

136/74

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

(APPELLATE DIVISION.)  
(AFDELING.)

## APPEAL IN CRIMINAL CASE. APPEL IN STRAFSAAK.

JULIAN AZELS & PATRICK CHETTY

Appellant.

versus/teen

THE STATE

Respondent.

Leslie Simon &amp; Co. Pmbg.

Appellant's Attorney ISRAEL 9 S Respondent's Attorney A.G. (Pmbg.)  
Prokureur van Appellant Prokureur van Respondent

Appellant's Advocate Ivan Rensburg Respondent's Advocate J.A. Booyens  
Advokaat van Appellant Advokaat van Respondent

Set down for hearing on 26-11-1974  
Op die rol geplaas vir verhoor op 126

(N.P.D.) Ex parte: Rumpff (HR) Botha et Rabie (ARR)

I. van Rensburg 9.48 - 10.30.

Booyens 10.30 - 11.00; 11.17 - 11.45

C.A.U.

The Court allows the said appeal of the 1st Appellant and sets aside his conviction and sentence; and

The Court dismisses the said appeal of the 2nd Appellant.

Judgment per  
Rabie & A  
2/12/74

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JULIAN AZELS.....First Appellant

and

PATRICK CHETTY.....Second Appellant

and

THE STATE.....Respondent

Coram: Rumpff, CJ., Botha et Rabie, JJA.

Heard:

26 November 1974.

Delivered:

2 December, 1974

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J U D G M E N T.

RABIE, JA:

The appellants were convicted in the Magistrate's Court, Pietermaritzburg, of having on 23 August 1973 contravened section 9 (1) of the Motor Carrier Transportation Act, No. 39 of 1930, by conveying for reward on a public

road...../2

road 23 wooden cable drums without having obtained a certificate or exemption, as provided for in the said Act, to authorise such conveyance. The charge against the appellants was that they wrongfully conveyed the 23 drums and "5 Wooden/Steel Doors", but the Magistrate found that the 5 doors fell to be included in the "Approximately 100 Garage Doors/Steel" which were conveyed on the same vehicle as the 23 drums, and in respect of which a certificate had been obtained. First appellant (Julian Azels) was sentenced to a fine of R1 000 or 12 months' imprisonment, R900 and 11 months of which sentence were conditionally suspended for 3 years. Second appellant (Patrick Chetty) was sentenced to a fine of R20 or imprisonment for 20 days. The case of 1st appellant went on automatic review in terms of the provisions of sec. 96 of the Magistrates' Courts Act, No. 32 of 1944, and, after written arguments relating to the convictions of both appellants had been submitted to the reviewing Judge, the matter was set down for argument in

terms...../3

terms of sec. 98(3) of the Magistrates' Court Act, apparently on the question whether the evidence supported the finding of the Magistrate that the drums had been conveyed for reward. The Court hearing the matter (Shearer, J, & Hill, A.J.) confirmed the convictions and sentences of both appellants in a judgment which has since been reported: see S. v. Azels And Another 1974 (4) S.A. 154 (N.) After judgment had been given on the argument on review, the appellants, having failed to note an appeal against their convictions in the Magistrate's Court, applied for, and were granted, leave to note an appeal to the Natal Provincial Division. The Provincial Division dismissed the appeals of both appellants for the reasons stated in the judgment given on the argument on review, but granted both appellants leave to appeal in this Court.

Sec. 9(1) of the Motor Carrier Transportation Act, No. 39 of 1930, hereinafter referred to as the Act, provides as follows:

(1)  
~~Prohibition~~...../4

"(1) Any person who carries on any motor carrier transportation shall be guilty of an offence unless he is the holder of a certificate or an exemption issued to him under this Act and unless he carries on the said transportation in accordance with the provisions of that certificate or exemption: Provided that such a certificate or exemption shall also cover the conveyance of all persons necessary in connection with the transportation authorized by that certificate or exemption".

The expression "motor carrier transportation" is defined in sec. 1 of the Act as meaning, in so far as here relevant -

".... the conveyance -

(i) of persons or goods by means of a motor vehicle for reward or in the course of any in-  
or  
dustry, trade/business.....  
.....  
on a public road.....".

On the afore-mentioned date (23 August 1973)

2nd appellant was stopped by a road transportation inspector,  
a Mr. Claassen, while driving a mechanical horse, with trailer  
attached...../5

attached, on a public road near Pietermaritzburg. On the trailer were a large number of garage doors, which Claassen did not attempt to count, it being dark at the time, and the afore-mentioned 23 wooden cable drums. Chetty produced, on Claassen's demand, a temporary motor carrier certificate which authorised the conveyance of "100 Garage Doors (Steel) 11 Tons" from the premises of Tilley Manufacturing (Pty) Ltd. (hereinafter referred to as Tilley), in Durban, to Tilley's branch business in Johannesburg. The certificate had been issued to Azels Transport Services/ (hereinafter referred to as Azels Transport), No certificate had been issued in respect of the 23 drums. Chetty also produced a delivery note, issued by Tilley, and addressed to "J.H.B.", in respect of the doors, and a similar note in respect of the 23 drums. Claassen, the only witness called by the State, did not know who the owner of the vehicles was, but he stated, relying on inquiries made by him, that the use of the vehicles "word beheer deur beskuldigde No. 1".

