

Witchcraft as a Criminal Defence, From Uganda to Canada and Back

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Editor's Note: This article originated with Dr. Nsereko's visit to the Faculty of Law of the University of Manitoba in March 1994. It is offered to our readership as both a contribution to comparative criminal law and in the hope that it will give the reader pause to ruminate over the propriety of the "honest but mistaken belief" defence in the Canadian legal system.

I. GENERAL INTRODUCTION

A. The Country and its People

UGANDA IS A LANDLOCKED AFRICAN STATE lying astride the Equator. It is surrounded by Kenya on the East, Zaire on the West, the Sudan on the North, and Rwanda and Tanzania on the South. It is approximately 241,139 square kilometres in size. Most of it is a high plateau, approximately 2,300 to 3,300 metres high with the high Rwenzori Mountain range in the West. It has an evergreen vegetation watered by a number of lakes, the largest of which is Lake Victoria, the source of the Nile River and the world's largest fresh water lake.

The population of Uganda is approximately 16,000,000, almost all aboriginal Africans, belonging to one of four major ethnic or linguistic groups. Until the onset of British colonization toward the end of the 19th century, the various peoples that constitute Uganda did not live under a single political authority. They existed as independent entities, with various forms of political and social organization. Some were kingdoms with centralized governments. The rest were in the main acephalous, the clan being the largest political unit.

The Kingdom of Buganda, from which the name Uganda is derived, was the most powerful, both politically and militarily.¹ It was with the king of Buganda, Kabaka Mutesa I, that the British made their initial contacts. On the persuasion of British explorer H.M. Stanley, he invited European missionaries to Buganda in

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¹ The British colonizers, under the influence of the Swahili languages of the East African Coast, originally called Buganda *Uganda*, which is the Swahili version of *Buganda*. To distinguish Buganda from the rest of the Protectorate the name *Uganda* was retained for the whole country.

1876.² In response to the Church Missionary Society (Anglican) arrived in the country from Britain in 1877, followed by the White Fathers (Catholics) from France in 1879. Kabaka Mutesa I died in 1884. His heir, Kabaka Mwangi, was forced to conclude a treaty with the Royal British East Africa Company which surrendered sovereignty over Buganda to the Company. Similar treaties were subsequently made with the rulers of the Kingdoms of Ankole, Bunyoro, and Toro.

B. Political System

The British government formally declared a protectorate over the Kingdom of Buganda in 1884, and, with the assistance of the Kabaka and his chiefs, proceeded to subjugate and extend the protectorate to adjacent territories. By 1896 it had control over almost all of present-day Uganda. In 1900, it concluded the *Uganda Agreement* with the Kingdom of Buganda, creating a province with some measure of internal self-government. Similar treaties were made with the Kingdoms of Toro in 1900, Ankole in 1901, and Bunyoro in 1933. The non-kingdom districts of the country were administered directly by the Protectorate government, in 1902 under the Uganda Order-in-Council, a legislative fiat of the British monarch. The government was headed by a governor, assisted by Executive and Legislative Councils appointed by the self-same governor. Thus, Uganda as it exists today is a creation of British colonization, just as Canada is.

Uganda attained independence from Britain on the 9th of October, 1962. She adopted a Westminster-type of constitution, with a parliamentary system of government, a titular head of state, and a cabinet headed by a prime minister. It also provided for an independent judiciary with the power to review acts of both the legislature and the executive. It preserved the autonomy hitherto enjoyed by the Kingdoms of Buganda, Bunyoro, Toro, Ankole and the territory of Busoga, by granting them quasi-federal status. The non-kingdom districts retained a direct unitary relationship with the central government. Very important, too, the *Constitution* embodied a justiciable bill of rights, based on the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. It set out individual rights and freedoms and established a mechanism for their enforcement at the instance of any aggrieved person.

The independence *Constitution* was, however, short-lived. It was abrogated in a snap *coup* in 1966 by the then prime minister, Mr. Milton Obote, who proceeded to declare himself president with full executive powers. Obote abolished the kingdom states, annulled their quasi-federal status, and declared a unitary system of government. Since then, Uganda has experienced six military *coups d'état*: in 1971 when Idi Amin Dada, Obote's army chief-of-staff, overthrew him; in 1979,

² See D.A. Low, *The Mind of Buganda* (London: Heinemann Educational Books Ltd., 1971).

Tanzania invaded Uganda, drove out Amin and replaced him with a civilian administration under Professor Yusufu Lule; in the same year, a faction of the civilian government, with the connivance of Tanzanian occupying forces, toppled Lule and replaced him with Godfrey Binayisa; in 1980, a military commission, with the blessing of the Tanzanian government, overthrew Binayisa, and brought Obote back to power; and in 1985, the Ugandan army once again overthrew Mr. Obote and replaced him with its commander, General Tito Okello Lutwa. The Lutwa regime was short-lived, toppled in 1986 by Yoweri Kaguta Museveni and his National Resistance Army which had been waging a guerrilla war against Mr. Obote in the preceding four years. Museveni is still in office, with a government that remains quasi-military.

C. The Legal System

The Uganda Order-in-Council promulgated by the British monarch in 1902 established the High Court of Uganda and other subordinate courts. These courts were to exercise jurisdiction in accordance with local ordinances and, subject to them, in conformity with the *Civil Procedure*, *Criminal Procedure*, and *Penal Codes* of India. The Order-in-Council was amended in 1911 to the effect that where the *Indian Codes* were inapplicable then the courts were to exercise jurisdiction "in conformity with the substance of the common law, doctrines of equity and the statutes of general application in force in England on the 11th of August 1902 and with the powers vested in and according to the procedure and practice observed by and before courts of justice and justices of the peace in England according to their respective jurisdictions." However, the common law, doctrines of equity, and statutes of general application were to apply only so far as "the circumstances of the Protectorate and its inhabitants and the High Court's jurisdiction permit and subject to such modifications as local circumstances render necessary." Additionally, in matters to which Africans were parties, the courts were to be guided by customary law, so far as such law was applicable and not "repugnant to justice, morality and good conscience and not inconsistent with the Order-in-Council." At independence these provisions were re-enacted with slight modifications, merely to take cognizance of the fact that it was now the Uganda Parliament, and not the British monarch, which was the sovereign law-making authority for the country.³ In truth, the Order-in-Council imported into Uganda English law and English legal culture which continue to form the basis of the country's legal system.

³ See the *Judicature Act*, Ap. 334.

