7-3-71

193/70

G.P.-S. 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.

ALBERT MAPUKATA

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Lovius, Block, *Respondent's Attorney* A.G. (C.T.)
Prokureur van Appellant Meltz & Cowen *Prokureur van Respondent*

Appellant's Advocate Mr. Beckley *Respondent's Advocate* DR P YNAR S.C & Mr E. Marais
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 14-5-1971
Op die rol geplaas vir verhoor op 1.7.10

(C.P.D.)

Ogilvie Thompson C.J. Rabie J.A. Kotze A.J.A.

9.45 am - 11 am
11.15 am - 12.15 pm
12.15 pm - 12.23 pm

C.A.V.

26.5.1971. per Rabie J.A. - Appeal upheld. Convictions and Sentences set aside.

REGISTRAR OF THE SUPREME COURT,
BLOEMFONTEIN.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:

ALBERT MAPUKATA ..... APPELLANT.

AND

THE STATE ..... RESPONDENT.

CORAM: OGILVIE THOMPSON, C.J., RABIE, J.A., et KOTZé, A.J.A.

HEARD: 14 May 1971. DELIVERED: 26 May 1971.

J U D G M E N T.

RABIE, J.A. :

The appellant was convicted of assault with intent to do grievous bodily harm in the Magistrate's Court, Wynberg, Cape, and sentenced to 12 months' imprisonment, the Court applying the provisions of section 4(1) of the Dangerous Weapons Act, 1968 (Act No. 71 of 1968) in imposing this sentence. An appeal to the Cape Provincial Division was dismissed, and the appellant now appeals to this Court on leave granted by that Division.

At the time of the alleged assault the com-

plainant in the case, Rubin (also known as Kierie) Smith, and his reputed wife, Sophy Ruskin, together with their six children, lived in a wood and iron house - described by Ruskin as a "sink pondokkie" - in Hardevlei, Prince George Drive, Cape Town. The appellant resided in the Guguletu Bantu Location, but it would appear that he and his wife often visited one Frances Thysman, a Coloured woman, who lived in a house only about twenty yards from that of the complainant.

Smith testified that at about 2.30 a.m. on Monday, 26 January 1970, he was awakened by someone breaking open the front door of his house. He called out "Wat maak jy dan nou?", whereupon the appellant replied "Kierie, I want you, I want to kill you". Smith asked "What for?", and the appellant answered "Don't ask me". Smith rushed to the door and managed to close it, but not before the appellant had twice hit him on the head with a knobkierie. Then a window was broken and objects were thrown through it. Thereupon the appellant climbed on to the roof of the house and removed two iron sheets from it. There were ten or twelve men with the appellant, and these men, egged on by the appellant, struck Smith with sticks through the hole

which had been made in the roof. The upper portion of the back door of the house was also smashed. Smith stated that he sustained five wounds on his head, two of which were inflicted by the appellant personally, and that he was taken to hospital, where the wounds were stitched.

In evidence to which fuller reference will be made at a later stage, Smith stated that he knew the appellant well and that he was not mistaken about his identity. He said that he saw the appellant's face in the light of the lamp which was burning in the "voorhuis".

A further point in Smith's evidence to which reference should be made, is the following. He was asked in cross-examination by the appellant's attorney whether he had knowledge of the fact that there had been "moeilikheid" at Frances Thysman's house, too, on the Sunday night. Smith replied that he had no such knowledge, and he was asked no further questions in regard to the matter.

Ruskin's evidence was much the same as that of Smith. She stated that she heard a banging on the front door of the house shortly after 2 a.m., and that the appellant called

out: "Kierie, maak oop die deur, ons wil jou doodmaak". She asked "Wat is dit, wat het ons jou gemaak?", whereupon the appellant replied "Moenie nou vra nie, dit is te laat om te vra". The appellant succeeded in breaking open the door, and struck Smith on the head. She saw one blow. She stated that she could not describe the weapon used by the appellant, because she was at that time standing near the back of the room, holding her year-old baby. A window was smashed and, with all the noise, her children all woke up. She heard the voices of a number of men outside, and stones, bricks and bottles were thrown through the broken window. Two holes were made in the roof, through which the men struck Smith on the head with sticks. Smith's son, a boy of fourteen, helped his father to fight the men off. She and the other children hid beneath a stove. The back door of the house was also smashed. At 3.40 a.m. the police arrived, and the assailants made off.

