

STATE
versus
TITUS MAFUKA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE 19, 20 October, 14 & 17 November 2017

Assessors: 1. Mr Mhandu
2. Mr Shenje

Criminal Trial

Mr HM Muringani for the State
Mr M Nkomo for the accused

TSANGA J: The accused's counsel raised a preliminary point in his closing submissions that the accused, in this criminal trial, did not receive a fair trial because counsel had requested a postponement when the trial started on the 19th of October 2017. The correspondence on file indeed confirms he had received the file ahead of time and had written to the Registrar on the 25th of September confirming appointment as *pro deo* counsel. He had also requested that the accused be availed to take instructions from him so as to prepare his defence outline. The accused had not been availed.

Indeed the accused should file a defence outline in terms of s 66 (6) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and where an accused is legally represented, this should be done at least three days before the trial in terms of s 66 (8) of the same Act. However, it often happens as in this case, that the accused is not available to his defence counsel for whatever administrative reason until the date of the hearing. It is often not the fault of the defence counsel or the prosecutor. In such cases, the court is always magnanimous about such situations as happened in this instance, allowing the matter to be stood down for a few hours to enable the defence to consult with the accused and obtain his defence.

In casu, I stood the matter down from 10:00am when it should have started, to 2:30pm that same day. Both counsel, however, ultimately opted to proceed with the matter at 12 noon as the defence counsel was through by then with taking the accused's defence instructions. The defence outline was presented orally and read into the record with the court further agreeing that the typed version could be filed later that day or early the following morning.

It is the refusal of a lengthier postponement which the court declined and which the accused's counsel takes umbrage with. Let me state categorically that if the court were at every request to give lengthy postponements of the kind defence counsel had in mind, these criminal trials would simply not take off. This I made it clear to defence counsel at the time. The complaint itself reveals a lack of appreciation of how the criminal roll functions in that once a matter which has been set down for hearing on given dates, removal from the roll or postponement for whatever reason at the eleventh hour ultimately means that new dates have to be allocated. It is not the judge who allocates the dates as the roll is continuous. When a judge is told that very morning, alas, a few minutes before the trial is about to commence, that a postponement is required by the defence to fully prepare, there is no way that the roll can be juggled with to deal with another matter. The state witnesses will already have presented themselves on that day for the matter on the roll and moreover many will have come from very far away and made great sacrifices to be available. Delays can therefore cause inconvenience which spills over into the availability of many parties. In addition, delays can thereafter spill over into another term or two or even years before the matter can be set down again. Delays can also weaken faith in the justice delivery system for justice delayed is justice denied. Ultimately of course the accused should be availed timeously by relevant authorities when requested by his counsel for the smooth operation of justice. Where the accused's counsel has written a letter to the Registrar requesting an accused to be availed for defence interview, the defence counsel still has a duty to vigorously pursue his correspondence to ensure that this is done.

Be that as it may, suffice it to say that since the accused as in this case will generally have had more than a year, if not longer, to mull over his defence, standing down the matter and allowing defence counsel a few hours to consult and take down the defence in order for the trial to go on is not unreasonable. Counsel concedes that he had indeed received the file well in advance. As such he was already familiar with the State allegations and the State summary of its witnesses. What was needed for the trial to commence was accused's defence

outline. Once the outline is given, it is the responsibility of the lawyer do their best for the accused. It is not the role of the judge to equip counsel with confidence, depth or skills in argument by delaying the matter until counsel feels confident to go ahead. If the lawyer needs to stay up all night on the days allocated for the trial in order to make solid arguments, then so be it. The preliminary point lacks merit and is accordingly dismissed as diversionary.

I will now proceed to the gist of the matter before me.

The accused, Titus Mafuka, was charged with one count of attempted sexual intercourse within a prohibited degree with his mother and one count of murder of his mother, Grace Kadzondera whom he is said to have strangled. These charges arise from factual circumstances fuelled by beliefs in witchcraft in that the accused believed that his mother was bewitching by having sexual intercourse with him in the spiritual realm. He believed particularly that she was responsible for his ailment involving his sexual organ. He pleaded not guilty to both counts. His defence relating to the first count, was that he never attempted to have sexual intercourse with the deceased but had merely confronted her about why she was sexually abusing him through unnatural means. He denied ever touching her on the day in question and put the State to the strict proof of that allegation. As regards the second count of murder, he denied strangling the deceased and said he had been forced by the police to admit to the offence after five days of continuous assault by detectives whilst detained at Mutawatawa Police. He said he had left her alive and well when he had gone to seek management of his condition from prophets stationed at his in-laws' residence in Mutoko. He was shocked when the police picked him up for a charge of murder. He therefore prayed for a verdict of not guilty on both counts and an acquittal.

