When Culture Clashes with the Criminal Law
Case note on *S* v *Hamunakwadi* 2015 (1) ZLR 392 (H); *S v Musino* HH-158-17 and *S v Taurayi* HH-298-90

By Geoff Feltoe

Introduction

How should the criminal law deal with a situation where a person charged with a criminal offence asserts that he or she was engaged simply in a widely practiced customary practice which is accepted as being appropriate in traditional society? How should the criminal law deal with a situation in which a person murders or assaults a person because he or she believes that the other person is using witchcraft to cause grave harm to them or their family members? A person brought up in traditional society who engages in conduct which the community perceives as entirely appropriate is likely to be baffled when he or she is prosecuted for a criminal offence.

The courts face the problem of deciding how to deal fairly with an accused who believes that he or she has done nothing wrong because he or she was simply engaging in a traditional practice. Should the accused's belief constitute some sort of defence or should it merely affect sentence? This problem has arisen in the context of witch killing and some sexual offences and also in one case where a person was forced to undergo a circumcision ritual. If the belief does not amount to a complete or partial defence, the courts have often struggled to decide upon the appropriate sentence to impose in such cases.

The Constitutional provisions

The 2013 Constitution contains various provisions aimed at protecting of cultural values but it also upholds a number of provisions disallowing cultural practices which violate the rights of women, and children and others.

Section 16(1) of the Constitution provides that the State and all institutions and agencies of government at every level must promote and preserve cultural values and practices which enhance the dignity, well-being and equality of Zimbabweans. This provision thus impliedly disallows the promotion of cultural practices that will lead to indignity; cause harm to the well-being of others or lead to inequality. The State and all institutions and agencies of government are required by section 16(3) to take measures to ensure due respect for the dignity of traditional institutions. Section 282(1) sets out the role of traditional leaders; which functions include promoting and upholding the cultural values of their communities and taking measures to preserve the culture and traditions of their communities.

It needs to be pointed out that culture and tradition are not static and immutable; they may change with changing social and economic conditions. Previously acceptable cultural practices may be deemed unacceptable in contemporary society, particularly those practices that harm women and children. Section 80 of the Constitution further provides that all laws, customs, traditions and cultural practices that infringe on the constitutional rights of women are void to the extent of the infringement. This applies to customary practices inconsistent with the rights of women set out in sections 56 and 80 of the Constitution and the constitutional rights of children set out in section 81. Section 63 further provides that although people may participate in their chosen cultural life, they may not do so in a manner that is inconsistent with the fundamental rights of others, such as the right to life.

Criminalisation of some traditional practices

Since 1980 the Government has criminalised various traditional practices which violate the rights of others. The Criminal Law (Codification and Reform) Act criminalises marital rape [s 68(a)] and pledging of female persons [s 94]. Wife beating constitutes assault [s 89] and domestic violence under the Domestic Violence Act; body dumping or refusal to bury a body until compensation is paid constitutes extortion under s 134. The Domestic Violence Act in s 3(1)(l) criminalises abuse derived from the following cultural or customary rites or practices that discriminate against or degrade women—

- forced virginity testing; or
- female genital mutilation; or
- pledging of women or girls for purposes of appeasing spirits; or
- forced marriage; or
- child marriage; or
- forced wife inheritance; or
- sexual intercourse between fathers-in-law and newly married daughters-in-law; or
- murder or assault of a person believed to be a witch who is causing harm

Cases have often arisen in which the accused kills or assaults another person genuinely believing that the person is using witchcraft to cause grave harm to himself or herself and his or her family members and believing that the only way to put a stop to this was to kill “the witch”.

A good example of the sort of events that may lead up to such a killing is found in the case of *S v Bitoni & Anor* S-98-87. Here the deceased was the first appellant’s father and the second appellant’s uncle. A bad relationship had developed between the son and his father. The son thought that the father had been callously unconcerned when his mother, the wife of his father, died. The father refused the son’s request to consult with a *n’anga* to discover the reason for his mother’s death. The son thought his father was in some way responsible for her death; his relationship with his father deteriorated

further and he decided to leave home. When he was leaving his father said to him, "Go right ahead and move to your new home, but you wait and see what will happen. You will eventually come back here." Soon after moving to his new home a series of calamities befell the son. His hut was twice destroyed by whirlwinds without any damage occurring to surrounding huts. His daughter died and at her funeral his father said to him, "You see now what is happened about the death of your daughter? You haven't seen nothing yet. You insist on leaving my home. You are going to see a lot more."

