

134/1959

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

(APPELLATE

DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAK.

(my record)

LINUS VAN RENSBURG

Appellant.

versus

THE QUEEN

Respondent.

Appellant's Attorney
Prokureur van Appellant

Respondent's Attorney
Prokureur van Respondent

pro deo

Appellant's Advocate
Advokaat van Appellant

H.C.J. Lemmer

Respondent's Advocate
Advokaat van Respondent

F. G. ...

Leave - TPD) Set down for hearing on: Wednesday, 23rd Sept, 1959
Op die rol geplaas vir verhoor op: -

1.3.6 (A) 9.45 - 12.6. C.A.V.

Malan, Ra. bottom, JA Botha, AJA

Partea: Monday 28th September 1959

appeal dismissed.

Malan J.A.
Kamshabam J.A.
Botha A.J.A.

[Signature]
acc. Ref

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION.)

In the matter between

LINUS VAN RENSBURG

..... Appellant,

and

REGINA

..... Respondent.

Coram: Malan et Ramsbottom KJJ.A. et Botha A.J.A.

Heard: 23rd September, 1959. Delivered:

28/9/1959.

J U D G M E N T.

BOTHA A.J.A.:

The appellant was charged with three others, including one William Khoza, before a regional magistrate with housebreaking with intent to steal and theft. The charge against William Khoza was withdrawn before plea and he thereafter gave evidence for the Crown. The two other accused were discharged at the close of the Crown case but the appellant was convicted and was, in view of his previous convictions, declared an habitual criminal as the magistrate was obliged to do in terms of Section 335(2) of Act 56 of 1955. An appeal against his conviction to the Transvaal Provincial Division was dismissed but that Division gave him leave to appeal to this Court.

The charge against the appellant was that on the 15th

September, 1957,/2

September, 1957, he did " wrongfully and unlawfully break and enter the office there-being of the 'Good Humour Ice Cream' factory with the intent the goods there being to steal and did then and there steal £70 in cash money,the property of the said 'Good Humour Ice Cream' and in the lawful possession of one Abe Levitan."

It is clear from the evidence adduced at the trial and it is not disputed that the office of the "Good Humour Ice Cream" factory was broken into some time before 11p.m. on the evening of the 15th September, 1957, and that a cash amount of £75 was removed therefrom. The only question in issue at the trial was whether the appellant was associated in the commission of the offence charged.

The main witness for the Crown, William Khoza, an employee of the Good Humour Ice Cream Company, stated that after he had paid in his takings for the day in the office on the afternoon of the 15th September, 1957, and just before going off duty at approximately 6 p.m., he received a message from Moses Ghama, a ~~xxx~~ co-employee, as a result of which he went to a van parked in the street. The appellant, his brother Gregory van Rensburg and a third person were in the van. On the appellant's invitation William also entered the van which then drove up Park Street, the street on which the factory is situated, and

eventually into/3

eventually into Jeppe Street. Here the van was parked.

Appellant then asked William where they could get liquor. As William was unable to supply the required information he suggested that the boys in the yard at the factory be consulted. He and the appellant thereupon walked back to the factory where they ~~ask~~ asked Elias about liquor. Elias also could not help the appellant. They then walked back to the van where William parted company from the appellant and went back to a room in the yard of the factory. Several other boys were in this room. At approximately 9 p.m. the appellant accompanied by his brother Gregory and a third unidentified person came to this room. They had handkerchiefs tied over the lower portions of their faces and the appellant had a gun in his hand. Only the appellant ~~ask~~ actually entered the room and ^{he} threatened to shoot anyone who stood up. One of the boys in the room, who happened to be a visitor there, was ~~is~~ dragged out of the room and asked where the office was. When this boy explained that he was a mere visitor, William was grabbed and dragged outside. Appellant said to him "Don't be scared man, we are the people, just show us where the office is ". William protested and said " How can you do such things, you know I am employed here, I will be arrested ". He nevertheless showed them the storeroom and then ran to the

night watchman/4

night watchman at the Public Utility Corporation premises nearby. After a short while William saw the van appear and Gregory van Rensburg and the third person running towards it carrying a cardboard box. When they got into the van, William took its registration number except for the last digit. After the van had left, William reported the matter to the police and later when Sgt. Booysen went to the factory to investigate as a result of this report, he furnished to the latter the number T.J. 5417. It is common cause that the registration number of appellant's van is T.J. 54179. Both the appellant and his ~~brother~~ brother Gregory have been known to William for approximately 6 or 7 years.

