90/525

G.P.-S.384—1952-3—10.000. U.D.J. 445.

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

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAK.

ORIE VAN HEERDEN
② DC TERBLANCHE

Appellant.

versus

THE QUEEN

Respondent.

81074

Appellant's Attorney / *Prokureur van Appellant*: [illegible] Horwitz
Respondent's Attorney / *Prokureur van Respondent*:

Appellant's Advocate / *Advokaat van Appellant*:
Respondent's Advocate / *Advokaat van Respondent*:

Set down for hearing on:— Friday, 21st Oct, 1955.
Op die rol geplaas vir verhoor op:—

(TPD. 2)

I 1,3,6,7,8

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :-

ROELOF ERASMUS VAN HEERDEN

&

DANIEL CORNELIUS TERBLANCHE Appellants

&

R E G I N A Respondent

CORAM :- Centlivres C.J., van den Heever, Steyn, de Beer et Reynolds JJ.A

Heard :- 21st October 1955. Delivered :- 3 11. 55

J U D G M E N T

CENTLIVRES C.J. :- The appellants were convicted by a Regional Court of housebreaking with intent to steal and theft in that they broke into a storeroom of the South African Railways and stole therefrom 28 ingots of tin. The conviction was based largely on the evidence of an accomplice named van Zyl as well as on the evidence of van Zyl's wife and a witness called Lensley. On appeal to the Transvaal Provincial Division the appellants applied for leave to call further evidence before that Division or alternatively for an order setting aside the conviction and sentence and remitting the case to the Regional Court for the purpose of hearing such

evidence. The reason given for the application was that Mrs. van Zyl and Lensley had made affidavits in which they stated that they had given false evidence before the Regional Court. The application was refused, leave to appeal was granted and the appeal to the Provincial Division was postponed pending the appeal to this Court.

Before dealing with the merits of the appeal I wish to refer to two points of procedure. As soon as judgment was given in the Provincial Division dismissing the application for leave to call further evidence, counsel for the appellant applied for leave to appeal to this Court. In my opinion the course that should have been adopted by the Provincial Division was to postpone the hearing of the application for leave to appeal until after judgment on the appeal. If the Provincial Division had heard the appeal and dismissed it, an application could then have been made for leave to appeal against both the order refusing leave to call further evidence and the order dismissing the appeal. If the Provincial Division had allowed the appeal, the application for leave to appeal against the order refusing leave to appeal would have fallen away. The procedure which was actually adopted in this case may lead to unnecessary expense and delay. For if this Court dismisses the appeal, the matter will have to go back

to the Provincial Division for the hearing of the appeal on the record as it stands and, if the Provincial Division dismisses the appeal there may be a further appeal to this Court, after leave granted.

The other point of procedure to which I wish to refer is that the legal advisers of appellants apparently made no attempt to avail themselves of the proviso to Rule 6(5) bis whereunder the parties may agree to lodge copies of only those parts of the record which are required for the purpose of the appeal. A bulky record of 640 pages was lodged, a very large portion of which was not relevant to the issue raised in this appeal. In the result the appellants have been put to needless expense. Practitioners should make greater use of the proviso to Rule 6(5) and(5) bis. Cf. the remarks made by de Wet C.J. in Drever & Others v Schmidt (1943 A.D. 508 at p. 513).

The Provincial Division had before it in support of the application to lead further evidence affidavits sworn to by Mrs. van Zyl and Lensley. The former stated in her affidavit that the evidence she gave at the trial was false in a number of particulars which she enumerated in detail. The reason why she gave false evidence was stated by her to be as follows:-

" Ek was bewus tydens die verhoor van die valsheid van my getuienis maar ek was verplig deur my man, naamlik Michael Johannes van Zyl om die valse getuienis te gee.

My man het gesê dat indien ek nie die valse getuienis gee soos wat hy my voorgesê het, ek in die tronk sou beland. Ek het hom geglo en omdat hy my baie geslaan het, was ek bang dat hy my verder sou mishandel, deur my te slaan en te skop, soos in die verlede.

Die rede waarom ek nou met die waarheid voor die dag kom is omdat ek later uitgevind het dat ek nie in die moeilikheid kon kom as ek die waarheid vertel het nie, en ek niemand met valsheid in die moeilikheid wil beland. "

Lensley in his affidavit also stated that his evidence was false in a number of particulars. He said that van Zyl had bribed him to give false evidence.

