

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 554/2010

In the special review between:-

THE STATE

and

GEELBOOI NONZIMA

First Accused

GILBERT MOTAUNG

Second Accused

CORAM: EBRAHIM, J *et* LEKALE, AJ

JUDGMENT BY: LEKALE, AJ

DELIVERED ON: 3 MARCH 2011

[1] The two accused persons appeared before the Regional Court at Wesselsbron on the 2nd June 2010 for sentencing in terms of section 116 of the Criminal Procedure Act, No. 51 of 1977, as amended (“the Act”) after they were convicted by the Wesselsbron District Magistrate’s Court on the 12th April 2010.

[2] The charge sheet viz J15 reflects that accused number 1 was found guilty of robbery as charge number 1 and assault with

intent to cause grievous bodily harm as charge number 2, while accused number 2 was only found guilty of robbery.

[3] Accused number 1 challenged the correctness of the verdict recorded against him. After hearing evidence on the issue the Regional Magistrate was left in doubt as to the correctness of the recorded verdict and sought clarification from the trial magistrate who responded that the verdicts are correctly recorded. He, further, explained that he inferred that accused number 1 had the intention to cause grievous bodily harm from the fact that the complainant was kicked.

[4] The Regional Magistrate, thereafter, invoked the provisions of section 304A of the Act and referred the matter to this Court for the setting aside of the proceedings before the District Court and remarked that:

“Dit blyk ook uit die notule van die distrikshof dat klaagster slegs een skop toegedien was en geen beserings opgedoen het nie...”

“Dit blyk ook uit die klagstaat, dat die klagstaat van die

distrikshof verkeerd is. Die klagstaat openbaar roof gewoon. Die bepalings van Artikel 51 Wet 105 van 1997 is nie van toepassing nie, soos in klagstaat aangetoon word nie.”

[5] My brother Cillié J, before whom the matter initially served, directed a request to the trial magistrate for, *inter alia*, the reasons why accused number 1 was also found guilty of robbery.

[6] The trial magistrate has since obliged, for which the court is grateful to him, and relies on the doctrine of common purpose for finding accused number 1 guilty of robbery as follows:

“... die twee beskuldigdes saam was voor die pleging van die misdryf en deurdat beskuldigde no 1 ‘n persoon saam met klaer aanrand en daardeur die misdryf bevorder en daarna steeds saam [met] beskuldigde no 2 rondbeweeg (en daardeur h[o]mself vereenselwig met die misdryf) totdat beide beskuldigdes saam arresteer word sien *S v Mgedezi 1989 (1) SA 687 (A)*.”

[7] In conclusion the learned trial magistrate requests the court to

either confirm the verdicts or return competent verdicts in respect of the accused and to remit the matter to him for sentencing.

[8] The record is clear on the charges on which the two accused were each found guilty.

[9] The questions for determination are whether or not:

9.1 accused number 1 was correctly found guilty of assault with intent to cause grievous bodily harm regard being had to the fact that the complainant was kicked only once and sustained no injuries;

9.2 the provisions of section 51 of Act No. 105 of 1977 (the Minimum Sentences Act) are applicable regard being had to the fact that the charge sheet, although it refers to the said Act, does not allege the presence of aggravating circumstances on the occasion when the robbery was committed.

[10] It is trite that for a verdict of guilty to return on a charge of

assault with intent to do grievous bodily harm it is not necessary that the accused should have actually caused bodily harm. What the State has to prove is that the accused intended to cause such harm. (See **R v ZONDI** 1930 TPD 107.)

[11] The trial magistrate drew the inference that accused number 1 intended to injure the complainant “really seriously” from the fact that he kicked her. The force used in executing the kick as well as the kind of shoes, if any, which accused number 1 had on when he kicked the complainant are not apparent *ex facie* the record. (Compare **S v DIPHOLO** 1983 (4) SA 757 (T) at 760.)

[12] The courts are loath to draw lightly an inference that the accused not only intended to injure his victim but intended to injure her seriously. (See **S v MGCINENI** 1993 (1) SACR 746 (E).)

[13] *In casu* there exists, in my view, insufficient, if any, indication that accused number 1 intended to cause the complainant

grievous bodily harm. In the circumstances of this matter such an inference can only be drawn on the basis of conjecture and speculation on the part of the court.

[14] As correctly pointed out by the Regional Magistrate the charge sheet discloses robbery simpliciter as opposed to robbery with aggravating circumstances. In this regard it should be noted that only a bald reference to the Criminal Law Amendment Act, 105 of 1997, is made in the charge sheet without alleging the presence of and specifying aggravating circumstances which make the minimum sentence provisions contained in that Act applicable. (Compare **R v ZONELE AND OTHERS** 1959 (3) SA 319 (A) at 323.)

[15] At the commencement of a trial an unrepresented accused person must be informed of the minimum sentence, if applicable, so as to ensure that he gets a fair trial in the sense that he knows the full thrust of the case that he has to meet. (See **S v NDLOVU AND ANOTHER** 1999 (2) SACR 645 (W) at 649 f – 650 b and **S v LEGOA** 2003 (1) SACR 13 (SCA) at

paras [20] – [22].)

- [16] The record reflects that the public prosecutor put the charges to the accused, who were unrepresented and notes that they understood the same and pleaded not guilty. There is no indication on the record that the trial magistrate, at the very least, explained to them what the Criminal Law Amendment Act, 105 of 1997, meant in the context of their case. In the court's view a mere allegation in the charge sheet that

“the accused are guilty of the crime robbery (read with the provisions of section 51(2), 52(2), 52A and 52B of the Criminal Law Amendment Act 105 of 1997)”

is a riddle to an unrepresented accused person who is not familiar with the relevant provisions. It is for the trial court to give those provisions meaning in order to convey their full import to such an accused person. There is no indication on the record that the accused are familiar with the relevant provisions. The trial magistrate, should, as such, have given life to the relevant provisions so as to ensure that the accused

get a fair trial.

[17] The court is, therefore, of the view that, as correctly and effectively opined by the Regional Magistrate, it would not be fair to apply the provisions of the Criminal Law Amendment Act *in casu*. There exists thus no cause for the matter to be referred to the Regional Court for sentencing.

[18] The court is, further, in respectful agreement with the trial magistrate on the applicability of the doctrine of common purpose to the robbery charge. Accused number 1 clearly associated himself with the acts of accused number 2 and furthered the commission of robbery.

[19] The court is thus satisfied that the evidence before the trial magistrate proved robbery against both accused persons and common assault against accused number 1 beyond reasonable doubt.

ORDER:

[20] The convictions of both accused number 1 and number 2 in

respect of charge 1 viz robbery are accordingly confirmed.

[21] The conviction of accused number 1 on charge 2 viz assault with intent to do grievous bodily harm is hereby set aside and in its place and stead is substituted the following order:

“Accused number 1 is also found guilty of common assault in terms of section 266(a) of the Criminal Procedure Act, No. 51 of 1977, as amended.”

[22] The matter is remitted to the trial magistrate (District Court) for the commencement of sentence proceedings.

L.J. LEKALE, AJ

I concur.

S. EBRAHIM, J

/sp