28/1959

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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).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

WILLIAM WILSON

Appellant.

versus/teen

THE QUEEN

Respondent.

Appellant's Attorney S.W. Horwitz *Respondent's Attorney*
Prokureur van Appellant *Prokureur van Respondent*

(TPD) *Appellant's Advocate* G. Gordon *Respondent's Advocate* P.J. v.d. Walt
Advokaat van Appellant *Advokaat van Respondent*

(Leave - AD) *Set down for hearing on:* Tuesday, 15th Sept, 1959.
Op die rol geplaas vir verhoor op:

~~4.7.~~ 5. (B) 9.45 - 12.10 C.A.V.

Present: Friday 2nd Oct. 1959.
appeal upheld. Conviction and sentence set aside.

de Beer
Beyers } JJ.A.
van Blerk

Registrar
Reg.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:

WILLIAM WILSON Appellant,

and

REGINA Respondent.

CORAM: De Beer, Beyers et van Blerk, JJ.A.

Heard On: 15th September, 1959. Delivered On: 8.10.1959

J U D G M E N T.

DE BEER, J.A.:

Three persons, namely appellant Wilson, a male European aged 28, Poppie Ruiters, a female coloured aged 17 years, and Magdalene Bimray, a female coloured aged 20, were jointly charged before the Magistrate for the Regional Division of Johannesburg on the following counts:-

> "THAT ACCUSED NO.1, a white male person,
> "is guilty of the offence of contravening
> "Sub-section 2 (a)(i), or alternatively
> " 2 (a)(ii), or alternatively 2 (a)(iii),
> "or alternatively 2 (a)(iv) of Section 16
> "of Act 23 of 1957, read with section 22 (

"of the Said Act, and that Accused NOS. 2 "and 3, coloured female persons, are guilty "of the offence of contravening Sub-section "1 (b)(i), or alternatively 1 (b)(ii), or "alternatively 1(b)(iii) or alternatively "1 (b)(iv), of the said section 16 of Act 23 "of 1957, read with section 22(e) of the "said Act.

"In that upon or about the 23rd June, 1958, "and at or near Johannesburg in the said "Division, the said accused no. 1, a white "male person, did wrongfully and unlawfully:

"MAIN CHARGE:
"have or attempt to have unlawful carnal "intercourse with the said Accused No. 2 and/ "or the said Accused No. 3, both coloured "coloured female persons, or

"1ST ALTERNATIVE CHARGE:
"Commit or attempt to commit with one or "other or both of the aforesaid coloured "female persons immoral or indecent acts, "or

"2ND ALTERNATIVE CHARGE:
"entice, solicit or importune one or other "or both of the aforesaid coloured female "persons to have carnal intercourse with "him, or

"3RD ALTERNATIVE CHARGE:
"entice, solicit or importune one or other "or both of the aforesaid coloured female "persons to the commission of immoral or "indecent acts,

"AND the said Accused NOS. 2 and 3, both "coloured female persons, both or one or "other of them, did wrongfully and unlawfully,

"MAIN CHARGE:
"have or attempt to have unlawful carnal "intercourse with the said Accused No.1, "a white male person, or

"1ST ALTERNATIVE CHARGE:
"commit or attempt to commit with the afore- "said white male person immoral or indecent "acts, or

"2ND ALTERNATIVE CHARGE:
"entice, solicit or importune the said white "male person to have unlawful carnal inter- "course with one or other or both of them, "or

"3RD ALTERNATIVE CHARGE:
"entice, solicit or importune the aforesaid "white male person to the commission of im- "moral or indecent acts,

"FOURTH ALTERNATIVE CHARGE:
"THAT the said (three) Accused are guilty "of the crime of conspiring to aid or procure "the commission of a crime or crimes in con- "travention of Section 18 (2)(a) of Act 17 "of 1956.
"IN THAT upon or about the 23rd June, 1958, "and at or near Johannesburg in the said "Division, the said accused, all or some or "other of them did wrongfully and unlawful- "ly conspire with each other to aid or pro- "cure the commission of or to commit offences, "to wit the offences of a white male person "having or attempting to have unlawful car- "nal intercourse, or committing or attempting "to commit immoral or indecent acts, with a "coloured female person; and/or of a coloured "female person having or attempting to have "unlawful carnal intercourse, or committing "or attempting to commit immoral or indecent "acts, with a white male person, in contra- "vention of Sections 16 (2)(a)(i) and/or "16(2)(a)(ii) and /or 16 (1)(b)(i) and/or "16(1)(b)(ii) of Act 23 of 1957, read with "Section 22(e) of the ~~said~~ said Act 23 "of 1957."

