

(APPELLATE DIVISION).  
(AFDELING).

1. N. WINNIE MANDELA; 2. S. P. MGUBANE

THE STATE

The Court dismisses the said appeal in respect of each appellant in so far as the conviction is concerned. The Court ~~of~~ allows the said appeal in respect of ~~of~~ the sentence.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter of:

NOMZANA WINNIE MANDELA

FIRST APPELLANT.

SEXFORTH PETER MAGUBANE

SECOND APPELLANT.

and

THE STATE

RESPONDENT.

Coram: Botha, Muller et Hofmeyr, JJ A.

Heard: 16 September, 1974.

Delivered: 30 September, 1974.

---

J U D G M E N T.

Hofmeyr, JA :

The appellants were convicted in the Court of the Magistrate for the Regional Division of Transvaal, held at Johannesburg, of the offence of communicating with each other in contravention of notices served on them in terms of section 10(1)(a) of Act 44 of 1950. They were each sentenced

to ...../2

to twelve months imprisonment. An appeal to the Transvaal Provincial Division against their conviction and sentence failed but they were given leave to appeal to this Court. I shall refer to the first appellant as Mandela and to the second as Magubane.

It is not disputed that the appellants were prohibited from communicating with each other. They contend, however, that no such communication in fact took place between them. The State case was that they communicated on three occasions (on 8, 9 and 10 May, 1973). These occasions were, however, charged as one count. The appellants were found guilty by the magistrate in respect of all three communications. The conviction, in so far as it related to 8 and 9 May, 1973, was based exclusively upon an indirect mode of communication, the State having, in accordance with the Magistrate's finding, failed to prove any direct communication on those dates. The offence in so far as it related to 8 and 9 May, 1973, was considered in both the Magistrate's Court and in the Provincial Division to be relatively unimportant. I propose

therefore ...../3

therefore to deal first with the communication alleged to have taken place on 10 May, 1973. This is the only occasion on which the conviction was based, principally, upon direct and personal communication between the appellants. If valid, the allegation of indirect communication would be equally applicable in respect of 10 May, 1973. Whether the offence charged can be committed by such indirect communications and whether the indictment justified a conviction on such allegations, will be discussed at a later stage.

Before dealing with the occurrences of 10 May, 1973, some background information should be recorded. It appears that a longstanding arrangement existed in pursuance of which Magubane would on occasion convey the two young daughters of Mandela to a point near her place of employment, viz. Wanda Furnishers on the southern side of Bree street, Johannesburg, in the block between Delvers and Troye streets, so that Mandela and her children could meet each other. The children were at boarding school in Swaziland and it was

only during holidays that Mandela made a habit of meeting them in town during the lunch hour.

The State case relating to 10 May, 1973, was succinctly stated by Hiemstra J. in the judgment of the Court a quo on appeal from the Regional Court as follows:-

"No. 2 (i.e. Magubane) came with the children in the Combi at about 1 pm., and drove east in Bree street. Thereafter accused No. 1 (i.e. Mandela) was seen to emerge from her place of employment, and to proceed towards Jeppe street which is parallel to Bree and to the South of it. At the corner of Jeppe and Polly street she was seen to get into the Combi, which had in the meantime turned into Jeppe street. At about 2 pm. she was seen to be a passenger in the Combi, driven by Magubane, and was seen alighting from the Combi in Jeppe street near to Delvers street. The two accused must have spent about three-quarters of an hour together in the Combi if this evidence is true. ... It was conceded that if No. 1 and No. 2 were in fact together in the Combi communication must be taken to have been proved".

The defence case was that Magubane was to bring Mandela's daughters in his Combi to a rendezvous shortly after 1 pm. on the south-west corner of Jeppe and Troye streets. Magubane

alleged that he failed to arrive at the appointed place at the agreed time for reasons which I shall discuss at a later stage. Mandela stayed in the vicinity until the Combi, with Magubane and the children, came down Jeppe street from east to west just on two o'clock. She stopped the vehicle on the west of the intersection of Jeppe and Troye streets; she approached it from the southern side and briefly spoke to one of her daughters who was sitting next to the driver (Magubane) to say that they would carry out their intended shopping expedition on the Friday. Mandela then moved away from the Combi but, upon noticing a commotion at the vehicle, returned to it and was arrested although she had at no stage entered the Combi.

