G.P.-S.117539—1954-5—5,000.

305/56
U.D.J. 445.

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

(Appellate DIVISION).
AFDELING).

(High Court)

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

Jacobus J Pienaar
Appellant.

versus/teen

Die Staat
Respondent.

Appellant's Attorney Prokureur van Appellant: Heyneke
Respondent's Attorney Prokureur van Respondent:

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

(Court Roll)
Set down for hearing on: Friday, 3rd May, 1957.
Op die rol geplaas vir verhoor op:

2.4.6.9.12

(B)

Appeal

IN THE SUPREME COURT OF SOUTH AFRICA.
(APPELLATE DIVISION)

In the matter between:-

J.J. PIETERSE ..... Appellant.

and

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

CORAM: Schreiner, Steyn, Reynolds, Beyers, JJ.A. et Van Blerk, A.J.A.

Heard: 3rd. May,1957. Delivered: 24-5-1957

J U D G M E N T.

REYNOLDS, J.A.:-

As there is a difference of opinion ~~before~~ amongst the members of this Court in this matter, I propose to set forth my reasons for coming to the conclusion that the appeal should succeed. It is not necessary, again, to set out most of the facts dealt with in the other judgments. In this judgment I shall allude to the accomplice, Ella Ndhlovu, as the complainant.

It is necessary to point out that, in this case, the appeal is ventured on a very narrow ground. In the Notice of Appeal against the decision of the Magistrate, the sole ground to be considered is thus expressed:-

> " The accused was convicted on the single
> " evidence of an accomplice, without proof
> " at all of the actual commission of the
> " offence, and thus the provisions of
> " Section 257 of Act 56 of 1955 were not
> " complied with."

/Clearly, .../2.

Clearly, this Notice of Appeal does not attack the decision of the Magistrate on the merits of the whole case, or bring on appeal the question whether the complainant was a satisfactory or truthful witness. It assumes that she was such a witness, but denies that her evidence is confirmed in the way required by law. It is admitted by the Crown that there was no proof aliunde of her evidence of the actual commission of the crime. But that is not fatal to the conviction if there is such evidence aliunde confirming her evidence in some material respect. As Solomon, A.C.J., said in Rex versus Lakatula and Others, 1919 A.D. page 365:-

> " All that was required was that the evi-
> " dence of the accomplice should be
> " corroborated in some material respect.
> " And in my opinion that is all that is
> " necessary in order that the jury may be
> " satisfied that the accomplice is a
> " reliable witness upon whose evidence
> " they may safely act. If his evidence
> " is corroborated in one or more material
> " respects by other competent testimony
> " then the conviction would not be based
> " on the single evidence of the accomplice,
> " and the jury accordingly is entitled to
> " convict."

In Rex versus Galperowitz, 1941 A.D. page 485, TINDALL, J.A. put it that the corroborating evidence "must show or tend to show that the accomplice is a reliable witness". See also Rex versus Thielke, 1918 A.D. page 737.

/When...../3.

When this Notice of Appeal was served on the Magistrate, he was quite correct in apparently taking it that the truthfulness of the complainant was not put in issue, and that the only questions he had to deal with were (1) his findings of fact on the alleged evidence constituting confirmation, in some material respect, of the evidence of complainant and existing outside her evidence and (2), the question whether this evidence was sufficient in law. He did deal with this Notice on that basis and made certain findings of fact on some of the evidence alleged to confirm the evidence of the complainant. On some of the evidence alleged to confirm her evidence, he made no findings at all and this is an all important fact in this case.

Now, when oral evidence is led to confirm the evidence of an accomplice, that does not mean that a Magistrate must accept, or reject, this oral evidence <u>in toto</u>. He may accept a portion of it and reject some other portion, and it cannot be said that the portion he rejects as not establishing certain facts can be relied upon as confirmatory evidence. Or he may accept one portion of the evidence and make no finding on another, since he feels he cannot make a finding on the other portion at all, and in that event, he can scarcely rely upon

/that...../4.

that portion of the evidence upon which he is not prepared to make a finding. This rule is most important in this case.

The Magistrate had before him confirmatory evidence of two classes: The first was evidence really common to both Crown and defence, the other was evidence led by the Crown and clearly put in issue by the defence. The first kind of evidence was that of native assistants who had been picking peas for appellant, and who aver that complainant is quite correct in saying that she assisted them, that appellant sent her into the open house to make coffee; that, thereafter, he went into the house from which his wife was absent. Though the staleness of the charge must handicap the appellant, he admits that complainant did assist in picking peas; that she had been in his employ before and that he probably did send her into the house to make coffee and followed her later, apparently, to have the coffee. That is all the admitted evidence amounted to.