The son believed that his father had caused these calamities by the use of witchcraft. He believed that unless he complied with his father's wishes, his father would kill more of his children or himself. He consulted with a *n'anga* about his daughter's death. The *n'anga* informed him that his father was responsible for his misfortunes. The son then told the nephew of his beliefs and the results of the divination. They decided to eliminate the source of the threat to the lives of their families and themselves by killing the father. Late at night, they proceeded to the deceased's house, poured petrol over it and set it alight. The deceased was rescued from the hut by someone but he died later from burns he had sustained.

In a series of murder cases decided after 1980, the courts adopted the approach that the belief that the person killed was using witchcraft to cause harm was not a defence but could be only an extenuating circumstance. In these cases, the courts accepted that there exists a widespread belief that witchcraft could be used to cause harm and that the accused were acting in accordance with their beliefs. Nonetheless, the courts still imposed lengthy prison sentences as a deterrent against the murder of those believed to be witches. The accused are not entitled to take the law into their hands by unlawfully killing and these cases can result in the murder of innocent persons falsely accused of using witchcraft.[1]

When the Criminal Law Code came into operation it laid down, in s 101, that where a person kills or injures a person under a genuine belief that the victim is a witch this belief will not constitute a defence but will operate simply to mitigate the sentence. Thus, for instance, the defence of self-defence or defence of a third party will not avail in a case of witch killing. It was previously accepted that these defences can apply only to fend off a physical attack and do not cover a situation where a person believes that supernatural means are being used to cause harm.

The Code also replaces the colonial witchcraft provisions with a number of new provisions which have the effect to not legalise witchcraft. It criminalises engaging in

[1] See also *S v Nare & Anor* S-165-88 and *S v Muleya & Ors* S-69-88. See also "Sentencing persons who kill witches" by G. Feltoe 1990 Vol 2 No 1 *Legal Forum* pp 36-40 which challenges the efficacy of deterrence in this area.

practices commonly associated with witchcraft. However, it also distinguishes between "witchcraft" and "witch-finding".

Whereas s 6 Witchcraft Suppression Act punished mere profession of witch-finding, the Code provides that if the accused simply accuses another of engaging in witchcraft practices he or she does not commit an offence. He or she is not liable, if having reasonable grounds for suspecting the other of engaging in such practices, he or she makes their accusation without the purported use of non-natural means. The crime is committed only if the accused—

- groundlessly accuses someone of being a witch or wizard; or
- by purported use of non-natural means accuses someone of witchcraft.

These provisions in effect recognise that witchcraft can be used to harm others and an accused is entitled, on reasonable grounds, to accuse another of practicing witchcraft.

Case law after the Code provision came into operation to lay down that a belief in witchcraft can only mitigate the sentence, seems to reflect a sentencing approach which pays more attention to the avid belief in the phenomenon of witchcraft.

In *S v Techu & Ors* HH-271-15 despite the fact that the accused brutally murdered a woman in her home, the court found that it was highly mitigatory that the accused was affected by his strong belief in witchcraft and thought that the woman was a witch. The court found that the belief in the destructive power of witchcraft appeared prevalent in their area. In *S v Hahlekiye* HH-260-17 the court took into account that the accused's belief in witchcraft played a major role in the commission of the murder. The two accused severely assaulted an 86 year old man who later died. The old man was believed by the accused to have used witchcraft against the accused's family.

On the other hand, in *S v Chiurunge* HH-295-15 the court said—

> This case once again brings to the force the negative impact of this deep rooted belief in witchcraft by a number of communities in our nation. I must confess this belief is extremely controversial and as a court we cannot claim to have a solution to the impact of this system which dates back to the creation of mankind. … The method used by the accused was clearly wrong in this case. There are scattered throughout this country local and traditional leaders whose duty is to deal with cases like the one which confronted the accused. The accused had no right to take the law into his own hands because he is not qualified to deal with the situation that he attempted to resolve. The life of the deceased was not so cheap to be ended in the way it did and the accused was expected to contain his beliefs no matter how strong they may have been. Chaos and anarchy will enslave this country if those of the mind of the accused person are not adequately punished for their conduct.