The position arising as a result of this conflict between the State and the defence versions is akin to the situation where an alibi is set up by the defence. The State must negative the defence case beyond a reasonable

doubt and must also establish its own case according to the same standard of proof.

In the circumstances of this case it is not necessary to deal in all its detail with the searching cross-examination to which counsel for the appellants subjected the State witnesses. Although numbers of arguable points of criticism of the State witnesses were raised, the defence case, if to be treated as reasonably true, must imply an elaborate and, in the circumstances, unlikely conspiracy on the part of five State witnesses involving a massive body of perjured evidence. The defence itself disavowed any intention to suggest this and submitted that the State witnesses were influenced by their subjective belief in what they expected to see, into convincing themselves of having seen what they had in fact not seen. With regard to the culminating incidents at about 2 pm. in Jeppe street west of its intersection with Troye street, there remained only a minute point of difference between the State and the appellants. There

was ...../7

was no dispute between the State and the appellants that they (the appellants) were at the stated time and place observed in each others immediate vicinity, separated by no more than a yard or two. The crisp point to be decided, on this part of the case, was whether Mandela merely approached the Combi to speak a few words with her daughter and was thereafter arrested without any justification or whether she was travelling down Jeppe street in the Combi with Magubane and alighted from it shortly before her arrest.

This issue cannot be considered in isolation but must be decided in the light of all the evidence. Mandela sought to strengthen her case by alleging that she had spoken to <sup>a</sup>co-employee, Mrs. Saule, on the corner of Jeppe and Troye streets a short while before the appearance of the Combi. Both these persons were at that stage due to proceed to their place of employment. Mandela, however, did not accompany her colleague to their place of employment but decided, apparently as a forlorn hope, to wait at the agreed point...../8



point of meeting on the off chance of the Combi with her children still turning up. According to the witness Saule the meeting took place on the north eastern corner of the intersection of Jeppe and Troye streets. The magistrate held that there was a serious conflict between the evidence of these two witnesses since he understood Mandela's evidence to be that the meeting had taken place on the south-western corner of the intersection. As pointed out by counsel for the appellants Mandela's evidence on this point was not fully investigated. Since Mandela admittedly waited on this corner, the appointed place of meeting with her children, after Saule left, it seems likely that the two witnesses allegedly chatted with each other on this corner. If they met on the north-eastern corner, it would presuppose that Mandela chose to walk away from her place of employment where she was very shortly due to start work. In any event this evidence could not be corroborated by comparing it with admitted or

established facts aliunde their testimony. The fact, which I take as established beyond a reasonable doubt, on the other hand, that Magubane's Combi was being pursued on its course along Jeppe street by a warrant officer running, with utter disregard of his dignity, to overtake it, clearly calls for an explanation especially if it is taken into account that he ran across the course of the traffic over the intersection of Jeppe and Troye streets. The explanation given by warrant officer Van Niekerk was that he had seen Mandela in the Combi and that he was intent on arresting her. This evidence with its spontaneous background of unusual action, is corroborated by traffic inspector Vlok who was doing point duty at the intersection in question. First he corroborated Van Niekerk's evidence regarding his pursuit of the Combi. He testified to Van Niekerk shouting to him "sorry pal" as he ran across the intersection. He saw Van Niekerk putting his hand in at the window of the Combi as it came to a standstill. At

established facts since their testimony.

which I do not establish beyond a reasonable doubt,

on the other hand, that the defendant is guilty of the crime charged.

on the other hand, the fact that the defendant is guilty of the crime charged.

remains, with other things, of his ability, to do so.

