

SOUTH AFRICA / JUDGMENT

# S v Ganadi (29/84) [1984] ZASCA 81 (31 August 1984) [1984] ZASCA 81

## COURT

Supreme Court of Appeal

## BEFORE

Rabie, Miller, Van Heerden, Galgut, Vivier

## CASE / FILE NUMBER

29/84

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/MC

NCAMSILTLE GANADI

- and -THE STATE VIVIER AJA.

Case no 29/84 /MC

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between

NCAMSILILE GANADI Appellant

- and -

THE STATE Respondent

Coram: RABIE CJ et MILLER, VAN HEERDEN JJA GALGUT, VIVIER AJJA.

Heard: 16 August 1984.

Delivered: 31 August 1984.

## JUDGMENT

VIVIER AJA.

The / ....

2.

The appellant, a Black man aged 26 years, together with one Madoda Rala appeared before PICKARD J and two assessors in the Supreme Court of Ciskei, on a charge of murdering Selinah Mneke on 21 July 1982. Rala (who was No 2 accused at the trial) was found not guilty and

discharged, but the appellant was found guilty of murder and, no extenuating circumstances having been found, he was sentenced to death. With the leave of the trial Judge he appeals to this Court against the finding that there were no extenuating circumstances. The issue before the trial court, and again on appeal, was whether the appellant's belief in witchcraft constituted an extenuating circumstance under the particular circumstances of this case.

The /

3. The deceased, a Black woman aged 40 years, lived alone in her house in a little village, referred to at the trial as Sandile Location, near Chalumna in the Ciskei. The appellant grew up in this village, but at the time of the deceased's death he and his parents had moved to Mdantsane which is some 120 km away. The deceased was killed under the following circumstances. According to the evidence of accused No 2, as well as that of his brother Vuyani Rala, who testified on behalf of the State, the appellant came to their house, which is near that of the deceased, during the early evening of 21 July 1982. He told them that he was on his way to the deceased to ask her for sour milk, which she was known to give away

free / ....

4. free of charge. He asked accused No 2 to accompany him, which he did. Inside the deceased's house the appellant, according to accused No 2, asked the deceased for sour milk. She replied that she did not have any. The appellant thereupon knocked the lamp from the table.

It fell on the floor and the light went out. The

appellant pulled out a long knife which looked like a

spear with which he attacked and killed the deceased. When accused No 2 tried to intervene, the appellant threatened to stab him as well - accused No 2 then ran home. He

testified that he heard the appellant say to the

deceased while attacking her, "Why are our friends

getting finished". According to the post-mortem

report, the deceased sustained 19 incised wounds of

the /

5. the head, chest and arms, of which 11 penetrated the lungs.

The appellant did not give evidence before his conviction. His version of the events of the evening in question, which Vuyani and accused No 2 denied when it was put to them in cross-examination, was that before going to the deceased's house, he told accused No 2 in the latter's house that the deceased was bewitching him and his family. Accused No 2 replied that the deceased had done the same thing to his own mother the previous week by making her ill. He and accused No 2 then decided to kill the deceased. Accused No 2 supplied two weapons; a large table knife and a dagger. Armed with these, they went to the deceased's house where they both

attacked

and / ....6. and killed her. Afterwards they returned to the house of accused No 2 where they hid the weapons in the ceiling of the house. The trial court found that the appellant was the person who did the stabbing and that it was not proved beyond a reasonable doubt that accused No 2 had taken any part in the deceased's death. The appellant was accordingly found guilty of murder and accused No 2 was acquitted.

The appellant testified on the issue of extenuating circumstances and told the trial court that he had killed the deceased because he believed that she practised witchcraft on him and other members of his family. The appellant said that during about

1974 /....

7. 1974, when he was still living in Sandile Location, his stomach started troubling him. It occasionally caused him to vomit at night. He also had nightmares in which he would see a vision of a female approaching him with her back towards him. He would wake up and scream and the vision would then disappear. He consulted a medical doctor who could not help him. He then consulted a herbalist who gave him medicine which only helped for a while. In 1981 he went to Johannesburg where, in November of that year, he consulted a witchdoctor about his problems. The witchdoctor told him that there was something in his stomach, called amafufenyane, which was the cause of his problems and which he would remove.

