124/55

G.P.-S.384-1951-3-40,000. U.D.J. 445.

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

([illegible] DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAK.

[illegible]

Appellant.

versus

THE CROWN

Respondent.

Appellant's Attorney / *Prokureur van Appellant*

Respondent's Attorney / *Prokureur van Respondent*

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

Respondent's Advocate [illegible] / *Advokaat van Respondent*

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

[illegible] II – 2, 5, 6, 9, 10. 9.45 – 12.55, 2.15 – 4.35.

20/10/55: 9.45 – 12.55, 2.15 – 6.5.

C.A.Y.

Judgment:

Appeal dismissed.

Schreiner, Hoexter, Steyn, Reynolds, & Brink – JJ.A.

31/10/55.

[illegible] Registrar

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

1.ROLAND GORDON SMITH First Appellant

2.ERIC REGINALD SMITH Second Appellant

and

R E G I N A Respondent

Coram:Schreiner,Fagan,Steyn,Reynolds et Brink, JJ.A.

Heard:19th and 20th.October,1955. Delivered: 31-10-1955

J U D G M E N T

SCHREINER J.A. :- The appellants, who are brothers aged 28 and 26 respectively, were convicted of rape by a court consisting of MURRAY J. and assessors, and were each sentenced to four years imprisonment and six strokes, leave, however, being granted by the learned ~~judge~~ trial judge to appeal to this Court.

In the broadest outline the facts appearing from the Crown case are these. After dinner time on the night of Friday, the 26th November 1954, the complainant and her husband (I shall call them "the Smiths", and him "Mr. Smith") were in the lounge of the Grand Station

Hotel/.....

Hotel, Jeppe, Johannesburg, having drinks together. According to their evidence their refreshment took the form of brandy and water and they each took three of these drinks, the third being taken in the company of the first appellant who admittedly joined them in the lounge. He had met them only once before, some five or six months previously. According to the Smiths the first appellant offered to take them home in his car and he, they and another man, apparently a friend of his who introduced himself as du Preez, left the hotel together and got into a large black car which was standing in front of the hotel and which already contained four other men. One of these four, according to the Smiths, was the second appellant - they said that he drove the car. He was admittedly at the hotel that night but had not been in the company of the Smiths, to whom he was a stranger. The car was driven off in a direction different from that of the Smith's home; when the complainant remarked on this she was silenced and threatened, and both of them received blows of some severity. Eventually the car, which was travelling at a high speed, was driven off the tarred road along another road and stopped beyond the built up area of the city. The complainant was pulled

out/.....

out of the car and thrown to the ground a few paces from it; there she was raped by all six of the men. Mr. Smith remained in the car, only intermittently conscious as a result of the blows he had received. After the raptors had effected their purpose they took the Smiths ~~back~~ to the immediate neighbourhood of their house and put them off there. The same night the Smiths reported the assault at the Jeppe Police Station and made statements there; they were examined by the district surgeon at between 4 and 5 a.m. The many injuries found upon them were consistent with their story.

The appellants have denied throughout that they were in the car; on that assumption they were not in a position to dispute the fact, confirmed by the medical evidence, that the assaults took place. The case thus turned on the identity of the appellants as two of the assailants. The Smiths' evidence that they were of the number was corroborated by one Linden, who was one of the men in the car but denied, in conflict with the complainant's testimony, that he also raped her.

Detective Sergeant Laubscher looked for the first appellant at their home the following, Saturday, morning at about 9.30. The first appellant was

not/.....

not in but came to the Jeppe Police Station and was there at about 12.30 p.m. when Laubscher arrived there with the complainant, Mr. Smith being already at the station. The first appellant greeted one of the Smiths in an apparently cool and friendly manner fashion. The complainant on hearing his voice turned round immediately and, saying "Dit is hy", rushed at him and slapped him in the face; at once she fell down in a faint. The first appellant was under the influenc/e of liquor at the time; he was detained and subsequently arrested on the charge of rape. At 8.45 on the following, Sunday, morning he signed a statement in which he described his movements on the Friday night. At about 7.30 p.m., he said, he had a drink with a friend, later identified as one Freudiger, at the Grand Station Hotel. He left the hotel at about 9.30 p.m. alone and visited friends, including people identified as the van Schalkwyks, who lived next to the Apostolic Church; he said that he went home to bed after 10 or 11 p.m. He concluded, " I never saw complainant or "her husband on Friday night. I am of opinion that the com-"plainant and her husband are making a mistake betwee-n myself "and my younger brother Eric."

On the Sunday morning the second appellant, at Laubscher's request, came to the police station

and/.....

and made a statement which he signed at 10.15 a.m. (not p.m. as stated in the copy of the record). He said that he went alone to the Grand Station Hotel at about 10.30 on the Friday night and had his last drink about closing time (11.30 p.m.). He saw the first appellant talking to the hotel manager, Bensch, in the lounge. He told the first appellant he was going home and then took him home in his small car, dropping him at their home. He himself went on to the flat of a witness, Mrs. Randall, with whom he spent the night.

Mrs. Randall gave a statement to the police on the Sunday afternoon in which she said that the second appellant came to her flat at seven minutes after midnight on the Friday night; she checked the time on her watch because the second appellant had promised to come much earlier and she rebuked him for his tardiness. She also stated that at about 1.40 p.m. on that day, the Saturday, at her flat the second appellant was rung up on the telephone, and that when she asked him what the trouble was he told her that the first appellant had been "picked "up" for assault. He told her that he, the second appellant, had been passing the Grand Station Hotel when he saw the first appellant engaged in a fight with someone. He

had/.....

had joined in and exchanged blows with the other man. He told Mrs. Randall that the police then appeared on the scene and that he got the first appellant into his car and drove him to their house, dropping him at about 11.45 p.m.,before coming on to her flat.

After he had made his statement on the Sunday morning the second appellant was detained in the police cells at Jeppe and afterwards at Marshall Square until the following, Monday, morning, when an identification parade was held at the Johannesburg magistrate's court. Both the appellants were on the parade. Each of the Smiths picked out the first appellant, which was of no importance as they had admittedly been in his company in the hotel lounge on the Friday night and had, moreover, already identified him on the Saturday; they failed to point out the second appellant, each pointing out someone else, not the same person. But when the parade had broken up the complainant came after Rossouw, a detective head constable, who had conducted the parade, and Laubscher and pointed out the second appellant as one of the assailants. The second appellant admitted in his evidence that when she pointed him out he said that it was not he who had committed the offence but that she must have mistaken him for his brother.

On/.....

On the night of Monday, the day of the parade, the second appellant told Laubscher the same story about a fight outside the hotel that had been included in Mrs. Randall's statement already referred to.

It was at this time, too, that the second appellant told Laubscher that it must have been "Linden's gang" that had committed the rape. This put the police on the tracks of Linden. He was then in Klerksdorp but returned a few days later and was interviewed on the 7th December 1954 by detective sergeant Davis, who had taken over the investigations from Laubscher owing to the latter's illness. Davis stated in his evidence that before the 7th December the first appellant had been there i.e. at the had said to him that Linden Grand Station Hotel on the night in question. In his evidence the first appellant denied that he had seen Linden that night; the evidence subsequently given by Davis was, however, not put to him.

The appellants gave evidence themselves and the evidence of a number of witnesses was led by the defence to show that the appellants were elsewhere at the time that the offence was committed.

Both the appellants in their

evidence/.....

evidence described a fight as having taken place outside the hotel at about 11.30 p.m. The parties to the fight were the first appellant and Mr. Smith, the second appellant joining in later. The first appellant explained the origin of the fight; Mr. Smith, he said, made some rude remark (which the first appellant could not recall) in the lounge and after they had gone outside "to settle the argument" challenged the first appellant by saying "you got a big mouth" and striking him. Mr. Smith, it may be remarked, is a small man; he weighs 110 lbs and is five foot one inch in height. The second appellant in his evidence not only said that Linden was present at the fight but said that he told them to leave Mr. Smith alone. The second appellant also repeated what he had said to Laubscher on Monday the 29th November, to the effect that he hustled the first appellant into his car and took him away. The first appellant's evidence was that he did not remember being taken home; according to him he was in an advanced state of intoxication.

