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G.P.-S.994—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 SAAKI.

Isaac Maquane
Appellant.

versus

The Queen
Respondent.

Appellant's Attorney
Prokureur van Appellant

Respondent's Attorney
Prokureur van Respondent

Appellant's Advocate H.C. Rapp
Advokaat van Appelant

Respondent's Advocate
Advokaat van Respondent

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

1, 3, 5, 6

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

ISAAC MAQUAME . . Appellant

and

REGINA Respondent

Coram: Centlivres, C.J., Schreiner, van den Heever, ~~Hunter~~ Fagan et Steyn, JJ.A.

Heard: 10th. June, 1955. Delivered: 10th. June, 1955

J U D G M E N T

STEYN J.A. :- In the magistrate's court the appellant was convicted of unlawfully conveying dagga in his motor car at Hopetown on 28th. September 1953, and sentenced to six months imprisonment with compulsory labour. His appeal to the Cape Provincial Division against the conviction was unsuccessful, and it granted leave to appeal.

On Monday night, 28th. September 1953, between 10 p.m. and 11 p.m., a car with the registration number O.B. 15515 was found by the police near Hopetown, some 200 yards from the location for coloured persons and about 440 yards from the native location, alongside the road from

Hopetown/.....

Hopetown to Orange River Station. The keys were on the switch board and in the boot of the car three bags were found. Two of them contained dagga and one of them also an empty tin. The third was empty but still contained some dagga leaves and seeds. Notwithstanding a search which lasted until about 1 a.m., nobody was found anywhere in the vicinity of the car. On the date in question the appellant was living in the Butchabella location near Bloemfontein, where he also carried on the business of a garage proprietor. The car found by the police near Hopetown was registered in his name. He had acquired it under a hire-purchase agreement and remained in possession of it.

The abovementioned facts are not disputed. What is denied is that the appellant was at Hopetown at all on the date in question or was in any way concerned with the conveyance of the dagga found in the car. The appellant maintained that on the Monday he was about his business until about 5.30 p.m. when he went to the Bloemfontein station in this car, accompanied by one Sam Selepe, that at the station he left the car in the care of the latter and proceeded to Johannesburg by the 8 o'clock train, and that he subsequently discovered that both the car and Sam had dis-

appeared/.....

-appeared. He called a witness, Peter Fenwick, to prove that he was in the location until shortly after 4 p.m. on 28th. September and another, Louis Isaacson, to prove that he was in Johannesburg about midday the next day.

The case against the appellant rests mainly on the evidence of Nkosi Ndaba, native constable. The evidence of this witness is to the following effect : On Thursday 24th. September 1953, at about sundown, he saw a car with the registration number O.B. 15515 stopping opposite the house of Martha Kwaaleng in the native location at Hopetown. He was about sixteen yards from the car. The appellant alighted from it, and went round to the back of Martha's house; she returned with him to a point where he (Ndaba) saw them in conversation, and thereafter the appellant left with his car. Ndaba immediately went to Martha to make enquiries about the visitor. He noted the number of the car on an old envelope and reported the incident at the police station, because he had been instructed to keep a lookout for unknown visitors to the location. He states thatb the appellant was alone in the car. This,apparently , was the first occasion on which he had set eyes on the appellant.

Martha confirms this incident, but is uncertain as to the date and denies that Ndaba came to

her/.....

her immediately after the appellant left. She is certain that he did so some time later, on a Sunday evening, i.e. at least three days after the appellant's visit on the Thursday. According to her the appellant enquired whether there were Basutos living in the location. The appellant himself does not deny the visit, but says that it took place on the 4th ~~and~~ or 5th September, that he was not alone but was travelling with one Joseph Malepe, in the latter's car, which had a T.J. registration number, and that he went to Martha's house to enquire whether it was necessary to obtain permission to enter the location.

The magistrate found Martha to be a person of the honest, simple type, and had no hesitation in accepting her evidence that the appellant made enquiries about Basuto residents and not about permission to enter the location. Although she contradicted Ndaba as to the occasion on which he spoke to her about the appellant's visit, the magistrate accepted Ndaba's statement that the appellant was there on 24th September in his own car and that he was alone.

Ndaba goes on to say that on Monday, 28th September, between 1 p.m. and 2 p.m., he again

saw/.....

saw the same car in Hopetown, opposite the Hopetown cafe. The appellant came out of the cafe and left with the car. Under cross-examination he is definite that he looked at his watch and that the car left at exactly 1.45 p.m.