The contested evidence was, firstly, whether the child of complainant was of mixed European and Native parentage. I need not detail the evidence of the Doctor and others in this respect and it suffices to say that that evidence, at least, raises the possibility that the father of the child was a Coloured, or an Indian. The child was produced, but the Magistrate made no note of any impression or view he had formed. Secondly,

/the...../5.

the other contested evidence was that of the age of the child. The complainant gave its date of birth but, naturally, she could not corroborate herself and that must, therefore, be ignored in this part of the case. But the other evidence was highly inconclusive, and from it the child might be anything from one to five years of age. But if it was four or five years old, or if, at the date of the trial in October,1956, it was one or two years old it could not be the result of intercourse in January,1953 - for that is the date of the alleged crime. Again, the Magistrate made no finding as to his view of the child's age, though the child was produced.

With these two kinds of evidence before him, i.e. the uncontested evidence and the evidence put in issue, the Magistrate made certain definite findings, showing expressly, that he accepted and relied on the uncontested evidence. He simply made no finding on the contested evidence. His reasons have already been set out in full in the judgment of VAN BLERK, A.J.A.

It is significant that he made only the findings based on the admitted evidence and refrained from making any findings of fact on the evidence put in issue and it is even more significant that he did this when Rule 63(3)(i) and (ii) of the Magistrate's Court Act requires him to state in writing when an appeal is noted: "(i) the facts he found to be proved, and

/(ii) the...../6.

(ii) the grounds on which he arrived at any finding of fact specified in the notice of appeal as appealed against". It looks as if he was not prepared to make any findings on the contested facts. At any rate, in this case, it cannot be otherwise than a matter of speculation what he intended to find on the facts put in issue, especially as he refrained from making any observations as to his impression of the appearance or race of the child, or its apparent age. Nor do I think that this Court can safely make any findings additional to those findings of fact made by the Magistrate on this evidence in issue. For all this Court knows, the Magistrate may have refrained from making those findings because he thought he could not, with safety, do so, and so he relied only on the uncontested evidence. The position is that there was this evidence, apart from and outside the evidence of complainant, and it was on this evidence that he made no findings at all. This Court cannot do so, in this case, for it does not know what the impression made by the child on the Magistrate was, and what he would have found on this evidence alone.

It really comes down to this that the only evidence, other than that of the complainant, was the evidence given by the people picking peas, namely, that complainant assisted them, was told by appellant to go into an open house during the absence of appellant's wife, and that appellant then went into the house

/after...../7.

after he had ordered the fire to be made and coffee prepared. The Court does not even know how long appellant was in the house at the same time as complainant, for the record is silent on that part. Had the appellant denied all this, the position might have been different, but he admits it as being probable. I am far from saying that the mere fact that an accused even admits certain facts, or facts averred by witnesses other than a complainant, makes it impossible in law to regard these facts as a confirmation of the evidence of a complainant who is an accomplice. The admitted facts may show conduct of an accused of an unusual nature pointing to something wrong on his part. Thus, when the complainant, in a charge like the one made in this case, says the appellant got her to go into a room alone with him and then locked the door and that locking is proved by other witnesses, he would be doing something most unusual and something that might be indicative of some wrong-doing, even if he admitted locking the door and being alone with the complainant. But there is simply nothing unusual in a farmer - as appellant is -in telling complainant, who had previously been in his service, to go into an open house to make a fire and coffee and then following after her to enjoy the coffee, especially when he has told her to do so in the presence of others. The Court does not even know the length of time the two persons were together

/in...../8

in the house, for the witnesses, other than complainant, do not give that time. It simply comes to this, that appellant really does not deny what complainant says about his doing something in no way unusual or suspicious, but denies what she says about his doing something criminal. I cannot see that witnesses, confirming her statement that appellant did something quite usual and not denied by him, can constitute any material confirmation of her evidence that appellant committed a criminal act with her and which he denies. At most, it would make mere opportunity coming by a usual act, completely innocent in itself, confirm the evidence of the complainant as to the commission of a crime. I think that is going too far.

Nor do I think that the case should be remitted to the Magistrate to make findings on evidence heard so long ago when, at the time, he refrained from making these findings despite the clear language of the Notice of Appeal and the requirements of Rule 63. Doing so, would in this case at least, leave the Magistrate in an invidious position and the accuracy of his memory might be challenged, apart from any other objections to such a remittal.

Accordingly, I think, the appeal should be allowed.

Yes Keyes

Oorspronklik

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA.
(APPÈLAFDELING)

In die geding tussen:

J.J. PIETERSE ..... Appellant

teen

DIE STAAT. ..... Respondent.

Voor: Schreiner, Steyn, Reynolds, Beyers, RR.A. en Van Blerk, W.R.A.

Verhoor op: 3 Mei 1957. Gelewer op: 24/5/57.

U I T S P R A A K .