The trial court attached great importance to the question whether or not there was a fight, and clearly it was a testing feature of the case. If there was a fight the Smiths could not be believed when they said -

that they accepted a lift home in a car with the appellants. On the other hand if there was no fight the admitted association of the Smiths and the first appellant in the hotel lounge ended in the air, on the ~~first~~ appellants' version, which furnished no explanation as to how the Smiths broke away from the first appellant and betook themselves to the car of the unknown assailants. And moreover, as MURRAY J. pointed out in his judgment, if there was no fight the relations of the Smiths and the first appellant at the hotel were pleasant throughout and, "it is extremely difficult to "see why he should be present to the Smiths' minds as the "aggressor in the rape, and why any delusion should select "him for that position."

The trial court rejected the appellants' story of a fight as a fabrication. In reaching this conclusion it had, of course, to take account, generally, of the evidence of the Smiths as against that of the appellants. Of the Smiths' evidence MURRAY J. said " We "have full regard to the criticisms levelled thereat by "accuseds' counsel." The learned Judge then dealt with various grounds of criticism, some of them weighty, and proceeded, " But even with these points of criticism (and "there are others) we are convinced that both she and her

"husband/.....

"husband are giving honest evidence.....We did not under-
"stand the defence to question their honesty." Nor, it may be interpolated, was their honesty, generally speaking, impugned on appeal. Mr. Morris, who argued the case for the appellants very well, contended that the Smiths were unreliable witnesses from several points of view, that they were under the influence of liquor, that the assaults had confused them and that, having been with the first appellant shortly before they entered the car they had formed the erroneous impression, probably as a result of discussions between them, that he had taken them to the car and played a leading part in the assault. The second appellant might have been seen by them with the first appellant either at the hotel or elsewhere. In regard to the appellants MURRAY J. said that they were very unimpressive and unconvincing in the witness box. But there was furthermore the important factor that there is no mention of the fight in their statements made to Laubscher on the Sunday morning.

Counsel argued that, just as the first appellant might have denied falsely that he saw the Smiths on the Friday night because, though innocent, he did not wish to risk admitting any association with them, so both the appellants might for the same reason have sup-

pressed in the first instance the fact that there was a fight with Mr. Smith, and only brought it out later when the complainant had identified the second appellant after the parade. At that stage it might have seemed to the latter to be unavoidable that he should bring to light that he was outside the hotel when the Smiths were there, as this might account for their erroneously identifying him as one of the raptors.

A major difficulty in the way of accepting this argument is that it is inconsistent with the evidence given by the appellants. The first appellant on this as on other points contradicted himself freely. He said at first that he told Laubscher about the fight and then that he did not do so because Laubscher was obviously only interested in the rape. Then when he was asked if he knew when he made his statement whom he was charged with raping - which was of importance in testing whether his explanation as to why he did not mention the fight could be true - he at first denied such knowledge and then admitted it. So far as the second appellant's evidence is concerned - and for present purposes it is the more important - he also said in the first place that he told Laubscher about the fight (which he called the "assault")

before/.....

before and while his written statement was taken down; at that stage he understood that he was being interrogated only about the fight, not about the rape. But when he was asked why he did not protest, when his statement was read over to him, against the complete absence from it of any reference to the fight, of which he had been giving the details, he said that Laubscher told him he was not bothered about the fight. He persisted that he told Laubscher about the fight but that Laubscher said he was not concerned with the fight or assault but with the same case of rape as his brother was involved in. Laubscher in his evidence, which was accepted, denied that he was told of the fight by either appellant until after the parade, and apart from the second appellant's untruthfulness his evidence makes it practically impossible to believe that he refrained from mentioning the fight (which he says that he did mention) because he was afraid of admitting that he was in the Smiths' presence that night. Assuming that the appellants did not mention a fight on the Sunday it is difficult to escape the conclusion that this was because there had been no fight.

In support of his clients'

version/.....

version counsel referred us to a passage in the cross-examination of Mr. Smith in which, after stating that he first heard of the allegation that there had been a fight outside the hotel one night when he was having a drink in the bar, he said that Bensch had told him about it on the same day that a police officer, Captain Klindt, enquired about the fight. The record proceeds, "Already on the Saturday the "allegation was made that there was a fight outside the "hotel ? - Yes." The matter was not followed up and the date on which Captain Klindt enquired about the fight was not fixed. The matter was not referred to in the judgment of MURRAY J. who says, "The first mention to the "authorities of a fight appears to have been made by Mrs. "Randall in her statement to the police on Sunday morning "the 28th, as being what accused No. 2 had told her." Whatever the explanation of Mr. Smith's acceptance of counsels suggestion I am satisfied that on the evidence it is not possible that Captain Klindt was investigating the fight story on Saturday the 27th November.

There remains the difficulty created by the fact that Mrs. Randall on the Sunday afternoon told the police that the second appellant had told her about the fight at about quarter to two on the Saturday afternoon, that is before he made his statement to the

police. MURRAY J. refers to the evidence of Laubscher to the effect that the second appellant had, apparently on his own admission, had an opportunity of speaking to Mrs. Randall personally after his arrest on the Sunday morning and before he first told Laubscher about the fight. This evidence is somewhat vague, but there is also the fact, admitted by the second appellant, that he spoke to Mrs. Randall on the telephone from the cells at Marshall Square. Mrs. Randall places this conversation, which both of them say amounted to nothing more than his assuring her of his innocence, on Tuesday, the 30th November, but it is clear that this is not so and that it took place before the 2nd appellant told Laubscher on the Monday night about the fight. MURRAY J. says on this aspect of the matter, "What his reasons "were for telling Mrs. Randall about this fight, if he did so, "is a matter of conjecture - it may be that he was merely "trying to put to her the conduct of himself and of No.1 "in a more favourable light, and only after he ascertained "that she had told the police of a fight he came out with it "to the police." This suggestion commends itself as reasonable.

In rejecting the story of the fight MURRAY J. also referred to the entire absence of any corroboration from persons who might have been expected to have observed.....

observed any such happening. Bensch and Freudiger, defence witnesses, said they were at the hotel until closing time but neither of them was aware of any altercation between the first appellant and Mr. Smith or of any quarrel or fight at all.

Linden's evidence was to the same effect although, as I have indicated, the second appellant stated that he actually interfered on Mr. Smith's behalf. It is convenient at this stage to refer somewhat more fully to Linden's evidence generally. The trial court properly treated him as an accomplice, but it was argued on appeal that the court had not carried its caution to what was said to be the logical conclusion of rejecting his evidence in toto. It was accepted by the trial court, and there is no reason to question this finding, that Linden was a stranger to the Smiths before the 26th November. He was a friend, though not a close friend, of the second appellant and knew the first appellant. On the defence case he knew them to be innocent of the rape but nevertheless lent himself to support this very serious false charge against them, in order, it was suggested, to shield himself and others. But, assuming that he might be sufficiently evil-minded to prefer to adopt the perjured implication of innocent persons if such a course

seemed/.....

seemed to present the slightest advantage to himself as compared with simpler and more honourable alternatives that were open to him, he was obviously taking a very grave risk of associating himself with an accusation which he knew to be baseless. He would surely realise that the truth might be established, by alibi evidence or otherwise, and that he would then in all probability be charged with perjury of the very worst kind. Linden's evidence conflicts with that of the Smiths in various respects. The trial court had regard to these conflicts, to which we too were fully referred. But what is apparently of more significance is the fact that Linden did not hesitate to give definite evidence on points on which he might have been expected, if his evidence was false to his knowledge, to have been vague and non-committal. For instance, he said that he saw the Smiths come out of the hotel with the second appellant and another man, whom he called Blondie. It is common cause that the Smiths came out with the first appellant and that Linden is wrong; but it is in favour of the acceptability of his evidence that he did not hesitate to state definitely who, according to his recollection, came out with the Smiths.

