218/1958

G.P.-S.1568732—1956-7—9,000. S. U.D.J. 445.

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

( APPELLATE DIVISION).
AFDELING).

218/1958

**APPEAL IN CRIMINAL CASE.**
**APPÈL IN STRAFSAAK.**

NORMAN MADELA
**Appellant.**

In gaal

*versus/teen*

THE QUEEN
**Respondent.**

*Appellant's Attorney* _____ *Respondent's Attorney* _____
*Prokureur van Appellant* *Prokureur van Respondent*

Pro Deo

*Appellant's Advocate* A.P. van Coller *Respondent's Advocate* P.E. Roux
*Advokaat van Appellant* *Advokaat van Respondent*

(Leave - WLD) (2)

*Set down for hearing on:* Monday 8th Dec., 1958
*Op die rol geplaas vir verhoor op:*
10.25 — 12.40 C.A.V.

(2:1:4:5:7:9:10:13)

JUDGMENT: MONDAY, 15th DECEMBER, 1958.

Appeal allowed, Conviction and sentence set aside.

Coram: Hoexter, de Beer, Beyers, van Blerk et Hall (Actg.) JJA.

L Registrar
15/12/58

Record.

IN THE SUPREME COURT OF SOUTH AFRICA

( APPELLATE DIVISION )

In the matter between:

NORMAN MANDELA ..... Appellant.

and

REGINA ..... Respondent.

Coram: Hoexter, De Beer, Beyers, Van Blerk JJ.A. et Hall A.JA.

Heard: 8th December, 1958 Delivered: 15th December 1958

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J U D G M E N T

BEYERS J.A.:

The appellant appeared before HIEMSTRA J. and assessors in the Witwatersrand Local Division on a charge of rape. He was convicted and sentenced to 3½ years imprisonment with compulsory labour and 6 strokes, and now appeals against the conviction upon leave granted by the trial judge.

The complainant describes how at about 4.40 a.m. on 21st December, 1957, she was walking alone in a street in Orlando Location when she met two young native males. She says the appellant was one of them. They seized hold of her, and in the struggle to get away she fell to the ground. As she attempted to rise one of them struck her between the

eyes ..../2

eyes with his fist, while the other stabbed her on the head with a knife. A third person then appeared, but, instead of assisting her, made common cause with the other two. They pulled her to a spot within the walls of a partly built house. The appellant had by now produced a revolver and was pointing it at her. Here they removed her bloomers and one of them, the third man, had intercourse with her. She says a policeman then appeared on the scene but the appellant pointed the revolver at him and [illegible] he did not linger. The third man then left them, and the appellant and his companion took her from the location into the veld where they made her lie down in the long grass. The appellant had full intercourse with her at this spot, while his companion kept guard. After having completed his purpose the appellant remained lying on top of her, and eventually fell asleep. The other man had in the meantime also fallen asleep, so she pushed the appellant from her and got up and ran away.

She made a report to the police that same day.

The appellant was not concerned to dispute that the complainant was attacked by three persons and raped. His defence is that he was not one of them. He was arrested on

the ...../3

the 8th January, 1958. He said in evidence that he was able to recall where he had been on the 21st December, the day on which he is alleged to have raped the complainant. It was a Saturday, and after rising late that morning he had gone to visit a friend in the Baragwanath Hospital.

The issue is one of identity only. It is the word of the complainant against that of the appellant.

The complainant was medically examined on the 23rd December. She says that on her way to the clinic - the South African Police medico-legal laboratories - she saw the appellant in the street. She at once informed the police that she had seen one of her assailants. The medical report was put in by consent. It testifies to a number of incised wounds and abrasions about the body. There was no injury to the private parts which is, of course, in no way inconsistent with the complainant's story, for at the time when the intercourse took place a revolver had been produced and she was forced to submit upon threat of death.

At an identification parade held on the 16th January the complainant pointed out the appellant, without hesitation, as one of those who had raped her.