II. THE CRIMINAL LAW — SOURCES

A. The Constitution

The *Constitution* of Uganda has been unilaterally abrogated, overthrown, suspended, and violated on numerous occasions. Nevertheless, it remains an important source of the criminal law, and vital to the concept of the rule of law in general. One principle is that the power of the legislature to make laws is not unlimited. It cannot, for example, pass laws that violate constitutionally recognized human rights.⁴ It cannot pass penal laws with retrospective effect.⁵ Nor can it pass criminal laws which presume an individual guilty of an offence,⁶ although it may pass laws that require the accused to prove some particular facts, for example, that he was not sane.⁷ Similarly, in the interest of certainty and accessibility, the *Constitution* forbids unwritten criminal law, such as “common law” or “customary law” offences, with the exception of the offence of contempt of court.⁸ It also forbids courts to expose accused persons to double jeopardy by recognizing the pleas of *autrefois acquit* and *autrefois convict*.⁹ Very important too, the *Constitution* spells out the minimum guarantees of a free and fair trial.¹⁰ The *Uganda Constitution*, in these respects, accords with the Canadian *Criminal Code* and at least the spirit of the *Canadian Charter of Rights and Freedoms*.

B. The Penal Code

As is the case in Canada, the bulk of the criminal law of Uganda is contained in a code, the *Uganda Penal Code*.¹¹ It lays down general principles applicable to all criminal legislation. Exceptions to these principles, if there be any, are contained in separate statutes creating those exceptions.¹² The *Code* also defines specific

⁴ See sections 8–20.

⁵ Article 15.

⁶ Article 15(2)(a).

⁷ Section 15(12)(a).

⁸ Article 15(8).

⁹ Article 15(6).

¹⁰ Article 15(1)(2).

¹¹ *Laws of Uganda*, Chapter 104.

¹² See, for example, the *Administration of Justice (Karamoja) Act*, Chap. 35. Section 42 of this Act departs from the general rule of presumption of innocence and of the burden of proof. It imposes on the accused person who participates in a cattle raid in which a person dies to prove himself innocent. The constitutionality of this provision has not yet been tested by the courts.

offences of general application and of a permanent nature (as opposed to offences created by special statutes dealing with conduct in certain specialized fields).

The Uganda *Penal Code* came in force in 1935, 46 years later than Canada's *Criminal Code*. It replaced the Indian *Penal Code* which had been applied to Uganda by the Uganda Order-in-Council of 1902. The Indian *Penal Code* was said to have been based on "the law of England, stripped of technicality and local peculiarities, shortened, simplified, made intelligible and precise."¹³ Nevertheless, the style of the Indian code did not impress the English-trained colonial law officers and magistrates who had to apply it on a day-to-day basis. According to the Secretary of State for the Colonies, these "[o]fficers [found] it easier to apply a *Code* which employs the terms and principles with which they are familiar in England than one in which the terms and principles have been discarded for others of doubtful import."¹⁴ The Indian *Code* was therefore discarded and replaced by the present *Code*, as more faithful to then current English criminal laws and principles. This *Code*, which was to be a model for other British dependencies in Eastern Africa and beyond,¹⁵ was drafted by law officers at the Colonial Office, based on a code previously drafted and promulgated for Nigeria.¹⁶ The Nigerian *Code*, for its part, owed its origins to the Queensland *Criminal Code* of 1892. The Queensland *Code* was, in turn, based on a draft prepared by James Fitzjames Stephen,¹⁷ the same primary draftsman of Canada's *Criminal Code* of 1892.

To ensure that English criminal law remained the basis and point of reference for the criminal law of Uganda, the drafters of the *Penal Code* inserted a provision which required courts to interpret it according to English legal principles. Section 3 of the *Code* provides as follows:

[t]his Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.

Thus, where the *Code* is unclear, the courts are expected to have recourse to the decisions of the English superior courts and to English commentaries for guidance.

¹³ W. Stokes, *Anglo-Indian Codes*, cited by J.S. Read, "Criminal Law in the Africa of Today and Tomorrow" 7 *Journal of African Law* 5 (1963).

¹⁴ Dispatch No.380, 10th of May 1927. Cited by Read, *ibid*.

¹⁵ This is true of the codes of the Gambia, Kenya, Malawi, Seychelles, Tanganyika, Zambia, Zanzibar, Cyprus and Fiji.

¹⁶ See H.F.Morris, "How Nigeria Got its *Criminal Code*" (1975) 14 *Journal of African Law* 37.

¹⁷ See M.L. Friedland, "Codification in the Commonwealth: Earlier Efforts" (1990) 2 *Criminal Law Forum* 45.

This they do liberally. English cases and English practise books such *Archbold's Criminal Pleadings* are cited frequently and extensively before the Ugandan courts.

As expected, the *Penal Code* has been amended from time to time in order to bring it in line with changing social, political and economic conditions in the country. The latest major amendments came in 1990. Among other things, they made rape, defilement, and detention with sexual intent punishable by death. The aim here seems to have been the desire to curb promiscuity and to stem the tide of the AIDS scourge. The amendments also created the new offence of issuing false cheques, a practice perceived to be injurious to the economy. The *Code* has also over the years been supplemented by other statutes, creating regulatory offences in the fields of road and traffic safety, public health, trade and commerce, and occupational and industrial activities. The tenor and philosophy underlying regulatory legislation seems to be the same as in Canada.

C. English Criminal Law

As shown above, the *Penal Code* must be interpreted in accordance with English rules of statutory interpretation and, save where the context otherwise requires, with principles of English criminal law. Substantive English criminal law has also been expressly imported in respect of the offences of contempt and piracy, as well as against the use of force in defence of person and property, and of rash, reckless, or negligent conduct.¹⁸

This, then, is the context, historical and legal, for one aspect of the Uganda criminal law: belief in witchcraft as the major driving force behind commission of certain criminal offences. Does such belief excuse the accused?

III. BELIEF IN WITCHCRAFT

WITCHCRAFT IS A FORM OF MAGIC. It is the use of supposed supernatural powers to do good, or, more often, evil. Belief in witchcraft is universal. It persists in the west, even in western Canada.¹⁹ It is, however, most rampant in societies beset with illiteracy and technological backwardness. In those societies any inexplicably

¹⁸ Section 17 of the *Penal Code*.

