

SOUTH AFRICA / JUDGMENT

S v Tyolo (04/2024) [2024] ZAECMKHC 30; 2024 (2) SACR 39 (ECMk) (14 March 2024) [2024] ZAECMKHC 30

COURT

Eastern Cape High Court, Makhanda

BEFORE

Govindjee

CASE / FILE NUMBER

04/2024

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FLYNOTES: CRIMINAL – Sentence – Belief in witchcraft – Murder – Accused believed deceased used witchcraft to cause illness to his brother and decided to kill her – Attack was premeditated and perpetrated on an elderly female relative – Little to suggest substantial and compelling circumstances to deviate from prescribed sentence – Previous conviction for rape – No regret or remorse – Sentenced to life imprisonment for murder.

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

REPORTABLE

Case no: 04/2024

In the matter between:

THE STATE

and

LANDILE TYOLO

Accused

SENTENCE

Govindjee J

- [1] Witchcraft has been defined as the practice of using supernatural power for evil, to harm others or to help oneself at the expense of others.[1] Accused witches or wizards can be young or old, male or female.[2] According to Tebbe, anthropologists have found that communities tend to suspect members that are elderly, female, disabled, or otherwise marginalised.[3] Fear of witchcraft is widespread in South Africa, though measuring its

prevalence using rigorous empirical methods has seemingly not been attempted nationwide. [4] The proverb ‘umhlahlo ngamehlo’ (‘to kill someone while everyone is looking’), according to Mesatywa and Jordan, tells the story of the practice of earlier times and the treatment of persons suspected to be witches in a public gathering.[5] Some twenty-five years after the Commission of Gender Equality’s adoption of the Thohoyandou Declaration on Ending Witchcraft

Violence, crimes with undertones of witchcraft persist. Despite various calls and proposals, post-constitutional national legislation

to address the issue has not yet been enacted.

- [2] The Witchcraft Suppression Act, 1957,[6] (‘the Act’) provides for the suppression of the practice of witchcraft and similar practices. Any person who names or indicates any other person as a ‘wizard’ is guilty of an offence.[7] Where a person in respect of whom such offence was committed has been killed, imprisonment for a period not exceeding twenty years is appropriate for the commission of the statutory offence.[8] Murder, when the death of the victim resulted from, or is directly related to, any offence contemplated in ss 1(a) to (e) of the Act is an offence in Part I of Schedule 2 of the Criminal Law Amendment Act, 1997.[9] As is the case with murder when planned or premeditated, a discretionary minimum sentence of imprisonment for life is prescribed, unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.[10]

Nature of the crimes

- [3] Mr Tyolo travelled from Cape Town to East London and stayed with his brother and sister-in-law in a shack in their yard between September 2022 and 3 December 2022. Upon arrival in East London, he discovered that another brother, Sibongile, who had grown up with him, was very ill. Sibongile suffered from a severe bloated stomach that required periodic hospitalisation. The condition worsened despite medical treatment, especially during November 2022. Mr Tyolo felt helpless and upset, having offered whatever assistance was possible, including financial support towards treatment and transport.
- [4] By December 2022, Mr Tyolo came to believe that his aunt, the deceased, was responsible for Sibongile’s condition in that she had bewitched him, blaming her for his condition. Mr Tyolo and the deceased attended a traditional ceremony on 3 December 2022. He consumed a lot of liquor, mixing brandy with other kinds of alcohol. At some point during the day, and in the company of his sister and Sibongile, he said ‘that the deceased was a witch using witchcraft that was causing Sibongile’s illness’. He then decided to kill the deceased because of what she had done. He offered the deceased a place to sleep at his residence, intending to kill her there. He walked with her to his shack. Upon arrival, he assaulted the deceased, using a panga-like object to cause her death, striking her several times in the head area, as reflected in the post-mortem examination. The chief post-mortem findings were multiple lacerations on the left side of the face, multiple skull fractures, subdural haemorrhages, and haemorrhage-strained muscles (neck). The facial lacerations measured 10 to 15 centimetres

in length. The cause of death was traumatic head injury.