Ruskin also testified that she had known the appellant for about five years and that she recognized his face in the light of the lamp which was burning in the house at the time. She saw his face at the back door and at the window, she

said. I shall deal with this part of her evidence in more detail at a later stage.

Ruskin was also asked in cross-examination whether she knew that there had been "moeilikheid" at Frances Thysman's house at about 11 p.m. on the Sunday night. She replied that she had no such knowledge, but that "mense het vroeg-aand op my dak gegooi ook, daai selfde aand". It was about 10 p.m. when this occurred, she stated. No further questions were put to her in connection with this matter.

The appellant testified that he knew Smith well, but he denied that he had ever spoken to him or to Ruskin. He also denied all knowledge of the assault on Smith, and gave evidence to the following effect about his movements on Sunday, 25 January 1970. At about 2 p.m. on that day he took his wife to the house of Frances Thysman "in order to collect there" - I am quoting the words used by the appellant - i.e., to collect money which customers owed him for soft goods they had bought from him. He himself went to "collect" in Guguletu. He returned to Thysman's house "at past eleven" that night to fetch his wife, and, as he approached, he saw that the house was "surrounded by

people". These people starting shouting and threw stones at his car. He turned back and drove to a garage on St. George's Drive, and from there he proceeded to walk to Thysman's house. When he came near the house, he met his wife and Freda Montolwana, a Bantu woman, who had decided that it would be safer not to wait at Thysman's house any longer. They then walked to the garage, and from there they drove to Guguletu, where they arrived some time before 12 o'clock.

In the course of his cross-examination the appellant was asked whether he had ever discovered the reason for the "commotion" at Thysman's house on the Sunday night, and his answer was that his wife and Thysman had told him that "they saw Rubin throwing stones at them". When asked whether it was only Rubin (i.e., Smith) who had been seen to throw stones, the appellant's reply was that there were "a group".

In view of certain findings made by the magistrate, reference must be made to two other matters in the appellant's evidence. The first is this: in cross-examination, after denying that he had been present at Smith's house on the night in question, the following suggestion was put to the

appellant by the prosecutor: "And furthermore I put it to you that your motive for doing so was the fact that Rubin and them knew that you were running the Sjebien, and had disclosed your activities". The appellant's reply was: "Where did they disclose that? When?" The prosecutor then suggested: "This is the reason why you did this. You felt that your Sjebien had been disclosed". The appellant's answer was: "I do not run a Sjebien". There was, in fact, no evidence that either Smith or Ruskin had "disclosed" the appellant's alleged "acitvities", and it may be added at this point that both Smith and Ruskin stated that they knew of no reason why the appellant should have wanted to harm them.

The second matter relates to some of the appellant's evidence regarding his work and earnings. In his evidence-in-chief, after agreeing with his attorney that he had "for the last two years ..... been working as a canvasser", he went on to say that he had for fifteen years before that worked for a Mr. Charles Field. In cross-examination he stated that he ceased working for Mr. Field in March 1968 and that he had since that time sold soft goods for his own account. His business, he said, consisted in buying from wholesalers and

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selling to his "customers" and people who placed orders with him. When asked by the Court to give it a "rough idea" as to how much he "earned" in his business, he said: "Roughly, a week, I do collect R60-00". With Mr. Field, he said, his earnings were R11-00 a week. Replying to questions as to the kind of licence he required, or held, for conducting his business, he stated that he had held a hawker's licence since 1955, save that he had not renewed his licence for 1970. In reply to a question by the Court as to how he arrived at "the figure of R60 per week profit from any business as hawker, i.e., R240 per month", the appellant's reply was: "I don't get more than R100 a month. It depends on the customers - one week it is more, the other week less. I don't keep books".

Freda Montolwana gave the following evidence. She accompanied the appellant and his wife, who was a friend of her's, to Thysman's house on the Sunday afternoon. The appellant's wife went there to take certain clothing to Thysman, and to collect money from her. She actually saw Thysman handing over money to the appellant's wife. While they were at Thysman's house, Coloured men started throwing stones at the house, and,

when the appellant's car approached, these men threw stones at the car. The car turned back and, after the Coloured men had left, she, Thysman and the appellant's wife "also started throwing stones", and "threw their bottles back". Later she and the appellant's wife left Thysman's house and met the appellant "on the way". They all went to a garage where the appellant had left his car, and from there they drove to Guguletu. The witness stated that she did not know Smith.