¹⁹ For example, it is reported that there are as many as 5,300 devotees of witchcraft in Canada, 2,000 of them living in British Columbia. This information surfaced recently when one Sam Wagar, a professed witch and priest of the Covenant of the Goddess Church, was denied nomination as a candidate of the New Democratic Party in a byelection in Matsqui, British Columbia. See R.M. Lee, "Witch Considers Taking Legal Broom to NDP" *The Vancouver Sun* (31 January 1994) A3.

unfortunate occurrence, such as illness, death, accident, loss of property, and any misfortune, is often attributed to practices of witchcraft.²⁰

These vary from country to country, from community to community. However the common denominator in most practices of the craft is its evil or foul nature. Typical practices include injuring or killing people and exhuming their corpses for ghoulish feasts; stealing or damaging property; destroying crops; and causing calamities or accidents.

In Uganda, as is the case in many African countries, witches or sorceresses are generally viewed with revulsion, fear, and abhorrence. They are considered to be inhuman and not fit to live. In pre-colonial times instant death was the sentence reserved for them. Among the Baganda of Uganda, for example, a *mulogo* (an ordinary witch or sorceress) or a *musezi* (the night prowler) was either burnt alive or killed by stuffing unripe bananas up his or her anus.²¹ Throughout Uganda and elsewhere in Africa perceived victims of witchcraft took, as they continue to do, the law in their hands to kill witches and sorcerers, and to rid the community of the peddlers of this evil craft.²²

To the enlightened and scientific mind, witchcraft is utter nonsense. Indeed, a leading authority has defined the practice of witchcraft as "... an imaginary offence because it is impossible. A witch cannot do what he is supposed to do and has in fact no real existence." This authority goes on to say that "a witch performs no rite, utters no spell, and possesses no medicine. An act of witchcraft is a psychic act."²³ However, to the superstitious mind witchcraft is real and is a social evil that must be combatted and extirpated. As indicated, the practice of witchcraft was already considered to be a heinous offence under the indigenous customary system. Modern

²⁰ See, for example, the case of *Uganda v. Zenatio Kombe*, H.Ct.Cr. Session No. 536 of 1967, H.Ct. Monthly Bulletin No. 136 of 1967. The accused killed a woman after being advised by a witch doctor that the same woman had charmed his penis so that it could not function when he slept with his wife.

²¹ See E.S. Haydon, *Law and Justice in Buganda* (London: Butterworths, 1960) at 283.

²² For a recent example see *Baziriyi Baryonruntaro v. Uganda*, S.Ct.Cr. App. No. 5 of 1991 (unreported). The appellant tried to kill his wife because neighbours accused her of being a witch. He was disarmed but in the process killed the deceased. See also Pislely Dodds, "Tribal Justice Problematic for Mandela" *The Globe and Mail* (13 June 1994), where it was reported that at the village of Lebowa in South Africa 65 people accused of witchcraft were burned to death between January and June 1994. A Lieutenant Ernest Setati of the Lebowa Police is reported to have said that "[t]he question of witchcraft is deeply rooted in this society. People don't just die. They think they must be bewitched." He said that whomever a witch doctor names is set upon and burned by villagers, who also burn the house. Family members are often attacked or driven away.

²³ Cited by J.S. Read, "Crime and Punishment in East Africa: The Twilight of Customary Law" (1964) 10 *Howard Law Journal* 164.

criminal law could not ignore this phenomenon. For this reason, the *Witchcraft Act* was enacted, making it an offence:

- (i) for any person to directly or indirectly threaten another with death by witchcraft or by any other supernatural means;
- (ii) for any person to directly or indirectly threaten to cause disease or any other physical harm to another, or to cause disease or harm to any livestock or harm to any property of whatever sort of another by witchcraft or by any other supernatural means;
- (iii) for any other person to practice witchcraft or to hold himself out as a witch, whether on one or more occasions;
- (iv) to hire or procure another person to practice witchcraft or for evil purposes to consult or consort with another who practices witchcraft or holds himself as a witch; or
- (v) to be found in possession or control of any article used in practicing witchcraft other than *bona fide* for scientific purposes or as a curio.

Contrary to the general law of evidence, the Act permits the prosecution to adduce evidence to the effect that the person charged with practising witchcraft is a witch by reputation. The prosecution may also adduce evidence to the effect that articles found in his possession are by common repute generally used in witchcraft. If the courts were not vigilant this kind of evidence could be very prejudicial to the accused person. In one case, for example, an accused person charged with being a witch was alleged to have been responsible for the death of over twenty people in his community. As is to be expected, there was no iota of evidence to substantiate this highly damaging allegation. It was based on sheer rumour and gossip which the High Court rejected.²⁴

A person convicted of offences under the Act may be sentenced to various terms of imprisonment. He may also be subjected to exclusion orders, prohibiting him, for such periods as may be stated in the orders, from entering and remaining in specified areas, including and surrounding the places in which the offences were committed.²⁵

Alongside witches and sorcerers is another class of professionals: the diviners or witch doctors. These are what in the west may be called "white witches" or practitioners of "white magic." These people, known as *endagu* or *abalaguzi* in the Lugandan language, claim to possess supernatural powers to diagnose people's

²⁴ *Uganda v. Fenekansi Oyuko*, [1973] Uganda Law Reports 35. The High Court held that reputation under the Act does not mean "a rumour or fame spread by gossip, but that reputation which springs from acknowledgment, conduct and life."

²⁵ *The Witchcraft Act*, Cap.108, sections 3 to 7.

problems and to find their causes; they claim to be able to counteract spells, find witches that are allegedly responsible for their clients' ills, and to find remedies to their supplicants' problems. To these "doctors" many supposed victims of witchcraft flock for assistance. Witch doctors or witch finders are another source of evil, because they may prey on the ignorance of the people to extort gain for themselves, to accuse other people falsely of being witches, and to lead their clients to commit dastardly crimes against innocent people, usually close relatives.²⁶

Laws of such countries as Botswana do not explicitly acknowledge the existence of witchcraft; hence, they refer to it as "so-called witchcraft" or to "pretended means of witchcraft." Their purpose is to discourage irrational belief in and fear of the craft.²⁷ The *Witchcraft Act*, on the other hand, by explicitly prohibiting practices of witchcraft unwittingly lends credence to the existence of the craft and perpetuates people's irrational belief in and fear of it.²⁸

One problem with witchcraft, at least in Uganda, is that there is usually no physical or tangible act that the witch does. Therefore, witches cannot easily be brought within the purview of the *Witchcraft Act* for prosecution. Their supposed victims usually base their accusations on mere suspicion and intuition and, unable to invoke the aid of the law, resort to self-help. Consequently crimes, mostly killings, are committed by such people. The problem that arises out of such killings is whether they are excused under the usual defences such as mistaken belief, provocation, or insanity.