The post mortem report which was admitted in evidence showed that the body was totally decomposed by the time it was brought for a post mortem. The deceased had been discovered a week after her death. As such, the cause of death on the report was captured as unascertained due to decomposition. The report noted that the police were to investigate the cause of death. Also admitted was the accused's warned and cautioned statement together with the procedural record of confirmation of that statement. The responses to the questions asked therein confirmed that the statement was indeed made freely and voluntarily. It was date stamped the 14th November 2016 by the magistrate. The translated statement in English captured from the accused himself, the events surrounding the two charges as follows:

"I have understood the caution for the offence and I admit the offence as charged. It was on Thursday 27th October 2016 in the morning when I woke up and discovered that my penis was ashen with sperm. I then approached Grace Kadzondera my mother and asked her why she continuously used black magic (*mubobobo*) to have sexual intercourse with me whilst I

was asleep as reported to me by a prophet. She admitted and indicated that it happens whilst she will be in a trance. I then spread a reed mat and advised her of my intention to have sexual intercourse with her during the day and not to visit me at night but she refused. I called my wife Lucia Kamhindi who entered the house where we were and advised her that Grace Kadzondera had become my senior wife since she used me for her husband. I told the deceased to slaughter a chicken for me as her husband and she slaughtered a cock. I left the chicken being cooked by my wife and went to Nyepanai Matimura's homestead where I bought four twists of *dagga* for one dollar. I smoked one twist still at Matimura's home and returned home when people had finished eating. At home I smoked another twist of *dagga* before eating and then slept. On the following day around 5 in the morning I woke up and smoked another twist of *dagga* whilst outside. After smoking I got into the house in which the deceased slept and strangled her. The deceased woke up and tried to set herself free but I kept on pressing her. At that moment, my wife arrived and peeped and I noticed it. I ordered her to leave and she returned to the house we were sleeping. When I noticed that the deceased had died I went to the house where my wife was and advised her to prepare so we could escape. After that we went to Sowa to collect payment for my cattle from Kapfudza. We left that place going to Chindoko area in Mudzi. That is where I was arrested.”

It is this statement that the accused now says he was coerced into signing by the police. Much of the evidence from the state witnesses was admitted in terms of s314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The facts which are not in dispute are those relating to the witchcraft allegations against the deceased and the various processes that unfolded at the community level in dealing with these allegations. The point of controversy which is whether or not the accused strangled the deceased as a result of those allegations. He says he did not whilst the State says he did. Whilst this court could very easily and briefly take the dispute from this point on the lack of consensus, in cases such as this involving witchcraft allegations, it is nonetheless expedient to give the full background facts for a number of reasons. Our law in Zimbabwe recognises beliefs in witchcraft as having a mitigatory impact on a crime such as murder which the accused is facing in this case. In other words, the court has to pitch its approach in such cases bearing in mind the mentality and belief system of the accused. As such, detailing the surrounding circumstances of the offence helps to shed light on the intensity of those beliefs in order to for the court to make an informed assessment as to their weight in mitigation. A detailed background narrative also makes for a careful assessment of the defences that are often put forward, if any, by persons accused of committing such murders in circumstances where the belief that they were being bewitched is central.

In addition detailed background facts also play an important secondary role beyond the accused himself. They enable not just the courts but other players in society to appreciate the multitude of dynamics at play that continue to fuel these beliefs in witchcraft. This is because what is often also apparent from the factual details in such matters is how those in

quest of power within societies build on people's weaknesses to maintain their power. Furthermore, in a context where we are trying to give everyday day meaning to constitutional values as enshrined in our Constitution, it is often cases such as this that help to unearth for ordinary people the meaning of crucial concepts such as freedom from cruel or unusual punishment or the meaning of and the significance of due process of the law. It is against the backdrop of these factors that the facts in this case are laid out. As fully as possible as unwrapped to the court.