- [5] During the assault, Mr Tyolo also threatened his brother and sister-in-law, to prevent their attempts to intervene. Having killed the deceased, Mr Tyolo took her body and placed it in the road. He later told his sister that he had killed the deceased because she had caused Sibongile's illness through witchcraft.
- [6] Mr Tyolo was convicted by this court of the offence of naming or indicating another person as a wizard in contravention of s 1(a), read with s 2, of the Act and of murder. The offences are extremely serious. The photographs submitted by the State depict a gruesome attack that resulted in the death of the deceased. That attack was planned or premeditated and perpetrated on an elderly female relative.

The accused's circumstances and interests

- [7] Mr Geldenhuys, representing Mr Tyolo, described his personal circumstances, no evidence having been led in mitigation. Mr Tyolo is 46 years of age, unmarried with two children who live with their mother. He left school during standard eight. While in Cape Town he was self-employed, repairing shoes and selling traditional medicines and earning between R4000 and R5000 per month. Part of this income was used to support his children, who are aged 12 and 16.
- [8] The State proved that Mr Tyolo was convicted of rape during 2002, and sentenced to 15 years imprisonment. He was released on parole on 31 March 2010. He pleaded guilty to both offences in this court and has been in custody since his arrest in December 2022.
- [9] In arguing for the cumulative existence of substantial and compelling considerations, Mr Geldenhuys emphasised that Mr Tyolo had been upset about his brother's illness and highlighted the authorities that have viewed belief in witchcraft as a mitigating consideration. Mr Tyolo's alcohol consumption was also cited as a general factor to be considered in assessing the proportionality of imposing the ultimate punishment.

The interests of society

- [10] The legislature's inclusion of a prescribed minimum sentence of life imprisonment for murder linked to certain offences described in the Act reflects society's abhorrence for crimes of this nature. The purpose of the prescribed minimum sentence is to ensure a severe, standardised, and consistent response from the courts to the commission of such crimes, unless there were, and could be seen to be, truly convincing reasons for a different response.
- [11] It must also be noted that s 30(4) of the Older Persons Act, 2006,[11] provides that if a court, after having convicted a person of any crime or offence, finds that the convicted person has abused an older person in the commission of such crime or offence, such finding must be regarded as an aggravating circumstance for sentencing purposes. The deceased was 82 years of age and the aunt of Mr Tyolo. The crime constitutes a specific form of family

violence which is aggravating. She accepted his offer of accommodation, only to be viciously and painfully attacked to death by her relative in a place she would have considered to be safe. The only reason for the murder was Mr Tyolo's belief in witchcraft and suspicion that the deceased was a witch. Attempts to prevent the attack were met with threats of violence, and the act completed by the deceased's body brazenly being placed in the road.

Witchcraft and the proper sentence: case law developments

[12] Considering the reliance placed on Mr Tyolo's belief in witchcraft as a substantial and compelling consideration, it is necessary to consider certain authorities before determining the appropriate sentence in this matter. The approach to sentence in cases involving murder and witchcraft has evolved over time. While each case is to be assessed on its own facts, decisions of courts in cases involving witchcraft must be considered against the background of the legal framework applicable at the time.

[13] As Hoorntje notes, a court practice arose in the first part of the previous century and, with limited exceptions, continues to present

day: namely to treat belief in witchcraft as a mitigating factor in certain circumstances.[12] In early cases, such as *R v Biyana*, [13] the court considered whether a profound belief in witchcraft, and its practise by the victim to cause grave harm, was an 'extenuating

circumstance'. In *R v Fundakubi and Others*, [14] Schreiner JA considered the belief in witchcraft to be a factor which 'does materially bear upon the accused's blameworthiness'. That was 75 years ago and, importantly, almost a decade prior to the enactment of the Act. Even in that context, Schreiner JA held that the existence of a belief in witchcraft would not necessarily and in all cases be treated as an 'effective extenuating circumstance', [15] considered it necessary to add the following: [16]

'But it is of importance to emphasise that the prevalent belief in witchcraft is a very great blight ... Excessive leniency in dealing with cases where such a belief has led to the commission of cruel crimes, often against the weakest members of the community, may conceivably help to delay the disappearance of such belief ... the imposition of suitably severe punishments should be made the occasion, not so much for expressions of sympathy ... as for public admonition or reprobation of those criminally foolish persons who allow themselves to be induced by utterly unfounded suspicions of innocent persons to commit the most savage murders.'

