CASE NO. CC 86/94

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

BENHARD MUKOSO

HAINGURA AUGUSTINUS

LEONARD MURONGA

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

Delivered on: 1995/06/29

SENTENCE

O'LINN, J.: Accused no. 1, Benhard Mukoso, and accused no. 2, Haingura Augustinus, were convicted by me on 09/06/1995 of the following crimes: Accused no. 1 - Murder. Accused no. 2 - Culpable Homicide.

I now have to consider an appropriate sentence. When doing so the Court must consider the personal circumstances of the accused, the crime committed and the interest of society. The Court must also keep in mind the main aims of punishment, namely deterrence, retribution and rehabilitation. By deterrence is meant not only that the

sentence must be such as to deter the accused themselves but also deter other like minded people in society from committing the same crimes. Although it has often been said by judges in decisions and by academics and authoritative commentators that in our law the aim of retribution has given way to the aim of deterrence, there is a growing feeling in some democracies including Great Britain that retribution should be given as much weight, if not more, than the other aforesaid aims, in the light of the continuing debate in many societies where crime has escalated dramatically, whether or not the punishments meted out have a deterrent effect and whether or not rehabilitation practices are successful. The disillusionment in many societies with existing practices and policies relating to the administration of justice, strengthens a demand for greater equality between that of sentences imposed by Court on an accused and the suffering of victims of crime. That in effect strengthens the cry for retribution to be regarded as an important aim of punishment. Compare the decision in State v Van Wvk, 1992(1) SACR 147 (NmSC).

For the purposes of sentence the facts found for the purposes of conviction are also facts relevant to sentence. Those facts need not be repeated at this stage.

I must point out, however, that I did not reject the evidence of State witness Miss Kamunima, the daughter of the deceased, to the effect that the deceased was first beaten with small sticks, inter alia by accused no. 2 before no. 1

took the pole, EXHIBIT 1, and struck the fatal blow. In view of the accused's denial and the fact that no other marks were being identified by the doctor who did the post mortem examination, I gave the accused the benefit of the doubt on this issue.

In regard to the personal circumstances of the accused the following may be mentioned:

1. Both accused are first offenders.
2. Accused no. 1 is about 29 years old and accused no. 2 40 years.
3. Accused no. 1 had limited formal education. Accused no. 2 reached standard 7 and at the time of the incident was a teacher in the Kavango.
4. Accused no. 1 has no wife at the moment but accused no. 2 still has a wife.
5. Accused no. 1 has been diagnosed by Dr Banda as having full-blown AIDS at this stage. His illness is terminal. He has a life expectancy of less than 1 year.

Both accused relied on their alleged belief in witchcraft and their alleged belief that the deceased was a witch who was held responsible by them for deaths and illnesses in the family. As a result of this often repeated justification or excuse for murder and assault with the intent to do grievous bodily harm relied on in our Courts by accused persons, this Court has embarked on an enquiry with the full co-operation and assistance of counsel who appeared, namely Mr Du Pisani

for the State, Mr Potgieter for accused no. 1 and Mr Metcalfe for accused no. 2. The Court here gave effect to the guidelines for the role of a Court set out in State v Van den Berg. 1995 (4) BCLR 479 (Nm) at 489-491 C, 523 H_ - 531 H.

In the course of this enquiry the Court called two persons named by the accused as witch doctors which, according to them, they and their families had consulted. These persons were a Mr Djasikongo and a Mr Mwira. The Court also called a Mr Amutenya Erasmus who was called at the instance of accused 2, apparently because accused no. 2 regarded this person as knowledgable regarding the beliefs and practices regarding witchcraft in the Kavango and about the allegation that the deceased was a witch.

Mr Potgieter called Dr Gandziami and Dr Banda to testify in regard to the present state of health of accused no. 1. Mr Metcalfe called accused no. 2 to testify in regard to sentence as well as the mother of both accused, namely Appolonia Sindonga and the wife of accused no. 2, namely Sophia Sifaku.

This concluded the viva voce evidence.

