275/1958

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

275/58

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

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

Appeal in Civil Case.
Appèl in Siviele Saak.

FLORIS PIETER BRAND *Appellant,*

versus

MINISTER of JUSTICE & ANO. *Respondents*

Appellant's Attorney / *Prokureur vir Appellant* Goodrick & J *Respondent's Attorney* / *Prokureur vir Respondent* Goodrick & J.

Appellant's Advocate / *Advokaat vir Appellant* Adv. G.P.C. Kat *Respondent's Advocate* / *Advokaat vir Respondent* Adv. v. Wyk de Vries

(WLD) *Set down for hearing on* / *Op die rol geplaas vir verhoor op* ~~Tuesday~~ ~~day~~ 23 ~~24~~ Sept. 1957

4.45 – 4.45 a.m.

2.4.5.7.5 (A)

C.A.V.

Postea: Wednesday 30th Sept. 1959

appeal dismissed with costs.

Schreiner J.A.
De Beer J.A.
Beyers J.A.
van Blerk J.A.
Ogilvie Thompson J.A.

L. A. Jacobson
Reg.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

FLORIS PIETER BRAND ..... Appellant.

versus

THE MINISTER OF JUSTICE
FOR THE UNION OF SOUTH AFRICA ..... 1st Respondent

and

[redacted]. STEPHANUS VIVIERS ..... 2nd Respondent.

Coram: Schreiner, De Beer, Beyers, Van Blerk et Ogilvie Thompson JJ.A.

Heard: 23rd September, 1959. Delivered: 30th September, 1959

J U D G M E N T

OGILVIE THOMPSON J.A.:

Appellant, a young man of twenty-nine years of age, unsuccessfully sued Respondents in the Witwatersrand Local Division for damages. His complaint, as set out in his Declaration, was that at about 1 a.m. on 24th November 1957, in a cafe called the Hamburger Hut situate in Claim Street, Hillbrow, Johannesburg, he was assaulted by Second Respondent who is a Detective Constable in the South African Police. The assault, according to the Declaration, took the form of Appellant's being forcibly pulled off a stool

and ...../2

and propelled out of the cafe. The Declaration then went on to aver that "shortly thereafter" Second Respondent wrongfully and unlawfully took Appellant to the Hospital Hill Police Station and there caused him to be imprisoned and detained. Respondents' plea, as amplified by further particulars, denied Appellant's allegations, and averred that on the occasion in question Second Respondent arrested Appellant inside the Hamburger Hut for the offence of creating a disturbance therein, and that, pursuant to this arrest, Appellant was lawfully held in custody at the Hospital Hill Police Station until approximately 11.20 a.m. on the 24th November 1957. First Respondent further pleaded that, in effecting the arrest, Second Respondent was not acting as a servant of First Respondent, but was executing a statutory duty. In response to a request for additional particulars, Respondents stated that Appellant had been arrested because he had, in the Hamburger Hut, contravened section 76 of the Johannesburg Traffic Bye-laws. This Bye-law, the validity of which was not questioned before us, reads, so far as is material to this appeal, as follows:

" Disturbing ..../3

" Disturbing the Public Peace.

(a) No person shall disturb the public peace by making noises or by shouting, roaring, wrangling, quarrelling ..... or by any riotous, violent or unseemly behaviour by day or night, in any public or private place, or premises or on any street".

At the trial the only witnesses called in relation to the happenings at the Hamburger Hut were Appellant and Second Respondent. For the defence, three policemen testified as to what occurred when Second ~~Appellant~~ Respondent brought Appellant to the Hospital Hill Police Station; ~~while~~ Appellant called a Doctor - who described certain bruises on Appellant's upper arms - and his attorney, who deposed to the condition next day of the blazer worn by Appellant on the night in question. The Trial Court found that Appellant had, in the presence of Second Respondent, contravened the above-cited bye-law in the Hamburger Hut; that Second Respondent had there arrested Appellant; and that the arrest, and subsequent detention, of Appellant were not ~~an~~ unlawful. It, accordingly, gave judgment for the defence with costs. Appellant now appeals to this Court.