Despite the Code provision that belief in witchcraft can only mitigate and will not constitute a defence, the judge in *S* v *Hamunakwadi* 2015 (1) ZLR 392 (H) raised the possibility of provocation operating a partial defence in a case of witch killing.

The judge points out that—

> …many cultures across Africa embrace traditional healers and a persistent belief in witchcraft. … African witches who, through sheer malice, either consciously or sub-consciously employ magical means to inflict all manner of evil on their fellow human beings. Someone is either born a witch or can learn witchcraft from a traditional healer.

He observes that whereas the colonialists attempted to suppress witchcraft, the Criminal Law Code has now legalised certain accusations of witchcraft and the harmful practice of witchcraft can be punished. The courts have recognised that witchcraft related violence can lead on to "a witchcraft-provocation defence that can be offered as a mitigating factor."[2]

He goes on to say that under this approach the crime or punishment could be reduced "upon proof that they believed they, or persons under their immediate care, were being bewitched and that this belief caused them to temporarily lose self-control." He then comments that this approach "in some ways provides tacit recognition that in certain communities killing a 'witch' is not merely explainable, or excusable, but praiseworthy."[3]

With respect, the judge's statement that in some ways, in some communities "killing a 'witch' is not merely explainable, or excusable, but praiseworthy" may reflect the social reality in some communities but surely the law should encourage restraint and advocate that rather than resorting to murder, these communities should be called upon to deal with witchcraft practices through cultural processes that do not involve killing.

The judge then then goes on to suggest that, in certain circumstances, the partial defence of provocation should be available in the witch killing situation. He said that the basic elements required for a successful defence of witchcraft provocation are:

(a) the act causing death must be proved to have been done in the heat of the passion, that is, anger: fear alone, even fear of immediate death, is not enough;

(b) the victim must have been performing, in the presence of the accused, some act which the accused genuinely believed, and which an ordinary person of the community to which the accused belongs would genuinely believe, to be an act of witchcraft against him or another person under his immediate care;

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[2] My emphasis. It necessary to clearly distinguish a defence from mitigation. Whereas a defence either excuses liability or reduces the crime to a lesser crime (partial defence), mitigation simply reduces the punishment for the crime.

[3] My emphasis.

(c) a belief in witchcraft *per se* does not constitute a circumstance of excuse or mitigation for killing a person believed to be a witch or wizard when there is no immediate act of provocation;

(d) the act of provocation must amount to a criminal offence under criminal law;

(e) the provocation must be not only grave but sudden and the killing must have been done in the heat of passion.

However, on the facts found by the court in this case, this defence could not apply as the accused did not act in the heat of passion.

The suggestion of a partial defence of provocation is an interesting one but, first, s 101 of the Criminal Law Code would need to be amended to allow this defence to apply and secondly, if the defence is to be allowed its requirements would have to be carefully worked out.

As indicated by the judge, the defence would need to be based on passion arising from provocation and not on action based on fear as it has been clearly established that the defence of self-defence, which can be a full defence, cannot apply to this situation. The accused will be contending on a charge of murder that he lacked the intention to kill because he was in a complete rage due to severe provocation. This might apply where he strongly believed that witchcraft was being used to cause him or his family serious harm and when he confronted the deceased she boasted that indeed she was perpetrating the harm through witchcraft and would continue to do so. Reacting to the provocation, the accused then completely lost his self-control and caused her death without intention to do so.[4] Under this approach the accused would be found guilty of culpable homicide instead of murder.

There is a second rung to the defence of provocation in the Code. This provides that an accused will be found guilty of culpable homicide and not murder if he intended to kill but as a result of the provocation suffered by the accused he completely lost his self-control; the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control.[5]

The witch killer would surely not be able to contend that a reasonable person in his position would have lost his self-control and perpetrated murder. Of course, this depends upon whether the reasonable person test is a reasonable person in the context of that community where the belief in the evil power of witchcraft is still extremely strong. Previously, the courts have refused to treat the belief in witchcraft as a reasonable belief which justifies killing.

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[4] See s 239(1)(a) of the Criminal Law Code.
[5] See s 239(1)(b of the Criminal Law Code.

