47/1958

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

(CAPE PROVINCIAL DIVISION).
AFDELING).

(orig record)

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

JACOB J. PIENAAR

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney J. de V. W. *Respondent's Attorney*
Prokureur van Appellant *Prokureur van Respondent*
(with J. Erasmus)

Appellant's Advocate W.J. Hoexter Q.C. *Respondent's Advocate* W.J. Smith
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on: Wednesday, 17th Sept, 1958.
Op die rol geplaas vir verhoor op:
9.45 - 12.50 C.A.V.

2.3.7.9.11. (B)

Registrar
17/9/58

JUDGMENT: MONDAY, 29th SEPTEMBER, 1958.

Appeal fails on the first Count and Succeeds on the other Counts. The verdict is altred to read "Guilty on the first Count; Not Guilty on the othr Counts," and the Sentence is altred to one of four months I.C.L

Coram: Hoexter, Steyn, van Blerk, Hall (Actg.) et Smit (Acta.) JJ.A.

Registrar.
29/9/58

 UITSPRAAK

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

In the matter of:

JACOB J. J. DIEDERICKS Appellant

versus

R E G I N A Respondent.

Delivered: 24.2.58.

WILLIAMSON, J.: The appellant in this matter was charged in the Magistrate's Court, Pilgrims Rest, on five counts with contravening Section 1 of Act 5 of 1927, in that being a European he had at specified times at Pilgrims Rest had sexual intercourse with certain women on different occasions, each of these women being non-Europeans who were at the particular time alleged in each count employed by the appellant. He was convicted on four counts and discharged on the one count. The Magistrate treated all counts as one count for the purpose of sentence and he imposed a sentence of six months imprisonment with compulsory labour.

The appellant appealed against his conviction on a number of grounds. The ground that was placed in the forefront of the argument on appeal was that the Magistrate wrongly convicted on each count in that the evidence of the commission of the offence on each count was only the evidence of an accomplice in each case and the evidence of such an accomplice was not confirmed.

The facts relating to each count were that at a certain period the woman concerned in the count had been working at the appellant's home as a domestic servant and

that while she was so working the appellant had on one or more occasions had intercourse with her. On Count 1, for instance, the evidence was given by a woman Esselina Mokwena, and she said that towards the end of 1955 she had been working at the appellant's home and that one morning, about 5.30, the appellant came to her in the kitchen and said that he wanted to have intercourse with her. His wife at that time was asleep in the bedroom which was a little distance from the kitchen; it was not possible to see from the bedroom into the kitchen; there were two passages and a dining-room intervening. It was possible to hear talking in the kitchen from the bedroom but not distinctly,and only if the speech was clear and fairly loud. The witness said that she did not want to have intercourse with him and told him so. He followed her into the pantry next door and there he caught hold of her body and touched her private parts and pulled her bloomers off. He told her to lie down, which she did, and intercourse followed. On a second occasion, about a month or so later, the same thing happened at a similar time. On each occasion the accused was clothed in his pyjamas and was wearing a blue dressing gown produced. In the following year she gave birth to a coloured child. She said she did have a native lover with whom she ordinarily did sleep. She said there was a native Johannes employed also at the house but that at the time that this intercourse took place between her and the appellant early in the morning, Johannes was outside attending to the animals and fowls. The appellant's wife, she said, usually got up at 6 a.m.

There was no other evidence directly connected with the events relating to this count, but on each of

the other three counts upon which the accused was convicted, similar evidence was given by a native domestic servant with whom the accused also had intercourse early in the morning before 6 o'clock, on at least one occasion in the pantry or in the kitchen before his wife got up, and while she was still asleep and when the accused was clothed in his pyjamas and dressing gown.

In regard to each of these other counts the direct evidence of the commission of an offence was again limited to the evidence of the particular woman concerned. It is clear that in each case the woman concerned on each count was an accomplice of the accused in the commission of an offence under the Act in question.

The Magistrate found each of these witnesses to be acceptable witnesses as such. There was nothing indicated on the record which showed that they were unreliable witnesses. Their stories were maintained under cross-examination and no material contradictions or any inconsistencies were made apparent. Nevertheless, of course, it was essential that the Magistrate should address his mind to the fact that the witness on each count was an accomplice and that the provisions of Section 257 of the Criminal Procedure Act of 1955 had to be borne in mind. There was no proof aliunde of the commission of the offence in any count and it was therefore necessary to have some confirmation in acceptable form of the evidence on each count.

In his argument on behalf of the appellant, Mr. Human placed reliance mainly upon the case of Rex v. Butelezi, 1944 T.P.D. 254, with particular reference to the remarks appearing at page 257 (et seq). He argued that the evidence on one count by one witness was not admissible on any other count and could not serve as