The state's factual evidence

The state led direct evidence from two witnesses namely Lucia Kamhindi the accused's wife and Hardlife Maronga the investigation officer.

Lucia Kamhindi

Her evidence was that the accused and one of their children were not feeling well. The child had diarrhoea while the accused suffered pain in his penis. It was swollen and the veins were also bleeding. He had had the condition for about three months. He had sought medical attention at the clinic and the hospital but had not improved despite the injection and tablets that had been administered to him. The deceased had gone to prophets who had fingered his mother whom they said was causing his illness. She had accompanied the accused to a prophet, one Chiutsi, in Mt Darwin who had purported to remove some things from the accused that looked like worms. Still he had not recovered. They had proceeded to see the village head and the accused had told the village his ordeal. His mother who had gone away for some days had been called and when found had been asked about the allegations. She had denied the allegations. The village head had suggested that they see the headman and had narrated the accused's story to him. The headman had remarked that it was not the first time that the deceased was being labelled as a witch as the same allegations had been levelled after her husband died. Her relatives were also said to be dying. The headman had then phoned a prophet to come and he had done so that evening. The prophet had prayed for the child and administered some potions. He had then started prophesying about deeds of witchcraft and in particular had stated that there were certain spirits that possessed the now deceased which she took to be those of a spirit medium when she was in fact possessed by the spirit of a python. The now deceased was advised that they were certain things in her house that needed to be removed. The prophet also said the child was sick on account of his father's illness. The accused at the time was told he had 72 hours to live.

The witness told the court these particular events happened about a month and some weeks before the now deceased's death. The prophet had also indicated that he wanted the deceased to remove certain things in her possession as it would solve the problem. The headman had phoned the councillor to arrange villagers to gather. The following morning the prophet had come and had stated that he would give instructions whilst the deceased would remove the things herself. She had produced two knobkerries, two wooden plates, and a winnowing basket which she said carried eight people when asked by the prophet. She had also produced a shell of a tortoise. She was told by the prophet that she had 12 incisions on her shoulders as well as on her buttocks. The persons feeling the incisions were also told by the prophet to feel under her navel as there was something moving. They were told to press inside so that whatever it was would retreat. The deceased had also been made to open her mouth and those doing the physical check had been instructed to press hard where the nose and mouth meet. They were also told to check if any tooth was longer than the other and told press down any protruding tooth. The deceased had also been told by the prophet that she had in her the blood of a child that she had miscarried.

She had been further told that she had a cat which was abusing male villagers in the dead of the night as all male villagers would dream of being in the company of beautiful girls. The villagers who had gathered had been asked if they had any desire for their wives to which they had resoundingly answered that they did not. The deceased had been asked for the cat but had said the cat belonged to her friend. The young men had been given prayer portions to use at a certain place where they were told they would see the cat. They were instructed to kill it and burn it. The now deceased had then been asked to name the people she had killed and she had mentioned her husband, some relatives as well as three people who used to welcome the spirit medium which she believed possessed her. The deceased had then been asked to sprinkle water on her son and the sick child whilst declaring that she would no longer consume them. The witness however told the court that the deceased was not saying any of this freely and voluntarily but because she had been told by the prophet that it was as it was. In other words, the reality was as dictated by the prophet. The headman had concluded that she the deceased was supposed to pay two cows and two goats. The deceased had accepted the ruling. She had paid the two beasts but had said she no longer had any goats.

Despite these elaborate cleansing endeavours the accused's affliction had continued. The headman had told the deceased that he no longer wanted her in the village and he was going to assist her to find another place to reside. A Mrs Elina Mbofana had in the meantime

been recommended for the accused's further treatment and had indeed been visited by the parties in the company of the headman's aide. She too had removed some "things" from the accused and the two children. The accused had been told to buy milk, lemons, and a coke. He drunk the liquids. In addition, items such as pills and pieces of bottle were said by this prophetess to have been removed from him. She had declared that she was unable to remove some things because they were at the deceased's homestead and had gone to the deceased's home for cleansing in the presence of the village heads' aide and the villagers. There, a black purse wrapped in a black cloth, a blood stained knife and a bottle with blood, a horn wrapped in a red cloth, and a tail of an unknown animal had all been brought out by the deceased. These had been burnt. The now deceased was then told not all amulets were there and she said the rest of the stuff which included a goblin were at her friends place. The deceased had however refused to reveal her friend's identity. The prophetess had expressed annoyance at the fact that having come all the way to help at the now deceased's own request, certain items had been held back. She had gone away and stated that the now deceased would come alone when ready to cooperate.

