275/54

G.P.-S.384—1952-3—10.000.

U.D.J. 445.

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

(_____DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAK.

_____

Appellant.

versus

_____

Respondent.

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

*Appellant's Advocate*_____ *Respondent's Advocate*_____
Advokaat van Appellant *Advokaat van Respondent*

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

11 am — 1 pm.

Appeal allowed Conviction
Arrested + Sentence set aside (Reasons to follow)

Chief Justice

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

WALTER MOGALE Appellant

and

REGINA Respondent

Coram: Schreiner, van den Heever et Fagan, JJ.A.

Heard: 22nd.February,1955. Handed in: 28.2.55

J U D G M E N T

SCHREINER J.A. :- The appellant was convicted by a court consisting of MARITZ J.P. and two assessors on a charge of rape, and was sentenced to three and a half years imprisonment and seven strokes. Leave to appeal was refused by the trial court but was granted when the appellant proceeded under subsection (4) of section 369 of Act 31 of 1917. The appeal was allowed and the conviction and sentence set aside, the reasons to be furnished later; these are the reasons.

The record is a very short one and the factors influencing the decision of this Court will appear more clearly if the whole record, from charge to

verdict/.....

verdict, is reproduced. It reads :-

" CHARGE: RAPE

PLEA: NOT GUILTY - I deny intercourse at all.

DINA MOTHLABE, s.s. (Interpreted)

BY THE COURT: Do you know Walter?------Yes.

Have you known him for a long time ?------Yes.

Why have the police caught him if you have known him for a long time ?---- The police arrested him because he caught me and took me along to his room. He had intercourse with me.

Why should he have caught you if he had known you a long time ?----- I was surprised myself.

Did he not ask you to come to his room ?-----No.

EXAMINATION BY MR. TUCKER: On the way to his room did you meet anybody?----We met one Fanwel at the corner.

Did Fanwel come to your assistance?---- I called him.

And then ?----Fanwel came nearer and when he got nearer the accused showed him a knife and said 'You must not think 'this is your mother.'

What did Fanwel do then ?--- He walked off.

What did the accused do with the knife then ?----He still had the knife in his hand and he then pulled me along into the yard.

And into his room, did he still have the knife?----He did not take me to his room then. He took me along to what appeared to be some fowl runs and there he stuck the knife in the ground and he said to me 'Sit down here.' He then told me that I was to undress. I said 'No, I cannot do that.' I said ' I am not well I am menstruating'. He said ' You 'have got far too much to say'. He then pressed me to the ground. He took off my bloomers and then he said he would not be able to fulfil his purpose there and took me along to his room. He then told me to lie down on the bed and I stood

for/.....

for a little while and he caught hold of me and pushed me on to the bed. Then he had intercourse with me.
Your clothes, did you take them off subsequently?----After he had had intercourse with me he told me to undress, I refused and he then proceeded and undressed me.
After he had intercourse with you?----Yes.
CROSS-EXAMINATION BY ACCUSED: Isn't it a fact that I had made a date with you and that you had come along there and we went into my room and we got undressed. I then wanted to have intercourse with you and you told me that you were not well and I said 'Well, in that case it is all right' and it was just shortly after that that your people came and knocked at the door. Did your people come there ?---- He never spoke to me in that connection at all. I did not consent to him having intercourse with me.
BY THE COURT: Did your people in fact come there ?----Yes.
Who sent them?----I think Fanwel must have gone and called them.
BY THE ACCUSED: If I had taken you by force as you suggest why didn't you scream in the street?----No answer.
FANWEL MPUTHA, s.s. (Interpreted)
EXAMINED BY MR. TUCKER: On the 29th. May 1954 at about 8 p.m. you were in Lady Selborne, Pretoria?----Yes, I was.
Did you see the complainant Dina?----Yes, I did.
Was there anybody with her?----I saw the accused had hold of her by the hand and he was pulling her along.
Then what happened?----The complainant called to me and she asked me to come and help her. I then approached them and the accused took out a long knife. The accused then said to me 'You better go and call your elder brothers' and I left him at that. I went to the complainant's place where I made a report to her mother. Her mother came out and she called another man and we then went along to this place.

