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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

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAK.

Aileen Pick NHLAPO

Appellant.

versus

THE QUEEN

Respondent.

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

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

Set down for hearing on:— [illegible] day [illegible] May 1955.
Op die rol geplaas vir verhoor op:—

1, 4, 6 [illegible]

Judgment: Appeal allowed, & conviction & sentence set aside — [illegible]

Centlivres C.J.
Hoexter, [illegible] J.A.
23 — 5 — 55.

[illegible]
Registrar.

Judgment on application for leave to appeal.

11th March, 1955.

On resuming at 10 a.m.

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL.

RAMSBOTTOM, J: The accused was charged with attempted murder. He was tried before me and a jury. The jury found him guilty of attempted murder, and he was sentenced to imprisonment with compulsory labour for five years. He has applied for leave to appeal, and in his application for leave he raised two points. The first is that the jury's verdict is wrong, in that he had not been at the house where the crime was committed on the night when the alleged shooting took place. The second point raised is that he had wished to be tried without a jury, but was compelled to be tried by a Judge and jury. In his written application for leave to appeal he says "From the beginning of the trial I told the Magistrate that I wanted to be tried by a Judge alone and not by a jury, but in the end I saw that a jury was given to me by force and I told the Judge in the jury's presence that I don't want to be tried by a jury, but in the end I was tried by a jury without my consent".

The statements of fact made in this application on the second point are not correct. The facts which the applicant yesterday admitted to be correct are as follows. After the jury had been empanelled the accused said that he wanted to be tried without a jury. He was then referred to what the Magistrate had recorded at page 11 of the record of the preparatory examination,

namely/....

namely, "The accused elects to be tried by a Judge and jury after the provisions of Section 165(1) have been explained". The applicant then admitted that the provisions of the section had been explained, and that he had elected to be tried by a Judge and jury, but he says that the functions of the jury were not explained to him. In the case of Regina versus Justice Bolane, which was tried before me with a jury on February the 21st of this year, I decided that an accused person who had elected to be tried by a Judge and jury, had no right to change his mind, and consequently I ruled that the applicant must be tried by a Judge and jury, and it is against that ruling that he now wishes to appeal.

I think that Mr. Smeath Thomas is right when he says that the point should be taken by way of a special entry. I am unable to say that the complaint is frivolous or absurd or an abuse of the process of the Court, and therefore I think that on the second point a special entry must be made. A special entry will be made in the following terms:-

> At the conclusion of the preparatory examination, as appears from the Magistrate's record, the accused elected to be tried by a Judge and jury after the provisions of Section 165(1) had been explained.
>
> At the trial the accused pleaded not guilty, and a jury was thereupon empanelled. The accused then stated that he wanted to be tried without a jury. In reply to questions by the presiding Judge the accused admitted that he had elected to be tried

by/....

by a Judge and jury, and that the record correctly states that he had done so after the provisions of Section 165(1) had been explained to him. He stated that the functions of a jury were not explained to him before he exercised his election.

The presiding Judge then ruled that the case was to be tried by a Judge and jury. This action of the presiding Judge is alleged by the accused to constitute an irregularity.

With regard to the first point raised in the application for leave to appeal, namely, that the verdict of the jury was wrong, there is more difficulty. I do not think that there is much likelihood that the Appellate Division would hold that the verdict of the jury was wrong and should be set aside, and if that was the only point that was taken by the accused, or the only ground of appeal, I think that the application would probably have to be refused, but there are considerations which lead me to think that the application should be granted. Not only has a special entry been made, but I propose to reserve a question of law for the consideration of the Appellate Division. As the case will go to the Appellate Division on these two matters, I think that it is right that the applicant should be given an opportunity of arguing the case on the merits at the same time. The application for leave to appeal is therefore granted.

In the course of the trial a question of law of some difficulty arose. Although the defence was an alibi and the accused denied that he had been at the

house/....

house where the crime was committed at the time that it was committed, there was evidence that if he was indeed the man who fired the shots and committed the crime, he did so while resisting an assault which was made upon him by a woman, Elizabeth Masute, and the question arose as to whether, assuming that the accused was the guilty party, he had fired under provocation. There was also some evidence that the accused might have been under the influence of liquor. The evidence was to the effect that his behaviour suggested to one of the witnesses that he was under the influence of liquor. The question arose whether, in considering the question of provocation, regard should be had to the fact that the person provoked had consumed intoxicating liquor, if that was a fact. I directed the jury that they were to disregard the fact, if it was a fact, that the accused had had intoxicating liquor, and the question is whether that direction was a correct direction in law. The law on the point seems to me not to be clear, and I think that this is a case in which a question of law should be reserved for the decision of the Appellate Division. In terms of Section 372 of Act 31 of 1917 the presiding Judge may reserve a question of law of his own motion, and although the accused, by reason of the nature of his defence, does not ask for this question to be reserved, I have decided to reserve it of my own motion. The following question of law is reserved by the Court of its own motion in terms of Section 372 of Act 31 of 1917.

At the trial of the accused on a charge of attempted murder, there was some evidence that the

accused was under the influence of intoxicating liquor, and there was some evidence of provocation. The presiding Judge directed the jury that "on the question of provocation the fact, if it is a fact that the accused .... had had some liquor, is not to be taken into account. You must consider whether the attack made .... upon him was of such a kind as would constitute provocation in an ordinary person, not having regard to the fact that the person who was attacked had had liquor".

The following question of law is reserved for the consideration of the Appellate Division:-

Is the statement of law contained in the direction set out above correct?

I direct that the question of law which has been reserved shall be specially entered in the record, and that a copy thereof shall be transmitted to the Registrar of the Appellate Division.

(SGD.) W.H. RAMSBOTTOM.

JUDGE OF THE SUPREME COURT OF SOUTH AFRICA.