The Crown opposed the application for leave to call further evidence and put in affidavits made by van Zyl and detectives in the railway police. Van Zyl denied the allegations made against him by his wife and Lensley. The detectives set forth in great length in their affidavits the steps they took in order to ensure that no false evidence should be given at the trial.

The question in issue in this case is what is the test that should be applied when an application under Sec. 103 read with Sec. 98(2) of Act 32 of 1944 to call fresh

evidence on appeal is based on the fact that Crown witnesses on whose evidence the trial court has relied have made affidavits to the effect that they committed perjury when giving evidence at the trial. In Solomon v Rex (1905 T.S. 711 at pp. 713 - 714) Innes C.J. said that "it is clear that the "Court would have to be satisfied, first that the evidence" (given at the trial) "was false and second that it was upon "such false evidence that the judgment had been obtained." In the present case the second requirement mentioned by Innes C.J. is satisfied, if in fact the evidence given by Mrs. van Zyl and Lensley was false. But it cannot be said that on the papers before us it has been established that Mrs. van Zyl and Lensley gave false evidence at the trial. In Rex v Schutte (1926 T.P.D. 172) the Court in setting aside a conviction and sentence where the complainant had subsequently made a sworn declaration to the effect that certain portions of her evidence at the trial were false remitted the case to the magistrate for further evidence. Feetham J. in giving judgment said on p. 173 : "The statements made by the "complainant in this declaration, while not exonerating the "accused, may affect the view which should be taken as to the "credibility of the complainant's testimony with regard to "the commission of the offence, and also the question of the

"sentence." The test applied by Feetham J. is obviously different from that of Innes C.J. Schutte's case (supra) cannot, however, be regarded as a satisfactory authority. That was a review case in which counsel were not heard in argument, no reference is made to Solomon's case, and, moreover, it appears from the judgment that the Attorney-General did not oppose the granting of the order which the Court made. It not infrequently happens that an Attorney-General has information before him which does not appear on the record of a case tried by a court.

In Rex v Boshoff (1932 T.P.D. 284) the Court refused to order a re-trial where a witness stated on affidavit that the evidence he gave at the trial was false. The main ground for that decision appears to have been that the Court had in the circumstances no power under the Magistrate's Court Act to order a re-trial. See the judgments of de Waal J.P. and de Wet J. at pp. 287 and 288. Since those judgments were given there has been a material amendment of the Magistrate's Court Act which is now wide enough to ampower the Court to order a re-trial. De Waal J.P., after stating what appears to be the main ground of his decision said on pp. 287 and 288 :-

" If we were to make an order for a re-trial merely because a witness recants in a subsequent affidavit the evidence given by him at the trial, such a course might easily have startling results. All that need happen, were we to make such an order, is for a witness who had given evidence against an accused person, evidence on

" which a conviction followed, to be induced to recant by affidavit the evidence given by him at the trial, from which it would follow that this Court on application would have to quash the conviction and remit the case back to the magistrate for re-trial. And it would further follow that the magistrate, in such circumstances, would be almost bound to acquit at the re-trial. As I say, if this procedure now suggested were to be followed, opportunity for escape for convicted criminals would be only too easy, a state of affairs never ~~contemplated~~ even remotely contemplated by the Act of 1917."

In Rex v Mhlongo and Another (1935 A.D. 133) this Court ordered a re-trial where a police sergeant discovered after the conviction of the appellants and after he made further investigations that he was mistaken in giving evidence at the trial in regard to the existence of shrub in the yard of a kraal. That case is of no real assistance because it is clear that there was every reason to think that the fact discovered by the police sergeant on his further investigations was correct. ~~In the present case it cannot be said that it is~~ If it were clear that Mrs. van Zyl and Lensley gave perjured evidence at the trial, that case would have been in point.

In Rex v Carr (1949 (2) S.A. 693) this Court gave leave to call fresh evidence as to the inference to be drawn from certain marks on the throat of a deceased person whom the appellant had been found guilty of murdering. In that case a doctor who had given evidence for the Crown afterwards entertained doubts as to the inference which he

had drawn in giving evidence. Here again the Court had no reason to doubt the veracity of the doctor.