In the days following this set of events the deceased had complained of sleepless nights and bodily aches which she attributed to the amulets she had remained with. The prophetess Mrs Mbofana, had steadfastly refused to return. The deceased had asked the accused to call the village head so she could tell him of the remaining amulets and artefacts and also reveal her companions. She revealed too that she was now ready to turn to the Christian faith.

The accused was asked by his mother to go and call the village head so that she could tell him of the things that had remained. The village head was not at home but his older brother had come but on hearing the matter had said it was best for the village head to attend to the matter himself. They had gone back later to see if the village head had returned but he was still not there. They had gone to the village secretary's house where she had revealed that she conducted her activities in the company of two friends. Thereafter the witness said they had proceeded to her sister-in-law's house where the accused explained that he had brought his mother to fully explain her witchcraft activities. She had confessed.

When they got home the deceased had demanded an explanation of how exactly she went about having sexual intercourse with him when he was asleep. The now deceased had explained to him that she would come with a gourd and that it would look like a woman. She would then place it on the accused person. The accused would wake up and she would be

seated beside. He would start fondling her and intercourse would occur. She also said that she would use the goblin to ensure that the accused and his wife had no attraction or desire for each other. At these revelations the accused had become angry and had threatened to crush her with a stone for abusing him and making his life miserable. The witness had asked him to desist and instead discuss the issue properly.

He had asked her why she did not just sleep with him openly and it was then that he had spread out a blanket on top of a reed mat and told her he wanted her to do it openly instead of abusing him whilst he was unaware. The witness again asked to him to stop it and was ordered by the accused to go outside. He had closed the door whilst she and her children sat outside. She could however hear their conversation. The accused had told the deceased that as he had undressed, she too was supposed to do so. The accused had later called the witness inside and she had observed that he was wearing his under wear (boxer shorts) and had his hand wrapped around the now the deceased, his mother, and had placed one of his legs on her. At this point he was also calling her by her first name and telling her she was now his wife. He had instructed the now deceased to tell the witness that she was the cause of his failure to sleep with her and the deceased had proceeded to state so. When in so doing as instructed the now deceased had referred to the witness as her daughter-in-law the accused had corrected her and said that she the now deceased was the elder wife and the witness, his wife, was his second wife. The witness had protested that she was not interested in the kind of talk they were having and the accused had sworn at her and commanded her again to go outside.

Whilst outside she had heard the accused state that he was now in a lying position and was waiting for her. The accused's older brother at that point had come by and had heard the commotion himself whilst outside. He was aware of the allegations. He had however not intervened and had merely asked her if she had seen his cattle and had proceeded on his way. The accused and his mother had then come outside and he had instructed her to kill a cock and thereafter she was supposed to cleanse his male organ. The accused had then left to buy dagga and had returned with five twists. He had smoked one. According to the witness he had remained unaffected by the dagga as he was the same before and after he had smoked it. He was not new to the dagga. The cock had been cooked as instructed. The witness had tried to ask the now deceased if what she was doing to her son was right. She had basically been told to mind her own business and not to interfere. They had then gone inside and gone to bed. In the morning the accused had lit up another twist. She had then heard an unfamiliar groaning

and puffing sound from the now deceased's hut and had gone out and called out to her thrice. She had not responded. She had then pushed the door with the intention of seeing what was happening inside. She was unable to fully open the door because the accused was at the door. She had however managed to see that the accused had his hands on the now deceased's neck as one could see through the poles of the hut as the mud had fallen off. She could also hear that the now deceased was passing wind (farting) from the grip on her throat.

After throttling the now deceased the accused had gone to release the cattle from the cattle pen and the witness had used this opportunity to check on the deceased and she had found her sprawled with one hand behind her back and another spread out. The accused had told her to quickly pack up as they were leaving. They had left and the deceased had indicated that he needed to collect money from one Kapfudza whom he had sold a beast. They had also gone to see someone for cleansing and several days had been spent there. The accused had then stated that he was going to leave her at her parents' house as he wanted to go and mine for minerals at a certain mine. On the way to her parents' house they had passed through to see the accused's brother who had then asked if they were unaware that the accused mother had passed away. The accused had simply remarked that those there should bury her as she had been trying to kill him. When they got to the witness's sister residence she had tried to phone her sister-in-law with the phone they had bought but the accused had grabbed the phone from her and had switched it off. When her sister-in-law had tried to reach her on her own number, the accused had attended to the call himself and she could hear him giving harsh responses to his sister. It was whilst at her sister's that the accused had been arrested. She could however not remember the actual date.

