

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

Appeal No. : A13/2002

In the appeal between:

MICHAEL MOLUSI

Appellant

and

THE STATE

Respondent

CORAM: C.J. MUSI J *et* MILTON AJ

HEARD ON: 4 SEPTEMBER 2006

JUDGMENT BY: MILTON AJ

DELIVERED ON: 7 SEPTEMBER 2006

[1] The Appellant, accused 2, is a 25 year old man, who was charged with a co-accused, accused no. 1, in the Thaba N'chu Regional Court on two counts, namely robbery with aggravating circumstances (count no. 1) and murder (count no. 2). I will for the sake of convenience refer to them as accused 1 and 2 respectively.

[2] Both accused pleaded not guilty but were found guilty on the 15th May

2002 on both charges.

[3] The accused were sentenced as follows:

3.1 Accused one was sentenced to 15 years on each count but the court ordered that 10 years of the sentence on count 1 will run concurrently with the sentence on count 2. Therefore the effective term of imprisonment was 20 years.

3.2 Accused two was also sentenced to 15 years on each count but it was ordered that 12 years of the sentence on count 1 will run concurrently with the sentence imposed on count 2. The effective term of imprisonment is one of 18 years imprisonment.

[4] Accused 2, is appealing against his convictions and sentences.

[5] Mr Bontes on behalf of the respondent argued, in limine, that the regional magistrate did not have jurisdiction to sentence the accused. Mr. Skibi, on behalf of the Appellant, lodged supplementary heads of argument specifically dealing with the Respondent's argument *in limine* that the matter should have been referred to the High Court for sentence.

His contention was that the accused who were undefended were not

informed by the magistrate that should they be found guilty the minimum prescribed sentence was applicable. He argued that the appeal should therefore be upheld.

[6] In brief, the magistrate found that the two accused entered the home of Mr and Mrs Matolo during the early hours of the morning of 13 March 2000. They asked the Matolo's for alcohol. They were told that they (Matolo's) did not have alcohol. When Mr Matolo requested them to leave his house. They refused. He went to the door and opened it for them. He was then attacked with an axe. He lost consciousness and only regained it at hospital. His wife was also attacked with the axe and died as a result of the wounds that she sustained during the attack. A radio, alarm clock, wrist watch, knife and purse were stolen from the Matolo's. The magistrate also found that the accused acted in concert with a common purpose to rob and murder. She expressed herself thus:

“Die afleiding is dus onvermydelik dat die byl deur die Beskuldigdes die huis ingebring is. Beskuldigde No 1 het 'n byl in sy hand gehad toe hy weggehardloop het en het getuig dat hy die Klaer daarmee gekap het. Op waarskynlikhede het hy die beserings aan sowel as die Klaer en sy vrou toegedien. Dit was in die teenwoordigheid van Beskuldigde No 2, daar is niks wat daarop dui dat beskuldigde No 2 hom van hierdie optrede gedistansieer het nie. Getoets aan die voorvereistes in Staat teen Nokedesi

1989 (1) SA 687 Appèl Afdeling, is die Hof oortuig daarvan dat beide Beskuldigdes na die huis van die Klaer is met 'n gemeenskaplike vooraf ooreengekome opset. Beskuldigde No 2 was te alle tye op die toneel teenwoordig, hy was klaarblyklik bewus van die aanranding op die Klaer en of die oorledene. Hy onttrek hom nooit aan die gebeure nie, maar hardloop saam met Beskuldigde No 1 weg sonder om ag te slaan op die welsyn van die Klaer of die oorledene. Beskuldigde No 2 het geen daad verrig waaruit afgelei kan word dat hy hom van die handeling van Beskuldigde No 1 gedistansieer het nie. Die Hof verwerp sy getuienis dat hy van die toneel weggehardloop het voordat die Klaer of die oorledene aangerand is. Dit strook nie met Lepoe se waarnemings nie, Beskuldigde No 2 het self aanvanklik getuig dat hy en Beskuldigde No 1 saam by die deur uit is, en kon later in kruisverhoor nie verduidelik wanneer beskuldigde No 1 dan nou die oorledene, die Klaer liever met die byl sou gekap het nie. In die *Staat teen Petersen 1989 (3) Suid-Afrikaanse Hofverslae 420 Appèl Afdeling op 425 E tot F, het Appèlregter Botha beslis: "Nou is dit so dat in gevalle waar twee persone deelneem aan 'n roof en die een van hulle in die loop van die aanranding die slagoffer dodelik verwond en die ander daarna optree op 'n wyse wat daarop dui dat hy hom vereenselwig het met wat gebeur het, sodanige latere optrede dikwels aangewend kan word as die grondslag van 'n afleiding dat hy die moontlikheid voorsien het dat die slagoffer gedood kan word, en onverskillig daarteenoor gestaan het."*

