



/ LVS
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT. PRETORIA)

DATE: 29 September 2009

MAGISTRATE ELLISRAS

Case No: SH91/09

Magistrate's serial no:

High Court Ref No: 1170

THE STATE VS FRANS LESIBA MACHABA AND OTHERS

REVIEW JUDGMENT

BOTHA J:

This is a special review submitted by a Regional Magistrate.

The two accused were charged in the magistrate's court with robbery "read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 19S7..." They were represented by an attorney. They pleaded not guilty but after an erstwhile co-accused had given evidence against them, they changed their pleas to guilty. When the magistrate raised the issue of aggravating circumstances, the statements of the accused were amended to

include an allegation that the complainant sustained serious bodily injuries on his face Thereafter the two accused were found guilty as charged.

After the previous convictions of the accused had been proved the magistrate referred the matter for sentence to the Regional Court in terms of section 116 of Act 51 of 1977

The Regional Magistrate submitted the matter for special review, asking, that the convictions be set aside and the matter be referred to the Regional Court for trial *de novo* He did so on the following grounds:

- (a) that the accused were not apprised of the consequences of the effect of section 51(2) of Act 105 of 1997 and
- (b) that the magistrate had no jurisdiction to hear the matter.

In view of the fact that the charge referred to section 51(2) of Act 105 of 1997 and in view of the fact that the accused were

represented no prejudice resulted to the accused from the fact that they were not specifically warned of the effect of the section. See *S v Cunningham* 2004(2) SACR 16(EC) Moreover, as I will show presently they were not exposed to any prejudice because section 51 (2) does not apply to a magistrate's court.

The Regional Magistrate obviously reasoned that the magistrate had no jurisdiction to hear the case at all because a magistrate court cannot apply section 51(2). In my view that view is wrong. The position is simply that section 51(2) does not apply to magistrate's courts and that it does not bind magistrate's courts. See *S v Jimenez* 2003(1) SACR 507 at 517 c-d. Section 51(2) did not create new offences that may be considered to be beyond the jurisdiction of the magistrate's court. See *S v Legoa* 2003(1) SACR (SCA) at 21e-f. The position is that the accused were charged with robbery and that the magistrate had the jurisdiction to hear the matter.

It may be that the magistrate was of the view that she could, by referring the matter for sentence to the Regional Court to ensure that section 51(2) be applied by the proper forum. Such a perception would have been wrong, because the finding that aggravating circumstances were present must have been made by the court convicting the accused. See *S v Legoa supra* at

21d-f.

The magistrate could not make a finding that would make section 51(2) applicable and the Regional Magistrate could not supply the deficiency.

It is therefore undesirable that cases where section 51(2) may be applicable should be heard in the magistrates' court. It does not, however, render such trials irregular or illegal. -

The magistrate was entitled to try and sentence the accused but she was also entitled, after convicting the accused, to refer the matter to the Regional Court for sentence in terms of section 116

As I have said before, if the magistrate was of the view that the Regional Court could impose a mandatory minimum sentence in terms of section 51(2) she was mistaken. It is however, still possible for the Regional Court to impose an appropriate sentence within its normal jurisdiction That is what the state advocates suggest should be done and I agree with them.

In all the circumstances the following order is made:

- 1. The conviction of the accused is confirmed.**
- 2. The matter is referred back to the Regional Court for the
imposition of sentence within its normal jurisdiction,
without reference to section 51(2) of Act 105 of 1997.**

C BOTHA

JUDGE OF THE HIGH COURT

I agree

C.J EKSTEEN

ACTING JUDGE OF THE HIGH COURT