In the course of the trial and particularly during examination of the latter group of witnesses some very important exhibits were handed in. In their evidence accused no. 1 as well as no. 2 alleged inter alia that:

The deceased was a witch diagnosed as such by witch doctors, known generally as a witch and accused by them, the accused, of having bewitched members of the family causing death and illness. This alleged death or illness were not done by poisoning or similar means but, if I understand the accused correctly, by making use of her supernatural powers as a witch to bewitch them. The manner and occasions of the so-called bewitching were never specified by the accused.

1.1 Both accused however knew that no person were entitled in Namibia to kill any other person on the ground of her or he being a witch.

Accused no. 1 inter alia alleged

2.1 That the deceased had bewitched his wife and was a cause of them having to separate.

2.2 That they, the accused, had taken their wives to a witch doctor where they were told by the witch doctor or witch doctors that she was bewitched by the deceased and that the deceased was the cause of their illness.

2.3 That the daughter of the deceased, the said Miss Kamunima, as well as the deceased, were taken by the accused to a witch doctor where the witch doctor declared the deceased to be a witch.

2.4 He knew that in order to test whether a person is a witch such person is given a drink by the witch doctor known as "Nwadi", and if the witch drinks Nwadi and dies she is proved to be a witch. If she does not die, however, then she is regarded as not being a witch. This test, according to the accused, was however never done on the deceased.

3. Accused no. 2, in addition to subscribing to the above allegations, came forward with some more dramatic allegations, namely:

3.1 His wife was operated upon in the hospital at Rundu and a tortoise removed from her body. The doctor who had operated actually showed him the tortoise in a bottle.

3.2 His mother had consulted a witch doctor in connection with her illness and the witch doctor made a sign with his fingers and by so doing removed the foreign object from her back.

The evidence of the accused were totally discredited in cross-examination as well as by the evidence of the State witness, Miss Kamunima, as well as by the evidence of the defence witnesses, namely Sindonga, the mother of the accused, and Sifaku, the wife of accused no. 2. The two alleged witch doctors also contradicted the evidence of the accused in all important respects. So did the witness called by the Court at the behest of accused no. 2, namely

Mr Amutenya Erasmus.

The evidence of the aforesaid witnesses were in substance to the following effect: The witness Kamunima, who stayed alone with her mother for a long time, testified that her mother was not a witch, had never practised anything resembling that of a so-called witch, had never given medicine to any person in the course of any practice as a witch doctor, witch, medicine person, or whatever. She also denied vehemently that she and her mother, the deceased, had ever visited any witch doctors with or without the company of any of the accused. She denied throughout that she was present and that her mother was present at any stage when any witch doctor allegedly told them that the deceased was a witch.

Mr Potgieter, for accused no. 1, did not strongly press any such allegation in his cross-examination of Kamunima. Mr Metcalfe, however, cross-examined her on an allegation that a certain relation of the deceased had accused the deceased -on one occasion that she had bewitched his father who at the time worked at CDM. That was the only incident of an allegation by anyone against her mother prior to her death as far as she was concerned. She did not know whether this person who had made the allegation had been to a witch doctor. She further conceded in cross-examination by Mr Metcalfe that as a result of this allegation, some people may have avoided her mother and may have hated her. She also said that she knows that that allegation was made by the accused either at the time of the incident when they

beat up the deceased or subsequently as their justification for killing the deceased. Her evidence in sum was therefore that her mother had never injured any person or done any harm to any person.

Now the mother of both accused, namely Appolonia Nangura Sindonga, gave evidence in total conflict with anything of importance which the accused had said. What she admitted was that, on one occasion, she did go to a witch doctor for advice and he treated her not with magic, but with a substance which apparently came from plants or something similar. She did not know anything about this incident with a witch doctor who allegedly just snapped his finger, so to speak, and in the course of that removed some suggested evil object from the back of her body. She also testified that she had no problem whatsoever with the deceased.