The / 8.

The appellant told the witchdoctor that his father was very ill, and that his sister had recently suffered

two miscarriages. Without being told about the deceased, the witchdoctor himself mentioned her name

as the person responsible for all their problems. He

advised that they leave Sandile Location. As a remedy

for his complaint, the witchdoctor gave him a rope to

wear round his waist. A knot was tied in the rope and he

was given a piece of hide and a piece of root to carry

inside the knot. This remedy proved to be successful as the nightmares and stomach trouble ceased. The witch= doctor also offered to cure his father if the latter was brought to him. His father did not go to the witchdoctor and his condition did not improve. His

sister /

9. sister died before his family moved to Mdantsane. The appellant testified that, as a result of the witchdoctor's advice, he informed his father that they were all being bewitched and that they had to leave Sandile location. His family moved to Mdantsane about 6 months before the deceased was killed. The appellant said that on the night that the deceased was killed, he spoke to accused No 2 in the latter's house before going to see the deceased. Accused No 2 then told him that his own mother had been ill the week before and that the witchdoctor believed the deceased to be responsible for her illness. After he had told accused No 2 about his family leaving the village in order to escape the deceased's witchcraft, he and

Madoda /

10. accused No 2 decided to kill the deceased.

Although it expressed a serious doubt about the truthfulness of the appellant's evidence generally,

the trial court appeared to have accepted that he killed the deceased because he believed her to be a witch, practising witchcraft on him and members of his family.

It is clear that an accused's genuine belief in witchcraft, which is directly associated with the crime which he has committed, may, depending on the circumstances, materially affect his blameworthiness and so constitute an extenuating circumstance. This is so because of the subjective approach to extenuating circumstances. See cases such as *R v Fundakubi and Others*, 1948(3) SA 810(A) at 819; *S v Nxele*, 1973(3)

SA /

- 11.

SA 753(A) at 757 A; *S v Modisadife* 1980(3) SA 860(A) at 863 C-D and *S v Ngubane* 1980(2) SA 741 at 745 D. When a murder is committed under circumstances such as the present, namely, where the victim is believed to have practised witchcraft on the killer or members of his family or even members of the community, as distinct from other cases such as the so-called ritual murders, it is the killer's fear of the victim which is usually relied upon as having induced the killing and as being a factor which affects the moral blameworthiness of the killer. In such a case it is the killer's fear of what the victim is believed to have done, or may yet do to himself or others for whose lives and safety he feels concerned, which is relied upon as having induced him to kill his victim.

In/ ....

- 12.

In *S v Ngubane*, supra, it was pointed out

by MILLER JA at p 745 G-H that a genuine fear of the victim is often the spur for killing the victim in this type of case, and that, in determining whether the killer acted under the influence of such fear, it is important to assess the degree of intensity of the killer's belief in witchcraft. The more intense such belief, the greater the sense of fear or apprehension it induces.

In the present case

the / 13. the appellant's fear of the deceased arose, according to him, from what the witchdoctor in Johannesburg told him in November 1981, which was some 8 months before the deceased was killed. His evidence that the witchdoctor himself first mentioned the deceased's name as the person who was bewitching him and his family, is totally unacceptable. The appellant also relied on what accused No 2 allegedly said on the night of the murder about his mother's illness. This evidence is doubtful in view of the evidence of both accused No 2 and Vuyani Rala that their mother had not been ill. The trial court was favourably impressed with Vuyani Rala and accepted his evidence. There is, on the other hand, the evidence of Nosekeni Mzoboshe that

Mododa /

14. accused No 2 told her two days after the murder that they had killed the deceased because she had killed his mother. This was obviously wrong as the witness added that she knew that accused No 2's mother was still alive. It is therefore very unlikely that he could have said this to Mzoboshe, and it would seem that this witness misunderstood whatever accused No 2 said to her. The trial court formed the same impression about the evidence of Mzoboshe.

