38/1959

G.P.-S.134917–1955-6–1,000. U.D.J. 219.

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

(Appellate Provincial Division.)
(Appèlafdeling). Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

Izak S. W. Burger *Appellant,*

versus

A de W. Roos, N.O., & Andere. *Respondent.*

Appellant's Attorney Goodrick & Y. *Respondent's Attorney* Vandè & Y.
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate M. Mentz *Respondent's Advocate* D. Curlewis
Advokaat vir Appellant *Advokaat vir Respondent*

Set down for hearing on Vrydag, 18 Sept. 1959.
Op die rol geplaas vir verhoor op

(TND) (2) 9.4.6.7.9 (B) 9.45 – 12-16. C.A.V.

Parlea: Vrydag 25 September 1959

" The appeal is allowed with costs and the order of the T.P.D. is altered to one confirming the rule nisi, save that there is no order as to costs in the T.P.D.

de Beer J.A.
Steyn J.A.
van Blerk J.A.
Rumpff J.A.

D. de Villiers
Ag. Hfr.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

Major IZAK SCHALK WILLEM BURGER Appellant

and

Luitenant BENJAMIN de WET ROOS,N.O. 1st Respondent

and Kolonel PETRUS JACOBUS JACOBS,N.O.
Kommandant IAN STEVENSON GUILFORD,N.O.
Majoor (Tydelike Kommandant) DAVID SCHALK PRETORIUS N.O.
Majoor (Tydelike Kommandant) DIRK JACOB [illegible]MAN N.O.
Majoor (Tydelike Kommandant) JACOBUS JOHANNES STAPELBERG N.O. 2nd Respondents

Coram: Schreiner,de Beer,Malan,van Blerk et Ramsbottom JJ.A.

Heard:18th September, 1959. Delivered: 25-9-1959

J U D G M E N T

SCHREINER J.A. :- The appellant, an officer of the Permanent Force of the South African Defence Force, was charged before a general Court Martial, convened under section 66 of the Military Discipline Code scheduled to the Defence Act (No. 44 of 1957), on counts of assault and conduct prejudicial to military discipline. The first respondent was the prosecutor and the second respondents were the President and members of the Court Martial.

A preliminary investigation was held under Rule 104 of the Rules framed under section 104 of the

Defence/.....

Defence Act for giving effect/ to the Military Discipline Code, and the evidence of various witnesses was duly recorded. In terms of Rule 48(1)(a)(iii) the President of the Court Martial had to be furnished with the original and a certified copy of the preliminary investigation record, but the rules do not require the other members to be furnished with copies of the record /, which is not evidence at the trial.

The hearing before the Court Martial took place on the 2nd,3rd and 4th February 1959. On the 3rd, and again on the 4th, the first respondent informed the Court Martial that he did not propose to call certain witnesses who had given evidence at the preliminary investigation. Among them were five who, according to the appellant, could give evidence favourable to him, and he claimed that it was the first respondent's duty in terms of Rule 95(2) to call these witnesses so that they might be cross-examined on behalf of the defence. The first respondent, without questioning that the witnesses could give evidence favourable to the appellant, submitted to the Court Martial that in terms of Rule 64(6) he was not obliged to call them, and that he had done all that he was obliged to do by making them available to be called for the defence or by the Court Martial itself. The second respondents, _

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through the President ruled in favour of the first respondent's contention and the latter thereupon closed the case for the prosecution.

The hearing was then postponed and the appellant set down an application in the Transvaal Provincial Division claiming a rule nisi /calling on the first respondent/ to show cause why he should not be ordered to call the five witnesses who could give evidence favourable to the appellant, with supplementary orders upon the second respondents to ensure the reopening of the prosecution's case and the calling of the five witnesses. A rule nisi in those terms was granted. It was not contended that the Supreme Court could not interfere with the proceedings until their conclusion (cf. Wessels v. General Court Martial, 1954 (1) S.A.220). On the return day the rule nisi was discharged. By agreement no order was made as to costs.

The parties having filed a written consent thereto, the appellant appeals direct to this Court from the order discharging the rule nisi.