The ...../4

The following passage which occurs in the complainant's evidence is of vital importance to the present inquiry:

> " Cross-examined by Mr. Schwartzman; And by what particular feature did you recognise the accused as one of your assailants? - By an old scar on his nose.
> And that is all? - Yes, that is all.
> His Lordship: Let the accused come up here to the bench. We want to see the scar.
> The Witness: He also had a scar above one of his eyes. I am not certain now which eye it is.
> (Accused's face being inspected by the Court).
> His Lordship: Let the witness come here and point out the scars. - Here they are, the one between the eyes and the one next to the left eye.
>
> It can be recorded that there is a brown streak just between the eyes, and there is some mark on the left eyebrow.
>
> .....
>
> Mr. Swartzman: So the only method by which you can identify the accused in any way is by certain marks which you say you remember on his face? - Not only those scars but his face as it is there as well."

After the appellant had given evidence of his whereabouts on the 21st December and had been cross-examined thereon by prosecuting counsel, he was questioned by members of the court, and replied as follows, regarding the marks which he bore:

> " These marks that you have and which the complainant pointed out, did you have them on

the ..../5

> " the 21st December? - I had these marks. .....
> .....
> Did the complainant see you anywhere outside this morning? - I did not notice.
> And at the preparatory examination did she come close to you? - No, M'Lord."

After the close of the defence case the complainant was recalled by the court and asked whether she had previously told anyone - whether a policeman, or the prosecutor - that her assailant's face bore any marks of the nature of those deposed to by her in evidence. She replied that she had mentioned it to the police, before the arrest. "I did not describe them", she says. "I just said there are certain marks on his face by which I would be able to identify him." ~~Her~~ She says her statement to the police was taken down in writing and read back to her, including the description she had given of her assailant. She was also asked whether she had seen these marks on his face at the time when she pointed him out on the identification parade. Her reply was, "When I got right up to him I noticed these marks".

In his judgment the learned trial judge sums up the position in the following words:

> " This case turns on identification. The complainant impressed us as a good and intelligent witness. She identified the accused

on ...../6

" on an identification parade which took place on the 16th January. She was asked how she recognised him, and she mentioned that he had a scar over his nose. The Court then ordered the accused to come out of the dock and to come to the bench so that his face could be observed. While he was coming nearer the complainant added another mark of identification, namely a scar above his left eye. At the time when she mentioned these two marks we are satisfied that from where she was standing she could not see these marks on the face of the accused where he was standing in the dock. The Court observed that there where indeed such marks on the face of the accused. The witness was asked to point out on the face of the accused which marks she meant, and she pointed out the two marks which the Court had observed without hesitation.

She was recalled and she stated that before the accused was arrested she had given a description of the accused to the police. She says that in that statement she made mention of marks in his face. She also says that she described his clothing in that statement in the same way as she did in Court today.

We have no doubt that if that statement is not in the form in which she testified the prosecutor would, in accordance with his duty, have made such fact known to the Court. Also, it is well established that if the defence doubts whether a statement to the police was the same as the evidence given in Court then the defence is entitled to demand the production of that statement.

.....

The Court is well aware of the danger of inaccurate identification. After careful consideration of the fact that mistakes in

identification ...../7

> " identification are very easily made, we have come to the conclusion that this evidence about the marks is so convincing that it is safe to accept the identification in this case."

It is clear from this extract that the trial court accepted that the complainant had in her report to the police referred to the marks on her assailant's face.

Mr. van Coller, who appeared for the appellant, challenged the admissibility of this evidence on what is undoubtedly good authority. In R. v. Manyana and Others (1931 A.D. 386) DE VILLIERS C.J. says, at p. 389:

> " Now although the witnesses were entitled to testify to the fact that they had made a report the next morning, the answers objected to, purporting to give the terms of the report, were clearly not admissible in evidence against the appellants. Not because they offend against the rule as to hearsay evidence (the persons who speak as to the terms of the report were themselves witnesses) but because as a general rule statements made by any person in the absence of the accused are not admissible except in certain crimes such as rape and kindred offences against females ....."