As the learned Trial Judge clearly recognised, the correct decision of the case vitally depended upon a

determination ..../4

determination of what had actually occurred at the Hamburger Hut. That was, of course, essentially a question of fact: and, as might be expected, the versions given in evidence by Appellant and Second Respondent regarding that question were widely divergent. Second Respondent justified his action in admittedly arresting Appellant without a warrant by relying upon subsection 22(1)(a) of Act 56 of 1955 which authorises a peace officer to arrest, without warrant, "any person who commits any offence in his presence". It was conceded by Counsel for Respondents in this Court that the onus of establishing that an offence was committed in his presence rests upon the peace officer who relies upon the above-cited subsection 22(1)(a) of the Code. This concession was, in my opinion, rightly made. For that view of the onus, which has been taken in Provincial Divisions (see e.g. R. v. Henkins 1954 (3) S.A. 560 (C); Rosseau v. Boshoff 1945 C.P.D. 135 at 137; R. v. Folkus 1954 (3) S.A. 442 at 445/6 (S.W.A.)), accords with principle and is in conformity with what was said by this Court in Union Government v. Bolstridge 1929 A.D. 240 at 244 and in Tsose v. Minister of Justice and Others 1951 (3) S.A. 10 at p.18).

Mr. Kotze developed his argument for Appellant around the basic submission that the learned Trial Judge had incorrectly placed upon Appellant the onus of showing that he had not committed any offence in the Hamburger Hut. The learned Judge did not anywhere in his reasons in terms state that he so placed the onus; but Mr. Kotze founded his above-stated submission upon a passage in the learned Judge's reasons which occurs in the following context. Second Respondent obtained a statement from one Pappas, the proprietor of the Hamburger Hut, who gave evidence at the criminal trial of Appellant for contravening the above-cited bye-law. Although available, Pappas was not called as a witness in the present suit. The Trial Court took the view that the failure to call Pappas could not, in the circumstances, weigh against either party. In dealing with this question - to which I shall later revert - in his reasons, the learned Trial Judge, inter alia, said:

> " It must, therefore, in my opinion, be taken that the evidence of Pappas would not have assisted the Plaintiff, on whom the onus rested to prove his case."

This remark, it was submitted by Mr. Kotze, revealed that

the ...../6

the learned Trial Judge had misdirected himself regarding the onus of establishing the commission of an offence by Appellant in the Hamburger Hut. I am unable to accede to this submission. The overall onus, in the sense of finally satisfying the Court that he was entitled to damages, ~~rested~~ rested, of course, upon Appellant (Pillay v. Krishna 1946 A.D. 946 at 952/953). I do not think that the learned Judge, in making the observation cited above, had anything more than that in mind. While it is true that the Trial Court's reasons nowhere specifically state that the onus rested upon Second Respondent to establish the commission in his presence of an offence, they equally do not contain any statement to the contrary. We were informed from the Bar that the onus now under discussion was common cause between, and was mentioned by, Counsel at the trial. It is, therefore, inherently unlikely that the learned Trial Judge, even if he had forgotten his own decision in Folkus's case (supra), would have been under any misapprehension as to where the onus in question lay. In all the circumstances, I am unable to hold that there was any such misdirection by the Trial Court as is contended for on behalf of Appellant. // New paragraph The

failure ..../7

failure of either side to call Pappas as a witness was much debated in argument before us. This failure was claimed by both Counsel to operate to the benefit of their respective clients. Now where a witness, who is available and able to elucidate the facts, is not called by a party such failure "leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him" (per WATERMEYER C.J. in Elgin Fireclays Ltd. v. Webb 1947 (4) S.A. 744 at 750). Ex hypothesi, such adverse inference only arises if the witness in question is able to elucidate the facts or may, from the circumstances, be presumed to be so able. Where the witness is equally available to both parties, it is, as Wigmore (section 288 cited with approval by this Court, inter alia in Gleneagles Farm Dairy v. Schoombee 1949 (1) S.A. 830 at 840) points out, more logical to say that the failure to call the witness "is open to an inference against both parties, the particular strength of the inference against either depending on the circumstances". In the present case, Pappas was available to both parties and he had given evidence at the criminal trial of Appellant

whereat ...../8

whereat Appellant was acquitted at the conclusion of the Crown case. Under cross-examination, Second Respondent admitted that he had heard Pappas depose at the criminal trial that two men with bad reputations had been engaged in an altercation with Appellant in the Hamburger Hut on the night in question. This would go to suggest that Appellant might have called Pappas. On the other hand, Second Respondent was in possession of a statement which he had taken from Pappas and of which, in the circumstances revealed by Second Respondent's evidence, he appears to have taken particular care. That may well have been a factor operating against Appellant's Counsel's calling Pappas (cf. R. v. BEZUIDENHOUT 1954 (3) S.A. 188 at 196 (A.D.)). So far as Second Respondent's not calling Pappas is concerned, his Counsel intimated to the Trial Court that he was not calling Pappas because the latter did not assist his case. Inasmuch as Pappas might reasonably have been expected to have observed at least some of Appellant's behaviour in the Hamburger Hut as deposed to by Second Respondent, Counsel's statement virtually amounted to an express intimation of what the Trial Court might, by applying the principle of the Elgin

Fireclays ..../9

Fireclays case (supra), have inferred. On balance of these various aspects of the matter, I do not think that the mere circumstance that Pappas was not called as a witness can, in all the circumstances, be accorded any particular weight.