The wife of accused no. 2, Sophia Sifaku, told the Court that she had gone to medical doctors at known hospitals in Kavango over a long period of time, that she had in her possession the medical record as contained in a little booklet, (handed in as Exhibit "E"), which reflects her various visits to hospitals, her treatment by doctors, her complaints made at the hospitals and the treatment and operations that she underwent in these particular hospitals. It shows that a few days before the date of the alleged killing of the deceased the witness was also at a hospital where she was treated for malaria and even on the day of the alleged incident when the deceased was killed, she was also in a hospital being treated for malaria. According to her

the accused was present that particular day. He knew that she was diagnosed as having malaria and being treated for malaria. When accused no. 2 testified he at first vehemently denied that he knew that his wife was diagnosed as having malaria and that she was treated for malaria. When he was confronted with the entries in the said Exhibit "E" he became very evasive but in the end said that medical doctors in hospitals could not diagnose whether or not a person is bewitched.

Mrs Sifaku also told the Court that she had an operation at one stage subsequent to the date of the killing of the deceased and in this operation no tortoise or anything similar was ever removed from her body. She said she was pregnant at the time and the child was also removed in the course of the operation and she was told that the organs removed from her body, namely her ovaries, would result in her not being able to bear children again. She also did not know of any allegation before the killing of the deceased that the deceased was a witch. She also had no dispute or problems with the deceased.

Now the importance of this evidence is that it completely destroyed the allegations of accused no. 2. That she was telling the truth was further demonstrated by the fact that, before she gave evidence, the accused had tried to tell her by means of a letter what she must come and tell the Court. That letter was, unfortunately for accused no. 2, intercepted by the police whose vigilance in this regard assisted the Court in deciding what the truth is in regard

to the farfetched allegations of the accused.

The letter, Exhibit "D", described in detail what the accused expected his wife to come and tell the Court. The instructions were coherent and explicit. He instructed her to stick to that because then he would stand a chance of being acquitted. These instructions related inter alia to her operation, her alleged removal of the tortoise, etc, and even instructions for her to say that she was at a different hospital at the particular time than the one where she had actually been treated. This letter was an attempt by the accused to defeat justice and to do so he was determined to tell lies and to get others to support his fabrications. This attempt by accused showed him as an intelligent, but devious and callous liar.

The two alleged witch doctors, Djasikongo and Mwira, testified that they give medicine to people who come to them for help for illnesses. The medicine they make from the roots of trees. Mr Mwira also admitted that he prays when a patient comes to him. He prays to God and to the spirits of the forefathers to assist him in making people well. According to them, they did not use any katembas or similar method to diagnose illnesses or to identify so-called witches. Both of them also denied that they ever referred to the deceased as a witch or that the deceased with or without the accused had ever visited them.

It is clear that in view of the fact that the practising of witchcraft and various aspects which are related to so-

called witchcraft practices constitute criminal offences in Namibian Law.

Before the Court examined Mr Djasikongo the Court warned him that because certain practices, relating to witchcraft, were illegal he need not answer any questions which may incriminate him. He however answered all the questions put to him. The same applied to Mr Mwira. Although I must treat their evidence with caution because of a possible motive that, because of witchcraft being criminal in Namibia, they may not be open with the Court, this caution however does not apply to witnesses such as the mother of the accused and the wife of accused no. 2 who testified for the defence and the witness Erasmus who testified at the request of accused no. 2.

The witness, Amutenya Erasmus, testified that there was such a thing in his community as medicine men, even witch doctors, and that some people possibly believe in the existence of witches and the evil which they are supposed to do. He said he had no knowledge of witch doctors using "katembas" and drinks such as "nwati" allegedly used by witch doctors in the course of their practise. He categorised such beliefs as being stories and tales told by old women in the Kavango. He did not believe in them and did not know whether there are any substance in such stories and tales. He himself, although he is in that immediate neighbourhood of the accused persons and the deceased person, never heard before the killing of the deceased that she was supposed to be a witch. The first time he heard

about that allegation was when an uncle, possibly of the accused, asked him to provide transport for the purpose of the funeral of the deceased. At that stage he enquired from this uncle what was the cause of the deceased's death. It was then that this uncle explained to him that according to some people, I am not sure whether it was according to the accused, it was said that the deceased was killed because she was allegedly a witch. He himself, although he lived in that same area as the accused and the deceased, had up to then never heard that the deceased was alleged to be a witch.

