IN THE HIGH COURT Off SWAZILAND HELD AT MBABANE

In the matter between: District Case No. M.199/79

REX

vs.

LOMPHAHLO MLOTSHWA

Review Order No. 12/1980 District of LUBOMBO (Mananga)

On the 25thMarch, 1980 Review Case No. 199/79

JUDGMENT ON REVIEW

COHEN. J.:

In this matter the Accused, a Swazi female, pleaded Not Guilty before the Magistrate at Mananga to a charge of "contravening Section 75 of the Crimes Act No. 6 of 1889 in that on (or about) the 27th day of November, 1979 and at (or near) Mlawula Area ....she did wrongfully and intentionally impute to Grace Nkosazane Hlawe the use of non-natural means (umutsi waseGema) in causing the death of Accused's mother in contravention of this Act". She was however convicted and sentenced to pay a fine of E200 or 200 days imprisonment and the record was submitted to me on automatic review. I called for the Magistrate's reasons for judgment, mainly because I was not satisfied that the use of "non-natural means" in terms of the section had been established by the Crown evidence.

The Magistrate has duly supplied such reasons in which he explains, inter alia, that the phrase "umutsi wasegema" when translated meant that the "muti" had been obtained from the Game Reserve. Although conceding that there was no direct evidence that the alleged use of the

muti constituted the use of "non-natural" means he drew my attention to page 431 and 432 of Vol. Ill of Milton, S.A. Criminal Law and Procedure. I quote the relevant passage from this book:-

"The imputation must refer to non-natural causes of damage and it would seen to be essential to allege and prove the nature of the non-natural means imputed to the person by the accused. It has thus been held that a statement by an accused that another has caused the death of X by means of "muti" constituted the offence as the reference to "muti" was a reference to a non-natural method of causing death".

The learned author refers to R. vs. M'Pompi 1920 J.S. Section 329(T) and R. vs. Galeni 1943 E. D. L. 291 in support of this conclusion. The report of the former case is not available in Swaziland but Gardiner and Lansdowne (6th Edition) mentions it, stating that in it "a conviction under the section was confirmed where the accused had, after throwing dolosse, advised his consultants that the illness and death of the father of one of them had been caused by muti given for administration to him by two Natives whom he named". It would appear therefore that in that case supernatural powers were as a fact invoked. I do not think that Milton intended to lay down a hard and fast ruling that the use of "muti" is always to be equated with the use of "non-natural" means. Whether or not it is so, appears to me a question of fact to be decided upon the evidence adduced in each case, and bearing in mind that the onus rests on the Crown to prove beyond a reasonable doubt that the reference to the use of muti was in fact a reference to its application by non-natural means.

The stem of the word "umutsi" (taken from the Zulu language) is "thi" and this is given several meanings in the authoritative Zulu-English Dictionary (second edition) compiled by C. M. Dolce, M. A. ; D. Litt; (one-time professor of Bantu philology at the Witwatersrand University) and B.W. Vilakazi M. A.; D. Litt (late senior language lecturer of Bantu studies of the same university) . It is there thus defined:-

"-thi (umuthi, 2. 3. and 5.4 umuthi)....

1. Tree, shrub, plant.,..,.

2. medicine, medicinal charm..... umuthi omnyama (harmful medicine, witchcraft charm; umuthi omhlophe (curative medicine);

3. Wood, wooden substance

4. modern idioms; boot polish, paint tooth paste, hair oil; shampoo powder, face ointment"

It will be observed that there is only one reference in this definition to witchcraft. I do not think that a Court should select from these examples of its meaning, only that which may have a supernatural or non-natural connotation. The muti ascribed to the complainant may have been of a poisonous character in the mind of the accusad, but not necessarily associated to some superstitious activity.