The corroboration provided by Linden is of course of prime importance in regard to the

persons/.....

persons who were in the car with himself and the Smiths. The latter stated in evidence that the first appellant sat on the back seat and that the second appellant was behind the wheel, driving. Now Linden also says that the first appellant was on the back seat and that the second appellant was in front but next to the driver, who was the man he called Blondie. Incidentally, it was put to Linden in cross-examination that he had stated atb the preparatory examination, the record of which was accepted by both sides as correct, that when the Smiths and the other two men came from the hotel to the car "accused No. 2 then told me "to get out as he wanted to drive", and his reply was " No "that isn't right." He was not feeling well when his deposition was read over to him. It is not of crucial importance whether the Smiths or Linden is right as to who drove the car - possibly different persons drove it on the journeys to and from the scene of the crime, so giving rise to different recollections. The important point, however, is that Linden was prepared to state definitely that the first appellant sat at the back and the second appellant in front, therein agreeing with the Smiths, and that there is no ground for believing that, when he first committed himself to this statement, he had any knowledge

of/.....

of the Smiths' version. Some point was, legitimately, made of the fact that during an adjournment in the course of the trial Linden sat at the same table in a restaurant as the Smiths, but this was clearly a very weak foundation for the suggestion that his evidence, to which he had presumably committed himself at least at the time of the preparatory examination, had in any way been made to conform with the Smiths' version. In the circumstances of this case there is force in the familiar argument that the disparities between the accounts given by these witnesses, while inconsistent with honest differences of observation and recollection, render improbable any conscious attempt to bring the accounts into line.

The conclusion reached by the trial court that there was no fight and that the evidence of the Smiths and Linden was true must, of course, be examined in the light of the alibi evidence produced by the defence. I do not propose to deal with this evidence in detail; it was very thoroughly discussed by MURRAY J. in his judgment. Broadly speaking, the first appellant's alibi, differing materially as to times from what he had said in his statement to the police, was that when he found himself outside their

home/.....

home after, presumably, having been dropped there by the second appellant at about 11.45 p.m., after the alleged fight, he spent an hour or two partly in the street near the van Schalkwyk's house and partly inside that house. This account was supported by the evidence of several witnesses who had only been invited to cast their minds back to the events of that night very shortly before the trial, which took place about six months after the crime. The witnesses did not in general impress the trial court favourably; some faint praise was accorded to van Schalkwyk and le Grange, of whom MURRAY J. said that they gave their evidence fairly and that the court"did not form the opinion that they were "deliberately giving untrue evidence." Summing up the trial court's view of their evidence, the learned judge said "We feel that in all the circumstances there is such a "probability of suggestion and reconstruction months later "than the material events that their testimony, even if "honestly given, is insufficient to make us doubt the evi- "dence of the complainant and her husband and Linden."

Two factors were of prime importance - the date and the time. The witnesses connected the presence of the first appellant with a certain Christmas

party/.....

party. That the date of the party was the 26th November was accepted by the Crown as correct, but there still remained the question whether the witnesses were right in connecting the events. In regard to the time, the trial court was satisfied that none of the estimates of time given by any of the witnesses could be relied upon. In one or two cases the foundations for the time estimates were manifestly worthless; the court was naturally not impressed by recollections that witnesses professed to have of having examined their watches at particular times, months before they had been asked about the events of the night. Only one or two times can be fixed with any certainty and on these counsel for the Crown and for the appellants properly sought to base time-tables, which would show that the appellants could or could not have committed the crime. The trial court's very careful consideration of these matters included a full examination of the evidence of the two police witnesses, van Wyk and Geldenhuys, who were on radio patrol duty on the Friday night and were approached by the Smiths after they had been dropped near their house after the rape. It is unnecessary to say more than that there is no good ground for dissenting from the conclusion reached by the trial court thereon or from the reasons for arriving

at that conclusion.

After the argument on the appeal had been heard the Court was furnished with a written development of the appellants' alibi argument based on an alleged correspondence between the statements made by them to the police on Sunday, the 29th November, after concoction between them had, so it is contended, ceased to be possible. Paragraph 7 of the written argument reads :-

"Both statements refer to the fact that when the accused parted company No. 1 accused walked across the road to talk to some people next to the Apostolic Church. (This is the vital point)."

But there does not appear to be any such correspondence as is alleged. The first appellant's statement is silent about going home with the second appellant; in fact it is inconsistent with it, for he says that after leaving the hotel alone, he visited a friend, Venter, who invited him to a birthday party to which he did not want to go. Then, he says, he went to the Apostolic Church in Doran Street where he had some tea, after which he went home to bed. The second appellant's statement says that he took the first appellant home in his car; after he had been

dropped/.....

dropped at the house, the first appellant "walked over "the road to speak to some people Doran Street (sic.) " So far from there being in the statements the identity on which the remainder of the additional argument rests, the difference between the two statements appears to operate fairly strongly against the appellants.

The/.....

~~at that conclusion.~~

The fact that the alibi witnesses were only approached to give evidence shortly before the trial not only made it more difficult for them to give trustworthy evidence but also raised an understandable ~~question~~ suspicion in the trial court's mind as to the honesty of the appellants in propounding the evidence; this applies more particularly to the case of the first appellant. MURRAY J. pointed out in his judgment that the appellants were represented by an attorney throughout and that it would have been the natural, indeed the obvious, thing to do if the first appellant knew that he was innocent and could prove it by showing that he had been in the company of the van Schalkwyk's, "to interview the witnesses and take statements "at a time when the events and their times were fresh in "their memory."

The alibi evidence produced by the second appellant was that of Mrs. Randall; it was rejected by the trial court for several reasons, including motive and demeanour, into which it is unnecessary to enter.

A further point which chiefly affects the second appellant (though a similar argument

could/.....

could be raised upon the first appellant's written statement to the police) is his reaction to being identified by the complainant after the parade. At that time he knew that he was suspected of having taken part on the Friday night in a rape for which a car was used of which he was the driver; in view of his evidence that he was with the first appellant at closing time and had taken him home after the fight, it is difficult to see how it could have entered his mind to say to the complainant that it must have been his brother. His attempt in his evidence to explain this away as a reprisal for what his brother had said in his statement was unconvincing.

The possibility that the Smiths were mistaken in regard to the identity of the first appellant is extremely remote. It presupposes that they were both so affected by the liquor they had consumed and the ill-treatment they had received that they lost sight of the fact that although the first appellant was with them in the lounge it was not he who invited them to drive home with him and took them out to the car and, entering it, sat next to the complainant. Quite apart from the evidence of Linden the case against the first appellant, once the Smiths are

accepted/.....

accepted as honest witnesses, was a very strong one. The possibility that they might be mistaken about the second appellant is obviously much less remote, but here the evidence of Linden provides powerful corroboration. For if Linden rightly identified the first appellant as one of the raptors it becomes difficult to conceive of a plausible reason why he should at the same time falsely implicate the second appellant. He would apparently gain every possible advantage for himself and any friend whom he might hope to protect, by identifying the first appellant and stating his inability to identify anyone else.

It was not contended that the trial court had misdirected itself in any way or that there was any fallacy in the reasoning by which it reached its conclusion. The argument for the appellants was, essentially, that the trial court by attaching too much weight to factors against the appellants and too little weight to factors in their favour had wrongly held that the identification by the Smiths and Linden proved the appellants' guilt beyond reasonable doubt. It is sufficient to say that the argument wholly failed to bring me to the view that the trial court erred; the appeal is accordingly dismissed.

Fagan,J.A.,Steyn, J.A.)
Reynolds,J.A.,Brink,J.A) } Concur.

D. Scheepers

31.10.55

12455

VOLUME II.