A. Mistaken Belief

Section 10 of the *Uganda Penal Code* provides as follows:

- (1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
- (2) The operation of this section may be excluded by the express or implied provisions of the law relating to the subject.

The defence of mistake is an extension of the general rule that a person who is not at fault should not be punished and that, therefore, the prosecution must prove

²⁶ Section 4 of the *Witchcraft Act* makes it an offence for any person to impute the use of witchcraft to another if any harm results to such other person as a result of such imputation.

²⁷ See Laws of Botswana, *Witchcraft Act*, Chap.09:02.

²⁸ Canada offers its own version of diviners. Such claimants to unique supernatural powers often market their forked sticks or rods to locate, with trembling, underground sources of water or oil. Police forces occasionally are pressured by a fearful community and family of victims of brutal, often serial, criminal acts to employ self-appointed "psychics." There appears to be little, if any, lawful regulation of such activities across Canada.

guilty knowledge or *mens rea*, where this has not been excluded. A person who labours under some genuine, albeit mistaken, belief as to the existence of a state of things is not at fault and may therefore have a good defence. However, for the defence to be sustained the mistaken belief must be: (i) in the existence of a factual state of things; (ii) honest or genuine; (iii) reasonable; and (iv) of a sort which, if true, would not render the accused guilty of a criminal offence.

Subsection 10(1) does not explicitly state whether the state of things to which the accused's belief relate must be factual or legal. Be that as it may, however, the side-note to the section uses the words "mistake of fact"; and the former Court of Appeal for Eastern Africa has held that side-notes may be referred to in order to determine the construction of a section to which they relate. Using this rule of interpretation the Court held that "state of things" as found in an identical section of the Tanzanian *Penal Code* means a factual and not legal state of things. It accordingly rejected as invalid the appellant's plea that they had been led to believe by one of them that the law had been changed to empower them to kill suspected thieves and that they genuinely believed this to be the state of affairs when they killed the deceased. Their belief related to law, not fact; it was not a valid defence.²⁹

Belief in the existence of a state of things must be honest or genuine. It must not be feigned belief. If the facts on which the accused based his belief are known to be non-existent, then the belief is not honest or genuine. Whether this is true or not is a matter of evidence. With respect to witchcraft, it must be shown in each case that the accused did honestly believe (i) that his victim practiced witchcraft on him or on any of his relatives; and (ii) that he acted in self-defence or defence of those relatives. Generally speaking, this is not a difficult task, since belief in witchcraft and its potential for harm is widespread and, as one judge has remarked, entire African communities are "soaked" in witchcraft.³⁰

Not only must the belief be honest, it must also be reasonable. What is "reasonable belief"? It is a belief that a reasonable person would hold. What test does one use to determine the behaviour of a reasonable person? The courts throughout English-speaking Africa, where the common law applies, have had to grapple with this issue. In a case from the former Nyasaland (now Malawi) the deceased, who had some misunderstanding with the appellant, told the appellant that the appellant would not see the sun that day. The appellant interpreted this to be a threat to kill him by witchcraft. The appellant decided to kill the deceased before sunset or else he himself would die first by her witchcraft. He shot her with an arrow through the

²⁹ *Musa & Anor v. Republic*, [1970] E.A. 42. Section 7 of the *Uganda Penal Code* does specifically provide that "[i]gnorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence."

³⁰ *Chabijana v. The King*, 12 East Africa Court of Appeal 104.

stomach and then struck her four blows on the head with a hoe. When charged with murder he pleaded that he honestly believed that the deceased would kill him by witchcraft, and that he acted in self-defence. The issue was whether the appellant's belief was reasonable. Before resolving this issue, the court had to determine what "reasonable" meant. According to the Federal Supreme Court of Rhodesia and Nyasaland "reasonable" meant "what would appear reasonable to the ordinary man in the street in England." Belief by the accused that the deceased would kill him by witchcraft before the end of the day was not a belief that an ordinary Englishman in the street in England would entertain; *ergo* it was not reasonable, and the defence of self-defence would not avail the appellant.³¹

To the Court of Appeal of Botswana, a "reasonable person" means "an ordinary person of the class of the community to which the accused belongs." If the accused is from a rural community his conduct will be judged by the standard of conduct expected of an ordinary or average person from that community. If he is urbane and educated, his conduct will be judged by the standard of an average urbane and educated individual. Using this standard the court held as reasonable an army officer's belief, which turned out to be mistaken, that a vehicle parked near the Botswana Defence Force barracks at Mogoditsthan, resembling those previously used by South African commandos to attack Botswana, was an enemy vehicle, justifying the officer to order his men to shoot at it to prevent its escape.³²

The Court of Appeal for Eastern Africa used a similar test, albeit implicitly, in the Tanzanian case involving villagers who killed suspected thieves on the honest but mistaken belief that the law permitted them to do so. Sir Charles Newbold, P., dealt with the matter in the following way:

[a]ccepting for the moment that the belief here was honest — and there is a certain amount of evidence which will support such a submission — is it a reasonable belief? It is true that these persons are illiterate and rural peasants, as they have been described, but is it reasonable that any member of the community could possibly believe that because his M.P. tells him that he can go and indiscriminately kill people that he is entitled to do so? We are satisfied that that cannot be regarded as a reasonable belief. One of the witnesses made it quite clear that he would not have done so.³³

The Zambian Court of Appeal was faced with issues similar to those involved in the Nyasaland case. The Court referred to the Nyasaland case but rejected its "ordinary man in the street in England" test as untenable. But the Court was not prepared to use the "ordinary man in the accused person's community" test. To do

³¹ *The Attorney General of Nyasaland v. Jackson*, [1957] Rhodesia and Nyasaland Law Reports 443 at 448, *per* Tredgold C.J.. The Trial Court had allowed the defence, but the Appellate Court reversed.

³² *Innocent Manjesa v. State* C.A. Crim. App. No.30 of 1991 (unreported).