[14] Prior to the constitutional dispensation and the decision in *S v Makwanyane and Another*, [17] ('*Makwanyane*') murder cases involving witchcraft focused on the question whether the death sentence was the only proper sentence. [18] In *S v Lukhwa and Another*, [19] for example, the court accepted that the only reasonable explanation for a witch hunt and killing spree was that the appellants cherished a deeply-rooted belief in and fear for witchcraft and that the events had been ignited and fuelled by such belief. While death sentences imposed by the trial court were set aside because this was not the only proper sentence, life imprisonment was imposed.

[15] Hoctor provides the following useful translation of the legal position prior to the Constitution of the Republic of South Africa, 1996, ('the Constitution') as expressed by Kriegler AJA in *S v Motsepa* ('Motsepa'): [20]

'A genuine and established belief in witchcraft which served in the mind of the accused as a motive for committing a murder was almost always a consideration at the determination of the presence or absence of mitigating factors. At such an inquiry various factors have played a role. Among them was the genuineness and depth of the accused's superstitious belief, the extent of the fear which it aroused in the accused, the immediacy of the perceived threat, the relationship between the accused and the threatened party (the 'witch'), as well as the degree of cruelty with which the alleged witch was killed.'

[16] The Constitution promises a society based on fundamental human rights and in which every citizen is equally protected by law. Human dignity and the advancement of human rights and freedoms are part of the founding values of the Constitution and everyone has the right to life. [21] The right to freedom and security of the person includes the right to be free from all forms of violence from either public or private sources. [22] Sachs J, in *Makwanyane*, bemoaned 'the frenzied, extra-judicial killings of supposed witches ...', advocating for rejection of the 'exorcist'

tradition. [23]

[17] Still, and notwithstanding various cautions and remarks indicative of a changing tide, courts have, post-Constitution, followed the earlier authorities that held that a genuine belief in witchcraft could be a mitigating factor. [24] That belief has also, on various occasions, been held to constitute a substantial and compelling circumstance justifying the imposition of a lesser sentence than the prescribed life imprisonment. [25] In this Division, cases such as *S v Latha and Another* ('Latha') and *S v Manundu and Another* [26] ('Manundu') rely on the earlier authorities (pre-constitutional and pre-amendment of the minimum sentencing legislation) in reflecting this approach. In the former case, and distinct from the present circumstances, counsel for the state conceded that substantial and compelling circumstances were present. [27]

[18] In the Gauteng Division, in *S v Morake*, [28] ('Morake') a full bench considered a magistrate's failure to consider a real belief in witchcraft linked to the fear of harm as a misdirection. It relied on the SCA decision in *Director of Public Prosecutions v Moloto* [29] ('Moloto') in finding that the appellant's fear of harm for himself and others, taken cumulatively with his personal circumstances,

constituted substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence.[30] While Morake involved a charge pertaining to the Act, and the resultant trigger of a prescribed minimum sentence of life imprisonment for that reason too, Moloto did not. In Moloto, a minimum sentence of life imprisonment was applicable only by virtue of a conviction of premeditated murder. The SCA cited passages of various authorities to support the need for a weighty sentence, including the following sentiments:[31]

‘To regard such killings as substantial and compelling circumstances would send out the wrong message to the community. The prevalence of such cases in South Africa is high. The continuation of such killings will create more instability in the communities where such practices are rife. A strong message must be sent out that such conduct will not be condoned in a civilised society. Where such killings arise they must be punished with the full strength of the law.’ (Footnotes omitted.)