VAN BLERK, W.R.A.:

Appellant, 'n blanke boer van die plaas Middelpunt, distrik Belfast, het op 19 Oktober 1956 in die landdroshof te Belfast tereggestaan op 'n aanklag van oortreding van die Ontugwet, 1927. In die klagstaat word aangevoer dat hy byna vier jaar gelede, naamlik, gedurende Januarie 1953, op die plaas Middelpunt ontug gepleeg het met 'n naturellevrou, Ella Ndhlovu.

Hy is skuldig bevind en 'n opgeskorte vonnis van vier maande gevangenisstraf met dwangarbeid is hom opgelê.

Ter ondersteuning van die aanklag het die naturellevrou Ella Ndhlovu getuig dat sy 'n week na nuwejaarsdag 1953 by die woonhuis van appellant op die plaas Middelpunt aangekom het waar sy naturelle-diensvolk besig was om die land ertjies te pluk, so

veertig/.....

veertig treë van die woonhuis af. Sy was op pad na haar stiefvader se stat en moes by appellant se huis verby loop. Laasgenoemde, aan wie sy bekend was (sy het vroeër by hom gewerk) het haar teë versoek om sy bediendes te help om ertjies te pluk. Sy het daartoe ingewillig en gehelp. 'n Ruk later terwyl die ertjieplukkery nog aan die gang was, het sy op versoek van appellant, wie se vrou nie tuis was nie, na die woonhuis gegaan om vir hom koffie te maak. Sy verklaar verder dat terwyl sy daar alleen in die huis was, besig om koffie te maak, het appellant ook in die huis gekom en haar versoek om met hom geslagsverkeer te hê. Sy het ingewillig waarop appellant haar beken en bevrug het met die gevolg dat sy ongeveer nege maande later op 27 September geboorte gegee het aan 'n vroulike kind, wat, soos sy sê, wit, lig van kleur is, en steil hare het terwyl haar enigste ander kind, haar oudste kind, swart is en die hare van 'n naturel het. Haar man verklaar ook dat die jongste kind ligter van kleur is en steil hare het. Met betrekking tot die voorkoms van die kind en die vaderskap daarvan het die distriksgeneesheer ook vir die Staat getuienis afgelê waarna later verwys word.

Volgens die vrou het die daad plaasgevind in 'n slaapkamer waarvan die deur oop was, en van die deur af kan gesien word op die ertjieland waar die naturelle nog besig was om ertjies te pluk.

Drie van die ertjieplukkers het ook vir die Staat getuie-

nis afgelê. Hul getuig ook dat die naturellevrou, Ella Ndhlovu, op versoek van appellant in die woonhuis gegaan het om koffie of tee te maak en dat appellant haar later na die huis gevolg het. Een van hul sê ook dat appellant en die naturellevrou toe alleen in die huis was terwyl die een slegs sê dat appellant se vrou by dié geleentheid nie tuis was nie.

Appellant, alhoewel hy toegee dat hy moontlik die naturellevrou instruksies kon gegee het om te gaan koffie maak in sy huis, ontken dat hy hom aan die daad besondig het.

Teen die skuldigbevinding is na die Transvaalse Provinsiale Afdeling van die Hooggeregshof geappelleer sonder sukses, op grond dat die appellant in stryd met die bepalinge van Artikel 257 van die Strafproseswet 1955, op die enkele en onbekragtigde getuienis van n mededader, naamlik dié van die naturellevrou, skuldig bevind is; met ander woorde, sonder dat haar getuienis in n wesenlike opsig gestaaf is. (R. v. Thielke, 1918 A.D. op bl. 377).

Appellant kom nou in hoër beroep op dieselfde grond van appél wat, soos dit geformuleer is, die ondersoek beperk tot die vraag of daar ~~enige~~ sodanige bekragtigende getuienis is as wat artikel 257 vereis.

Dusdanige getuienis, alhoewel dit nie die appellant direk in die misdaad hoef te betrek nie, moet minstens daarop dui dat die mededader n betroubare getuie is. Kyk R. v. SA1/...

Kyk R. v. Galperowitz 1941 A.D. op bl. 492. Die Magistraat het ingevolge reël 63(3)(i) van die Magistraatshowe Wet, n skriftelike verklaring verstrek waarin die volgende feite wat hy as bewese bevind het, aangegee word, naamlik:

> " (a) beskuldigde het Ella Ndhlovu op die betrok
> " ke dag van die oortreding van die ertjieland
> " af huistoe gestuur om koffie of tee te gaan
> " maak.
> " (b) beskuldigde het later ook van die ertjie-
> " land af weggegaan huistoe - plus minus 40 tree
> " van die land af.
> " (c) Mev. Pieterse was op die betrokke dag nie
> " tuis gewees nie; "

en sy redes vir die beslissing aangaande die feite waarteen, blykens aangifte in die appellant se verklaring geappelleer word, ~~soos reël 63(3)(ii) voorskryf hy moet doen~~, lui soos volg:

> " Die Kroon getuies bevestig of korroboreer
> " mekaar oor en weer in hul getuienis dat boge-
> " noemde toedrag juis was soos op die betrokke
> " dag afgespeel. "

Die feit dat appellant die naturellevrou, n gewese huisbediende, na die huis gestuur het om te gaan koffie maak en later self na die huis gegaan het terwyl sy vrou nie tuis was nie, met die gevolg dat hulle twee alleen saam was in die huis, word nie betwis nie en is iets wat sy eweknie vind in alledaagse verskynsels in ons land waar dit gebruiklik is dat naturellevrouens deur blankes as huisbediendes in diens geneem word. Die feit dat hul onder hierdie omstandigheede alleen in die huis was, is dus in sigself en alleenstaande van geen betekenis ten aansien van die betrouhaarheid van die natu-

rellevrou omtrent die gebeure in die huis nie. Al word hierdie feit deur ander bevestig, het dit vanweë die kleurloosheid daarvan geen krag as stawende getuienis nie. Dit bevestig klaagster se getuienis in geen wesenlike opsig nie. Dergelike stawing sou weliswaar aantoon dat die klaagster nie haar hele verhaal versin het nie, maar ek kan nie daarin alleen voldoening aan die vereistes van artikel 257 vind nie. Die ruimste bevestiging van onbetwiste onwesenlike besonderhede is nie voldoende nie.

Mnr. Schreiber, namens die Staat, het egter betoog dat in aanmerking geneem moet word die getuienis wat vir die Staat aangevoer is om te bewys dat n kind met ~~dieselfde~~ blanke bloed op n tydstip gebore is wat konsepsie op die datum waarvan die natuurellevrou getuig, moontlik maak, en dat dit beskou moet word as stawende getuienis.

Ek sal aanneem dat as n sodanige kind op so n tydstip gebore is, so n feit in n geval soos hierdie die getuienis van die vrou, die mededader, sou staaf in n wesenlike opsig. Maar die Magistraat wat ook self die kind gesien het (beide kinders is in die hof vertoon), het ~~egter~~ nie op die notule n aantekening gemaak nie oor wat sy indruk was van die voorkoms van die kind en het ook nie n skatting gemaak nie van die ouderdom van die kind; ook het hy nie in sy skriftelike verklaring ingevolge reël 63 as n bewese feit aangegee nie dat n kind met blanke bloed

gebore /.....

gebore was op n tydstip wat strook met die naturellevrou se getuienis oor die datum van konsepsie, ten spyte daarvan dat sy aandag deur die kennisgewing van appél pertinent gevestig was op die punt dat stawende getuienis sou ontbreek; en, soos ek later sal aantoon, daar kwalik twyfel by hom kon bestaan het dat die getuienis aangaande die voorkoms van die kind, gepaard met die vertoning van die kind voorgelê is juis met die oogmerk om bekragtigende bewys te verskaf.

Aangesien Mnr. Schreiber versoek het dat, ten spyte van die ontbreking van n uitdruklike bevinding op die punt, hierdie hof moet aanneem dat in elk geval sodanige feit bewys is en sal die getuienis in oënskou geneem word.

In hierdie verband moet ek dadelik sê dat vanweë die onbevredigende aard van die getuienis op die betrokke punt dit gevaarlik sou wees om van die veronderstelling uit te gaan dat die Magistraat self so n feit as bewese moes bevind het. In teendeel is dit verstaanbaar dat hy op die getuienis wat hier kortliks uiteengesit word tot die konklusie kon geraak het dat so n bevinding nie geregverdig is nie. Die distriksgeneesheer verklaar dat die oudste kind regte peperkorrelhare het, baie donker van kleur is en definitief die kind van naturelle-ouers is, terwyl die jongste kind, wat weer steil hare het en ligter van kleur is, trekke het wat daarop dui dat sy blanke bloed in

haar/...

haar
are het, maar dan weer sê die geneesheer onder kruisverhoor:

„ ek kan nie definitief sê dat daar blanke bloed
„ in die kind (menende die jongste kind) se are
„ is nie. Daar bestaan ook die moontlikheid dat
„ daar bloed van n nie-blanke in die kind se are
„ mag wees. Ek kan die moontlikheid nie uitskakel
„ nie dat die twee kinders dieselfde ouers het. Die
„ vader van die jongste kind kan selfs n kleurling
„ of Indiër wees. "Die geneesheer se getuienis is,
soos reeds opgewys,
klaarblyklik deur die vervolger voorgelê as stawende getuienis.