³³ *Musa & Anor v. Republic* [1970] East Africa 42 at 44.

so would have involved using the standard of a typical Zambian village, the majority of whose members were illiterate and believed in witchcraft. Instead, it used the standard of the average “member of a modern society.” Said Charles J.:

[w]hether a belief or act occurring in the course of the everyday affairs of life is or is not reasonable depends, for the purpose of the Penal Code, and apart from any positive rule of law governing the question, upon whether or not it was a belief or reaction which was likely to be held or suffered in the circumstances by, *a member of a modern society who has average modern knowledge, average perception, average intelligence, average judgment and average self-control, and who is to be presumed to be guided so far as the imperfections of human nature permit, by reason in the light of such modern knowledge as has extended beyond the realm of the experts into the realm of judicial knowledge.*³⁴

Using such a standard, the Court rejected as unreasonable the belief by the appellants — all members of a religious sect — that the deceased and other members of a police contingent sent to carry out investigations into their activities, had gone there to attack them and to expel them from their village — “as their primitive minds may well have led them to such belief.”

Does not the fact that the majority, even an overwhelming majority, of the members of a community to which the accused person belongs believe in witchcraft render the accused’s belief reasonable? Not so, according to the West African Court of Appeal. In a case originating from Nigeria the accused genuinely believed that the miscarriage and mortal illness of his wife was caused by witchcraft, practiced on her by an old woman. Labouring under such a belief the accused struck the old woman to death with a hoe. Dismissing an appeal against the accused’s conviction for the old woman’s murder, the West African Court of Appeal held that belief in witchcraft, though honest and prevalent in the accused’s community, was not reasonable so as to excuse the murder. The Court cited with approval the following passage from an earlier unreported case:

I have no doubt that a belief in witchcraft such as the accused obviously has is shared by the ordinary members of his community. It would, however, in my opinion be a dangerous precedent to recognize that because a superstition, which may lead to such a terrible result as is disclosed by the facts of this case, is generally prevalent among a community, it is therefore reasonable. The Courts must, I think, regard the holding of such beliefs unreasonable.³⁵

The issue of “reasonable belief” or “reasonable person” is one that will continue to tax the minds of jurists and judges in developing societies. The standard suggested by the Zambian Court of Appeal and followed, albeit by implication, by the West African Court of Appeal, has some merit, in that it underscores the criminal law’s educative value, setting societal standards of behaviour and requiring members to

³⁴ *Mutambo & Anor v. The People*, [1965] Zambia Law Reports 15 (emphasis supplied).

³⁵ *Gadam v. R.*, [1954] 14 West African Court of Appeal 442. The cited case is *Ifereonwe v. R.*

conform to those standards. If judges insist that the accused ought to know that witchcraft is superstitious nonsense, the law is telling him or her to strive to get educated and become more enlightened. Even if the entire village or community were to be enthralled by the belief, this would afford no excuse. The village or community ought to strive and free itself from such thralldom! However, the weakness of the “enlightened reasonable man” standard is that it is unrealistic and unfair. When the majority of the people in a community are uneducated and unenlightened, is it reasonable or fair to expect them to behave as if they were educated and enlightened? Are the ends of criminal justice subserved by standards that are too high for the ordinary member of the community to reach? One may be permitted to doubt it. This doubt is underscored by the fact that in many cases in which this standard has been used, and the accused convicted and sentenced usually to death, the Courts have made recommendations to the head of state to exercise the prerogative of mercy. This suggests that the Courts were not satisfied with the justness of their decisions.

This is where the “ordinary man of the accused’s community” standard has much to recommend itself. It deals with people at their own level. It recognizes the need for the law to move in tandem with the general societal beliefs of the people. It accords with requirements of fairness in that it does not demand from community members more than what can be attained by an ordinary member of that community. Its obvious drawback, however, is that it tends to perpetuate ignorance, to slow the pace of societal development, and the eradication of harmful, antiquated, and unscientific beliefs.

Be that as it may, the courts in Uganda, as in other common-law countries in Africa, have made a policy decision to reject belief in witchcraft as a basis for the defence of mistake. In a case originating from Uganda the Court of Appeal for Eastern Africa declared that:

[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 provocative act.*³⁶

B. Provocation

Provocation, then, may be a defence to a crime committed under the influence of beliefs in witchcraft. It should, however, be emphasized from the outset that provocation as a defence is available only in cases of murder which, in Uganda, is a capital offence. Furthermore, if granted, the defence of provocation does not lead to a complete acquittal, but to a conviction of the lesser offence of manslaughter. It merely recognizes the frailty of man and his proneness to lose self-control under

³⁶ *Eria Galikuwa v. R.*, [1951] 18 Eastern African Court of Appeal 175 (emphasis added).

certain circumstances and thus to do things which he otherwise would not do. As Chief Justice Brian Dickson of the Supreme Court of Canada put it,

all human beings are subject to uncontrollable outbursts of passion and anger which may lead them to violent acts. In such circumstances the law would lessen the severity of criminal liability.³⁷

Section 187 of the *Uganda Penal Code* provides that:

[w]hen a person, who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.

Section 188 defines “provocation” as follows:

- (1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely —
 - a) when done or offered to an ordinary person; or
 - b) when done or offered in the presence of an ordinary person to another person -
 - i) who is under his immediate care; or
 - ii) to whom he stands in a conjugal, parental, filial or paternal relation, or in the relation of master and servant

to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.³⁸

Witch killers have not always found it easy to invoke the provocation defence, particularly because of the *Code’s* insistence that (i) they must have acted under “sudden provocation,” (ii) arising out of a “wrongful act or insult,” and (iii) “before there is time for ... passion to cool.”

The essence of provocation is that it is sudden, unanticipated and takes the affected person off guard. In the Canadian case of *The Queen v. Tripodi*, Rand J. defined a provocative act as “the wrongful act or insult upon a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame.”³⁹ The law’s insistence on sudden provocation

³⁷ *R. v. Hill*, [1985] 51 C.R. 97 at 108, [1986] 1 S.C.R. 313 at 323.

³⁸ This provision is substantially similar to section 215 of the *Criminal Code* of Canada, R.S.C. 1985, c-46.

³⁹ [1955] S.C.R. 438 at 443. In this case the accused had information that his wife had been unfaithful to him and had had an abortion whilst away from him in Italy. On the day in question, the wife confessed to the unfaithfulness; whereupon the accused strangled her to death. It was held that this confession did not constitute “sudden provocation,” because it did not contain information that the accused did not know already. To constitute sudden provocation, the confession should have amounted to sudden discovery.

seems to be the need to guard against self-help by deliberate and premeditated killings of other people. As often happens, however, killers of the so-called witches take considerable time brooding and nursing suspicions against their victims. The victims, for their part, often say no word or do no direct overt act to the accused that the law would recognize as sudden provocation.