Coming now to English cases, Halsbury's Laws of England (3rd edit. Vol. 10 at p. 533) states in a footnote (i) that the Court of Criminal Appeal granted an application for leave to call fresh evidence on the ground of perjury at the trial. The authority given for this statement is Rex v Donovan & Hurley (2 C.A.R. 1.). According to the very brief report of that case the Lord Chief Justice said : "The case requires further investigation." The order is shown as "Leave to appeal and to call further evidence." The latter part of the order appears to have been inaccurately reproduced because it appears from p.18 that all that the Court ordered when the matter first came before it was that certain persons whom the appellants desired to be called as witnesses should be present at the hearing of the appeal. After argument was heard on appeal the Court dismissed the appeal and at the end of his judgment the Lord Chief Justice said at p. 18 :-

" Application has been made to call further evidence, but in this case it is impossible to allow an entirely different story from that presented at the trial to be set up in this Court. "

Another case referred to by Halsbury in the footnote referred to above is Rex v Wattam (36 C.A.R. 72) "untrue "evidence given by important witness at trial." In that case, however, the "important witness" had not recanted his evidence : it was sought to call a police officer to prove that the witness had made two contradictory statements to him. Here again the Court had no reason to doubt the veracity of the police officer.

So far I have dealt with cases in which a witness has recanted the evidence he gave at trial. I shall now refer to cases where the application to call fresh evidence was not made on that ground. In Rex v Sittig (1929 T.P.D. 669 at p. 678) de Waal J.P. said :-

" The power to order a re-trial will be very sparingly exercised, and only under very exceptional circumstances. It is impossible to lay down any hard and fast rule as to when the Court will or will not order a re-trial. It seems to me that the Court will order a re-trial in circumstances where, if the conviction be left undisturbed, there is a possibility, amounting almost to a probability, that a miscarriage of justice will take place. "

In Rex v Ramsay (1948 (2) S.A. 442 at p. 444) Ramsbottom J. said :-

" I think that the words used by the learned Judge-President in Rex v Sittig mean that, assuming that the

" evidence now tendered to be true, there is a probability that a miscarriage of justice will take place if it is not placed before the Court. "

If we assume that the affidavits of Mrs. van Zyl and Lensley are true then there can be no doubt that a miscarriage of justice may have taken place. The mere fact that a miscarriage of justice may have taken place is not sufficient to justify the admission of fresh evidence for, in cases where the evidence was available at the trial "there "must be some possible explanation based on allegations that "may be true why the evidence was not put before the Court." (per Greenberg J. in Rex v Foley - 1926 T.P.D. 168 at p. 171 and see Rex v Carr - supra at p. 699). I am drawing attention to this factor because the sole criterion in an application for leave to lead further evidence on appeal is not whether a miscarriage of justice may have taken place. However strongly the further evidence may indicate that there may have been a miscarriage of justice, the courts will not allow it to be lead unless the appellant satisfies the requirement laid down in the decided cases. That requirement may in the usual type of case be satisfied by showing that the further evidence only came to light after the trial. In the present case the further evidence contained in the affi-

davits made by Mrs. van Zyl and Lensley came to light after the trial but it differs from the usual type of case in that it has this peculiar feature that it is the evidence of self-confessed perjurers, who, according to themselves, deliberately gave false evidence on which the appellants were convicted. In the usual type of case the further evidence which is tendered is not the evidence of self-confessed perjurers and there is no reason why the Court should not regard that evidence as being prima facie true.

I can see no reason why the Court should accept at their face value affidavits made by persons who allege therein that they gave perjured evidence at the trial. In this connection I may refer to the case of Ladd v Marshall (1954 (3) A.E.R.745). In that case an application (was made on appeal) for (leave to call) a witness who stated on affidavit that she had given false evidence at the trial of the case because she was afraid of her husband and other members of the family. At p. 748 Denning L.J. set forth the principles to be applied in an application for a new trial when fresh evidence is sought to be introduced. The third principle he stated as follows :-

" The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible. "

Continuing the learned Lord Justice said :

" We have to apply those principles to the case where a witness comes and says : 'I told a lie but nevertheless I now want to tell the truth'. It seems to me that the fresh evidence of such a witness will not as a rule satisfy the third condition. A confessed liar cannot usually be accepted as credible. To justify the reception of the fresh evidence, some good reason must be shown why a lie was told in the first instance, and good ground given for thinking the witness will tell the truth on the second occasion. It it were proved that the witness had been bribed or coerced into telling a lie at the trial, and was now anxious to tell the truth, that would, I think, be a ground for a new trial, and it would not be necessary to resort to an action to set aside the judgment on the ground of fraud. "

