

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 809/08

In the review between:-

THE STATE

and

A. KOLOZA AND ANOTHER

CORAM: CILLIé, J *et* RAMPAL, J

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 8 JANUARY 2009

[1] The matter came by way of a special review in terms of section 304(4) Act No. 51 of 1977. The two accused persons, namely Phikile Alfred Koloza accused 2 and Pule Petrus Maphutsi accused 3, were tried in the Parys District Court where they were convicted on 26 August 2008.

[2] The charge against them was that they unlawfully and intentionally stole four Brahman valued at R38 000.00 on Zandfontein farm in the district of Parys on 24 August 2007.

The animals were owned or lawfully possessed by A.M. Smit.

- [3] Instead of sentencing the accused, the district magistrate transferred the case to the Kroonstad Regional Court in terms of section 116(1)(b) Act No. 51 of 1977 for sentence. He was of the opinion that, in view of their previous convictions, each of them deserved a sentence which exceeded the penal jurisdiction of a district court.
- [4] As regards accused 2, the regional magistrate, Mr. G.J. Visagie, had no insurmountable problems about the transfer, although only one previous conviction was still current. The rest had already lapsed – section 271A Act No. 51 of 1977.
- [5] As regards accused 3, there was a problem. Unlike accused 2, accused 3 denied the previous convictions attributed to him. Notwithstanding such wholesome denial and the prosecution's failure to prove the alleged previous convictions, the district magistrate nonetheless transferred accused 3 to the regional court for sentence. By so doing, the district magistrate implicitly accepted, as true and correct, the disputed and unproven previous convictions against

accused 3. The underlying reason for the decision to transfer him entailed the notion that he had a blameworthy track record of crimes which justified the imposition of a more severe sentence than the district court was empowered to impose. Obviously the transfer seriously prejudiced accused 3. Since it was an irregular procedural step, the transfer cannot be let to stand.

- [6] The alleged previous convictions should first have been proven before the transfer of accused 3 in terms of section 116(1)(b) Act No. 51 of 1977 – *vide* **S v CELE AND OTHERS** 1994 (1) SACR 616 (NPD); **S v NGUBANE** 1991 (1) SACR 163 (NPD); **S v BEYERS** 1978 (4) SA 816 (NCD); **S v KGOMO** 1978 (2) SA 946 (TPD) on 947.
- [7] The regional and the district magistrates are agreed that the transfer in respect of accused 3 should be set aside as an irregular process. In the circumstances, I am inclined to agree. The nullification of the transfer will enable the State to either prove the alleged previous convictions or withdraw them, if it cannot. If the state succeeds, then accused 3 can at a later stage be transferred to the regional court for

sentence. If the State fails, then in that event, the district court itself will have to sentence him.

[8] Accordingly I make the following order:

8.1 The transfer of accused 3 to the regional court for sentence is set aside.

8.2 The case of accused 3 must be remitted from the regional court to the district court to be dealt with in accordance with the guidelines outlined in this judgment.

M.H. RAMPAL, J

I concur.

C.B. CILLIÉ, J

/sp