She explained in cross-examination that the accused's character was such that he would not listen to anyone and that is why even though the brother had heard the attempted sexual intercourse himself, he had not done anything. He had a hot temperament towards not just her but all his relatives. She had not reported the strangling to neighbours because immediately after the act the accused had ordered them to leave the premises. She also explained that she was afraid of him. She had also not told his relatives because the accused had threatened her that if she did it would be the end of her. She denied the assertion that the police had threatened her with lengthy incarceration and emphasised instead that the accused had voluntarily confessed himself.

She also clarified to the court that the accused had been told at the clinic that he was suffering from a sexually transmitted disease which had affected his stomach. In fact after the

deceased had been killed the accused had actually been hospitalised for his condition whilst in custody and she had visited him there. She also told the court that the things that were removed by the now deceased from her house during the cleansing process were things that she used as a spirit medium.

Hardlife Maronga

Hardlife Maronga who was the Investigation Officer on the matter also gave evidence. He was allocated the case on 6 November by the officer in charge of criminal matters. On the 7th he had taken the body for a post mortem but it had been said by the doctor to be too decomposed. By that time he had received information that it was the accused who had committed the offence. On the 8th of November they had interviewed Lucia Kamhindi who had revealed that she had seen the accused strangling the deceased. She had been taken for indications and had voluntarily made indications on how the accused had committed the offence. Photographs from the indications were produced as exhibits. On 9 November the accused had been interviewed in connection with the case. At first he had denied but had later admitted. The officer had recorded the warned and cautioned statement from him and had taken the accused for its confirmation. On the 10th of November he had taken the accused to the scene of the crime where he freely made indications as to what had taken place.

As for the accused, his own version corroborated that of the wife's evidence save for the strangulation which he denied. There is therefore no need to repeat the materiality of that evidence on which there is consensus.

LEGAL AND FACTUAL ANALYSIS

Attempted sexual intercourse within a prohibited degree

Section 189 (1) and (2) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] provides as follows with regard to an attempt to commit a crime.

189 Attempt

(1) Subject to subsection (1), any person who

(a) intending to commit a crime, whether in terms of this Code or any other enactment; or

(b) realising that there is a real risk or possibility that a crime, whether in terms of this Code or any other enactment, may be committed;

does or omits to do anything in preparation for or in furtherance of the commission of the crime, shall be guilty of attempting to commit the crime concerned:

(2) A person shall not be guilty of attempting to commit a crime if he or she changes his or her mind and voluntarily desists from proceeding further with the crime before he or she has taken any substantial step towards its commission.

Section 189 (2) is therefore clear that where a person changes their mind and desists from further proceeding with the crime, this must be before they have taken any substantial steps towards its preparation. The accused's argument is that Lucia Kamhindi did not actually see him attempting to have sexual intercourse and that she only claimed to have seen him in his pants. He argues that this is insufficient to sustain a charge. The context in which she had come to see him in his pants was fully related to this court. Her evidence was clear that he had spread a blanket on the reed mat in preparation. When she had been called inside, her evidence was clear that the accused had one leg wrapped around his mother and also that he was holding her by the waist. The facts in our view adequately speak for themselves that the accused had in fact made all the preparations in an endeavour to have sexual intercourse with his mother.

Even if she was ordered to go outside she was adamant at all times that she could hear what was taking place inside the hut. She was also clear that when her brother-in-law came, he was able to hear for himself the dispute between his brother and his mother. The fact that the brother did not take action is not the point. The accused's problematic and often violent temperament where he listened to nobody was also told to the court. Culturally, his preparatory acts are in themselves shocking and an anathema. Even his act of ordering her to cook a cock for him because he was now her husband is culturally disturbing and his utterances that his mother was now his wife and his own wife was now his second wife are even more so. It is hard to see how all the evidence put together can be said to fall short of showing that he did attempt to have sexual intercourse within prohibited degrees with his own mother. Even if he ultimately did not ultimately go through with it, we were satisfied that he had made all the preparations in order to do so at the point that he stopped.