This witness, Erasmus, was also adamant that there is no person in the Kavango, as far as he is concerned, who does not know that you cannot kill another person, whether because of allegations she is a witch or any other reason. He was uncertain as to whether a person could kill another in self defence.

In all the circumstances I have no doubt that the alleged incidents and events on which the accused relied to show that the deceased was a witch and so on, are deliberate fabrications. Not only are these alleged incidents and events contradicted by all these witnesses but they are extremely improbable. The cherry at the top is the story of accused no. 2 relating to the tortoise. To that extent the evidence of both accused is rejected and those of the witnesses Kamunima, Appolonia Sindonga, Sophia Sifaku and Erasmus accepted in every material respect.

It follows that the deceased was not a witch, had never practised witchcraft and was not the cause of any death or illness in the family. Furthermore, she had done nothing to justify the allegations by the accused and was completely innocent.

The most that the Court could find in their favour is that it is reasonably possible that the accused believed that the deceased was a witch and that she had something to do with the illnesses in the family. It is quite clear however, that even though they may have had this type of belief, they knew that they had no good reason for their beliefs. That is why they fabricated the incidents and events on which they allegedly relied for their belief that the deceased was a witch and had caused the deaths and illness in the family.

I must make it absolutely clear however that I do not believe that the accused had the aforesaid belief but merely that there is a reasonable possibility that they had the aforesaid belief to the aforesaid extent. There is an equally reasonable possibility, if not a probability, that the accused merely used the witchcraft story as a shield, knowing that it has thus far been accepted by the courts without proper testing and always as a very important mitigating factor resulting in very lenient sentences.

With those facts in mind the Court must weigh what impact this measure of subjective belief that I have accepted is a reasonable possibility, should have on the ultimate sentence of the accused.

It is in this regard that Counsel referred me to many-authorities. Mr Du Pisani referred to Namibian decisions such as in the case of State v Nkoma & Amutenya, NmHC, unreported, where two accused persons were found guilty of Murder and each sentenced to 11 years imprisonment. The lenient sentence was probably on the ground that the accused had come forward with the excuse that somehow they regarded the deceased as having practised some form of witchcraft or other. It was not possible for this Court to establish in detail what precisely were the considerations of the learned presiding judge.

In the case of State v Ndango & Ndango, NmHC, 11/10/1993, unreported, the accused were sentenced on counts of attempted murder and common assault. In those cases it seems that 7 years imprisonment were imposed of which 2 years were suspended. I am told that in considering that sentence the Court also gave weight to the impact of alleged beliefs in witchcraft. The distinction of course is that in that case the accused were only convicted of attempted murder and the victim in that case did not die as far as I can see from the Court record. The other case to which I was referred was State v Silento, NmHC, 1/9/1994, unreported. There the person was convicted of murder and sentenced to 12 years imprisonment by the Honourable Strydom, J.P. I am informed the question of witchcraft was also used as an excuse by the accused in that particular case.

Then there was another decision also by the Honourable

Strydom, J.P. in the case State v Hainqura Benjamin, NmHC, 15/11/1994, unreported. The accused was sentenced, on the charge of murder, to 9 years imprisonment and on the charge of the possession of a fire arm without a licence to 1 year imprisonment. Unfortunately, in that case, the judgement of the learned Strydom, J.P. on sentence is not available at this stage. I will assume in favour of the present accused that the lenient sentence in that case was also imposed because of an excuse on the side of the accused which related to their belief in witchcraft.

I have been referred to several other decisions in South Africa in the past, some of which were given many years ago and related to conditions in South Africa at the time.

