181/1958

G.P.-S.1568732—1956-7—9,000. S. U.D.J. 445.

181/1958

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

(APPELLATE DIVISION).
AFDELING).

Pro Deo

CAPITAL

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

ROBERT GOLIATH

Appellant.

versus/teen

THE QUEEN

Respondent.

Appellant's Attorney / Prokureur van Appellant — Respondent's Attorney / Prokureur van Respondent

(In Gaol)

Appellant's Advocate / Advokaat van Appellant: W. Lane — Respondent's Advocate / Advokaat van Respondent: P. Yutar

(Leave: WLD)

Set down for hearing on: / Op die rol geplaas vir verhoor op: THURSDAY, 18th Sept, 1958

9.50 - 11.35 C.A.V.

~~REGISTRAR~~
18/9/58

— Appeal dismissed.

Schreiner CJ, Hoexter, de Beer, Malan, + Ogilvie Thompson JJA.

Regr. 22/9/58.

Record

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

ROBERT GOLIATH ..... Appellant.

versus

REGINA ..... Respondent.

Coram: Schreiner, A.C.J., Hoexter, De Beer, Malan et Ogilvie Thompson, JJ.A.

Heard: 18th September, 1958. Delivered: 22nd September, 1958.

J U D G M E N T

OGILVIE THOMPSON, J.A.:

Appellant was, together with three others, indicted before the Witwatersrand Local Division on [redacted] charges of (i) Rape (ii) Robbery (iii) Housebreaking with intent to commit a crime unknown to the Prosecutor, and attempted murder. On application by the Crown, the trials were separated, and that of Appellant proceeded before CILLIE, J., sitting with two Assessors, on the abovementioned three charges. Appellant was acquitted on the third charge (which related to crimes committed on 28th December, 1957), but was convicted on both the first and the second charges, the verdict recorded being "skuldig

bevind ...../2

bevind aan die misdaad van verkragting, en die misdaad van roof, met verswarende omstandighede". Appellant was sentenced to death. The learned Trial Judge, however, granted leave - in terms to which I will later make fuller reference - to appeal to this Court.

The evidence for the Crown established that shortly after ten o'clock on the night of 23rd December, 1957 the female complainant and her husband, the male complainant, were in bed in their joint bedroom at their residence in Krugersdorp when they were roused by a knocking at the front door. Upon the male complainant's opening the door, he was confronted by masked males who, in addition to immediately levelling a revolver, severely assaulted him and forced him back into the bedroom where the female complainant was still in bed with her baby asleep in a perambulator next to her. After tying the male complainant to his bed and further assaulting him, the intruders - according to the evidence of complainants, certainly four, and possibly more, in number - assaulted the female complainant by tying her hands and striking her and, under threats of further violence, then proceeded to rape her as she lay on her bed adjacent to that of her husband: at the trial

the ..../3

the female complainant testified to five separate completed acts of intercourse being thus perpetrated upon her. In addition to this physical violence, the intruders throughout maintained a brutally menacing attitude, demanding money upon threats, inter alia, of killing the complainants and their children. On one occasion - so the female complainant deposed - one of the intruders held her baby aloft threatening to dash him to the ground if she did not disclose where money was claimed to be hidden in the house. After ransacking the house, the intruders ultimately decamped with some £800 worth of the complainants' possessions.

Apart from expressing the opinion that they appeared to be coloured men, the complainants were unable to identify any of their assailants, all of whom wore caps and masks. Accordingly, the vital issue for decision at the trial was whether or not the Crown had proved beyond reasonable doubt that Appellant was one of those assailants. The Crown case against Appellant rested mainly upon a fingerprint, upon the subsequent possession by Appellant of certain of the articles stolen from complainants on the night of 23rd December, 1957, and upon certain oral statements deposed to by the Crown

witness Ensley Maedi as having been made by Appellant in the police cells at Krugersdorp. I will deal first with the evidence relating to the fingerprint.