Parker L.J. said on P. 752 :-

" The further evidence which it is desired to call in this case is the evidence of one of the plaintiff's witnesses, Mrs. Marshall, who, it is said, will now say that what she said at the trial was a lie and that she is now prepared to tell the truth. The circumstances in which the court on such an application will grant leave to adduce further evidence must be very rare, for the very good reason that such evidence on the face of it does not comply with the test laid down by LORD LOREBURN, L.C., in Brown v Dean (1910 A.C. 393) where he said that new evidence must at least be 'such as is presumably to be believed.' It may be that if it could be shown that the witness told a lie originally because he or she had been bribed or because he or she had been coerced, it could be said in those circumstances that her evidence was such as is presumably to be believed. "

To accept at their face value affidavits made by material witnesses ~~that~~ who allege therein that they knowingly gave false evidence at the trial would leave the door/open wide to corruption and fraud. It is not in the interests of the proper administration of justice that further evidence should be allowed on appeal or that there should be a re-trial for the purpose of hearing that further evidence, when the only further evidence is that contained in affidavits made after trial and conviction by persons who have recanted the evidence they gave at the trial. To allow such further evidence would encourage unscrupulous persons to exert by means of threats, bribery or otherwise undue pressure on witnesses to recant their evidence. In a matter such as this the Court must be extremely careful not to do anything which may lead to serious abuses in the administration of justice.

If one were to adopt the view taken by Denning L.J. in Ladd's case (supra) that there should be proof that the witnesses had been bribed or coerced into telling lies at the trial, it cannot be said that in this case there is such proof. There may be cases in which such proof is forthcoming, for instance where a witness recants his evidence that he actually saw the accused killing the deceased and there is credible evidence aliunde that that evidence was false

because the witness was at the relevant time locked up in gaol. In the present case there is no evidence aliunde to satisfy me that Mrs. van Zyl and Lensley gave false evidence at the trial. Ladd's case was a civil case and I shall assume in favour of the appellants that the strict rule laid down by Denning L.J. is not applicable to criminal cases and that all that the appellants need show is that the affidavits made by Mrs. van Zyl and Lensley are prima facie true.

Mr. Goldsmid who argued the case with great ability on behalf of the appellants contended that in this case the recanting affidavits were prima facie true on the ground that each of the deponents was warned before she or he made the affidavits that they were exposing themselves to a criminal prosecution for making two conflicting statements on oath in contravention of Sec. 131(3) of Act 31 of 1917 (now Sec. 319 of Act 56 of 1955). I do not think that this carries the matter any further, because the deponents must be presumed to have known that they were exposing themselves to a prosecution at common law for having committed perjury at the trial of the appellants. I may add that it is a matter for regret that experience in judicial matters shows that the taking of an oath before giving evidence in court or in making an affidavit is not regarded as seriously as it ought to be and that prosecutions for perjury are rare.

Mr. Goldsmit also contended that the circumstances of the case were such that they ~~lost~~ lent credence to the recanting affidavits. In connection with Lensley counsel drew the Court's attention to the evidence given by that witness at the trial when he said that on a material occasion he saw, through a lavatory window, two ~~cases~~ cars in the backyard of an hotel, one of which was van Zyl's and the other the second appellant's. In his affidavit Lensley stated :-

" Ek het deur geen privaat se venster gekyk daardie aand nie. My kamer was nommer 23 en die privaat wat ek bedoel het is net regoor my kamer. Hierdie privaat se venster wys na wes na 'n oop stuk grond. Daar is 'n ander privaat wat ook wes wys en van waar 'n mens in die werf kan sien maar ek het nie daardie privaat bedoel nie, wat ver van my kamer is. "

