

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A11/2008

DATE:

15 AUGUST 2008

5 In the matter between:

CLIVE DESMOND LEWIS

APPELLANT

and

THE STATE

RESPONDENT

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JUDGMENT

OLIVIER, A J

15 On 8 December 2003, the appellant, Mr Clive Desmond Lewis,
was convicted on one count of housebreaking with the intent to
steal and theft. He was sentenced to three years
imprisonment.

20 The appellant now appeals both against his conviction and
sentence. I pause to mention that the appellant only applied
on 9 February 2007 for leave to appeal.

This sentence has not yet been served or not yet been fully
served, at least so we are informed.

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Mr Maartens, who appeared on behalf of the respondent, pointed out in his heads of argument, and I may add quite correctly, that the record reflects that the trial commenced on 27 August 2003 and that the magistrate was assisted by two assessors. On 16 October 2003 the complainant, Mr Thiar, as well as the appellant, testified. On 23 October 2003, and after the conclusion of the evidence of the second accused, Mr Esso, the matter stood recorded that the proceedings on 23 October took place in the absence of both assessors.

There was no objection to their absence from either the State or the legal representatives representing both accused. It was then submitted on behalf of the first accused, the appellant, that there was no prejudice to him, whilst the representative of the second accused left matters in the hand of the Court. The magistrate suggested that the two assessors should listen to the record, though he acknowledged that they had not had the opportunity to observe the demeanour of accused No 2 when he gave his evidence.

Mr Maartens quite correctly pointed out that the continuation of the proceedings in the absence of the assessors constituted an irreparable and fatal irregularity. He referred us to Kriegler and Kruger, Hiemstra, Suid Afrikaans Strafproses, 6th Edition, at 375 and the cases of S v Daniels and Another, 1997(2)

SACR 532 (C). S v Petersen and Another, 1998(2) SACR 311 (C). S v Kleinbooi, 1999(1) SACR 177 (C), and S v Mngeni 2001(2) SACR 20 (EC).

5 In Rex v Price, 1955(1) SALR 219 (A), Greenberg, J A held as follows, at 224C - E:-

10 “*Prima facie* when a decision is entrusted to a tribunal consisting of more than one person, every member of that tribunal should take part in the consideration of the decision. In Ras Behari Lal and Others v The King Emperor, 150 LTR 3, which was followed in this court in Rex v Silver, 1940 AD
15 187, the privy council set aside the verdict of a jury because one of its members did not understand the language in which the proceedings or a material part of them were conducted. Lord Atkin said that the board thought

20 “That the effect of the incompetence of a juror is to deny to the accused an essential part of the protection afforded to him by law and that the result of the trial in the present case was a clear miscarriage of justice.”

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(See also Silber's case at page 193 to 194). What was denied to the accused in these cases was his right to a consideration of his case by every member of the fact-finding tribunal."

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Greenberg, J A held that the Court had not been properly constituted and that its proceedings in convicting the appellant amounted to an irregularity, at 226A.

10 Corbett, C J, in S v Malindi, 1990(1) SALR 962 (A) held at 970G - J as follows:-

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"An assessor appointed in terms of section 145 is a member of the court and participates in all decisions of the Court on question of fact. Where the Judge sits with two assessors, the decision of the majority on factual questions constitutes the decision of the Court. Where, on the other hand, the Judge sits with only one assessor then, in the event of a difference of opinion, the decision of the judge prevails (section 145(4)). An accused person has a right to have his case considered by every member of the fact-finding tribunal (see R v Price, 1955(1) SALR 219 (A) at 224D - E), and it is essentially important that this should be so in cases

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covered by the proviso to section 145(2). See also
R v Mati and Others, 1960(1) SALR 304 (A) at
306F, S v Malinga (supra) at 498I to J, S v Gqeba
and Others, 1989(3) SALR 712 (A) at 718A - C,
and, as was pointed out by Grosskopf, J A
inGqeba's case supra at 718B – C, although section
147(1) of the Act does permit in certain
circumstances the continuation of a trial without
one of the assessors even, in cases covered by the
proviso to section 145(2), these circumstances
should not extend beyond those clearly falling
within the language of section 147(1)."

Section 93 *ter* (5) of the Magistrate's Court Act 32 of 1944
provides that the provisions of section 147 of the Criminal
Procedure Act 51 of 1977 apply *mutatis mutandis* where an
assessor sitting with a magistrate in a criminal trial dies or
becomes, in the magistrate's opinion, incapable of continuing
to act as an assessor. Section 147 provides as follows:-

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"(1) If an assessor dies or, in the opinion of the
presiding Judge becomes unable to act as an
assessor at any time during a trial, the
presiding Judge may direct

25 (a) that the trial proceed before the

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remaining member or members of the court, or

5 (b) that the trial start *de novo*, and for that purpose summon an assessor in the place of the assessor who has died or has become unable to act as an assessor.

(c) where the presiding Judge acts under section 1(b), the plea already recorded shall stand.”

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The above factual situation is not covered by section 145 and it did not apply. It follows that the magistrate did not have the power to dispense with the presence of the assessors and to

15 proceed without them.

In my view the appellant's conviction and sentence should be set aside. This Court is entitled and obliged to do so in terms of the provisions of section 304(4) of the Criminal Procedure

20 Act 51 of 1977.

Farlam, J., as he then was, pointed out in S v Daniels and Another, 1997(2) SACR 531 (C) at 533H that it would not be appropriate for this Court to order that a trial *de novo* should

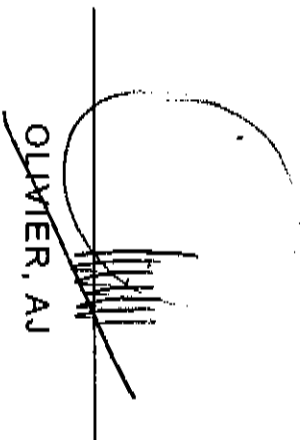
25 take place. It is for the Director of Public Prosecutions to

decide whether the accused should be prosecuted.

For the above reasons, I would SET ASIDE THE CONVICTION
AND SENTENCE of the appellant.

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OLIVIER, AJ

I agree and it is so ordered.

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MOOSA, J

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