Did/.....

Did you know where the accused lived?----There is just a street separating our places.

And then ?----We then heard screams of this girl in the room and we went there and there her mother pushed the door open. In the doorway the accused pushed the complainant's mother away and another man struck him on the forehead with a stick. The accused fell down backwards in the room and he got up and ran away.

BY THE COURT: What was the state of his clothes?----He was in the nude.

And she?----All she had on was a petticoat.

Is that the knife that the accused had?----This is the knife.

CROSS-EXAMINATION BY THE ACCUSED: How close up to me did you come?----A distance from where I am to you (About 20 feet).

And you saw that I had a knife?----Yes, there are electric lights there.

(Mr. Tucker: The doctor's evidence is negative.)

Isn't it a fact that the woman never pushed the door open at all but that I opened the door and was then struck on the forehead with a stick?----I saw the mother of the complainant push the door in.

Did the complainant not say at the Lower Court that I opened the door?----I do not know of that, I know that her mother pushed the door open.

(Case for the Crown)

BY THE COURT TO THE ACCUSED: Have you got any witnesses?

Accused: I have no witnesses to call, I wish to give evidence.

WALTER MOGALE, s.s. (Interpreted):

BY THE COURT: When you pleaded this morning you said you know nothing about this case. When the interpreter asked you what your defence was you said 'She is my wife and I sleep 'with her.' What made you change your mind?------I did not

understand properly. I was asked if I had raped this girl. You have heard Fanwel's evidence?----I heard what he said. He says that you threatened him with a knife?----But I had no knife.

Then he is lying to us?----I went along to the police to go and report that these people had assaulted me and afterwards they came to light with this knife. I did not have a knife. How do you account for her mother coming there with Fanwel?--- This girl and I were in bed. I heard a knock at the door. I got up and opened the door and as I opened the door I was met by a stick.

Were you having connection?----No, I was not having connection ~~because~~ with her because she had informed me that she was menstruating. I then ran away to report to the police that these people had come and assaulted me.

CROSS-EXMINATION BY MR. TUCKER: How long was the complainant in your room before her mother arrived?----Quite a time. What were you doing all the time if you were not having intercourse?-----We had been sitting carrying on a conversation and eventually we got undressed and went to bed.

Fully aware that she was menstruating?----Yes, she having told me so.

BY THE COURT : Do you wish to say anything else?--- I have nothing further.

JUDGMENT

MARITZ J.P.: Tell the accused we do not believe him when he says that she was a consenting party and that because she was menstruating nothing was done although they were sleeping together in bed. We believe the complainant when she says you raped her. She is amply corroborated by the evidence of Fanwel whom you threatened with a knife and who saw you dragging her away and heard her screaming in your room. We find you guilty of rape. "

Certain/.....

Certain features of the record must be noticed. The complainant's evidence began with questions not by the prosecutor but by the court and there was none of the usual introductory evidence which is rightly regarded as important to enable the triers of fact to understand and, especially where the accused is not represented, to test the complainant's evidence. She was, for instance, not asked about the locality, the distance between her dwelling and that of the appellant, the time of day, the presence or absence of other persons in the vicinity, and what she was doing at the time. The learned Judge President did ask the complainant whether she had known the appellant for a long time, but on her replying in the affirmative he did not enquire whether they had been close friends or whether they had previously had intercourse. The record contains references to the alleged use by the appellant of a knife to intimidate the witness Fanwel. A knife was apparently in court but how it came to be there was not referred to in the evidence. All that is known is that the court, in reference to a knife that was visible to Fanwel, asked him, "Is that the knife that the accused had?" to which Fanwel replied, "This is the knife." He was not asked how he was

able/.....

able to recognise it nor was the complainant asked if she had at any time seen this knife either in the possession of the appellant or elsewhere.