As will appear later, this part of Ndaba's evidence is of the greatest importance. There is, however, no other evidence to support his statement that the appellant was at this cafe at the time mentioned. The proprietor of the cafe, Stephanus Apostolides, was absent during the lunch hour, and Willie Moffat, who works at the cafe, was not questioned in this regard. Both testify to another visit by the appellant to the cafe, allegedly between 7 p.m. and 8 p.m. the same day. The evidence of Apostolides, however, is so unsatisfactory that the magistrate, for good reason, disregarded it entirely. Under cross-examination also Willie Moffat became so uncertain that no reliance can be placed upon the date given by him in his evidence in chief. He admitted that the police had mentioned the date to him and that he himself could not remember it. An attempt was made to fix the date by reference to the date on which the police approached him in connection with the charge against the appellant, but this failed because the witness could not fix the latter date and no policeman was called to do so. The

appellant admits a visit to this cafe, but at an earlier date. In the result the evidence of Ndaba that the appellant was at this cafe between 1 p.m. and 2 p.m. on the 28th. September stands alone, and there is no reliable evidence that the appellant was there at any other time on this date.

According to Ndaba he next saw the appellant's car on this date in the native location at 7.45 p.m., to the minute. The car stopped immediately in front of the house of Jim Mpandle. He saw the number of the car, but could not recognise the person in it. The driver remained in the car, sounded the hooter, and Jim came out to the car. Jim went back into his house and the car left, taking a road to a place outside the location. At exactly 8.15 p.m. Jim followed in the same direction as the car. Ndaba reported at the police station, Jim was waylaid on his return, and found im possession of 3 lbs. of dagga. The car was not seen again until it was found by the police at the place already mentioned.

In regard to this incident, Jim's evidence to some extent corroborates that of Ndaba. He admits that he bought this dagga from a person in a car with an O.B. number. This person was a native who told

him/.....

24th September. Martha, upon whose evidence the magistrate has made the favourable comments to which I have already referred, is emphatic that that is incorrect. It was only some days later that he spoke to her. His insistence, also, on the exact times, to the very minute, upon which he witnessed various incidents, suggests that his assertions of fact are more definite than his actual observations.

There is, further, the evidence of Fenwick and Isaacson. Isaacson is a partner in the wholesale firm of Finis Clothing, Johannesburg. He says that on 29th. September 1953, a native by the name of Isaac Maquame, who told him he came from Bloemfontein and had a car, came to see him in connection with a hawker's licence for selling clothes. He told his secretary to make a note on a dated pad. He also fixes the date by an engagement he had to play bowls that day, a weekday upon which he rarely plays bowls. He says : "Of the date I am definite. He interviewed me on the date I was playing bowls and I was in a hurry to get away. I am definite my bowls appointment was on 29th September 1953." On 3rd October he received a letter dated 2nd October from the appellant's attorney in Bloemfontein in connection with the same matter. The

facts/.....

facts were then still fresh in his memory and he has no doubt as to the date. He is not, however, quite certain that it was the appellant. He says in this connection : "There were two natives. I think the accused was one of "them. It is a little difficult to identify the native "without any doubt. We do business with many natives but "I am certain he has been in my office before today. I "think it was probably the accused.....I am almost certain "it was the accused who interviewed me that day..... Nor-"mally I would have said that is the fellow. The fact "that the police asked me for a statement and the fact that "there is a case proceeding. I think it is natural that "the doubt should arise." According to the appellant he did on that day, accompanied by his brother-in-law, interview Isaacson in his office at about midday, and he did subsequently instruct his attorney to write to Isaacson. The latter's evidence cannot but be regarded as affording some confirmation of this, and if the appellant was in Johannesburg on the morning of the 29th September, that would tend to support his denial that he was in the Hopetown location the previous night. There is nothing in the evidence to suggest that he could have got to Johannesburg in that time by train, by leaving after 10 p.m. when the

police/.....

police came upon his car. Although not impossible, it is not probable that he could have got there by other means, except by an unusually fortunate coincidence of transport facilities with the sudden need of the appellant. The magistrate accepted that the appellant was in Johannesburg on 29th September : " How he got there can only remain a "matter of conjecture." Fenwick is the assistent superintendent of the Butchabella location. He knows the appellant and also his car. He says that at 12.30. p.m. on 28th September, the appellant was at his office with his, the appellant's,car, and spoke to him in connection with a stand in the location for which he had applied. Fenwick had arranged to assist one Viljoen that day in effecting certain repairs to his car. He needed a jack and borrowed one from the appellant, who returned for it shortly afterwards 4 p.m., still driving his car. He remembers the date because Viljoen had already approached him the previous day. As that was a Sunday and he was on his farm, he could not do anything,but arranged that he would assist him the next day. On 2nd October he heard that the appellant's car had been seized by the police.