[19] The SCA nonetheless accepted as mitigating factors the accused’s belief in witchcraft and that her life was in danger, also based on the deceased having threatened to kill her previously. Considered cumulatively with the accused’s personal circumstances, the SCA held that substantial and compelling circumstances justified a deviation from the prescribed minimum sentence, imposing a sentence of 10 years imprisonment.[32]

[20] Hoor, noting the relevant amendments to the Criminal Law Amendment Act, 1997, argued more than a decade ago that the cases reflected a trend to regard any mitigating effect due to a genuine belief in witchcraft

‘as increasingly less substantial ... [reflecting] the modern South African society’.[33] That analysis stops short of assessing the continued place of a genuine belief in witchcraft, on its own, as a ‘substantial and compelling’ factor in circumstances where the legislature has expressly included witchcraft-related offences, when linked to murder, as deserving of life imprisonment. Put differently, can the very rationale for imposition of a minimum sentence of life

imprisonment qualify on its own as a substantial and compelling circumstance to justify imposition of a lesser sentence than that

prescribed?

[21] In *S v Xaba*,[34] Mbatha J answered a similar question by holding that a belief in witchcraft should not be considered as a mitigating factor at

all.[35] In *Nkosi v S*,[36] the appellant was found guilty of the murder of his grandmother, a crime perpetrated in the belief that she was a witch. A full bench in the Gauteng Division refused to consider the appellant’s belief in witchcraft to ‘rise to the level of being either a substantial or compelling circumstance’, based on the appellant’s ability to function and ‘hold his own in modern society’.[37]

[22] It may be useful to consider the position by way of analogy. Assume that the legislature decides that a particular use of a dangerous

dependence-producing substance, an existing offence in terms of the Drugs and Drug Trafficking Act, 1992,[38] is increasingly linked to the commission of the crime of murder. It amends part I of Schedule 2 of the Criminal Law Amendment Act, 1997, to include murder when the death of the victim resulted from, or is directly related to, that particular drug use. Would such a drug user, convicted for the statutory offence, be able to rely on the use of that drug, on its own, as a 'substantial and compelling' circumstance, to avoid life imprisonment? Bearing in mind the legislative intent, could such drug use be mitigating at all in these circumstances?

[23] The Act must have been crafted taking due cognisance of witchcraft beliefs. It expressly seeks to suppress the practice of witchcraft

and similar practices, notwithstanding the beliefs of individuals in society. It is accepted that those who name or indicate any other person as a wizard, in contravention of the Act, typically do so out of a genuine subjective belief. Such conduct has been criminalised as described. In addition, murder when the death of the victim resulted from, or is directly related to, such an offence carries a minimum sentence of life imprisonment, as prescribed by the legislature. That being the case, it is inapposite to rely on the underlying subjective belief in witchcraft alone as a substantial and compelling circumstance. Latha and Manundu did not consider the impact of the minimum sentence provisioning pertaining directly to witchcraft in arriving at their outcomes and, respectfully, cannot be followed based on this analysis.

[24] Considering the decision in Moloto, however, it must be accepted that a belief in witchcraft may still be mitigating in certain circumstances, notably when an accused acts out of genuine fear. It is unnecessary for present purposes to attempt to draw the dividing line with any greater degree of clarity. Both Moloto and Morake are distinguishable on the facts. It may be added that many of the earlier cases concerning witchcraft did not involve any charge

pertaining to contravention of the Act, in addition to a charge of murder. Similarly, various authorities were not seized with

considering the implications of the reference to the Act in the Criminal Law Amendment Act, 1997, for purposes of determining the applicability of the prescribed minimum sentence.

