239/54

G.P.-S.994—1952-3—10,000. U.D.J. 443.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(.....DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAKI.

.....

Appellant.

versus

.....

Respondent.

Appellant's Attorney ..... *Respondent's Attorney* .....
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate J. F. HARRIS & M. J. MENTZ *Respondent's Advocate* A. P. MyBURGH.
Advokaat van Appelant *Advokaat van Respondent*

Set down for hearing on:— 1955
Op die rol geplaas vir verhoor op:—

Before: Centlivres C.J., Greenberg, Schreiner, v.d. Heever & Hoexter J.J.A.

9.45 a.m. — 12.40 p.m.

C.A.V.

Judgment:
on 8/3/55:—

Original

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

G. D. GRUNDLINGH Appellant

and

R E G I N A Respondent

Coram: Centlivres C.J., Greenberg, Schreiner, van den Heever et Hoexter, JJ.A.

Heard: 24th. February, 1955. Delivered:

J U D G M E N T

SCHREINER J.A. :- I agree with my brother HOEXTER that this appeal should be dismissed.

In regard to the question of practice, I agree, for the reasons stated by HOEXTER J.A., that once a criminal appeal has been called in court the appellant has no right to withdraw it if the court considers that justice requires that an order should be made in relation thereto; and this order may be one increasing the sentence. But we were not referred to any general rule of statute or common law entitling an appellant to withdraw his appeal in a criminal matter, nor do I know of any; the

matter/.....

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[illegible]

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[illegible]

[illegible]

[illegible]

[illegible]

matter rests in the field of practice and the further question, therefore, arises whether the courts should not observe the ~~practice~~ rule that the appellant cannot withdraw a criminal appeal that he has noted, not only once it has been called in court, but also once he has been notified, either by the Crown or by the registrar of the court that will be hearing the appeal, that the issue of the increase of the sentence will be raised at the hearing of the appeal. It seems to me that it would be convenient, just and consistent with the existing practice if this rule were observed. This view provides a further reason why in my opinion the appellant's first attack on the order of the Transvaal Provincial Division should fail.

In regard to the sentence imposed by that Division, counsel for the appellant disclaimed any wish to distinguish the imposition of strokes from the imposition of imprisonment. That being so, I concur in the dismissal of the appeal.

O.D. Schreiner

8. 3. 55

Original

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:-

G.D. GRUNDLINGH Appellant

and

REGINA Respondent

Coram:- Centlivres, C.J., Greenberg, Schreiner, van den Heever et Hoexter, JJ.A.

Heard:- 24th February, 1955. Delivered:- 8.3.55

VAN DEN HEEVER, J.A. J U D G M E N T.

I have had the advantage of reading the judgments prepared by my brothers Schreiner and Hoexter. I agree with the views they express and would like to add a few observations. According to Roman Dutch law the general rule was that neither the prosecution nor the convicted person could appeal in criminal cases. This rule was regarded as so selfevident that when William of Orange referred an application for leave to appeal to the Supreme Court of Holland the reply was that practically throughout Christendom the rule was that convicted persons could not appeal. If appeals were

1(a)/ allowed .....

allowed, the missive naively continued, convicted criminals would only be enabled to commit further crimes while their appeals were pending (Boel ad Loen, Cas. 117). The harshness of this common law rule was somewhat alleviated by statute both in the Netherlands (van der Linden, Jud. Pract. 2.24.4 and 5) and at the Cape (Wessels, History of R.D. Law, Ch. 34). But in both countries, until after the second British occupation the right to appeal in criminal cases was much more restricted than the right to appeal in civil cases. (Compare the Instructions of De Mist 24/25 May 1804, Kaapse Plakaatboek Vol. 6 p. 136, with the situation in regard to criminal appeals sketched by Wessels l.c.). To this day there are still traces of the presumption of the correctness and finality of criminal proceedings. Criminal appeals to this Court are more restricted than civil appeals and from Magistrates' Courts the Crown can appeal only on questions of law. Today the right to appeal is entirely governed by statute.

It was claimed in argument that an appellant always had and has the right to withdraw his appeal, although appellant's Counsel admitted that, considering the

present state of the law, he could not go so far as to contend for the exercise of that right in the closing stages of proceedings on appeal - say just before judgment is pronounced - as that would stultify the objects of the Legislature in empowering the Court of Appeal to increase the sentence imposed in the first instance.