~~Hier~~ It is common cause that Lensley could not have seen the cars in the backyard of the hotel from the lavatory opposite room 23. He could, however, have seen the cars from the other lavatory which he refers to in his affidavit. Mr. Goldsmit contends that all this tends to show that Lensley gave false evidence at the trial. The flaw in counsel's contention is that Lensley did not say at the trial that he looked out of the window of the lavatory opposite his bedroom. Lensley was a barman at the hotel in question and must therefore be taken to have known that he could not see the backyard from the

window of the lavatory opposite his room. If Lensley had been bribed to give false evidence it is in the highest degree unlikely that when he gave evidence at the trial he should have exposed himself to being then and there proved to have been a liar by proof, which was easily available, that the backyard could not have been seen from the window of the lavatory opposite his bedroom. There is nothing inherently improbable in the evidence given by Lensley at the trial on this point, for, as the magistrate says in his reasons :-

> " He heard the cars being driven round and from what had transpired earlier must have had a shrewd suspicion that something was afoot so looked through the lavatory window to satisfy a natural curiosity. He could not see much but sufficient to establish that both accused were in the backyard. "

Having regard to the fact that van Zyl was admittedly an accomplice and is a man whose word should be accepted with the greatest caution, it may be assumed that his affidavit denying the allegations made by his wife and Lensley is not of much value. But even on that assumption it does not follow that one must hold that either Lensley's or Mrs. van Zyl's affidavit is prima facie true. If one ignores van Zyl's affidavit, the important factor remains that there is no fresh evidence aliunde to suggest that Lensley and Mrs.

[illegible] of the lavatory opposite his [illegible]. If Hensley had been called to give false evidence it is in the highest degree unlikely that [illegible] the truth [illegible] would have exposed himself to being [illegible] to have been [illegible] by proof, [illegible] readily available, that the [illegible] from the vicinity of the lavatory opposite his [illegible]. There is nothing inherently improbable in the evidence given by Hensley at the trial or [illegible] as [illegible] in his reasons :-

" He heard the [illegible] and [illegible] that [illegible] was [illegible] through the lavatory [illegible] to satisfy [illegible]. He could not see [illegible] been [illegible] in the [illegible]. "

Having regard to the fact that [illegible] an accomplice and [illegible] should be [illegible] with the greatest caution, it may be [illegible] that [illegible] difficult [illegible] denying the allegations [illegible] by this [illegible] is not [illegible]. But [illegible] Further that [illegible] was [illegible] difficult [illegible] the [illegible] was [illegible] evidence [illegible].

van Zyl gave false evidence at the trial. In saying this I do not wish in any way to suggest that their evidence as given at the trial is such that there is no reasonable doubt as to the guilt of the appellants : that is a matter which will have to be considered by the Provincial Division when it deals with the appeal on the record as it stands. For the purpose of this appeal it is sufficient to say that no evidence has been placed before the Court to lend credence to the recanting affidavits of Lesley and Mrs. van Zyl. In the case of the latter there is no evidence except her own affidavit that her husband had often beaten her.

In my opinion, therefore, the appeal should be dismissed and the case remitted to the Transvaal Provincial Division for the purpose of hearing the appeal on the record as it stands.

van den Heever JA
Steyn JA.
Ruppolas JA } concur.

man, gave false evidence at the trial. In saying this I do not wish in any way to suggest that their evidence as given at the trial is such that there is no reasonable doubt as to the guilt of the appellants: that is a matter which will have to be considered by the Provincial Division when it deals with the appeal on the record as it stands. For the purpose of this appeal it is sufficient to say that no evidence has been placed before the Court to lend credence to the recanting affidavits of Isabel and Mrs. von Apf. In the case of the latter there is no evidence except her own affidavit that her husband had never beaten her.

In my opinion, therefore, the appeal should be dismissed and the case remitted to the Transvaal Provincial Division for the purpose of hearing the appeal; [illegible]

Record

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION.)

In the matter between :

Roelof Erasmus VAN HEERDEN

and ..... Appellants,

Daniel Cornelius TERBLANCHE

AND

R E G I N A ..... Respondent.

CORAM : Centlivres, C.J., et van den Heever, Steyn, de Beer, Reynolds, JJ.A. .

HEARD ON : 21st October, 1955.

DELIVERED ON : 3rd November, 1955.

(DISSENTING) JUDGMENT : DE BEER, J.A. .

I have had the advantage of reading the judgment prepared in this matter by [redacted] the Chief Justice, and on due consideration I regret that I am constrained to differ from the conclusion arrived at by him for the reasons which follow. I however do agree that the procedure as outlined by him should have been followed.