Analysis

[25] It is so that sentencing, even in serious cases, involves the application of a moderation of generosity where appropriate. That

principle cannot replace the balanced weighing of the triad of factors to determine whether the prescribed minimum sentence should

be imposed.[39] Both the striving after severity and misplaced pity are out of place, as are sentences designed to use the crime to set an example for others in society.[40] Courts are obliged to impose the minimum sentences expressed by parliament, unless there are truly convincing reasons to depart from them.[41]

[26] Bearing those principles in mind, there is little to suggest substantial and compelling circumstances to deviate from the prescribed minimum sentence for murder in these proceedings, or that imposition of that sentence would be disproportionate in the circumstances. This while alive to the fact that life imprisonment is the heaviest sentence that a person can legally be obliged to serve.[42]

[27] Mr Tyolo admitted a previous conviction for rape in terms of s 271 of the Criminal Procedure Act, 1977[43] ('the CPA'). This court is obliged to take that conviction into account when imposing any sentence in these proceedings and notes that it includes an element of violence.[44] Although it is accepted that he had consumed a mixture of liquor and was operating to some extent under its influence on 3 December 2022, Mr Tyolo admits that he was aware of what was happening around him, and at all times able to distinguish between right and wrong.[45]

[28] His conduct reflects thought and planning. His brother's condition worsened during November and by December 2022 he had placed the blame for this on his aunt's supposed power to bewitch. The traditional ceremony that took place a few days later, on 3 December 2022, added fuel to his fire and provided him with an opportunity. During the day he named his aunt as a witch, deciding to kill her for what she had supposedly done to Sibongile, who was present at the ceremony. He acted by inviting the deceased to sleep at his residence, purely so that he could kill her there. He walked with her. At his shack he used the panga-like object to cause her death, inflicting, inter alia, multiple lacerations, 10 to 15 centimetres in length, on the left side of her face and multiple skull fractures.

[29] While Mr Tyolo pleaded guilty to both offences, the circumstances are such that the evidence against him was overwhelming, there being at least two eye-witnesses to both offences. There is no suggestion of regret or remorse, as is evident from the treatment of the body after the murder, merely the repeated justification based on the belief in witchcraft linked to Mr Tyolo's sympathies towards Sibongile's health. There is also no mention in his statement, in terms of s 112 of the CPA, that once released he would refrain from such conduct.[46]

[30] It is in the best interests of society that a belief in witchcraft should not, at least on its own, be permitted to displace what sound, established sentencing principles require, considering the moral blameworthiness of the individual for the offence having regard to all the facts. [47] To permit this would, in effect, be to undermine the legislature's prescription of a minimum sentence of life imprisonment when murder is directly related to an offence contemplated in ss 1(a) to (e) of the Act.

[31] Even if the analysis regarding witchcraft as a possible substantial and compelling factor is erroneous, the facts are such that the belief in witchcraft, together with the other factors in favour of Mr Tyolo, are not substantial and compelling to justify imposition of a lesser sentence. Applying the considerations expressed in *Motsepa*, and as in *Phama*, this was not an instance where the accused operated under imminent threat or out of a sense of fear, prevention or self-protection.

Rather, it was more an act of vengeance ‘because of what I believed the deceased had done to my brother’.[48] Even if depth and sincerity of belief are assumed, there is nothing to suggest that the accused has lived in a part of society that may be considered as justifiably behind the times. The information at hand suggests the contrary, the accused having considered Cape Town to be his home. The extent of fear experienced by the accused, the immediacy of any perceived threat or impulse and the accused’s relationship with the deceased was unexplained. Added to this is the brutality with which the premeditated murder was committed, coupled with the various other aggravating features of the crime already described, notably the victim’s age and the inherent breach of trust when considering the familial connection and circumstances of the offence. Society’s evolving view regarding such crimes, as reflected in the link between contraventions of the Act and a minimum sentence of life imprisonment for a related murder, must also be considered.[49] Mr Tyolo’s personal circumstances, notably his plea of guilty and alcohol usage, are wholly outweighed by the other factors considered. I am ultimately unconvinced, when examining the circumstances of the case, that imposition of the prescribed sentence would be disproportionate to the crime, the criminal and the legitimate needs of society.[50] Considering the seriousness of the statutory offence, which precipitated the murder, and the provisions of the Act, I impose the

maximum sentence permissible for that crime, to run concurrently with the sentence imposed for murder.