Frances Thysman's evidence was that the appellant brought his wife and Montolwana to her house at about 2 p.m. on the Sunday. The appellant's wife came to collect money. They were away from the house till about 4 p.m., collecting about R15 from various people. Money was also collected from her (the witness) for clothing which she had sold. Later in the afternoon, at about 6.15 p.m., Smith's son threw a brick into her house, and thereafter others also took part in throwing stones at her house. (In one passage the witness is recorded as having said: "Rubin hulle het bakstene na my huis gegooi"). At about 8.45 p.m., when the appellant's car approached her house, "die kinders" threw stones at the car. The appellant turned back. Later she,

the appellant's wife and Montolwana went outside and threw stones in the direction of Smith's house. Some time after 9 p.m. the appellant's wife and Montolwana left.

The appellant's wife, Deborah Mapukata, stated that she and Montolwana went to Thysman's house at about 2 p.m., and with regard to the collecting of money she is recorded to have said the following in cross-examination: "We don't collect money from our customers. If my husband says we collect money from Frances it is not correct". In answer to a question by the Court she said: "I went out with Frances and Tilda (i.e., Montolwana) doing collections that day, but I collected nothing from Frances herself". According to this witness the stone-throwing began at about 9 p.m. People "surrounded the house", she said, and her husband, who had come to fetch her, had to turn back. The stone-throwers finally went into a house when she, Thysman and Montolwana also started throwing stones. "After 10, something to 11" she and Montolwana left Thysman's house, intending to find a taxi to take them home, and they met the appellant about fifty or sixty yards from the house.

The magistrate, in finding the appellant

guilty, found the evidence of Smith and Ruskin to be true, and rejected that of the appellant as untrue. According to notes which were used by the magistrate when he gave an oral judgment at the end of the trial - which notes form part of the record and are termed "Comments on Evidence" - he said the following about the appellant's evidence:

> "Accused proved to be an entirely unreliable and untruthful witness and under cross-examination on his activities on the night in question and also on his means of livelihood, he was dodgy and uncertain of himself and contradicted himself on numerous points in the course of his evidence. Even on his own evidence it is clear that he had been on the scene, and his attempts to wriggle himself out of the picture by way of an alibi was a complete failure".

In his written "Reasons for Judgment" - in which the appellant and his witnesses are referred to as "a set of unreliable and incredible persons" - in a paragraph appearing under the heading "Defence evidence and why it was rejected", the magistrate says the following when discussing what are termed "untruths, contradictions and discrepancies" in the appellant's evidence (the Court's references to pages in the record are omitted):

> " (i) Whilst under cross-examination he first stated, somewhat conceitedly, that he was earning roughly R60 a week as 'canvasser or dealer' in soft goods...; later on, when questioned by the Court, ...however he stated that he does not get more than

R100 per month adding that it depends on the customers.

(ii) Asked by the prosecutor whether he had a licence (as hawker), his emphatic reply was 'Yes, I have got a licence - I got the licence since 1955', and this, in spite of the fact that he was supposed to have been in the employ of Mr. Charles Field during the period 1953 to 1968, and that he had first said he has been working for his own account for the last two years only ....., but later on again, he very reluctantly and falteringly had to confess that he had not taken out a licence for 1970 at all and could not produce a 1969 licence either.

In addition, I wish to emphasize what I remarked in the course of judgment on 10.8.1970, viz. that the accused had proved to be evasive and uncertain of himself throughout the course of his evidence and most certainly did not impress me at all as being a credible witness in any respect. Furthermore, if one has to look for a possible motive for the assault, one cannot resist the inference that the suggestion put by the P.P. to the accused in cross-examination, is by no means far-fetched, viz. that accused had been enraged by the fact that complainant's wife had exposed the accused's illicit trade in liquor, for the accused was most evasive and unconvincing when these suggestions were put to him as already stated hereinbefore".

In addition to what has just been quoted, the magistrate also makes special reference to the defence evidence about the stone-throwing. I will return to this a little later.