It may be inferred from the passage in the record where the prosecutor states, "The doctor's "evidence is negative", that the complainant was examined by a district surgeon subsequent to the alleged assault; it may also be inferred that the doctor found no injuries of any kind upon the complainant. But there was no investigation into whether or not the complainant was a virgin at the time of the examination, or whether the doctor would have expected to find bruises or other injuries upon the complainant if her account of what had happened was true. These and similar inquiries may be of crucial importance in trials for rape.

Again, unless the record is gravely defective, the appellant, when he said that he wished to give evidence, was not invited to furnish his account of the happenings deposed to by the complainant and Fanwel, but was at once examined by the court, the questions being *prima facie* of a testing or cross-examining nature. Moreover the court first put to the appellant that when he had pleaded he had stated that he knew nothing about the case. This was not,

according/.....

[illegible]

[illegible] of [illegible]

[illegible] ct or [illegible].

It may be [illegible] the [illegible]

[illegible] conditions, [illegible]

[illegible] that the complaint [illegible]

[illegible] judgment [illegible]

[illegible] doctor [illegible]

[illegible]

[illegible]

[illegible] doctor [illegible]

[illegible] upon the complaint [illegible]

[illegible]

[illegible]

[illegible] as the [illegible]

[illegible]

[illegible]

[illegible]

[illegible] court, the [illegible]

[illegible]

[illegible]

[illegible]

...... [illegible]

according to the record, a true reflection of what the appellant had said in pleading. The learned Judge President proceeded, "When the interpreter asked you what your defence "was you said, 'She is my wife I sleep with her.' What made "you change your mind ?" Counsel for the Crown suggested that this unexplained and unrecorded intervention by the interpreter might have taken place at the close of the Crown case and that the appellant's answer, "She is my wife I "sleep with her", might be regarded as,in effect, the sum total of his evidence in chief. Assuming even so much in the Crown's favour the fact remains that the learned Judge President was clearly wrong in conveying to the appellant that he had evinced a change of mind. That proposition, coming from the court at the start of his evidence, was obviously calculated to disconcert the appellant and prevent him from giving his evidence in a calm,convincing manner. Counsel for the Crown, however, referred to the opening sentence of the learned Judge President's judgment as showing that he had corrected his mistake and no longer thought that the appellant had changed his mind, but now rejected as incredible the appellant's version that the parties were in bed but did not have intercourse. What was intended to be conveyed by

the sentence in question is by no means clear but, assuming that counsel's suggested interpretation of the sentence standing by itself might be correct, it remains to consider whether any assistance in its elucidation may be derived from the learned Judge President's report, furnished under section 372 bis of Act 31 of 1917.

The report was forwarded to the Registrar of this Court just over a month after the trial. It purports to summarise the evidence given at the trial, but counsel for the appellant pointed out that in a number of respects the summary is not borne out by the record. It is sufficient to refer to certain of the more important discrepancies. The report quotes the complainant as saying that the appellant pulled her into his room "retaining the "knife in his one hand." In fact her evidence about the knife ends at an earlier stage where she says that at what appeared to be fowl runs he stuck the knife into the ground; there is no evidence that it was removed from there. The report then states, apparently again on the authority of the complainant, that the appellant locked the door of his room, but no evidence to that effect was given; indeed the evidence of Fanwel that the door was pushed open by the complainant's mother tends to negative the locking. Again, the report states that the appellant, after locking the door, ordered the complainant to remove her clothes and, when she refused, threw

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her on the bed, himself removed her clothes and had inter-course with her; but in her evidence the complainant was insistent that the appellant first had intercourse with her and then told her to undress and on her refusal undressed her. The report also states that "The complainant said that she did "not resist the accused because he threatened her with the "knife." There is no trace of such evidence by the com-plainant on the record and when asked why she did not scream in the street she made no reply. Counsel for the Crown was driven to argue that the learned Judge President had inferred from the fact that she did not resist that she was frightened of the knife and that his statement that the complainant had said that she did not resist because she was threatened was, though erroneous, irrelevant. But the complainant's own evi-dence as to what led her to offer no resistance would certain-ly have been of importance, if it had been given, and there is nothing to suggest that the learned Judge President reached the conclusion, which he apparently reached, that she was threatened, by any mental process other than acceptance of what he mistakenly supposed was the evidence that she had given.