Order

[32] The following sentence is imposed:

1. The accused is sentenced to life imprisonment for the murder of Nobinza Violet Kevu.
2. The accused is sentenced to twenty years imprisonment for contravention of s 1(a), read with s 2, of the Witchcraft Suppression Act, 1957, the sentence to run concurrently with the sentence of life imprisonment.
3. The Registrar is directed to ensure that the accused’s name is placed on the Minister of Social Development’s register of persons convicted of an offence contemplated in s 30(4) of the Older Persons Act, 2006.
4. In terms of section 103(1) of the Firearms Control Act 60 of 2000, the accused is unfit to possess a firearm, the Registrar of Firearms to be notified accordingly.

A GOVINDJEE

JUDGE OF THE HIGH COURT

Heard: 11 March 2024

Delivered: 14 March 2024

Appearances:

For the State:

Adv T Soga

Director of Public Prosecutions

Makhanda

046 602 3000

For the Accused:

Adv D Geldenhuys

Legal Aid South Africa

046 622 9350

[1] N Tebbe 'Witchcraft and statecraft: liberal democracy in Africa'

(2007) 96 Geo LJ 183 at 190.

[2] N Tebbe 'Witchcraft and the Constitution' in TW Bennett (ed) Traditional African Religions in South African Law (2011) at 163 accessed at <http://ssrn.com/abstract=1926885>.

[3] Ibid at 163, 164. See S v Mafunisa 1986

(3) SA 495 (V).

[4] Ibid at 164.

[5] EWM Mesatywa and AC Jordan Izaci Namaqhalo EsiXhosa (1971) at 63 as cited in A Mvanyashe 'IsiXhosa proverbs and idioms as a reflection of indigenous knowledge systems and an education tool' Southern African Journal for Folklore Studies (vol 29, no. 2) (2019) at 11

[6] Act 3 of 1957.

[7] The act does not define 'wizard'. The term may be understood to mean a human being who deploys supernatural power for nefarious purposes: N Tebbe 'Witchcraft and the Constitution' in TW Bennett (ed) Traditional African Religions in South African Law (2011) at 161 accessed at <http://ssrn.com/abstract=1926885>. The term is clearly not intended to refer only to male practitioners of the occult and also includes females, and the accused does not have to be shown to have used the word 'wizard' before he may be convicted: see SV Hoor et al South African Criminal Law and Procedure Volume III: Statutory Offences (RS

- [23] (2013) chE2-p3. Also see *S v Mafunisa* 1986
- (3) SA 495 (V).
- [8] S 1(i) of the Act. Where any person in respect of whom such an offence was committed is killed, it is presumed, until the contrary is proved, that such person was killed in consequence of the commission of such offence: s 2 of the Act.
- [9] Act 105 of 1997.
- [10] S 51(1) read with s 51(3) of the Criminal Law Amendment Act, 1997. The applicable amendment to this legislation has been in effect for more than 15 years.
- [11] Act 13 of 2006. 'Abuse' includes physical abuse, which is defined to mean any act or threat of physical violence towards an older person, defined to include women over the age of 60.
- [12] S Hoctor 'Belief in witchcraft as a mitigating factor in sentencing: *S v Latha and Another* 2012
- (2) SACR 30 (ECG)' *Obiter* (2012) 380 at 382.
- [13] *R v Biyana* 1938 EDL 310.
- [14] *R v Fundakubi and Others* 1948
- (3) SA 810 (A) at 818.
- [15] *Ibid* at 819 – 820.
- [16] *Ibid* at 818 – 819. Also see *S v Phama* 1997
- (1) SACR 485 (E) ('Phama') at 487, where Jones J held that '...my sentence should reflect the revulsion of society at the readiness to resort to criminal violence; the horror of society that human life should be made so cheap; and the need to show the accused and other potential offenders that the price they must pay for resorting to murder in order to eliminate an alleged witch or wizard from their midst is not worth it'.
- [17] *S v Makwanyane and Another* [1995] ZACC 3; 1995
- (3) SA 391 (CC).
- [18] See *S v Motsepa and Another* 1991
- (2) SACR 462 (A) ('Motsepa').
- [19] *S v Lukhwa and Anothers* 1994
- (1) SACR 5 (A).
- [20] *Motsepa* above n 18 at 470, as translated by Hoctor above n 12 at 386.
- [21] Preamble to the Constitution, read with ss 1 and 11 of the Constitution.

