

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE:

In the matter of:

REX

vs

ELIJAH P. MAPHALALA

Review Order No. 18/1980

District of HHOHHO (Piggs Peak)

Mbabane on 2nd May 1980

Review Case No. 61/1980

JUDGMENT ON REVIEW

Nathan, C.J.

The Accused in this case was charged with contravening section 80(1) of the Grimes Act No. 6 of 1889 "in that upon or about the 20th day of January 1980 ..... the said Accused did wrongfully and for the purposes of gain pretend to exercise supernatural powers to set free from jail two sons of Irene Shiba who were convicted of murder and sentenced to death and did further undertake to tell fortunes and pretended from his skill to prevent one Irene Shiba from hanging herself in contravention of this Act."

Section 80(1) of Act 6 of 1889 provides as follows: "Any person who for purposes of gain pretends to exercise or use any kind of supernatural power, witchcraft, sorcery, enchantment or conjuration or undertakes to tell fortunes or pretends from his skill or knowledge in any occult science to discover where or in what manner anything supposed to have been stolen or lost may be found shall be guilty of an offence and liable on conviction to a fine of four hundred rand or imprisonment not exceeding one year."

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The Accused was convicted of the offence charged and was sentenced to a fine of E200 or 200 days imprisonment.

The case came before me on review. As it appeared to me that the sentence was unduly lenient I directed that it "be set down for argument with a view to increase in sentence. pro deo counsel being assigned to the accused. Mr. Dunseith has appeared for the Accused, and the Court is grateful to him for his argument.

The background to the case, as emerges from the Crown evidence which, on this point, was not disputed by the defence, is that the complainant Irene Shiba's husband was shot dead by one of the Gule family. Thereafter two of the complainant's sons killed Fezi Gule; and for this they were sentenced to death.

From the evidence of the complainant it appears that the Accused came to her with a companion and told her that he had met her late husband in a dream, and that the husband had sent him to come and "prevent" the imminent danger of her two sons being hanged. He went on to describe what should be done with some pieces of meat from a beast and with some stones. The Accused said that he was to be given three beasts, one of which would be retained by him as his payment. He then told the complainant that she also was going to die because she was going to hang herself; and that he would stop her from doing this by giving her some "muti". For this he would charge E800. The complainant's evidence was substantially corroborated by her sister-in-law, and notwithstanding certain discrepancies in regard to amount, by the accomplice witness Maphalala. It also receives some corroboration from the evidence of the Accused himself,

who said he would be charging E100 for the whole family.

I have no doubt that the Accused was correctly convicted . I proceed to consider the sentence. In regard to this the Magistrate has pointed out in his reasons for judgment that the maximum sentence provided in section 80(1) of Act 6 of 1889 is a fine of E400 or imprisonment not exceeding one year. He also refers to the fact that the Accused is a first offender and he-cites the case of R. v. Butelezi, 1961(1) S.A. 91(N) in which the Natal Provincial Division, in a far less serious case than the present, declined to interfere with a sentence of a fine of E30 or in default of payment, three months imprisonment. I find little assistance from Butelezi's case. It may be mentioned that the maximum period of imprisonment under the statute there under consideration was 2 years.

In my opinion the penalty provided for a contravention of section 80(1) of Act 6 of 1889 is quite inadequate and should be substantially increased. But even taking the section as it stands I am of the view that the sentence imposed in the present case was far too lenient. It is the obvious intention of the legislature to inflict a heavy penalty upon those who, like the present accused, prey upon the misfortunes of a family by professing to be able to exercise supernatural powers.

I pointed out in my judgment in R. v D. Mavuso, Review Order No. 9 of 1980 (12th February, 1980) that under a section worded as section 80(1) is the Court is entitled to impose a prison sentence without giving the Accused the option of a fine.

I have seriously considered whether this should not be done in the present case which I regard as an extremely serious one. I have, however, come to the conclusion that justice will be done if the sentence is increased to a fine of E380 or in default of payment, imprisonment for 9 months.

Before leaving the case I should point out that the indictment has been badly drawn in two respects. It alleges that the Accused "pretended from his skill to prevent one Irene Shiba from hanging herself in contravention of this Act." The words "in contravention of this Act" have, of course, nothing to do with the question whether Irene Shiba hanged herself or not. They should have appeared much earlier in the indictment, before the words "did wrongfully". But more important than this is the fact that the words "pretends from his skill" in section 80(1) of the Act refer to the words that follow later, namely "to discover where or in what manner anything supposed to be stolen or lost may be found". They have no bearing upon the preventing of Irene Shiba from hanging herself. There has, however, been no prejudice to the Accused because his pretence in this respect clearly falls within the pretending to exercise supernatural powers alleged earlier in the indictment. Consequently I do not consider it necessary to amend the indictment. But I venture to suggest that the indictment should have been drafted to read "... in that the said accused, in contravention of the said section did wrongfully and for purposes of gain pretend to exercise or to use supernatural powers to set free from jail two sons of one Irene Shiba who were convicted of murder and

and sentenced to death and to "be able to prevent the said Irene Shiba from hanging herself".

The conviction is confirmed but the sentence is altered to a fine of E380 or in default of payment imprisonment for nine months .

(C. J. M. NAIHAN)

CHIEF JUSTICE.

I agree.

(D. LUKELE)

JUDGE