In R. v. Rose (1937 A.D. 467) DE WET J.A. expresses himself as follows on the same subject:

> " In certain exceptional cases a previous similar statement made by the witness is admitted not to prove the truth of the facts

asserted .../8

" asserted but merely to show that the witness is consistent with himself, but the general rule is that a witness cannot be corroborated by proof of prior similar statements, see R. v. Manyana (1931 A.D. 386 at p. 389); Phipson on Evidence (7th Ed. p. 471). Wigmore on Evidence (vol. 2, sec. 1122 et seq.), has an interesting review of the whole subject. He quotes a judgment of an American Judge as follows: ' It can scareely be satisfactory to my mind to say that, if a witness testifies to a statement today under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath. The idea that the mere repetition of a story gives it any force or proves its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth. Indeed it has never been supposed by any writer or judge that the repetition had any force as substantive evidence to prove the facts, but only to remove the imputation upon the witness'."

Wigmore (par. 1122 et seq.) deals with the exceptions to the general rule that prior consistent statements are inadmissible. Before a prior statement will be admitted it is necessary that the witness should have been impeached on one or other of the recognised grounds such as, for example, bias or interest, prior inconsistent statement, or recent contrivance (under which head is included "statements identifying an accused, on a former occasion). See also R. v. Kizi 1950 (4) S.A. 532 (A) - "Where such an imputation

(that ..../9

(that the witness had conspired to give fabricated evidence) is levelled at witnesses it is clearly open to the party calling them to prove previous similar statements by such witnesses made before they had a motive or an opportunity to fabricate false evidence (Phipson on Evidence,,8th ed. 480 et seq.)" - per VAN DEN HEEVER J.A.

The appellant does not accuse the complainant of fabricating any part of her evidence. When asked if he could give any reason why the complainant had pointed him out, he replied that she had done so "because she was raped by a man who had marks on his face". In other words, he was prepared to concede that she saw the marks when she was raped, but avers that she has mistaken him for that man because he, too, has some marks on his face.

In the absence of any suggestion by the defence that the complainant had seen the marks for the first time at the identification parade, or in court, and was now embellishing her story by adding to it this further important detail, it was not open to the Crown to lead evidence of a prior consistent statement. The court took it upon itself to do so. I shall assume that the court was entitled to do

so .../10

so mero motu, and without the witness having been impeached by the defence. It may be in the interests of justice (in some cases in favorem innocentiae) for the court to ascertain whether in fact the witness has or has not made a previous consistent statement. What prompted the court to embark upon the inquiry in the present case is not clear to me. There was nothing to suggest that the complainant had seen the marks for the first time in court. On the contrary the learned judge says "We are satisfied that from where she was standing she could not see these marks on the face of the accused where he was standing in the dock". It had also been elicited from the appellant that the complainant had not come close to him at the preparatory examination. The court may, nevertheless, have had a doubt in its mind as to the possibility of her having seen these marks at some stage subsequent to the arrest, and , to banish this doubt, decided to recall the complainant.

It must, of course, be appreciated that evidence of this nature is admissible solely for the purpose of refuting an imputation, or of rebutting an inference, which might otherwise arise, of recent fabrication. Cf. R. v. Rose

(supra); ...../11

(supra); Pincus v. Solomon (1) 1942 W.L.D. 237; R. v. Vlok 1951(1) S.A. 26 (C). I am not at all clear in my mind as to whether the trial court, having heard the evidence, has not made more of it than ~~warranted by~~ the limited purpose warrants. for which it was admitted. However that may be, the real fault which I have to find with this evidence lies in the manner in which it was admitted, and the reason which the court has given for accepting it as true.