Finally, and this is the point on which this judgment first made reference to the report, the latter states, "The accused, in giving evidence, although

"having/.....

"having pleaded that he denied intercourse entirely, admitted "that he had had intercourse with the complainant but stated "that she was a willing party, although she was menstruating "at the time." This clearly reveals the same misconception as to the consistency of the appellant's case that appeared in the opening questions put by the court to the appellant, and if the report is to be taken into account as revealing the learned Judge President's state of mind at the time of verdict it tends strongly to negative the contention that the first sentence of the judgment shows that the learned Judge President/s had corrected his previous error.

But counsel for the Crown submitted that no use could be made of the report to show what the learned Judge President, and a fortiori what the assessors, had in mind at the trial. He based this submission primarily on what he contended was the restricted scope of a statutory report, having regard to the language of section 372 bis. The material part of the latter reads :- "The judge or judges..... "shall furnish to the registrar a report giving his (or their) "opinion upon the case or on any point arising in the case, and "such report, which shall form part of the record, shall, with- "out delay, be forwarded by the registrar to the registrar of

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"the court of appeal." The language is similar to that of section 8 of the English Criminal Appeal Act, 1907, but the latter contains no provision that the report is to form part of the record; on the contrary, by Rule 15(b) framed under the English Act the report is not to be furnished to any person except by leave of the court or a judge. The English adherence to trial by jury would make any decision on section 8 of little relatively assistance in the interpretation of section 372 bis, but in fact no such decision seems to have been reported.

Counsel for the Crown contended that the report should only contain the judge's opinion upon the case, or a point in it, in the sense that all that he is required to, and therefore should, state is his view as to whether the appeal, application or point should be decided in favour of one party or the other. The only case, so far as I am aware, that has any bearing on the meaning of the provision is Rex v. John Hammond (A.D. 6th. November, 1951, not reported). At page 13 of the majority judgment GREENBERG J.A., after stating that the trial judge, who sat with assessors, had delivered fairly full reasons for the conviction of the appellant by the court, proceeded as follows:

"Thereafter the learned judge made a 'report' in terms of

[illegible]

[illegible]

Letting [illegible] that the report [illegible]

of [illegible]

[illegible] report [illegible]

[illegible] court [illegible]

[illegible] trial [illegible]

[illegible] did

[illegible]

[illegible]

[illegible] contain [illegible]

[illegible] that [illegible]

[illegible] therefore [illegible]

[illegible] the [illegible] trial or [illegible]

[illegible] of [illegible]

[illegible] the

[illegible]

[illegible]

[illegible] that the trial [illegible]

[illegible] Poll [illegible]

[illegible] the court, [illegible] as follows:

[illegible] made [illegible] report [illegible]

[illegible] ......

"Sec. 372 bis of Act 31 of 1917' as amended. Later, when "he received a copy of the petition to this Court for leave "to appeal, he made a further report, dealing with its "contents. During the hearing of the appeal the learned "Chief Justice pointed out difficulties ~~which~~ that might arise "in regard to the contents of these reports inasmuch as they "were reports not of the trial court but only of one member. "it seems clear that, in so far as these reports may contain "matter additional to the reasons of the trial court, non "constat that they represent the views of either of the "remaining members of that court. But at least in the main "these reports are an elaboration of the original reasons, "largely by way of argument, and an affirmation of those "reasons notwithstanding the points raised in the petition "for leave. Counsel for the appellant, possibly because he "desired to refer to portion of the reports in aid of his "argument, raised no objection to this Court's consideration "of them as part of the reasons, and they were accepted in the "same way by counsel for the Crown. As far as I can see they "involve no departure, material to the appeal, from the "findings of fact or inferences to be drawn from the facts "and in all the circumstances in this case they can be treated

"as/.....

