

IN THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL DIVISION)CASE NO:

A227/2007

DATE:

9 MAY 2008

5 In the matter between:

JACOB RICARDO

Appellant

and

THE STATE

Respondent

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J U D G M E N TBOZALEK, J:

[1] The appellant was convicted in the George Regional

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Court on one count of murder and one count of attempted

robbery. He was sentenced on 24 October 2006 to 15

years' imprisonment on the count of murder and five

years' imprisonment on the robbery count. The

magistrate ordered that the two sentences run

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concurrently. With the leave of the magistrate, the

appellant now appeals against both his convictions and

sentences. The appellant was apprised in the charge

sheet that the provisions of section 51 of Act 105 of 1997

("the Act"), colloquially known as the minimum sentence

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Act, would be applicable to both the murder count and the robbery count.

5 [2] The latter count averred that aggravating circumstances were present as described in section 1 of Act 51 of 1977 in that a dangerous weapon was used in the robbery, to wit a knife and/or a bottlekop (broken bottle). However, in sentencing the appellant on count 1, the magistrate misdirected himself in finding that in the absence of “substantial and compelling circumstances” as envisaged in the Act, he was compelled to impose a minimum sentence of 15 years’ imprisonment. In fact, regard being had to section (c)(ii) of Part I of Schedule 2 to the Act read with section 52(1)(i) of the Act, the appellant 10 qualified for a minimum sentence of life imprisonment inasmuch as he had been convicted of attempted robbery with aggravating circumstances as above described. 15

20 [3] Although the magistrate did not say so in terms, it is clear that the appellant was so convicted in that not only was the charge one of robbery with aggravating circumstances, but the evidence accepted by the magistrate proved that the appellant was party to a robbery in which a knife and at least one broken bottle 25 were used to inflict the fatal injuries to the deceased. In

the circumstances the magistrate had no jurisdiction to sentence the appellant. In terms of section 52(1) of the Act, which is cast in peremptory language, the magistrate was obliged to stop the proceedings and commit the appellant for sentence by the High Court (see in this regard S v Sekgobela & Four Others, 2006(2) SACR 309 (WLD).) In those matters, in similar circumstances to the present matter, Mbha, J, Satchwell, J concurring, held that the appropriate course of action was to set aside the sentences irregularly imposed by the magistrate and refer the matters to a single judge of the High Court to be dealt with in terms of section 52 of the Act.

[4] The Court held further that it would be inadvisable for it, as a Court of appeal, to express an opinion on the merits of the appeal since a single judge of the High Court, to whom the matter must ultimately be referred, would have to decide whether or not to confirm the convictions or convictions. Such a decision should not be influenced by any judgment or opinion of the Court of appeal. I am in respectful agreement with the approach of the learned judges, but with the qualification that there may well be cases where it is so clear to the Court of appeal that the conviction or convictions cannot stand, that it would be appropriate to uphold the appeal there and then and set

aside the conviction and sentences without referring the proceedings to a single judge of the High Court. (See in this regard S v Liau 2005(1) SACR 498 (T).)

5 [5] The present matter is, however, not such a case and I consider therefore that, in the ordinary course, the appropriate course would be to set the sentences aside and refer the matter to a single judge of the High Court. In my view, it would be appropriate to set aside both sentences since the sentence imposed by the magistrate on the count of attempted robbery was linked to and influenced by the sentence imposed on the count of murder.

15 [6] This state of affairs is, however, potentially affected by the fact that with effect from 31 December 2007 the minimum sentence dispensation has been changed. The Regional Court now has jurisdiction to impose a sentence of life imprisonment on persons whom it has convicted of offences referred to in Part I of Schedule 2 to the Act.

20 The new dispensation has been affected by the provisions of the Criminal Law (Sentencing) Act 38 of 2007. However, one of the functions which that Act serves is to insert into the Act, namely the Criminal Law Amendment Act 105 of 1997, a savings clause in the form

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of section 53(3). That savings clause, insofar as it is relevant, reads as follows:

“Any appeal against -

(a) a conviction of an offence

5 (i) referred to in Schedule 2 of this Act
and the resultant sentence imposed in
terms of section 51; or

(b) a sentence imposed in terms of section 51 or
52A, as the case may be, shall be continued
10 and concluded as if section 51 and 51A had at
all relevant times been in operation”.

The effect of that savings provision is then, it appears to
me, to preserve the earlier dispensation in aspic, as it
were, for the purposes of the determination of an appeal
15 against a conviction or sentence imposed under the pre-
2008 dispensation. A necessary consequence of this, in
my view, is that this Court remains obliged to set aside
the incompetent sentence or sentences imposed by the
magistrate and remit the matter to a single judge of the
20 High Court to deal with the confirmation of the
convictions and sentencing.

[7] In the result I would set aside the incompetent
sentences, strike the appeal off the roll and refer the
25 matter to a single judge of the High Court.

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IRISH, AJ: I agree.

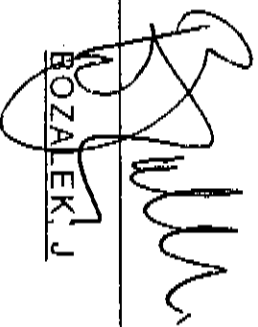
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IRISH, AJ

10 BOZALEK, J: The following order is made:

1. The sentence of 15 years' imprisonment and five years' imprisonment imposed by the trial Court in respect of the counts of murder and attempted robbery respectively are set aside.
2. The appeal is struck off the roll.
3. The matter is referred to a single judge of the High Court to proceed in terms of section 52 (as it then was) of Act 105 of 1997.

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BOZALEK, J