The complainants' two single beds in their bedroom were joined by a single head-board abutting the wall. As one faced this wall, the bed on the left hand side was occupied by the male complainant, and that on the right hand side by the female complainant. On either side of the head-board, and flanking the two beds, were small bedside tables, each having a glass top. On the glass top of the bedside table adjacent to the head of the male complainant's bed - that is to say, the table standing to the <u>right</u> of any person lying on his back upon either bed - the fingerprint in issue was found by the fingerprint expert van der Walt at about 9 a.m. on 24th December, 1957. van der Walt deposed that this fingerprint was made by Appellant's right thumb, maintaining that eleven points of identity - photographically indicated in the usual manner, and being four in excess of the seven which, according to him, conclusively establish identity - were discernable. van der Walt's conclusion was fully corroborated and supported by the evidence of another Crown witness, Lt. Retief, who has

had ...../5

had twenty seven years of experience as a fingerprint expert. The Trial Court accepted the evidence of these two witnesses - who had been exhaustively cross-examined by defence counsel -- and held that no doubt whatever existed regarding nine of the points of identity and that the remaining two points, although perhaps unclear, certainly reflected no variation. The Trial Court accordingly found as a fact that the fingerprint in issue had been made by the Appellant. This finding was - in my view, wisely - not challenged by Mr. Lane in his argument for Appellant in this Court.

At the trial Appellant sought to account for the presence of this fingerprint in the following way. He deposed that he had been at complainants' house on 20th December, 1957 to enquire about painting work; that, on that occasion, the female complainant had stated that she wanted a [redacted] childs' cot and small chest painted; and that she had then taken him into the house to inspect these articles, which he found next to her bed. Appellant suggested that he may have left his fingerprint on the glass table top when - as he deposed he did - he pulled out the cot and chest in order to examine them.

Under ..../6

Under cross-examination the female complainant readily agreed that approximately a week - she was uncertain of the precise period, and conceded that it might be less - before 23rd December, 1957 Appellant had come to her house enquiring for painting work. She also agreed that on this accasion Appellant undertook to paint a babys' cot and table for her for the sum of ten shillings; but she was quite definate in her testimony that she had not taken Appellant into the house and that, so far as she was aware, he had not, on this occasion, entered the house at all. She had, she said, sent Appellant round to the garage - situate at the back of the house - in order to ascertain whether there was enough paint there, and she conceded that it was physically possible for Appellant to have then slipped into the house through the back way, although she added that, since she kept two servants, she felt it was most unlikely that Appellant would have done so. The Trial Court found the female complainant to be a most reliable witness and rejected Appellant's explanation of how his finger-print came to be found on the bedside table. It was, however, urged upon us by Mr. Lane that this explanation might reasonably be true and that, consequently, the Trial

Court ...../7

Court erred in rejecting it. For the reasons which I will now state, I am unable to accede to this submission,

In the first place it is to be observed that Appellant himself never contended that - as is now urged upon us by counsel as being a reasonable possibility - he had on 20th December slipped into the house alone via the back entrance: Appellant's case was that he had accompanied the female complainant into the house. On this he was flatly contradicted by the female complainant, whose evidence was unreservedly accepted by the Trial Court. A perusal of the record serves to confirm the Trial Court's view that the female complainant was an extremely fair witness.

No foundation exists for any suggestion that she might either have forgotten, or deliberately denied, accompanying Appellant into the house to inspect the cot and table. Such improbability as may be said to exist in Appellant's having given a quotation of ten shillings without actually seeing the articles to be painted is readily explicable by the relatively trivial character of the work to be done, and is, in any event to be weighed against the improbability of a fingerprint surviving for several days despite the usual cleaning of the

glass ...../8

glass table tops deposed to by the female complainant. The latter was, moreover, very definite in her evidence that the cot and table which she required to be painted were at all material times, not in her bedroom (where the fingerprint was found), but in the spare room. In his evidence in chief Appellant stated that the cot and the table which, in the presence of the female complainant, he examined in order to give his quotation, were both in the same bedroom, which latter, he implied, was the complainants' bedroom. Under cross-examination however Appellant changed his evidence, saying that the cot and table (which he throughout described as a "kassie") were in separate rooms. Nor is that all. Appellant insisted, after being given every opportunity by the learned Trial Judge to correct possible error, that he had gone only to the right side of the bed as one faced the bed-head, and not to the other side at all. That is to say, even accepting Appellant's own version, he was never on 20th December, near to the table top upon which his fingerprint was found on the morning of 24th.