The *Code* also requires some physical and overt act or insult that is capable of derailing a person's fortitude and power of self-control and likely to induce him to retaliate by killing the person who offers it. Metaphysical phenomena, such as fears of witchcraft, are not such acts. Moreover, with the exception of a woman's confession to marital infidelity which is hitherto unknown to her husband, mere words falling short of an insult are not enough.⁴⁰ Equally unacceptable are threats to do harm in the future. *Eria Galikauwa v. R.* is a case in point. Here the appellant sought the assistance of the deceased, a reputed witch doctor, to recover money stolen from him. It is not clear from the report whether the appellant did recover the money. What is clear is that the deceased demanded from the appellant remuneration for his services with such vigour that he told the appellant that if he did not pay, his [the deceased's] medicines would "eat him up." The appellant failed to raise the money. Fearing that the witch doctor's powers would kill him, he got a stick and struck the witch doctor five blows on the head and killed him. Charged with murder, he pleaded provocation. The plea was rejected, principally because there was no overt physical provocative act on the part of the deceased. There was merely a threat to cause injury in the future. In confirming the conviction the Court of Appeal for Eastern Africa said:

[i]t seems that a mere threat to cause injury to health or even death in the near future cannot be considered as a physical provocative act. In any case, the appellant's own evidence shows clearly (a) that he was motivated not by anger but by fear alone. He struck, not in the heat of passion, but in despair arising from the recognition of his inability to raise the money demanded and his hopeless fear of the consequences; and (b) that he was not suddenly deprived of his self-control but acted as he did deliberately and intentionally because of the impasse.⁴¹

A similar case with similar results is that of *Rex v. Emilio Lumu*.⁴² A child belonging to the appellant's sister died after a short illness. It died in the appellant's

⁴⁰ See *R. v. Rothwell* (1871-74), 12 Cox C.C.145 at 147 where Blackburn J., in his summation to the jury, said, "[a]s a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance, if a husband suddenly hearing from his wife that she had committed adultery, and he having no idea of such a thing before, were to kill his wife, it might be manslaughter."

⁴¹ (1951) 8 Eastern Africa Court of Appeal 175.

⁴² (1946) 13 East Africa Court of Appeal 144.

hands. The appellant's sister told him that the deceased, who happened to be his own father-in-law and a reputed witch, had administered some black powder, which she believed to be witchcraft medicine, to the child. She held him responsible for the child's death. On hearing this allegation the appellant went over to the deceased's house and stabbed him to death. In his own deposition to the court, the appellant said:

I stabbed the deceased Sempogo for giving medicine to my [sister's] son and killing him. If he had not given medicine to the child I would not have done anything to him. I felt it very badly for such a young child being bewitched. I would rather he had bewitched me. Therefore I was angry and went to stab the deceased and I was weeping when I came to stab him. That is all. The child had died that same day at 7 a.m. and I killed deceased at 8 a.m.

The court was prepared to accept the alleged administration of the black powder as an act of witchcraft. However, since that act was performed several days before the stabbing and in the absence of the accused, it could not amount to legal provocation. Even apart from the appellant's honest belief in witchcraft, it could be assumed that the deceased had killed the child by natural means, by poisoning, rather than by witchcraft. The court would not afford the appellant the defence of provocation. He did not satisfy the requirement of the *Penal Code* that the provocative act be done "in the presence of an ordinary person to another to whom he stands in conjugal, parental, filial or paternal relation." The court emphasised that with the exception of provocation by adultery, in all cases the party alleged to have been provoked must see the act done. It accordingly upheld the appellant's conviction for murder.

R v. Fabiano Kinene & Anor is one of the few cases in which belief in witchcraft was held to constitute legal provocation. The accused had long suspected the deceased to have caused the deaths of their relatives by witchcraft. On the night in question, they found the deceased crawling naked in their compound. They seized him and killed him by forcibly inserting into his anus 20 unripe bananas. The Court of Appeal for Eastern Africa held that the deceased's act of crawling naked in the accused's compound at night amounted to "sudden provocation." Said Sir Joseph Sheridan C.J.:

[w]e think that if the facts proved establish that the victim was performing in the actual presence of the accused some act which the accused did genuinely believe, 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 [which act would be a criminal offence under the Criminal Law (Witchcraft) Ordinance of Uganda and similar legislation in the other East African Territories] he might be angered to such an extent as to be deprived of the power of self-control and

induced to assault the person doing the act of witchcraft. And if this be the case a defence of grave and sudden provocation is open to him.⁴³

Threats of future harm by themselves, according to the *Eria Galikuwa case*, are unacceptable as a foundation for the defence of provocation. However, according to more recent judicial opinion "a threat to kill taken with other existing circumstances could amount to legal provocation."⁴⁴ In two cases this has been held to be so. In the first, the trial judge summarized his findings as follows:

I am quite sure that the accused believed that the deceased had super-natural powers and this belief was shared by most of the village. I accept that the accused honestly (but obviously mistakenly) suspected that the deceased had caused his wife's death. The deceased's sudden boast confirmed his worst suspicions and to this was added a threat that the accused and his children would meet the same fate. But this was not all: I also accept the deceased seized the piece of cloth round the accused's neck and pulled it tight, at the same time trying to take possession of the panga which the accused was innocently carrying. Judging the accused by the standards of a reasonable member of the unsophisticated community to which he belongs, I have no doubt that legal provocation has been made out sufficient to reduce this terrible killing to manslaughter.⁴⁵

In the second case, the accused stabbed his step-mother to death. He said that he did so under provocation. The facts constituting the provocation were that he suspected her of having bewitched his son to death; he found her squatting in the doorway of his house (something that women in that part of the country do not do); she threw away something wrapped in a cloth in the nearby bush; in reply to a suggestion that she had killed his son she allegedly replied, "if I have bewitched your child go and accuse me to the authorities. If you are not careful I will also kill you." From these facts the court held that the accused acted under provocation and convicted him of manslaughter only.⁴⁶

It may be argued that if suspicions and fears are entertained by a person against another, passage of time may facilitate the heating up, rather than the cooling down of his passions.⁴⁷ This may be true. Nevertheless, since provocation is already a concession, to make a further concession on this point might appear to encourage

⁴³ (1941) 8 Eastern Africa Court of Appeal 95.

⁴⁴ See *Yovan v. Uganda* [1970] E.A. 405 at 406 per Duffus P..

⁴⁵ *Uganda v. Nambwagere s/o Rovumba*, [1972] Uganda Law Reports 14.

⁴⁶ *Uganda v. Bonefasi Muvaga*, [1973] Uganda Law Reports 30.

