146/56

G.P.-S.117539—1954-5—5,000. U.D.J 445.

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

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

[illegible]
Appellant.

versus/teen

Criminal

[illegible]
Respondent.

Appellant's Attorney [illegible] *Respondent's Attorney* A.G.
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate Mr M.P. Lewis *Respondent's Advocate* B.G. van Wyk
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on:— Friday 30th Nov., 1956.
Op die rol geplaas vir verhoor op:—

OPD
1, 2, 5, 10, 11.

30/11/56 (9.45 - 12.00)

C.A.V.

Appeal dismissed.

[signature]
11/11/56

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :

ELIAS NKOSI Appellant

and

R E G I N A Respondent

Coram: Centlivres, C.J., Schreiner, Steyn, Beyers JJ.A. et Hall A.J.A.

Heard: 30th November, 1956. Delivered: 4 – 11 – 1956

J U D G M E N T

SCHREINER J.A. :- The appellant was convicted by a regional magistrate on a charge of theft and was sentenced to three years' imprisonment with compulsory labour. His appeal to the Orange Free State Provincial Division was dismissed but he was granted leave to appeal to this Court. Leave was granted in a general form but it was clear from the judgment granting leave that the court considered that there was one legal question only on which the appellant had a reasonable prospect of succeeding on appeal. That was the only question argued before this Court. It was not specifically raised in the original notice of appeal or in an amended notice that was subsequently filed, but the Crown raised no objection on that account.

The/.....

The appellant was arrested at Harrismith in September 1955 on a charge of having stolen £116.15.-. from one Veronica Letsie at Bloemfontein two years previously. The charge sheet, on which he was tried in February 1956, alleged that he committed the theft "upon (or about) the 3rd day "of September 1953."

The question argued on behalf of the appellant related to the application to the present facts of section 177(1) of the Criminal Procedure Act (Act 5 6 of 1955). The sub-section reads :-

"If in any case the defence of the accused is that commonly called an alibi, and the court before which the trial is held considers that the accused might be prejudiced in making such defence if proof were admitted that the act or offence in question was committed on some day or time other than the day or time stated in the charge then, although the day or time proposed to be proved is within a period of three months before or after the day stated in the charge, the court shall reject such proof and thereupon the same consequences shall follow as are in the last proviso of sub-section (2) of section one hundred and seventy-six mentioned, anything in that section to the contrary notwithstanding. "

Section 176(2) provides inter alia , that proof may be given of the commission of the offence on a date up to three months before or after the date alleged in the indictment, where time is not of the essence of the

offence/.....

offence, but that if the court considers that the accused is likely to be prejudiced thereby, it shall reject the proof and the accused shall be deemed not to have pleaded. In other words the trial is put an end to and the accused may be tried again on the same or an amended or substituted charge.

In the present case the appellant's defence was an alibi, the Crown evidence being explainable on the basis of mistaken identity. The argument advanced on the appellant's behalf was that the Crown evidence went to prove that the offence was committed on some day other than the 3rd September 1953. Consequently, it was contended, the magistrate should have rejected the evidence and dealt with the appellant as if he had not pleaded to the charge.

There were five Crown witnesses who stated that the appellant was in Bloemfontein at about the beginning of September 1953. The complainant, Veronica Letsie, began her evidence by saying that during September 1953 her brother was sick at their home in a Bloemfontein location. She got into touch with a woman named Memosebetsi, a herbalist, who in turn put her into touch with the appellant. The latter visited their home and took the large sum of money which she possessed away with him in order to "doctor" it; he did not bring it back as he had promised. Veronica did not deal

further/.....