Rule 64 deals with "Evidence for the Prosecution" and sub-rule (6) reads :-

"Subject to the provisions of sub-rule (2) of rule ninety-five, no prosecutor shall be obliged to call all the witnesses who gave evidence at the preliminary investigation, but where a prosecutor closes the case for the prosecution without having called such witnesses, he shall advise the court thereof and make any witness not called by him available for the purpose of being/.....

being called either by the accused or the court. "

Rule 95 deals with "General Duties of Prosecutor and Counsel." Sub-rule (1) enjoins the prosecutor and the defence counsel, in addition to other duties imposed on them by the Code, to assist the court and treat it and the judge advocate respectfully, to present their cases fairly, to follow the Code and the practice of the Union's civil courts in regard to the examination of witnesses, not to refer to irrelevancies and not to state as facts things not intend- proved or intended to be proved.

Sub-rule (2) reads -

"In addition to the duties imposed upon him by sub-rule (1), the prosecutor shall bring before the court the whole of any transaction on which any charge is based and shall not take any unfair advantage of or withhold from the court any evidence in favour of the accused. "

The argument for the appellant is that Rule 64(6) is in terms made subject to Rule 95(2) and that it would not be giving proper effect to the opening words of Rule 64(6) if, in regard to the calling of witnesses who may favour the accused, the prosecutor were not obliged by Rule 95(2) to do more than he is required to do by the concluding portion of Rule 64 (6). In other words, the appellant's contention runs, Rule 64 (6) relieves the prosecutor of the obligation to call all

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the premilinary investigation witnesses except where (a) they are all necessary to bring out the whole transaction, or (b) not to call them would be taking an unfair advantage of the accused, or (c) their evidence favours the accused. I have some difficulty in visualising a case that would fall under (b) without falling under (c), but, however that may be, when Rule 64(6) says "Subject to the provisions of Subrule (2) of rule ninety-five" this means, in the absence of indications to the contrary, subject to the whole of the provisions of Rule 85(2), including (c). In fact it is (c) that is most directly germane to the subject matter of Rule 64(6).

For the respondents it was contended that withholding evidence ("getuienis.....weerhou" is the Afrikaans expression) means something more than not calling evidence which you have available. This was the view taken by CLAASSEN J. when he discharged the rule nisi. The learned judge illustrated what he meant by the case of a book which he said would be withheld from a reader if kept in a locked library but would not be withheld if the library were open and the reader were told where he could get the book. The learned judge proceeded, "Having informed the court and the accused of the avail-"ability of certain witnesses, the subsequent passive attitude "in the sense of not actually adducing the evidence himself,

"does/.....

"does not amount to 'withholding of the evidence' ". The chief difficulty that I have in accepting this reasoning is that its effect, so far as the treatment of evidence favourable to the accused is concerned, is to make no difference between Rule 64(6) and Rule 95(2). The latter, on this view, adds nothing to the former. Whether the evidence favours the accused or not the prosecutor is obliged under Rule 64(6) to tell the court that he is not calling all the preliminary investigation witnesses and is obliged to make them available.

The only way, consistently with the view of CLAASSEN J., in which some effect could be given to the opening words of Rule 64(6) as applied to (c) in Rule 95(2), would seem to be to interpret "withholding the evidence" as meaning "withhold information about evidence". On that view if the prosecutor knew, but the court and the accused did not know, that a witness who gave evidence at the preliminary investigation could give evidence favourable to the accused, he could be said to withhold evidence if he merely said that he was not calling the witness but made him available, without at the same time disclosing his knowledge that the witness could give evidence favourable to the accused. It would not be convenient to make the question whether there was a withholding depend on what precisely the prosecutor says when he announces that he is not

calling/.....

calling a particular witness. That it should depend on whether he says he thinks that the witness may favour the accused or that he doubts whether he would favour the accused or uses some other expression would be unsatisfactory and would not, I think, fit in with any clear or practical concept of withholding evidence. When a party has available evidence it seems to me that he can be properly said to withhold it if he does not call the witnesses, whatever information he furnishes about their evidence. Whether this is the proper meaning to be given to the expression "withholding evidence" in Rule 95(2) depends on the context, which includes Rule 64(6), the operation of which is made subject to it.

