BELIEF IN WITCHCRAFT AS A MITIGATING FACTOR IN SENTENCING

S v Latha 2012 (2) SACR 30 (ECG)

1 Introduction

Supernatural belief does not sit easily with the law. Squaring such belief with legal concepts such as the reasonable person is a particularly vexing task (see *S v Ngema* 1992 (2) SACR 651 (D)). Nevertheless, it is necessary for the courts to take account of such belief as a fact of the South African society. Belief in witchcraft is an ongoing and widespread phenomenon, giving rise to the question whether such belief can play a role in exculpating, or mitigating the punishment of those who engage in criminal conduct as a consequence of such belief (see Van Blerk "Sorcery and Crime" 1978 *CILSA* 330; Bennett and Scholtz "Witchcraft: A Problem of Fault and Causation" 1979 *CILSA* 288; Motshekga "The Ideology Behind Witchcraft and the Principle of Fault in Criminal Law" 1984 *Codicillus* 4; Dhlodhlo "Some Views on Belief in Witchcraft as a Mitigating Factor" 1984 *De Rebus* 409; Van den Heever and Wildenboer "Geloof in Toorkuns as Versagtende Omstandigheid in die Suid-Afrikaanse Reg" 1985 *De Jure* 105; and Labuschagne "Geloof in Toorkuns: 'n Morele Dilemma vir die Strafreg" 1990 *SACJ* 246). A recurring problem for the courts is how to deal with the situation where a genuine belief in witchcraft provides the motivation for the killing of a suspected witch or wizard in order to protect or defend the interests of the accused or another person. Can such a belief mitigate punishment? This problem arose in the case of *S v Latha* (2012 (2) SACR 30 (ECG)).

2 Facts

The accused, who were cousins, pleaded guilty to the murder of their grandmother, as well as a contravention of section 1(a) of the Witchcraft Suppression Act 3 of 1957. The second accused also pleaded guilty to assaulting a family member who wished to intervene in the killing. The accused were accordingly convicted on this basis. In his plea explanation first accused stated that upon consulting a *sangoma*, to establish the reason for a pain in his leg, he was advised that the deceased had bewitched him. This was not the first time that he had received advice of this nature: his aunt had told him that the deceased had bewitched her shortly before her death, and another relative had informed him that the deceased had said that she would "get him" one day (par [4]–[6]). Having made the decision to attack the deceased (which, the court accepted, amounted to forming an intention to kill the deceased, rendering the murder "probably premeditated" (par [6])), first accused related that he had informed second accused of his intention in the course of imbibing a quantity of alcohol. Despite the contradictory

versions of the two accused, the court accepted that the attack, which took the form of "a sustained and vicious assault [particularly in the context of an 86-year-old victim] resulting in numerous head and body wounds" (par [10]) was not as spontaneous as the accused indicated, and moreover that the evidence of consumption of liquor did not establish more than that the accused were "to a degree intoxicated" and did not afford any reduction in moral blameworthiness (par [15]). Nonetheless, the court accepted that both accused believed the deceased "to be possessed of some extraordinary and evil powers, and to be responsible for the death of second accused's mother" (par [15]).

