

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

(Appellant)

DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAKI.

DIPLOMA BACCALAUREAT

Appellant.

VERSUS

THE QUEEN

Respondent.

Appellant's Attorney
Prokureur van Appellant

Respondent's Attorney
Prokureur van Respondent

Appellant's Advocate
Advokaat van Appellant

Respondent's Advocate
Advokaat van Respondent

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

Thursday 24 August 1958
(111 D 5) 1.2.4.5.6.

Appellant

Schuman, K.
Stewart, J.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

MANILALL BOODHUN

Appellant

and

R E G I N A

Respondent

Coram: Schreiner A.C.J., v.d. Heever, Hoexter, Fagan et Steyn, JJ. ^{/A}

Heard: 30th. August, 1955. Delivered: 1-9-1955

J U D G M E N T

SCHREINER A.C.J.:— The appellant pleaded guilty in a magistrate's court to the theft of two hub caps from a car standing in a Durban street. He was convicted and, after evidence of the commission of the crime had been given, he was sentenced to six weeks imprisonment. Though the magistrate adjourned the court to enable him to consider his position the appellant, who was unrepresented, gave no evidence and advanced no argument, contenting himself with asking for a suspended sentence. He appealed on the sentence to the Natal Provincial Division and at the same time applied for an order setting aside the sentence and remitting the case to the magistrate's court

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for the hearing of evidence in mitigation of sentence. The Provincial Division dismissed the appeal and refused the application, but granted leave to appeal to this Court against both orders.

The appeal against the sentence may be dealt with very briefly. There is no reason whatever for holding that on the record as it stands the magistrate misdirected himself upon any matter of principle or did not exercise a proper discretion in imposing the sentence which he did, and the appeal must accordingly be dismissed.

In support of his application the appellant filed an affidavit, paragraphs 4 and 5 of which read:-

"4. I desire to lead the following evidence in mitigation:-

(a) That I am twenty five years of age, and married, and have a wife and two children to support.

(b) I am presently in the employ of Messrs. G. H. Langler & Co. Ltd., of Maydon Wharf, Durban. This Company took over Messrs. Bartle & Co. Ltd. with whom I had been employed for the past ten years, I joined Messrs. Bartle & Co. Ltd. when I left school

at/.....

at the age of 15, and have been with them ever since. To-day I am a truck-driver, and earn £9.2.- weekly.

(c)I annex hereto an affidavit by Mr. Arthur William Green, the Chief Storekeeper of Messrs.G.H.Langler & Co.Ltd., who has known me ever since I ~~have~~ joined the firm.

(d)On the Saturday evening previous to my conviction, I was in the Butterworth Hotel Indian Bar, when I met two of my friends and we decided to have a bit of a party.

(e)I do not habitually drink, but at week ends I do sometimes go into the bar for a drink, but on this occasion I had much more than I usually do.

(f)I had parked my car, a 1940 Oldsmobile, outside the Butterworth Hotel, and when I came out I noticed that someone had removed two of my hub caps.

(g)There was another car standing parked next to my car, and I proceeded to remove two of its hub caps and drove off.

(h)The next day, when I realised what I had done, I was filled with shame, and wondered what I could do about the matter. I did think of going to the

Police/.....

Police but I thought I would get into trouble. I also had a vague idea that I might perhaps get in touch with the owner by inserting an advertisement, handing the hub caps back to him, and so avoiding any further trouble or the consequences of my foolishness.

(i) I left the hub caps in the car, and went to work on Monday.

(j) On Tuesday Detective Lombard accompanied by an Indian constable called at my house. He was given my place of employment, and he called on me that afternoon.

(k) He asked me where I had been on the previous Saturday night and I replied the Butterworth Hotel. I then said, 'you are looking for the hub caps.' He replied that he was. I then told him how I came to take the hub caps, and that they were at home in my car. He told me to bring them to the Central Police Station the next day.

(l) The following morning - Wednesday - I went to the Central Police Station, saw the Indian constable first, and waited for Mr. Lombard who came some time later. I handed the hub caps to him. Mr. Lombard told me to be at Court - B'Court, the following/.....

following day.

(m) I attended court the following day. I pleaded guilty when I was called upon to plead to the charge of theft.

(n) I did not tell my parents anything about this, as I felt too ashamed, and moreover didn't want them to know anything about it.

(o) I didn't consider it necessary to be legally represented because I admitted that I had ~~been~~ taken the hub caps, and I told the Police everything.

(p) At the conclusion of the evidence, I do remember the Magistrate asking me if I had anything to say, but I thought that as I had already told everything there was nothing for me to say, and so remained silent.

5. I have now been advised that the Magistrate would not ordinarily be aware of what I had told the Police, and was therefore unaware of all the circumstances. " The affidavit of Mr. Green, the storekeeper, affirmed that he had known the appellant for ten years and that he had found him hardworking and honest.

BROOME J.P., who delivered the
judgment/.....

judgment under appeal, referred to the cases of Rex v. Zackey (1945 A.D.505), Rex v. Gray (1947(4)S.A.557), Rex v. Carr (1949(2)S.A.603) and Rex v. de Beer (1949(3) S.A. 740), and considered (a) whether the evidence which it was sought to lay before the magistrate was relevant and of such a nature as might reasonably have induced the magistrate to impose a lighter sentence; and (b) whether there was a reasonable explanation why such evidence had not been led. The court was satisfied as to (a) but not as to (b). In dealing with the latter EROOME J.P. said inter alia, "The mistake which the applicant made in imagining that information laid before the Police would automatically be laid before Court was, a very grave error. Such an error might be excusable in the case of uneducated or uncivilized persons, but I cannot regard the error as a reasonable one in the case of a person in the circumstances of the applicant." Now the question what is a reasonable explanation, or, as it was put in the judgment of GREENBERG J.A. in Zackey's case (supra) at page 516, "some reasonably sufficient explanation" is clearly difficult to answer in the abstract, and its application to particular facts may well lead to differences of opinion. In the present

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case it seems to me that the court below took too stern a view of the appellant's error, assuming that it existed. The court was right in being prepared to make some allowance for the personal equipment of the appellant, but I do not think that the record showed him to be of such education or knowledge of the world as would make it unreasonable for him not to have appreciated that the magistrate would not have in his possession the information furnished by the appellant to the police.

It appears clearly from the cases cited by BROOME J.P. that applications like this should not be granted lightly, but on the facts of the present case, as they appear from the documents before us, I think that an order should be made. If it should appear at the further hearing that those facts have been materially misrepresented the magistrate will be in a position to deal with the situation so created. I should add, what is indeed obvious, that the fact that an order setting aside the sentence is being granted in no way reflects on the magistrate's conduct of the proceedings or on the conclusion reached by him on the materials before him. When the further evidence has been led it is to be expected

that/.....