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It was contended on the appellant's behalf by Mr. Beckley - who appeared on very short notice after counsel who had originally been briefed became indisposed - that the magistrate misdirected himself in at least some of the matters mentioned by him in the passage quoted above concerning "untruths, contradictions and discrepancies" in the appellant's evidence, and, furthermore, that even if the magistrate was impressed with Smith and Ruskin as witnesses, he nevertheless erred in holding that they could not have been mistaken about the identity of the person who assaulted Smith, and in rejecting the appellant's denial of the assault. Mr. Yutar, who appeared on behalf of the State, conceded that there were certain misdirections, and, whilst he did not concede that the appeal should on that account succeed, he nevertheless, in an argument which was of much assistance to the Court, very properly pointed to certain features in the case which, he submitted, might possibly be found to assist the appellant in his appeal. It is conceded by the State - and there is no doubt that the concession is correctly made - that the magistrate misdirected himself when holding that the appellant might have had a motive for assaulting Smith as suggested by the prosecutor. As has been pointed out, the

magistrate found that "the suggestion put by the P.P. to the accused in cross-examination, is by no means far-fetched, viz. that accused had been enraged by the fact that complainant's wife had exposed the accused's illicit trade in liquor, for the accused was most evasive and unconvincing when these suggestions were put to him .....". There was, in fact, no evidence at all that either Smith or Ruskin had made any complaint about the appellant's alleged illicit liquor trade, and, this being so, there is also no justification for the finding that the appellant was "most evasive and unconvincing when these suggestions were put to him". The record shows that two suggestions were put to the appellant. The first was that he had a motive for assaulting Smith because "Rubin and them" had "disclosed" his alleged illicit liquor trade, and, there having been no evidence of any such "disclosure", the appellant quite understandably replied by asking "Where did they disclose that? When"? And then, when the prosecutor again suggested "This is the reason why you did this. You felt that your Sjebien had been disclosed", the appellant's reply was a denial: "I do not run a Sjebien". The magistrate should, therefore, have disregarded the suggestions

made by the prosecutor, and he erred in not doing so.

Criticism was also levelled at the magistrate's finding that the appellant was evasive and contradicted himself when testifying about his work and earnings. As will appear from the above-quoted passage from the "Reasons for Judgment", the first point made by the magistrate is that the appellant first stated that he earned roughly R60-00 a week as a dealer in soft goods, and that later, in reply to a question by the Court, he contradicted himself by saying that he did not "get" more than R100-00 a month. But the magistrate errs. The appellant never stated that he "earned" R60-00 in the sense that he made so much profit in a week. What he said was that he "collected" about R60-00 a week, and it is clear from his evidence that only part of what he "collected" was profit, the other part being the amount which he had to pay to the wholesalers from whom he had bought the goods. The further point made by the magistrate in regard to the appellant's hawking licence is, in my view, also not justified. It is true that the appellant stated that he had "for the last two years" worked as a "canvasser", and that he had before that time for a period of 15 years worked for a Mr. Field,

but he did not say, as the magistrate has it , that he had worked for his own account for the last two years "only". It can accordingly not be said that the appellant intended to convey that he had not had a hawker's business during the 15 years which preceded 1968. His evidence was that he first took out a hawker's licence in 1955, and it is quite conceivable that someone else could have done the actual hawking on his behalf. The appellant stated, furthermore, that he could produce licences for 1963 and 1965, and there is nothing to show that he could not in fact produce them. The magistrate also makes a point of the fact that the appellant could not produce a licence for 1969, but his inability to "produce" a licence did not disprove his statement that he took out a licence for that year.

As will appear from the above-quoted passage from the "Reasons for Judgment", the magistrate also found that the appellant was "evasive and uncertain of himself throughout the course of his evidence .....". A reference to the "Comments on Evidence" shows that this observation was intended to refer mainly to the appellant's evidence on two matters, viz. his work and earnings, and his movements on the Sunday. I have already discussed his evidence on the first matter, and his evidence

regarding the Sunday - which is dealt with at some length by the magistrate in another part of his "Reasons for Judgment" - will be considered later in this judgment. At this stage it is sufficient to say that in my view the magistrate erred en each of the points expressly mentioned by him when discussing "untruths, contradictions and discrepancies" in the appellant's evidence, and, furthermore, that it is clear from the "Reasons for Judgment" that these points played an important part in the magistrate's rejection of the appellant's evidence.

