140/56

G.P.-S.103675—1954-5—1,000. U.D.J. 219.

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

(Appellate Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

Commissioner for Inland Revenue Appellant,

versus

Freddies [illegible] Respondent.

Appellant's Attorney / Prokureur vir Appellant [illegible] *Respondent's Attorney / Prokureur vir Respondent* [illegible]

Appellant's Advocate / Advokaat vir Appellant [illegible] *Respondent's Advocate / Advokaat vir Respondent* [illegible] Q.C. ([illegible])

Set down for hearing on / Op die rol geplaas vir verhoor op Monday, 19th Nov., 1956.

(T.P.D.) 89.
1, 2, 5, 1
9.45 – 12.50
2.15 – 4.10 } C.A.V.

— Appeal allowed, with costs, & the order made by the trial Court is altered to read; "Application dismissed, with costs".

[illegible]
R. — 20/11/56

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

WILLIAM LEVE Appellant

and

R E G I N A Respondent

Coram: Hoexter, Steyn, Reynolds, Beyers, JJ.A. et Hall A.J.A.

Heard: 14th September, 1956. Delivered: 28-9-1956

J U D G M E N T

STEYN J.A. :- In the court below the appellant was convicted of the murder of one Alfred Sidina and sentenced to death. The evidence disclosed that on 26th February 1956 the deceased received a stab wound in the neck which partially severed the spinal cord and that he died as a result of this wound on the 3rd March. There was no eye witness to the stabbing. The prosecution rested its case upon circumstantial evidence and the defence was an alibi, the appellant stating that on the day in question he was ill and at home all day. In this he was supported by his father Paul, his sister Winnie and his wife Miriam. In rejecting the alibi put forward

by/.....

by the appellant as deliberately false, the trial judge remarked:-

"If I must give some reason for rejecting the alibi, I point to the fact that when upon arrest he was informed of the date upon which this assault had been committed, he made no statement to the police officer to the effect that he was at home all that day, sick, - a fact of which he must have been perfectly well aware at the time. Indeed in order to explain the absence of some such statement his witnesses endeavoured to persuade the Court that the date of this offence was not indicated to the accused when he was charged. This is a piece of evidence which we cannot regard as true. After he had been taken into custody and was questioned by D/Const. Kemp he still made no attempt to say that he was at home - he denied all knowledge and said he was never at Soyama Street, but he failed to state to D/Const.Kemp that he was ill in bed on that day. Such information was only given some fourteen days later - at least fourteen days later at the conclusion of the preparatory examination when he was committed for trial. "

The appellant was arrested on Friday 2nd March, the day before the ~~appellant's~~ deceased's death, on a charge of assault with intent to do grievous bodily harm. According to Jacob Dieke, who arrested him, he explained the charge to him and informed him of the date of the assault. That date fell on the previous Sunday. Dieke does not say that the appellant did not tell him

that/.....

that he had been ill and at home on that day and the appellant himself was not questioned about this. Neither his father, Paul, nor his sister Winnie was present at the arrest and both say that they first learned of the date of the assault when the preparatory examination commenced. Miriam says that she was present at the arrest, and she is the only witness who was questioned as to what the appellant said to Dieke. According to her Dieke did not mention a date but merely informed the appellant that he was arresting him for having stabbed a person, whereupon the appellant replied that he knew nothing about it. She says that the appellant did not ask Dieke when the stabbing was supposed to have taken place. The following is an extract from Dieke's evidence :-

"Did you explain the charge against him when you arrested him?.....Yes, I did, my lord.
Did you tell him when it was that he had committed this offence?.....I told him 'I am arresting you on account 'that you have stabbed the complainant'.
Did you tell him when he was supposed to have done it?... I told him.
Are you quite sure?.....I am quite sure, my lord.
Do you remember what day of the week it was that he was supposed to have stabbed the man - are you quite sure that you told the accused the day of the week?.....I did tell him, my lord. "

The rest of his evidence consists mainly of a repetition of his unswerving conviction that he informed the appellant of the date of the offence, but it is not, perhaps, altogether without significance that when he was first asked whether he did do so, his reply accorded fully with Miriam's evidence. It is not impossible that his conviction sprang from the knowledge of what he should have done and would usually do, rather than from any reliable recollection of what passed between him and the appellant. But even if he did mention the date, it would not be surprising if at the time, Miriam, who does not appear to be a very intelligent witness, was preoccupied primarily with the immediate fact of her husband's arrest for an alleged stabbing, with the result that the mention of the date escaped her, and that she should not inform Paul or Winnie of any date. I would hesitate, therefore, to ascribe any ulterior motive or deliberate falsehood to these witnesses merely because they say that they ~~first~~ ascertained the date for the first time at the preparatory examination.