S v Mavuhunau. 1981(1) SA 56 (A);

R v Bivana, 1938 EDL 310;

R v Fundakubi & Ors., 1948(3) SA 810 (A);

R v Nxele, 1973(3), SA 753 (A);

S v Ndhlovu & An., 1971(1), SA 27 (RAD);

S v Modasife, 1980(3), SA 860 (A);

S v Ngubane, 1980(2), SA 741 (A).

In my respectful opinion the view of the learned judges of appeal in S v Modasife is even more apt in the Namibia of today where they said that "in the times in which we are living, the belief in witchcraft, which the appellant probably had, the nature of the fear of the appellant, .-. . . . could not make his deed less reprehensible and less reproachable. . . . . ." (My translation from the Afrikaans.)

Although in S v Nqubane the same Appellate Division held that the subjective fear is important for sentencing purposes where it is proved that the killer was truly fearful of the fate that may be in store for him or others at the hand of the victim, the Appeal Court nevertheless upheld the finding of the Court a quo that there were no extenuating circumstances.

See generally the article on sentencing at 6 - 21 of the publication "Sentencing," 1st ed., Service No 2 of 1992 by D.P. v.d. Merwe.

Mr Metcalfe also referred me to S v Ndhlovu & An. , supra, where the learned Chief Justice first summarised the facts as follows:

> "The appellants believed implicitly in the power of witches and wizards intentionally to cause harm to others by supernatural means; They also believed the witch doctors are able, by throwing bones, to expose the witch or wizard responsible for causing harm .... In the circumstances his threat that he would cause the appellant to be struck by lightning and die in an empty sack would be unlikely to fall on deaf ears. In view of all that had gone before, the coincidental destruction of the first appellant's grain hut, supposedly or actually by lightning, must have served to convince the appellants that the deceased possessed supernatural power and by it's use, intended to kill them."
>
> (My emphasis)

The learned Chief Justice continued as follows:

> "It is clear, therefore, that the law permits witchcraft to flourish without fear of punishment under the criminal law in a wide field of human affairs, and persons who become steeped in witchcraft under its almost benevolent attitude are not likely to be impressed when, at a late stage, the law steps in to punish them for taking their beliefs to a logical conclusion. Any punishment imposed in these circumstances is likely to be regarded as an extension of the evil wrought by supernatural means rather than just retribution. A prison sentence is unlikely to reform an accused person either by persuading him that to believe in witchcraft is foolish or by convincing him that it is wrong to resort to witch doctors in order to escape from misfortunes believed to be caused by a witch or a wizard through the use of supernatural means. In the present state of law, the sentences for offences such as those committed by the appellants must necessarily be to deter others not from indulging in witchcraft, because this is permitted under the law, but from committing the excesses to which such indulgence all to frequently leads. If the law were less equivocal in dealing with witchcraft, the task of deciding upon sentence would be a great deal easier. In deciding whether sentence is manifestly excessive, this Court must be guided mainly by the sentences sanctioned or imposed by this Court in similar cases, due allowance being made of course for factual differences."
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> (My emphasis)

The first observation that I must make is that the facts of the present case as found by the Court, differ materially from those accepted in the Rhodesian decision aforesaid.

In the present case, in contrast to the Rhodesian decision, the factual allegation by the accused relating to the actions of the deceased and the events relied on, were found

to be false in all material respects. So also the alleged witchcraft practices in the Kavango and the particular practices relied on by the accused.

The second observation that I must make is that the whole basis of the argument by the learned Chief Justice was to a very substantial extent based on the fact that there were no laws in Rhodesia at the time outlawing witchcraft and such practices and that is why the learned Chief Justice argued that if the law does not prevent this, how can you punish a person harshly who just gives effect to a belief which is sanctified by and allowed by the law? There is a fundamental difference between that situation in the early 1970's in Zimbabwe, for instance, and that in Namibia. In Namibia Proclamation No. 27 of 1933 already outlawed witchcraft and this proclamation is still in force in Namibia. The relevant part reads as follows:

> "1. A person shall be guilty of an offence and liable on conviction to imprisonment with or without hard labour for a period not exceeding 5 years or to a fine or to whipping or to any two or more of such punishments if he
>
> a. imputes to another the use of non-natural means in causing any disease in any person or property or in causing injury to any person or property or names or indicates another as a wizard or witch; or
>
> b. having named or indicated another as a wizard or witch is proved to be by habit or repute a witch doctor or witch finder; or

c. employs or solicits any witch doctor or witch finder to name or indicate another as a wizard or witch; or

d. prepares or supplies any poisonous drink or substance which is injurious to health or dangerous to life or who administers to any person or who induces any person to drink or take such drink or substance for the purpose of testing any person who is accused of witchcraft; or

e. while professing a knowledge of so-called witchcraft or the use of chants advises any person applying to him how to be witched or injure persons, animals or other property or supplies any person with the pretended means of witchcraft; or

f. on the advice of a witch doctor or by means of his pretended knowledge of so-called witchcraft with intent to injure, uses or causes to be put into operation such means or processes as he believes to be calculated to injure any person or property; or

g. for the purposes of gain pretends to exercise or use any kind of supernatural power, witchcraft, sorcery, enchantment or conjuration or undertakes to tell fortunes or pretends from his skill or knowledge in any occult science to discover where or in what manner anything supposed to have been stolen or lost may be found."

So it is quite clear from this proclamation that for decades now in Namibia the type of belief and practices referred to here by the accused were constituted as serious criminal offences, not only for the alleged witch doctor or wizard

but also for those people who take part and make use of it and particularly anyone who is party to identifying or accusing a certain person as a witch.

The lesson from all this is that one cannot give weight to certain decisions in the past and in other parts of Africa without comparing it to our situation at the present point in time. Here in Namibia we, at this point in time, have a constitution which is the Supreme Law. This law was contributed to by the representatives of all the people of Namibia, including the whole international community through the United Nations and through the so-called Western Five.

There is no justification to distinguish in the Namibia of today between the law of the white person and the black person as had been done so condescendingly in several decisions of the Courts in colonial days and there is even less reason to do so in the case of the constitution of the Republic of Namibia.

There is also no justification to regard the majority of the indigenous population as innocent and ignorant children of nature.

The constitution of the Republic of Namibia, in Article 78, clearly provides for the Supreme Court, the High Court and the Lower Courts of Namibia to exercise the judicial power. These courts jointly exercise the judicial power in the whole of Namibia. Magistrate's Courts are established and functioning in every part of Namibia and known to all

Namibians.

Article 12 of the Namibian Constitution provides for a fair trial whenever a person's civil rights and obligations are determined, as well as when a person is charged with crimes and criminal offences.

Such persons are entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law.

It follows from the above, that trial by witch doctors are not only outlawed by the constitution, but is a barbaric and inhuman practice, totally in conflict with the norms and values of the Namibian people, as evidenced and entrenched in such constitution.

Everyone in Namibia today knows that they cannot rely on witchcraft to kill any par .sou.. That *is* not in dispute. The decision that I have for instance referred to and many others are to the effect that people believed that they could take the law into their own hands and really kill and injure people in accordance with their belief in witchcraft and/or on the mere intimation by the witch doctor of the guilt of a witch, without trial.

Furthermore this country has been intensively politicised over many decades with extensive international involvement. It is a big country but with a small population where ideas and the rights or wrongs of actions and beliefs may travel

faster than in some other parts of the world. Certain practices relating to witchcraft have not only been outlawed in Namibia for many decades even before the Namibian Constitution, but our constitution has outlawed any possible reliance on witchcraft practices relied on by the accused in this case as a justification for killing people.

The evidence of the witness, Erasmus, and all the others except the accused, are significant also in respect of the issue of how deep, how serious and how extensive is the belief in witches and witchcraft in the Kavango. I have accepted his evidence and those of the other witnesses that I have mentioned and it follows from that evidence that the accused are grossly exaggerating the so-called beliefs of the people of the Kavango and their own beliefs. If they were not grossly exaggerating it would not have been necessary for them to refer to incidents which have been proved by their own witnesses to be false.