Neither...../6

Neither of the appellants gave evidence, and the only witness called on behalf of the defence was a Mr. Reynolds, the manager of Tilley in Durban. According to his evidence, Azels Transport was "run" by 1st appellant. The Magistrate, in convicting the appellants, said the following in his judgment:

"It is common cause that the accused - the Court refers to both of them, but it is, as Mr. de Wet (the accused's attorney) pointed out, mainly accused no. 1 - that he has a contract with Tilley Manufacturing Company to convey certain articles for them, and according to the evidence of Mr. Reynolds - the Court accepts his evidence - they are paid a fixed amount for each load that they convey from Durban to Johannesburg. This amount is paid to them irrespective of what the load consists of.

Now in the present case, it is quite clear, and accepted, the load consisted of a number of doors, these doors being covered by the exemption certificate which was issued and 23 wooden cable drums. Now, clearly these drums, although not specifically

charged...../3

charged for, form a portion of the load for which the accused are paid. In view of this the Court finds that they did in fact convey the drums for a reward which was included in the fixed price which they are paid for every load".

The Magistrate's written "Reasons for Judgment", submitted at the request of the reviewing Judge, contains the following two paragraphs on the issue:

"The defence witness, Mr. Reynolds, testified that the drums were not conveyed for reward or in the course of an industry, trade or business, but also that the accused firm was paid a fixed amount of R175-00 per load irrespective of what the load consists of.

The Court found that, although accused No. 1's firm was not specifically paid for the conveyance of the 23 cable drums, they form part of the load for which the accused was paid. That they therefore were indirectly being conveyed for reward".

These passages contain the whole of the Magistrate's reasoning on the issue whether there had been a conveyance for reward. They contain no reference to the presumption



created by sec. 11(1)(a) of the Act, and it seems to be quite clear that the Magistrate held that the evidence of Reynolds concerning the contract between Azels Transport and Tilley provided proof beyond a reasonable doubt that appellants had conveyed the drums for reward. The appellant's contention is that the Magistrate erred in his view of the evidence of Reynolds, and that he should, furthermore, have found it established on a balance of probabilities, on Reynolds's evidence, that the contract between Azels Transport and Tilley provided for the transport of garage doors (plus the necessary fittings) only, and that the conveyance of the drums accordingly did not constitute a conveyance for reward by either of the appellants. This contention renders it necessary to examine the evidence of Reynolds in some detail.

Reynolds commenced his evidence in chief by saying that Tilley manufactured "garage doors" in their factory in Durban; that Azels Transport had, at the time of the hearing

(23 October 1973), been transporting doors to the Company's branch business in Johannesburg for slightly more than a year; that there had initially been consignments once every 2 weeks, but that they had increased to "virtually once every week"; and that "roughly ..... between 80 and 100 doors" were conveyed to Johannesburg every week. When questioned as to what he knew of the conveyance of the drums, Reynolds said:

"This was unfortunately sent by one of our workshop foremen to a branch manager up in Johannesburg. These are drums that you received plastic slips on and he's been up there and he asked for these things to be sent to him - he wanted to put them around his 'braaivleis' to use them as tables and chairs".

This evidence was followed by the following questions and answers, appearing at the conclusion of the witness's evidence in chief:

"Your contract or arrangement with accused no. 1, does this include the conveyance of wooden drums? --- Well, we have got a contract

with...../90

with so much per load. Here is no stipulation as to how many doors or what goes onto the truck - it is just so much per load.

Is your contract for doors only? --- It is only for doors to be sent up.

Now, these cable drums, were they conveyed for reward? --- No, as I said, it is clearly my Durban branch - my factory foreman - sending it up to - a personal favour - to the branch manager in Johannesburg.

.....

Were these cable drums being conveyed in the course of an industry, trade or business? --- No, not at all. It was merely a personal arrangement between people? --- That's right".

The following evidence was given at the commencement of the cross-examination:

"The accused no. 1 gets paid per load? --- That's correct.

How much? --- R175.

Irrespective of what he takes or what the load consists of? ---

That's right. It is a flat rate which we work on all the time.

You...../11

You specially asked for the temporary permit yourself? You applied for the --- I applied myself, yes.

Did you know what goods had to be delivered? --- Not until the very last minute. The orders come on as they are completed in the factory at the time of loading, so they will be loaded onto the truck to be sent off. That's why we always ask for plus minus.....

