260/54

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 F.K. Weber *Respondent's Advocate* L.A. Liebenberg
Advokaat van Appelant *Advokaat van Respondent*

Set down for hearing on:—
Op die rol geplaas vir verhoor op:— Before Centlivres, C.J. Schreiner et van Heerden, JJ.A.

9.45 — 10.45 am
Appeal dismissed Reasons later

Registrar

J U D G M E N T.

ROPER, J.:

The accused in this case is charged with the murder, on the 30th of April 1954 and at Berea in the district of Johannesburg, of John Hubert Widdicombe. The accused was charged with two other men, Jacob Dube, the first accused, and Phineas Ncube, the second accused, but those two accused persons were discharged on account of the insufficiency of the evidence against them.

The evidence shows that the deceased lived at No. 66, Lily Avenue Berea, and that on the evening of the 30th of April he visited his sister who occupied a flat at Aintree Flats, Tudhope Avenue, Berea. The distance between those two residences is somewhat under a mile. The evidence of the deceased's sister was that at 9.15 that evening he got up in order to go presumably to return home. In order to do so he must have walked up Tudhope Avenue becasuse that led in the direction of his home. The exact time when he left Aintree Flats / does not appear in the evidence, but at about 9.45 p.m. his dead body was found lying in the foothpath in Tudhope Avenue approximately at the corner of Alexander Street and at a point marked A on the plan which was put in, exhibit K. It was quite clear that he had been robbed, money and a watch and possibly some papers having been taken from his person. The medical evidence was that he had a number of injuries upon his body. There was a lacerated wound at the back of his head on the right side. The skull

was not fractured at the seat of this wound, but the medical evidence was that the wound must have been inflicted by a blow with a blunt instrument with considerable force. Then there was a fractured dislocation between the sixth and the seventh cervical vertebrae. This was a crushing of the spinal cord. In colloquial language his neck had been broken. Then there was a lacerated wound on his left forehead, the skull not being fractured under the seat of this wound. There was brusing behind the left shoulder which, according to the medical evidence, was probably caused by some wide blunt instrument and might have been caused by a blow with a fist or with an elbow. Then there were a number of abrasions upon his face, his hands and upon one of his knees. There were subarachnoidal haemorrhages below the injuries on the back of the head and the forehead, and the cause of death, according to Dr. Friedman, the district-surgeon who carried out the post-morterm examination, was these subarachnoidal haemorrhages and the crushed spinal cord due to the fractured dislocation of the cervical spine. This witness expressed the view that probably it was the neck injury which resulted in death. Dr. Friedman expressed the view that the injury on the deceased's forehead was probably caused by the deceased pitching on to his head on having been struck down from behind and he said that the breaking of the neck might also have been caused in this way, in which case the injuries on the body were consistent with the supposition that there were two blows or applications of force

applied to the back of the deceased, but he said that he rather favoured the supposition that there were three separate applications of force on the back and though, as I have said, he suggested that the breaking of the neck might have been caused by the deceased pitching on his head, he told the Court that he could not exclude the possibility that the deceased received first a blow on the back of his head and then a blow on the back of the neck whilst still on his feet. He was not questioned as to the possibility ofhis having received one blow while on his feet and another while he was on the ground because evidence which suggested that possibility had not yet been led. This witness expressed the opinion that the injury on the back of the head could have been caused, that is the lacerated injury that I have referred to, could have been caused by the iron bar produeed in the case as exhibit 9. There were no knife wounds on the body.

The one eye witness of the attack on the deceased was called for the Crown. This was a witness named Martha Gobe who was a domestic servant employed at a house in Tudhope Avenue in the block between Alexander Road and Joel Road. This witness told the Court that she was in the back yard of her employer's premises standing on a bench in order to look over the wall into the yard next door so that she might speak to the girl employed next door who was a friend of hers. From this position she was able to look across Tudhope Avenue and the attack which she then proceeds to describe accurred at a point almost directly opposite to her where she was

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standing and a distance of approximately 75 feet according to the plan. The street at this point was well illuminated by street lamps. Briefly the story that Martha Gobe told the Court was this, that she saw a European walking up Tudhope Avenue followed by two natives. The two natives caught up to him and then she saw the taller of the two raise his hand and bring it down as if he was striking the European on the back of the head. She did not see, however, what he struck him with or whether the native had anything in his hand. The European fell to the ground and both natives then proceeded to go through his pockets. While they were doing so the European raised his head and the taller of the two natives then struck him again. As he did so Martha said that she heard a sound as if iron was striking on the pavement. The two natives then went on with the search of the pockets of the deceased. They then got up and ran away down Tudhope Avenue in a southerly direction. When they reached the corner of Joel Road a European came along that road and Martha says she saw the taller man put his hands behind his back as if he was hiding something. From that point they walked on, but after they had passed Joel Road she, Martha, went into the house and did not see them further.

