

IN THE HIGH COURT

(BISHO)

CASE NO.: CC40/03

DATE: 18 JUNE 2003

In the matter between:

5

THE STATE

versus

MLUNGISI GEGE

EX TEMPORE JUDGMENT

10

EBRAHIM J

In this matter I previously sent a request to the Regional Magistrate who presided over the accused's trial to furnish me with the reasons for his having invoked the provisions of section 52(1)(b) of the Criminal Law Amendment Act, 105 of 1997. The reason for issuing this request was to ascertain from the Magistrate why he was of the opinion that the offence merited punishment in excess of the jurisdiction of the Regional Court.

15

The Regional Magistrate had convicted the accused of the offence of murder. However, in convicting the accused the Magistrate did not specifically state whether the murder was planned or premeditated. In those instances where an accused is convicted of murder which is planned or premeditated it is a conviction which falls under Part 1 of Schedule II of Criminal Law Amendment Act, 105 of 1997. In such an instance a magistrate has no discretion, but is obliged to stop the proceedings and to refer the accused to the High Court for sentence.

20

25

However, where an accused is convicted of the offence of murder

and the murder has not been planned or premeditated the offence of which the accused has been convicted resides under Part 2 of Schedule II of the aforesaid Criminal Law Amendment Act, 105 of 1997. In this latter instance the magistrate must form the opinion that the sentence to be imposed exceeds the jurisdiction of the Regional Court and in those circumstances he is entitled to refer the matter to the High Court for sentence.

5

When I requested reasons from the magistrate I indicated that my *prima facie* view was that, on the basis of the evidence before the trial court, it did not appear to me that the act of murder was a premeditated or planned one.

10

In the reasons which the magistrate has now furnished he has stated, that in his view, since the accused had the necessary intention to kill the deceased the murder was clearly planned. I am with regret unable to follow this reasoning since, from the circumstances as described in the evidence given by the witnesses, it appears that there had been some kind of altercation between the accused and the deceased and other individuals. Shortly thereafter the accused had emerged from a shebeen and gone up to the deceased who was outside the shebeen and stabbed the deceased once in the chest with a knife. While it appears that one of the witnesses indicated that the accused had emerged with a knife drawn, I am of the view that this in itself is not sufficient from which one must simply draw the inference that the accused was acting in a premeditated manner in bringing about the death of the deceased. So as far as that is concerned I do not find myself in agreement with the trial magistrate.

15

20

25

Both Miss Ncobo, who appears for the State today, and Mr Mazwi,

who appears for the accused, have submitted that I should refer the matter back to the Regional Magistrate so that he may impose sentence. In their view the magistrate was incorrect in committing the accused for sentence by the High Court. Both have submitted that since the magistrate in his judgment has not found that the accused had acted in a planned or premeditated manner, that the committal of the accused for sentence by the High Court was incorrect. Mr Mazwi has gone further to submit that the provisions of Criminal Law Amendment Act, 105 of 1997 do not apply and for this reason, too, the matter should be referred back to the Regional Magistrate to impose sentence. 5 10

I am not persuaded by the arguments which have been placed before me that it would serve the interests of justice for the accused to be referred back to the Regional Magistrate to impose sentence. It is evident from the reasons that the magistrate has furnished, and which he did so with some reluctance, that he is of the view that the accused should be sentenced to a term of imprisonment in excess of 19 years. It seems to me that in these circumstances it would be prejudicial to the accused that I refer the matter back to the Regional Magistrate to impose sentence. He has clearly already formed the opinion that the sentence should be in excess of 19 years. I am at a loss to understand, therefore, why Mr Mazwi insists that the accused be referred back to the magistrate for sentence. In my view, should I refer him back it may result in an injustice in so far as the accused is concerned. 15 20

I am also not in agreement with Mr Mazwi that the rationale as expressed in the case of **S v LEGOA** 2003 (1) SACR 13 (SCA) are applicable in the present case. I do not intend to discuss this in any detail as I think it would not serve any relevant purpose in so far as the 25

present case is concerned. Suffice to say that if this Court is of the view that the murder was not planned or premeditated it need not necessarily impose the minimum sentence of 15 years as prescribed in section 51(2)(a) of Criminal Law Amendment Act, 105 of 1997. Should there be substantial and compelling circumstances the Court may deviate from such a minimum prescribed sentence.

5

I am of the view, therefore, that this Court should now proceed to the sentencing stage of the proceedings in so far as the accused's trial is concerned and for that purpose will receive such evidence or submissions as may be necessary to assist the Court in determining an appropriate sentence.

10

In brief the application by both the State and the Defence for the matter to be referred back to the Regional Magistrate to impose sentence is refused.

15

Y EBRAHIM

JUDGE, BISHO HIGH COURT

20

25