You should know the type of goods being consigned? The type of goods? --- Yes, they are all garage doors".

Later in the course of his cross-examination Reynolds denied the suggestion that the drums had been<sup>conveyed</sup>/"in the course of the accused's work for you, in the course of his duty", and when he was asked to say why he denied the suggestion, he said:

"Because, his contract with me is to take the doors up for me. The truck wasn't full. So, because the truck not being full on that particular evening, we put those drums up which we had promised to our branch manager up in Johannesburg, that one day, should the truck not ever be completely full, we will send these things

up...../12

up to him".

The promise to send the drums to Johannesburg, he said, had been given "about Christmas last year" (i.e., 1972).

The above summing up, and quotations from, the evidence, constitute the whole of what the record contains on the issue of the contract between Azels Transport and Tilley. It will immediately be apparent that no attempt was made to establish the precise terms of the contract. It was not even established whether the contract was oral or in writing. Reynolds no doubt stated what he thought the contract to be, but no attempt was made to discover whether his knowledge of the contract was sufficient to enable him to testify to its contents. But however this may be, the Magistrate found on his evidence, as I have said, that the contract between Azels Transport and Tilley was that, upon payment of the sum of R175-00, Tilley could load onto a vehicle whatever goods it wished.

It cannot be gainsaid that Reynolds gave two

answers...../13

answers which lend support to the Magistrate's finding that the contract provided for the payment of R175-00 per load "irrespective of what the load consists of". The first answer (numbered (i) for easy reference), given in reply to the question "Your contract or arrangement with accused no. 1, does this include the conveyance of wooden drums?", was:

- (i) "Well, we have got a contract with so much per load. Here is no stipulation as to how many doors or what goes onto the truck - it is just so much per load".

The second answer (numbered (ii) for easy reference), given in reply to the question whether the rate per load was R175-00 "irrespective of what he takes or what the load consists of?", was:

- (ii) "That's right. It is a flat rate which we work on all the time".

Reynolds's evidence should be read as a whole, and the two answers cited should not be considered in isolation.

In answer (i) the words "or what", in the second sentence of the answer, appear to refer to things other than doors, and it was so contended on behalf of the State. Reynolds's statement that "Here is no stipulation as to how many doors...." seems to show that the contract provided for the conveyance of doors, without, however, stipulating any particular number, or perhaps weight, as the maximum to be taken on any vehicle. If this is so, it is not inconceivable that Reynolds might have stated his personal view that, in the event of a vehicle not being loaded to the full with doors, Tilley would have the right to fill the vacant space with other goods. Immediately after giving answer (i), Reynolds was asked: "Is your contract for doors only?", and his reply was: "It is only for doors to be sent up". It was contended on behalf of the State that this reply should be ignored because it was given in answer to a leading question, and because it is in conflict with answer (i). The reply was no doubt given in answer to a leading question, and it may therefore validly be said

that...../15

that its value is lessened as a result thereof. I am not persuaded, however, that it is necessarily in conflict with answer (i). It seems to mean, or could reasonably mean, I think, that the contract was made with specific reference to doors, in which event the reply would not necessarily be in conflict with answer (i). For, as said above, Reynolds's statement that there was no "stipulation as to how many doors" suggests that the contract was made with reference to doors. In this connection it should be remembered, also, that when Reynolds was questioned as to the circumstances in which the drums came to be loaded, he said, inter alia, "his contract with me is to take the doors up for me". It is true, of course, that this answer, like the answer "It (the contract) is only for doors to be sent up", does not wholly correspond with what is said about doors in answer (i), but then, is it so unlikely that the contract would have made reference to the conveyance of doors only? In this connection it should be borne in mind that Tilley apparently manufactured doors only (garage



and factory doors) and that it was concerned, right from the outset, to transport doors from its factory in Durban to its branch business in Johannesburg, where (so it would appear from the evidence) no manufacturing was done, but where the manufactured articles were sold. This being so, it is not unlikely, I think, that the contract would, at its inception, at least, have referred to doors only. As for the period which followed, it would seem that, as from about December 1972, right up to the date of the conveyance of the drums here in issue, nothing but doors were transported. If this is so - and that is what the evidence seems to show - it lends support to the view that the contract might have referred to the conveyance of doors only. I would add, as to answer (i), that Reynolds was not cross-examined as to what he meant when he said "how many doors or what". It was also not put to him that answer (i) appeared to be in conflict with his reply that "It (the contract) is only for doors to be sent up", and he was not asked to explain either of the answers.