At the conclusion of the case Magdalene Bimray, No.3 Accused, was discharged on all counts. Appellant Wilson was convicted on the first alternative charge preferred against him, namely, contravening Sub-section 2 (a) (ii) of Section 16

4./and.....

and sentenced to 12 months imprisonment with compulsory labour. Poppie Ruiters, who was also convicted on the first alternative charge preferred against her, was sentenced to three months imprisonment with compulsory labour, suspended for three years on certain conditions.

On appeal to the Transvaal Provincial Division the conviction and sentence in the case of Wilson, accused No.1, were set aside and the following substituted therefore:- "Guilty on the second alternative charge, namely, soliciting in contravention of section 16(2)(a)(ii) of Act 23 of 1957" and the sentence imposed was one of six months imprisonment with compulsory labour. In the case of Poppie Ruiters, No. 2 accused, the conviction and sentence were set aside.

Application was thereupon made for leave to appeal to the Appellate Division, but this was refused. Thereafter leave to appeal was granted by the Chief Justice in terms of Section 363 of Act No. 56 of 1955 and the matter now comes up for hearing before us.

The case, as presented to the Regional Court was, in broad outline to the following effect. The two

female accused whilst walking along a street in Doornfontein, Johannesburg, about 9 p.m., were approached by appellant who was driving a Baby Austin car which had two bucket type seats in front: the parties were unknown to each other. The appellant stopped his car and after explaining to the woman that he had lost his way asked to be directed to the main Reef Road. They climbed into the car and occupied the back seat. At about 11 o'clock that night a police patrol van carrying two European and a native policeman, noticed a Baby Austin car parked in a cul-de-sac in Linksfield about a mile from the nearest residence. The police switched on the headlights of the van; they noticed a female jumping from the left front bucket seat into the back of the car. The European members of the patrol hurried to the parked car and there saw appellant sitting in the drivers-seat, wearing only his shirt and found the woman Poppie Ruiters crouching on the floor in the back of the car: her dress was pulled up above her knees whilst her bloomers were below her knees. On this evidence the Regional Court found that Appellant and

and the female Poppie Ruiters had committed or attempted to commit immoral or indecent acts with each other in contravention of the Act as set out above.

The judgment of the Transvaal Provincial Division shows that the whole of the evidence was fully analysed and most carefully weighed and considered, and, for the purposes of the present appeal, I can do no better than to set out the following passages from the judgment of Marais, J.;

> "It would, to my mind, be dangerous to
> "find that anyone of the occupants of
> "the parked car was partially undressed
> "when the police arrived."

The evidence is then further referred to and the judgment proceeds:-

> "I come to the conclusion that the
> "crown evidence, in so far as it is
> "in conflict with the defence evidence,
> "cannot be accepted as being beyond
> "doubt the truth.
> " The defence evidence is, on all
> "material points where it conflicts with
> "the crown evidence, wholly untruth-
> "full ..... There remain the facts
> "which are common cause between the
> "parties the Crown and the defence. They
> "are these:-

" The Appellant, who lives at Benoni, stopped "his car in a public street in Doornfontein (a "suburb of Johannesburg), a few miles from the "centre of the city and gave a lift to two coloured "women, who were walking by themselves along "that street; these woman lived in Doornfontein; "it was after nine o'clock of a mid-winter "Monday evening; they were strangers to him and "he to them. At about 11 p.m. the three of them "were still in the same car; the car was parked "at a dead end of a tarred road, which ascends "a ridge, some considerable distance from "Doornfontein in a northerly direction from "Johannesburg, whereas Benoni lies to the east "of Johannesburg. All the lights of the car "had been switched off and the car was facing "down the incline, with its rear towards the "end of the road. The man was found without "his jacket. He subsequently lied as to the "reason why he was there, in the company of "two coloured women.

" The question is whether these facts prove "the commission by the man of any of the offences "created by the appropriate paragraph of Section "16 of the Act. The following acts are made "punishable: intercourse, attempted intercourse, "an immoral and indecent act, an attempted im- "moral or indecent act, enticing, soliciting "or importuning a female to commit an immoral "or indecent act.

" It is common cause that the women did not "signal to the appellant to stop, and did not,

"when he had stopped, ask for a lift. The
"initiative came from him. The answer as to
"the purpose with which he asked them to get into
"his car is the answer to the whole issue to be
"decided. The obvious answer is that he "picked
"them up" for an immoral purpose. He and the
"woman, have suggested only one alternative,
"innocent explanation, and that explanation
"has been rejected as palpably false. There
"is no third explanation which can be regarded
"to be within the limits of reasonable possi-
"bility. One is driven to the conclusion that
"the obvious answer is the true one: He
"gave them a lift with the intention of having
"sexual intercourse with either or both of them.
"And although no such intention may have been
"expressed in words, it must have been clear
"to the woman, either at the time they were
"offered the lift or at the time the car was
"parked in an isolated spot and the lights switched
"off, that the appellant was associating with
"them in order to have intercourse with either
"or both of them. The circumstances created
"by the appellant were such that there could
"have been no doubt as to what he intended,
"or as to what he was inviting them. Such an
"invitation amounts, in my opinion, to soliciting
"in terms of the Act. (See, too R. v. J. 1958
"(4) S.A. 488).

