

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

Review No.: SR82/2004

In the Special Review between:

THE STATE

and

MATHEWS PENS RAKOTI

CORAM: **CILLIé et RAMPAL, JJ**

JUDGMENT BY: **RAMPAL, J**

DELIVERED ON: **22 JULY 2004**

- [1] The matter came to this court in terms of section 116(3)(a) of the Criminal Procedure Act No. 51/1977 for review. The accused was arrested on Sunday 13 April 2003 on a charge of robbery committed at Moroborobo in Sasolburg on Saturday 12 April 2003. The prosecution alleged in an annexure to the charge sheet that he attacked and assaulted a certain Moeketsi Lawrence Nkhome and that he stole from him an amount of R54,00 by violent means.

- [2] He was tried in the Sasolburg District Magistrate Court. Since he was a 17 year old minor, he was initially assisted by his father Mr Frans Rakoti. It is apparent from the record that he was uncertain as to what plea he really wanted to tender. His uncertainty prompted the presiding magistrate Mr K.C. Dlamini to note a plea of not guilty in terms of section 113 of Act No.51 of 1977. There being no explanation of the plea, the prosecution was called upon to lead evidence.
- [3] The victim was the only witness for the prosecution. In addition to his oral testimony, the written affidavit or the J88 medical report by the doctor was handed in as Exhibit “A” with the consent of the accused. The accused also testified in his defence.
- [4] At the end of the trial on Monday 1 September 2003, the accused was convicted as charged. Instead of sentencing the accused the presiding magistrate stayed the proceedings in terms of section 116(1)(a) of Act No. 51 of 1977 and transferred the accused to the Sasolburg Regional Court for sentence. The accused’s case was remanded to Monday 15 September 2003 in the said regional court.

[5] The case was postponed several times in the regional court. In that higher forum Attorney W.J. van Wyk was appearing as the defence lawyer. On 3 March 2004 Ms Sanna Rakoti replaced Mr Frans Rakoti as the accused's guardian. The latter had died in the meantime as the court was informed by the lawyer on 10 February 2004. After a few more postponements Mr E.H. Ludick, the regional court magistrate, decided to impose no sentence on the accused but to send a query to the district court magistrate instead. He doubted whether the proceedings in the district court were in accordance with justice.

[6] On Tuesday 6 April 2004 Mr Ludick sent a request for written reasons to Mr Dlamini. The relevant portion of the request made in terms of section 116(3)(a), Act No. 51 of 1977 reads as follows:

“Whereas after considering the record of the proceedings in the magistrate court doubt exists whether the proceedings are in accordance with justice in that:

1. The provisions of section 51 of Act No.105 of 1997 was not explained to the accused who was a juvenile and undefended.

2. The J88 form completed by a medical doctor was accepted and handed in as exhibit in the magistrate's court whereas the J88 form does not comply with the provisions of section 212, Act No. 51 of 1977 the presiding officer in the magistrate's court is required to provide reasons in respect of the issues raised above."

[7] The district court magistrate responded to the request of the regional court magistrate on 5 May 2004. He briefly stated his reasons as follows:

“ -1-

According to Annexure A of the district court charge sheet it is not indicated that this offence falls under Schedule 2 of part 2 of the Act 105 of 1977. The prosecutor did not inform the court that there are aggravating circumstances.

(Part II Schedule Two, Act No. 105/1997)

-2-

The J88 was observed (perused) by the accused and every (thing) written on it was explained to him and the contents was read on the record. The accused admit to the truth of the contents of the J88."

The words in brackets are my own additions.

[8] The reservation or doubt of the regional court magistrate has two dimensions. The one issue relates to section 51, Act No.105 of 1977. Therefore the first dimension is a procedural issue. It questions the correctness of the transfer. The other issue relates to

section 212, Act No. 51 of 1977. Therefore the second dimension is a substantive issue. It questions the merits of the conviction. Logic dictates that the second issue be considered first. I proceed to do so. The conviction after all preceded the transfer.

[9] The version of the complainant was that in the evening of Saturday 12 April 2003 he was walking on foot on his way home. The street lamps were burning. He came across the accused. He recognised him. He knew him by the name “Spens”. He knew where the accused’s home was situated. They passed each other seemingly in opposite directions. Shortly after turning left towards his house, he heard footsteps behind him. He looked back and saw the accused charging at him and grabbing him. The accused was armed with a knife. He was unarmed. The accused demanded money from him. He resisted the attack and the robbery. The accused knifed him on the right shoulder blade. He fell down.

[10] As he was trying to get back on his feet again, the second robber came. The two robbers intensified the attack. The second robber was also armed with a knife. He stabbed him in the face. The accused searched him and found a wallet in the pocket of his pants.

The robbers got away with his wallet and his ATM-card. They ran away. He remained standing on the scene. He watched them sharing his money which was in the wallet. They came back to him again and demanded more money. They threatened him with the knives. On this second occasion they scratched his neck before they again ran away for good. The next day he reported the incident to the accused's parents before he went to the hospital and the police.

[11] The victim's version is materially and substantially supported by the accused. He basically disputed two issues only. Firstly he denied that he had a knife, but he admitted he stabbed the victim though he claimed to have used the victim's own knife. Secondly he denied that he robbed the victim of any money, but he admitted that he took the victim's wallet though he claimed to have found it moneyless.