further with the date when the appellant removed the money, but in answer to the court said, "Ek het nie vir beskuldigde "voor 3/9/53 geken nie." Counsel for the Crown rightly conceded that the magistrate probably used the date in the charge when putting the question, so that the witness could not be taken to have affirmed that the offence was committed on the 3rd September 1953. It was established that she made her first statement to the police on the 15th September 1953. Mamosebetsi, who resides in the same location, confirmed the complainant's evidence to the effect that she put the appellant into touch with the complainant. At that time she said that she had known the appellant for about three weeks, during which period he was "doctoring" some other person. According to her he first came to her home in the company of the Crown witnesses Joseph and Hlalele. She produced a letter which she said was written by Hlalele and signed by the appellant in her presence. The letter purports to embody an agreement for the establishment between the appellant and Mamosebetsi of a "Herbalist Chemist "Partnership company" and it mentions as the date of the agreement the 10th August 1953. Otherwise Mamosebetsi did not fix the date beyond saying that it was about three years before the trial. Joseph, a resident in another Bloemfontein location,

stated/.....

stated in evidence that the appellant lived in his house for about three weeks from the middle of August 1953 and left on a Saturday at the end of the first week in September. The 5th September was a Saturday. Although the appellant slept in his house Joseph could not say what he did during the day. Also staying with Joseph at the time was his relative Hlalele, a detective constable, who eventually arrested the appellant in September 1955. Hlalele said in evidence that he first met the appellant at Joseph's house in August 1953. He also said that they were there together from September to October 1953. He also said that after the offence had been reported he looked for the appellant in Bloemfontein but could not find him. Although Hlalele had, as indicated above, mentioned October as the end of the period when he and the appellant were together at Joseph's house, he subsequently was positive that they met in August 1953 when he, Hlalele, was moved to Bloemfontein, but was not prepared to be certain that the appellant was in Bloemfontein in September 1953. His evidence was clearly unreliable in regard to dates. The Crown witness on whose evidence much stress was laid by counsel for the appellant was Maria, the grandmother of the complainant, who lived with her. She described the appellant's taking the money much

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as the complainant had done, and stated that before leaving he said "julle moet weet ek gaan die geld Woensdag terugbring." She proceeded "Dit was 'n Dinsdag gewees wat hy dit gesê het." The 3rd September 1953 having been a Thursday, the Tuesday of which Maria spoke might have been the 1st, or of course any other Tuesday before the complaint was laid.

The appellant gave evidence in his defence and said that until after his arrest he had never during his whole life been in Bloemfontein. He produced two receipts dated the 4th and 5th September 1953 purporting to relate respectively to the purchase price and the licence fee in respect of a car which the appellant said that he personally bought in Johannesburg on the earlier of those dates. The magistrate dealt with these documents and held that, even if they were treated as evidence corroborating that of the appellant that he was in Johannesburg on the 4th and 5th September, they did not suffice to cast a reasonable doubt upon the evidence of the Crown witnesses. The Magistrate accordingly found that the appellant was in Bloemfontein on the 3rd September 1953 and that he stole the complainant's money.

The question argued on appeal was

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not that the magistrate had erred on the merits. The contention was that there was no evidence that the theft took place on the 3rd September 1953 and that there was the evidence of Maria that it took place on the 1st September 1953 or on some other Tuesday. Accordingly, it was contended, section 177(1) should have been applied by the magistrate, despite the fact that the point was not mentioned at the trial and was indeed, it seems, raised by the Provincial Division mero motu on the application for leave to appeal. We were referred to the case of Rex v. Jooste (1928 A.D. 369), which was decided on section 152(1) of Act 31 of 1917, a provision substantially identical with section 177(1) of the present Act. In that case counsel for the accused had at the close of the Crown case asked the trial judge to withdraw the case from the jury because the accused was charged with murdering the deceased "on or about "the 26th September 1927" while the evidence went to show that the murder was committed on the following day, the 27th. No objection was taken to the evidence when it was led. The trial judge refused to withdraw the case but after conviction made a special entry to decide whether his refusal was irregular and not according to law.

This Court held that there had

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preparatiry examination showed that the accused had reason to know that both dates were involved. In the present case there was no preparatory examination. Nor is it clear that, by itself, the introduction of the words "on or about" would be sufficient to put an accused person on his guard, so as to exclude the operation of section 177(1). Since section 176 allows a latitude of three months on each side of the named date it seems natural to refer the words "or about" to the periods of three months and not to provide, in effect, an uncertain extension of those periods by calculating them from a day or two or a few days before and after the named date.