Daarbenewens is die kind in die hof vertoon. Uit die aantekeninge op die prosesstukke blyk dat die vervolger , toe hy ~~doe~~ die hof toegespreek het, ingegaan het op die vraag wanneer die getuienis van n medepligtige aangeneem kan word. Dit is heel onwaarskynlik dat hy nie op die getuienis wat hyself insake die voorkoms van die kind voorgelê het, sou gesteun het nie; en dit is by gevolg nouliks denkbaar dat die Magistraat nie bewus was van die beweerde stawende strekking van dié getuienis nie. Ten spyte daarvan het hy, toe sy aandag deur die kennisgewing van appél pertinent op die beweerde afwesigheid van stawende getuienis gevestig is, geen melding van hierdie getuienis gemaak nie en geen bevinding daaromtrent geboekstaaf nie. Dit laat t vermoed dat hy hom nie in staat gevind het om n stawende bevinding te maak nie.

Waar die geneesheer getuig dat die kind baie ligter is van kleur, is hy besig om n vergelyking te tref met die ouer kind

wat ...

wat baie donker van kleur is. Ook neem hy die ouer kind met sy peperkorrelhare as maatstaf waar hy sê die kind het meer steil hare, wat sou kan beteken dat die hare minder kroes is. Dat van naturelle gesê kan word dat die een ligter van kleur is as die ander en meer steil hare of minder kroes hare het as die ander, is niks vreemds nie. Uit hierdie getuienis is dit bygevolg moeilik om ook maar by benadering 'n juiste denkbeeld te vorm van die graad van ligtheid van die vel of steilheid van die hare van die kind. Die geneesheer se getuienis kom daarop neer dat hy nie kan sê nie dat dit meer waarskynlik is dat die kind 'n blanke vader het as dat hy nie 'n blanke vader het nie; en dit verklaar ook waarom die vrou, soos haar man getuig, en soos sy self erken, op een stadium voor die verhoor ontken het dat dit 'n „wit"kind is.

Dit is nie onredelik nie om in teenstelling met 'n veronderstelling ten gunste van die Staat, ten gunste van die appellant aan te neem dat die Magistraat ook die getuienis in sodanige lig beskou het en nie bereid was om te bevind dat die kind inderdaad blanke bloed in die are het nie. In die besondere omstandighede van hierdie saak en sonder 'n geleentheid om die kind waar te neem, sou dit ongerade wees vir hierdie Hof om 'n bevinding te maak wat die Magistraat na alle waarskynlikheid met opset nie gemaak het nie, en aan te neem dat die vrou se getuienis wel deur/:

deur die voorkoms van die kind gestaaf word.

Wat betref die datum van die beweerde konsepsie staan die getuienis van die naturellevrou alleen. Geeneen van die drie ertjieplukkers, wat geroep is om haar op die punt te steun, kon eers by benadering sê watter maand of selfs watter jaar dit was nie. Die een, Lina Sindane, sê sy kan nie onthou watter tyd dit was nie. Die ander een, Lina Nkosi, sê sy het altyd, wanneer daar ertjies was, gaan help pluk, (appellant sê die ertjieseisoen duur van Desember tot April) en die voorval waarvan sy getuig, sou dan plaasgevind het „ eendag"toe sy gaan ertjies pluk het. Sy kon nie die jaar/ onthou nie en sê: „ dis n paar jaar gelede, meer as twee jaar gelede ". Die derde een, Amos Sindane, verwys net na n tyd of tydperk toe hy „ vroeër " by appellant ertjies gepluk het.

Hierdie getuienis is so vaag dat dit nie beskou kan word as getuienis wat die konsepsiedatum van die kind verbind met die voorval in Januarie 1953 waarvan die vrou getuig nie en as in gedagte gehou word dat n ander man (al was dit haar baas) klere en doeke vir die kind gegee het, soos haar man getuig, dan kan dit wel wees dat die kind op glad n ander tydstip verwek is deur n ander man.

Om terug te keer tot die ontbreking van n bevinding aangaande die voorkoms van die kind, en betreffende die ouderdom van die kind, is die moontlikheid nie uitgesluit nie dat die Magistraat selfs nog op hierdie stadium volgens sy destydse

waarneming/.....

waarneming bevindings op die punte kan maak as die saak na hom terug verwys word, maar geen sodanige versoek is tot hierdie Hof gerig nie en ek dink nie dit is n geval waar die Hof uit eie beweging die saak na die Magistraat vir verdere feite-bevindings moet terugverwys nie. Daar bestaan géén voldoende rede vir so n stap nie en dit is n bevoegdheid wat nie geredelik uitgeoefen word nie. As in die vorm waarin die saak voor hierdie Hof gebring is, ~~maak geen aan~~ n hiatus bestaan dan is dit in die omstandighede van hierdie geval n gebrek wat die Staat moet beswaar en nie die appellant nie.

