IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A390/2007

DATE: 1 AUGUST 2008

In the matter between:

CHARLES ROMAN 1ST APPELLANT

GERSHWIN SAULS 2ND APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

BOZALEK, J

On 26 November the appellant, Mr Charles Roman, was found guilty in the Regional Court for the District of Somerset West on two counts of robbery with aggravating circumstances and sentenced to seven years direct imprisonment on each count. In a notice dated 2 December 2002, received by the Court on 10 December that year, he noted his intention to appeal against the sentences imposed and the grounds of his appeal. For reasons which are not apparent the matter only came to the attention of the High Court relatively early in 2008. The spur for this appears

to have been an unsuccessful application by the first appellant's co-accused, Mr Gershwin Sauls, for leave to appeal against his convictions and sentences. That application commenced in May 2004 and was eventually heard and refused by the Magistrate on 8 April 2005. When the matter was received by the High Court it appears to have been treated as a petition by both accused for leave to appeal in terms of Section 309(C) of the Criminal Procedure Act 51 of 1977.

This appears from an order made by Dlodlo, J and Steyn, AJ on 30 April 2008, referring to the two accused as "petitioners", which reads as follows;

> "In terms of Section 309(C)(7) of Act 51 of 1977 as amended the petition/application is refused."

The terms of the order are puzzling, at least insofar as the appellant is concerned, since, on a perusal of both the appeal file and the petition file, there appears to be no record of any petition proceedings having been launched by appellant.

I shall restrict myself to the circumstances of the appellant since the second accused's legal representative, ie I am referring to Mr

Gershwin Sauls, Advocate Joubert, has withdrawn accused number 2's appeal which has accordingly been struck from the roll.

The first question is, then, whether appellant's appeal is properly before this Court, or put differently, whether he has a right to have his appeal heard. When appellant noted his intention to appeal against sentence no leave to appeal was necessary. The only exception at that time to the unqualified right to appeal against convictions and/or sentences of lower courts pertained to judges certificates for jail appeals. In S v Ntuli 1996(1) BCLR 141 CC 1996(1) SA 1207 CC, 1996(1) SACR 94 CC, it was held that the requirement of a judge's certificate discriminates unfairly against prisoners who lack the means to pay for legal assistance. The declaration of an invalidity was postponed for 18 months, and an application for an extension of the postponed period was later refused in Minister of Justice v Ntuli 1997(2) SACR 19 Constitutional Court. This led to the first versions of Section 309 B, C and D being placed on the statute book, the intention thereof apparently being to make the leave to appeal regime which applies to appeals from High Courts applicable also to appeals from the Magistrates Courts.

However, in S v Steyn 2001(1) BCLR 52 CC 2001(1) SA 1146 CC, it was held that the required leave to appeal from lower courts was unconstitutional. The declaration of invalidity was postponed for six months to allow the authorities to correct the position. On the 1 January 2004 the new sections 309 B, C and D came into operation, by virtue of the Criminal Procedure Amendment Act 42 of 2003. This revised procedure is not retrospective however, and only applies to appeals noted after 1 January 2004. In my view the appellant's right to appeal is extant and is unaffected by the order made by Dlodlo, J and Steyn, AJ on 30 April 2008. That order, in all probability given in error, on its own terms does not dispose of the appellant's existing appeal, but purports only to refuse a petition brought by the appellant which, as I have noted, does not appear to exist; more importantly nor does the primary jurisdictional requirement for such a petition appear to have existed, namely, a refusal by the lower court of an application for leave to appeal on behalf of the appellant. Nor do I consider that it is necessary, before appellant's appeal can be entertained by this Court, for the order of 30 April 2008 to be set aside or corrected insofar as it affects or purports to affect appellant's right to appeal.

/ds

In Mkhize v Swemmer and Others 1967(1) SA (DCLD) 186 it was held that an order made by a Court when it was *functus officio* was a nullity. At page 197(c) Fannin, J stated as follows;

> "The rule is that judicial decisions will ordinarily stand until set aside by way of an appeal or review, but to that rule there are certain exceptions, one of them being that where a decision is given without jurisdiction it may be disregarded without the necessity of a formal order setting it aside."