In addition to this witness a witness named John Kanyela was called. He told the Court that he was a night watchman at Marlene Mansions in Tudhope Avenue at the point marked D on the plan marked K. He said that between 9.30 and 9.45 two natives came running down Tudhope Avenue

from north to south, one of them being taller than the other. He did not think, however, that the taller man resembled No. 3, the present accused, in build. These two men passed the witness running in a direction which would have led them to Doornfontein.

A further witness called was George Ngubane, who said that he saw two men running in Lily Avenue about this time, but his evidence was somewhat vague and there is no reason for thinking that the men he saw were connected with the attack on the deceased.

Now the evidence against the accused consists in a confession which he is alleged to have made before an additional magistrate and which was put in by the Crown. This confession was made on the 20th of July, 1954, after the preparatory examination had been opened against the first and second accused and after a considerable amount of evidence had been led against those two accused. The accused at that time was being detained in the Leeuwkop farm colony under a detention order made against him under the Natives Urban Areas Act. After the usual introductory passages the statement which he made is recorded as follows. He, that is the accused, states that he was sent to Leeuwnkop in terms of section 29 and while he was being detained there his conscience worried him because Jacob was arrested for a thing he did not do and so he decided to write a letter to the police and tell them that he did it and not Jacob. He now makes the following statement freely and voluntarily: "On the 30th of April, 1954, I was at N. a dice/...

a dice gambling school. Jacob, Phineas and I left the gambling place. We were walking along Tudhope Avenue. Phineas and I walked in front and Jacob followed a distance bbehind us. I saw a European male walking in front of us. I said to Phineas there is a European ahead of us and we want money. Phineas said that we would walk fast and catch up with the European. We walked faster and caught up with this European. I took out an iron rod I was carrying in the left sleeve of my overcoat. I hit the European at the back of his neck with the iron rod. The European fell down. Phineas stabbed the European at the back, but I did not see where because it was dark. Phineas and I went through the pockets of this European. Phineas took a roll of notes out of the back pocket of the European's trousers. I took a watch from his left-hand trouser pocket. I then hit the European over his back with the rod. Phineas and I then ran away with the money and the watch. We ran to a place near the Doornfontein railway station where we counted the money and found it to be £40. We found Jacob waiting for us near the station. We gave Jacob £10. Phineas and I each took £15. I sold the watch at Alexander Township for £2. 10.0. I gave Phineas £1. 5. 0 and kept £1. 5. 0. That was on the Sunday. Jacob and Phineas were arrested. I was arrested afterwards on Sunday the 23rd of May. I denied the allegation and was charged under se tion 29. I was sentenced to 12 months at Leeuwkop. I escaped from Leeuwkop and went back later and surrendered myself. I was sentenced to three months for escaping. All night I could not sleep. I saw this European in my

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dreams. I wrote a letter to the gaol at Hospital Hill and told them that Jacob was innocent and that I committed the crime. I wish to go and point out where I sold this watch and also the iron with which I struck the European." That stament, as I have said, was made on the 20th of July, and on the following day the accused took the police to find the man to whom he said he had sold the watch. They eventually found a man named Petrus Nozene at Braamfontein. This man, however, denied having bought any pocket watch from the accused. He said that he had bought a wrist watch from the accused and that was in the previous December. The accused also took the police on a search to find the iron bar which he referred to, took them to the house of one Wilson Ngwenya in Alexander Township Township. There was found the iron bar, exhibit 9, lying on the floor behind the door in Wilson's house. Wilson Ngwenya was called for the Crown and he told the Court that the bar had been left in his house by the accused. He was uncertain as to the date, but he expressed the view that it was in May and as the accused was arrested on the 23rd of May, if Wilson's evidence is accepted, it must have been before that date that the bar was left at his house.