the fact, clearly only for an opinion especially if it

is taken into account that he was across the course of the

traffic over the intersection of the two streets.

the opinion that the defendant is guilty of the crime charged.

and no one has been able to find any evidence in the case.

fact of the defendant's guilt. The fact that the defendant is guilty of the crime charged.

of the defendant's guilt, is corroborated by the fact

that the defendant is guilty of the crime charged.

in the defendant's guilt, is corroborated by the fact

that the defendant is guilty of the crime charged.

is a fact that the defendant is guilty of the crime charged.

is a fact that the defendant is guilty of the crime charged.

is a fact that the defendant is guilty of the crime charged.

about the same time he saw a Bantu woman, whom he later identified as Mandela, quickly alighting from the left front door of the Combi and moving in an easterly direction in Jeppe street. At the rear portion of the Combi she collided with or brushed against a Bantu man and proceeded to the northern side of Jeppe street in the direction of Vlok who left his point and halted her.

Van Niekerk joined them almost immediately and took the woman towards the Combi after having arrested her. Vlok was not only a stranger to the Security Police but was clearly unaware of their patrolling the area in search of the appellants. The Bantu man with whom Mandela collided, was Bantu detective sergeant Zulu of the Security Branch of the South African Police. He testified to seeing both Mandela and Magubane on the front seat of the Combi, the latter driving it and he corroborated Vlok on his own brush with Mandela.

The ...../11

The episode just described had the following prelude according to the State witnesses. At about 1 pm. Magubane was seen to drive his Combi in an easterly direction in Bree street at about the level of Edith Cavill street. Mandela was seen at about the same time leaving her place of employment and also proceeding in an easterly direction until she encountered Magubane's Combi parked at the corner of Jeppe and Polly streets, one block to the east of Troye street. Magubane was behind the wheel and Mandela climbed into the Combi by its left front door. They then drove off in a southerly direction whereafter the State witnesses lost track of the vehicle until it reappeared in Jeppe street, as described above, at about 2 pm. The witnesses who deposed to these movements of Mandela were Bantu detective constable Gule of the Security Branch of the South African Police, the abovementioned two police officers, Zulu and Van Niekerk, and warrant officer Herfurth who was not attached to the Security Branch at all but

whose help had been enlisted for the occasion to take photographs where possible. The witness Zulu only gave evidence regarding the route initially taken by the Combi. He did not profess to have seen Mandela enter the Combi.

This evidence was not subjected to any serious criticism. In this connection it is significant to note that on three occasions, i.e. in Bree street, the incident just mentioned at the corner of Jeppe and Polly street and the final incident at 2 pm. in Jeppe street, at least three state witnesses testified to what they saw. If the defence version is correct they must on all three these occasions have mistakenly believed that they saw what they expected to see and must have given their evidence in accordance with that belief. This is a most unlikely proposition. The State evidence was, however, contradicted by the two appellants, Mandela's two daughters and Magubane's daughter all of whom denied being at the corner of Polly and Jeppe streets at the alleged time. Magubane and the three children alleged that they failed to keep their appointment with Mandela for the following reasons. They had proceeded first to the University and had left there at 12.15 pm., arriving at the hospital behind the Fort, for Magubane's

daughter to visit her mother who was employed there. They received information at 12.30 pm. that the child's mother (Magubane's divorced wife) was out but would return at 1.30 pm. When asked why he then decided not to drive at once to the corner of Jeppe and Troye streets (according to the evidence, one mile away) in order to keep the rendezvous with Mandela, he had no acceptable explanation. The reason he gave was that he was afraid that something might happen to the car so that he would not be back in time for his daughter to see her mother. This explanation was palpably false and counsel for the appellants could do no better than to suggest the theory, not based on any evidence, that Magubane lied in court because he was ashamed to admit before Mandela that he had not been prepared to make the additional trip of two miles to deliver the children at the appointed time and place to their mother as he could quite easily have done.