In crafting an appropriate sentence, the court took into account certain cases where the effect of a belief in witchcraft on sentencing was examined (*Phama v S* [1997] 1 All SA 539 (E); *R v Fundakubi* 1948 (3) SA 810 (A); *R v Biyana* 1938 EDL 310; *S v Malaza* 1990 (1) SACR 357 (A); and *S v Magoro* 1996 (2) SACR 359 (A)). The court noted the arguments in aggravation of sentence: that the deceased was the grandmother of both accused; that the deceased was elderly and defenceless and had been attacked in her own home by people from whom she should have been able to obtain protection; that the attack had been of a brutal and sustained nature; that first accused had a previous conviction for assault; that neither accused was youthful, and that their level of education and responsible employment meant that neither could be categorized as "illiterate people from deeply rural backgrounds" (par [26]–[27]). The court further noted the recent guidance of the Supreme Court of Appeal in *Director of Public Prosecutions v Thusi* (2012 (1) SACR 423 (SCA)) to the effect that considerations of retribution and deterrence should be accorded greater weight in the context of sentencing serious crimes (par [29]). However, prosecution counsel conceded that substantial and compelling circumstances which would justify the non-imposition of a mandatory or minimum sentence could be present *in casu*, and after a discussion of the pertinent case authority in this regard (the Supreme Court of Appeal decisions in *S v Malgas* (2001 (1) SACR 469 (SCA)) and *S v Vilakazi* (2009 (1) SACR 552 (SCA)) the court affirmed that such sentences would indeed be inappropriate in this case (par [34]). The court further sought to place the contravention of section 1(a) of the Witchcraft Suppression Act in context, holding that the primary purpose of the section is the punishment of people whose statements have had the effect of other persons harming the victim, and that to impose any more than a "relatively nominal" sentence for this offence in the present case would give rise to duplication of the punishment imposed for the murder (par [38]). Given the finding of the court that the accused had displayed remorse, that their actions were influenced by the intake of alcohol, and that the accused could be rehabilitated, effective sentences of fifteen years' imprisonment and ten years' imprisonment were respectively imposed upon the first and second accused (par [40]).

Thus, the primary basis for mitigation of sentence in the present case was belief in witchcraft. Indeed the court explains its conclusion that minimum sentences would not be appropriate by stating (par [34]) that it is satisfied that, as was held in the *Biyana* case (*supra*), the accused were labouring under a delusion which "though impotent in any way to alter their guilt

legally, does in some measure palliate the horror of the crime and thus provide an extenuating circumstance". This begs the question as to the extent to which a belief in witchcraft should be regarded as a mitigating factor in sentencing, most commonly in the context of the physical injury or death of the person suspected of practising witchcraft. This question will be examined below in the context of South African case law.

3 The early development of the rule that a belief in witchcraft mitigates punishment

It is trite that a belief in witchcraft has always existed amongst the South African population. Judicial consideration of the nature of a belief in witchcraft may be found in 19th century case law. In 1893 De Villiers CJ dismissed a belief in witchcraft as held by "foolish people", and consequently held that an accusation by the defendant that one Du Plooy had bewitched defendant's daughter was not regarded as defamatory, since "no reasonable person would have believed him capable of doing [so]" (*Ex parte Du Plooy* (1892–1893) 10 SC 7). In *R v Zillah* (1911 CPD 644) Buchanan J, whilst acknowledging belief in witchcraft in the "olden days", as well as that such a belief was "common amongst natives", stated that "no reasonable person of education" would believe in palmistry or clairvoyance, or would be so credulous as to accept such practices. Although the court notes in an aside that "even our old friend Voet held some belief in ghosts and spectres" (see *Commentarius ad Pandectas* 19, 2, 23 (*The Selective Voet being the Commentary on the Pandects (Paris edition of 1829*) translated by Gane, Vol 3 (1956) 434)), the court insists that the "advance of progress and knowledge and … common sense" would prevent any court from upholding a defence based on such supernatural activity.

Given such insistence on rationality in the early case law, it was not surprising that belief in witchcraft was not regarded as being a substantive defence. Hence attempts to equate a belief in witchcraft with insanity were summarily dismissed in *R v Radebe* (1915 AD 96) and *R v Molehane* (1942 GWLD 64). Nevertheless, whilst reliance on such belief was excluded as a relevant factor in so far as the inquiry into liability was concerned, in the first part of the previous century a practice arose in the courts which has continued till the present day: to treat belief in witchcraft as a mitigating factor in certain circumstances.