IN THE SUPREME COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

REGINA v. 1. ROLAND GORDON SMITH;
2. ERIC REGINALD SMITH.

CHARGE : RAPE.

Certified a true copy of the Criginal
Record.

REGISTRAR, SUPREME COURT
(WITWATERSRAND LOCAL DIVISION)
JOHANNESBURG.

13th June, 1955.

On resuming at 11.30 a.m.

J U D G M E N T.

MURRAY, J.: The two accused - Roland Gordon Smith and his younger brother Eric Reginald Smith - are charged with the crime of rape, alleged to have been committed on theperson of one Frances Smith in Johannesburg on the night of Friday 26th November, 1954.

The direct evidence adduced by the Crown is that of the complainant, a married woman of 37 years of age, her husband William George Smith and one Linden - the lastnamed is considered by the Court (for reasons later given) probably to be an accomplice in the crime. Mr. and Mrs. Smith are not related to the accused.

The basic features of the story told by the complainant and her husband are the following : At about 8.30 p.m. on the night in question they visited the Grand Station Hotel at Jeppe, and proceeded to have drinks in the lounge. They were then joined by Accused No. 1 whom they had once before met on one occasion a few months previously. On No. 1 Accused's request for a drink, another round was ordered by the husband - in all the husband and wife took three drinks each, brandy and water, during their stay in the lounge. The Smith's decided to return home and No. 1 Accused offered to take them home in his car. Before their

departure/...

departure another man, du Preez, joined the party, he being apparently a friend of No. 1 Accused. Eventually- the time according to the complainant and her husband being about 9.45 - these four persons left the hotel and went to a large black car parked outside, with four other men already in it. The complainant, her husband, No. 1 Accused and du Preez entered the car, which was driven off, but in a direction opposite to that of complainant's home. The car proceeded some distance outside of Johannesburg, and past Kensington, and the complainant and her husband were severely assaulted on this outward journey. The assault started on complainant's protest that the car was being driven in the wrong direction. Eventually the car was driven off the tarmac road on which it had travelled and for a short distance along an untarred road, when it was stopped in the veld. The complainant was dragged out of the car, her husband being left inside it, and on the veld each of the six men had forceable intercourse with her, one of them having it twice. Thereafter the car was driven back to Jeppe and she and her husband were put out immediately opposite their house in Hans Street. At that moment she noticed the S.A. Police Mobile car standing on the other side of the street. She at once went across the street to the occupants of that car, told them she had been assaulted by six men in the other car, the number of which car she gave them, and told them to follow that car. Both cars disappeared. She and her husband at once i.e. after only a momentary

wait to get her a coat and another pair of shoes, seeing one shoe had been lost in the assault, proceeded on foot to Jeppe Police Station where her complaint was lodged and a statement taken later from her. It appears to be clear that this statement was written down beginning at 2.30 a.m. - this is one of the few times on which reliance can be placed. At 4.15 a.m. she was examined by the District Surgeon, who also examined her husband at 4.48 a.m. Both of them shewed signs of severe physical injury. Vaginal swabs taken shewed positive results, and her statement that she had not quite completed her menstrual period was in accordance with blood seen by the District Surgeon. She displayed signs of acute mental strain. The following morning at 12.30 p.m. when at Jeppe Police Station, she saw No. 1 Accused who had come there in consequence of a message left at his house by the investigating officer - Det. Sgt. Laubscher. She immediately called out "That's him", ran to him, struck him and collapsed in a faint. At an identification parade on the 29th November, she identified No. 1 Accused (which is scarcely surprising), wrongly identified another person and failed to identify No. 2 Accused, although after the parade she came up to Laubscher and Head Const. Rossouw who conducted the parade : No. 2 Accused was in their company, and she then identified him as one of her assailants. In evidence both she and her husband stated that No. 2 Accused was the person who drove the car in question from the Grand Station Hotel.

In the main essentials of her story she is corroborated by her husband.

It is advisable at this point, I think, to indicate here very briefly the tenor of Linden's evidence. He says that he knows both accused, No. 1 slightly, No. 2 much better owing to sporting association. He was at the hotel from about 9 p.m. and spoke to No. 2 Accused. He had several drinks and later having been offered a lift by one Blondie, went out to a big black car with certain men named Van and Johny. They sat in the car. Eventually Blondie and No. 1 Accused came out, Blondie went away and came back with No. 2 Accused, Complainant and her husband. All eight were in the car when at about 11 p.m. it drove off at high speed - disregarding the question of dropping Linden or anyone else, out along some Main Road from Johannesburg : it then turned down a sand road, and stopped. The others except Smith, all gotout and all the other occupants except himself raped the complainant. Eventually the car was driven back and complainant and her husband put out in Jeppe, not at their house but outside the Welcome Beer Hall, not far away. It is of some importance to bear in mind that Linden was a stranger to the complainant and her husband : that neither of them implicated him in the crime : and that on the evidence there is no reason to think that they had any contact at all with him up to the time when, in consequence of police investigations, he went to the police some weeks later and made his statement. According to him, it was the

individual Blondie, and not No. 2 Accused who drove the car, but No. 2 was seated next to the driver.

For a proper understanding of the case it is desirable now to record in outline the evidence for the defence. Both accused admit that they were at the Grand Station Hotel on the night in question and No. 1 admits that he drank in company with the complainant and her husband. Just before the closing time which was 11.30 p.m. an argument developed between him and Smith : the latter made some remark to which offence was taken, and No. 1 invited him outside to settle this by fight. Blows were exchanged outside the hotel, each accused admits having struck Smith. But the fight terminated and Accused No. 2 says he drove No. 1 away almost at once in his own car as the latter was under the influence of drink. No. 1 Accused professes vagueness due to intoxication, as to times and details; in essence their story is that No. 2 Accused dropped No. 1 outside their house (a few minutes drive from the hotel) at about 11.45 and he himself proceeded to spend the night with his lady friend, Mrs. Randall, at Forest Hill, where he arrived just after twelve - he has the support of her evidence of his arrival at 12.07 a.m. A number of witnesses were called to shew that the two accused were at the hotel appreciably after the time of 9.45 given by the complainant and her husband for their departure from the hotel : in addition No. 1 produced several witnesses to establish that from just after 11.30 and until about 12.45 a.m. he was in their

company not far from his house. Their evidence has to be considered in the light of such information as can be obtained in regard to the time when the complainant and her husband were dropped either at or near their home by their assailants. And in regard thereto it will be necessary to consider: Firstly, whether (from the time of her making her statement at 2.30 a.m. and certain preliminaries thereto) it is possible to fix with any degree of accuracy when they were so dropped; and secondly, whether the evidence of the mobile car officers that this was before 11.30 p.m. can be accepted.

In the opinion of the members of this Court it has been proved, in the first place, beyond any doubt that on the night in question the complainant was in fact raped in circumstances detailed by her and her husband and corroborated by Linden, the rape having occurred at some unidentified spot after they had proceeded thither in a car with six other persons, and after grevious physical injury had been done to them by their assailants. This was not challenged by the defence. Whatever criticism may be levelled at Linden's evidence (and we are fully conscious of the necessity of scrutinising it with the greatest care) and despite a number of noticeable differences between his evidence and that of the complainant and her husband, it is impossible to think that he and they are not referring to the same incident of a drive away that night from the hotel in a car to a deserted spot, a rape by a number of men, after the infliction of physical injuries which were

seen to some extent by the mobile car officers, van Wyk and Geldenhuys, on return and more fully a few hours later by Dr. Krausey the District Surgeon.

