G.P.-S. 4 445.

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

(_____ DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

KEVIN JAMES JAMES

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Meyer & Newdigate *Respondent's Attorney* A. G. (Pte.)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate G. Bizos *Respondent's Advocate*
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on
Op die rol geplaas vir verhoor op

(T.P.D.)

Leave by RABIE J.A. (155/75)

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between -

KEVIN JAMES JEFFERS — Appellant

and

THE STATE — Respondent

Coram: HOLMES, WESSELS, GALGUT, JJ.A.

Heard: 26 February 1976

Delivered: 4 March 1976

J U D G M E N T .

HOLMES, J.A., : -

The appellant appeals against his conviction and sentence on a charge that, while on board an aircraft in flight, he wilfully interfered with members of the

/crew ...

crew of the aircraft in the performance of their duties, in contravention of section 2 (a) (iii) of the Civil Aviation Offences Act, No. 10 of 1972. It is said that this is the first such case in South Africa.

Act 10 of 1972 gave effect inter alia to an international Convention in regard to offences committed on board aircraft.

It was not disputed that the Transvaal Court had jurisdiction; see section 18 of the Aviation Act, No. 74 of 1962. Furthermore, during part of the time, to which the appellant's conduct relates, the aircraft was flying over the Transvaal.

Upon a summer's evening a South African Airways Boeing 727 took off from Louis Botha airport in Natal, bound for Jan Smuts airport in the Transvaal. The plane was full: there were nearly 100 passengers aboard. The weather was bad. The estimated flying time was 45 minutes. Among the passengers was the appellant, who was a young married man dressed in a tight T shirt and jeans. He had been attending a funeral, and had sought some solace in the smile of liquor's promises. His mood was unco-

/operative

operative: he failed to heed the announcement to fasten seat belts for the take-off and, although the air hostess asked him more than once to do so, he refused, arguing in an unfriendly manner that it was not necessary, and emphasi= zing that he had flown before. The hostess insisted that if he did not comply she would have to report the matter to the captain. She mentioned it to the senior flight steward. The latter spoke to the appellant, who then fastened his seat belt, under some protest. After the flight had been in progress for some fifteen minutes, drinks were served. The appellant ordered and received two miniature bottles of vodka (each is exactly double a metric tot) which he took with water. Soon thereafter he beckoned the air hostess to him and said -

"Miss, this is a hijack".

She was surprised and shocked, but managed to keep calm and say, "Really?" He continued, "Miss, do you know what a hijack is?" She replied, "Yes I do know what a hijack is." He concluded -

"Go to your captain and tell him to head for Lourenco Marques, or otherwise I won't be responsible

/for .....

for the consequences".

She replied (true to her training) that she could not trouble the captain, adding that this would disturb him as the weather was very bad.

This happened about twenty minutes after take-off, when the plane was flying over Ladysmith, Natal.

The air hostess reported the incident to the senior flight steward, who was in the front part of the passenger cabin. He says that he was shocked. He instructed her to stand by the door giving access to the cockpit, while he walked down the aisle to confirm that the appellant was in seat 18 (e). The steward asked the rear steward to watch the appellant, and he and the hostess then went in to the cockpit to report the matter to the captain. The latter gave them their instructions and told them to return to the passenger cabin. It was then that the interleading door giving access to the cockpit was locked from the inside. The captain immediately radioed a messege to

/the .....

the safety organisation of the airline, CATHA Z.U.R., which operates in circumstances such as these. He reported a potential hijacking and asked for police assistance on landing.

Meantime the senior steward kept the appellant under observation. The air hostess busied herself with the removal of empty glasses. Eight to ten minutes after the appellant had first mentioned a hijack, he again beckoned the hostess to him and said:

"Miss, you don't look worried."

She replied that she was not worried. Where= upon, according to her, he said:

"Go to your captain and tell him to go to Lourenco Marques otherwise I shall not be responsible."

The steward's version of this was -

"You had better tell the captain now to change course for Lourenco Marques otherwise he will face serious consequences."

/This was ...

