

IN THE HIGH COURT

(BISHO)

CASE NO.: CC40/2003

DATE: 14 MAY 2003

In the matter between:

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THE STATE

versus

MLUNGISI GEGE

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EX TEMPORE JUDGMENT:

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EBRAHIM J:

This matter was before me earlier today and has stood down to enable me to consider the submissions which have been placed before me and to enable me to arrive at a decision as to how this matter should proceed further. I have now reached a decision in this regard and these are my ex tempore reasons for the decision and the order which I propose making.

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On 23 October 2002 in the Regional Court for the Eastern Cape Region held at Zwelitsha the accused, Mlungisi Gege, was convicted of the offence of murder. The conviction followed upon a trial in which the accused pleaded not guilty. At the trial the accused was represented by a legal representative, namely, Mr Mbandanzayo. In consequence of the conviction the Regional Magistrate, who presided over the trial, committed the accused in terms of section 52(1) of the Criminal Law Amendment Act, No. 105 of 1997, for sentence by the High Court. This has resulted in his appearance before this Court today.

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Ms Ncobo who appears for the State has placed the record of the

proceedings in the Regional Court before this Court and has asked that it be received by this Court and form part of the record of this Court. The record is a transcribed copy of the proceedings in the court a quo and has been certified by the transcriber as a true and correct copy of the original evidence which was mechanically recorded. Mr Mazwi who now appears for the accused has not registered any objection to this and has confirmed that the aforesaid record may be so received by this Court. The record was thereupon received and now forms part of the record of the proceedings of this Court.

Ms Ncobo addressed the Court in regard to the proceedings in the court a quo and submitted that the accused had been correctly convicted of murder. However, she said that the evidence did not reveal that the murder was planned or premeditated. Furthermore the Regional Magistrate has not indicated why the offence merited punishment in excess of the jurisdiction of the Regional Court. In fact it appeared that a sentence lesser than that prescribed in terms of section 51(2)(i) of the Criminal Law Amendment Act, 105 of 1997, would be appropriate. In view of this, she contended, that the case should be referred back to the Regional Magistrate for him to impose sentence. Alternatively, this Court could request the Regional Magistrate to furnish reasons why he considered the offence merited punishment in excess of the jurisdiction of the Regional Court.

Upon receipt of these reasons this Court could then determine whether to refer the matter back to the Regional Court or it could impose sentence itself. Mr Mazwi, while not opposed to the State's proposals, contended that the accused should have been convicted of culpable homicide and not murder.

I have considered the submissions made by both Ms Ncobo and Mr Mazwi. There is a great deal of merit in the submissions which Ms Ncobo has made and it appears to me that it is advisable that this Court should adopt one or other of the causes of action she has proposed. I say so, since the circumstances relating to the commission of the offence, of which the accused has been convicted, do not tend to support the conclusion that the offence necessarily merits punishment in excess of the jurisdiction of the Regional Court.

I must, however, express a word of caution that this is only my prima facie view and may have to be reassessed once I have more fully considered all the relevant circumstances, together with any further information that may be forthcoming from the Regional Magistrate and counsel for the State and the Defence.

It is evident from the record that in committing the accused for sentence by the High Court that the Regional Magistrate has not indicated why he was of the opinion that the offence merited punishment in excess of the jurisdiction of the Regional Court. In regard to this question, all that the Regional Magistrate has said, is the following:

"In terms of section 52(1) of the Criminal Law Amendment Act, 1977, Act No. 105, 1977 the proceedings are stopped and the accused is committed for sentence by the High Court."

Let me observe that the citation of the Act is incorrect as it should really be Criminal Law Amendment Act No. 105 of 1997, the Regional Magistrate has obviously made a mistake in this regard.

The decision to commit the accused for sentence by the High Court is, in my view, discretionary. A Regional Magistrate is not

compelled in each instance where an accused is convicted of an offence specified in Schedule 2 of Criminal Law Amendment Act, 105 of 1997 to commit an accused for sentence by the High Court. The Regional Magistrate is required to exercise his discretion judicially, taking account of the circumstances relating to the commission of the offence and with due regard to the prescribed sentences set out in the said Act.

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In the circumstances of this matter I do not consider it proper that the proceedings before this Court continue in the absence of the Regional Magistrate's reasons for his decision to commit the accused for sentence by this Court. It follows from, this too, that the court at this stage does not address the question of whether the accused was correctly convicted or not and whether the conviction should stand so that the Court may then proceed to the question of imposing sentence upon the accused. In my view it is proper that this aspect may only be proceeded with once this Court has received the reasons which it is requesting from the Regional Magistrate.

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Accordingly the Regional Magistrate who presided over the accused's trial is required to furnish to this Court the reasons for his invoking the provisions of section 52(1)(b) of Criminal Law Amendment Act, 105 of 1997 and, in particular, why he was of the opinion that the offence merited punishment in excess of the jurisdiction of the Regional Court. The Regional Magistrate is requested to provide these reasons without delay. Until such time as the reasons are forthcoming the proceedings before this Court shall stand over.

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Y EBRAHIM JUDGE BISHO HIGH COURT