IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NUMBER 385/89

In the matter between:

JOSEPH MICHULU MALAZA — APPELLANT

and

THE STATE — RESPONDENT

Coram: SMALBERGER, KUMLEBEN, JJA et GOLDSTONE AJA.

Date heard: 1 March 1990

Date delivered: 8 March 1990

J U D G M E N T

GOLDSTONE AJA:

The appellant stood trial in the Orange Free State Provincial Division on a charge of murder. He was convicted and, no extenuating circumstances having been found, he was sentenced to death. His application for leave to appeal against the imposition of the death sentence was granted by the learned Judge *a quo*.

The appellant pleaded guilty to the charge of murder. Counsel who appeared *pro deo* for the appellant informed the trial Judge that the plea was not in accordance with his instructions. He added that he had formed the opinion that the appellant was not of sound mind and unfit to stand trial. Thereupon counsel for the State, who accepted the onus of proving the fitness of the appellant to stand trial, led evidence to that end. No evidence on

that issue was led on behalf of the appellant. After considering the State evidence, the Court a quo held that the appellant was indeed fit to stand trial and able properly to defend himself. That decision is fully justified by the record and no attempt was made to challenge that finding.

After the Court a quo found that the appellant was mentally fit to stand trial, the appellant tendered a plea of guilty to the charge of murder. The prosecutor proceeded to lead evidence in order to establish, by evidence aliunde, the commission of the offence. The murder was a gruesome one. In short, on 29 July 1988, the appellant stabbed Thabo Davey Maniet (the deceased) twice with an assegaai. He took the body of the deceased to his room in the house of his mother. He proceeded to mutilate the body. He buried parts of it and then wrapped the remains in a plastic sack and placed it under his bed. On the following morning, the appellant's sister discovered the body. His mother reported the incident to the headman and the police were called in.

The circumstances in which the murder was probably committed emerged from

extra-curial statements made by the appellant to a magistrate and to Professor P. H. J. J. van Rensburg, a psychiatrist attached to the University of the Orange Free State. The appellant did not testify at the trial. It appears that the appellant, aged 26 years, suffered from what he regarded as a diminution of his vitality. More particularly he could find neither a wife nor permanent employment. The latter factor caused him anguish as he was unable to look after his widowed mother for whom he had a deep respect. According to Professor Nel, an ethnologist, who testified on behalf of the appellant, he found himself under psychological pressure to gain "power". To that end, one infers that the appellant consulted a witchdoctor. The appellant, so it would further appear to be probable, was advised by the witchdoctor to drink the blood of a strong and successful person and to bury certain of his organs. For that reason the appellant killed the deceased.

In his judgment on extenuating circumstances, the learned trial Judge made the following factual findings:

"Ons bevind dat die beskuldigde wel homself in hierdie psigologiese drukgang bevind het. Ons bevind eweneens eenparig dat die beskuldigde wel muti wou bekom ten einde sy lewenskragte, in die sin deur prof. Nel uiteengesit, aan te vul, en ons bevind eweneens dat die beskuldigde in die omgewing en in die gemeenskap waarin hy beweeg het 'n diepe gesetelde geloof in sodanige herstelkragte van die muti gehad het."

As the trial Court correctly directed itself, the issue was whether, having regard to that factual finding, there were extenuating circumstances present in respect of the murder. The trial Judge concluded his judgment as follows:

"Daar is voor ons geen getuienis hoegenaamd dat die beskuldigde enige vrees gekoester het jeens die oorledene nie of dat die oorledene hom of sy familie of sy gemeenskap met enige leed bedreig het nie. Daar is ook geen getuienis voor ons dat die beskuldigde op aandrang van 'n toordokter en uit vrees vir die toordokter die oorledene gedood het nie.

Die waarskynlike afleiding wat gemaak word uit die getuienis van prof. Nel en die beskuldigde se stilswye is dat hy die oorledene gedood het ten einde muti te bekom sodat hy lewenskrag kon herwin. Ons bevind gevolglik eenparig dat op grond van die voorafgaande daar geen versagtende omstandighede aanwesig is nie."

In the judgment there is reference to the judgments of this Court in R v Myeni 1955 (4) SA 196 (A) and S v Nxele 1973 (3) SA 753 (A) and to the judgment of the Rhodesian Appellate Division in S v Sibanda 1975 (1) SA 966. With reference thereto the learned Judge said the following:

"Die deurlopende gedagterigting in hierdie beslissings is deurgaans dat alhoewel die geloof in magiese kragte kon inwerk op die gedagtegang van die beskuldigde sodat hy die misdaad begaan, die effek daarvan nie is dat die hof die doodslag van onskuldige persone, wat die beskuldigde nie geglo het die oorsaak van sy probleme was nie, as minder laakbaar beskou nie. Sover dit die howe betref word in voormoemde gevalle nie van die derde been van die drie vereistes vir die bestaan

van versagtende omstandighede voldoen nie."

Counsel for the appellant submitted that this summary of the effect of the aforesaid judgments was incorrect and constituted a misdirection. It was submitted to be incorrect in that it lays down as a general rule that the killing of an innocent person does not admit of a finding that there were extenuating circumstances. I do not agree. The passage just cited, if read in context, was clearly not intended by the learned Judge to be a comprehensive summary of what was laid down in the three judgments referred to by him. Indeed, it is preceeded by a passage referring expressly to the judgment of Schreiner JA in one of them, viz. Myeni's case, supra in the following terms:

"In effek sê die geleerde Appèlregter dat die geloof in die bonatuurlikke en die geloof in 'n magiese nie per se versagtende omstandighede is nie, maar elke saak se feite self beoordeel moet word.

Dieselfde is ook die effek van die uitspraak in S v Nxele 1973 (2)

SA 753 (A) op 757 en ook die uitspraak van die Rhodesiese Appèlhof in die beslissing van S v Sibanda 1975 (1) SA 966."

In my opinion, the trial Judge correctly applied the approach of Rumpff CJ in S v Modisadife 1980 (3) SA 860 (A) at 863C-E to the following effect:

"Dit is by herhaling gesê dat 'n werklike geloof in toorkuns in oorweging geneem kan word by die vasstelling of daar versagtende omstandighede is. Terselfdertyd is dit ook by herhaling beklemtoon dat toorkuns as versagtende omstandigheid noodwendig moet afhang van die besondere feite van elke saak. In die tyd waarin ons lewe, kan, na my mening, die geloof in toorkuns wat appellant waarskynlik gehad het, die aard van die vrees van appellant, 'n vrees wat o.a niks met die oorledene te doen gehad het nie en ook nie onmiddellik was nie en wat hy self kon afgewend het deur weg te trek uit die omgewing, nie sy daad minder laakbaar of verwytbaar maak nie."

The deceased was in no way perceived by the appellant as having been a

threat to him or responsible for his misfortune. He was perchance a man with a good job who was regarded by the appellant as a suitable victim. There was no question here of a threat of harm to either the appellant or to his family or tribe. Those were all circumstances properly taken into account by the trial Court in making its finding. The fact that the welfare of his mother was a factor which may have moved the appellant to have acted as he did, does not in my judgment, lessen the moral blameworthiness of his deed.

In my opinion, the Court a quo, in a carefully reasoned judgment, correctly directed itself. I can find no reason to interfere with the discretion exercised by that Court. The appeal is accordingly dismissed.

GOLDSTONE AJA

SMALBERGER J)
) CONCUR
KUMLEBEN J)