

SOUTH AFRICA / JUDGMENT

S v Camako (A450/2007) [2008]

ZAGPHC 278 (18 September 2008)

[2008] ZAGPHC 278

COURT

High Courts - Gauteng

BEFORE

B.R. Southwood, A.A. Louw, W.A.J. Van Zyl

CASE / FILE NUMBER

A450/2007

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IN THE HIGH COURT OF SOUTH
AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Date: 2008-09-18

Case Number: A450/2007

In the matter between: SYDNEY CAMAKO
Appellant
and
THE STATE
Respondent

JUDGMENT

SOUTHWOOD J

- [1] On 7 September 2004 the appellant was found guilty of murder in the Nigel regional court and sentenced to 15 years imprisonment. With the leave of the court a quo the appellant appeals against the sentence.
- [2] On 18 June 2007 the appeal came before the full bench and the two judges could not agree on the outcome of the appeal. Accordingly, they referred the appeal for hearing by the full court. At that stage no-one appreciated that the sentence imposed was a nullity.

- [3] The circumstances accepted by the court a quo show that the murder was planned or premeditated. The regional magistrate rejected the appellant's version that he acted in self defence. According to the accepted facts, the appellant entered the shebeen, approached the deceased and said they must

talk. When the deceased indicated that they should talk, then and there, the appellant took out a firearm and shot the deceased three times at point blank range. The deceased died from a bullet wound in the chest.

- [4] The court a quo therefore convicted the appellant of an offence referred to in Part I of Schedule 2 of Act 105 of 1997 and in terms of section 52(1) of the Act (prior to its repeal on 31 December 2007 by section 2 of Act 38 of 2007) the court a quo was obliged to stop the proceedings and refer the matter to the High Court for sentencing. See *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* 2004
- (2) SACR 1 (T) paras 23, 29 and 30. Since the regional magistrate proceeded to sentence the accused the sentence imposed was a nullity and on appeal the court must set aside the sentence imposed and refer the matter to the appropriate court for sentencing. See *S v Liao* 2005
- (1) SACR 498 (T) at 501g-I and 503f-h. In *Liao* the court struck the appeal from the roll, set aside the sentence and substituted the sentence with an order in terms of section 52(1) that the proceedings be stayed and that the accused be referred to the High Court which has jurisdiction to sentence as contemplated by section 51(1) of Act 105 of 1997.
- [5] The Criminal Law (Sentencing) Amendment Act 38 of 2007 (which commenced on 31 December 2007) has radically altered the power of the regional court regarding sentencing of offences referred to in Part I of Schedule 2 of Act 105 of 1997. It introduced a new section 51(1) which provides that a regional court has the power to sentence a person to imprisonment for life when it convicts that person of an offence referred to in Part I of Schedule 2 of Act 105 of 1997 and shall do so subject to subsections
- (3) and (6) and it repealed section 52 of Act 105 of 1997 which required the regional magistrate to stop the proceedings and refer the matter to the High Court for sentencing. Act 38 of 2007 also inserted the following new section 53A containing the following transitional provisions –

'If a regional court has, prior to the date of the commencement of the Criminal Law (Sentencing) Amendment Act, 2007 –

- (a) committed an accused for sentence by a High Court under this Act, the High Court must dispose of the matter as if the Criminal Law (Sentencing) Amendment Act, 2007, had not been passed; or

- (b) not committed an accused for sentence by a High Court under this Act, then the regional court must dispose of the matter in terms of this Act, as amended by the Criminal Law (Sentencing) Amendment Act, 2007.’
- [6] If this court now (on 17 September 2008) sets aside the regional magistrate’s sentence as a nullity the regional magistrate has not yet committed the appellant for sentence by the High Court and the regional magistrate must dispose of the matter in terms of the new powers conferred by Act 38 of 2007. The regional magistrate will have to decide whether he is obliged to impose a life sentence or whether a lesser sentence may be imposed if he finds substantial and compelling circumstances or in accordance with the principles set out in *S v Malgas* 2001
- (1) SACR 469 (SCA).
- [7] On 12 September 2008 the presiding judge requested counsel to comment on the effect on this appeal of the judgments in *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* 2004
- (2) SACR 1 (T), *S v Liau* 2005
- (1) SACR 498 (T) and the Criminal Law (Sentencing) Amendment Act 38 of 2007. The respondent’s representative filed supplementary heads of argument dealing fully with the cases and the effect of the Act. The appellant’s counsel did not file supplementary heads of argument. Instead the appellant’s attorney delivered a notice of withdrawal of the appeal. At the hearing on 17 September 2008 the appellant was not represented. The respondent’s representative informed the court that it was the intention of the Director of Public Prosecutions to seek an order setting aside the sentence and referring the matter back to the regional court for sentence. He requested the court to set aside the sentence and refer the matter to the regional magistrate to sentence the appellant in accordance with section 51 of Act 105 of 1997 as amended by Act 38 of 2007 on 31 December 2007.
- [8] It seems to me that this court should accede to that request notwithstanding the notice of withdrawal. In terms of section 22(b) of the Supreme Court Act, 59 of 1959, the court has the power to set aside the order which is the subject of the appeal and to make any order which the circumstances require. Similarly, in terms of section 304(2)(iii) of Act 51 of 1977 the court has the power to set aside or correct the proceedings of the magistrates’ court. In terms of section 304(4) this court also has the power to rectify the proceedings in which the sentence was imposed because they were not in accordance with justice.

Order

- [9] The sentence is set aside and the matter is referred back to the regional court for sentencing in terms of section 51 of Act 105 of 1997 as amended by Act 38 of 2007 on 31 December 2007.

B.R. SOUTHWOOD

JUDGE OF THE HIGH COURT

I agree

A.A. LOUW

ACTING JUDGE OF THE HIGH COURT

W.A.J. VAN ZYL

CASE NO: A450/2007

HEARD ON: 17 September 2008

FOR THE APPELLANT: Unrepresented

FOR THE RESPONDENT: ADV. V.L.N. DAVHANA

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 18 September 2008

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