The issue is further limited by the fact that the defence has not attempted to establish in any way, nor to suggest, that complainant and her husband are dishonest in deliberately implicating the two accused as two of their six assailants. While it will be necessary to enquire whether Linden is not deliberately implicating the two accused in order to shield two other persons, possibly friends of his, the essential question is whether the Crown has shewn beyond reasonable doubt that the complainant and her husband are not possibly mistaken, although bona fide mistaken, in saying that the two accused were two of those assailants. In our opinion, whatever criticism directed at the accuracy of their testimony, complainant and her husband gave evidence honestly in firm conviction that the two accused are guilty parties. It remains therefore to be seen whether that criticism shews the possibility of their honest mistake on so fundamental a question as the identification of the 1st Accused, who (on their version) had been drinking in friendly fashion with them immediately prior to the car journey, as the person who got them into the car and accompanied them. The alibi evidence produced by the 1st Accused will have to be considered to see whether it can be accepted as casting doubt on the accuracy of such identification. In regard to Accused No. 2, of course, there is the

further question as to whether complainant and her husband cannot possibly be mistaken, in all the circumstances, in now saying he was a member of the party.

The Crown has stressed and we think rightly so, the crucial character of an initial decision as to whether, as the accused both allege, there was this fight at or outside the hotel between the accused and Mr. Smith. For, as the Crown concedes, its case would collapse if this fight were reasonably possible : in such event is it conceivable that the complainant and her husband would voluntarily have entered the car? The complainant and her husband, as indicated, deny this fight in toto. The two accused depose to it. No. 2 Accused was not present at the argument leading to the fight, but says that at 11.30 he saw the fight take place. No. 1, who pleads the influence of liquor, is vague as to what were the offensive remarks necessitating a resort to fisticuffs. Not only were the two accused very unimpressive and unconvincing in the witness box, but it is, we hold, of considerable importance that in the respective statements made by them to Det. Sgt. Laubscher on Sunday morning the 28th there is not a word of reference to any fight. The 1st Accused's statement contains at least five untruthful statements, the most important is the repeated allegation that he did not see complainant or her husband at all on the Friday night in qhestion. He also there stated that about 7.30 p.m. he went to the Grand Station Hotel where he had a drink with his friend Barney, and at about 9.30 p.m. he left the hotel alone.

This individual Barney Frendiger (not a very impressive witness) was called as a defence witness witness and said he went there after the bioscope came out at 10.30 p.m. and from 11 till about 11.15 he and No. 1 Accused drank together in the lounge, accused No. 1 then leaving. Frendiger remained there until 11.30 when he went home : he is unaware of any argument between Accused No. 1 and W.G. Smith in the lounge, and says that if there had been a fight outside the hotel entrance he must have seen it, but in fact saw nothing. The first mention to the authorities of a fight appears to have been made by Mrs. Randdall in her statement to the police on Sunday morning the 28th, as being what Accused No. 2 told her. Thereafter, after the identification parade on Monday the 29th, Accused No. 2 did mention to Laubscher this alleged fight. According to Laubscher the accused No. 2 had had the opportunity of speaking to her before this and after his arrest on Sunday morning, and in fact actually told Laubscher he had seen her. What his reasons were for telling Mrs. Randall about this fight, if he did so, is a matter of conjecture - it may be that he was merely trying to put to her
/the conduct of himself and of No. 1 in a more favourable light, and only after he ascertained that she had told the police of a fight became out with it to the police. In his statement No. 2 Accused said that at closing time (which he wrongly gives at 11 p.m.) he had his last drink and went outside - he noticed his brother, Accused No. 1, talking to Bensch (Manager of the hotel) in the lounge, and told him he was going home - then he

took/...

took him home in his car, dropping him in the street outside their house at about 11.45 p.m. After No. 2's verbal statement to Laubscher on the 29th November, the police attempted, but unsuccessfully to secure evidence of such a fight. Bensch, also a defence witness, is ignorant of any such trouble on his premises. No. 2 Accused also said at the time to Laubscher that Linden was on the scene of the fight and had made a remark about leaving Smith alone - he suggested that the guilty parties to the rape were "Linden en sy maats". Linden, as stated a Crown witness, denies any such fight. The Court is satisfied that on this point the accused are both untruthful and findsin fact that there was no fight.

The importance of this fight is obvious. If it took place,the Crown must fail. If we are certain it did not take place, then we are faced with the position that the Smith's contact with the 1st Accused were of a pleasant character, conversation and the paying for a drink enjoyed with him. In the absence of any unpleasant features, it is extremely difficult to see why he should be present to the Smith's mind as the aggressor in the rape, and why any delusion should select him for that position.

The accuracy of the identification of the accused by the complainant and her husband was attacked by the defence on a number of grounds. It was pointed out firstly that in their evidence they contradicted one another in various details, and the evidence of each

varied from what he or she said at the preparatory examination. Secondly, stress was laid on material differences between their story and that told by Linden in regard to details, not only as to the times and conditions of departure from the hotel but also as to the events in the car journey, the rape and the place and circumstances of their being dropped at or near their home. Thirdly, it was contended that the evidence of the various defence witnesses (B.J. and L.P. Swanepoel, Frendiger, L.W. and J. Coetzee and Sequera) should be accepted as at least casting doubt on the Smith's evidence that accused and the Smith's left the hotel about 9.45 p.m. and did not stay there until closing time. The importance of this point is to challenge not only the credibility of the complainant and her husband, but also in conjunction with the statement of the mobile squad policemen van Wyk and Geldenhuys that it was at 11.30 or earlier that they saw complainant and her husband, to shew the impossibility of any rape by the accused having occurred. Fourthly, it was contended that the evidence of van Wyk and Geldenhuys should be accepted, and that it cast grave doubt as to the reliability of complainant and her husband in every respect as witnesses. Fifthly, there was the alibi evidence on behalf of each accused. It rested on the basis that shortly after the fight ended at 11.30 or 11.40 p.m. 2nd accused drove first accused home and dropped him in the street about 11.45. Defence witnesses Miss Fisher, Brown, van Schalkwyk

and le Grange gave evidence of seeing No. 1 Accused and talking to him outside and inside van Schalkwyk's house from 11.30 or thereabouts until 12.45 a.m., the house being one next the Apostolic Church not far from Accused's home. No. 2 produced the evidence of his lady friend Mrs. Randall to shew he had, after dropping No. 1, gone to her flat at once and spent the night with her there.

It should be pointed out that the suggestion made by the defence - on whom admittedly no onus lay - was that even if the assault and rape had occurred substantially as alleged, the real perpetrators might well have been Linden and his friends : that in their confused and slightly intoxicated condition and the shocked state after their injuries, the Smith's were mistakenly, even if not deliberately, implicating the accused. Linden it was suggested was deliberately and falsely implicating the accused to shield two of his associates.

As to the first matter there is the question of the evidence given by the complainant and her husband in the box. We have full regard to the criticisms levelled thereat by accused's counsel. It is true that there are differences between them, and between their previous testimony at the preparatory examination. It is true that the complainant is now far more positive in her evidence against Accused No. 1 than she previously was e.g. as to who forced wine on her and who removed her bloomers : we have little doubt that she is

affected/...

affected probably unconsciously by her certainty that the 1st Accused is the person primarily responsible. It is also true that it is difficult to believe as she says that she and her husband have not discussed the case. Little attention is due to her statement that she had not been interviewed by the Crown Prosecutor - the interview just before Court was not of any moment. It is curious that at the preparatory examination she did not mention that she heard the words "Eric get a move on", but the prosecutor may not have specifically led her on this. There are passages shewing certain confusion in her evidence e.g. she said she had not seen accused No. 1 before but immediately contradicted herself by saying what is common cause, viz that they had met some months previously. Again she said that "she could not identify the other four men in the car" - but later in chief she said No. 2 was one of them. But even with these points of criticism (and there are others) we are convinced that both she and her husband are giving honest evidence, that they are not deliberately attempting to reconcile their statements with each other's or with Linden's. We did not understand the defence to question their honesty. The critical question is, can she and her husband possibly be genuinely mistaken in so paramount a question as to the accused, and particularly No. 1, being the persons who got her into the car and thereafter raped her.

There are various matters which support or corroborate them: (a) The evidence of Linden; and (b) the

inferences to be drawn from what the accused said in their statements to the police and in evidence.