" That the woman understood the invitation
"in those terms is apparent from their conduct;
"there is no suggestion that they were being
"kept in the car against their will.

" The Crown has failed, in my opinion, to "prove either intercourse or the commission of "an immoral or indecent act."

And in the result the appellant was convicted of soliciting in terms of Section 16 (2) (a) (iii).

On appeal to this Court the argument assumed a most novel and unusual form. Both Counsel for the appellant and Counsel for the Crown expressly abandoned any and every finding of fact of the Regional Court which may have been urged as supporting either the Appellant's case or the Crown case, and both parties accepted the position that the appeal could and should be decided only on the facts which Marais, J., found to be common cause. And on these facts the question which emerges for our decision is whether the words or the conduct separately or conjointly establish beyond reasonable doubt, that the appellant either when he picked up the women or at some later stage, prior to the arrival of the police, was guilty of soliciting in terms of the Act.

It would appear that under the Vagrancy Act 1898, the English Courts are clearly of opinion

10/. that.....

that a person may be convicted of soliciting, although there is no proof that any body had seen his gestures or heard what he said. On appeal in the case of Horton v. Mead (1913, 1 K.B. 154) the facts found, as stated by Alverstone, C.J., were that the accused

> "smiled in the faces of gentlemen, pursed "his lips, and wriggled his body. His "face and lips appeared to have been "artificially reddened, and in his "pocket a powder puff with pink powder "upon it was found, not unimportant in "connection with an offence of this "kind."

In the course of his judgment the Chief Justice stated:-

> "to say that, because on the particular "occasion he does not succeed in attracting "the notice of anyone, there is no "evidence upon which he can be convicted "of soliciting, is an argument which "we cannot adopt."

The difficulties here raised need not detain us. Appellant is not charged with soliciting in vacuo as it were and the English cases are therefore distinguishable. I do, however, venture to suggest that if the evidence proved that the gestures or words of the Appellant were such as to convey to the everage reasonable man that the appellant was here soliciting the two women in terms of the Act, he would have been guilty of an offence whether the women reacted to his solicitations or simply ignored him. In this connection, see Regine versus F. 1958 (4) S.A. - 300 at p. 306. But whatever form the solicitation may have taken when the appellant stopped his car, it certainly resulted in the two women entering his car. And if the solicitation was later repeated, in whatever form, it resulted in the two women remaining in the car till 11 p.m. This, however,

does not solve our main difficulty which was expressed by Marais, J., in these terms:-

> "The answer to the question as to the purpose "with which he asked them to get into his "car is the answer to the whole issue to "be decided."

The Crown relies on the following facts which are common cause as being sufficient to establish the commission of the offence for which appellant was convicted. The appellant and the women were complete strangers to one another: he took the initiative by stopping the car and inviting them to join him. They did so under the pretext of directing him to Germiston and although they lived in Doornfontein, they submitted to being picked up at 9 p.m. and being taken to Linksfield, which lies North of Doornfontein whereas the main Reef Road lies due East from where they were picked up: and two hours later the coloured women were still in the car. The Transvaal Provincial Division in concluding that the evidence did not disclose that there had been an attempt to commit either an immoral or indecent act was mainly swayed by the uncertainty as to the agreement arrived at when appellant picked

up the women. The only direct evidence on record bearing on this aspect of the case is that of Magdalene Bimray and the appellant. They both proffered an exculpatory statement which was however rejected both by the Regional Court and the Transvaal Provincial Division. But apart from this the only incriminating evidence is to be culled from the facts referred to as common cause. There can of course be no doubt that appellant accosted them with the intention of committing an immoral act with either one or both of them that evening or some other opportune time or occasion, when for example, he was not in that Baby Austin and when there would be no third party present. But the question remains whether the intention of appellant taken in conjunction with his false evidence and the gravely suspicious surrounding circumstances, is sufficient to establish soliciting at the time he picked them up?

This question I have thoroughly investigated and after anxious consideration, I am not satisfied that the Crown has established the offence of soliciting

beyond reasonable doubt. The appellant is entitled to the benefit of this doubt with the result that the appeal succeeds and the conviction and sentence are set aside.

L. M. de Beer.
~~Appèlrechter.~~
judge of appeal

Beyers, J.A.
van Blerk, J.A. } concur.