This was also reported to the captain, who radioed to Z.U.R. the exact location of the appellant's seat.

When the plane landed at Jan Smuts airport, the captain asked the passengers not to undo their seat belts and to remain in their seats. The steward opened the rear door and let in the police, the first of whom was Lieutenant Farrell of the South African Railway Police. He immediately went up to the appellant and pulled him out of his seat and removed him from the plane. Outside there was a number of armed policemen, ready for a possible emergency. The appellant was taken into custody. He asked, with querulous displeasure and anger, why he was arrested. Lieutenant Farrell said that it was because he had wanted to hijack the aircraft; whereupon the appellant uttered words to this effect -

"Next time I won't hijack it, I will put a bomb on your South African aircraft."

/The ...

The State places no reliance on that remark, save to suggest that his defence of joking (see infra) might have been somewhat strengthened if it had been raised earlier - rather like the case of an alibi.

The appellant was searched, as also was his luggage which had been fetched from the hold. No firearm or other weapon was found.

At the trial, the appellant said in evidence -

(a) that he was in liquor at the time;

(b) that he made the remarks as a joke, to tease the air hostess and to bring a smile to her face;

(c) that he did not intend to interfere with any of the crew in the performance of their duties;

(d) that he never had any intention of hijacking the plane.

The trial Court -

as to (a), found that the appellant was not so much under the influence

/of .....

of intoxicating liquor as not to know what he was doing;

as to (b), rejected this evidence;

as to (c), held that the appellant did so intend;

as to (d), accepted this.

In this Court, counsel for the appellant contended that the word "interferes", in section 2 (a) (iii) of Act 10 of 1972, imports the notion of some physical interference; and that, in the absence thereof, the appellant could not be convicted. Counsel argued that, as the Afrikaans text of the statute was signed, regard should be had to the corresponding word there used, namely "belemmer", as against the English word "interferes". In my view "belemmer" does not necessarily import a physical connotation. In the "Handwoordeboek van die Afrikaanse Taal", (HAT), the first example of the use of the word is, "My werk word belemmer deur die geraas".

/However, ...

However, counsel went on to submit that nevertheless the physical connotation was imported by the words "assaults or" in the subsection. I set it out -

"2. Any person who -

(a) on board any aircraft in flight -

(i) .....

(ii) .....

(iii) assaults or wilfully interferes with any member of the crew of that aircraft in the performance of his duties."

The argument was that the word "assault" ordinarily has a physical meaning, and the ensuing word "or " introduces the ejusdem generis rule which has the effect of similarly colouring the word "interferes". I am unable to accept that the ejusdem generis rule applies to the interpretation of section 2 (a) (iii). See Die Uitleg van Wette, deur Steyn, derde uitgawe, page 29 -

/Volgens ...

> "Volgens hierdie reël word n woord met n wyere betekenis, as hy gebesig word met andere woorde wat almal species van dieselfde genus beskryf, en self ook op een of meer species van daardie genus kan slaan, so beperk in sy betekenis dat hy nie iets buite daardie genus om beskryf nie."

A further submission in this part of the argument was that the words "belemmer" and "interferes" are ambiguous; and that accordingly, as this is a penal statute, the narrow meaning should be ascribed, namely, that of physical interference. In my view the words in question are not ambiguous. One may interfere with members of the crew, in the performance of their duties, in a variety of ways; but that does not make the word ambiguous, in the general context of this statute which is at pains to protect the safety of air= craft passengers.

/Counsel ...

Counsel then urged that paragraphs (e) and (f) of section 2 were there to cope with non-physical offences. They read -

> "(e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight;
>
> (f) falsely alleges that any other person is about to commit a contravention of paragraph (a) (i) or (c) or has committed a contravention of the said paragraph (c)."

It seems to me that those sub-paragraphs deal with specific situations; and they afford no basis for holding that "interferes" in section 2 (a) (iii) requires some physical act.