The question now to be decided is whether there was, or was not, a failure of justice warranting the setting aside of the appellant's conviction: see the proviso to section 369(1) of the Criminal Procedure Act, 1955. The approach to be followed by a court of appeal in a case like the present is set out as follows in the judgment of Steyn, C.J., in S. v. Bernardus, 1965(3) S.A. 287(A) at p. 299 C-G:

> "Soos aangedui in S. v. Harris, 1965(2) S.A. 340 (A.A.), op bl. 362 en 363, het dit, in navolging van die benadering van Engelse Regters, gebruiklik geword om vir dié doel 'n redelike hof te veronderstel wat die saak as Verhoorhof in eerste instansie oorweeg. Dit sluit aan by die omstandigheid dat 'n Appèlhof nie 'n Hof is wat 'n bevinding as Hof van eerste instansie doen nie, maar wat die bevindings van laer howe beoordeel en waar nodig tot niet maak of verbeter.

> Wat dan ondersoek word, is die gevolgtrekking waartoe so 'n redelike hof, sonder die onreëlmatigheid of gebrek, onvermydelik of sonder twyfel sou gekom het. Soos uit genoemde saak blyk, is die woord „onvermydelik" nie hier letterlik te verstaan nie. Dit stel geen hoër maatstaf dan die uitdrukking „sonder twyfel" nie. Om te bepaal wat 'n redelike hof sou besluit het, is 'n Appèlhof, met inagneming van die Verhoorhof se bevindings insake geloofwaardigheid, uit die aard van die saak aangewese op sy eie oordeel omtrent die oortuigingskrag van die getuienis wat voor hom geplaas is. Ek stem saam met my kollega HOLMES dat dit wesenlik daarop neerkom dat 'n Appèlhof moet besluit of daardie getuienis, sonder die onreëlmatigheid of gebrek, buite redelike twyfel bewys dat die veroordeelde inderdaad skuldig is."

See also S. v. Tuge, 1966(4) S.A. 565 (A) at p. 568 A-C, and S. v. Yusuf, 1968(2) S.A. 52 (A) at p. 57 B-E. Following the approach indicated in these cases, I now proceed to consider whether this Court should hold that the appellant's guilt was proved beyond reasonable doubt.

There is no reason for doubting that the assault on Smith was committed with an intent to do him grievous bodily harm, nor that a dangerous weapon within the meaning of Act No. 71 of 1968 was used in the assault. The only real issue is, therefore, whether the evidence establishes that it was the appellant who assaulted Smith.

The magistrate, as has been said, found

Smith and Ruskin to be truthful witnesses. He also says of them that they were "absolutely certain of everything they said in the witness box", an observation which was, no doubt, also intended to apply to their identification of the appellant. These findings must, of course, be given all due weight, but it need hardly be said that they do not exclude an examination of the witnesses' evidence or an inquiry into the possibility of a mistaken identification having been made by them. The magistrate made the following findings of fact on the question of identification:

> "5. That both complainant and his wife saw that the accused, whom they know very well, was the main assailant, and that he was in fact, present throughout this episode. They know him by the name of Slabien.
>
> 6. That, during the onslaught, there was a light burning in the hut, making it virtually impossible for complainant and his wife to make any mistake regarding the identity of the accused and his presence on the scene".

Smith's only evidence relating to this light is contained in the following passage in his evidence:

> "HOF: Het daar lig in die huis gebrand? -- Ja.
>
> Hoe is dit dan dat daar nog ~~xixyx~~ daardie tyd lig gebrand het? -- Wel, my kinders, hulle slaap in die voorhuis.
>
> En het die lampie nog gebrand? -- Die lamp het nog gebrand, ja.
>
> En jy kon in die lig sien dit is hy? -- Dit was hy, ja".

The statement that it was the appellant who was seen in the light of the lamp was, it will be observed, given in reply to a leading question by the Court.

According to the passage just quoted the light was in the "voorhuis", but it is not known whether the door at which the appellant was allegedly seen gave access to this room. Perhaps it should be assumed that this was the position, but even then there is no evidence which shows where in the room this lamp stood, of what type it was, how strong a light it gave off, etc.

Ruskin stated in cross-examination - the matter was not referred to at all in her evidence-in-chief - that there was a "lamp" in the house, and that it was burning: it always burnt at night, she said, because she had small children in the house. This was the sum total of her evidence about the lamp. As to her ability to see, she said that it was dark outside, but "nie so donker, ek kon gesien het wie hy is". On her own evidence she did not have too good a view of what took place at the front door, the reason being that she stood near the back of the room and that she was afraid to look. At some

stage - which cannot be determined on the evidence - she hid under a stove, and, although the matter was not investigated, her view from there was not likely to have been a good one. In my view the evidence about the lamp is, on the whole, not very satisfactory, and I would hesitate to hold on the strength thereof that the "light burning in the hut" made it "virtually impossible" for Smith and Ruskin to have made a mistake in their identification of Smith's assailant.

