compelled by statute to give written notice to the Director-General of Health and Welfare of any permission granted by him for an abortion. In Minister van Polisie v Ewels it was held that a policeman on duty who witnesses an assault has a duty to come to the assistance of the person being assaulted.

The instances of legal duties listed above represent only those which have come to be recognised as such in practice. It is, however,

perfectly possible that a court may find that a legal duty to act exists, even in a case falling outside the scope of the above-mentioned classification. There is no magic formula which determines when a legal duty exists. The "legal convictions of society" play a very important role here, but care should be taken not to confuse the test to determine the unlawfulness of an act (which, as will be shown later, includes reference to the legal convictions of society) with the test to determine the existence of a legal duty to act. Whether X failed to take action in circumstances where he has a legal duty to do so, is one question; whether this failure is unlawful is another. Just as an adjective cannot exist without a noun, so something cannot be termed "unlawful" unless it is known what the object is that is described as "unlawful" and, as was pointed out above, in the case of an omission this object is not merely "nothing", but a failure to act positively in circumstances in which there is a legal duty to act positively."

Now the one category which would probably be applicable in the instant case, is category ' e ', namely a duty may arise from a previous positive act.

This whole question of liability for a legal duty to act positively in certain circumstances was dealt with by this Court in the case of State v Kleynhans and Others in a

judgment delivered on 19th to 20th August, 1991, but which has not been reported. See pages 15 to 21 of the aforesaid judgment.

This principle of liability was also dealt within a recent decision of this Court, namely the State v Dennis Eigowab, NmHC, 24th August, 1994, unreported. Although the two judges, being myself and Hannah J., differed on certain issues, we did not differ on the issue of the principle of liability in a criminal case for an omission to act positively in certain circumstances. In my judgment I dealt with the issue at p. 30 - 33 and referred to all the available decisions at the time. In the judgment of Hannah J. , the issue was dealt with at page 10 to 11 of his judgment.

There are also a number of recent cases in other divisions of the South African Supreme Court to which I referred in this particular judgment. I quote from the relevant part of my judgment at page 30;

"The doctrine relating to criminal culpability for an omission is set out in the following decisions. Minister van Polisie v Ewels, 1975 (3) SA 590 AD at 597B. State v Gaba, 1981 (3) SA 754 (O.P.D.) at 749F -751H. State v A and Another, 1991 (3) SACR, 257 at 272B - 274D. State v Kleynhans and Others, NmHC, 19/8/91, unreported, at 12 - 18. State v Banda 1990 (3) SA 466 at 571B - 572C. State v Rosenthal 1980 (1) SA 65, (IAD) at 87G - 88F. Compare also Rex v Munango 1956 (1) SA 4386 SWA.

In State v A and Another. 1991 (2) SACR, 257 (N), Hugo J. made it clear that the principle stated in Minister van Polisie v Ewels. although in that case applied to delict, is also applicable to criminal law. See judgment at page 272B - 273G. I fully agree that the principles stated in Minister van Polisie v Ewels are also applicable to criminal law in regard to the question of the existence of a legal duty and failure or omission to comply with it. I also agree with the statement of Burchell and Hunt in SA Criminal Law and Procedure, Vol. I, 2nd ed., that: "The lawfulness or unlawfulness of an omission depends upon whether the legal convictions of the community (die regsourtuiging van die gemeenskap), expect the omission to be regarded as criminal."

In regard to prior conduct, the learned authors say: "Where by some positive act X has created a potentially dangerous state of things which would otherwise not have existed, he (she) has a duty to guard against foreseeable danger...".

See also: State v Barnes & Another. 1990 (2) SACR 485 (N) at 492h - 493b. (This is a decision of the Full Bench of three judges.)

Compare: State v Madlala & Others. 1992 (1) SACR 473 (N) at 475(i) - 477(b).

When this principle is applied to the facts of the present case, then in my view there was a legal duty on the accused to prevent accused no. 1 from striking the fatal blow, when

she was sitting defenceless before those that assaulted her. Accused no. 2 pulled this old lady out of her house for the purpose of an assault. He provided so to speak the murder weapon, being this pole. He was present all the time from the beginning of the assault to the end. He was not drunk or otherwise incapacitated. He had enough time if he wished to do so to prevent accused no. 1 from hitting the deceased with this heavy pole. He failed to do anything. It was only after the fatal blow was struck and accused no. 1 wanted to continue the assault, that he interfered. And as I indicated before, the fact that he did so, saved him from a conviction of murder. I find that in the circumstances there was a legal duty on the accused to prevent the accused no. 1 from hitting the deceased with that heavy pole. He was at least negligent in not guarding against the foreseeable danger and not taking reasonable steps to prevent the death of the deceased. This negligence contributed to the death of the deceased.

Culpable Homicide consists in the unlawful negligent killing of another. See: SA Criminal Law and Procedure, Vol. II, Revised 2nd ed., p. 401.

In the result accused no. 1 is found guilty of the crime of Murder. Accused no. 2 is found guilty of the crime of Culpable Homicide.

B. O'Lin

O'LINN, JUDGE