Finally, continuing with this argument, counsel referred to certain decided cases under other statutes. One of them was Burkett v Smith, 1920 A.D. 106. Sec 8 (5) of Act 27 of 1882 (C), makes it an offence to "hinder or disturb any police officer in the the execution

/of his ...

of his duty". Innes, C.J., said at page 110, in fin -

> "Now it is clear that the offence of hindering the police in the execution of their duty may under certain circumstances be committed without physical force or violence".

If anything, the case is rather against the appellant.

Another decision strongly relied upon by counsel was that of R. v Weyer, 1958 (3) S.A. 467 (G). The charge was one of obstructing or hindering the police in contravention of section 26 ter (a) of Act 14 of 1912, as inserted by section 18 of Act 32 of 1957. It reads -

> "Any person who -
>
> (a) assaults or resists or wilfully obstructs, hinders or interferes with any member of the Force in the execution of his duty, the exercise of his powers or the performance of his functions; ....
>
> shall be guilty of an offence ....."

As a matter of interest, the wording is the same in section 27 (a) of the repealing Act 7 of 1958.

That formidable catalogue of verbs induced Diemont, J., to say at page 472 A, that "there is a physical element which must be present". However, the learned Judge was there only dealing with the concept of obstruction; see the first four lines of that page -

> "To bring a case within the section it must be proved that the obstruction had a physical aspect, although it may not be necessary that any force or violence should be used". (My italics).

And at marginal letter C of page 472 the learned Judge summed it up by saying of the appellant -

> "He was making the sergeant's duty more difficult".

That is consistent with what was said by Lord Goddard, C.J., in Hinchliffe v Sheldon, (1955) 3 ALL ER 406 at p. 408 F.

/However, ...

However, all that may be, the real answer to the appellant's reliance on these and other cases is that they deal with different situations. An aircraft in flight is unique in that the crew are responsible for the safety and comfort of encapsulated passengers: nobody can get off in mid-air. This taut situation requires a sustained degree of discipline and concentration on the part of the crew, and a measure of responsible conduct on the part of the passengers. Against that background, in this statute vitally concerned with the safety of aircraft passengers, it would be at odds with the plain intention of the Legisla= ture if, in section 2 (a) (iii) which deals with an aircraft in flight, the words, "interferes with any member of the crew ..... in the performance of his duties", were to be restricted to cases of physical interference. I therefore hold against the appellant's contention in this regard.

That the conduct of the appellant did interfere with members of the crew admits of no doubt: the air

/hostess ...

hostess and the senior steward were shocked; and the captain, with 100 lives in his care, was tense while dealing by radio with a potential hijacking in the midst of negotiating storm conditions.

Counsel then proceeded to deal with the question whether the appellant intended to interfere with any of the crew in the performance of their duties.

As to the appellant's evidence that he made the remarks as a joke, merely to tease the air hostess, and to bring a smile to her face, the trial Court rejected this explanation. The learned Judge Presi= dent had the advantage of seeing and hearing the witness, and I am unpersuaded that his appraisal was wrong. "But why else should the appellant have made the remarks", asked counsel, "seeing that it is accepted that he had no intention of hijacking the plane?" It may be that the appellant was irritated by his earlier brush with the air hostess and the steward on being made to fasten

/his .....

his seat belt against his wish; and that he uttered these remarks as a form of retaliation. However that may be, it is not incumbent on the State to prove his motive. The fact that he uttered the remark, twice within ten minutes, was proved, and the trial Court held that this was not done as a joke. For that matter, the air hostess and the steward were shocked, and they saw no hint of any joking or levity in his demeanour or in his utterances.

There remains the question of the appellant's condition as to insobriety. It is common cause that in seeking to establish wilful interference the onus was on the State to prove mens rea. There is a conflict of evidence as the degree of the appellant's insobriety. The air hostess and the senior steward both say that the appellant was not drunk and spoke normally. The appellant says that he was drunk. The trial Court's appraisal of him was -

"The .....

> "The accused is given to exaggeration, and on occasions his statements are so excessive that the Court did not know what to accept. It is almost impossible to decide what is exaggeration and what is the truth".