The Magistrate accepted, especially in the light of the evidence of Moses Ghama, which will be considered presently, that William was an accomplice, not in the actual commission of the offence, but in the sense that he undoubtedly had something to do with it, and it is clear from his reasons for judgment that the Magistrate would not, on that account, have convicted the appellant in the absence of the necessary corroboration implicating him. Apart from that consideration it is clear from William's evidence under cross-examination, that he was a most unsatisfactory and untruthful witness. The Magistrate

was however...../5

was however fully alive to these considerations but came to the conclusion that while his complicity in the crime may have prompted him to colour his evidence and to tell untruths, there was no reason why his evidence should not be regarded as credible " as far as his actions after, according to him, the accused and others came there again," is concerned, i.e. after the visit that afternoon when preparations for the commission of the crime may have been discussed.

The Magistrate found strong corroboration of William's evidence in the evidence of Moses Ghama who stated that while sitting on the pavement near the factory premises on the afternoon of the 15th September, 1957, a van stopped near him. Appellant and another coloured man were in the van and the appellant asked him where William was. He told the appellant that William had not yet come in, and they then waited outside in the van. Moses was then called in by a European and while he was inside in the office William came in. He told William about the people waiting outside and he said that William seemed happy about it and he, Moses, gained the impression that William knew about them. After William had done his business he went outside but the witness did not see where he went to. He next saw William at about 7.30 p.m. when he came into the room in the

yard where the witness and the other boys were. After about 5 minutes William again left the room. At that time the witness also went outside and to the garage on the Public Utility Corporation premises nearby. ^{while he was} ~~Whilst~~ sitting in this garage July and Elias, apparently both employees at the ice-cream factory, came and made a report to him. As a result of this report he ~~he~~ followed them and as he got to Gough Street, which apparently runs out of Park Street, he saw parked there the same van that he had seen earlier that afternoon, and because he became suspicious he wrote down the registration number of that van T.J. 54179 on a piece of paper which was later handed to the police and was an exhibit at the trial. The time, he said, was " something to nine ". After a few minutes he went back to the garage where he had been sitting when called by July and Elias, but while he was still on the pavement he saw three people enter the ice-cream yard. He could not identify them but after a short while the three people emerged from the yard, one carrying a money-bag, while one went to the corner to fetch the van. The van came, stopped and then these people got into the van and the van then pulled off. He said that van was the same van that he had seen during the day and of which he had taken the number at "something to nine". After that he reported to a

He alleged that it was his birthday on the 15th September and that a party had been arranged for him at his house that afternoon and evening. He and his brother Gregory left the house to fetch some beer in Fordsburg and after that decided to collect some money which William Khoza owed him. He admitted that he had known William Khoza since 1955 and that he knew that the latter was employed at the Good Humour Ice-cream Factory. He admitted that he spoke to Moses Ghama and that the latter called William. He said William paid him £1 ~~out~~ of the £5 he owed him. William then went with him in the van to his house in Sophiatown where he had a meal and some beer. At about 7.30 p.m. he decided to fetch his brother-in-law who was employed at the Waldorf Hotel; he took William with him and on the way there, about a block above the Good Humour Ice-cream Factory and in Gough Street he dropped him. He said he stopped there for a while to attend to a radiogram which he had in the back of the van and which was shifting about. He then drove to the Waldorf Hotel where he picked up his brother-in-law at 8 p.m. He dropped his brother-in-law in Vrededorp and then went on to his house in Sophiatown. After about three-quarters of an hour he and his wife took his brother Gregory to Kliptown. On the way he picked up a native Solomon. He said that the petrol in the van ran short and as the garage on the Main Reef Road was closed.....19

closed, he went on to Krugersdorp and filled up there. On their way back they were arrested by the police.