It is not disputed that the distance of 165 miles from Bloemfontein to Hoetown cannot be covered

by/.....

by a car travelling from sixty to seventy miles per hour, in much less than three hours. If Fenwick's evidence is to be accepted, therefore, it must follow that the appellant's car could not have been in Hopetown until 7 p.m. or shortly thereafter. It certainly could not have been there between 1 p.m. and 2 p.m., and neither could the appellant.

The magistrate states in his reasons for judgment : " Fenwick gave his evidence in a way "which called for no criticism." He had, therefore, no fault to find with this witness. In regard to Ndaba he observes that he had no reason to suspect any deliberate untruthfulness and that he was perfectly satisfied that his evidence was substantially the truth. Both witnesses, therefore, made a favourable impression. There is little to explain why he rejected the evidence of Fenwick, preferring that of Ndaba. He states in this connection :"If it"(i. e the appellant's car) "had been seen in the location at "7.45 p.m., then Fenwick's evidence cannot stand. Not if "one considers accused's own statement that he and Selepe, "after leaving Fenwick's place at 4.30. p.m., used it to "the station at 5.30. p.m. ..... Ndaba was definite "about the time being 7.45 p.m. when he noticed the car in "the location. The further happenings that night tend

"to make his story possible." This leaves the impression that the magistrate judges Fenwick's evidence by a false statement made by the appellant. On Fenwick's evidence the car may very well have been in Hopetown by 7.45 p.m., and neither the false statement by the appellant nor Ndaba's assertion that he saw the car at 7.45 p.m., can show that Fenwick is wrong. The point is that no witness was able to say with any certainty that he saw the appellant himself in the car at that time. That he was then driving the car is something to be inferred mainly from his alleged presence with the car at the Hopetown cafe between 1 p.m. and 2 p.m. The real issue raised by Fenwick's evidence is not whether the car was in Hopetown at about 7.45 p.m., but whether the appellant visited this cafe with the car at the time stated. In regard to this issue, as already indicated, Ndaba&s evidence finds no support in that of any other witness. What is to be weighed, is his evidence against that of Fenwick. Both cannot stand together. In dealing with this conflict, HERBSTEIN J. observed that "Fenwick fixes the date and time solely on his own memory "of certain happenings. But that a particular thing on "which he relies happened when he says it did was not "established in any way; it rests upon his <u>ipse dixit</u>.

"When/.....

"When the reliability of a witness' recollection of a "particular happening is being tested, his recollection of "another happening on which he relies but which is not in- "dependently established is of no assistance. When, there- "fore, Fenwick seeks to fix the day by a telephone message "he says he received on Sunday the 27th, he is only changing "the test." The general proposition is no doubt correct, where the witness has no special reason for remembering the other happening. But Fenwick does give such a reason. Viljoen had asked him for assistance at an inconvenient time and in inconvenient circumstances, i.e. on a Sunday while he was on his farm. Because of this he refused and made an appointment with him for the next day. The next day Viljoen came to his office as a result of this appointment, and that was the time when he borrowed the jack from the appellant. In my opinion it cannot be said that Fenwick had no good reason for remembering the Sunday. When on the next Friday, 2nd. October, he heard that the appellant's car had been seized, it could not have been a difficult matter for him to cast his mind back to the previous Sunday and to remember that he borrowed the jack from the appellant on the Monday. In these circumstances I cannot agree that Fenwick's recollection of what ~~transpired~~ happened

on/.....

on the Sunday, is of no assistance.

In the result I am unable to find any adequate ground for preferring Ndaba's evidence on the crucial issue, to that of Fenwick. Because of this and of Isaacson's evidence, which the magistrate accepted, the magistrate should, in my view, in spite of the fact that the car belonged to the appellant and that he had made a number of false statements, have had a doubt as to whether the appellant was the person who drove the car in Hopetown on 28th. September. One cannot but have the gravest suspicion as to the appellant's association with the dagga found in his car at Hopetown, but the evidence seems to fall short of proof beyond reasonable doubt that he was the person who conveyed the dagga.

In my opinion the appeal must ~~should~~ be succeeds and the conviction and sentence ~~are~~ set aside.

L. Steyn A.

(Centlivres C.J.
Schreiner J.A.
v.d. Heever J.A.
Fagan J.A.) Concur