60/1959

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).

60/1959

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

(Orig. record)

WILLIAM MABOMBO
Appellant.

versus/teen

THE QUEEN
Respondent.

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

Pro Deo (BPD)

Appellant's Advocate H.C.J. Flemming *Respondent's Advocate* P.E. Nöthling
Advokaat van Appellant *Advokaat van Respondent*

(Leave - ECD) *Set down for hearing on:* Monday, 21st Sept., 1959.
Op die rol geplaas vir verhoor op:

9.45 - 12.10 p.m.
2.6.8 (B) C.A.V.

[signature]
Adj. Griffier.

Postea: Tuesday 22nd September, 1959

Appeal allowed; all proceedings after appellant's plea of not guilty before Supreme Court set aside and the case returned to Court a quo to be resumed from that stage.

Schreiner J.A.
Malan J.A.
Ogilvie Thompson J.A.

[signature]
Adj. Reg.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

WILLIAM MADOMBO Appellant

and

R E G I N A Respondent

Coram: Schreiner, Malan et Ogilvie Thompson, JJ.A.

Heard: 21st September, 1959. Delivered: 22-9-59

J U D G M E N T

SCHREINER J.A. :- The appellant was charged in a magistrate's court with (a) theft and (b) impersonating a member of the police force. It seems that the impersonation was only a step towards the theft so that there should have been only one charge (Regina v. Malako, 1959(1)S.A.569). But while this should not be lost sight of in any further proceedings that may take place, it does not affect the order to be made on this appeal.

The appellant pleaded not guilty in the magistrate's court and evidence, including his own, was led. He was convicted and the case was adjourned for the examination of his record of previous convictions. On this being shown to the magistrate the latter, under section 93(2) of Act 32 of 1944, set aside his finding of guilty and converted the proceedings/.....

proceedings into a preparatory examination.

According to the record the appellant was then asked in terms of section 66 of Act 56 of 1955 whether he wished to say anything in answer to the charge, to which he replied that he pleaded guilty on both charges. Accordingly to the record he was then asked in terms of section 75 of Act 56 of 1955 whether he wished the witnesses to appear again and he said "no". He was accordingly committed for sentence.

He appeared before O'HAGAN J. in the Port Elizabeth Circuit Local Division and when the charges were put to him in terms of section 174 of Act 56 of 1955 pleaded not guilty. The Crown asked the learned judge to apply subsection(2) of section 174 and enter a plea of guilty. O'HAGAN J. then heard the evidence of the magistrate who had committed the appellant for sentence. The magistrate confirmed as correct what appeared over his signature on the form U.D.J. 163, which records what the accused is asked and answers at the close of a preparatory examination. O'HAGAN J. then asked whether there was no possibility of misunderstanding and the magistrate said that of course if an interpreter was used he could only state that he recorded what the interpreter told him. In fact, the record showed that an interpreter had been used. Asked if he had any questions to put to the magistrate the appellant said

he/.....

he was not guilty and had not been asked any questions by the magistrate, i.e. at the close of the preparatory examination. It followed in effect that he denied making the statements said to have been made by him in answer to those questions. O'HAGAN J. then verified that the magistrate was accustomed to satisfy himself that an accused understood the statutory questions. The learned judge then said - "I am satisfied after hearing the "evidence of the magistrate and after scrutinizing the record "that the matter was put to the accused and that he pleaded "guilty. In terms of section 174(2) I direct that a plea of "guilty be entered. "

Subsection (2) of section 174 provides that the court shall direct the entry of a plea of guilty if it is satisfied "that he duly admitted before the magistrate "that he was guilty of the offence charged, and was so guilty." Subsection (3) provides that if the court is not so satisfied, a plea of not guilty shall be entered.

In the magistrate's court the appellant had said that he had no witnesses but subsequently when served with notice of trial he told the Deputy Sheriff that he had a witness. Before entering the plea of guilty, O'HAGAN J. referred to the fact that the appellant had a witness, and, after the plea of guilty had been entered and the

list/.....

list of previous convictions had been put in, the learned judge asked the appellant for the name of his witness. The name was called out in the court precincts but the witness was not present. The appellant said that the witness, a cousin of his, was present when he was arrested. It may be remarked that his evidence at the magistrate's court contains no suggestion of any such person having been present.

O'HAGAN J., after finding the appellant guilty on both counts, declared him an habitual criminal Soon after being sentenced, the appellant signed an application for a certificate under section 103(6) of Act 32 of 1944 which has no relation to a conviction by the Supreme Court. Apart from its form it is not an easily comprehended document but it was rightly treated by O'HAGAN J. as an application for leave to appeal to this Court.