Die resultaat is dat die vrou se getuienis in geen wesenlike opsig gestaaf is nie en op haar enkele en onbekragtigde getuienis kan n skuldigbevinding nie gebaseer word nie.

Die appél word toegestaan en die skuldigbevinding en vonnis word nietig verklaar.

P.J. van Blerk

Steyn en Beyers, RR.A.; stem saam.

IN THE S'PR.E COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between:-

J. J. PIETERSE Appellant

and

REGINA Respondent

Coram:Schreiner,Steyn,Reynolds,Beyers JJ.A.et v.Blerk A.J.A.

Heard: 3rd May, 1957. Delivered: 24-5-1957

J U D G M E N T

SCHREINER J.A. :- The facts in this appeal appear from the judgment of Van BLERK A.J.A. It is of prime importance to emphasise the narrow ground on which the appeal was noted in the first instance. An attempt which was made to enlarge the grounds by a "notice of appeal" from the Provincial Division to this Court could not succeed; there is no foundation for such a course. Apart from a point of law connected with the indictment, which was abandoned, the only ground advanced in the statutory notice of appeal was that "the conviction was bad in law in that the accused was "convicted on the single evidence of an accomplice, without "proof at all of the actual commission of the offence, and

"thus/.....

"thus the provisions of section 257 of Act No.56 of 1955 "were not so complied with." This is not a case, in my view, in which this Court can legitimately treat the ground of appeal as in any degree extended beyond its terms. We cannot, for instance, investigate the question whether the evidence as a whole was such as to establish the guilt of the appellant beyond reasonable doubt, or the question whether in coming to his conclusion the magistrate observed the cautionary rule referred to in Rex v. Ncanana (1948 (4) S.A.399). Under section 103(4) of Act 32 of 1944 the court dealing with an appeal from a magistrate has the power to increase any sentence imposed upon the appellant or substitute another form of sentence "unless the appeal is based solely "upon a question o' law." In the present case the magistrate imposed a suspended sentence and there was a risk that, if an appeal which raised issues of fact were dismissed, the sentence might be made more severe, as for instance by the removal in whole or in part of the suspension. In the circumstances it seems to me that the inquiry in this appeal must be kept strictly to the ground raised in the notice, namely, whether the evidence of the complainant, who was admittedly an accomplice, was "single and unconfirmed" within the meaning of section 257.

Faced with a notice of appeal

which/.....

which only raised ~~xkm~~ questions of law the magistrate, whose duty it was under Rule 63(3) to state his findings of fact a nd his reasons therefor, did not do so as fully as he doubtless would have done if issues of fact had been raised in the notice. He mentioned the facts that the appellant sent the complainant from the field to the house to make tea or coffee, that the appellant thereafter went to the hous/e and that his wife was not at home on that day. But he did not mention the appearance of the child of whom the complainant claimed that the appellant was the father. The child was shown to the court at the trial as was also an older child of the complainant the father of whom was an African. It was argued on behalf of the appellant that this Court should assume that the magistrate was not prepared to find that the younger child had to any degree the appearance of one whose one parent was an African and the other a European. I do not think that this Court should make any such assumption. It may be that the magistrate thought it unnecessary for the purposes of the points raised in the notice of appeal to mention the appearance of the child. Or, in view of the doctor's answers in cross-examination, which showed that scientifically speaking it is impossible/.....

-possible to be dogmatic in judging race from appearance, the magistrate may, mistakenly, have considered that the child's appearance could not bear upon the question whether the complainant's evidence was unconfirmed or not within the meaning of the section. But I do not think that it is possible that the magistrate did not accept the doctor's statements, corroborated as they were by the evidence of the complainant's husband, that the child had some characteristics of appearance which pointed to "white blood in her veins", to use the popular manner of speaking adopted by the doctor. The magistrate cannot have rejected the doctor's and the husband's statements that this child, in contrast with the ~~other~~ older child, had straight hair and a much lighter colour.

To meet another suggested explanation of the magistrate's silence as to the child's appearance, it should be pointed out that the husband of the complainant confirmed her evidence that the younger child before the court was her child, but not his, and that it was born after their marriage which took place five years before the trial, that is about 1951. The record contains no suggestion by way of cross-examination of any of the Crown witnesses or otherwise

that/.....

that the appearance of the child was inconsistent with or rendered improbable the complainant's evidence as to when it was born or her husband's evidence that it was born within the previous five years. It is not in my view permissible to assume that possibly the magistrate thought that the child looked too young or too old to have been born when the complainant said it was, and that this may have been why he made no finding regarding the half-caste characteristics of the child.