The first reported case where this approach is taken appears to be *R v Mbilwana* (1936 EDL 13), where the accused were charged with assault for burning a woman suspected of witchcraft. Gane J, having made "careful enquiries" amongst magistrates in the area, chose to deviate from the view that severity of punishment was appropriate in such cases (a view adopted by the magistrate in the trial court), in favour of what he regarded as the majority view: a recognition that in such cases "sentences should not be so severe as they would be in the case of similar actions by persons who are labouring under no delusion as to the existence of witchcraft" (14). The court took the view that such cases fell to be treated on special lines, given that "the native people are so much under the influence of witchcraft that they

cannot, when they commit cruel actions of this description, be considered as altogether in a normal frame of mind" (14). The sentences of the accused were accordingly reduced.

In 1938, in *R v Biyana* (*supra*) the court was required to assess whether the mandatory death penalty should be inflicted on the four accused who had been found guilty of murder for killing the victim, whom they suspected of inflicting evil upon themselves and the general public through the practice of witchcraft. Lansdown JP noted that the crisp issue was therefore whether extenuating circumstances existed to allow for the non-imposition of the death penalty. The court described an extenuating circumstance as "a fact associated with the crime which serves in the minds of reasonable men to diminish morally albeit not legally the degree of the prisoner's guilt" (311). It was further held that "the mentality of the accused" may provide such a fact, including "a delusion, erroneous belief or defect" which would make a crime committed in the context of such state of mind "less reprehensible or diabolical than it would be in the case of a mind of normal condition" (311). The court, noting the "universal belief in witchcraft by the vast majority of Bantu people", found that the prisoners' belief in witchcraft was "profound", and that though such belief was greatly deplorable, "I am not sure that we Europeans are entitled, having regard to our own history, to give them unqualified condemnation for clinging to such a belief". The court consequently found such genuine belief in witchcraft to "in some measure palliate the horror of the crime" and thus provide an extenuating circumstance (312). This approach was approved by Schreiner J (as he then was) in *R v Hugo* (1940 WLD 285 288) (also citing *R v Mutkisub* 1938 SWA 4 as an analogous case), as well as in *R v Molehane* (*supra* 71). Schreiner J described the notion of a "delusion, erroneous belief or defect" as encompassing a clear element of "abnormality" not in the sense of a mental defect, but with "something of the same compelling force and the same manifest error according to normal standards that we associate with mental disorders" (*R v Hugo supra* 288–289).

The judge's views are of interest given that he authored the leading judgment of *R v Fundakubi* (*supra*). Since the *Biyana* case, the courts had been very consistent in regarding evidence of a belief in witchcraft as an extenuating circumstance. However, in a series of cases handed down by Pittman JP in the Eastern Cape, it was questioned whether this approach was indeed correct, or whether witchcraft should not be taken into account in this context. The matter came before the Appellate Division for decision. Schreiner JA had no hesitation in reaffirming the approach adopted in *Biyana* that witchcraft "is a factor which does materially bear upon the accused's blameworthiness" (818). However, significantly, Schreiner JA was at pains to demarcate the ambit of such belief as a mitigating factor carefully. First, it was noted that belief in witchcraft "is a very great blight upon the native peoples of the Union" which persisted despite criminal sanction for conduct arising out of such belief (819). Schreiner JA expressed the concern that, whilst severe punishment in itself would not eradicate such belief, excessive leniency in dealing with such crimes arising out of such belief may hinder the process of extinguishing such belief, and therefore

> "the imposition of suitably severe punishments should be made on the occasion, not so much for expressions of sympathy with the accused, 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" (819).