In granting the appellant leave to appeal O'HAGAN J. referred to the factor of interpretation and said, "I might have considered calling the interpreter to give "evidence on the question whether or not the applicant "pleaded guilty before the magistrate, but I doubt very much "if that would have helped as these interpreters are concerned "in so many cases each day that it is improbable that the in- "terpreter would have remembered any particular incident of "this case. "

From the rest of his judgment granting leave to appeal it appears that at that date at least, i.e. some two months after the appellant was convicted and sentenced, O'HAGAN J. thought that there might have been some misunderstanding on the part of the appellant himself or the interpreter. The learned judge was apparently influenced by the appellant's having fought the case in the magistrate's court right up to the stage of conviction and by his statement that he had a witness to call.

Although O'HAGAN J. did not at any stage say that he was satisfied that the appellant was guilty, it may, I think, be accepted that, if he was properly satisfied that the appellant had duly admitted his guilt to the magistrate the record of evidence would rightly satisfy him of the appellant's guilt. But although the learned judge formally recorded that he was satisfied that the appellant had duly admitted his guilt to the magistrate it seems that throughout the proceedings he retained a measure of doubt. It was contended on behalf of the Crown that the learned judge must, as was recorded, have been satisfied at the time when he entered a plea of guilty and that he only became doubtful at a later stage. If that was the position there was, it was argued, no irregularity in the proceedings justifying interference by this Court. But

although/.....

although there is some force in the submission that the learned judge's doubt developed after he had sentenced the appellant, the better view appears to be that he had doubt at the time when the magistrate gave evidence and if that was so the question arises whether he could lawfully dispel that doubt without hearing the interpreter.

It was submitted on behalf of the Crown that it was not necessary to call the interpreter, or even the magistrate, to prove what the appellant had said at the close of the proparatory examination, in view of the provisions of sections 66 and 250 of Act 56 of 1955. So far as material section 66 reads -

"66(1) After the examination of the witnesses in support of the charge the magistrate shall ask the accused.....what, if anything, he desires to say in answer to the charge.....

(2) The accused may.....make any statement.....and every statement.....shall be taken down in writing.....and after being read over to him shall be signed by him if he is willing to sign it, and also by the magistrate, and shall be received in evidence before any court upon its mere production without further proof unless it is shown that the statement ~~or marks~~ -- was not in fact made -- or that the signature or marks thereto are not in fact the signatures or marks of the person whose signatures or marks they purport to be."

In terms of section 75 where the accused, in making the statement referred to in section 66, states that he is guilty of the charge, he must, except in cases of

murder/.....

murder,treason or rape, be asked if he wishes the witnesses to appear again. If he answers in the negative his statement is read over to him and signed by the magistrate. He is then committed for sentence only.

Section 250, so far as material, provides -

"The statement made by an accused under section sixty-six or seventy-five ....shall,when he is brought before a superior court after committal by a magistrate for sentence.....be admissible in evidence without further proof."

These provisions, however, though they facilitate proof that the statutory questions were put to and answered by the accused as recorded, do not relieve the court of its duty of satisfying itself before entering a plea of guilty under section 174(2) that the accused had duly admitted his guilt before the magistrate.

The appellant was not called upon to place on oath his denial that he had admitted his guilt before the magistrate, but there is nothing to suggest that the learned judge was affected by the fact that the denial was unsworn. The learned judge apparently thought for the moment that despite the appellant's challenge he could satisfy himself on the magistrate's evidence alone. But once it appeared that without the interpreter the magistrate could not give

useful/.....

useful information as to what the accused had said, his hearsay evidence could not properly dispel the learned judge's doubt.

It is no doubt true, as O'DAGAN J. remarked, that busy interpreters are unlikely to remember particular cases in which they have been concerned but they can ~~give evidence~~ nonetheless give admissible evidence, based on seeing their signatures, to the effect that the interpretation was correct. Had that been done in this case there would not have been the gap which now undoubtedly exists .

In the circumstances the requirements of section 174(2) were not duly observed ~~and the guilt was not duly established according to law~~ and it is not possible to apply the proviso to section 369 of Act 56 of 1955 by holding that the same result must inevitably have followed if the interpreter had been called.

We were invited by counsel for the appellant merely to set the conviction and sentence aside. But this is not the kind of case in which that course should be followed.

The order that justice requires is that the appeal is allowed and that all proceedings following upon the appellant's plea of not guilty before the Supreme Court are set aside. The case is returned to the Port Elizabeth Circuit Local Division to be resumed from that stage.

Malan, J.A.
Ogilvie Thompson J.A. Concur

22.9.59