I do not think the liberty to withdraw or jettison a criminal appeal before the Courts were empowered to increase sentences can properly be described as the exercise of a right. It was merely a consequence flowing from the law as it then stood. Unless the convicted person successfully moved a Court of appeal to set aside the conviction and sentence, they stood, cum res judicata pro veritate habeatur et justa praesumatur (Voet 48.2.12). If at any stage the appellant jettisoned his appeal or allowed it to lapse, the result was the same, save that the Court could intervene in favour of the accused, which is essentially an exercise of powers of automatic review. To question the validity of appellant's jettisoning his appeal at any stage would therefore have been a pointless

proceeding; only the appellant had an interest in disturbing the status quo.

That situation was radically altered when the Courts were empowered to increase a sentence upon appeal, for the presumption to which I have referred was thereby virtually abolished. Prior to that the convicted person could rely upon at least having the sentence not increased, save in exceptional circumstances, not now relevant, for example where a sentence was passed which was incompetent.

While casting upon Courts hearing appeals from Magistrates' Courts the duty to ensure that adequate sentences are imposed the Legislature has prescribed no procedure to be observed in the discharge of that function. The inference is inescapable, therefore, that the Legislature intended the Divisions of the Supreme Court with appellate jurisdiction to exercise powers consequential to the powers expressly conferred and that, with due regard to the dictates of natural justice; cursus curiae will be lex curiae.

Mr. Marais, for appellant, strongly

relied upon the use of the word "thereupon" in the empowering sub-section (Section 103 (4) of Act 32 of 1944). He contended that the power to increase a sentence can be exercised only after appellant has prosecuted his appeal beyond the stage where the case is called in Court; that an appellant reaches the "point of no return" only if after the case has been called, he has invited the Court to consider the merits of his appeal. From this he infers that an appellant is at liberty to withdraw his appeal with impunity at any point of time before that stage is reached.

Had the object of that empowering provision been to deter convicted persons from appealing or persisting in their appeals, there might have been some substance in the argument that only a modicum of persistence may be indulged in with impunity whereas the appellant oversteps the limits of inculpatae tenacitatis at his peril. But it is common cause that the power was conferred, not to that end, but in order that justice be properly administered. The first part of Mr. Marais' contention is undoubtedly correct. I can hardly imagine a Court exercising its

powers without giving the appellant an opportunity to prepare his case and of being heard (Cf. R. v. Swanepoel, 1945 A.D. 444). But the point of time at which the Court of Appeal will be in a position to consider the adequacy of the sentence and give its decision increasing it, if necessary, has no bearing on the question whether prior to that point of time the appellant may freely withdraw his appeal and so prevent the Court from discharging a duty imposed upon it by the Legislature.

It is not necessary in this case to decide the academic question, at what stage, if at all, can a convicted person who has noted an appeal withdraw his appeal or jettison it by default of appearance or otherwise with the result that the Court of Appeal is prevented from exercising its powers under Section 103 (4). It follows from the power conferred that, as soon as the appellant has noted an appeal and the Court has cognisance of the case, the quondam finality as against the Crown and the Court is destroyed. The matter being in a pending state the appellant cannot withdraw his appeal without leave

of the Court any more than he can withdraw from a criminal charge pending against him, and for the same reason. The Court certainly has cognisance of the case when the case is called for the first time on appeal. What the position is prior to that date need not be considered.

I concur in the order proposed by my brother Hoexter.

J.V.D.L. Steyn.

~~Centlivres, C.J.~~
~~Greenberg, J.A.~~
~~Schreiner, J.A.~~
~~Hoexter, J.A.~~

JUDGMENT ON APPLICATION TO WITHDRAW

IN THE SUPREME COURT OF SOUTH AFRICA

Transvaal Provincial Division.

22nd November, 1954.

G. D. GRUNDLINGH v. REGINA

BLACKWELL, J.: This is an appeal from a judgment of the Magistrate of Pretoria. The accused was charged with assault with intent, found guilty of common assault and sentenced to a fine of £15 or six weeks' imprisonment with compulsory labour. On the 3rd November, 1954, a cross-appeal on the question of sentence was noted by the Attorney-General.