The same principle was recently approved and applied in Combrinck v Nhlapo 2002(5) SA 611. See also Todt v Ipser 1993(3) SA 577 AD at 589 c-d. The order of 30 April 2008 does not purport to deal with the merits of the appellant's appeal against sentence but to refuse him leave to appeal to this Court, a right which appellant enjoyed at the time and which he exercised. In the circumstances I am of the view that the order in question may be disregarded and it remains open for this Court to deal with the merits of the appellant's appeal.

/ds

The main ground of appeal was that the sentence imposed by the magistrate induces a sense of shock. The magistrate found that substantial and compelling circumstances existed which justified a deviation from the minimum sentence applicable to both counts, namely, 15 years imprisonment. He found that appellant's age, 19 years old at the time of the commission of the offence, the fact that the appellant had been in custody for approximately 12 months, awaiting finalisation of the trial, and that no evidence was presented by the State that a real firearm was used in the robberies, constituted substantial and compelling circumstances.

The circumstances of the robberies were that the appellant and his two fellow accused approached a group of persons enjoying the amenities at Firgrove dam and robbed two of them at gunpoint. The first victim, a woman, was robbed of a watch and jewellery and cash to the value of some R5 000. When her companion hastened to her assistance he was robbed of sunglasses and petty cash to the value of some R650. No injuries of any significance were caused to any of the complainants and a ring and a small amount of cash was recovered from the accused who were arrested very shortly after the incident.

/ds

At the time of sentencing the appellant's only previous conviction was for the possession of cannabis in 1998 for which he received a fine. He was unmarried with no dependants. The magistrate treated the appellant as a first offender, finding furthermore that his role in the robbery was no greater than those of his fellow accused. The magistrate correctly viewed the offences in a serious light and thus justifying direct imprisonment. There is however no indication in his sentencing remarks that he considered ordering that all or part of the sentence imposed on count 2 run concurrently with that on count 1.

It is trite law that a Court must have regard to the cumulative effect of sentences imposed, see in this regard S v Koutandos and Another 2002(1) SACR 219 at g-h, S v Kwenamore 2004(1) SACR 385 SCA and S v Coals 1995(1) SACR 33 AD at pg 36 f and the authorities there cited.

Such an approach was in my view clearly indicated in the present matter, since the two robberies were closely associated in time and place. In the light of the appellant's youth, his comparatively clean record and the fact that the robberies appear to have been opportunistic rather than planned, I am of the view that the total

sentence of 14 years imprisonment imposed on appellant indeed induces a sense of shock and justifies this Court interfering.

In the result this Court is at large to impose a sentence which it considers appropriate. In my view the sentence imposed upon the appellant in respect of count 1 – seven years, was in itself weighty and, for justice to be served, a substantial portion of the sentence imposed in respect of count 2 should run concurrently with that in respect of count 1.

Taking all relevant circumstances into account I consider that an effective SENTENCE OF 9 (NINE) YEARS IMPRISONMENT would be appropriate. I would therefore UPHOLD THE APPEAL AGAINST SENTENCE by confirming the sentences imposed on counts 1 and 2, but ORDERING THAT 5 (FIVE) YEARS OF THE SENTENCE ON COUNT 2 RUN CONCURRENTLY WITH THE SENTENCE IMPOSED ON COUNT 1.

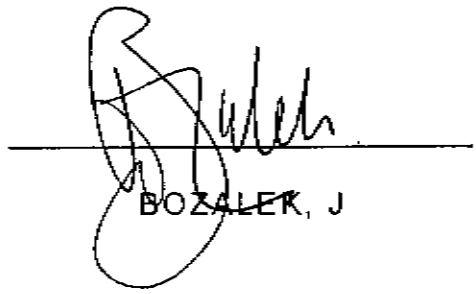
The appeal against sentence is upheld, the sentence imposed being substituted by the following:

Count 1 – 7 (seven) years imprisonment;

Count 2 – 7 (seven) years imprisonment

/ds

In terms of Section 280 of the Criminal Procedure Act 5 (five) years of the sentence imposed on count 2 will run concurrently with the sentence imposed on count 1. The sentence is antedated to 26 November 2002.



BOZALEK, J

I agree,

SAMELA, AJ

/ds