Linden is, we consider, probably an accomplice, although he says he was in the car before the Accused, Blondie and the complainant and her husband entered it, and although he denies himself having actually committed rape, as the complainant says he did. Probably he knew in advance of the project, if not, it is quite possible that when the actual raping started he decided to participate. The impression left on us by him in the witness box is that he is a weakling incapable of being a leading spirit in so disgraceful an affair. His conduct (even if he did not rape) was despicable. Treating him as an accomplice, we bear in mind the principles laid down in the cases quoted by the Crown Prosecutor (Regina v. Levy 1943 A.D. 651 : Regina v. Gumedi 1949(3) S.A.L.R. 758 : Regina v. Nganana 1948(4) S.A.L.R. 405).

As stated he was a stranger to the Smiths. His existence was disclosed only at a later stage when Accused No. 2 in verbally mentioning the fight to the police officers said that Linden had been present at the scene and had said "Leave him alone". It seems there was a suggestion by No. 2 that "Linden en sy maats" might be involved in the rape. On this disclosure Linden was sought and on his return to Johannesburg first saw his attorney, Mr. Goss - he says he did so because of threats by Blondie if he disclosed anything - and then proceeded to report and give a statement to the

police. It was submitted by counsel that No. 2's disclosure of Linden is more consistent with innocence than with guilt. We find it difficult to draw any inference on this point. At any rate it is clear that neither the Smiths nor either accused had directly implicated Linden and Linden's admission to the police of the part he played (even assuming he was a mere spectator of the rape) was clearly against his own interest. If he merely wished to implicate the accused, why did he not simply tell the police he had seen the Smiths taken off by the accused and their friends, without admitting that he himself went with the party. Moreover Linden, though only casually acquainted with No. 1 had had frequent contact with No. 2, and the latter could suggest no animus on Linden's part or any motive for a false implication. There was no evidence as to who the other persons were whom (on the defence suggestion) Linden might wish to shield. It is true that Linden's account of the car journey differs in numerous respects from that of the Smiths (e.g. as to how the various persons came together to enter the car, as to who drove the car, as to whether the Smiths were physically assaulted, as to the attempted to force wine into their mouths, as to whether Smith was gagged, as to who pulled her out and raped her). But even if he is unreliable in these matters in an attempt to minimise his share in the proceedings, yet this unreliability may well be disregarded if in the outstanding essentials he corroborates them. We bear in mind the fact that he had taken a fair number of drinks. He says however he was sober, not actually tight, and

there/...

there are numerous details in which his recollection accords with that of the Smiths. It is somewhat difficult to form a definite opinion as to whether he or the Smiths are correct as to who brought the Smiths out to the car and who it was that drove the car. There are points in his favour and there are points in favour of the Smiths. In fact there are certain matters of conflict in which it may well be that the Smiths are mistaken and he correct e.g. it may well be that the time of departure from the hotel is nearer his 11 p.m. than their 9.45, and that they were dropped not at their house, but at the Welcome Beer Hall. In consequence we feel justified in holding that he can and must be accepted as corroborating the Smiths in essential matters, and that he is telling the truth thereon.

The accused were, as stated, unconvincing witnesses in regard to demeanour. Certain improbabilities should be mentioned. If the first accused was so intoxicated that he is unable to give details of time and other incidents of his argument and fight, and as to how he got home, and that No. 2 drove him off to avoid trouble with a police patrol, it is difficult to see why he should have been left in the street outside his house and not put to bed, and why he should recover sufficiently to be able to give the detail of his encounter with the later alibi witnesses. The matter is even more serious, we think, when we consider his statement to the police which I quote; prefacing this by saying we entirely accept Laubscher's statement that Accused No.1

was/...

was in his sober senses when he made it, we disbelieve accused's contrary allegations:

"Roland Gordon Smith having been warned that he "is not obliged to make any statement and that "whatever he wishes to say may be taken down in "writing and used as evidence, freely and "voluntarily without having been influenced there- "to states:- I have been warned by D/Sergt. "Laubscher of Jeppe that I am not obliged to "make any statement and allegations of rape "alleged to have been committed on Mrs. Smith "on the night of 26-27.11.1954 (explained). "I wish to make the following statement freely "and voluntarily without having been influenced "thereto and whilst I am in my sound and sober "senses:-

"I deny the allegations. I know the man and his "wife. The man is a relative of Mr. Kruger of "Crown Street, Jeppe, Johannesburg. I have seen "them years ago.

"About 5 - 6 months ago I personally met the two "of them in the Welcome Beer Hall in the lounge. "I afterwards went home with them that night, "I had a meal with them at their house then. I "afterwards left.

"Since then it was the first time for me to see "them on 27.11.54 at about 12.30 p.m. at Jeppe "C.I.D. Offices.

"I went to the Grand Station Hotel at about "7.30 p.m. on 26.11.1954 and had a drink with a "friend of mine by the name of Barney and his "wife. At about 9.30 p.m. I left the Grand "Station Hotel alone. I thereupon went to "Piet Venter who resides at Bradlan Court, "corner Bourke and Main Streets, Belgravia. "He invited me to my elder brother's girl friend's "birthday party. I did not want to go. I "thereupon went to people next to the Apostolic "Church in Doran Street, where I had some tea "and cake. After 10 or 11 p.m. on 26.11.54 "I went home, and to bed. When I came home "my brother Paul and Eric were not at home. "They are sleeping in a room next to me. "Eric, one of my brothers, has a Ford Prefect - "never came home that night. My brother "Paul came back at about 9 - 9.30 a.m. on "27.11.54.

"I never saw complainant or her husband on "Friday night. I am of the opinion that the "complainant and her husband are making a "mistake between myself and my younger brother "Eric."

Apart from its incorrectness as to the time of his contact with Barney Frendiger and its admitted falsity in disclaiming any contact at all that night with complainant and her husband three points are

emphasised. He deposed to leaving the hotel alone and paying a visit after 9.30 p.m. to Piet Venter. Venter's evidence shows undoubtedly this was before 8 p.m.; then No. 1 says thereupon he went to people next to the Apostolic Church, i.e. the Van Schalkwyk's and after 10 or 11 he went home to bed. He and No. 2 now say this was after he left the hotel with No. 2, and the defence case is that at the important time of 11.30 onwards he was with these witnesses. And finally he says the Smiths are mistaking him for No. 2 - No. 2 it will be remembered, made a statement that the Smiths were mistaking him for No. 1.

If the accused, as Laubscher says they did, knew that the rape charged was supposed to have been committed some time between 9 and 12 p.m., or 1.00 a.m. or 2.00 a.m., we find it difficult to understand why on their basis they had left the hotel together at 11.30, and never drove the Smiths away, either could have thought it possible that the other might have been guilty. There are several matters in which there is direct conflict between Laubscher and the two accused : we have no hesitation in accepting Laubscher' and finding the accused untruthful in these matters. Now it may well be that in the absence of <u>prima facie</u> acceptable evidence against an accused person the absence of reasonable explanation by him or even proof of untruthfulness on his part is insufficient to warrant a conviction. Where however as here there is such <u>prima facie</u> evidence, it seems that proved untruth-

untruthfulness in material matters may well operate to strengthen the case against him : there is authority for that in R. v. Cilliers (1937 A.D. 278).

Defendant's counsel hardly relied, if at all, on the possible correctness of the evidence of the accused themselves as casting doubt on what the Smiths and Linden said : it was the evidence of the other witnesses and of van Wyk and Geldenhuys which was pressed as being at the least reasonably possible of belief. This will be dealt with later. A point taken against the complainant and her husband was on the question of sobriety. At the Police Station complainant, according to van Tonder, was normal though her breath smelt of alcohol, and at Dr. Krausey's examination it still so smelt. Van Wyk and Geldenhuys considered her to be drunk when they saw her : the shock of the severe attack on her must account to a great extent for her dazed condition. In regard to the stage when the Smiths were at the hotel, the only evidence of indulgence in liquor on their part is their admission of having had three drinks each of brandy and water - they admit being "light-headed" but claims sobriety. They say wine had been forced upon them in the car to a greater extent in the case of the husband than of the complainant herself. We find it difficult to see that they were both so under the influence as to render possible a bona fide mistake as to the identity of their main assailant. They did not appear to us to be neurotic or imaginative in character, so as to be likely to

labour under any delusion in regard to so important a matter. Incidentally, despite Dr. Krausey's evidence that he fit before him was similar to epileptic, she denied she was an epileptic subject and there is no medical evidence that an epileptic was particularly prone to delusion of this character.

