123/1958

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

123/58

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

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

SIDLILE CELE Appellant.

versus/teen

REGINA. Respondent.

Appellant's Attorney *Respondent's Attorney*
Prokureur van Appellant *Prokureur van Respondent*

Pro Deo.

Appellant's Advocate T.J.F. Hefer *Respondent's Advocate* J.B. Thom
Advokaat van Appellant *Advokaat van Respondent*

(Leave DCL) (Question of Law)

Set down for hearing on: Thursday 6th Nov, 1958.
Op die rol geplaas vir verhoor op:

3.4.5.8.11. (B) 9.45 - 12.50; 2.15 - 3.20 C.A.V.

REGISTRAR 6/11/58

JUDGMENT: THURSDAY, 20th NOVEMBER, 1958.

Appeal allowed, Conviction and Sentence set aside.

Steyn, de Beer, Beyers, Ogilvie Thompson et Smit

REGISTRAR 20/11/58

Record

SIDLELE CELE v. REGINA.

Coram: Steyn, De Beer, Beyers, Ogilvie Thompson JJ.A. et Smit A.J.A.

Heard: 6-11-58 Delivered: 20-11-58

J U D G M E N T

OGILVIE THOMPSON, J.A.:

I agree that for the reasons stated by STEYN J.A. - whose judgment I have had the advantage of reading - the Appellant, although represented by counsel, was nevertheless entitled to make an unsworn statement from the dock, and that, since he was precluded from doing so, this Court should, on the particular facts of this case, set his conviction and sentence aside. I merely wish to add a few remarks concerning the nature of, and the weight to be assigned to, an unsworn statement made by an accused person from the dock pursuant to the right reserved by sub-section 227(3) of the Code.

This sub-section obviously derives from section 1(h) of the English "Criminal Evidence Act" of 1898, which latter has also been taken over in several Australian and New Zealand jurisdictions. Cowen and Carter (Essays on the Law of Evidence) at p.216 describe the subject of unsworn

statements ...../2

statements from the dock as "a confused and unsatisfactory chapter in the law of evidence." This description is amply borne out by the conflict revealed in the various English, Australian, New Zealand, and other, authorities cited by the learned authors. As appears from the authorities reviewed by YOUNG J. in R. v. Wooldridge 1957(1) S.A. 5 (S.R.), considerable divergence of judicial opinion has also manifested itself in our own Courts in relation to this subject.

Phipson (Evidence: 9th Ed. p.2), after pointing out that the word"evidence", as used in judicial proceedings, has several meanings, says that "in a real sense evidence is that which may be placed before the Court in order that it may decide the issues of fact." An unsworn statement from the dock, which is expressly made receivable by the statute, appears to me to fall within the ambit of Phipson's definition. Such a statement may, therefore, rightly be described as evidence, in the sense of material which the Court or jury must take into consideration in determining the guilt or otherwise of the accused. See also Cross (Evidence) who at p.172 mentions the Irish case of The People (A-G) v. Riordan 1948 I.R. 416 (a full report of which is

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not presently available to me) wherein a conviction was quashed because of the trial judge's failure to put to the jury the contents of the accused's unsworn statement, which latter had also not been included in the transcript of the proceedings.

The authorities indicated above also reveal a remarkable divergence of view as to the stage when the accused should make his unsworn statement, and also as to whether the right to make such a statement is affected by the calling of defence witnesses. In our practice, the calling of defence witnesses does not, in my opinion, affect the right of the accused to make the statement, which latter may, in my view, be made either before or after the defence witnesses have been called. The statement should, however, be made before the defence case is closed and thus precede the addresses of counsel.

An unsworn statement from the dock obviously carries less weight than evidence given under oath. I find it impossible, however, to define in positive terms exactly what weight should be accorded to such a statement; for that must inevitably depend both upon the content of the statement

and ...../4

and upon the particular facts of the particular case as reflected in the sworn evidence. In Wooldridge's case (supra) YOUNG J. equated an unsworn dock statement with the exculpatory portions of an accused's extra-curial confession and applied to the former the test laid down by this Court in relation to the latter in R. v. Valachia & Others 1945 A.D. 826 at 837, viz: that, although the absence of oath detracts very much from their weight, such exculpatory statements must be taken into consideration by the Court and "accepted or rejected according to the Court's view of their cogency". As is pointed out by STEYN J.A. in the present case however, the unsworn dock statement is, unlike the exculpatory extra-curial statement, open to the additional criticism that, by electing to speak from the dock, the accused is deliberately - albeit as his right - avoiding taking an oath and subjecting himself to cross-examination. That, in my opinion, is an important aspect to be borne in mind when evaluating the statement.