The trial court, although it rejected also Miriam's evidence as to the alibi as deliberately false, appears to have accepted her

statement/.....

statement that the appellant, when he was told that he was being arrested for having stabbed the complainant, said that he knew nothing about it. There is no other evidence as to what his reactions were. The statement which she ascribes to him must mean that he was not present when the offence was committed.

According to Detective Constable Kemp, he saw the appellant on 4th March, and after he had given him the usual warning, the appellant stated that on the day in question he had not been at No. 3 Soyama Street, where the offence had been committed.

Although on both occasions the appellant, according to the evidence, indicated clearly enough that his defence was an alibi, the trial judge commented on the fact that he did not inform Dieke or Kemp that he had been ill and at home during the whole of that Sunday, and advanced this fact as one of the more substantial reasons, if not the decisive reason, for rejecting that defence. In regard to the first occasion, the following remarks by TINDALL J.A. in Rex v. Patel (1946 A.D. 903 at page 907) appear to be in point :

"Now it is true that the conduct of a person, when he "is informed that he is arrested on a specific charge

"and/.....

"and before he receives the usual caution, may be rele-
"vant; although the greatest caution must be exercised
"in considering whether such conduct should be regarded
"as evidence of a guilty mind, for the temperaments of men
"vary and it is difficult to say how an innocent or
"guilty man ought or would be likely to act in the cir-
"cumstances or whether he was too much or too little
"moved for an innocent man." In the instant case the
appellant may, for all the evidence shows, have said
nothing
no more than Miriam says he did because he was in a state
of confused amazement; and he was not asked to explain
nothing
why he said no more. In these circumstances and on the
meagre evidence before it, the trial court erred, I
think, in drawing an inference adverse to the appellant
silence
from his ~~evidence~~ at his arrest as to his precise where-
abouts on this Sunday. In regard to the second occasion
it is clear that the trial court misdirected itself. The
failure of an accused to give any explanation at all after
he has been cautioned, cannot give rise to any inference
that an alibi set up at the trial is false, and a court
is not entitled to draw any such inference. (Rex v. Mashe-
lele, 1944 A.D. 571 at pages 583 to 585; Rex v. Patch
supra). Here the trial court went a step further.

although/.....

yard at a place in line with the direction he would have taken in going to and returning from the lavatory. The knife with which he had been stabbed was still lodged in his neck and was only removed with some difficulty and after several attempts. On a report made by the deceased, Riebeek, William and Dan, either together or in succession, ran from the back to the front of the house in order to follow the assailant. They say that they saw the appellant/ the running away. There is further/evidence of Emily to the effect that while she was standing at the window of the room where her visitors had gathered, listening to a guitar being played outside, she saw the appellant run past the window, and heard him exclaim: "I have finished him."

As already indicated/ the witnesses for the prosecution are by no means unanimous as to whether the appellant was present at this gathering. Emily, who professes to know him very well, says that he was there, and so does Dina, who claims that he spoke to her and followed her to a bedroom. Also Dan says that he saw him there : "He was not in such a position where "he was out of sight - he was right in front of us." In spite of this, there are three other witnesses who

did/.....

did not notice his presence at all. Gladys, who says that she knows him by sight, did not see him there, and according to her, Dina went to the bedroom alone. Riebeek, who likewise knows him by sight, states that he did not see him at Emily's house. William, who claims to be a friend of the appellant and accustomed to seeing him, did not see him either. There has been and can be no suggestion that these witnesses are shielding the appellant. The deceased was Gladys' "boyfriend". Both Riebeek and William implicate the appellant by saying that they saw him running away from the scene of the crime. In a room which was by no means crowded, these witnesses, although all of them saw the deceased leave the room, did not see the appellant come or go or having any conversation with anybody. The effect of their evidence is that he was not there. This supports the appellant's alibi and puts in question the credibility of the witnesses who depose to his presence in Emily's house. The trial court makes no mention of this aspect of the case and does not deal with the credibility or reliability of the various witnesses. The evidence, moreover, identifying the appellant as the person who was running away from Emily's house immediately after the assault, is subject to serious criticism.