The suggestion that Moses Ghama may have taken the number of appellant's van when he had stopped in Gough Street some time before 8 p.m. to attend to the radiogram in the van, cannot be accepted. Moses said that he took the number at "something to nine", but more important is the fact that Moses ~~x~~ said that he saw three persons emerge from the yard at the factory, and enter the van, the number of which he had taken earlier, whereas according to the appellant he was the only one in the van at the time. There is no reason for ~~regarding~~ ^{rejecting} the evidence of Moses that the van which he saw these three persons enter, was the same van he had seen there earlier that afternoon and of which he had later in the evening taken the number.

That evidence was accepted by the Magistrate and I have not been convinced that he was wrong in doing so. Of some importance in this regard is the evidence of Gregory van ~~HEE~~ Rensburg, called for the defence, who stated that the appellant and William left the party between 7 and 8 p.m. and that the appellant did not return until some time between 8.45 p.m. and 9.30 p.m.

Although he was not positive about the relevant times, it does appear from his evidence that at the time of the commission of

the alleged offence, neither the appellant nor his van was at the house.

The appellant was cross-examined at length about the false denials he made to Sgt. Engelbrecht. He admitted that they were false but tried to justify himself on the ground that he was under arrest for nothing that he had done and although he did not want to make a statement, Sgt. Engelbrecht continued asking him questions to which he admittedly gave false answers. His denial that he knew William Khoza is, however, based on a different ground. He said that he did not deny that he knew William Khoza. He said he was asked whether he knew "George Khoza" - a name by which William Khoza is also known - and he denied that he knew George Khoza, because he did not know William by that name. But Sgt. Engelbrecht stated in evidence that he ^{had} asked the appellant whether he knew "William Khoza" and th_{at} was not challenged in cross-examination.

Appellant's wife, Dolly van Rensburg, also stated that the appellant and his brother Gregory left their house in Sophiatown at about 4.30 p.m. to fetch some beer. They returned at about 5.30 p.m. with William Khoza who had some refreshments and left again with appellant at approximately 7.30 p.m. She said appellant left to fetch her brother Patrick and he returned

between 8 p.m. and 8.30 p.m. The party at her house ended at ~~XX~~ about 10.30 p.m. and they then left to take appellant's brother Gregory home to Kliptown. On the way they picked up a fourth person and between 11 p.m. and 11.30 p.m. they were arrested by the police. They were arrested on the Roodepoort Road because they had run out of petrol.

The Magistrate rejected as false the evidence of the appellant and his witnesses mainly on the ground of the untrue statements made ~~by~~ by the appellant to Sgt. Engelbrecht and in view of the evidence of Moses, which he accepted, that appellant's van was at approximately 9 o'clock that evening seen near the scene of the crime. Having rejected as false the evidence of the appellant, the Magistrate necessarily concluded that the defence raised by the appellant, namely that of an alibi, could not, ~~not~~ in the light of all the evidence, reasonably be true. (Rex vs. Hlongwane, 1959(3) S.A. 337 (A.D.)) I am not convinced that the Magistrate erred in coming to the conclusion he did.

William Khoza's allegation that the appellant was one of the three persons who came into the yard of the factory at approximately 9 p.m. on the evening of the 15th September is corroborated by the evidence of Moses, which the Magistrate accepted, and according to which the appellant's van T.J. 54179 was at approximately...../12

was at approximately that time at first seen in Gough Street, near the factory premises, from where it was later fetched by one of the three persons who emerged from the factory yard, to a spot near the yard where the other two persons, one of whom carried the alleged money-bag, entered it. The appellant did not allege that his van was at any time during that evening out of his possession - on the contrary, according to his evidence the van remained in his possession all the time. This evidence fully implicates the appellant and coupled with the false denials which he made to Sgt. Engelbrecht, especially his denial that he knew William Khoza who turned out to be the principal witness against him, which is strongly indicative of a guilty conscience, the Magistrate was, in my ~~x~~ opinion, entitled, on all the evidence, to convict the appellant.

Counsel for the appellant criticised William Khoza's identification of the appellant as one of the persons who staged the hold-up in the room where William and the other boys were on the ground that his identification was based entirely on the remarks the appellant made when he entered the room, and because William said that he could not recognize the appellant as he was not wearing the same clothes he wore that afternoon and that he had a handkerchief tied round the lower portion of his face.