Second, the court noted that not all killings associated with witchcraft could qualify to be regarded as having been committed in extenuating circumstances. "Ritual" murders ("muti killings") where the victim is killed to enable access to parts of his or her body for use for "medicinal" purposes would fall out with this category of less blameworthy killings, as would practices such as that of murdering new-born twins (819). Third, even killings which would *prima facie* qualify to be regarded as part of this category by reason of a genuine belief in witchcraft may not ultimately give rise to a finding of extenuating circumstances: where murder is incited, or where excessive cruelty is used, this may not be the case (819). Schreiner JA carefully qualifies the latter example, however, noting that the mere multiplicity of wounds caused to the deceased, whilst brutal and savage, does not necessarily establish calculated cruelty, as genuine belief in witchcraft, and the attendant threat to the accused or his nearest and dearest, may spark a rage which gives rise to the situation that the accused "is really beside himself and acts with the unthinking fury that he might be expected to show towards a venomous snake that had bitten his child" (820).

Two further factors are regarded as worthy of mention by the court. The question is raised whether extenuating circumstances would apply if the victim was believed to have caused the death (or presumably, to have threatened the life of) of those who were not near relations of the accused. The court expressed doubt whether or to what extent any imagined conduct "of a less heinous character" than the death of a close relation of the accused should be regarded as an extenuating circumstance (820). A further question, on which the court does not express itself, is whether the "limited protection" afforded those who kill on the basis of a genuine belief in witchcraft should extend beyond the killing of the suspected wrongdoer to the killing of his or her spouse (820). Finally, Schreiner JA cautions against the possible abuse of the recognition of a belief in witchcraft as an extenuating circumstance in murder (820).

4 Developments subsequent to *Fundakubi*

The principles set out in the *Fundakubi* case have been developed and elaborated upon in subsequent cases.

First, in the broader context of a move towards a subjective criterion for the assessment of intention in South African law, and a consequent readiness of the courts to apply the principles of individual liability, it is no surprise that a genuine belief in witchcraft was confirmed as an extenuating factor on a number of occasions by the Appellate Division (*S v Dikgale* 1965 (1) SA 209 (A); *S v Mokonto* 1971 (2) SA 319 (A); *S v Nxele* 1973 (3) SA 753 (A); and *S v Ngubane* 1980 (2) SA 741 (A)). Nonetheless, as in *Fundakubi*, noting the "dread influence of witchcraft which still holds in thrall the minds of some" (*S v Mokonto supra* 320), the courts have warned

against "undue leniency when such belief has manifested itself in conduct which is criminally punishable" (*S v Nxele supra* 758). Accordingly, it has been held that in the context of loss of life arising from a belief in witchcraft "almost paramount consideration must be given to the possible deterrent effect on others of the punishment" (*S v Zanhibe* 1954 (3) SA 597 (T) 600), in that the only way to express the community's disapproval of the death of innocent people is to impose sentences which will show that those who kill in such circumstances will not go unpunished, no matter how sincere their belief in the validity of their conduct (*S v Mojapelo* 1991 (1) SACR 257 (T) 260; and see application of such approach in *S v Motsepa* 1991 (2) SACR 462 (A) 471).

The courts have reaffirmed the dictum in *Fundakubi* to the effect that not all killings associated with witchcraft could be regarded as less blameworthy, and that in each case the facts of the matter will be decisive (*S v Nxele supra* 757; *S v Modisadife* 1980 (3) SA 860 (A) 863; and *S v Mojapelo supra* 260). Thus the view that certain types of killing, such as ritual ("muti") killings are not regarded by the courts as mitigating punishment (see *S v Sibanda* 1975 (1) SA 966 (RA); and *S v Modisadife supra*) has been followed. The following factors can (where no other mitigating circumstances are applicable) negate the mitigating effect of a belief in witchcraft: where the motivation for the killing was primarily personal gain (*S v Sibanda supra* 967; *S v Ngubane* 1980 (2) SA 741 (A) 746; *S v Mavhungu* 1981 (1) SA 56 (A) 69; and *S v Munyai* 1993 (1) SACR 252 (A) 255); where the victim was innocent and was not a threat to the accused (*R v Myeni* 1955 (4) SA 196 (A) 199; *S v Modisadife supra* 863; and *S v Malaza supra* 359); where the killing is not motivated by any immediate threat (*R v Ncanana* 1948 (4) SA 399 (A) 407); and where the killing was committed with excessive cruelty (see *S v Matala* 1993 (1) SACR 531 (A) 539). With regard to the last factor, courts have, however held, following *Fundakubi*, that where the vicious attack arises out of a "frenzied state of mind rather than cold-blooded cruelty" (*S v Ndhlovu* 1971 (1) SA 27 (RA) 30; and see also *S v Mojapelo supra* 260), the nature of the attack should not negate the mitigatory effect of the belief in witchcraft.