It was contended on behalf of the respondents that while Rule 95 constitutes the broad standard of behaviour to be followed in courts martial, Rule 64 is a specific enjoinder of how the trial is to be conducted and sub-rule (6) covers the whole obligation of the prosecutor in regard to the calling of witnesses. The argument was in effect an application of generalia specialibus non derogant. But that cannot apply to the present provisions where Rule 64(6) is in terms made subject to Rule 95(2).

For the same reason it could not be contended successfully, though it was suggested, that

Rule/.....

Rule 95(2) is only directory.

It was further submitted on behalf of the respondents that "A survey of the Act, the Code and "the rules makes it clear that it was intended that the princip- "les governing evidence and procedure in the civil courts "should apply in military trials", and a number of references to provisions were furnished which were said to support that conclusion. I have examined all the provisions referred to and I donot find that they provide this support. On the contrary it seems to me to be noteworthy that there is no general reference to the practice in civil courts as providing a supplementary source of rules for military courts. When the rules of evidence applicable in civil courts are to be made applicable in military courts this is done expressly and specifically (Section 84 of the Code). And when the Rules require the practice of the civil courts in relation to the examination, cross-examination and re-examination to be followed, this too is specifically provided for (Rule 95(1)(d)). So far from the civil courts providing a reservoir of practice to be used when the Code and Rules are silent, Rule 128 provides:-"Whenever "in the application of this Code, any matter arises for which "no provision has been made, such course as appears to be con- "sistent with this Code and best calculated to do justice,

"shall/.....

"shall be adopted," In fact the Military Code and Rules, though in many respects they run parallel to the practice of civil courts, in a number of respects diverge from that practice and no safe inference can generally be drawn from the one to the other.

The proper practice in regard to the calling of all relevant witnesses by the prosecutor in civil courts has now been substantially stabilised. The prosecutor has a discretion as to the witnesses whom he decides to call. But he should exercise his discretion fairly, and this may entail the calling of witnesses who appear to be more favourable to the accused than to the Crown. This will be especially the position when the accused is undefended and if the prosecutor does not call witnesses who gave evidence at the preparatory examination he should make them available to the defence. The cases in our courts are cited in Gardiner and Lansdown, South African Criminal Law, Sixth Edition, pages 384 and 400. The English practice is perhaps more favourable to the accused than ours. See Archbold,33rd (1954)Edition page 515; Halsbury,3rd Edition Vol.10 page 418. In Adel Muhammed el Dabbah v. Attorney General for Palestine (1944 A.C. 156) the Privy Council accorded clear recognition to the prosecutor's discretion while stating, at page 169, "It is consisten/t

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"with the discretion of counsel for the prosecution, which "is thus recognised, that it should be a general practice of "prosecuting counsel, if they find no sufficient reason to the "contrary, to tender such witnesses for cross-examination by "the defence, and this practice has probably become more gene- "ral in recent years, and rightly so, but it remains a matter "for the discretion of the prosecutor." Tendering for cross-examination means calling the witness, even if no questions are put to him by the prosecutor. The existence of the normal English practice of calling a witness simply in order that the defence may cross-examine him is at least some indication that there would be nothing absurd or impracticable if a particular statute made it obligatory upon a prosecutor to follow that course. By so calling a witness for cross-examination the prosecutor would not be indorsing the witness' evidence in any way but he would be putting the accused into the fortunate position of being able to lead a witness who was disposed to be favourable to the defence. Generally that might not seem to be a satisfactory practice, but there is no manifest reason why a statute or statutory rule should not, as a matter of policy, make it applicable to a particular type of proceedings.