Although the State must, in order to succeed in obtaining a conviction, negative the evidence of every defence witness tending to prove the innocence of the persons charged,

I hold that it succeeded in doing so and that it proved its case beyond a reasonable doubt. As regards the evidence given by the three children, the Magistrate took into account that they were young girls who would inevitably be susceptible to the influence of their parents. Since the Magistrate actually saw these witnesses, this Court cannot say that he was wrong in rejecting their evidence, and in finding the appellants guilty of the offence charged in so far as it related to the communication alleged to have taken place on 10 May 1973.

It will be recalled that, as regards the indirect communications alleged to have taken place on 8 and 9 May 1973, the Magistrate found the appellants guilty. This was subsequently upheld on appeal by the Transvaal Provincial Division. The basis of these decisions was that the appellants must on these occasions have communicated with each other through the children as intermediaries since, so it was held, as long as something, however, unimportant, passes from mind to mind,



there is communication.

I am firmly of the opinion that the conviction relating to 8 and 9 May, 1973, cannot stand. The case which the State set out to prove, was alleged in the particulars of the charge supplied in response to a request received from the appellants. It was alleged that on 8 May, 1973, the communication took place at about 1.05 pm. on the corner of Delvers and Bree streets, and that the communication alleged to have taken place on 9 May, 1973, was also at about 1.05 pm. but on the corner of Jeppe and Troye streets.

In upholding the conviction in respect of 8 and 9 May, 1973, the Provincial Division relied upon the provisions of section 176(2)(a) of the Criminal Procedure Act, No. 56 of 1955 which provides inter alia that when a day or a period is alleged in a charge and time is not of the essence of the offence, proof that the act charged was committed on any other day or during any other period not more than three months before or after the day or period alleged, shall be taken to

support the charge.

In the present case these provisions could not validate the conviction in respect of 8 and 9 May, 1973. The basis of the conviction was entirely different from the case alleged in the particulars of the charge. The variance between the allegations made by the State and the evidence relied upon by it was radical and related not only to time and place but also to the mode of communication. The charge as framed is equivalent to an allegation of direct communication between the appellants. (See Erasmus v. Venter, 1953(3) S.A. 828(0) at p. 834 G. - H., and cases there cited). The State should have made a positive allegation to the effect that the communication relied on was made through intermediaries if it wished to base its case upon such indirect communications.

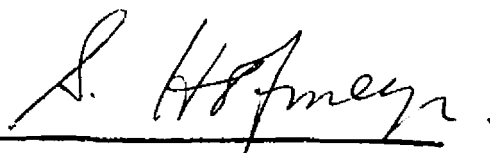
The State being bound by the particulars alleged by it (See R. v. Bruins, 1944 A.D. 131 at p. 135), and having failed to prove its case as alleged, the convictions can not stand because of the potential prejudice caused to the ap-

pellants by the defective form of the charge. The State itself did not adduce any evidence in support of the grounds of conviction now relied upon. The evidence alleged to prove their guilt was voluntarily tendered by the appellants. The precise circumstances in which the children made arrangements to be taken to their mother did not necessarily imply that they were acting as their mother's agents or messengers. If the matter had been fully investigated upon a proper charge alleging communication between the appellants with the children as intermediaries, it is quite conceivable that it could have transpired that they were acting as principals on their own behalf in requesting Magubane to convey them to various places in town to meet their mother. In such circumstances it is at least doubtful whether any communication between the appellants would have been proved. An amendment to the charge was applied for to the Provincial Division. The application was, however, held to be unnecessary.

Since ...../18

Since the conviction in respect of 8 and 9 May, 1973, can for the foregoing reasons not be maintained, this Court is at large on the question of sentence. In view of all the circumstances of the case I have come to the conclusion that the sentences should be reduced to six months imprisonment in respect of each appellant.

The appeal is dismissed in respect of each appellant in so far as the conviction is concerned. It is upheld in respect of the sentence which is reduced to a sentence of imprisonment of six months in respect of each appellant.

  
HOFMEYR, JA.

Botha, JA

Muller, JA      Concur.