In view of the appellant's unsatisfactory evidence

that the deceased was the person practising witchcraft on him and his family, and in view, further, of the evidence of the State witnesses and that of accused No 2

that the deceased was not known to be a witch but was

in fact a friendly, generous and kindhearted woman, it

seems /

15. seems doubtful whether the appellant in fact believed that the deceased was responsible for the witchcraft which was affecting him and his family. Even assuming that the appellant believed that the deceased was a witch, casting spells on him and members of his family, it does not seem that he acted under the influence of any great, or intense or immediate fear, whether in regard to his own health and safety or those of his family. The witchdoctor, whose advice he accepted, did not tell him that the deceased had to be killed in order to free them from the evil practised by her. The witchdoctor's advice was that they move away from the area where the deceased lived, which they did. The witchdoctor also advised

that /

16.that his father be brought to him so that he could be treated. As the witchdoctor's treatment of the appellant proved to be entirely successful, there is no reason why he could not have done the same for the appellant's father. No reason was advanced by the appellant why his father did not visit the witchdoctor. On his own evidence the appellant, at the time of the killing, believed himself to be immune from any danger, as a result of the rope he was wearing. In fact, he was still wearing the rope at the time of the trial which took place more than a year after he had killed the deceased. His father's condition had remained unchanged since leaving Sandile.

17.

The trial court's conclusion that the appellant's belief in witchcraft did not, on the facts of the present case, constitute an extenuating circumstance, was stated in the following words:

"Applying these principles to the facts of this case, one may well say that in this case, although the belief in witchcraft of this accused which in all probability did exist, may have motivated his offence, the nature of his fear - a fear for which he had very little reason to believe that the deceased was responsible and which was not an immediate fear and which could have been avoided by the fact that they moved away and the steps he allegedly subsequently took, would not have reduced the blameworthiness of his offence."

It was submitted on behalf of the appellant that,

in arriving at its aforesaid conclusion, the trial court misdirected itself in three respects. Firstly it was

submitted /...

18.

submitted that, in saying that the belief in witchcraft "may have motivated" the offence, the trial court was adopting a less favourable attitude towards the appellant's conduct than it should have, in view of its earlier finding that the appellant was in fact motivated to kill the deceased because he believed that she was a witch. It is quite clear from the trial court's judgment on extenuating circumstances, read as a whole, that it was prepared to accept that the appellant had killed the deceased because he believed that she was a witch. The phrase "may have motivated" in the passage quoted above does not, in my view, indicate that the trial court was now adopting a less favourable attitude towards the appellant's

conduct/

19. conduct. It was next submitted on behalf of the appellant that the trial court misdirected itself in finding that the appellant had little reason to believe that the deceased was responsible for his fear of witchcraft and for his troubles. For the reasons I have given, I agree with the trial court's finding and I cannot say that the trial court misdirected itself in any respect in arriving at this finding. Thirdly it was submitted that the trial court misdirected itself by failing to have regard to the fact that, although the appellant's fear might not have been an immediate one, it was still an existing one.

In / 20. In my view, the trial court did have regard to the fact that the fear was an existing one. The trial court, however, regarded this factor as insufficient to have reduced the moral guilt of the appellant. For the reasons stated above, I agree with this finding. It was finally submitted on behalf of the appellant that the trial court misdirected itself by failing to view the appellant's belief in witchcraft and his crime in the light of his background. In this regard we were referred to the fact that appellant lived in a relatively primitive and backward environment and that he had only passed standard three at school. These factors are all mentioned in the trial court's judgment on extenuating circumstances and no doubt

influenced / 21. influenced the trial court in its findings that the appellant believed in witchcraft. It was not submitted that the appellant's background, per se, constituted an extenuating circumstance. In my view there are no grounds for interfering with the finding of the trial court that there are no extenuating circumstances.

The appeal is dismissed.

W. VIVIER AJA.

RABIE CJ.

MILLER JA. Concur.

VAN HEERDEN JA. GALGUT AJA.

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Prepared on 10 October 2026 · Esheria