In the second case (R. vs. Galeni (supra)) referred to by Milton, the allegation made against the accused was that he had imputed to a female the use of non-natural means in causing illness to a certain person. The evidence showed that the accused had said that "one Temba was killed (strangled) by Nojayile by means of her "impundlu". The Magistrate who, the Court on appeal found, was presumably well acquainted with Xosa gave his translation of the word "impundulu" as "lightning bird". Moreover the Judge stated

that it was a word which frequently came up in criminal cases in the Transkei and the Court was familiar with its meaning. I think there is a considerable difference between accusing a person of having used her bird on the deceased and that the deceased had died from a plant or herb administered to her - the former is a word which is apparently usually connected with the art of bewitching, but this is not necessarily so in the case of the latter.

A more recent case, that of S. vs. Nyathi 1978(1) S.A. 289(T) - also a review case) dealt with certain provisions of the later South African statute which are not identical with our own Act. Nevertheless what Ackermann A.J. stated in that case seems to me to be apposite to the present matter;

"The magistrate cannot be faulted for accepting the evidence given by the State witnesses that the accused had accused complainant of killing the accused's brother so that complainant might get the deceased's estate. This was the sum total of the evidence concerning the actual contents of the accused's express imputation. The complainant sought to explain the import of the imputation by stating that -

"if a person says I have killed a person, this may mean bewitching or physically killing" The State witness Anna Malatye, in an answer to a question put by the Court stated that -

"when a person says to another you have killed a person in Bantu custom it means he has killed such person by witchcraft"

In my view this latter testimony cannot simply be accepted at face value. In the first place the witness was not qualified to testify on Bantu custom.

Secondly, I am not prepared to accept that the only meaning to be attached to the words used by the accused is that the complainant killed the accused's brother by witchcraft. At highest for the State, therefore, the imputation by the accused was equivocal. That being the case the accused could not and should not have been convicted of a contravention of Section l(a) of the said Act in the absence of proof beyond reasonable doubt that he intended his words to be understood in the sense contended for by the State".

I may mention that in the matter now before me there was in fact no evidence, expert or non-expert, that the use of "muti" always implied a resorting to some form of witchcraft or any other non-natural means.

The use of the word "non-natural" in Section 75 of the Act as opposed to "super-natural" elsewhere in the Act might lead to the view that the former word is something of a less sinister character than the latter, I have given some considerations to this aspect but, having regard, inter alia, to the fact that this particular Chapter of the Act is devoted entirely to crimes relating to witchcraft or wizardy (and not at all to the medicine man or herbalist or inyanga) I consider that the legislature had in mind some use of the hidden or occults arts or skills which are so frequently accepted in certain societies, even although it does not necessarily mean contact with the ancestors or spirits. "Non-natural" is defined in the Shorter Oxford Dictionary as "not belonging to the natural order of things, not according to or dependent upon nature; not in accordance with natural meaning". The mere use of a poisonous plant even with malicious intent is not in that

sense a non-natural phenomenon. If it were so used then any criminal action indulged in by the criminal against any member of society would classify as being non-natural. To state that someone has used a poisonous herb for the purpose of killing another might be highly defamatory but not necessarily a "non-natural" action.

In my view the evidence before the magistrate in this case was inadequate to justify the conviction. The complainant testified that the accused had stated "I know that you Mrs. Hlawe killed my mother by muti which you got from the Game Reserve". As corroborative testimony another witness declared that accused had stated - "I know you Hlawes. I also know that the muti by which you killed my mother came from the Game Reserve". As in the case of S. vs. Nyathi (supra) so in this matter - the evidence does not provide beyond a reasonable doubt the unequivocal proof that although the accused by his imputations may have been guilty of a serious criminal defa-nation, they were understood to be intended to convey that the Hlawes were indulging in "non-natural" activities.

In my view therefore the conviction should be quashed and the sentence set aside.

(D. COHEN)

JUDGE OF THE HIGH COURT

NATHAN, C.J.:

I agree. I would point out that Milton (op. cit. 4-32) states "Clearly, if the imputation is of a natural manner of causing injury etc., the offence is not committed".

It appears to me to follow that if the allegation had been

that the complainant had caused the death of the accused's mother by means of poison obtained from the Game Reserve, no offence within the meaning of the section would have been disclosed. In my view the allegation in the instant case amounts to no more than this.

The conviction and sentence are set aside.

(C. J. M. NATHAN)

CHIEF JUSTICE

MARCH, 1980 MBABANE