The accused's evidence as to this confession before the magistrate is that the confession is a complete fabrication and there is not a word of truth in it. He says he invented it in order to enable himself to get away from Leeuwkop because he was being ill-treated there by certain of the inmates against whom he had given evidence while he was a police informer. He says that some statements in the

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the letter were results of his own imagination and that these statements had been embodied in the letter sent to the police but that a number of the details in this statement emanated from Detective Head-Constable Joyner, who had originally arrested him and who was concerned in the investigation of the case from the time that the accused, more particularly from the time that the accused got in touch with the police with a view to making a statement. Now as to the accused's explanation that his motive in making this statemtn was based upon his ill-treatment at Leeuwkop we are satisfied there is nothing in this. TheChief warder, a Mr. Terblanche, was called for the Crown and he told the Court how some little time after the accused had made an attempt to escape from Leeuwkop the accused asked to see him and said he wished to communicate with the police. On asked why he said something to this effect "Die oubaas pla my, hy wil my doodmaak". He was asked to explain what he meant, and then he made a statement to Mr. Terblanche. I may say in passing that Mr. Terblanche colunteered, although not asked to give evidence on the point, that what the accused said was that he had killed this "oubaas" that he mentioned. That statement was not admissible in evidence, but we have paid no attention whatever to it in arriving at a decision in this case, and in fact the accused himself when he gave his evidence said that he had made such a statement. Mr. Terblanche tells the Court that the accused made no complaint whatever of ill-treatment by other inmates of Leeuwkop and he was corroborated by a head warder named Dreyer who was called both on that point and on

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statement by the accused about the "oubaas" who was worrying him. The accused himself admitted in his evidence that he did make the statement to Mr. Terblanche about the "oubaas" that I have referred to.

The accused it is clear did suffer from a scalp wound about that time, but it appears that he attempted to escape on the 1st of July and either gave himself up or was arrested almost at once and he was found to be suffering from this scalp wound after that. In particular Constable Joyner when he saw him about the 20th of July noticed this wound on his head and asked him what is the matter with him and the accused replied that he had been assaulted by the warders on the day that he attempted to escape. The accused asked us to believe that this wound on the head was inflicted by his fellow prisoners who were ill-treating and assaulting him, but we do not believe that evidence.

Then in regard to the accused's allegation that he was given the details, which appeared in the statement, by Detective Head Constable Joyner, as his allegation to this effect had not been fully put to Detective Head Constable Joyner in original cross-examination he was recalled by the Court and questioned on this both by the Court and by Counsel for the Crown and for the defence. He denied that he had told the accused to insert in his statement the details which the accused said he had told him to insert. The Head Constable appeared to us to give his evidence truthfully and frankly, and Mr. Weber who appeared for the accused told the Court frankly

that he did not feel that he could support the accused's statement on this point. The accused himself was by no means a convincing witness, and we do not believe his explanation. He told the Court that he was prepared to risk a conviction for murder and death by hanging in order to escape from ill-treatment at Leeuwkop, but we find it quite impossible to believe that, and the fact is that so far as the records of evidence of the prison officials are concerned he made no complaint whatsoever about such ill-treatment.

On examing the statement made by the accused before the magistrate, one finds that there are a number of points upon which there is cooroboration from outside and that is very important in considering whether it was possible that the accused's statement was completely fabricated, as he says it was, because if it is found on examing the statement that on a number of points the statement is supported by other evidence it tends to the inference that the statement was true and not a fabricated one as the accused in this case suggests. There are a number of points on which, as I have said, there is corroboration by other evidence. In ths first place the accused said in his statement that he and the other two accused had been to a gambling school before they went to Tudhope Avenue and fell into the ordeal. A witness named Daniel Baloi was called who gave evidence that the first and second accused were at a gambling party at Hendon Boarding House not far from Tudhope Avenue until about 9.15.p.m. that night. It is true that he does not say that he saw the

present accused there, but the fact that he saw the fisrt and sceond accused at this gambling party does afford some corroboration of the statement that the first and second and third accused were at a gambling party together. Then there is evidence of witnesses such as, for instance as Jakob Makope and Mary Butelezi that this accused and the other two accused go about together. That tends to support the statement in the confession that the accused and the first and second accused were together that night. Then in his statement this accused said that he and the second accused, Phineas, followed a European up Tudhope Avenue and then caught up with him. There is confirmation of this in the evidence of Martha Gobe to the effect that a European was followed by two natives who caught up with him and that one of the two natives was taller than the other. This accused is taller than the accused Phineas. Then the accused said in his statement that he hit the European on the back of his neck with an iron rod and the European fell down. Martha Gobe told that Court that she saw the taller of the two natives raise his hand and bring it down as if striking the European on the back of the head and that then the European fell to the ground. Then there is the medical evidence which is that the lacerated wound on the back of the deceased's head was made by a severe glancing blow with a blunt weapon and could have been produced by the iron bar which is produced in Court. Then the accused said in his statement that he and Phineas went through the pockets of the European. Martha Gobe told the Court that both natives searched the