⁴⁷ See P. Brett, "The Physiology of Provocation" [1970] Criminal Law Review 634. See also R.B. Seidmen, "Witch Murder and *Mens Rea*: A Problem of Society under Change" [1965] Mod. L. Rev. 46 at 52 where he writes that "... the peculiar nature of witchcraft is that it presents an overhanging, omnipresent threat. Time in such a case does not cool the passion; it inflames it."

the nursing of baseless suspicions and "to supply a secure refuge for every scoundrel with homicidal tendencies."⁴⁸

Three further points may be noted. The first is that, provided that there is an overt physical act of witchcraft, the courts are at least willing to accept an ordinary person of the community and background of the accused as the standard for determining whether or not an act of witchcraft would be sufficient to deprive a reasonable person of self-control and to induce him to commit the offence in question.⁴⁹ The second is that the requirement, as in Canadian law, that the provocative act or insult be unlawful is supplied by the fact that acts of witchcraft are outlawed in Uganda. The third is that Ugandan criminal law, in keeping with English law,⁵⁰ but in sharp contrast with Canadian law,⁵¹ apparently requires that the accused's retaliatory act must bear reasonable relationship with the provocative act or insult.⁵²

The requirement of "sudden provocation" has thus in the past tended to take the defence of provocation away from most people who kill others out of fear of witchcraft. This led a judge in Tanzania, whose law on the subject is identical with that of Uganda, to bemoan the state of the law, writing that "[u]ntil all and sundry are rid of the age-old belief in magic our people will be condemned to death for holding such beliefs." Condemning to death an accused person who killed his father who had previously threatened to kill by witchcraft, the judge said, "[u]nfortunately for him [the accused] the law as it stands does not allow the killing of wizards like it does the killing of snakes and other prowling beasts."⁵³

⁴⁸ See *R v. Fabiano Kinene & Anor*, *supra* note 43.

⁴⁹ See the passage in *R v. Fabiano Kinene & Anor*, *ibid.* See also *Uganda v. Nambwegene s/o Rovumba*, *supra* note 45.

⁵⁰ See *Mancini v. Director of Public Prosecutions*, [1942] A.C. 1.

⁵¹ For example see *R v. Hill*, [1985] 51 C.R. (3d) 97 at 115 where Dickson C.J. wrote that: "[t]he second test of provocation is called "subjective" because it involves an assessment of what actually occurred in the mind of the accused. At this stage, the jury must also consider whether the accused reacted to the provocation on the sudden and before there was time for his passion to cool. In instructing the jury with respect to the subject test of provocation, the trial judge must make clear to the jury that its task at this point is to ascertain whether the accused was in fact acting as a result of provocation. In this regard, a trial judge may wish to remind the jury members that, in determining whether an accused was actually provoked, they are entitled to take into account his or her mental state and psychological temperament."

⁵² While this requirement is not spelled out in the *Penal Code*, the courts have applied the principle in a few cases. See *Ochuku s/o Ochende v. R.*, [1955] 19 Eastern Africa Court of Appeal 220. See also James S. Read, "Some Aspects of Manslaughter in East Africa" (1965) 1 East Africa Law Journal 260.

⁵³ *Republic v. Juma*, [1974] E.A. 336.

In contrast, the Ugandan judges have not been content to wait for the legislature to initiate the changes that their Tanzanian counterpart alluded to. Taking an activist stance, they have shown ready willingness to depart from old authorities, invariably of a colonial vintage and a willingness to interpret the law liberally so as to afford believers in witchcraft some defence. As a result of this change of attitude some defendants have been saved from the gallows. This has been accomplished by (i) using belief in witchcraft to negate malice aforethought, and (ii) treating the belief as insanity.

C. Malice Aforethought

An amendment to the *Penal Code* in 1970 limited malice aforethought, the *mens rea* in murder cases, to an actual intention to cause death.⁵⁴ Mere intention to cause actual bodily harm is no longer adequate.⁵⁵ In *Uganda v. Gabriel Ojoba* the accused was charged with murder. His defence was that he killed the deceased out of fear that he was bewitching him and his relatives. The High Court convicted him of manslaughter instead of murder, reasoning that when the accused killed the deceased he did so under a state of fear and confusion to save his life and that of his relatives; and that under such a state of mind he could not be said to have intended to kill. Commenting on the existing state of the law, the Court also observed thus:

[i]t is not for me to pass judgment on the correctness of earlier decisions especially when they are decisions of the highest Appellate Court in the land. But, I think, there was by far too much emphasis on eradicating the belief of witchcraft by the "natives." The purpose of the criminal law is to punish an individual for his wrongdoing and not to sacrifice a few in the hope of converting their community from beliefs, however primitive, which they hold so deeply. Criminal responsibility has always been individual.⁵⁶

⁵⁴ Section 186.

⁵⁵ See *Bukenya & Anor v. Uganda*, [1972] E.A. 549. This is still the law in Botswana, according to section 204 of the *Penal Code* and in Canada, according to subsection 212(a) of the *Criminal Code*.

⁵⁶ High Court Crim. Session Case No. 260 of 1975. See also *Uganda v. Gabriel Habaasi* H.Ct. Cr. Session No. 41 of 1992 (unreported). In this case the accused killed his father whom he accused of having bewitched his children and of threatening to kill him as well. The father wanted to initiate the accused into becoming a witch like him, but the accused refused on religious grounds. The father treated this refusal as an act of insubordination and threatened to punish him "seriously" for it. Subsequently, two of the accused's children died and a third went mad. The father apparently accepted responsibility and intimated to the accused that these punitive measures would continue until he agreed to become a witch. It is for these reasons that the accused hit the father on the head and killed him. The accused was charged with murder. He instead pleaded guilty to manslaughter. The court accepted the plea, apparently because the accused did not kill with malice aforethought. In sentencing him to a three-year gaol term, the court remarked that the father "was the author of his own death"! The Northern Rhodesian High Court in *R. v. Luka Matengula & Anor* (1952),

D. Insanity

In a case decided by the Uganda High Court in 1957, the accused was charged with the murder of his father. The accused believed that the father had bewitched and killed his two sons, his first wife, his goats and a cow. He also believed that the father had bewitched him and made him impotent, and bewitched his second wife who was always sickly. On the fateful day, the accused and his father went to a funeral of a child. They came back together, talking in a friendly manner. All of a sudden and without any quarrel or provocation, the accused hacked his father to death with a panga. He then went to a Gombolola Chief and reported the killing. He said to the Chief, "I have killed him because he was Satan" (meaning that he was bewitching him). An assessor assisting the Court opined that the accused's belief that the father bewitched his children affected his mind; and the nadir of this effect was the attendance at the funeral of a child, which reminded him of his own children. Faced with the Court of Appeal decisions discussed above, the Court ruled out the defence of provocation, and instead decided to avail him of the defence of insanity. Said Lyon J.:

[t]his case is not free from difficulty. I have considered the words "disease of the mind" in s.12 of the *Penal Code*. I am of the opinion that an African living far away in the bush may become so obsessed with the idea that he is being bewitched that the balance of his mind may be disturbed to such an extent that it may be described as disease of the mind. Here the killing is unexplained, and in my opinion inexplicable; except upon the basis that the accused did not know what he was doing⁵⁷.

