G.P.-S.384—1932-3—10,000. U.D.J. 445. 264/54

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 R B & B *Respondent's Attorney*..................
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate [illegible] Q.C. *Respondent's Advocate* [illegible]
Advokaat van Appelant *Advokaat van Respondent*

Set down for hearing on:— FRIDAY 25th MARCH 1955
Op die rol geplaas vir verhoor op:—

3.4.5. (9.45 — 10.20.)

— Appeal dismissed. – Reasons will be rendered in [illegible].

[illegible] [illegible] [illegible], [illegible] — J.A.

25—3—55.

[illegible]

Title

264/54.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

THOMAS HENDRIKUS PENDERIS Appellant

and

R E G I N A Respondent

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

Heard: 25th.March,1955. Reasons handed in: 31-3-55.

J U D G M E N T

SCHREINER J.A. :- The appellant was convicted of criminal injuria by a magistrate in South West Africa and was sentenced to a fine of £25. He appealed unsuccessfully to the High Court, which, however, granted him leave to appeal, holding that the magistrate had misdirected himself in two respects, and that this Court might take a more serious view than had the High Court of the misdirections, or at least of one of them. This Court dismissed the appeal, the reasons to be furnished later; those reasons follow.

The case against the appellant was that at about 11.30. p.m. on the night of Monday, the 2nd. August 1954, he went to the house of the complainant at

Otjiwarongo/.....

Otjiwarongo and made indecent and insulting advances to her and assaulted her by holding her by the arm and body. The complainant's husband is a transport driver whose regular practice, well known in the neighbourhood, is to be away from his home at his work on Monday nights. The appellant is a railway engine-driver who had been stationed for seven or eight years at Otjiwarongo, and on the night in question he was on shunting duty in the local station yard, which is some three or four minutes' walk from the house of the complainant. The appellant is a married man and he and his wife were well acquainted with the complainant and her husband.

It is unnecessary to go into the details of the complainant's evidence as to the approach made to her and the assault inflicted upon her by the man whom she finally drove away by threatening him with a pistol and whom she identified as the appellant. A neighbour gave evidence that at a time that fits in with the complainant's evidence he passed a man who was leaving her premises by the front gate; he could not identify the man. Another Crown witness, Stoffberg, was the fireman who was on duty on the appellant's engine on the night in

question./.....

question. He deposed to the appellant's having indicated to him on more than one occasion, by the use of a colloquial expression, that he was planning or hoping to have intercourse that evening with a woman, who obviously from the nature of the remark was not his wife. Stoffberg also deposed to the appellant's having absented himself from the engine more than once that night but, apart from one occasion between 8 and 8.30. p.m., he could not say at what time or for how long the appellant was away. Another Crown witness, Mrs. Bezuidenhout, a divorcee living alone near the station, said that at about 8 p.m. on that Monday the appellant, whom she had met at his house but had not spoken to, came to her house and enquired whether one Labuschagne, a railway conductor to whom she was engaged, was there. She told him that Labuschagne had just arrived. She invited the appellant to come in but he declined and, after being there for five minutes in all, he left.

The appellant gave evidence himself denying that he was at the complainant's house that night, denying that he had spoken to Stoffberg in the terms stated by the latter and denying that he had been at the house of Mrs. Bezuidenhout. The appellant

called/.....

called the evidence of several fellow-railwaymen to show how difficult, if not impossible, it would have been for him to absent himself from the station yard at a time that would have permitted his commission of the crime.

The magistrate reviewed the evidence fully in a written judgment and came to the conclusion that the complainant was a wholly trustworthy witness, and that the same applied to the other Crown witnesses. He dealt with a conflict between the evidence of the complainant and the brother-in-law of the appellant, who was called on his behalf, and apparently seemed to the magistrate to be a satisfactory witness. The magistrate thought that the conflict might be explainable as being due to misunderstanding but, failing that, he found it unnecessary to decide which version was true. As the point in issue was on the fringe of the case and bore only on credibility it did not assist the appellant to show that in this respect the magistrate did not find affirmatively that the complainant spoke the truth; he did not find that she was untruthful in this or any other respect.

The magistrate found the appellant to be an unsatisfactory, hesitant witness. In regard to his witnesses the magistrate found them to be

vague/.....

vague in their evidence and he gained the impression that they were trying to shield ~~him~~ the appellant as much as possible without directly lying.

The magistrate referred to certain elements of probability that seemed to operate in favour of the complainant's version. That she was at least honest in her belief that the appellant was the man in question seemed to be shown from an early morning report that she made to her neighbour, in which she gave the appellant's name. As he was to her knowledge an engine-driver she would obviously have been taking a grave risk, if she had falsely implicated him, that he might be proved to have been far away from Otjiwarongo that night.

Counsel for the appellant argued that the magistrate had insufficiently appreciated the risks of false accusations in offences of this kind, which are referred to in Rex v. W (1949 (3) S.A.772 at pages 778 to 781). But the criticism is not well-founded. The magistrate dealt with the nature of the offence in relation to the subject of corroboration and there is no reason to suppose that he in any way misdirected himself in this respect.