European after he had been struck down. Then the accused said in his statement before the magistrate that he hit the European over his back with a rod after he had fallen. Therefore it appeared from the accused's statement that he had hit the European once while he was om his feet and again when he was on the ground. Martha Gobe told the Court that when the deceased was on the ground she saw him raise his head and then the taller of the two natives hit him again. It appears from her evidence too therefore that the taller native hit the deceased once when he was on his feet and again when he was on the ground. It is true that the accused says he hit the European over his back when he was on the ground and Martha merely says that he hit the European again when he raised his head, but it may be that this blow which was referred to was on the back of the hedd or possibly on the back of the neck. One does not expect that the two statemnets will tally absolutely with one another or absolutely with the medical facts. Then the present accused said that Phineas stabbed the European somewhere on the back before his pockets were searched. Now Martha says nothing as to any blow or stab by the shorter native and there is no outside evidence which corroborates this statement of the accused that Phineas stabbed the European and in fact no knife wounds were found on the body of the deceased. The confession, however, does refer to two blows by the present accused and a stabbing blow by Phineas and, as I have said, the medical evidence is consistent with three differemt blows having been struck. It is possible that

the accused when he said that Phineas stabbed the European may have thought Phineas had a knife in his hand when in fact he had not or it may be that Phineas tried to stab with a knife but did not succeed in doing so. Then we have the statement by the accused that he hit the European with an iron rod, and there is the evidence of Wilson Mgwenya that the accused brought the iron rod, which is produced, to his room and left it there and it was later found there by the police when the accused took them to look for it. Then the accused said that he carried this rod in the sleeve of an overcoat which he was wearing. It is clear that the rod could have been carried in this way, because Detective Head Constable Joyner demonstrated that it could have been carried in the sleeve of his own jacket and it would have been easier to carry it in the sleeve on an overcoat than in the sleeve of a jacket. Then we have the statement by the accused that Phineas took a roll of notes amounting to £40 out of the trouser pocket of the deceased, and a witness was called to prove that the deceased had cashed a cheque for his month's salary amounting to £72. 10. 0 on the 28th of April, that is two days before the attack on the deceased. It is true that the accused said that Phineas took the notes out of the back pocket of the European's trousers and that the deceased's widow told the Court that the deceased usually carried his money in a wallt in the breast pocket of his jacket, but it does not follow that he had the money in that position on this occasion. He may have had some reason for putting the notes into his back trouser pocket on

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this evening. As to the difference between £40 and £72, 10. Oit is obviously possible that the deceased may have used some of his month's salary to pay bills before this particular night.

Then we have the fact that the accused told the magistrate that the decaesed's watch was taken from his trouser pocket, not from his wrist. That suggests the possibility that the watch that was taken was not a wrist watch but a pocket watch, and we have the evidence of the deceased's widow that the deceased's watch was not a wrist watch but a pocket watch which he usually carried in his waistcoat pocket. There are all these points in the statement of the deceased on which there is confirmation from outside, and in view of these points that I have referred to it is very difficult indeed to accept the accused's statement that the whole of this statement was a pure fabrication and a parcel of lies from beginning to end.

I think I should refer to the question of dress. Martha told the Court that the taller of the two men who attacked the European wore a light coloured raincoat and a green hat, and John Kanyele told the Court that the taller of the two men whom he saw wore a light coloured raincoat or overcoat and carried a hat in his hand. Both these witnesses said that these articles of clothing were similar to exhibits No.6, a raincoat, and No.7, a hat, which are produced in Court, and the evidence is that those articles are the property of the first accused and not of the third accused. These exhibits, however, are articles of clothing of a very common description

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and they are probably similar to hundreds of other coats and hats worn by natives on that night, so that the evidence in regard to the coat and the hat by no means leaves the inference that the taller of the two men seen by Gobe was not the accused and in fact it appears from the accused's own statement that he was wearing an overcoat that night because he said that he took the iron rod out of the left sleeve of his overcoat.