The question of what constitutes a genuine belief in witchcraft has arisen for decision on a number of occasions in the courts (see *S v Ndhlovu supra* 29, where the genuineness of the belief was indicated by the consultation of no fewer than four different witchdoctors to establish the cause of misfortune). It has been held that the "genuineness of the belief in witchcraft must always be a condition precedent" (*S v Nxele supra* 757), and that the belief entails acting so as to avert "some great evil that would either befall himself or befall his family or his community" (*S v Sibanda supra* 967). Thus the "degree of intensity of the belief" is highly significant "for the more intense such belief is, the greater the sense of fear or apprehension it induces" (*S v Ngubane supra* 745). Hence, where the perceived threat was not immediate and the accused could have averted it in another way, it would not mitigate punishment for killing (*S v Modisadife supra* 863; and *S v Malaza supra* 359). Other factors which may be relevant in assessing the genuineness of the belief are the level of sophistication of the accused (see, *eg*, *S v Mavhungu supra* 69; and *S v Mathoka* 1992 (2) SACR 443 (NC)),

and the possible impact of deindividuation on the accused's state of mind (see *S v Matala supra* 538; and on deindividuation, Hoctor "Crowd Violence and Criminal Behaviour: Dissecting Deindividuation" 2000 *Obiter* 161). Even if it is not raised by the accused, the court may nevertheless find that the motivation for the accused's conduct was belief in witchcraft (*S v Dikgale supra* 214; *S v Matala supra* 535; and *S v Lukhwa* 1994 (1) SACR 53 (A) 58).

In respect of the question whether a belief in witchcraft would mitigate punishment if the victim was a threat to persons who were not near relations of the accused, it has been held (*S v Dikgale supra* 213) that the doubts expressed in this regard in *Fundakubi* were *obiter*. Whether the killing of the spouse of the suspected wrongdoer would be mitigated by the accused's belief in witchcraft is, however, doubtful, in the light of the contrary finding in *S v Nxele* (*supra*).

Just prior to the inception of the Constitution, the legal position with regard to belief in witchcraft serving as a mitigating factor in the context of murder was summarized by Kriegler AJA in *S v Motsepa supra* 470 (approved in *S v Lukhwa supra* 57) as follows:

> "'n Opregte en gevestigde geloof in die toorkuns wat in 'n beskuldigde se gemoed gedien het as dryfveer vir die pleging van 'n moord, was feitlik altyd 'n oorweging by die bepaling van die aanwesigheid al dan nie van versagtende omstandighede. By sodanige ondersoek … het verskeie faktore 'n rol gespeel. Daaronder was die opregtheid en diepte van die beskuldigde se bygeloof, die omvang van die vrees wat dit by hom ingeboesem het, die onmiddellikheid van die aangevoelde bedreiging, die verwantskap tussen die beskuldigde en die waargenome bedreigde, asook die wreedheidsgraad waarmee die vermeende towenaar om die lewe gebring is."
>
> "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" (author's own translation).

5 Post-constitutional developments

The advent of a constitutional democracy, along with a justiciable Bill of Rights, radically altered the South African legal framework. However, not only were the precepts of the Constitution supreme over other legal rules, but the values upheld by the Constitution became the fundamental values in South African society. In the light of this transformation, the question arises whether the courts would have a different perspective on the well-established approach that a belief in witchcraft could serve as a mitigating factor.