According/.....

According to Emily it was just after 6 p.m. when the appellant came to her house. The sun had not yet set but the street lights were on. She stated further that the deceased was removed to hospital in a taxi at 6.15 p.m. On both occasions, i.e. when the deceased arrived and also when he was removed, she looked at a watch. She denied that at the preparatory examination she had said that it was dusk when he arrived and that he was removed at about 6.30. p.m. In the ~~short~~ brief space of time between shortly after 6 p.m. and 6.15 p.m., the deceased must have left the room, followed ~~shortly~~ soon thereafter first by the appellant and then by Riebeek, the stabbing must have taken place, Riebeek must have returned to the room to make a report, the others must have followed him, ~~and the deceased~~ the deceased must have made a report, the knife must have been removed from the deceased's neck (which was only accomplished after several unsuccessful efforts), and he must have been taken into a passing taxi. This seems unlikely. Her evidence as to the exact times does not bear the imprint of truth and leaves room for the possibility that it may well have been dusk and that the visibility may have been none too good. In regard to her evidence as to the precise words uttered by the appellant

as/.....

as he was running past her window, it must be borne in mind that according to her evidence he was running hard, the window was closed, a guitar was being played a short distance from the window, and in the room where she was, there were persons jiving to the accompaniment of a gramophone. She did not therefore have a favourable opportunity for hearing what may be said by someone running past the window. It is true that she states that the words ~~xxxx~~ were said loudly, but that again does not commend itself as a probability. It does not seem likely that an assailant, whilst running away from his prostrate victim, presumably in order to escape detection, would at the same time, whatever he may be muttering to himself, proclaim so loudly that he has done someone to death.

The difficulties with Emily's evidence become more acute if it is related to the evidence of the other witnesses who say that they saw the appellant running away. Of these, Riebeek may be discarded as obviously and admittedly altogether untrustworthy. According to William, the deceased requested that the knife be taken out of his neck, he then asked the deceased what had happened, the deceased made a report to him and it was then only that he ran round the

house/.....

house "to see who it was". When he had covered the distance to the front of the house, he saw the appellant running about sixty yards away. The other witness, Dan, says that after he had removed the knife with some difficulty, he asked the deceased who had stabbed him, received a reply, ran into the street and saw the appellant running away at a distance of ~~5~~ fifty yards. If Emily had in fact seen the appellant run past the front window when she says she did, he must, making allowances for what transpired between that moment and the time William and Dan reached the point where they could have seen him, have been much further away than fifty or sixty yards. They saw him from behind only, running past other persons in the street, and if he was much further away than they say, as seems highly probable on Emily's evidence, and if it was dusk, as it may well have been, it may be doubted whether their identification may safely be relied upon. According to Dan the person observed by him ran through the yard in which the appellant was known to reside, which suggests that surmise may have turned an uncertain identification into an unshakable conviction. If the appellant was in fact no further away from them than fifty or sixty yards, it becomes questionable indeed whether he could have

passed/.....

passed the front of the room whilst Emily was standing at the window, and if he did not, the whole of her evidence would be more than suspect and would lend little, if any, support to the contention that the appellant had visited her house.

In these circumstances there are, I think, grave difficulties in the way of the conclusion that a reasonable court must, without the misdirection in question, inevitably have been- rejected the appellant's alibi and arrived at the same verdict. There appears to be a reasonable possibility that such a court may have entertained a real doubt as to whether or not his alibi is a true one.

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

L. Exter.

Boexter, J.A.
Reynolds, J.A.
Beyers, J.A.
Hall, A.J.A.
} Concur