[12] I have to stress that the injuries which were inflicted upon the victim by the two robbers were never in issue. The version of the accused remarkably corroborated the version of the victim. On his own version the accused was undoubtedly guilty of robbery. A

formidable case was made out against him. I am of the view that the conviction of the accused was justified on the strength of the totality of the oral evidence alone apart from the written evidence received by way of the statutory medical report purportedly admitted in terms of section 212(4), Act No. 51 of 1977.

- [13] Exhibit “A”, in other words the J88 medical report we are here concerned about, does not form part of the record before me. On the one hand the district court magistrate found it compliant with the formalities of section 212. The regional court magistrate on the other hand found it non-compliant. Regretably the latter made no attempt to spell out vividly in what respect it was defective. The passage of the medical report quoted by the district court magistrate, if correctly quoted, leaves much to be desired. For instance the victim’s facial injury was described as “30 millimetre lacerations”. The victim’s shoulder injury was described as “20 metre lacerations”. Naturally I had some difficulty with both figures. The conventional or orthodox way of measuring the length of a wound is to use centimetres and not millimetres and most certainly not metres. As I see it, whatever defects the medical report may have and however serious such defects may have been,

cannot be said to have had an adverse impact on the verdict pronounced by the trial magistrate in the instant case. The conviction could still have been safely secured without the tendering of the medical report. After all, this was a charge of robbery and not assault with intent to do grievous bodily harm. Therefore, I would confirm the conviction.

[14] I now turn to consider the first dimension of this review. The critical question is whether the district court magistrate was correct or not in committing the accused for sentence by the regional court instead of himself handing down the sentence. Section 116(1)(a), Act No. 51/1977 reads:

- “1 If a magistrate’s court, after conviction following on a plea of not guilty but before sentence, is of the opinion –
- (a) that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate’s court;
 - (b) ...
 - (c) ...
- the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction.”

The following factors are relevant to the enquiry: The accused was a juvenile offender hardly 18 years old. The circumstances of the crime committed in the instant case fall far short of the magnitude of the robbery types which the central legislator envisaged when section 51 of the Criminal Law Amendment Act No. 105 of 1997 was enacted. The victim's physical injuries seem to have caused him no serious permanent disability. The amount of money stolen from the victim was a modest amount. The child offender had no lawyer on his side. Above all these, the accused was never warned by the presiding magistrate or the wording of the charge sheet before he pleaded or at any subsequent stage before his conviction of the drastic provisions of section 51 of the Criminal Procedure Amendment Act 105 of 1977.

“In the instant case, absolutely no prior advice was given to the accused. He was not pertinently forewarned about section 51 of the Criminal Law Amendment Act 105/1997. Everyone said nothing about it until the magistrate had found the accused guilty. By then it was too late for the defence lawyer to tighten her belt. She had been ambushed. The accused's right to a fair trial had been violated. *Vide* **S v SELEKE EN ANDERE** 1976 (1) SA 786 (TPD) at 682H which was quoted with approval by Cameron JA at par 20 in the recent decision of **S v MICHAEL LEGOA** 2002 (4) All SA 373 SCA and again by

Mpati JA at par 12 in **S v NDLOVU**, *supra*. Stressing the concept of substantive fairness as embraced in a guaranteed constitutional right to a fair trial, Mpati JA elucidating the said passage in **S v SELEKE** *supra* as ably translated from Afrikaans to English by Cameron JA said:

“And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial, if not in the charge sheet then in some other form, so that the accused is placed in a position to properly appreciate in good time the charge that he faces as well as its possible consequences.

... It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State’s intention to enable him to properly conduct his defence.”

per Rampai J, Ebrahim J concurring in the unreported decision of this court delivered on 6 March 2003 in the matter of **S v SAMUEL NTSANE MOHAPI**, Review No. 307/2003.

[17] The problem in this case is that the accused had never been charged or convicted of robbery with aggravating circumstances.

His conviction is one of ordinary robbery and the whole issue of section 51 is not applicable. The difference between the maximum sentence of three years imprisonment which the district court is empowered to impose and the maximum sentence of 15 years imprisonment which the regional court is empowered to impose in terms of its ordinary jurisdiction is substantially huge and not marginally trivial. Herein lies the prejudice of the transfer of the accused to the regional court. In the regional court he faces the real jeopardy of a sentence in excess of the district magistrate's jurisdiction. In the district court he faces a maximum of 3 years imprisonment.

- [18] It seems to me that the district court magistrate moved from the premise that seeing that the robbers used the knives which are dangerous weapons they thereby committed robbery with aggravating circumstances which automatically attracted the provisions of section 51. Such an approach is untenable as the accused was not prosecuted or convicted of that offence. Having considered the aforementioned factors I have come to the conclusion that the transfer of the accused to the regional court for sentence in the circumstances of this case was vitiated by a

misdirection seeing that the accused did not commit a scheduled offence. It follows therefore that the decision adopted by the district court magistrate in referring the accused to the regional court for sentence was based on a misconception of the legal position. Had it not been for that misconception, the matter would obviously never have been transferred to the regional court for sentence.

[19] Accordingly I make the following order:

The conviction is confirmed. The case is remitted to the district court *via* the regional court for the trial magistrate to sentence the accused according to his jurisdictional powers.

M.H. RAMPAL, J

I CONCUR

C.B. CILLIÉ, J
/scd