In the groundbreaking Constitutional Court judgment declaring the death penalty to be unconstitutional, *S v Makwanyane* (1995 (2) SACR 1 (CC)), Sachs J, in the course of a thoughtful analysis of the relative absence of the death penalty in African society in this country, pointed out a notable

exception to this general trend: "the frenzied, extra-judicial killings of supposed witches, a spontaneous and irrational form of crowd behaviour that has unfortunately continued to this day in the form of necklacing and witch-burning" (par [381]. Sachs J proceeds to state that in the light of "the kind of values which should inform our broad approach to interpreting the Constitution" the "exorcist" tradition ought to be rejected (par [382]).

The statement of Sachs J begs the question of the extent to which such conduct could still be sympathetically viewed. This question had surfaced a number of times in the case law. Thus in *S v Modisadife* (*supra* 863), Rumpff CJ prefaces his finding that the accused could not be regarded as less blameworthy despite his belief in witchcraft with the words "in die tyd waarin ons lewe" ("in the time in which we live"), and in *S v Mathoka* (*supra* 450) the court states that the time is soon coming that superstitious beliefs which do not belong in a civilized community are no longer regarded as mitigating, but as aggravating. On the other hand, in *S v Mojapelo* (*supra* 259) and *S v Lukhwa* (*supra* 60) the court accepts that the belief in witchcraft is deep-seated. However, these cases predate the Constitution. What is the perspective of the more recent cases?

Although it was evident in 1996 in *S v Magoro* (*supra*) that killing witches was the goal of the accused's conduct, the court did not accept in respect of any of the accused that the belief in witchcraft rendered the conduct less blameworthy. Instead it was held that where one of the accused knew the deceased very well, such accused's conduct was more reprehensible (367). In *S v Phama* (1997 (1) SACR 485 (E) 487 (also reported in the All South African reports, cited *supra*)) Jones J, noting that two innocent people were deliberately and needlessly killed, stated the following:

> "Nothing can undo the dreadful wrong that has been done to them. Society demands that other people like them should not suffer the same fate. The deterrent and preventive elements of criminal justice, and also, but not to the same extent, the retributive element, require 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."

Although the court acknowledged that a belief in witchcraft has been regarded as mitigation in the past in these circumstances, it held that, given the relative sophistication of the accused in this case, must militate against too much weight being afforded to this aspect (487–488):

> "The accused … is not a tribesman from some remote district completely cut off from the influences of modern civilization … While he may not have escaped entirely from the beliefs and superstitions of his forebears, he is expected to control those beliefs and superstitions instead of allowing them to regulate his behaviour towards his fellow human beings. The accused, the victims, and their families do not come from a primitive society, and the message which my sentence must send out is not a message for a primitive society."

In the case of *S v Zuma* ([2000] JOL 7061 (N)), the court once again noted the "accepted fact" that a genuine belief in witchcraft could be a

mitigating factor (114), and sentenced the accused accordingly, but also struck a dissenting note (114–115):

> "One wonders how much longer that sort of factor can be taken into account in a country where everybody of adult age has the vote. Killings for witchcraft died out in other countries centuries ago. In essence there is very little difference between killing a person because you think he has bewitched you and killing a person who you believe has stolen your property or committed some other crime towards you. Either it constitutes an act of taking the law into your own hands or an act of revenge, neither of which can be excused. The courts are here to deal with complaints against people which take the form of a crime. They cannot deal with suspicions and the public cannot be allowed to take the law into their own hands simply because of their own suspicions."