It must immediately be added, however, that Smith and Ruskin knew the appellant well, and that they stated that they also knew his voice. This evidence will now be examined. Smith's evidence that he knew the appellant well and that he could not be mistaken about his identity is contained in the following extract from the record:

> "HERONDERVRAGING DEUR AANKLAER: Jy sê jy ken die beskuldigde al omtrent twee jaar? -- Ja.
> Jy ken hom goed nê? -- Ja, ek ken hom goed.
> Jy kan nie 'n fout maak met sy identiteit nie? -- Nee.
> HOF: Jy kon nie 'n ander man vir hom aangesien het nie? -- Nee, ek ken hom te goed."

This evidence, given in reply to questions which could hardly have left the witness in doubt as to what answers were sought

from him, is obviously less convincing than it would have been if it had not been elicited by such questions. The same may be said of the witness' evidence that he was familiar with the appellant's voice. The only question put to him in this connection was one by the magistrate, and it was this: "Ken jy sy stem baie goed?", and the reply was: "Ek ken sy stem baie goed".

Ruskin told the prosecutor "Ek ken sy stem, en ek ken hom ook", but answers given by her on this point in cross-examination were not, it seems to me, very satisfactory. She was asked whether she had ever spoken to the appellant, and her reply was: "As ek gepraat het met hom? Ek het nooit n woord gepraat met hom nie". When this reply was followed up with the question "Nog nooit nie?", her answer was: "Ek het hom gegroet vir môre as dit môre is dan groet ek hom, maar nie in n geheim gepraat met hom nie".

In the magistrate's "Reasons for Judgment" there is no specific statement to the effect that he found it proved that either Smith or Ruskin had recognized the appellant by his voice. There is also no such statement in the "Comments

on Evidence". It may be that the magistrate considered that such a finding was covered by his finding that the witnesses knew the appellant well, but it is by no means certain that it is so, because, after making mention of the fact that they knew him well (fact (5)), he goes on to say (in fact (6)) "there was a light burning in the hut, making it virtually impossible for complainant and his wife to make any mistake .....". In other words, the fact of their having known him well seems to be tied up with the point that they recognized his face when they saw him in the light of the lamp, rather than/with their having recognized his voice. But be this as it may, in my view, as I have indicated, the force of the witnesses' evidence regarding the appellant's voice is weakened by reason of the nature of the questions which were put to them in that connection.

Turning now to the appellant's evidence, I have already stated that the matters mentioned by the magistrate when dealing with "untruths, contradictions and discrepancies" in the appellant's evidence do not justify the finding that the appellant was an untruthful witness. It now remains to consider the appellant's evidence regarding the stone-throwing episode

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and the magistrate's findings in regard thereto. In his "Reasons for Judgment" the magistrate, after referring to the appellant's evidence that he went to Thysman's house at about 11 p.m. on the Sunday night to fetch his wife, proceeds to say the following:

> "Then he surprised both the State and the Court by telling a story about a stoning of his motor car on the afternoon of 25.1.70, how a group of people had previously surrounded the house of Francis Thysman, and how he (the accused) had to drive away to safer quarters. I say that the accused had surprised the State as well as the Court with this story, for the simple reason that at no stage during Mr. Essop's cross-examination of the State witnesses had it been put to them that it would be part of the defence case that this stoning of Francis' house and the accused's motor car had taken place on the 25th January, 1970. The only cross-examination by Mr. Essop centred entirely round the identity of the accused; only once or twice he had hinted at alleged 'moeilikheid' that had occurred at Francis' home on the evening of 25.1.70, but he never at any stage indicated what 'moeilikheid' was being alluded to. Yet this alleged stoning eventually proved to be of such importance to the defence that it became virtually the mainstay of their case, for later on Francis Thysman, and Freda Montolwana, as well as Deborah Mapukata were called to testify about this stoning in which, they alleged, the complainant and his son had taken an active part. However, Francis, Freda and Deborah each gave a different version of the alleged stoning of Francis' house and accused's car, and these stories, in turn, are in conflict with the version given by the accused himself."