It was further submitted in argument before us that, since the onus rested upon Second Respondent to prove that Appellant had committed an offence in his presence, the failure to call Pappas must, for that reason, be taken against Second Respondent. This submission was founded upon the statement by VAN DEN HEEVER J.A. in the Gleneagles case (supra) at p.840, and adopted in R. v. Bezuidenhout (supra) at p.196, to the effect that, where either party could have called a witness, failure to do so operates against the party on whom the onus rests rather than against the other party. This statement does not, however, mean any more than that, if, in the absence of the testimony of the witness in question, the evidence is otherwise equally balanced, the onus will come into effective operation. The statement in question does not mean that any greater obligation to call the witness rests upon the onus-bearing party: it merely means that, if he does not call the witness,

he ...../10

he runs the risk of the onus proving decisive against him. It is, of course, always open to the onus-bearing party to prove his case independently of - that is to say, without calling - any particular witness. That appears to me to be what happened in the present case. The onus was on Second Respondent to prove the commission of an offence in his presence by Appellant. By failing to call Pappas Second Respondent took the risk of the Court's holding that he had not discharged that onus. Since, however, the Trial Court, in the event, believed Second Respondent's own evidence on this important issue, the fact that he had called no corroborating evidence was, in the result, immaterial. The absence of any such corroborating evidence, as well as the inference to be drawn from his Counsel's statement that Pappas's evidence would not assist Second Respondent's case, must inevitably have been taken into consideration by the learned Judge in reaching his decision to believe Second Respondent's account. In the enquiry before us - which is, in essence, whether the learned Trial Judge has been shown to be wrong in ~~xxxx~~ having accepted Second Respondent's version of the events of the night in question - ~~the~~ Second Respondent's failure to call Pappas

is ...../11

is no more than one of the factors to be considered. It certainly can not, in my opinion, rightly be elevated into a decisive consideration.

The learned Trial Judge concluded a full and careful review of the conflicting versions of the events in the Hamburger Hut given by Appellant and Second Respondent respectively by finding that Appellant's conduct on the evening in question was to some extent influenced by the consumption of alcohol and that, but for that, his conduct might have been different. The learned Judge continued:

> " Therefore on the balance of probabilities I find that the plaintiff's version of the facts is not reasonable nor logical, whereas the version on behalf of the defendants is reasonable and logical. I therefore reject the plaintiff's version and accept the defence version and I do so in spite of the fact that Viviers, the second defendant, was untruthful in two respects namely as to the contents of an affidavit of disclosure in connection with the misplacement of documents and secondly as to the reading at the Magistrate's Court of a record after a certain criminal case. I find that in the Hamburger Hut the plaintiff did disturb the public peace by his conduct in a private place. It was a private place to which the public had access."

In fairness to Second Respondent, it must be stated that his

evidence ..../12

evidence concerning the reading of the record, mentioned in the above-cited passage, reveals him to be an unsatisfactory, rather than an untruthful, witness. The significance of the matter, however, lies in the fact that what the learned Trial Judge regarded as serious defects in Second Respondent's evidence were in no way overlooked by him in reaching his conclusion that Second Respondent's version should be believed. Against these unsatisfactory features in Second Respondent's evidence, has to be weighed the fact that Appellant's account of what occurred at the Police Station is disputed by the three defence witnesses. Even if the testimony of those witnesses be approached with the reserve which the circumstances might suggest, the fact remains that, in relation to the events at the Police Station, Second Respondent's version is supported on the record, while that of Appellant is contradicted. It is not disputed that, once Second Respondent's account of Appellant's conduct in the Hamburger Hut is accepted, Second Respondent was legally entitled to arrest Appellant. The appeal thus resolves itself very largely into an enquiry as to whether the learned Trial Judge has been shown to be wrong in having preferred

Second ...../13

Second Respondent's version of the events in the Hamburger Hut to that given by Appellant.

In relation to this enquiry, full and helpful arguments were addressed to us by both Counsel. It is not practicable to discuss, in this judgment, all the facets of those arguments. It suffices to say that, having given careful consideration to Counsel's arguments, I have come to the conclusion that no sufficient ground has been made out for this Court to disturb the Trial Court's essential findings of fact. I proceed to outline, without going into detail, the main considerations which have led me to this conclusion.