Having regard to the various considerations I have mentioned, the Trial Court was, in my judgment, quite correct in rejecting Appellant's explanation of how his fingerprint

came ...../9

came to be found at the scene of the crime. It follows that, in my view, the Trial Court rightly found Appellant to have been one of the persons who were illegally in complainants' home on 23rd December, 1957.

Nor does the Crown case against Appellant end there. Shortly after 23rd December, 1957 the Appellant was admittedly in possession of, and dealt with, a number of articles duly identified as having been stolen from complainants on that date, inter alia: a ladies' wrist-watch (Ex. 10); certain table linen (Ex. 7); a white necklace and matching brooch, earrings and bracelet (Ex. 9); a gas pistol (Ex. 1) and keys in a holder (Ex. 12). Appellant's explanation was that he had acquired these articles from Ensley (alias Jumbo) and one Nyoni acting together. Not only was this explanation largely at variance with what Appellant had contemporaneously stated to the persons to whom he had respectively sold or given the articles in question - which said persons were called by the Crown at the trial - but it was specifically denied by Ensley who also gave evidence at the trial on behalf of the Crown. Moreover, Appellants actions in dealing with Exhibits 1 and 12 (which he had hidden under a stone) are well high impossible to reconcile with his protestations of innocent acquisition ...../10

acquisition of these articles. In addition, Appellant was, when arrested on the 30th December, 1957, found to have on his person a ladies ring (Ex. 6) which the female complainant identified as having been stolen from her on 23rd December, 1957 Initially the female complainant was not cross-examined on this identification. When recalled at a later stage of the case she said, in reply to Defence Counsel, that the ring fell into the category of costume jewellery and that she had bought it in Durban; but that, nevertheless, she was certain that this ring was the one stolen from her on 23rd December. Appellant claimed to have picked this ring up in a beer-hall. According to the police evidence, Appellant initially said he had picked up the ring on 27th December: under cross-examination at the trial, Appellant first said that he had picked up this ring about a week before his arrest, but then immediately altered the period to "omtrent 'n week of twee". Making every allowance for the possible fallibility of the female complainant's identification of the ring, it would, indeed, be an extraordinary coincidence if, in addition to leaving his fingerprint at the scene of the crime and being admittedly in possession of articles stolen therefrom, Appellant

should ...../11

should also happen almost contemporaneously to pick up a ring identical with the one stolen from complainants' house. The cumulative effect of the various considerations I have mentioned is such that the Trial Court was, in my view, entirely correct in rejecting Appellant's explanations in regard to the various exhibits which I have listed above.

In my opinion, the Crown evidence relating to these articles, allied to that of the fingerprint, established beyond all reasonable doubt. that Appellant was one of the criminals who entered complainants' house on 23rd December, 1957.

This conclusion renders it unnecessary to make any close examination of the evidence given by the witness Ensley. The substance of Ensley's evidence was that, while locked up in the police cells at Krugersdorp on 4th January, 1958, Appellant made various verbal statements clearly admitting his participation in the rape of the female complainant and in the subsequent robbery. In addition to denying the statements themselves, the defence case at the trial was that Ensley was never in the police cell with Appellant on 4th January, or on any other relevant occasion. The Trial Court, with full

appreciation ..../12

appreciation of Ensley's defects as a witness - the learned Judge in his reasons described Ensley as a "skurk" - nevertheless accepted his testimony as to what happened in the Police Cells on 4th January. It is sufficient to say that Mr. Lane failed to advance any arguments which would warrant this Court in differing from the Trial Court's finding on this essentially factual issue.

In the course of his argument before this Court Mr. Lane submitted that certain irregularities had occured at the trial which had prejudiced Appellant in the conduct of his defence and that, in consequence, a failure of justice had resulted. Before considering these alleged irregularities, it is desirable that brief reference be made to the terms of the learned Trial Judge's order granting leave to appeal.