The mere absence of a finding by a magistrate does not justify a court of appeal in disregarding important evidence that appears on the record. In the circumstances I should have preferred to remit the case to the magistrate's court under section 98(2) of Act 32 of 1944, with instructions to furnish a finding upon the appearance of the child in respect of racial characteristics, but the other members of the Court do not agree with this course. The matter must accordingly be dealt with on the record as it stands.

The operation of the old section corresponding to section 257 was stated in Rex v. Thielke

(1918 A.D. 373, at page 375), where INNES C.J., after quoting the relevant words of the section said, "A duty " is thereby cast both upon the Judge and upon the jury; it "is for the former to say whether corroboration has, in any "given xxxx case, been established; it is for the latter to "say whether the corroboration is sufficient to warrant a "conviction." "Established" here obviously means "shown "to exist". On page 377 the word "confirmed" is given the meaning "corroborated in some material respect". In Rex v. Lakatula (1919 A.D. 362) SOLOMON A.C.J., in rejecting the view that evidence implicating the accused was required to satisfy the section, said at page 365 with reference to Rex v. Thielke , "All that was required was that the "evidence of an accomplice should be corroborated in some "material respect. And in my opinion that is all that is "necessary in order that the jury may be satisfied that the "accomplice is a reliable witness upon whose evidence they "may safely act. If his evidence is corroborated in one or "more material respects by other competent testimony then "the conviction would not be based on the single evidence "of the accomplice, and the jury accordingly is entitled "to convict." In Rex v. Galperowitz (1941 A.D.485)

TINDALL J.A., after referring at page 492 to the danger of attempting to formulate the kind of evidence which can be regarded as corroboration, went on to say," But the evidence "relied on as corroboration must show or tend to show that "the accomplice is a reliable witness." Finally in Rex v. Owen (1942 A.D.389, at page 394), De WET C.J. referred to a query that had been raised in the court below as to the meaning of "in a material respect", and proceeded, "As to the "nature of corroborative evidence the answer to the query "put by the learned Judge is to be found in Rex v. Galperowitz (at page 492) where Rex v. Baskerville 1916,2 K.B. at "page 658 is referred to. In that case LORD READING in "delivering the judgment of the Court of Criminal Appeal "said at page 667:'The nature of the corroboration will "necessarily vary according to the particular circumstances "of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which "would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to "show that the story of the accomplice that the accused committed the crime is true.' But as regards the weight of "the corroborative evidence required, no standard can be

"laid/.....

Muller (1934 T.P.D.9), which decision was applied to a case under the Immorality Act in Rex v. Nel (T.P.D.6th of June 1951, not reported). In the judgment of RAMSBOTTOM J.in the latter case, with a copy of which this Court was supplied by the Crown, the learned judge says,"But while the birth of a "coloured child does not constitute proof,aliunde, that the "offence was committed, it does, in my opinion, constitute "evidence corroborative or confirmatory of the evidence of "the accomplice." I have no doubt of the correctness of this view. Although we are without a finding by the magistrate on this aspect of the case, the evidence was undisputed and constituted confirmation of the complainant's case in that the child had beyond reasonable doubt some characteristics, namely its hair and colour, which were like those of a person with a European ancestor as well as an African mother. That evidence tended to show that the complainant was telling the truth and accordingly satisfied rule 257.

But even if, because of the absence of a finding from the magistrate, the appearance of the child is wholly disregarded, the facts mentioned by the magistrate seem to me to be materially confirmatory of the complainant's story. The propor comparison is, I take it, between her story without that evidence, and her story with it. And

when/.....

when that comparison is made it seems to me to be clear that the evidence of the field workers renders her story more probable, because, if accepted, it rules out a complete concoction. To that extent at least it tends to show that she spoke the truth and is therefore material. It shows that there was an occasion, when the appellant's wife was away from home, when the complainant picked peas in the field and was sent to the house to make tea or coffee and was followed by the appellant. The witnesses thus confirm the facts that there was an opportunity for the commission of the offence and that this opportunity was created by the appellant. (The complainant, it should be remarked, was not then in the appellant's service, though while she was still young she had worked for him in the house and had looked after his fowls). The witnesses speak of a single occasion, though they could not place the date. One of them, Lina Nkosi, said that it was when her mistress was sick and not at home; it was, she thought, at the beginning of the year - the complainant had said that it was a week after New Year's day 1953 and that the child was born on the 27th September 1953. Lina Nkosi said "Dis 'n paar jaar gelede. Dis meer as twee jaar gelede." Evidence was being given in October 1956. The complainant linked the occasion up with one when she was passing the appellant's farm on her way to a place where she hoped to find another child who belonged to their family. Her husband said in evidence that there was such an occasion, though he could not fix the date. Appellant said in his evidence

that the pea season is from December to April. He said his wife was at one time in hospital in Pretoria but he could not say when this was.