Although, as appears from the above-cited passage from his reasons, the learned Trial Judge based his final conclusions on probabilities - as distinct from findings of demeanour and the like - this Court can not entirely overlook the advantages which the Trial Judge enjoyed of seeing and hearing the witnesses. That advantage applied even in relation to the drawing of inferences. For, as was pointed out in Dhlumayo's case 1948 (2) S.A. at 705 (A.D.), a Trial Judge may be better able than an Appeal Court to estimate

what ...../14

what is probable or improbable in relation to the particular people whom he has observed at the trial.

Appellant's evidence is not corroborated by any feature which materially strengthens that evidence. That his blazer was badly torn the next day is established by the evidence of Appellant's attorney; but this evidence is largely neutralized by the police evidence as to the extent of the tear when Appellant was brought to the Police Station. Again, the Doctor's evidence regarding the bruising of Appellant's upper arms, although consistent with Appellant's evidence, falls far short of being decisive. According to Appellant, Second Respondent took the intiative in interfering with him by shouting out to Appellant "You think you are tough, but I will fix you". Appellant admits that at one stage, he told Second Respondent to mind his own business. Save for this remark, on Appellant's account of the events in the Hamburger Hut, his conduct called for no action whatever on the part of Second Respondent. There is thus, inherent in Appellant's testimony, the fundamental improbability that Second Respondent would have arrested him at all. The record contains no suggestion of any prior bad blood

between ...../15

between the parties: indeed, they were total strangers to one another. Moreover, it is in some measure also inherently improbable that Second Respondent, a detective of nine year's experience, would, in the absence of good cause, summarily arrest Appellant in the presence of numerous witnesses. In contrast with all this, Second Respondent's version has little or no improbability inherent in it. Appellant had, on his own account, had several beers earlier in the evening, and he was admittedly involved in a protracted altercation with certain somewhat belligerent persons, referred to in the evidence as "Ducktails", inside the Hamburger Hut. Appellant freely conceded that he had "a few times" addressed these "Ducktails" with words to the effect of "Come and get me you Tigers"; and he also agreed that he had on one occasion had to defend himself against an attack from these "Ducktails" by using a bar-stool as a shield. Appellant's own evidence reveals him as having been in a somewhat militant, if not actively aggressive, mood. Without pursuing all the details, the general impression created by the evidence is that the account given by Second Respondent is the more probable of the two. Having regard to the

various ..../16

various considerations I have mentioned, I find myself unable to say that the learned Trial Judge was wrong in accepting the version of Second Respondent and in finding that Appellant committed an offence in Second Respondent's presence and that, consequently, Second Respondent was in law entitled to arrest Appellant without a warrant.

Some reliance was also sought to be placed by Mr. Kotze upon section 26 of Act 56 of 1955 which provides that

> " Whenever a person arrests any other person without warrant, he shall forthwith inform the arrested person of the cause of the arrest".

Decisions exist to the effect that, if this section be not complied with, the arrest is unlawful (see Gardiner and Lansdowne 6th Edit. Vol. 1 page 215 and R. v. Kistesamy 1947 (4) S.A. 788 at 792). It may be that such a result will not always follow if the circumstances be such that the arrested person - for instance, a thief who is caught red-handed - necessarily must know why he has been arrested (cf. Christie and Another v. Leachinsky (H.L.) 1947 (1) A.E.R. 567 and R. v. Ndara 1955 (4) S.A. 182 at 184 (A.D.)). It is,

however, .../17

however, not necessary, for the purposes of this appeal, to express any opinion on that question; for, upon the learned Trial Judge's findings, Second Respondent did, when he arrested Appellant, "forthwith" inform him that he was arrested "for disturbance". The submission that this was insufficient information to constitute compliance with the section is without substance. Section 26 manifestly does not require the arrested person to be informed of the ipsissima verba of the charge which is later to be proffered against him. What is required is that the arrested person should in substance be apprised of why his liberty is being restrained. As Viscount Simon, in dealing with the identical question in England (where, however, the matter is not governed by statute) put it in Leachinsky's case (supra), the requirement that the arrested person must be informed of the cause of his arrest does not mean that technical or precise language need be used. In the present case Appellant was, on the learned Trial Judge's finding, sufficiently informed of the cause of his arrest.

It follows - and was, indeed, not contested before us - that, if Appellant was lawfully arrested, his subsequent

detention ...../18

detention at the Police Station would not found any action for damages.

For the foregoing reasons, the appeal fails and is dismissed with costs.

(Signed) N. OGILVIE THOMPSON.

SCHREINER, J.A.
DE BEER, J.A.
BEYERS, J.A.
VAN BLERK, J.A.
} Concur.