Much...../17

Much of what has been said above with regard to answer (i) also applies to answer (ii), and it need not to be repeated. Taken at its face value, answer (ii) no doubt seems to support the conclusion that the contract provided for, or permitted, the conveyance of whatever goods Tilley wished to load onto the vehicles of Azels Transport. On the other hand, it is somewhat difficult to accept that Reynolds would have intended to say something which would, on the face of it, seem to be in conflict with his reply, given only about 10 lines earlier, that "It (the contract) is only for doors to be sent up". Later in his evidence, as already stated above, he said "his contract with me is to take the doors up for me". This answer, too, is, on the face of it, against the view that Reynolds thought that the contract provided for the conveyance of doors and ~~whatever~~ else Tilley might decide to load onto Azels Transport's vehicles.

The foregoing review and discussion of the evidence

show...../18

show, I think, that the question with which we are here concerned was not properly investigated, and that Reynolds's evidence with regard thereto was not clear. One might sum up the position, I think, by saying that certain passages in his evidence, taken at their face value, provide support for the conclusion to which the Magistrate came, but that there are, at the same time, passages which do not seem to support that conclusion. My view is that Reynolds's evidence, considered as a whole, does not furnish proof beyond reasonable doubt that the contract between Azels Transport and Tilley was as found by the Magistrate, and that the Magistrate erred in finding it so proved.

In the light of all that has been said above concerning Reynolds's evidence, I am of the view, too, that his evidence did not establish on a balance of probabilities (as was contended on behalf of appellants) that the contract between Azels Transport and Tilley provided for, and permitted, the conveyance of doors only.

On my view of the evidence, as set out above, the

question...../19

question of the applicability of sec. 11(1)(a) of the Act to the position of the two appellants arises. The subsection reads:

- "(1) In any proceedings under this Act -
- (a) any person who has conveyed any person or any goods by means of a motor vehicle or who was permitted the conveyance by such means of any person in addition to the driver of the vehicle or of any goods, shall be presumed thereby to have carried on motor carrier transportation, unless the contrary is proved\*.

1st appellant did not himself convey the drums, and it is accordingly clear that the presumption created by the subsection can apply to him only upon proof that he permitted the conveyance. The onus of proving permission falls on the State, and such proof has to be proof beyond a reasonable doubt.

There...../20

There is no evidence that 1st appellant actually knew on 23 August 1973 that the drums were going to be sent to Johannesburg. On the contrary, the evidence shows that he probably did not know about the intended conveyance. There is consequently no question of his having expressly permitted the conveyance of the drums. As to the question whether he can be said to have permitted the conveyance of the drums in advance, so to speak, by allowing Tilley, in the contract between Azels Transport and Tilley, to load onto vehicles whatever goods they wished, I have already stated that, in my view, it was not proved that the contract provided for the conveyance of anything but doors. The only remaining question to consider is, I think, whether

it...../21

it can be said that 1st appellant, by his conduct prior to the day in question, allowed Tilley to use the vehicles for the transport of goods other than doors, and that he should, for that reason, be taken to have permitted the conveyance of the drums as well. There is no evidence of any such conduct on the part of 1st appellant. The only evidence which ~~may~~ be said to have a bearing on the question of what happened in <sup>fact</sup> ~~fact~~ during the period prior to 23 August 1973, is the evidence of Reynolds that for a period of several months (as from about December 1972) prior to the day in question there was never any room on any of the vehicles for the drums to be sent to Johannesburg. This seems to suggest that vehicles were always fully loaded with doors manufactured by Tilley, but even if such an inference would not be warranted, the fact remains that there was no proof of such conduct on 1st appellant's part as would entitle one to draw the inference that he permitted, by his conduct, the conveyance of the drums.

It follows from all the foregoing that the presumption referred to has no application in the case of 1st appellant. There was, accordingly, no onus on him to disprove the allegation that the drums were conveyed for reward. I have held that the Magistrate should not have convicted 1st appellant on Reynolds's evidence concerning the contract between Azels Transport and Tilley, and it therefore follows that, in my view, 1st appellant's appeal must succeed. I should add that it was not contended by the State that, if it failed to prove that there was a conveyance for reward, 1st appellant could nevertheless be convicted of having conveyed the drums in the course of an industry, trade or business.

As far as 2nd appellant is concerned, his position is, because of the operation of the aforesaid presumption, different from that of 1st appellant. 2nd appellant conveyed the drums, and the presumption accordingly applies to him. As stated above, it was not, in my view, proved on Reynolds's evidence that the conveyance was not for reward, and, there

having...../23

having been no other evidence on the issue, the position is that 2nd appellant failed to discharge the onus which sec. 11(1)(a) of the Act puts on him. It follows that his appeal cannot succeed.

The following order is made:

- (1) The appeal of the 1st appellant succeeds, and his conviction and sentence are set aside.
- (2) The appeal of the 2nd appellant is dismissed.

*P. J. Rabie*  
JUDGE OF APPEAL.

Rumpff, CJ.)  
Botha, JA.) Concur.