Accordingly our finding on attempted sexual intercourse within prohibited degrees is that the accused is guilty as charged.

The charge of murder

We found the evidence of Lucia Kamhindi to be credible and unshaken on what actually transpired that led to the accused strangling the deceased on that day. We believed her that she had in fact seen the accused strangling the deceased following her detailed

account of what transpired which the accused himself agreed with save on the strangulation. On this main charge of murder the accused states that Lucia Kamhindi's evidence is unbelievable because she failed to explain why she did not alert other people and that her confession came after being detained by the police for two days. In fact her evidence was very clear why she did not report to the police. The accused was in control of her from the very onset and had threatened her with death. Having witnessed him strangle his own mother as she said she did, surely it could not be expected that she would have taken his threats as an idle threat. She described to this court how he made her walk in front and how he took the phone away from her when she called her sister in law. As already stated his violent disposition was highlighted to the court. Under the factual circumstances, it is no surprise at all that soon after he had committed the offence the accused took every step to ensure that she remained under his control. The fact that she failed to report immediately therefore cannot be held against her. Cases where witnesses to killings are threatened and prevented from reporting are not uncommon – not least of all in this case where the witness was an intimate partner over whom the accused had immediate control.

The argument that she should not be believed because in the one year period following the accused's arrest she has since fallen pregnant also makes little sense. She has not come up with any new story regarding the accused's actions. We were also mindful in this regard of the fact that her version of what happened was told to the police a very short while after the murder and that the accused's own warned and cautioned statement to the police was equally made within that time frame. Zeroing in on her pregnancy which has clearly occurred several months down the line and has nothing to do with the case is therefore a distraction and constitutes unnecessary noise in the narrative which need not detain us. It merely exemplifies the different sexual standards that men hold women to which they would never observe themselves under the same circumstances. We had no difficulties with Lucia Kamhindi's evidence on account of this or in any regard for that matter. No woman or man for that matter who witnesses their spouse strangling their own mother could be reasonably faulted for putting an end to that relationship and moving on. She should not be held to a different standard just because she is a woman.

It is also argued that the deceased who had complained of not feeling well and could therefore have died from other causes. The evidence in no way suggested that her illness was critical. True, she would have been driven to despair by the accusations since in reality a person accused of being a witch often stands no chance against those making the accusations

of witchcraft. In any event the real issue is that there was a witness who was able to tell the court what had happened to her. The court believed Lucia Kamhindi who was able to tell the court fairly and squarely what actually had happened to the deceased and how she met her death. We believed her evidence. She was steadfast even when counsel for the accused tried to shake her with irrelevant issues.

The evidence of Hardlife Maronga was also said to be porous on the grounds that having seen the accused two days after his arrest he could not say with certainty that the accused had not been assaulted. In his evidence he stated that the accused was arrested on the 7th of November. Accused's counsel put it to him that the accused had been arrested on the 6th of November 2016. Lucia Kamhindi herself could not remember the exact date but definitely told the court that on the day in question the police had come at night after 9pm and had had to wrestle the accused before they managed to arrest him. We are not told how long the process took. Suffice it to observe that if indeed it was the 6th it was very late on that day when the accused was arrested. It is therefore not correct to say that he was interviewed for four days before he was brought to court. If he was brought to court on the 9th then this was before the end of the first day of the expiry of the 48 hours. This cannot be said to be wholly unreasonable as he could not have been brought in the middle of the night.

It was also argued that the accused had only admitted to killing his mother after intensive questioning and assaults by the police. The State on its part emphasised the fact that the warned and cautioned statement had been confirmed and that the accused had not raised any issues relating to assault or impropriety at the time. Section 70 (3) of the Constitution Amendment (No.20) Act 2013, provides for the rights of accused persons. It states that any evidence obtained in manner which violates the tenets of the Constitution must be excluded if the evidence would render the trial unfair would otherwise be detrimental to the administration of justice or public interest. Clearly, the apt opportunity for an accused to challenge a statement which he says he made involuntarily is at the confirmation proceedings of that statement. Notably the record of proceedings of the confirmation procedure was availed.