It was argued on behalf of the appellant that because the witnesses other than the complainant were unable to place the year when the incident happened there was no corroboration of the complainant, because they might have been speaking of quite a different occasion. It is true that this is theoretically possible. But they all say that there was one such incident and the question whether they were speaking of the same occasion as that deposed to by the complainant was a jury matter, a matter for inference based on all the evidence. It cannot, in my view, be properly ruled as a matter of law that when witnesses are uncertain as to dates they cannot provide corroboration of a witness who states that the incident, which they all describe, happened on a certain date. Their uncertainty may weaken the corroborative effect of their evidence, for the trier of fact has to consider the possibility that they may be speaking of a different occasion. But the magistrate was entitled to hold, as he did, that they were speaking of the same occasion, and once that conclusion

is/.....

is reached their evidence corroborates the complainant just as much as if they had been able to fix the date precisely.

In my view there was confirmation of the complainant's evidence within the meaning of section 257 and the appeal should accordingly be dismissed.

O.W. Schreiner
23.5.57

UITSPRAAK

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA
(TRANSVAALSE PROVINSIALE AFDELING)

11.12.1956.

JACOBUS JOHANNES PIETERSE v. REG.

HIEMSTRA, R.: Beskuldigde is aangekla van oortreding van Artikel 1 van Wet No. 5 van 1927, soos gewysig deur Artikel 1 van Wet 21 van 1950 en Artikel 15 van Wet No. 62 van 1955, deurdat hy vleeslike gemeenskap gehad het met 'n nieblanke vrou gedurende Januarie 1953. Hy het onskuldig gepleit maar is skuldig bevind en gevonnis tot 4 maande gevangenisstraf met dwangarbeid, opgeskort vir drie jaar op voorwaarde dat hy in die tydperk nie weer 'n soortgelyke misdaad pleeg nie.

Die Kroongetuienis is dat die betrokke nieblanke vrou waarop die aanklag betrekking het, by die huis van die beskuldigde gehelp het om ertjies te pluk en dat hy haar toe in die huis ingeroep het op voorwendsel dat sy vir hom moet koffie maak. Sy getuig dat toe sy in die huis gekom het, hy aan haar voorgestel het dat hulle gemeenskap moet hê, waarop sy toegestem het. Sy sê dat gemeenskap plaasgevind het en getuig dat 'n kind gebore is op 'n tydstip wat dit duidelik maak dat konsepsie op daardie dag kon plaasgevind het. Daar is getuienis dat die betrokke kind die voorkoms het van 'n kind van gemengde bloed.

Namens beskuldigde word op appèl aangevoer dat die Kroon se bewyse nie voldoen aan die vereistes van Artikel 257 van die Strafproseswet nie, deurdat die Kroongetuienis dié is van 'n mededader en daar geen bevestiging daarvan is nie en ook geen onafhanklike bewyse aliunde

dat die misdaad wel gepleeg is nie.

Namens die Kroon word aangevoer dat die blote feit dat hierdie kind gebore is en dat die kind daardie voorkoms het, neerkom op bevestiging. Die Magistraat het haar getuienis geglo en ek is van mening dat hierdie punt insake die kind en die voorkoms van die kind wel bevestiging van haar getuienis uitmaak.

'n Geneesheer het getuig dat die kind nie noodwendig die kind van 'n blanke man hoef te wees nie. Die posisie is egter dat die bevestiging van die getuienis van 'n mededader nie op sigself bo redelike twyfel bewys hoef te word nie. Dit moet alleen daartoe bydra dat die getuienis van die mededader waarskynliker en aanneemliker word as wat dit selfstandig sou gewees het. Die magistraat is van mening dat die naturellevrou se getuienis geloofwaardig is en ons kan met dié bevinding geen fout vind nie.

Tweedens is namens die beskuldigde betoog dat die klagstaat gebrekkig is deurdat dit die wysiging vermeld wat aangebring is deur Wet no. 62 van 1955 en wat nog nie aangebring was op die datum toe die misdaad na bewering gepleeg is nie. Die wysiging is egter nie van so'n aard dat sonder die wysiging die handeling nie 'n misdaad sou gewees het in 1953 nie. Die wysiging wat aangebring is, het aan die strafbaarheid van die daad geen onderskeid gemaak nie en ek is van mening dat hoewel dit nie heeltemal korrek is om die klagstaat so te stel nie, daar hoegenaamd geen benadeling vir beskuldigde was nie en dat 'n skuldigbevinding op hierdie klagstaat wel deeglik kompetent is.

Die appèl word gevolglik van die hand gewys en die skuldigbevinding en straf word bekragtig.

MARITZ, R.P.: Ek stem saam.

Op versoek van mnr. Kotze vir appellant, word verlof toegestaan om te appelleer.