This/.....

This brings me to the two points in respect of which CLAASSEN J. in the High Court held that the magistrate had misdirected himself. The first relates to his treatment of a suggestion, which had apparently been advanced by the defence, that the investigating officer might have coached the Crown witnesses to give false evidence against the appellant. The magistrate in dealing with this suggestion said that the court had come to know the officer over a period of three and a half years during which he had often given evidence before it and always been found fair and truthful. For this reason the magistrate said that he had not the slightest hesitation in rejecting the suggestion in toto.

In holding that the magistrate had misdirected himself, albeit in a respect which could not have influenced the findings on credibility or the eventual conclusion, CLAASSEN J. relied upon the decision in Rex v. Seeber (1948(3) S.A. 1036), which had followed the earlier case of Rex v. Madiba (1947(3)S.A.491), in treating it as a misdirection by a magistrate to accept the evidence of a police witness merely on the ground that he had previously given evidence before the magistrate who had always found him to be trustworthy. When

CLAASSEN J. gave judgment in the present matter the case of Regina v. L. (1955 (1) S.A.575) had not yet been decided. In that case CLAYDEN J., in giving the judgment of a court consisting of himself and RAMSBOTTOM J., reviewed the earlier cases, including one in this Court (Dunjiwa v. Regina, 1945 (2) P. H. H 179), and accepted as the ~~learned~~ view that it was "inevitable that a court should form a general impression "of the reliability of a witness who appears frequently "before it, and impossible for that impression to be dis- "regarded when the witness gives evidence." The learned judge proceeded, "And the position of the accused "cannot I consider be improved because the judicial officer "is candid in his reasons and says that he has taken that "impression into account." These statements must be read with the caution, already extracted by CLAYDEN J. from Rex v. Mukumu (1934 T.P.D. 134) and Dunjiwa v. Regina (supra), that there is no justification for basing a conviction solely on the improbability that an apparently responsible and trustworthy witness, who has frequently given what has seemed to the court to be fair and honest evidence, would on this occasion lie. The principles thus stated appear to be correct ones, their application to the circumstances of a particular case naturally requiring the

exercise/.....

exercise of care and judgment.

In the present case there was not the slightest basis for the suggestion that the investigating officer might have coached the Crown witnesses to give false evidence and the magistrate was entirely justified in treating the suggestion as nonsense, unworthy of serious consideration. That in so doing he took occasion to express his confidence in the trustworthiness of the officer in question clearly did not amount to a misdirection, even of the mildest kind, nor, it should in fairness be stated, was it relied upon as such by appellant's counsel in this Court.

The other example of supposed misdirection, which was regarded by CLAASSEN J. as more serious, related to the use made by the magistrate of the evidence of Mrs. Bezuidenhout. The learned judge took the view that, while her evidence was admissible to prove that it was possible for the appellant to leave the station yard for a while without his absence being noticed by the other railway-men, it was not evidence that supported an inference that it was the appellant who insulted and assaulted the complainant. The learned judge seems to have thought that in this regard the evidence amounted to no more than that the appellant was the kind of man who was given to

committing/.....

committing offences of this kind. But clearly the evidence of Mrs. Bezuidenhout related to matters much more closely connected with the allegations of the complainant than any general propensity to commit crimes or crimes of a particular kind. Here there was the evidence of Stoffberg supporting the view that the appellant was that evening feeling a strong sexual urge. That urge might be met honourably at his home or dishonourably and even criminally elsewhere. In deciding whether his urge that night was such as might lead him into criminal advances to the complainant, evidence was clearly admissible that he sought out another woman, almost a stranger to him, who might well be alone and that he left her unaccountably upon finding that her fiance, after whom he had enquired, was actually in her house. The connection between the two incidents though the appellant's bodily urge that night is sufficient to make the evidence of the earlier incident relevant to the identity of the man concerned in the later one, and there is no need to consider whether the relevance to identity could also be supported on other lines (cf. Rex v. Sebeso, 1943 A.D.196 at pages 204 and 205; Regina v. Roets, 1954 (3) S.A. 512).

It should furthermore be pointed

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out that, before the earlier incident could be used as throwing light on the later one, it was not necessary, as CLAASSEN J. appeared to have thought, that the inference should be clear beyond reasonable doubt that the appellant's object in going to Mrs. Bezuidenhout was in order to have connection with her. The acceptance of Mrs. Bezuidenhout's evidence made it unnecessary to try to draw an inference from facts only shown to be probable (cf. Rex v. Manda, 1951(3) 158 at page 166); the proved facts in connection with Mrs. Bezuidenhout had to be taken in conjunction with all the other facts of the case in order to see whether the case against the appellant was proved beyond reasonable doubt (see Rex v. de Villiers, 1944 A.D. 493 at pages 508 and 509).

The magistrate was thus not guilty of any misdirection. His conclusions as to the credibility of the respective witnesses, based on his impression of them and on his well-reasoned view as to the probabilities of the case, could accordingly not be attacked successfully and the appeal was therefore dismissed.

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