[7] The accused were found guilty of robbery with aggravating circumstances as meant in section 1 of the Criminal Procedure Act 51 of 1977 since the robbery was committed with a dangerous weapon, an axe, with

which grievous bodily harm was inflicted on both victims, one of which died as a result of the wounds – therefore the murder conviction.

[8] Section 51(1)(a) of the Criminal Law and Procedure Act No. 105 of 1997 reads as follows:

“Notwithstanding any other law but subject to subsection (3) and (6), a High Court shall –

(a) if it has convicted a person of an offence referred to in part I of schedule 2 or

(b)

sentence the person to imprisonment for life.”

The relevant portions of Part 1 of Schedule 2 read as follows:

“The obligatory life sentence is to be imposed for murder when

(a) it was planned or premeditated...

(c) The death of the victim was caused by the accused in

committing or attempting to commit or having or after having committed or attempted to commit one of the following offences:

(i) rape; or

(ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977); or

(d) the offence was committed by a person, group of persons or syndicate acting in the execution of furtherance of a common purpose or conspiracy.”

[9] The accused have clearly been convicted of robbery with aggravating circumstances and murder as contemplated in Part I of Schedule 2 and a minimum sentence of life imprisonment is therefore obligatory subject to subsections 3 and 6 of section 51 (1) (a) of Act 105 of 1997.

[10] A Regional Court has no jurisdiction to impose such sentence as it is clear from the said section that only a High Court has the authority to do so.

[11] The regional magistrate acted ultra vires in sentencing the accused, she should have referred the matter to the High Court for sentencing.

[12] Mr Skibi's argument is with respect, without merit, since this Court cannot continue with the appeal as the case is not yet ripe for the appeal. The sentence imposed by the regional magistrate is irregular, unlawful and void and the matter only becomes appealable after the correct court has imposed a sentence. This Court does not therefore have to evaluate the merits of the case at this stage. This will certainly be attended to by the High Court before imposing sentence.

[13] Although Accused 1 did not lodge an appeal in this matter. The regional magistrate also erred in imposing his sentence and this Court is entitled

to interfere with the sentence imposed in terms of this Court's inherent review powers and in terms of section 304(4) of the Criminal Procedure Act 51 of 1977.

[15] In the circumstances the following order is made:

(a) The proceedings in the court a quo subsequent to the conviction of both accused are declared a nullity and set aside.

(b) In substitution therefore the following order is made:

In terms of s 52(1) of Act 105 of 1997:

- i. the proceedings are stopped;**
- ii. the accused is committed to the High Court, Free State Provincial Division, for sentence as contemplated in s 51(1)(b) of the Act.**
- (c) The appeal against the conviction is struck from the roll.**
- (d) Both accused will remain in custody pending the disposal of this case in the High Court.**

D. MILTON, AJ

I concur.

C.J. MUSI, J

On behalf of the appellant: Adv. N.L. Skibi
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. D.W. Bontes
Instructed by:
Director Public Prosecutions
BLOEMFONTEIN