The conviction by the Regional Magistrate was based almost entirely on the evidence given by the witnesses van Zyl, mrs van Zyl and Lensley.

van Zyl was...../....2/....

van Zyl was clearly an accomplice; he gave his evidence under an indemnity and the trial court apparently appreciated and applied the correct legal principles and safeguards when dealing with the evidence of an accomplice. Nevertheless there are certain aspects of van Zyl's evidence which I am disposed to stress. On his own showing he failed to pay over to appellants their share of the loot amounting to some £ 200; instead he utilized this in purchasing a radio for £ 59, a second-hand motor car for £ 45, in paying his hotel bill and certain outstanding debts amounting to £ 45 in all, and the balance, except for £ 26 found in possession at the time of his arrest, he squandered between Saturday-morning and Tuesday-afternoon. He also at this time purchased from one Grobler, an employee of the Post Office, certain copper wire which had been stolen from the Department and for which he also failed to pay. van Zyl admits that he also on several previous occasions purchased stolen property well knowing it to have been stolen. However, the trial court found that van Zyl "judging from his demeanour as a witness which created a favourable impression, the Court was satisfied that he was worthy of credence".

The evidence...../.....3/.....

The evidence corroborating van Zyl's testimony is supplied firstly by Mrs. van Zyl "who appeared to be a truthful witness and was not exaggerating and repeating what she had been told to say. - - - - She was an excellent witness and thoroughly honest in her testimony" : and, secondly, by Lensly who also "created a good impression as a witness. He seemed truthful and fair."

After conviction and sentence appeal was noted, but before the hearing appellant van Heerden received a report from a third party to the effect that Mrs. van Zyl had stated that the evidence given by her at the trial was false. Appellant consulted a member of the Attorney-General's staff about the matter but was informed that nothing could be done about it. Thereafter, acting on Counsel's advice, his Attorney and a Police Constable interviewed Mrs. van Zyl who admitted having given perjured evidence at the instance of van Zyl who had ~~virtually~~ forced her to give such evidence. At a later stage the Attorney and Detective Constable van der Merwe interviewed Mrs. van Zyl when her statement was reduced to writing : She was warned about the possibility of a charge of perjury being brought against her if she signed this conflicting statement under oath. She pondered over the matter and then swore to its correctness and signed it the next afternoon.

None of these facts were questioned at the hearing of the appeal.

Then, as a result of investigations conducted by appellants' Counsel, it was ascertained that Lensly could not possibly have seen through the window what he had testified to had he been referring to the lavatory opposite his bedroom. In his evidence he may well have had in mind the lavatory on the plan designated "Ladies" and situate some fifty yards away in another wing of the building. When ~~confronted~~ this was put to him he, however, stated that he was referring to the former window admitting that he had given perjured evidence and stating that van Zyl had bribed him to do so.

The application by appellants, wherein it was sought to have the case reopendd and to allow Lensly and Mrs. van Zyl to be recalled in an effort to persuade the Court that their evidence given at the trial was false, was refused by the Transvaal Provincial Division. That Court was faced with the problem whether it should follow the judgment of DE WAAL, J.P., DE WET, J., concurring, in REX v. BOSHOFF, (1932, T.P.D., 284), or the judgment of FEETHAM, J., in REX v. SCHUTTE, (1926, T.P.D., 172), in which CURLEWIS, J.P., and TINDALL, J., concurred. REX v. SCHUTTE, which was subsequently followed in a number of decisions, was not referred to in REX v. BOSHOFF. The former judgment seems more in conformity with these tests laid down in LADD v. MARSHALL, (1954(3), A.E.R., 745), namely : - .....

/....5/...

745), namely : -

(a) that the evidence could not have been obtained with reasonable diligence for use at the trial;

(b) that it would probably have an important influence on the result - though it need not be decisive; and

(c) that it must be apparently credible, though it need not be incontrovertible; -

see further SCOULIDES v. R., (1955(2), P.H., H. 170), and DELPORT v. R., (1955(2), P.H., H. 171).

Then also the attack levelled against the judgment in REX v. SCHUTTE, (supra), on the ground that the course which the Court proposed adopting was referred to the Attorney-General and that he did not oppose does not impress me. Matters are in practice often referred to the Attorney-General by the Court, and should he not oppose the proposed course this surely does not derogate from the force of the judgment: on the contrary, it adds force to that judgment.