This Court has a duty in terms of the aforesaid constitution, to protect the fundamental rights not only of accused persons, but also the victims of crime.
See: State v Van den Berg, supra.

Those fundamental rights include the right to life and of their bodily integrity and dignity.
See: Articles 5, 6. 7, 8. 12 and 25

The main means at the disposal of the Courts to protect the fundamental rights of the victims of crime, is to aim at

deterrence and retribution when passing sentence on persons who have been convicted of serious crimes involving the breach of the fundamental rights of the victims, with due consideration to the aim of rehabilitation of the convicted person and the personal circumstances of such person.

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

Similarly, a Namibian Court should not be satisfied by the mere say so of the accused. The allegations relating to witchcraft should in all cases be properly investigated to enable the Court to ensure that justice is done, not only to the accused, but also to the victims. Accused persons must also know that allegations relating to witchcraft will be properly tested in Court and in this manner accused persons will be discouraged from giving false testimony about the role of witchcraft.

Although this Court will still at the present moment give some weight to a genuine belief, if it is found to have existed in connection with a particular case, too much weight cannot be given in light of the reasons that I have already indicated. It is time that, if there is any further reliance in any part of Namibia on beliefs in witchcraft, that this Court must in future give sentences which will make inhabitants of the country understand that they will not be allowed to come with excuses and justifications such

as the present for heinous, cowardly and brutal deeds.

The unique feature of the case of accused no. 2 that I must emphasise, is that he is suffering at the present moment from full-blown AIDS. That means he must have been HIV positive for a considerable time. It is a scientific fact which no one in this Court will doubt, that persons in such a situation transmit the disease to other people with whom they have sexual intercourse. It is therefore quite possible that some of those ill in the family or even deceased, could have been infected by the same virus and could have been infected even by accused no. 1. When you have that situation in mind one is struck by the shocking injustice of killing an innocent old lady who was sleeping in her humble bed on the ground, who was dragged out and without being able to defend herself was sentenced to death without trial and beaten to death without mercy. I also hold it against the accused that, after beating this old lady, she was left apparently unconscious and dying in the middle of the night at the scene of the crime without offering any help.

Mr Metcalfe asked me to consider that accused no. 2 is a teacher or was a teacher at all relevant times. As a teacher he is a leader in his society, he is a leader of the youth and he is a person with some standing in his society. If such a person gives this sort of leadership that he has given, namely help to kill people, then rely for that on his belief in witchcraft, and then attempt to deceive the Court throughout, such a person should rather be dealt with more

harshly because he should know better and because he has abused his trust as a teacher.

In the case of accused no. 1 the Court is faced with a very difficult situation because he is, according to reliable medical evaluation, a dying person. I considered adjourning sentencing him and also the alternative of postponing his sentence until a specific date. I have come to the conclusion, however, that it would be more appropriate not to express final sentence on him today. If it was not for this very unique situation with which the Court is faced, I would probably have imposed a sentence in the region of 20 years imprisonment. However, for the reasons I have stated, I am going to postpone sentencing him on certain conditions.

Before I conclude, I must express my appreciation for the contribution made in this case by all counsel that appeared before me.

In the result, I make the following order:

Accused no. 1: Your sentence is postponed to the 9th February, 1996 and you are released from custody in the meantime on condition:

1. That you appear on the said date at 10 am. in this Court for sentence unless your state of health justifies your absence.

2. That in view of the danger of transmitting your disease

to others by sexual intercourse, you are prohibited from having sexual intercourse with any person, whether or not you take measures such as using condoms, during the period from today up to the 9th February, 1996.

Accused no. 2: You are sentenced to serve 7 years imprisonment.

O'LINN, JUDGE

FOR ACCUSED NO. 1: **ADV J D POTGIETER**

From Legal Aid Directorate

FOR ACCUSED NO. 2 : **ADV R N METCALFE**

Instructed by Legal Aid Directorate

FOR THE STATE: **ADV L H DU PISANI**