Other cultural beliefs

In *S* v *Musimo & Ors* HH-358-17 the appellants, using threats of violence, kidnapped a 51 year old man, held him for two months and forced him to undergo an initiation and circumcision ceremony. The appellants appealed against the sentence imposed for this offence stressing, amongst other things, the role cultural beliefs played in the commission of the offence.

The appeal judge refers to the problem that arises when an act is criminalised which — in the cultural group of the accused — the same act is

> … condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation … The problem posed by cultural offences is not peculiar to this jurisdiction but is a world-wide phenomenon which requires the courts to resolve problems of socio-legal complexity.

The judge refers to "the underlying constitutional imperative which is raised in such cases where there is a clear conflict of the legal norm and social cultural norm." The judge points out that before independence there was a deliberate policy to discriminate against indigenous cultures but, following independence, under the Constitution 2013 a deliberate effort was made to entrench the promotion and preservation of indigenous cultures. The court says that s 63 of the Constitution now guarantees the right to participate in the cultural life of one's choice and provides for the functions of traditional leaders.

The judge raises the question whether the promotion and protection of cultural rights can be strengthened by seeking guidance from traditional leaders where issues of culture conflict arise to ensure the fair administration of the criminal justice system. He suggests that the Law Development Commission should examine this matter. In the present case, the judge says the court would have welcomed testimony from a cultural expert who would have guided the court about the nature of the conflict between the appellants' conduct and the general law.

The court then comments that—

> The right to equality and the right to a fair trial, all impact on the cultural foundational basis of the appellants' convictions. The offence with which the appellants were convicted brings into sharp focus the need to balance the individual rights and freedoms as espoused in the Constitution and the cultural background of the appellants, as a court is required to do, in order to strike the delicate balance in the assessment of an appropriate sentence.

The court concluded that the appellants' moral blameworthiness was moderate in light of the mitigating cultural beliefs under which they conducted themselves. The judge

also suggested that had this point been properly taken "it may well have operated as a defence to a limited extent. It is therefore highly mitigatory."[6]

It is submitted that despite taking into account the cultural beliefs of the accused, the nature and effect of the kidnapping made this a case a very serious matter. It is correct that the 2013 Constitution guarantees the right to participate in the cultural life of one's community and obliges government to promote and preserve cultural values. However, s 63 makes it clear that people may not practice culture in a manner that is inconsistent with the fundamental rights of others. In the present case, the complainant did not wish to undergo the initiation and circumcision ceremony and was forced by threats to do so against his will. Further, he was kidnapped and held for two months. His fundamental rights were thus seriously violated. The accused's cultural beliefs were certainly mitigatory but it is arguable that they were "highly mitigatory".

Sexual offences

In *R* v *S* 1965 (4) SA 604 (RAD) the court dealt with a case of an accused person who had been convicted of rape after sexual intercourse with the girl pledged to him according to local *baTonga* custom in which the pledging of children was almost universal. The court held that this lessened the moral blameworthiness of the accused.

In *S v Taurayi* HH-298-90 the accused, aged 22, fell in love with grade 8 schoolgirl. They decided to get married and approached the girl's aunt to assist. Eventually the accused paid *lobola* to the girl's parents and they met all the traditional requirements for marriage in terms of customary law. The parties, parents and the community all accepted that they were properly married. They had sex only after their marriage but the girl was still only fourteen and a half at time. The girl became pregnant but the baby died soon after birth. The sister of the girl reported to the police that unlawful sex had occurred.

The magistrate imposed a fine plus short prison sentence wholly suspended. On review, the judge substituted a caution and discharge. He laid emphasis on the fact that the community and even the elders were unaware that a crime had been committed in these sorts of circumstances.

Conclusion

Situations where accused persons violate the criminal law by engaging in cultural practices that are widely acceptable in their own communities pose a difficult problem for the courts. The courts must be fair to the accused by properly taking into account the cultural reasons behind what the accused did. However, they also need to balance this against the harm caused to others.

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[6] My emphasis.

In the past this matter has been dealt with by the courts taking the cultural beliefs into account in mitigation of sentence rather than by allowing even a partial defence to apply. The *Musimo* case, on the other hand, suggests that in a case of witch killing a partial defence of provocation may apply subject to certain requirements being satisfied. If, due to provocation the accused completely lost his self-control and caused death without intending to do so, then the essential element of murder namely, intention to kill — would be absent and a conviction for murder is not sustainable.