Members of the armed forces, who often have not the same freedom as civilians to seek legal

advice/.....

advice and assistance and who live in a world of some limitation and restraint, may perhaps naturally be treated with special consideration, when they are brought before military tribunals. The earlier history of the provisions under consideration shows that there has been some groping after a satisfactory way of adjusting the matter. In the Rules of Procedure that applied under the 1912 Defence Act of the Union, Rule 60 corresponded to the present Rule 85 and sub-rule A read - "It is the duty "of the prosecutor to assist the court in the administration of "justice, to behave impartially, to bring the whole of the trans "-action before the court, and not to take advantage of, or supp "press any evidence in favour of the accused." Rule 75 corresponded to the present Rule 64(6); it read - "The prosecutor "is not bound to call all the witnesses whose evidence in the "summary or abstract of evidence given to the accused, but he "should ordinarily call such of them who were called for the "prosecution as the accused desires to be called, in order that "the accused may, if he thinks fit, cross-examine them, and the "prosecutor should for this reason, so far as seems to the "court practicable, secure the attendance of all such witnes- "ses."

These earlier Rules, 60 and 75, were identical with the similarly numbered rules in the English

Rules/.....

Rules of Procedure contained in the Manual of Military Law. At page 609 of the 1914 Edition of that Manual it is noted against Rule 60 - "The Prosecutor is an officer for securing "that justice is done, not a partisan to obtain a conviction, "independently of the justice of the case. Therefore he should "prove, either by witnesses called for the purpose, or by the "examination of the other witnesses, any facts which show the "true character of the offence, whether they tend to aggravate "or alleviate it, or to show the innocence of the accused, and "he must be especially careful to prove any facts tending either "to show the innocence of the accused or to extenuate his of-"fence." At page 617 in the note to the English Rule 75 it is said, inter alia - "Failure to produce a material wit-"ness for cross-examination might invalidate the proceedings. "Any witness whose evidence is in the summary or abstract of "evidence, and whom the accused asks to have called, should be "called by the prosecution."

In 1946 our Rule 75 was altered to read - "The prosecutor is not bound to call all the witnes-"ses whose evidence is in the summary or abstract of evidence "given to the accused, but he should, so far as seems to the "court practicable, secure the attendance of all such witnesses "as he does not call in order that the accused, if he thinks

"fit/.....

"fit, may call them in his defence."

The change in 1943 was possibly the result of war conditions. It operated less generously to the accused than the earlier Rule. But even the two earlier Rules (60 and 75) did not compel the prosecutor to call all witnesses favourable to the accused, though the normal practice, it seems, strongly favoured doing so.

When the present Rules were introduced in 1958 it seems clear that there was a reversion towards the greater protection of the accused. If the contention for the appellant is correct it would only mean that the ordinary practice of earlier times, which was departed from in 1943, was restored in a tightened-up form. The accused was certainly to be treated more favourably after 1958 than from 1943 to 1957, and there would be no obvious reason why he should not be treated more favourably even than before 1943. The change from "suppress" in the old Rule 60 A to "withhold" in the new Rule 95 (2) seems to point that way.

It should be pointed out that the allegations in the petition are only to the effect that the five witnesses "can" give evidence favourable to the accused, now the appellant. But that I think amounts to saying that their evidence is in favour of the accused within the meaning

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of Rule 95 (2). Until the evidence is actually given and assessed one cannot say for certain that it favours the accused. Rule 95(2) is dealing with what is the prima facie position - the witness is capable of helping the accused.

On the whole it seems to me that the proper interpretation of the Rule is that contended for by the appellant. Moreover, if the interpretation is taken to be in doubt the appellant is entitled to the principle applied in Rex v. Milne and Erleigh (1951(1) S.A.791 at page 823), that the more lenient of two reasonably acceptable constructions should be adopted. Here the appellant's construction is the more lenient in the sense that it is more favourable to the defence.

It was not contended on behalf of the appellant, and it does not follow from a conclusion in his favour, that if he has himself called witnesses at the preliminary investigation, he can require the prosecutor to call such witnesses before the Court Martial.

No argument was addressed to us on the propriety of the form of the rule nisi as issued, save that, as stated above, it was agreed that there should be no order as to the costs in the Transvaal Provincial Divisoon.

We/.....

We were informed by counsel that it had been agreed that the costs of appeal should follow the event.

The appeal is allowed with costs and the order of the Transvaal Provincial Division is altered to one confirming the rule nisi, save that there is no order as to costs in the Transvaal Provincial Division.

De Beer, J.A.
Malan, J.A.
Van Blerk, J.A.
Ramsbottom, J.A.
} Concur.

24/9/59