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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No.: A1068/08

DATE:14/05/2009

In the matter between:

MALESELA JACOB LAMOLA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MAKGOKA AJ:

[1] The appellant stood trial in the regional court, Mokerong, on a charge of rape. The appellant was legally represented and pleaded not guilty. However, the trial culminated in his conviction and sentence of 15 years imprisonment on 10 February 2004.

[2] The evidence of the complainant, Ms HM, which was accepted by the regional

magistrate, was that on 25 January 2004, the appellant raped her twice. This then brought the rapes within the purview of Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The said section provides for a prescribed sentence of life imprisonment.

[3] Section 52(1) of the Act (prior to its repeal on 31 December 2007 by section 2 of Act 38 of 2007) provided that in such circumstances the regional magistrate was obliged, upon conviction, to stop the proceedings and refer the matter to the High Court for sentencing. The section, as indicated earlier, provides for life sentence, which sentence, a regional court was not competent to impose at the time of the appellant's conviction.

[4] This aspect received scant attention from the magistrate, who seemed oblivious to the fact that upon conviction, he should have stopped the proceedings, and referred the matter to the High Court in terms of section 52, for sentencing. The sentence is therefore a nullity. See *S v Liao* 2005(1) SACR 498 (T) at 502b-c.

[5] The Criminal Law (Sentencing) Amendment Act 38 of 2007 (which commenced on 31 December 2007) has radically altered the power of the regional court regarding sentencing of offences referred to in Part 1 of Schedule 2 of Act 105 of 1997. It introduced a new section 51(1) which provides that a regional court has the power to sentence a person to imprisonment for life when it convicts that person of an offence referred to in Part 1 of Schedule 2 of Act 105 of 1997 and shall do so subject to subsections (3) and (6) and it repealed section 52 of Act 105 of 1997 which require the regional magistrate to stop the proceedings and refer the matter to the High Court for sentencing. Act 38 of 2007 also inserted the following new section 53A containing the following transitional provisions -

‘If a regional court has, prior to the date of the commencement of the Criminal Law

(Sentencing) Amendment Act, 2007 –

(a) committed an accused for sentence by a High Court under this Act, the High Court must dispose of the matter as if the Criminal Law (Sentencing) Amendment Act, 2007, had not been passed; or

(b) not committed an accused for sentence by a High Court under this Act, then the regional court must dispose of the matter in terms of this Act, as amended by the Criminal Law (Sentencing) Amendment Act, 2007/

[6] If this court now sets aside the regional magistrate's sentence as a nullity, the regional magistrate has not yet committed the appellant for sentence by the High Court and the regional magistrate must dispose of the matter in terms of the new powers conferred by Act 38 of 2007. The regional magistrate will have to decide whether he is obliged to impose a life sentence or whether a lesser sentence may be imposed if he finds substantial and compelling circumstances or in accordance with the principles set out in *S v Malgas* 2001 (1) SACR 469 (SCA).

[7] In the premises I propose an order as follows:

[7.1] The sentence imposed upon the appellant is set aside and the matter is referred back to the regional court for sentencing in terms of section 51 of Act 105 of 1997 as amended by Act 38 of 2007 on 31 December 2007.

TM MAKGOKA

ACTING JUDGE OF THE HIGH COURT, PRETORIA

I agree

CP RABIE

JUDGE OF THE HIGH COURT, PRETORIA