I must refer briefly to one or two minor matters : Certain scratches were found on No. 1 Accused and he gave an explanation as to how they came about, and the Assessors and myself are unable to attach any great importance to the presence of the scratches. The next matter is that the point was made that on returning the two accused were seen by various persons and there were no signs of dirt or mud on the clothing of the accused. It is difficult to draw any inference from that; it is true that that night there had been rain, but the actual rape may have taken place under the trees in the vicinity of which they were so as to avoid the ground being muddy. If so it was not inevitable that had the rape been perpetrated by the accused, mud would have been seen on their clothing. There is the noteworthy fact that the complainant's frock was produced in Court and although it is soiled at the one point that one would expect, namely where her shoulders were forced on to the ground by her assailants, the frock is nowhere else mudstained as one would expect when she was raped on a muddy surface.

Up to this point in our judgment we are minded to accept the Crown evidence implicating the accused. But there are other matters to consider. We deal now

with the defence evidence as to the time at which the 1st Accused was still at the hotel. In nearly all these questions of times the evidence on both sides is vague and contradictory. The Smiths' evidence of 9.45 p.m. is atvariance with Linden's 11 p.m. and with that of certain of the defence witnesses. Though B.J. and L.P. Swanepoel testify to seeing the 1st Accused there, their particular time is not opposed to the Smiths' 9.45. The evidence of the two Coetzees and Sequera at first sight is so opposed. We think it unnecessary to set out in detail the Crown Prosecutor's argument that the evidence of the two Coetzees, because of its tie up with the game of darts between Swanepoel and No. 2 Accused, is still reconcilable with 9.45 as the time of No. 1's departure. We consider that all the time evidence, including that of the Smiths, is vague and uncertain. None of the defence witnesses were particularly impressive, but even if they cannot be discounted on grounds of demeanour we find it difficult to attach much importance to the recollection six months after the event of the precise hours now given in evidence. Thus applies to the defence evidence, for one doubts why, even if they saw the reports of the arrest of the accused at the time, they should not have a clear recollection of hearing time signals and looking at watches so as to be able to fix times. This criticism applies in a less degree to the complainant and her husband. It may well be that they are incorrect in fixing 9.45 as the hour, and that Linden is substantially correct or nearer

the mark in fixing it at 11 p.m. For as far as we can make out there is nothing to show that even if the 1st accused was there with the Smiths at 10.30 or 11 it was not impossible for the journey to have been made and the rape committed if the parties all returned to Jeppe by 12 midnight or 12.30 a.m.

The next matter is one to which defending counsel attached considerable importance viz. the contradictions between the Smiths' evidence and that of van Wyk and Geldenhuys as to their time of meeting in Hans Street later on that evening and the circumstances thereof. Van Wyk, though a Crown witness at the preparatory examination, was called at the trial not by the Crown but by the Court at the request of the defence. Geldenhuys was also so called. The complainant and her husband are unable to say when they met these two witnesses : on the Crown case it is a matter of guess work, calculating backwards from the time of the Smiths' arrival at the Jeppe Police Station, to which (they say) they immediately walked after seeing van Wyk and Geldenhuys. Normally it was a 15 minute walk - possibly twice as long in the damaged condition of the Smiths. The time of her arrival at the Police Station is a matter of surmise and speculation though her statement was written down commencing at 2.30 a.m. It would be a lengthy process to set out the details and possible deductions from the evidence of van Tonder and others, but we think that her time of arrival

at the Police Station can be placed indefinitely somewhere between 12.30 and 1.30 a.m. - possibly slightly before 12.30 a.m.

Now if this meeting between the Smiths and van Wyk and Geldenhuys was before 11.30, as van Wyk and Geldenhuys positively state, it is clear, we think, that the Crown case is extremely difficult to accept. But van Wyk and Geldenhuys are clearly wrong on this - even on the defence version and this was admitted. We were not very favourably impressed with these two witnesses. It seems to us that they did not realise the possible seriousness of the matter, and regarded the Smiths as persons who had been involved in some drunken brawl and were practically at home again. They did not mention the occurrence to the inspecting officer van Eden when inspected by him at 11.30 - this time of inspection is definite and it is by such inspection that they now fix the time of meeting the Smiths. There are also certain minor contradictions in their evidence, e.g. how they met van Eden, whether they did not at one stage disagree as to the time of their meeting and whether there were other cars where they met the Smiths. It is also difficult to understand the necessity for their revisiting the scene after receiving the wireless message to report at Jeppe Police Station.

In considering the conflict on several matters between their story and that of the Smiths, it seems to us that very substantial allowance must be made for the bewildered and shocked condition of the latter.

It may be that they were dropped not at their house but at the nearby Welcome Beer Hall, as Linden says, or in Wolhuter Street as the police officers say. It is certainly difficult to understand why if (as she says) she alleged an assault by persons in a nearby car, whose number she gave, that the officers did not follow the car - but the explanation may well be that she did so and was not understood by them owing to defective speech, her dentures having been lost. Or it may be that as in the officers' opinion the Smiths were merely two drunkards struggling home, the remark was made but disregarded. Stress was laid by the defence on (1) her failure to allege rape, but merely assault; and (2) her failure, as one officer says, to mention that she knew any of her assailants or as the other says her positive statement that her assailants were unknown to her. As to (1) the delicacy she claimed in regard to mentioning rape to strange persons, one youthful, is significantly born out by her proved disinclination at the police station to give details of rape while a young constable was present. In any event the undisputed fact remains that she had been raped, so no point can be made of her allegation only of assault. As to the second point it seems to us significant that very shortly thereafter at the police station she did implicate the 1st Accused : the disclosure of this fact could not be avoided although it was ruled on the evidence before the Court at the time (possibly wrongly) that the mobile squad officers

were the first persons to whom she could have been expected to have complained. We are not prepared to accept the evidence of the one officer who says she said "six unknown men", and again the vital question presents itself - even if her version of what she said to these officers is incorrect, is it reasonably possible that short of deliberate dishonesty - and none is imputed to her - she can be mistaken as to the 1st Accused, whom she knew and who had admittedly been in her company immediately prior to departure from the hotel, being her main assailant?

The alibi evidence of Miss Fisher and the other three witnesses is to the effect that No. 1 was in the vicinity of and later in van Schalkwyk's house (which is very near his own home, and only a few minutes by car from the hotel) from 11.30. or just after, and until 12.45. This cannot be reconciled with the complainant and her husband having been dropped after the rape (whether at their house or at the Beer Hall) somewhere between 12 and 1 as is probable, unless of course they were taken away from the hotel about as early as they say - viz. 9.45 - and we have indicated that we have some doubt as to whether this 9.45 is correct - it was probably later. If 9.45 is correct, the party returned probably much earlier than 12 to 1, and it is difficult then to accept the complainant's story that immediately after being dropped she and her husband walked to the police station at Jeppe to report : if they did not go at once, the pertinent

question/...

question would arise as to what they did in the interim.