Although I am not exactly enamoured of the more exacting tests approved in REX v. BOSHOFF, (supra), namely, that the appellants must show that there is a possibility, amounting almost to a probability, that a miscarriage of justice will ensue if the relief sought is refused, I am

for the purposes...../.....6/.....

for the purposes of this judgment prepared to apply such test. The Transvaal Provincial Division, in electing to follow REX v. BOSHOFF, stated that Mrs. van Zyl and Lensly were material witnesses, that if their evidence was false "it is a pity that it was accepted", that there exists a grave doubt as to the truth of their affidavits and, as "the evidence which has been put before us does not indicate that there is 'a possibility amounting almost to a probability' that a miscarriage of justice will take place if the conviction is left undisturbed", the application was refused.

Now, the main authority relied on by the Crown in the present appeal was SOLOMON v. REX, (1905, T.S., 711), where the headnote reads as follows : -

" Applicant, who had been convicted in a magistrate's
" court of theft, applied for a new trial or that the
" case might be remitted for further evidence, and relied
" upon an affidavit by an accomplice confessing that he
" had committed the crime and had given false evidence
" against the applicant at the trial. There was also
" an appeal on the merits.

"HELD, that even if the Court had power to order a new
" trial, the circumstances of the case did not entitle

" the applicant to such an order.

" HELD, further, that sec. 5 of Ordinance 12 of 1904

" did not empower the Court to remit the case on a

" ground outside the record. "

It appears from the judgement of INNES, C.J., that the Ordinance then in force governing appeals (No. 12 of 1904, (TVL), sec. 5) did not empower the court of appeal to remit the case to the magistrate to be reopened on grounds not appearing within the four corners of the record. With reference to the prayer asking for a new trial the learned Chief Justice pointed out that if judgment is obtained by corruption or fraud it may be possible to set it aside by way of proceedings for <u>restitutio in integrum</u> : In that ~~XXX~~ case the Court would have to be satisfied : -

" ....., first, that the evidence was false,

" and, second, that it was upon such false evidence

" that the judgment had been obtained. I am not satis-

" fied on either of these points. I am not satisfied

" that what Berkman says as to his evidence in the court

" below is correct, and that his evidence was false;

" and after reading the magistrate's reasons I am not

" at all satisfied that he came to his decision on

" Berkman's...../.....8/...

" Berkman's testimony. Therefore I do not see how
" we could possibly grant restitutio in integrum and
" allow a new trial. " - (at pages 713 to 714).

SOLOMON v. REX is, therefore, clearly distinguishable because the present Magistrates' Courts Act, (sec. 98(2)), does empower the court of appeal to grant the prayer sought. It is also common cause that the Regional Magistrate here "came to his decision" on the evidence of Mrs. van Zyl and Lensley.

Nor am I unduly perturbed by the gloomy prognostication : -

" If we were to make an order for a retrial merely
" because a witness recants in a subsequent affidavit
" the evidence given by him at the trial, such a course
" might easily have startling results. All that need
" happen, were we to make such an order, is for a wit-
" ness who had given evidence against an accused person,
" evidence on which a conviction followed, to be induced
" to recant by affidavit the evidence given by him at
" the trial, From which it would follow that this Court
" on application would have to quash the conviction
" and remit the case back to the magistrate for re-trial.

" And...../.....9/....

" And it would further follow that the magistrate, in
" such circumstances, would be almost bound to acquit
" at the re-trial. As I say, if this procedure now
" suggested were to be followed, opportunity for escape
" for convicted criminals would be only too easy, a
" state of affairs never even remotely contemplated
" by the Act of 1917. " - (per DE WAAL, J.P., in REX v. BOSHOFF, (supra), at pages 287 to 288).

The prospect that a witness may recant and thereby incur the penalties attaching to perjury by making two conflicting statements under oath is to my mind extremely remote. I know of no case where this has occurred in the Orange Free State during the last sixteen years, and the provisions of sec. 319 of Act No. 56 of 1955 will make it even more remote.

In contrast with the proposition postulated that if an order for a re-trial were made "merely" because a witness recants, we have here not "merely" a bald recantation but the manner in which the whole question arose and the manner in which it was pursued and investigated : This all adds greatly to the probability of these affidavits being the truth.

The conviction..../....10/...

The conviction ensued as a result of the evidence given at the trial : The witnesses advance as reasons for the false evidence duress and bribery.