That certainly is...../13

That certainly is the evidence William gave, but he also said, when first asked how he recognized the appellant, that it was " because I saw them ". Reading his evidence as a whole one gains the impression that William's identification of the ~~x~~ appellant was not limited to the remarks the appellant is alleged to have made when he entered the room. Appellant was well known to him and the fact that he asserted that the appellant had changed his clothes, indicates that he recognized him because, as he put it, he saw him. In any event, he had no doubt about his identity and the fact that appellant's van was at that time seen near the scene of the crime is, as I have already indicated, strong corroboration of the allegation that the appellant was one of the three persons concerned.

A further criticism offered by Counsel was the Crown's failure to call as ~~x~~ witnesses some of the several other boys in the room at the time of the alleged hold-up, including July and Elias, or the night Watchman at the Public Utility Corporation premises, where William sought refuge. It is clear that the evidence of these persons would have been of great assistance to the court, and the Crown's failure to call any of them may certainly be matter for adverse comment. But even though it is unlikely that none of these witnesses were available at the trial,/14

trial, the matter was not raised or investigated then, and I cannot now assume that the Crown had no valid reason for not calling any of them.

The appeal is dismissed.

A. J. A.
BOTHA A.J.A.

MALAN J.A.

RAMSBOTTOM J.A.

IN THE SUPREME COURT OF SOUTH AFRICA
(Transvaal Provincial Division)

13th June, 1958.

LINUS VAN RENSBURG v. REGINA

BEKKER, J.: The present is an appeal by one Linus van Rensburg who was convicted by a regional magistrate on a charge of housebreaking with intent to steal and theft. Appellant was charged jointly with three other accused namely William Khoza, Gregory van Rensburg and Solomon Tsele. The Crown withdrew the charge against William Khoza and called him as a witness for the prosecution. At the conclusion of the Crown case the magistrate discharged Gregory and Solomon as there was insufficient evidence produced against them to warrant them being put on their defence. In view of his previous convictions the appellant was declared an habitual criminal. 10

In broad outline the case as presented to the magistrate was the following: The Crown called William Khoza, whom the magistrate quite correctly treated as an accomplice, and upon whose evidence, in the absence of the necessary corroboration, he would not have convicted the appellant. He however found such corroboration in the evidence of a further Crown witness one Moses Gama and in the untruthfulness of the appellant. The defence put up by the appellant was an alibi; in support of this defence appellant, who gave evidence under oath, called his wife Dolly, and his brother, a co-accused, Gregory. The magistrate however rejected this defence and the evidence of these persons and convicted the appellant. 20

The following facts are common cause:

At about 9 p.m. on the 15th September 1957, the office of the "Good Humour Icecream" factory in Johannesburg was broken into and £70 in cash was stolen. At about 6 p.m. on the same day, the appellant, visited the factory in a fawn coloured Ford panel van bearing registration numbers, TJ 54179. After having enquired from Moses Gama the whereabouts of William Khoza, Moses called the latter who then went to appellant, entered the panel van which departed. William Khoza returned later on, 10 but before the housebreaking took place. At about 2 p.m. on the 16th September 1957 appellant and others were arrested by the Police who found them driving the van on the Roodepoort Road. On being questioned by Dect. Sergt. Engelbrecht appellant stated that he had not been to the "Good Humour Icecream" factory on the 15th September 1957, and that he knew nobody there i.e. including William Khoza; the appellant admitted in evidence that these were untruthful statements inasmuch as he had been to the factory to see William Khoza on that day and that the 20 latter was well known to him; his reasons for having made the untruthful statements to the Dect. Sergt. I shall return to later.

I think it is convenient if I deal with appellant's version immediately. He stated that at about 5 or 6 p.m. he visited the icecream factory in order to obtain payment of a debt owing to him by William Khoza; after speaking to Moses Gama about William's whereabouts, the latter came to his van. They discussed the debt and as there was a birthday celebration/^{party} to be held that night 30 at his house, William accompanied him there in his van.