- [22] S 12(1)(c) of the Constitution.
- [23] S v Makwanyane above n 17 at 381 – 382, cited in Hoorar above n 12 at 387.
- [24] See, for example, S v Zuma [2000] JOL 7061 (N) at 114 – 115.
- [25] S v Mbobi (2005 JDR 0016 (E)) paras 9 – 10.
- [26] S v Manundu (2022 JDR 2409 (ECM)) paras 15, 26 and 31.
- [27] S v Latha and Another 2012
- (2) SACR 30 (ECG) ('Latha') paras 27 – 28. In that matter, the State accepted an indirect intention to kill.
- [28] S v Morake (2020 JDR 2633 (GP) ('Morake')).
- [29] Director of Public Prosecutions v Moloto 2019
- (2) SACR 123 (SCA) ('Moloto').
- [30] Morake above n 28 para 7.6. A sentence of 20 years imprisonment was imposed.
- [31] S v Mogaramedi (2014 JDR 1622 (GP)) para 35, cited with approval in Moloto above n 29 para 10.
- [32] Moloto above n 29 para 11. For criticism of this decision, see S Terblanche (ed) Du Toit: Commentary on the Criminal Procedure Act >(RS
- 61) (2018) ch 28 - p18Z – 6 / 7.
- [33] Hoorar above n 12 at 389.
- [34] S v Xaba (2018 JDR 0964 (KZP)).
- [35] Ibid para 23. For support of the approach in Xaba, see Terblanche above n 32 at p18Z - 5. For criticism of the actual sentences imposed in Xaba, and the extent of their departure from the sentence prescribed, see S Terblanche 'Sentencing' (2018) SACR 465 at 477 – 478.
- [36] Nkosi v S [2022] ZAGPPHC 563.
- [37] Ibid para 18. In that matter, only the youthfulness of the accused, who was 22 years old at the time of the commission of the offence, spared him from a sentence of life imprisonment for the murder of his grandmother. A sentence of 25 years imprisonment was imposed, of which five years was suspended.
- [38] Act 140 of 1992.
- [39] S v Zinn [1969] 3 All SA 57 (A) at 540G – H.
- [40] S v Khulu 1975
- (2) SA 518 (N) at 521 – 522.

[41] S v Matyityi 2011

(1) SACR 40 (SCA) para 23.

[42] Rammoko v Director of Public Prosecutions 2003

(1) SACR 200 (SCA).

[43] Act 51 of 1977.

[44] S 271(4) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

[45] A similar approach was adopted in Latha above n 27 para 15.

[46] See Mogaramedi above n 31 paras 30 – 31.

[47] Terblanche above n 32 at p18Z – 5. Also see Kapeshe and Another v The People (unreported, SCZ / 9 / 99, 100/2013, appeal case no 99/100/205, 6 September 2017 at 147 as cited in Terblanche above n 32 at p18Z – 6: a belief in witchcraft should reach the threshold required for provocation if it is to serve as an extenuating factor to an accused person facing a charge of murder, given that there is ‘absolute need to protect victims of witchcraft accusations from unprovable allegations leading invariably to multiple violations of their rights, and in some cases death’.

[48] S v Phama above n 16 at 487I – J. As the court noted in Latha, the sentence in Phama was imposed prior to the promulgation of the minimum sentencing legislation: see Latha above n 27 para 18.

[49] See SS Terblanch A guide to sentencing (3rd Ed)

(2016) at 231.

[50] S v GK 2013

(2) SACR 505 (WCC) para 9.

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