Lensley's affidavit is to the effect that van Zyl bribed him by giving him the motor car already referred to. And as an instance that bribery did play a part it is only necessary to refer to van Zyl's evidence given at the trial and his affidavit in the motion proceedings. The following is portion of his evidence given at the trial - (volume I, at pages 196 to 198 of the record) - : -

" Het jy £ 45 vir 'n kar betaal ? .....Ja.

" Watse kar ? ..... n Austin.

" Watter model ? ..... 1934 of 1935.

" Is dit die Austin wat jy weer verkoop het aan Mnr.

" Lensly ? ..... Ja.

" Vir hoeveel ? ..... Vir dieselfde prys.

" £ 45 ? ..... Ja.

" En Mnr. Lensly het dit vir jou betaal ? ..... Ja,

" nog nie sover nie, nog nie alles nie.

" Hoeveel het hy jou betaal ? ..... Hy moet my nog

" £ 10 gee.

" Dus het hy jou £ 35 betaal. Wanneer het hy jou betaal?

" ..... Hy het my £ 10 sover gegee.

" En verder nog niks ? ..... Nee.

" Is jy seker daarvan ? ..... Ja.

" Het jy hom 'n kwitansie gegee ? ..... Nee.

" Het jy hom nie 'n kwitansie gegee vir £ 45 nie ? .....

" ..... Ek het hom nie 'n kwitansie gegee nie.

" Wat hy jou reeds betaal het is nog nie die volle ver-

" effening van die kar se geld nie ? ..... Ek het hom

" geld geskuld.

" Hy het nog nie die volle bedrag vir die kar betaal

" nie ? .....Nee.

" Het jy kontant betaal vir die kar ? ..... Ja.

" Waar het jy dit gekoop ? ..... Ek ken nie die man

" se van nie.

" Van watter besigheid ? ..... Dit was nie van 'n be-

" sigheid nie, van 'n privaat man.

" Hoe het jy van die kar te hore gekom ? ..... Ek het

" hom by die kafee in Pretoria-Noord gekry.

" Was die kar daar ? ..... Ja.

" Het julle die koop daar deurgesit ? ..... Ek het gese

" ek sal hom koop.

" Jy weet nie wie die man is nie ? ..... Nee.

" Het jy nie papiere van hom gekry nie ? ..... Ek het.

" Is daardie...../.....12/...

" Is daardie papiere in die besit van ? ..... Mnr.
" Lensley. "

His affidavit (volume III, at pages 607 to 608 of the record) reads : -

" Ek het nie 'n kar aan Lensly gegee as 'n beloning
" dat hy valse getuienis moet gee in die saak teen
" van Heerden en Terblanche nie. Ek het die kar aan
" hom verkoop vir 'n bedrag van £ 25, waarop hy nog onge-
" veer 'n bedrag van £ 7.10.0. (sewe pond tien sjielings)
" skuld. Ek het hom 'n koopbrief ~~XXX~~ vir £ 40 gegee.
" Die rede hiervoor is dat ek bang was dat my vrou sou
" raas omdat ek die kar so goedkoop verkoop het, en
" daarom het ek hom 'n koopbrief van £ 40 gegee. Die
" rede omdat ek die kar so goedkoop verkoop het was
" omdat ek platsak was en geld dringend nodig gehad het
" om van te lewe, want ek het nie gewerk nie. "

The whole transaction reeks with such grave suspicion that it lends colour to the bribery story. What further supports the argument that this allegation may ~~XX~~ reasonably be true and that appellants have established a prima facie case emerges from the following : Lensly states that he was bribed to testify that he had seen and heard

certain occurrences through the lavatory window. In his sworn statement to the Police van Zyl, in order to lend support to Lensley's evidence, stated that he saw Lensley peering through that window; and at the trial van Zyl resiled from this. Lensley recants and van Zyl refuses to confirm. This in itself must throw doubt on the whole of Lensley's evidence at the trial.

I find it difficult to understand why the appellants should in these circumstances be precluded from attempting to establish their innocence and why a more onerous burden should be placed on them than would otherwise be the case. The mere fact that Mrs. van Zyl and Lensley are self-confessed perjurers cannot be carried too far - the more so when the conviction was based on their evidence : It is a two-edged sword.

I am of opinion that the appellants have made out a prima facie case and that the appeal should be allowed.

E.M. de Beer.