"as an elaboration of the trial court's reasons."

It is at least clear that in that case section 372 bis was not given as narrow a meaning as that now contended for on behalf of the Crown.

The scope of the provision is not ideally clear. It may be that it was simply taken from the English Statute under which it operated in relation to jury trials where the judge is not himself one of the triers of fact. It may have been thought that if the judge considered that the jury was wrong the court of appeal should have the benefit of knowing his view. On the other hand this would hardly apply to a report "upon any ~~report~~ point arising in "the case", which is also in the English section. Moreover our Parliament in 1948, when the provision was introduced, must have had regard to the fact that in our practice cases may be tried by a judge alone or by a judge and assessors, as well as by a judge and jury. The reference to more than one judge, too, which appears to cover special courts set up under section 215 of Act 31 of 1917 and the Natal Native High Court, shows that the report was not intended to be limited to the expression, by a judge who took no part in a decision, of his view as to ~~the~~ its correctness or otherwise.

Since therefore, especially where

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the reporting judge or judges constituted the whole tribunal, it could not have been intended that the report should merely reiterate a conclusion already pronounced, one is led to the view that the report should include at least as much explanatory material as is thought by the rpporting judge or judges to be calculated to assist the court of appeal in reaching a just decision. Particularly where such explanatory matter operates in favour of an appellant this Court should clearly take it into account.

It follows that in this case the report of MARITZ J.P. could properly be considered in so far, at least, as it explained the reasoning whereby he, at any rate, came to the conclusion that the appellant should be convicted. And so regarding the matter it is clear that the learned Judge President was throughout under the misapprehension that the appellant had changed his mind, i.e. that he had altered his defence inconsistently, which if it had been true must have gravely reflected upon his credibility.

Counsel for the Crown contended further that even if MARITZ J.P. misdirected himself as to the consistency of the appellant it would not follow that the

minds/.....

minds of the assessors were similarly affected. But that argument could not be sustained. If an assessor's reasoning is different from that of the presiding judge he may himself give expression to it or request the judge to indicate the difference of view in his judgment. The record shows that throughout the apparently brief proceedings the assessors remained silent and there is no ground for supposing that their reasoning differed in any material respect from that of the learned Judge President. It had to be assumed therefore for the decision of the appeal that the assessors, if they were not themselves mistaken as to the existence of a contradiction in the appellant's defence, were at least so far influenced by the reasoning of the learned Judge President as not effectively to disagree with it.

In view of the seriousness of the above misunderstanding it would seem to be right to describe it as a misdirection amounting to an irregularity, with the consequence that the appeal could only have failed if a reasonable court not misdirecting itself must inevitably have come to the same conclusion; and that could certainly not be affirmed on the facts of this case. But even if there was not technically an irregularity in the above respect it is clear that in view of the seriously unsatisfactory features in the conduct of the case disclosed

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by the record and referred to above, this was a case in which this Court was at large and would only be justified in dismissing the appeal if it had been satisfied on the record of the appellant's guilt (cf. Regina v. Bezuidenhout, 1954(3) S.A. 188 at pages 193, 198, 226 and 227).

In view of the above considerations it was not necessary for the Court to express its views upon the various points of probability which counsel for the appellant forcefully urged in favour of his client. The brief judgment of MARITZ J.P. does not indicate whether the probabilities were considered; indeed it furnishes no reasons why the evidence of the complainant and Fanwel ~~were~~ was preferred to that of the appellant. It is however sufficient to say that the Court was not satisfied on the record of the appellant's guilt and accordingly allowed the appeal.

28.2.55