Sitting on the window-seat side of the appellant was a nineteen-year-old trainee in uniform. He gave evidence for the defence. He sought to make light of the whole affair and said that the appellant was drunk. The trial Court discounted his evidence -

> "(He) is a young man who was very light-hearted and apparently has never considered the seriousness of matters such as this. He, for example, said in this Court that he would not be concerned at all if the plane was deviated to Lourenco Marques, because that would give him a few days extra leave from the army. It was a remark which caused some mirth in Court, but it demonstrated the attitude of the man".

/There was ...

There was also medical evidence on the subject. Reviewing all of the evidence, the trial Court came to the definite conclusion that the appellant, although he had partaken of intoxicating liquor both before and during the flight, knew what he was doing and saying when he uttered the words in question. On all the evidence, in my view that finding of fact cannot be disturbed.

However, counsel for the appellant contended that nevertheless it was not proved that the appellant intended his words to interfere with the crew in the performance of their duty. The argument was that the consumption of even some liquor would affect his judgment as to the effect that his words would have on the crew. As to that, the facts are as follows. The appellant was able -

(i) to mount the steps and board the plane;

(ii) to find his way to seat 18 (e);

/(iii) to ...

(iii) to rationalise with the hostess on the question of the seat belt, namely, that he had flown before and that it was not necessary to fasten it;

(iv) to fasten his seat belt, when the senior steward told him to do so;

(v) to order a double vodka, open the miniature bottles, and mix the drink with water;

(vi) to beckon the hostess to him;

(vii) to utter the words "Miss, this is a hijack; Do you know what a hijack is;" and to rationalise that she should report this to the captain; "Go to your captain and tell him to head for Lourenco Marques, or otherwise I won't be responsible for the consequences";

(viii) to beckon the hostess to him the second time, after the lapse of some 10 minutes;

/(ix) to ...

(ix) to rationalise that she did not look worried; and that she should report the matter to the captain - "Go to your captain and tell him to go to Lourenco Marques, otherwise I shall not be responsible" - a reiteration which plainly indicates that he intended her to report it to the captain;

(x) to get up from his seat (the centre seat of three) and go to the toilet at some stage;

(xi) to find his way back to his seat;

(xii) to ask the police why they were arresting him.

In addition, the appellant is an adult. He has flown before. He is employed by an air-freight company, and works a good deal at the Jan Smuts airport. He knew, because the air hostess had told him, that the weather was bad. He must have known that the captain would be concentrating on this, yet he intended her to

/report .....

report his remarks to him. Finally, on his own admission he was aware of the dangers of hijacking, and knew that it is something of which the world is very conscious.

In my view the cumulative effect of all of the foregoing indicates that the learned Judge President was right in holding that the appellant did intend his conduct to interfere with members of the crew, in particular the air hostess and the captain, in the performance of their duties.

THE APPEAL AGAINST THE SENTENCE

Section 2 of Act 10 of 1972 provides for a mandatory minimum sentence of imprisonment for five years. The learned Judge President, giving full reasons for his decision, suspended two years of this.

/The Court's ...

The Court's approach in an appeal against sentence is well settled. It was summarised in S. v Rabie, 1975 (4) S.A. 855 (A.D.) at page 857 D - F, as follows -

"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

(a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court '; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.

2. The text under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

/General .....

General guidelines in arriving at an appro= priate sentence are set out in S. v Rabie, supra, at pages 861 to 862. We bear all of these in mind in this case, and also all of the arguments of counsel for the appellant.

There is also the factor that in these times of hijacking and the sudden fang of terrorism, the deterrent aspect of punishment calls for a measure of emphasis in regard to offences committed while the aircraft is in flight, so that hazard may be minimised and those who fly may be reassured as to their safety.

The sentence passed by the learned Judge President was robust but, in all the circumstances, we are unable to hold that it is disturbingly inappro= priate. There is therefore no basis for interference with the trial Court's discretion as to punishment.

/In the ...

In the result, the appeal is dismissed.

G.N. HOLMES

JUDGE OF APPEAL

WESSELS, J.A.)
GALGUT, J.A.) BOTH CONCUR