It was not put to the investigation officer when he was still available on the witness stand that he was actually present in court when the confirmation proceedings were carried out. This emerged from the mouth of the accused only in cross examination well after the investigation officer had given his evidence. The record of the proceedings was availed. The first instruction to be observed by the confirming Magistrate reads as follows:

“IMPORTANT: If any member of the police force who recorded or assisted in the recording of the statement is present in court, request such person to leave the court during confirmation proceedings”.

It is hard to imagine that the Magistrate would have overlooked such a vital instruction. The questions were asked by the Magistrate whether the statement was made voluntarily and the accused himself affirmed positively. Given the failure by accused’s own counsel to put forward the vital allegation that the officer was present when the Investigation officer was on the witness stand, this court comes to the conclusion that the accused deliberately seeks to now distance himself from the statement for obvious reasons of avoiding responsibility. The court does not take the proceedings for granted where allegations of impropriety are made. But they must be credible otherwise in terms of s 256 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], such a statement which has been confirmed is admissible in a court of law on its mere production by the prosecutor.

There was no evidence led by the accused that the statement was not made freely and voluntarily other than his mere say so of allegations of assault which he makes well after its confirmation. It is not unusual for accused person who have confirmed their statements to then turn around at the trial after spending time in custody among other inmates and having exchanged details of how best one can try to beat the system on procedural grounds. Significantly, the evidence in the warned and cautioned statement corroborates the evidence which was put before this court regarding what transpired which the accused himself detailed with similar accuracy. What he now seeks to change is the material aspect of the strangulation. His denial is simply not credible. In the final analysis is the fact that the accused strangled his mother under circumstances where his belief in witchcraft led to the commission of the offence in question. This is what this court must engage itself with.

In terms of s 99 of the Criminal Codification and Reform Act [*Chapter 9:23*] it is only an offence to call someone a witch if the accusation is made of groundlessly. In other words the law takes witchcraft to be a reality. However, s101 states that belief in witchcraft shall operate in mitigation and not as a defence to crimes. It is couched as follows:

101 Belief in witchcraft to operate in mitigation and not as defence to crimes

It shall not be a defence to murder, assault or any other crime that the accused was actuated by a genuine belief that the victim was a witch or wizard, but a court convicting such person may take such belief into account when imposing sentence upon him or her for the crime.

The real issue is whether the accused was guilty of murder with actual intent. To the extent that the accused believed in witchcraft then that can only be a factor that is taken into account in mitigation. Whilst self-defence and provocation are often relied on to negate *mens rea* or to mitigate the sentence, *in casu* the accused relied on an outright denial of the charge despite his admitted warned and cautioned statement which showed that he committed the crime. The case of the *S v Hamunakwadi 2015 (1) ZLR 392 (H)* at 393 lays out the circumstances under which an act would be deemed sufficiently provocative as a defence in witchcraft cases. These principles are stated thus:

“The basic elements required for a successful defence of witchcraft provocation should be: (a) the act causing death must be proved to have been done in the heat of the passion, that is, in anger; fear alone, even fear of immediate death, is not enough; (b) the victim must have been performing, in the presence of the accused, some act which the accused genuinely believed, and which an ordinary person of the community to which the accused belongs would genuinely believe, to be an act of witchcraft against him or another person under his immediate care; (c) a belief in witchcraft *per se* does not constitute a circumstance of excuse or mitigation for killing a person believed to be a witch or wizard when there is no immediate act of provocation; (d) the act of provocation must amount to a criminal offence under criminal law; (e) the provocation must be not only grave but sudden and the killing must have been done in the heat of passion”.

It cannot be said that he faced any immediate provocation at the time when he strangled her. There was no overt act to which he reacted on sudden impulse. Whilst he was incensed by her failure to surrender everything to the prophet who had come to do the cleansing he had not at all acted in the heat of the moment. The accused whom we are told usually smoked dagga had gone out to buy his dagga which smoked. He had come home, eaten his supper and gone to bed. It was in the morning when the deceased was still asleep that he had pounced on her by strangling her. He had clearly deliberated on how he was going to kill her and had proceeded to take action as per his plan. There was nothing which showed that he smoked more than usual as put out by his defence counsel. In *S v Ndlovu & Anor HB98-15*, the accused persons killed an elderly 62 year old woman whom they believed to be a witch by strangling her. One of the accused as *in casu* had also smoked dagga before carrying out the act. The court found them guilty of murder with actual intent. Indeed whilst beliefs in witchcraft can ultimately act in mitigation, the mitigation value ought always to be assessed against the facts of the case. The defence argument that at most the accused should be found guilty of culpable homicide cannot hold. Applying pressure to the neck evidences a clear intention to kill. The accused's is clear in his own statement that when the deceased had tried to resist he had kept pressing her down.