Then, after setting out differences in the evidence of the appellant and the three women relating to the times when the stone-throwing is alleged to have taken place - there are further discrepancies, not mentioned by the magistrate, regarding the "collection" of money on the Sunday afternoon - the magistrate concludes:

> "The only impression I got from this story is that it was nothing but an afterthought and a pure fabrication by the defence, calculated to serve as a counterpoise to the convincing story told by the State witnesses, as the defence obviously realised that there was no getting away from the fact that a commotion of some sort had taken place at the complainant's house on the night in question and that their only hope lay in concocting a story which could serve to negative the latter".

In the"Comments on Evidence" the following is said:

> "Even on his own evidence (i.e., the appellant's) it is clear that he had been on the scene, and his attempts to wriggle himself out of the picture by way of an alibi was a complete failure".

The magistrate's statement that Thysman, Montolwana and the appellant's wife testified that "complainant and his son had taken an active part" in the stone-throwing is not quite correct, for it was only Thysman who mentioned their names. The error is, however, of no real importance, and I

agree with the magistrate's view that the allegations of stone-throwing should have been put to Smith, if only because the appellant testified that Thysman and his wife had told him that they saw Smith throwing stones. It is true, of course, that the appellant's attorney did ask Smith and Ruskin whether they knew of "moeilikheid" at Thysman's house on the Sunday night, but the nature of the "moeilikheid" was not specified, and, when the witnesses replied that they had no such knowledge, the matter was not pursued. Ruskin, it will be remembered, stated that stones were thrown on the roof of her house at about 10 p.m. on the Sunday night, but this matter was also not investigated, so that it cannot be said that her evidence provides support for that of Thysman, Montolwana and the appellant's wife who, as has been shown, testified that they threw stones in the direction of Smith's house. In the circumstances there can be no doubt, I think, that the magistrate was correct in holding that the defence evidence about the stone-throwing was untrue. The magistrate was wrong, however, in stating that the defence evidence about the stone-throwing "proved to be of such importance to the defence that it became virtually the mainstay of their

case", for the defence was simply that it was not the appellant who assaulted Smith.

Accepting, as I do, the correctness of the magistrate's finding that the defence designedly gave false evidence about the stone-throwing, I am nevertheless not satisfied that one should, on that account, hold that the appellant's denial of the assault could not possibly be true. The magistrate, as I have shown, considered that because the appellant had, on his own evidence, been "on the scene", he was forced to fabricate evidence in order to provide himself with an alibi - the suggestion being, so it would seem, that the fabrication of such evidence afforded conclusive proof of a guilty conscience. I am not persuaded that this is the only possible explanation for the false evidence tendered, for I find it difficult to believe that the defence could have believed that by giving evidence about events which allegedly took place at about 11 p.m. on the Sunday night they could provide the appellant with an alibi in respect of an offence which was committed at 2.30 a.m. the next day. It is not impossible, it seems to me, that the appellant might have resorted to the giving of false evidence because he

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thought that his mere denial of the assault, unsupported by other evidence, would be less likely to commend itself to the trial Court than a story, supported by witnesses, to the effect that he was at a place near the scene of the assault on the night in question but that he had left it and had gone home well before the time when the assault took place.

To conclude, I would sum up my view of the case as follows: The only real issue in the case is the identity of the person who assaulted Smith. Smith and Ruskin knew the appellant well, but the assault took place on a dark night and the only light available was a lamp in the "voorhuis". The evidence does not reveal where in the room this lamp was, nor how strong a light it gave off. In the circumstances the ability of Smith and Ruskin to make proper observations should have been thoroughly investigated, but this was not done; and on the evidence as recorded one cannot be completely satisfied that no error could have been made by them in their identification of the appellant. Their evidence of having recognized the appellant by his voice is also not quite convincing. The whole of that evidence was given in reply to questions by the prose-

cutor and the magistrate which were of such a leading nature that it cannot, in my view, be considered to be free from doubt. As for the appellant, he - and his witnesses - gave false evidence in regard to the stone-throwing, but at the same time I am not satisfied that this would be a sufficient reason for holding that his denial of the assault cannot possibly be true. Furthermore, there was no proof of a motive on the appellant's part as suggested by the magistrate, and there is no apparent reason why the appellant should have wanted to assault Smith or, what is more, should have threatened him with death. Smith himself knew of no reason why the appellant should have wanted to harm him. In all the circumstances I hold that there is not proof beyond doubt of the appellant's guilt.

The appeal is upheld, and the conviction and sentence are set aside.

P. J. Rabie.

OGILVIE THOMPSON, C.J. } CONCUR.
KOTZÉ, A.J.A. }