The first objection to the correctness, or possible correctness of this evidence, is to be found in the terms of Accused No. 1's statement, in which he purported to detail to Det. Sergt. Laubscher his movements on the night in question. If he went in to the "people next to the Apostolic Church in Doran Street" i.e. the van Schalkwyk's at once after leaving Piet Venter, then he must have arrived at the van Schalkwyk's vicinity possibly more than an hour before 11.30. For on Venter's evidence, he saw No. 1 at 8 or before. This, of course, would have made it perfectly possible for Accused No. 1 to have gone back to the hotel, even if he had spent an hour or more having tea and cake with the van Schalkwyk family, and to have thereafter driven away from the hotel with the Smiths. The accused's mind was here clearly directed, shortly after the event, to the precise times of his movements - which is not the case with Miss Fisher and the other witnesses. If he did see the van Schalkwyk's that evening it was at an appreciably earlier hour than they now depose to, and one asks how true is it that "after 10 to 11" he went home to bed.

The second criticism of this evidence is that its starting point is the 1st Accused speaking to Miss Fisher and her fiancee Brown in the street just across from the van Schalkwyk's - Van Schalkwyk and Le Grange say that they saw this and then Accused came across to them and their evidence is tied up with hers.

Miss Fisher was subpoenaed, not Brown, but the defence proposed to call him instead; he explained that she was unable to give evidence. She was hoever at Court and thedefence tendered her for cross-examination. Her evidence - putting this conversation at 11.30 because she looked at her watch after she and Brown had walked straight home from the second showing at a particular bioscope, must be rejected : there was admittedly not a second showing, the only showing came out at 10.40 at the latest and she and Brown must have reached her home well before 11, at a time when (if the accused is to be believed) he was still at the Station Hotel, drinking with the Smiths before the alleged fight. Brown was a poor witness - we reject his story of fixing a time by looking at his watch because Miss Fisher wanted to buy something at a shop. Van Schalkwyk and le Grange gave their evidence fairly and we did not form the opinion that they were deliberately giving untrue evidence. But there is so much against its accuracy that we are compelled to reject it.

Brown and Miss Fisher cannot fix this occasion as being 26th November - its date is vague, probably a Friday in November. Van Schalkwyk and Le Grange fix it by the Annual Children's Xmas Tree at the Church next door. The Crown was prepared to accept the position (mainly on van Niekerk's evidence) that it was on the 26th November that this festivity did take place, with a blow out of lights. It ended about 9.15 or 9.30, and van Schalkwyk and le Grange

say that thereafter they went home and were talking for about two hours until at about 11.30 le Grange (who was interested in Miss van Schalkwyk) proceeded to take his departure. They all accompanied him on to the stoep and then saw the accused whom they knew, but not well, talking to Miss Fisher and/or Brown outside Mrs. Fisher's house. He came across and was in a somewhat intoxicated condition - singing/and playing in a silly way with his dogs. After talking sometime over the fence, he came on to the stoep. This all took about one hour. They all remained there, hinting at times so as to get him to go away as he was an unwelcome visitor. Eventually at about 12.30 le Grange left-again there is evidence that watches were looked at when le Grange left, and it is somewhat difficult to understand why he did leave at all seeing that, according to him, he was unhappy that this undesirable person was there. The others then invited the accused inside and gave him tea and cake until he left at about 12.45; van Schalkwyk is not quite certain how he fixes this additional quarter of an hour.

Such in essence is their story. It is/a peculiar story in some respects. Why should they waste their time, when they all wanted to go to bed, watching the antics of a befuddled man and then ask him inside. The story also labours under the initial disadvantage of its association with Miss Fisher's erroneous time schedule. From what I have said it is quite clear that they tied up with her evidence. There is no special evidence other than their recollection that this all happened on the 26th November (the conceded date of

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the Xmas party): Assuming however that it did take place on that particular night, we still have to consider whether in the light of the positive evidence of the Smiths and Linden this evidence as to the particular time on the Friday is sufficiently strong to raise doubt in our minds as to the accuracy of the latter three witnesses.

As indicated, on accused No. 1's own shewing in his statement, his visit to these people must have been long before 11.30 and in ample time for him to get back to the hotel to drink with the Smiths and take them off in the car. These defence witnesses admit that it is only recently after a lapse of about five months that they have directed their minds to the events of this night in question. The accused may not possess a high order of intelligence but they were represented throughout by an attorney and no effort was made at all to interview their alibi witnesses and take statements at a time when the events and their times were fresh in their memory. Van Schalkwyk who gave evidence on the 27th May (the fourth day of the trial) said in the first instance that no one had approached him to give evidence until the attorney did so the previous week and he admitted thereafter that on the day previous to the attorney's approach, No. 1 Accused had seen him. It is not quite clear whether on this visit Accused No. 1 suggested, or merely enquired as to times : Van Schalkwyk's evidence is somewhat confused about this. Le Grange gave evidence on the 6th June, after the case had been postponed for a week - he had heardof Accused's visit to van Schalkwyk. He did not know at any time that he

was/...

was wanted as a witness. Van Schalkwyk admits that there were family discussions as to when the Xmas Treat took place - Le Grange says "we all discussed with one another, all more or less."

In the result the evidence of Miss Fisher and Brown leave no impression at all on us. In regard to Van Schalkwyk and le Grange we feel that in all the circumstances there is such probability of suggestion and reconstruction months later than the material events that their testimony, even if honestly given, is insufficient to make us doubt the evidence of complainant and her husband and Linden.

The last question is whether No. 2 Accused has been sufficiently identified as one of the assailants. On his own evidence he and No. 1 Accused were in one another's company when the left the hotel (whether, as he says, he drove No. 1 home, or not). They had been together for an appreciable time that night. We have no hesitation at all in rejecting Mrs. Randall as establishing an alibi for him. Apart from her interest in him as being his lady friend, her story as to having looked at a watch and a clock at 12.07 and 12.10 strikes a most unconvincing note. There are other features - on the following Wednesday she visited the Smiths, according to Smith she said it was at 9 or just after that she had seen Accused No. 2; and according to both Smiths she pleaded for their forgiveness to No. 2 by saying to Mrs. Smith that she had had the same experience and had forgiven. She was not an impressive witness.

If the evidence of the Smiths stood alone, it would be difficult for the Crown to contend that No. 2 had

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been sufficiently identified. For he was a stranger to them and had not been seen by them earlier that night : they had but a fleeting glimpse of him when the car drove off, and if (as Linden says) he was not the driver, the identification might be in serious doubt, particularly when at the identification parade he was not picked out at once. But there are the facts : firstly, that in somewhat better light than at the actual parade she did identify him as one of the assailants; secondly, that in addition there is the evidence of Linden as identifying the 2nd accused as one of the occupants of the car, though not the driver; and thirdly, we pay little attention to No. 2 Accused's personal evidence in denial.

As stated before, there is this feature that the two accused were in company of one another and there is no apparent reason why Linden should deliberately and falsely implicate the second accused. We have specifically rejected the second accused's story of the fight as false and we are satisfied beyond a reasonable doubt, on the evidence of the Smiths and of Linden, that the second accused was one of the party of six who raped the complainant.

Both accused are therefore found guilty of the charge of rape.

PROSECUTOR: My Lord, the accused have no previous convictions.

Court Adjourns until tomorrow.

14th June, 1955.

On resuming at 10.00 a.m.

Evidence in mitigation of sentence:

ALEXANDER COHEN, sworn, states:

EXAMINED BY MR. MORRIS: You are the employer of No. 1 Accused ? --- Yes.

How long has he been employed by you ? --- About 12 Years.

In what capacity ? --- As a wood-working machinist.

During that time have you formed any estimate of his character ? --- Yes.

What would you say about his character ? --- Ordinary.

Does he appear to you to be a normal and respectful citizen ? --- Yes.

Could you tell the Court anything about his attitude to woman from your own observations? --- As a rule during lunch hour the men always sit on the steps and discuss and crack jokes about various things such as sex, and personally I never heard him take any interest whatsoever as far as this is concerned.

You have read about the offence with which he has been charged, what was your reaction ? --- I was more astonished and surprised that he was complicated with the woman.

Did you think him to be the sort of person to suspect of this offence ? --- No.

CROSS-EXAMINATION BY MR. CLAASEN: I take it that for the 12 years you have known him he has been a good worker? --- Very.