The court in *S v Mbobi* (2005 JDR 0016 (E)) regarded as correct the concession by the state that the accused's genuine belief in witchcraft, which motivated his killing of the two deceased, reduced his moral blameworthiness. Consequently, it was held that this constituted a substantial and compelling circumstance justifying the imposition of a lesser sentence than the prescribed life imprisonment (9–10). Nevertheless, the court regarded the killings of two innocent persons, who had done the accused no harm whatsoever and had not bewitched him, as extremely serious. Citing with approval the passages from *S v Phama* quoted above, the court stated (12):

> "So too in the present case is the accused not a primitive tribesman cut off from civilisation. Genuine though his belief in witchcraft may be, he is expected to control that belief and to regulate his conduct accordingly. He had the advantage of two consultations with medical practitioners and his illness was diagnosed as being tuberculosis. He was, however, not prepared to accept this diagnosis and on the flimsiest of evidence … was prepared to accept that he had been bewitched and to take the lives of innocent people."

In two further recent cases, the accused's belief in witchcraft did not avail the accused. It was held in *S v Ngwane* ([2000] JOL 7052 (N)) that the mere belief that the victim had bewitched a family member did not constitute substantial and compelling circumstances justifying a departure from the mandatory punishment of life imprisonment. In *S v Alam* (2006 (2) SACR 613 (Ck)), the court held, in the context of a killing to obtain blood for a "traditional healer", that there was "no evidence that [the accused] believed in witchcraft when he stabbed the deceased" (par [19]). The context of ritual murder would suggest otherwise. The court determined sentence on the basis of other considerations.

6 Concluding remarks

The court in *S v Latha* found on the facts of the case that the genuineness of the accused's belief in witchcraft could serve to mitigate sentence such that the prescribed minimum sentences would not be appropriate. This finding cannot be faulted in terms of the legal development set out above. It is, however notable that the caution (and occasionally disquiet) evident in judgments dealing with killing in such circumstances appears to be returning in even greater measure in the recently decided cases. In cases such as

Phama, *Zuma* and *Mbobi* the courts appear to be prepared to particularly scrutinize the level of sophistication of the accused in the light of the prevailing societal standards. Schreiner JA's warning in *S v Fundakubi* (*supra* 819) against excessive leniency in these matters resonates with these concerns, and whilst a genuine belief in witchcraft must necessarily be taken into account in sentencing, it seems that the trend is to regard such mitigating effect as increasingly less substantial. Whilst in sentencing the facts of the particular case must be determinative, such a development would seem to reflect the modern South African society. It seems, in the light of the heavy sentence imposed in *S v Latha*, that this was indeed the approach of the court in this case.

It can further be argued that such a less tolerant approach to a belief in witchcraft is consistent with the recent amendment of the mandatory sentencing provisions found in section 51 of the Criminal Law Amendment Act 105 of 1997. Section 51(1) provides for the mandatory life imprisonment for an offender convicted of an offence referred to in Part I of Schedule 2 of the Act (absent "substantial and compelling circumstances"). Part I of Schedule 2 was amended by section 5(a) of the Criminal Law (Sentencing) Amendment Act 38 of 2007 to include in the list of circumstances when murder would require mandatory life imprisonment, where "the victim was killed in order to unlawfully remove any body part of the victim, or as a result of such unlawful removal of a body part of the victim" (par (e)) or where "the death of the victim resulted from, or is directly related to, any offence contemplated in section 1(a) to (e) of the Witchcraft Suppression Act 3 of 1957" (par (f)) (such offences relate to imputing to another the causing of harm by supernatural means, the use of witchcraft to name someone as a witch or to bewitch, and acting on the advice of a witchcraft practitioner to injure someone). The addition of these grounds for the imposition of a mandatory life sentence evidences the concern that the legislature has in relation to the scourge of witchcraft-related killing.

Where the facts of a particular case raise the question whether the murder accused is entitled to be regarded as less blameworthy by reason of a belief in witchcraft, it is clear, as discussed above, that the genuineness of such belief, and the associated factors relating to the question whether such belief can be regarded as providing mitigation, fall to be assessed in terms of the aspects set out in *S v Fundakubi*, as developed in subsequent cases, and further refined by the Appellate Division in *S v Motsepa*.

Shannon Hoctor
University of KwaZulu-Natal, Pietermaritzburg