Later he drove William back to the icecream factory; he dropped William not at the premises, but two street blocks away; the time was approximately 7.30 p.m. Thereupon he returned home. He denied all knowledge of the housebreaking. Gregory supported Appellant's version in the main but in cross-examination added that Appellant and William left the party between 7 and 8 o'clock and that the Appellant returned between the hours of 8.45 p.m. to 9.30 p.m. He was, however, not quite sure of the time. Dolly, the wife of Appellant, said that there was 10 a shortage of beer at the party whereupon her husband left to obtain a further supply. He left at about 4.30 p.m., returned at about 5.30 p.m. accompanied by William Khoza. They again left at 7.30 p.m. and Appellant returned home between 8 and 8.30 p.m. At 10.30 p.m. the party came to an end and Gregory was taken home by Appellant and his wife. On the way a fourth person was picked up whereafter the arrest took place at about 11 p.m. If this evidence might reasonably be true then appellant naturally should have been acquitted. The Magistrate, 20 however, rejected this evidence for reasons previously mentioned and in the light of the grounds of appeal and the argument of Mr. Lowenthal, for the Appellant, I think it becomes necessary to review the evidence of William Khoza and Moses Gama in some detail.

William Khoza told the Magistrate that after he had gone off duty at about 6 o'clock that evening, Moses Gama made a report to him as a result of which he went into the street and to a van which was parked there. In the van he saw the appellant and two other persons, one 30 of whom he recognised as Gregory. Appellant told him to

enter the vehicle which he did. Appellant then drove off into Jeppe Street; some distance away from the complainant's premises the vehicle was brought to a stop. Appellant asked him if he could tell them where liquor could be obtained. The witness was unable to assist but suggested that they should return to the yard of complainant's premises and ask the 'boys' where liquor could be obtained. They drove back some distance and parked the vehicle from where Appellant and the witness proceeded on foot into the yard. Then one Elias was asked about liquor. He apparently knew where it could be procured but was unwilling to take them to the place because of the lateness of the hour. Appellant, accompanied by the witness, returned to the van. After appellant had said "all right, you remain, we'll come and see you some other day" he drove off and the witness returned to the yard. At about 9 o'clock, whilst he and other natives were sitting in a room in the yard, he saw Appellant, Gregory, and a third person enter the room. The three persons had the lower portions of their faces masked with handkerchiefs. Appellant who was armed, said "anyone who stands up here we will shoot." They got hold of an inmate of the room and directed him to lead them to the 'office'. This person explained that being a stranger he was unable to comply with the demand. They thereupon grabbed hold of the witness and directed him to lead them to the office, Appellant adding: "Don't be scared man, we are the people, just show us where the office is." Having shown them the "store"-room, he left them there, but immediately ran to the night watchman of Putco and made a report to him. As he returned he saw the van ap-

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proaching; Gregory and the unknown person were carrying a cardboard box between them, running to the van; the vehicle slowed down, they jumped in and the car raced off, but not before he, the witness, had made a mental note of the registration number of the vehicle; he thereupon reported the matter to the Police at Fordsburg and gave them the registration number (save the last digit which he could not remember) of the vehicle, namely, T.J. 5417.

A mere perusal of William Kosa's evidence in cross-examination shows him to be a dangerous witness, of a highly mendacious character, the author of a version labouring under serious improbabilities, inconsistencies and contradictions — the details whereof I need not dwell upon. In my opinion he was implicated in the commission of the crime and was an accomplice without any doubt. The fact of the matter is, however, that he reported the crime to the Fordsburg Police at about 11.30 p.m. on the 15th September 1957, and supplied the registration number T.J. 5417. (cf. the evidence of Constable S.D. Booyesen). This action on his part does not alter the view I hold of him; his effort at supplying the registration number reveals the working of his mind. It is common cause that he was well acquainted with the Appellant and knew the panel van very well. There was no need for him to have pretended ignorance as to the identity of the housebreaker on his version of the events; and if he desired to assist the Police, he could simply have told them that Appellant was the culprit.