corroboration of the witness on such other count. It is of course clear from Butelezi's case (supra) and numerous other cases that evidence of similar facts is not normally admissible merely to prove propensity on the part of an accused person to commit a particular act, the subject of an offence. But it is also clear that evidence of similar facts may be admissible for other purposes. This whole question of similar fact evidence has been fully discussed in a number of cases and particularly in the case of Rex v. Katz and Another, 1946 A.D. 71 at p. 78 et seq. At page 79 WATERMEYER, C.J. quotes with approval a passage from the case of Makin v. Attorney-General of New South Wales, 1894 A.C. 57 at p. 65, to the following effect: "On the other hand a mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the Jury and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged were designed accidentally or to rebut a defence which would be otherwise open to the accused." A number of further cases are referred to by the Chief Justice on the same page. He also refers to two articles in the Law Quarterly Review to which may now be added two further articles appearing at Vol. 69 p. 80 and Vol. 70 p. 214. The question has also on a number of occasions been before the Court of Appeal in England in recent years. Particular reference may be made to the case of Rex v. Sims, 1946 K.B. 531, where Lord GODDARD again emphasised that evidence that an accused has a bad character or disposition, only is to be excluded if it shows no more than that, but where an accused was charged on several acts of sodomy or gross indecency in one indictment and the acts bore a striking similarity one

to the other, the evidence of one count was admissible in relation to another count in that the repetition of the acts with a special feature tended to connect the accused with the crime in each case.

Certain remarks of Lord GODDARD, but not these remarks in particular, were criticised in the case of Noor Mahomed v. Rex, 1949 A.C. 182. But in the later case of Rex v. Hall, 1952(1) K.B. 302, Lord GODDARD again sitting in the Court of Appeal, and after referring to the judgment in the Noor Mahomed case, held that a trial Judge had rightly refused a separation of trials where an accused was charged on eight counts of indecency with different young men; and further held that the evidence on one count was admissible on another count to rebut a defence of innocent interpretation of the accused's acts in each case. He had tried to suggest that each young man was being subjected to some form of medical treatment. In regard to one charge the defence was a denial of ever having seen the complainant. In regard to that particular case Lord GODDARD said at page 308 that the evidence of other counts was admissible to show that the witness for the prosecution was speaking the truth when he identified the accused as the person who committed the indecent acts on him; in other words, evidence of similar acts was in that case held admissible for purposes of corroborating evidence of one of the witnesses on one count.

That is a very different thing from using the evidence solely for the purpose of showing that the accused possessed a propensity to commit an act.

The decision in Hall's case (supra) was subsequently approved in the speech of Viscount Simon in the House of Lords in Harris v. Director of Public Prosecutions,

1952 A.C. 694 at p. 711. This question of similar evidence was also again discussed by the Court of Criminal Appeal in the recent case of Regina v. Straffen, 1952(2) Q.B. 911, where on a charge of murder, evidence of the commission of other murders alleged to have been committed by the accused with peculiar similarities being apparent in all the killings, on the ground that that evidence tended to rebut a defence that the accused was not the person who killed the victim in the instant charge.

In the present case four native women employed by the accused at different times, having no connection one with the other in the sense that they did not live near each other, and, as far as the record goes, did not know each other, all testified to peculiar conduct on the part of the accused in that he in regard to each woman sought intercourse with her in the kitchen or in the pantry in the early hours of the morning, clothed in his pyjamas and dressing gown.

In my view the evidence of any one of these women would, on the authority I have referred to, have been admissible on any one count as being evidence tending to confirm or corroborate the evidence of the accomplice on that count. I further think that the evidence in each count in this case was confirmed by the evidence of the accomplice on each of the other counts because of the peculiarities attached to the way in which this man was said to have had intercourse with the woman in each case. Therefore, if their evidence was acceptable otherwise, I think that there was legal evidence upon which a Magistrate was entitled to convict on each count.

Nothing has been placed before the Court on appeal to show that the Magistrate's conclusions in regard

to the reliability of each of these witnesses, confirmed as they were by the evidence of the other witnesses, was not justified. The Magistrate rejected the accused's evidence which was a denial, and it does not appear to me that his decision in that regard can be interfered with. There was some cross-examination and evidence tending to show a possibility of enmity between the appellant and certain members of the police connected with the investigation of the case against him, but that evidence again has been considered by the Magistrate and it does not seem to me that anything was shown which would indicate that the Magistrate was not justified in accepting the evidence which he did accept.

The result is that in my opinion no grounds have been shown for reversing the Magistrate's decision.

In the result the appeal must be dismissed and the conviction on each count of the four upon which he was convicted and the sentence imposed must be confirmed.

(Sgd.) A. FAURE WILLIAMSON.
JUDGE OF THE SUPREME COURT.

I concur.

(Sgd.) S. KUPER.
JUDGE OF THE SUPREME COURT.

UITSPRAAK - VERLOF OM TE APPELLEER.

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

In the matter between:

J.J.J. DIEDERICKS vs. REGINA

15th March, 1958.

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

WILLIAMSON, J.: In this matter leave is sought to appeal to the Appellate Division on a judgment of this Court upholding the conviction of the applicant on certain charges in the Magistrate's Court of Pilgrims Rest. The main point in the appeal was the question as to whether the evidence on one count could be used to corroborate or strengthen the evidence on another count. These were all charges of contravention of the Immorality Act of 1927, and there was evidence given by the different women concerned and that evidence was used by the Magistrate to corroborate the evidence on the other counts; apart from the complainant's evidence in each case there was no other corroboration on any of the counts.

This Court upheld the Magistrate's decision, but we feel that on several grounds the matter is certainly arguable whatever the view of this Court might be.

In the circumstances leave to appeal to the Appellate Division is granted to the applicant.

(Sgd.) A. FAURE WILLIAMSON.

JUDGE OF THE SUPREME COURT.