Although Wigmore (par. 1132) is of the opinion that "When, by any of the foregoing rules, the statements are admissible at all, there is no reason why the impeached witness himself may not testify to them; even though this will usually be of less value than the testimony of other persons", I am of the opinion that the evidence ~~ought~~ in this case, ought to have come from the policeman to whom the statement was made (cf. R. v. Manyana (supra) at p.390). The learned trial judge gives the following reasons for accepting the evidence: "We have no doubt that if that statement is not in the form in which she testified the prosecutor would, in accordance with his duty, have made such fact known to the Court." It is true that where there is a

serious ...../12

serious discrepancy between the statement of a witness and what she says on oath at the trial, it is the duty of the prosecutor to make the statement available to the defence for cross-examination, and in R. v. Steyn 1954(1) S.A. 324 (A) the hope was expressed that prosecutors would observe this duty; but that is a far cry from assuming that they will do so. In R. v. Kizi (supra) the judge in the court a quo, in summing up to the jury, informed them that "it is the practice in this court that the prosecutor will not hide the fact that there is a material difference in the story between what was said in the first place, in the magistrates' court, and here. So you cannot assume that the two Crown witnesses told anything materially different to the police, and you are entitled to assume that shortly after they were arrested they told materially the same story as they told today." It was held that this was a misdirection: "it posed a non-existent presumption: it postulated evidence not led in Court and it virtually withdrew from the jury a matter which peculiarly fell within their province, namely to adjudge the credibility of the two principal Crown witnesses in the light of all the

circumstances ..../13

circumstances of the case". Although there was in the present case the evidence of the complainant as to what she told the police, I can see no distinction in principle between Kizi's case and the present case. In both cases it was assumed that what the witness had said in court corresponded with what appeared in the statement made to the police. And it is no answer to say here that the appellant was indifferent as to whether the complainant had or had not made the previous statement: it was, in the view which the court took of the matter, important to establish whether she had in fact done so. In my opinion the trial court has misdirected itself on a material point by accepting that the complainant must have told the police what she told the court when recalled (namely, that there was a reference in her statement to the marks on the appellant's face) because the prosecutor sat quietly by while she gave this evidence.

Mr. van Coller also submitted that the trial court was unfair to the appellant in summarily rejecting his evidence of an alibi. In doing so the learned judge said: "He professed to be able to remember most things that happened on the 21st December, and also on the Saturdays following that until he was arrested ..... It is of course quite unacceptable that a man can remember an uneventful day in his life many months ago, and we are satisfied that the accused was deliberately untruthful when he gave that

evidence ...../14

evidence". It was, however, not a case of having to cast his mind back for many months. He told the court that on the day when the identification parade was held - 16th January - he was informed of the charge against him. It was at that stage, less than one month after the event, and not on the day of the trial, that he was able to remember, by casting his mind back, that he had been to the Baragwanath Hospital on the 21st December. The reason for remembering this day was thoroughly investigated, and I can find nothing very improbable about his ability to recall, four weeks later, where he had been on that particular Saturday. As a result of its mistaken view as to the lapse of time the trial court has made virtually no enquiry as to whether "on all the evidence there is a reasonable possibility that this alibi evidence is true" - cf. R. v. Biya 1952(4) S.A. 514 at p.521.

Counsel also had some criticism to affer regarding the way in which the identification parade was held. In view of the conclusion to which I have come on other aspects of the case, it is not necessary for me to deal with this question.

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In my opinion the trial court misdirected itself in one, and possibly two, material respects. This constituted an irregularity in the proceedings and it follows that this Court must allow the appeal unless it is @ satisfied that no failure of justice has in fact resulted from such irregularity (R. v. Piek 1958(2) S.A. 491 (A)). In order to be so satisfied it must appear to this Court that a reasonable trial court, properly directed and unaffected by the irregularity, would inevitably have convicted the appellant. I am unable to say that a court which has excluded from its mind the fact that the complainant had previously made a similar statement to the police, and which has taken into more careful consideration the evidence of the alibi, would inevitably have convicted the appellant.

The appeal is therefore allowed, and the conviction and sentence are set aside.

D.O.K. Beyers

(Signed) D.O.K. BEYERS.

HOEXTER, J.A.
DE BEER, J.A.
VAN BLERK, J.A.
HALL, A.J.A.