When de VILLIERS J.A. referred to the procedure laid down in the section the learned judge was no doubt proceeding on the view that, because the trial court was obliged in certain circumstances to exclude evidence and stop the trial, the accused or his legal representative should take objection to any evidence pointing to the offence having been committed on a date other than that stated in the charge. The sub-section does not in terms lay down any procedure to be followed but no doubt if counsel has in mind to rely upon section 177(1) his proper course is to raise it by objecting to the evidence. If no objection is taken to the

evidence/.....

evidence and the trial court, possibly because in the absence of objection it does not occur to it that the accused might be prejudiced in his defence, does not in fact consider that there might be such prejudice, it is obviously difficult for a court of appeal to hold that the provisions of ~~xxx~~ the sub-section have not been observed. For the condition, on the fulfilment of which the sub-section requires action, is that the trial court considers that there might be prejudice, and that condition has not been fulfilled. It may have been considerations of that kind which led de VILLIERS J.A. to speak of the discretion of the trial court. But, however that may be, a court of appeal must/be satisfied, before it can allow an appeal on this ground, that it was wrong of the trial court, even in the absence of objection, not to appreciate that there might be prejudice. How difficult it will generally be for a court of appeal to be so satisfied is well illustrated by the present case. The appellant was legally represented and for all the magistrate could know the defence of alibi ~~was~~ not based upon evidence relating to the 3rd September 1953 only but ~~was~~ on broader lines covering a period of weeks or months or even longer. The defence might for instance have been relying on evidence that throughout the period August, September and October, or even throughout the

year/.....

year 1953, the appellant was in regular employment in Durban and never left that city . The only Crown evidence that positively points away from the 3rd September is the short passage in the evidence of Maria which I have mentioned. When she gave her evidence the complainant, Hlalele and Mamosebetsi had already given evidence which did not fix precisely the date of the offence but was to the effect that the appellant was in Bloemfontein during a period of weeks, including the 3rd September. There had been no indication that the appellant's alibi was directed to the 3rd September only as contrasted with other days near to it. Indeed the two receipts, which were directed towards showing that the appellant was in Johannesburg on the 4th and 5th September and which were put to Hlalele in cross-examination, themselves show that ~~at least~~ the alibi was not being limited to the 3rd September alone.

It does not follow from section 177(1) that when an accused person, who is being defended, indicates that his defence is an alibi the trial court must assume that it may be important to that defence that no evidence of the commission of the ~~offence~~ offence on a date other than the date mentioned in the charge should be given, and must, despite the absence of objection, rule out the evidence and ~~cut short~~ stop the trial. No doubt where the accused is

undefended/.....

undefended the court will be properly watchful lest the possibility of prejudice to an alibi defence might arise through the evidence not coinciding with the charge in regard to dates. But in the circumstances of this case I am very far indeed from being satisfied that the trial court was wrong in not acting mero motu under section 177(1).

For these reasons the appeal is dismissed.

O.D. Schreiner

Centlivres, C.J.
Steyn, J.A.
Beyers, J.A.
Hall, A.J.A. } Concur

been no irregularity. In stating the Court's reasons de VILLIERS J.A. said, at page 371, "Mr. Roper on behalf of the "appellant relied on section 152(1) of the above Act, contending "that the appellant must inevitably be prejudiced in his de- "fence under the circumstances detailed above. But in the "first place it must be pointed out that no attempt was made "by counsel for the accused to follow the procedure laid down "in that section. No objection was taken to the evidence "when given, or at any time, and the Court was not asked to "reject the proof tendered. At the same time that is not nec- "essarily fatal. For if at any time it comes to the notice "of the Court that the defence is an alibi it would be the "duty of the Court mero motu to reject evidence that the "offence was committed on a day other than that stated in the "indictment if the Court is of the opinion that such evidence "might prejudice the accused in his defence. But whether or "no such prejudice might result is a matter entirely within "the discretion of the Court, which decides the matter upon "all the circumstances of the case." The learned judge went on to say that there was no possibility of prejudice in that case because the charge was laid "on or about" the 26th September 1927, and because the circumstances disclosed in the

preparatory/.....