After his conviction and sentence, Appellant filed an application divided into three parts labelled A, B and C. Part A was an application for leave to appeal, in terms of section 363 of the Code, to this Court on five listed grounds. Part B was an application for a special entry, in terms of section 364 of the Code, in relation to three separate alleged irregularities all of which, if they can be said to be

irregularities ...../13

irregularities at all, appear on the record. Part C was an application for "reservation of questions of law as to whether the questions referred to in B above were admissible". The record contains no statement of the learned Trial Judge's reasons in adjudicating upon these applications, but the Court's order made on 4th August, 1958 - the conviction and sentence were on 12th July, 1958 - was as follows:

> " 1. That leave be and is hereby granted to the Applicant under Section 363 of Act No. 56/1955 in terms of Section A.1. of his aforesaid Application.
>
> 2. That leave to appeal against the sentence be and is hereby granted."

Section A.1. of the Appellant's application, referred to in Clause 1 of the above cited order, is somewhat ineptly worded and reads as follows :

> " 1. The conviction was against the evidence and weight of evidence and another Court on the same evidence might have come to a different conclusion."

Now, as was pointed out by SCHREINER, A.C.J., in R. v. Nzimande 1957 (3) S.A. 772 at 774, when leave to appeal is granted this will ordinarily suffice to enable all issues, factual, legal or procedural, to be dealt with by this Court. Moreover, in terms of section 364(1) of the Code, a special entry must,

when ..../14

when applied for, be made unless the Court or Judge to whom application is made "is of opinion that the application is not made bona fide, or that it is frivolous or absurd, or that the granting of the application would be an abuse of the process of the Court." Having regard to the foregoing considerations, the terms of the above cited order granting leave to appeal must, in my view, be construed, in favour of the Appellant, as enabling him to raise before this Court the alleged irregularities listed under paragraph B of his application and upon which Mr. Lane now seeks to rely. Had the learned Trial Judge intended to refuse leave to Appellant in respect of all matters other than those specifically mentioned in Sec. A.1. of his application, the learned Judge would, in my opinion, have said so. In the absence of any reasons from the learned Trial Judge, it would, in my judgment, be wrong to ascribe any such intention to him merely because of the terms of the order of 4th August, 1958: this latter, it is to be observed, does not say that leave is granted only in terms of Section A.1. of the application. It was, therefore, open to Mr. Lane to raise the alleged irregularities before this Court.

The ...../15.

The irregularities thus complained of related to certain allegedly unfair questions put in cross-examination by Counsel for the Crown to Appellant and to two of his witnesses, namely Violet Meyer and George Muller. These questions mainly related to the presence of a hiding place in the floor of Violet Meyer's house (where Appellant also at times lived) and to the failure of the defence to raise at the Preparatory Examination the contention, advanced at the trial, that Ensley had never been locked up in a police cell with Appellant. It is unnecessary to enter into the details, for there is no substance in any of the contentions raised. It suffices to say that, having heard Mr. Lane's submissions, I am satisfied that no material irregularity whatever occurred and that, in any event, there was no failure of justice within the meaning of the proviso to Section 369(1) of the Code.

It was but faintly argued that, even if the Crown had proved Appellant's presence in the complainants' bedroom on the night of 23rd December, 1957, it had failed to prove that Appellant had intercourse with the female complainant. On Ensley's evidence - which, as stated above, the Trial Court accepted - Appellant did, on his own admission, have [redacted]

such ...../16

such intercourse. In any event, quite independently of Ensley's evidence, it was clearly established that Appellant was acting in concert with the group who raped the female complainant preparatory to looting the house.

For the foregoing reasons, I come to the conclusion that Appellant was rightly convicted by the Trial Court of both rape and robbery.

No argument was addressed to us in support of the appeal against the sentence. In this Mr. Lane, in my opinion, exercised a wise discretion. The robbery was committed before Act 9 of 1958 came into force. It is however unnecessary to discuss the competence, or otherwise, of the death sentence in relation to the robbery charge; for in terms of Section 329 of the Code that sentence was, of course, competent for the crime of rape. Having regard to the circumstances whereunder this particular rape was committed the death sentence was, in my view, entirely appropriate.

The appeal accordingly fails and is dismissed.

(Signed) N. OGILVIE THOMPSON

[redacted], A.C.J.
[redacted], J.A.
DE BEER, J.A.
MALAN, J.A.

} Concur.