The problem with this decision is that it is generalistic and did not pinpoint the "disease" that affected the accused's mind. It is no wonder that for twenty years it was neither cited nor followed. It was resurrected only in 1978 when the Uganda Court of Appeals likened the fear of witchcraft to "an insane delusion," "a disease of the mind," and found the appellant not guilty of murder on account of insanity.⁵⁸

5 Northern Rhodesia Law Reports 14, reached a similar conclusion. The accused were pallbearers for the coffin of one Chichibanda. They bumped an old woman several times in the chest with fatal consequences, since under a Lambia custom where a dead person in a coffin can "point out" the person responsible for his death. The Court held the custom to be repugnant to natural justice. It nevertheless found the accused guilty of manslaughter instead of murder. They did not possess the required malice aforethought. The Court said: "[i]f any manifestation to take the life of this woman had been disclosed by the Crown I would not have hesitated to find malice aforethought. I do not

think that these four stupid men had any knowledge that the bumps of the coffin, severe as they were, would probably have caused the death of Mayamba."

⁵⁷ *Regina v. Magata s/o Kachehakana*, [1956-7] 8 Uganda Law Reports 294

⁵⁸ *Okello s/o Kamuleti v. Uganda*, Uganda Court of Appeals, Crim.App. No.2 of 1978

These decisions are in sharp contrast with decisions from two other disparate jurisdictions. The first decision is from the United States. The appellant was charged with murder. His defence was insanity based on belief in witchcraft. Basing himself on the Bible he believed that his people and tribe were being affected by witches, that the deaths that were occurring in his neighbourhood were due to the evil influence of witches and that the person he killed was a witch. According to his investigations and understanding of the Scriptures he was entitled to kill her. The trial judge charged the jury that if the accused's belief in witches and his right to kill them were the product of a diseased brain (such as an insane delusion) he was not responsible and was entitled to an acquittal. If, on the other hand, the accused's belief was not the product of a diseased brain, but simply an erroneous conclusion of a sane mind, he was responsible and should be found guilty. The jury found him guilty and the Supreme Court of the United States affirmed the conviction.⁵⁹

The second decision is from Kenya. The accused killed his wife, believing that she was practising witchcraft against him. Psychiatric evidence showed that there was epilepsy and madness in the accused's family, but at the time of the killing he knew what he was doing, he could distinguish right from wrong and that according to community beliefs he believed to be justified in doing what he did. The defence of insanity was rejected, because

... even if [the accused] believed that he was justified in killing his wife because she was practising witchcraft there is again no evidence that such belief arose from any mental defect; it is a belief sometimes held by entirely sane Africans.⁶⁰

According to these two cases, belief in witchcraft *per se* does not amount to insanity. However, where witchcraft is a product of a disease of the mind it can be accepted as a defence.

IV. CONCLUDING REMARKS

BELIEF IN, AND FEAR OF, witchcraft still holds captive thousands of people in Uganda, Africa, and beyond. Legislation against witchcraft has not made much of a dent on its influence. Nor have decades of Christian campaigns against it been effectual to loosen its grip on the minds that it has enthralled. Crimes continue to be committed under its influence. The Tanzanian judge in the case cited above put it well when he said:

⁵⁹ *Solomon Notema v. United States* (1901), 186 U.S. 313.

⁶⁰ *Philip Muswi s/o Mosola v. R.*, [1956] 23 Eastern Africa Court of Appeal 622 at 625.

[o]ur people, whether we like it or not, have believed, are believing and will continue to believe in witchcraft even if literacy were to become universal tomorrow morning. Science and technology have yet to explain the natural puzzles and phenomena which are peculiar to Africa. And judging from the very low level and slow pace of our technological advancement, these beliefs shall remain with us for quite some time. Should we not therefore face this fact and adjust the law accordingly?⁶¹

A partial solution may be to incorporate into the law of Uganda and Tanzania the principle of extenuation. Under that principle, as found in the *Penal Code* of Botswana, judges are given discretion in capital offences not to impose the mandatory death penalty in case where they find extenuating circumstances to exist. Extenuating circumstances are any factors that reduce the moral blameworthiness of the offence. Belief in witchcraft is clearly such a factor.⁶²

For the time being, however, the law in Uganda is that, genuine though be the belief, it is not, *per se*, reasonable and cannot therefore afford the accused the defence of self-defence. It can, however, be a partial defence to a murder charge where there has been an overt and physically provocative act on the part of the victim, to which the accused retaliates on sudden impulse. This defence is rarely successfully invoked because witchcraft, being a metaphysical phenomenon, does not usually manifest itself in overt physical acts. The belief could also be a defence where it is the product of a diseased mind. However, as we have noted, Ugandan Courts have, of late, liberally interpreted the law of insanity to accommodate belief in witchcraft and also to negate *mens rea* in cases of murder. This liberal judicial attitude may be ascribable to the fact that judges are loathe to send to the gallows defendants who kill under the belief and fear of witchcraft. It is, to some extent, also ascribable to the appointment to the bench of Ugandan lawyers who grew up in the Ugandan community and to whom these beliefs are a reality. They are not likely to apply the measure of "the man on the Clapham omnibus" to Africa. Defendants who kill under the influence of witchcraft are clearly less blameworthy than those who do so free from these beliefs. Even if the death penalty were to be abolished and replaced by life sentences the problem of convicting people who are "not at fault" will continue to trouble the minds of jurists, judges, and law-makers alike, from Uganda to Canada and back.

⁶¹ *Republic v. Juma*, [1974] E.A. 336 at 338, *per Kwikima Ag. J.*.

⁶² For a discussion on this subject, see D.D.N. Nsereko, "Extenuating Circumstances in Capital Offences in Botswana" (1991) 2 *Criminal Law Forum* 235.