This morning Mr. Mentz, who appears for the appellant, asked for leave to withdraw the appeal. He states that if such leave is not granted and the cross-appeal is successful then his client may receive a heavier penalty than that imposed by the magistrate and such a penalty might have a serious effect on his career as a member of the Permanent Force. I do not think that we should listen to an argument of that sort at this stage. If every time the Attorney-General notes a cross-appeal on the question of sentence the appellant could escape the effect of such cross-appeal by asking to withdraw his appeal then, in my opinion, that Section of the Code which permits a cross-appeal would be frustrated and defeated. We think that the matter should be heard today on its merits, i.e. on an appeal and cross-appeal, and leave to withdraw the appeal will be refused.

WILLIAMSON, J.: I agree.

IN THE SUPREME COURT OF SOUTH AFRICA

Transvaal Provincial Division.

22nd November, 1954.

G. D. GRUNDLINGH v. REGINA

BLACKWELL, J.: The appellant in this matter is a man of 27. He was charged before a magistrate of Pretoria with assault with intent; he was found guilty of common assault and fined £15 or six weeks' imprisonment. He has a previous conviction in 1949 on four counts of theft by embezzlement in respect of which he received eight months in all, of which six months was suspended.

The facts in this case are somewhat unusual. On the evening of the 4th July two native constables had been out visiting some native township and returned to Pretoria. They were in plain clothes. They were walking along Church Street from west to east. Coming in the opposite direction were four young European men, one of whom was the appellant. As these men passed them, the two native constables turned in towards the back of the sidewalk so as to allow these four Europeans to pass. No word was spoken; no provocation of any sort was given. The appellant then struck the complainant, Hendrik, or took hold of him by his body and threw him violently to the ground. While he lay on the ground the appellant kicked him into a state of insensibility with a booted foot. Five weeks after this assault Hendrik was still suffering from its results. His right elbow was put out of joint and was kept in plaster for five weeks; his ear was swollen as a result of this kick on the head and he

was still off duty on sick leave. The assault, therefore, not only was a brutal one but had serious consequences to the person assaulted.

The second constable, Dennis, ran away and was pursued by certain members of the gang. They did not catch him but he kept them under observation and he traced them to a certain house, and the next day the police came along and found them there, including the appellant. The appellant was put on an identification parade and Hendrik failed to identify him on the parade. When he gave evidence in court the complainant was clear and could not be shaken that it was the appellant who assaulted him. Two other members of the gang were called by the Crown and they said that the appellant was there that night and was involved in trouble with these two natives.

The appellant himself gave no evidence and did not deny the Crown evidence and therefore we have no doubt that the magistrate was right in finding that the appellant was the person who committed this assault. What shakes one's confidence in the magistrate's judgment is the fact that he did not do what I think was his plain duty in finding the appellant guilty of assault with intent to do grievous bodily harm. There is no doubt that Hendrik suffered grievous bodily harm and that this was a direct consequence of the assault that he received from the appellant. Why the magistrate should have shrunk from a finding plainly indicated by the facts I cannot pretend to understand. He found the appellant guilty of common assault and fined him £15, which was paid, and the appellant therefore is free. The Crown, on an appeal being noted in this case, exercised its somewhat rarely exercised privilege of noting

a cross-appeal and therefore this Court has jurisdiction to impose what it thinks is a proper sentence.

We have no doubt that the sentence imposed by the magistrate was grossly inadequate. This is a case of two inoffensive natives set upon in the open street, without any provocation, without any excuse, and one of them subjected to extreme violence by the appellant, so much so that five weeks afterwards he was still not fully recovered from the assault. His counsel was not able to tell us that the appellant has exhibited any sign of penitence; no attempt apparently was made to compensate the injured person in any way. The only thing one can say in his favour is that he had had some liquor, although it is not pretended that he was seriously affected by the liquor. In these circumstances, I repeat, the magistrate was wrong in taking the light view that he did of the matter and his sentence cannot be allowed to stand. Citizens in this country must understand that the Courts are here to protect all sections of the population and to punish violence of this sort.

After giving the matter full consideration we think that the appellant should be punished as for an aggravated assault. The conviction will stand; the sentence imposed by the magistrate is altered to one of three months' imprisonment and six strokes.

WILLIAMSON, J.: I agree.