As I have said in the last sentence of his statement the accused told the magistrate that he wished to go and point out where he had sold the watch taken from the deceased and also the irom with which he had struck him. The evidence is that the accused did take the police out with him in an attempt to trace the deceased's watch and was taken to the man Petrus Nozene. Now the accused told the Court that he never told Detective Head Constable Joyner that he had sold a pocket watch to Petrus and all that he told him was that he had sold his own wrist watch to Petrus, but we cannot a cccept that statement because if that was so ther was no reason whatever why Detective Head Constable Joyner should go searching for Petrus and go from Alexander to Braamfontein in order to run Petrus down, and Detective Head Constable Joyner says that he took the accused in order to find a pocket watch which was said to have been taken from the deceased, and the last sentence of the accused's statement supports that and furthermore Detective Head Constable Joyner told the Court that when confronted with Petrus the accused persisted to Petrus that he had

sold a pocket watch to him for £2. 10. 0 and that Petrus denied it. Then there is the evidence in regard to the finding of theiron bar. In Detective Constable Joyner's original evidence he told the Court how the iron bar was found and he told the Court that the accused gave no exculpatory explanation of his possession of it and he was not cross-examined on this in so far as I remember. The accused told the Court in his evidence that he told the police that this iron bar was the property of a man named Green an acquaintance of the accused, that Green had left it in the accused's room and that Wilson had borrowed it actually in March under a promise to return it but that he had never done so. Detective Head Constable Joyner was recalled on this point and he denied that any such explanation was given to him, and we accept that denial.

Now in this case the Court is indebted to Mr. Weber for having underteken the defence of the accused, but after considering all the evidence we have come to the conclusion that there is no reasonable doubt whatever that the accused took part in the attack on the deceased and in the killing of the deceased.

The unanimous verdict of the Court therefore is that the accused is guilty of the crime of murder.

(Mr. Weber addresses the Court on the question of extenuating circumstances).

ROPER, J. : The Court does not think there are any extenuating circumstances in the matters you have mentioned Mr. Weber.

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REGISTRAR TO ACCUSED : Haveyou anything to say why sentence of death shall not be passed on you according to law?

ACCUSED : If ten men each have 7/- and then should give his 7/- to some one else, would somebody be able to identify that money as belonging to this other person? By that I mean that in fact I did not kill this European. If money is found by one person, say 7/-, how much would each one have to get if it is divided among 10 persons. If I had not told the magistrate that I found money on the deceased, then there would have been nothing against me. Now I am only asking Your Lordship to pass the death sentence on me and I want to be executed. It won't help me to say anything further, as I won't have any place to work at.

S E N T E N C E.

ROPER, J. : John Ncube what you have said to me will be conveyed in due course to the authorities and will be considered by them. You have been found guilty of murder without extenuating circumstances. For that crime there is only one sentence that the law allows me to pass upon you, and the sentence of the Court is that you will be returned to the place of custody and thereafter at a time and place to be settled by the authorities you will be hanged by the neck until you are dead.

17th December, 1954.

Application for Leave to Appeal:

Mr. Weber applies, on behalf of No. 3 accused, convicted, for leave to appeal on grounds set out in typed notice (see page A). His Lordship grants application (see judgment on pages B and C of this record).

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION) 5.2.55

In the matter between :-

JOHN NCUBE . Appellant

&

R E G I N A Respondent

CORAM :- Centlivres C.J., Schreiner et v.d. Heever JJ.A.

Heard :- 23rd Feb. 1955. Reasons Handed In : 2.3.55

J U D G M E N T

CENTLIVRES C.J. :- The appellant was convicted of murder by Roper J. sitting with assessors and sentenced to death. Roper J. granted him leave to appeal and this Court dismissed the appeal and intimated that reasons would be filed later. The following are the reasons.

In giving judgment on the application for leave to appeal Roper J. said :-

" In the notice of this application grounds are set out and amount in substance to an allegation that the conviction was against the evidence and the weight of the evidence. In addition to that I am informed today by counsel for the applicant that he wishes an opportunity to make an application for the calling of fresh evidence which has come to his

knowledge since the conviction, and which may have an important bearing upon the question of the guilt or innocence of the applicant.

As I understand it, it is not competent for the Trial Court to entertain an application for hearing fresh evidence which has come to light since the trial. The only means which the proposed appellant has of having that evidence considered is by an application to the Appellate Division.