Moses Gama's evidence was, however, accepted by the Magistrate, and if the Magistrate did not err in so doing, it seems to me to be the end of this appeal. Moses

also worked at the ice-cream factory, and apart from matters which are common cause, he testified to the following events. He stated that William returned to the yard of the ice cream factory some time after the Appellant had first spoken to him; the employees were then having their evening meal; William had some food and left the room; he then left and went to visit his friend the Putco night-watchman. He entered the Putco Garage and sat down. Some time later he said "July came to me and Elias, they made a report to me". As a result of this report, 10 (the evidence does not reveal what the nature of the report was) he proceeded to Gough Street where he saw the Appellant's van. He became suspicious and recorded the registration numbers T.J. 54179 on a piece of paper which was later handed to the Police. He explained why he became suspicious. In cross-examination he said:-

"It is because I had seen this van during the day, and now I see the van parked at the corner and George".... (i.e. William Khoza)...

"had gone out and come back and then came back 20 again, and then Elias came and made this report to me at Putco that is the thing that made me afraid".

At the time he was accompanied by July and Elias. The Putco night-watchman, however, remained at his station. Having taken the registration number returned to the Putco night-watchman and after having sat down for a short while he observed three people entering the factory yard; later they emerged from the yard, one carrying a money bag. Another then walked in the direction of the 30 van; the van returned, stopped and the persons then drove off. He then went to report the incident to certain

Mr. Cohen and was taken by the latter to the Fordsburg police station.

Mr. Lowenthal sought to attack the reliability of Moses on a number of grounds. He contended that for all one knew, Moses might have been an accomplice in the crime. In support of this contention he pointed to the fact that Moses and William were co-employees; Moses called William, in the first instance to interview the Appellant, and that Moses happened to take the number of the vehicle. These features, so the argument ran, are 10 consistent with a possibility that Moses might have been a possible accomplice and if the magistrate had been alive to the possibility, it is doubtful whether a conviction would have followed. At no time during the trial was this ever suggested, least of all by cross-examining counsel; in any event, I do not regard the facts enumerated by counsel as sufficient to justify a finding that it is reasonably possible that Moses was an accomplice.

Counsel next referred to a number of contradictions in the evidence of Moses as compared with that of William, 20 and urged that Moses' evidence was, for that reason, suspect and unsatisfactory. I do not regard this as a reason for finding that the magistrate clearly erred in accepting Moses' evidence as reliable. William in my view of the matter is patently unreliable and if the magistrate shewed a preference for Moses, I cannot quarrel with him.

Counsel then suggested that Moses' version laboured under a serious improbability. In this connection he emphasised the feature that on Moses' evidence, the 30 registration number was taken before the main event, i.e.

the housebreaking, occurred. Why, asked Counsel, should Moses have walked to Gough Street? Nothing had happened which could have enabled July or Elias to have made a report of a nature which would have taken them to Gough Street, thus to have enabled them to observe Appellant's van! There is merit in this suggestion, but the matter was not investigated during the trial. The nature of the report made to Moses is not revealed in evidence. It may be the case, had the matter been investigated by cross-examining Counsel, that Moses could have supplied 10 a reason or the reasons why he walked to Gough Street. On the evidence presented however, I cannot find that the magistrate erred in relying on Moses' evidence for the reason advanced.

A final criticism offered was that the Crown failed to call a number of witnesses, in particular, the Putco night watchman, Elias and July, who could have supplied important corroborative evidence if Moses' version was a truthful one. Inasmuch as they were not called Moses' version according to Counsel, stands alone and in the cir- 20 cumstances must result in a doubt on the question of the guilt of the Appellant. There obviously is, subject to what I have to say, force in this argument. No doubt the three persons mentioned could have given important evidence. But again, the record is silent whether these persons were available as witnesses; if they had been and were not called by the Crown, the point would have been well taken. In the absence of information as to whether they were so available I do not think this Court would be justified in assuming that they were available, 30 and to dispose of the matter on that basis.

A further feature which influenced the magistrate

in convicting the appellant was his untruthful statements to Detective Sergeant Engelbrecht. It is common cause that he was then untruthful but the appellant explained that he told lies because he was not prepared to assist the police in the investigation of the case, and that he thought it advisable to deny everything. Whilst this is understandable, a perusal of appellant's evidence under cross-examination, at pages 103 to 106 justified the magistrate's conclusion that appellant in fact was an untruthful witness. In the result I am unable to find 10 that the magistrate erred in relying on Moses' evidence or that he was clearly wrong in convicting the appellant. The appeal is dismissed.

HIEMSTRA, J.: I agree.