The facts as a whole show that the accused should have exercised healthy scepticism on what he was being told by prophets who were simply out to exercise power upon gullible villagers. The village head who ordered that two cows and two goats be paid and ultimately received two cows also had a vested interest in self-enrichment. Prophets are in fact at the centre of labelling others as witches thriving as they generally do on people's problems and naïve attitude to life. They would also be in rivalry with spirit mediums. It was the prophets whom he said he had consulted who were responsible for fuelling his beliefs that his mother was bewitching him. It boggles the mind that the accused would have seriously believed that pills, worms and bottles were being pulled from his body. Furthermore he also knew that his mother was spirit medium and would have had the amulets that were in her possession. The deceased would have had amulets because she was a practising spirit medium yet we see here how that evidence was quickly distorted to advance the conclusion that she was a witch. If anyone was equally broken to the point of believing that what she was being told she was, it was the deceased. Granted the deceased appears to have agreed that she was a witch but Lucia Kamhindi's evidence was clear that she was being told what she was and had no choice in the matter.

The fact that the accused ultimately recovered in hospital lends credence to the fact that right from the onset he was suffering from no more than a very advanced type of sexually transmitted disease. If courts simply agree to lesser charges on account of beliefs in witchcraft without an analysis of those beliefs against the facts presented in court, courts will not be doing anyone a service least of all those who rely on lack of sophistication for their beliefs. *In casu* we find that when the accused killed the deceased it was with actual intent. The verdict of the court on the charge of murder is therefore guilty of murder as defined in s 47 (1) (a) of the Criminal Code.

Sentence

The accused in this case is said to be a 36 aged first offender with five minor children. This court also takes consideration the accused's belief in witchcraft albeit bearing in mind as has been discussed, the weighting to be accorded to its mitigatory value in light of the facts of the case. The fact that misfortunes especially illnesses, continue to be ascribed to witchcraft as the cause, also points to the need for the State to be far more proactive in raising awareness about the cause of diseases instead of encouraging or promoting beliefs that can lead to loss of life. In aggravation is the wanton loss of life and the absence of an immediate act of provocation at the time of the murder even if there was a belief in witchcraft.

In *S v Ndlovu & Anor* HB-98-15 for example the court found the accused guilty of murder with actual intent and sentenced the two accused in that case to a term of imprisonment of 30 years. However, looking holistically at other cases of murder fuelled by a belief in witchcraft, the sentences show variance depending on the facts of each case. As stated in the case of *S v Ndhlovu* 1971 (1) SA (RA) 27 at p 31 ultimately in imposing sentence in such matters the court ought to be guided by sentences imposed in similar cases, allowance being made for factual differences. Furthermore, the aim of a stern approach to sentencing in such cases is to prevent others from committing the excesses to which the indulgence in the belief in witchcraft often leads.

In *Joshua Mhlanga v The State* AD 27-81 a sentence of 15 years murder and five years for another count of attempted murder was upheld. In *Alimani v The State* AD 117-77 a sentence of death was altered to 15 years imprisonment on account of the accused's advanced age and the recognition that the 15 year sentence would approximate to life imprisonment. The accused in that case was deemed to be between 65 and 72 years old. In this instance the court considers a 20 year sentence to be appropriate for the count of murder taking all factors into consideration as discussed comprehensively in the case.

On the count of attempted sexual intercourse within a prohibited degree, notably the Criminal Code in s 75 (1) imposes a fine up to or exceeding level fourteen or imprisonment for a period not exceeding five years or both where the actual offence has been committed. *In casu* where there was an attempt but not the actual commission of the offence, a sentence of no more than two years imprisonment to run concurrently with the count on murder would seem appropriate. Accordingly the accused is sentenced as follows:

On count one: 2 years imprisonment to run concurrently with the term of imprisonment in count two.

On count two: 20 years imprisonment.

Actual term of imprisonment: 20 years