It does not seem to me, in view of the nature of the evidence led against the applicant at the trial, that there is a reasonable prospect that the Judges of the Appeal Court will take a different view to that taken by the Trial Court, and perhaps the correct procedure would be for me to refuse the application for leave to appeal. The applicant would then be entitled to apply to the Appellate Division direct for leave to appeal and conjoin with such application an application that the Court should either hear this new evidence or give instructions for it to be heard. If that course is followed, however, the position will be that the Appellate Division, if the usual practice is followed, will only have before it the reasons given by the Trial Court for the conviction and will have no evidence bearing on the guilt or innocence of the applicant such as would enable it to decide whether or not

" to order the hearing of the new evidence. On the other hand, if I give leave to appeal the whole record will be before the Appellate Division and that Court will then be in the position to consider whether/ there is any reasonable proppect that the new evidence proposed to be led will affect the conviction in any way.

In view of that consideration and in view of the serious consequences to the applicant it appears to me that the best course in all the circumstances is to grant leave to appeal, and it will be for the applicant to make such application as he may be advised to make to the Appellate Division in regard to the hearing of further evidence.

The application for leave to appeal is granted. "

It is clear from the reasons given by the learned Judge in granting leave to appeal that he considered that on the record as it stood there would have been no reasonable proppect of success on appeal and that had it not been that counsel for the accused intimated that he wished to have an opportunity of applying to the Appellate Division for leave to call fresh evidence he would have refused leave to appeal. At the hearing of the appeal counsel for the appellant stated that he was unable to apply for leave to lead further evidence as it was not possible to verify certain information forming the

basis of certain allegations made during the hearing of the application for leave to appeal. This Court, was, therefore, confined to the record on appeal and, having come to the conclusion after hearing counsel for the appellant that there was no substance in the appeal, dismissed it. It is not necessary to set out the facts which are fully dealt with in the judgment of Roper J. with whom the assessors concurred. We have nothing further to add to that judgment and we were satisfied that the conviction and sentence could not be successfully assailed.

In view, however, of the fact that a question of procedure is involved, we consider it necessary to state our view whether Roper J. should, in the circumstances that arose, have granted leave to appeal. The learned Judge was correct in holding that it is not competent for a trial court to entertain an application for hearing fresh evidence which has come to light since the trial. Such an application must be made to the Appellate Division under s.4 of Act 1 of 1911. (Rex v Carr - 1949 (2) S.A. 693 at pp.698/9.) It is clear from ~~that case~~ that it is only in exceptional circumstances that leave will be granted to call fresh evidence. Counsel for the appellant stated at the hearing of the appeal that the learned trial Judge was informed verbally at the hearing of the application for leave to appeal that the appellant wished to have

an opportunity to make an application for leave to call fresh evidence. Such verbal information was, in our opinion, insufficient to justify the learned trial judge in the great favour to grant leave to appeal. There should have been something on affidavit to show (1) the gist of the fresh evidence in order to enable the trial judge to decide the relevancy or otherwise of that evidence and (2) that there were exceptional circumstances which might justify the Appellate Division to grant leave to call that evidence. There being no such affidavit before the trial judge, he should not have granted leave to appeal, and he had come to the conclusion that on the record as it stood there was no reasonable prospect that the Appellate Division would allow the appeal. In those circumstances the correct note open to the learned judge. He could either have refused leave to appeal or postponed the hearing of the application in order to enable the accused to place the necessary facts before him on affidavit.

If the learned judge had refused leave to appeal the accused could have applied to the Chief Justice in terms of s. 369 of Act 31 of 1917 (as substituted by s.7 of Act 37 of 1948) for leave to appeal and in such an application the accused could have set forth an affidavit the gist of any fresh evidence which had come to light since his conviction and the exceptional

circumstances which might lead ~~justify~~ the Appellate Division to grant leave to call such evidence and the judge considering the application would have granted leave to appeal on being satisfied that, although an appeal on the record as it stood would have been hopeless, there was a reasonable prospect ~~xxxxxxxx~~ that the Appellate Division would grant leave to adduce fresh evidence.

If the learned judge had granted a postponement of the application for leave to appeal and, if at the postponed hearing the accused had satisfied him that there was a reasonable prospect that the Appellate Division would grant leave to adduce fresh evidence, he would then have granted leave to appeal. If he had not been so satisfied he would have refused leave to appeal.

I may add that the assumption made by the learned judge that the judge of appeal who considers an application for leave to appeal will usually have before him only the reasons given by the trial court for the conviction is not quite correct. He will also have before him a copy of the application made for leave to appeal to the trial court and a copy of the reasons of the trial judge in refusing leave to appeal. But whenever the appeal judge, who deals with the application for leave to appeal, considers it necessary he calls for a copy of the evidence on xxx which the accused was convicted.