As far back as 1882 - that is to say, before an accused in England became, as he did by the 1898 Act, a competent witness in his own defence in all cases - CAVE J.

in ...../5

in R. v. SHIMMIN (15 Cox 122), expressing the views of the Judges of the High Court in England, laid down that a dock statement, though not entitled to the same weight as sworn testimony, was nevertheless entitled to "such consideration as the jury might think it deserved". With some variation in phraseology, this criterion has been substantially adopted in what appears to me to be the more persuasive of the modern cases brought up in the authorities I have mentioned above. It is also in general accord with the test laid down in R. v. Valachia (supra) in relation to the analogous case - save for the deliberate avoidance of oath referred to above - of the exculpatory portions of an extra-curial confession. Without entering upon any further discussion of the various conflicting opinions which have been expressed in the various decisions to be found collated in Wooldridge's case (supra) and in Cowen and Carter (supra), I am of opinion that, subject to what is stated below, CAVE J.'s statement, unprecise though it is, remains equally applicable under modern conditions. In my judgment, the correct view is that an unsworn statement from the dock, though technically to be regarded as evidence, is certainly not entitled to the same weight as sworn testimony; but that

it ..../6

it must nevertheless receive due consideration by the trier of fact and be accorded such weight as, in the particular circumstances of the case, the trier of fact considers that it deserves.

Obviously the trier of fact must always appreciate - and, if a jury, be apprised of - the lack of cogency resulting from the absence of the oath: but in an undefended case this may, I think, occasionally be somewhat more benevolently regarded for, despite the best endeavours of the presiding judicial officer to explain the accused's rights to him, it sometimes happens that an uneducated accused fails to grasp the essential difference between evidence under oath and a statement from the dock. Where the trier of fact has reason to think that such a situation obtains, the trier of fact may, under suitable circumstances, be disposed to assign more weight to the dock statement than would have been accorded to it had the accused been defended. In defended cases no confusion is likely to arise regarding the respective cogency of sworn evidence and an unsworn dock statement. In a defended case it will, therefore, in my opinion be relatively rare that an unsworn statement from the dock provides an effective counter to contrary sworn testimony.

DE BEER, J.A.
BEYERS, J.A.
SMIT, A.J.A. } Concur.

N Ogilvie Thompson

Record

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(Appélafdeling)

Insake:-

S I D L E L E C E L E Appellant

en

R E G I N A Respondent

Verhoor deur:Steyn, de Beer, Beyers, Ogilvie Thompson RR.A. en Smit W.R.A.

Verhoordatum: 6 November,1958. Leweringsdatum: 20-11-1958

U I T S P R A A K

STEYN R.A. :- In die hof a quo het die appellant tereggestaan op 'n aanklag van verkragting. By afsluiting van die saak vir die vervolging het die advokaat vir die appellant die hof meegedeel dat die appellant, nadat sy regte aan hom verduidelik is, verlang om 'n onbeëdigde verklaring uit die beskuldigdebank af te lê. Die advokaat vir die vervolging het daarteen beswaar geopper op grond daarvan dat 'n beskuldigde wat 'n regsverteenwoordiger het, nie self so'n verklaring kan doen nie. Die beswaar is gehandhaaf. Die advokaat vir die appellant is die geleentheid gebied om namens die appellant 'n onbeëdigde verklaring voor te lê maar hy het nie daarvan gebruik gemaak nie. Hy het betoog

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dat so'n verklaring geen bewyswaarde hoegenaamd sou hê as dit van hom en nie van die appellant self sou kom nie, en het die saak vir die verdediging sonder voorlegging van getuienis afgesluit. Die appellant is vervolgens skuldig bevind aan poging tot verkragting en veroordeel tot twaalf maande gevangenisstraf met dwangarbeid en vier houe. Ingevolge Artikel 366 van die Strafproseswet, 1955, is die vraag of 'n beskuldigde wat deur 'n advokaat verteenwoordig word, die reg het om na afsluiting van die saak vir die vervolging en voor afsluiting van die saak vir die verdediging en die betoë van die advokate, self 'n onbeëdigde verklaring uit die beskuldigdebank af te lê, vir oorweging deur hierdie Hof voorbehou.

Die bepaling waarom dit gaan is vervat in Artikel 227 van die Strafproseswet, wat ooreenstem met Artikel 264 van die vorige Wet No. 31 van 1917. Subartikel (1) van Artikel 227 verklaar 'n beskuldigde, met sekere voorbehoude, tot 'n bevoegde getuie vir die verdediging op elke stadium van 'n strafsaak, en dan word bepaal:

"(2) Tensy die hof anders gelas, moet elke beskuldigde wat ingevolge hierdie artikel as getuie opgeroep word, sy getuienis aflê vanuit die getuiebank of ander plek waar die ander getuies hul getuienis aflê.

(3) Geen bepaling van hierdie artikel doen afbreuk aan enige reg van die beskuldigde om 'n verklaring af te lê sonder dat hy ingesweer is nie: Met dien verstande dat indien hy

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by 'n voorlopige ondersoek getuienis ten behoewe van homself aflê, daardie getuienis by sy verhoor deur die aanklaer uitgelees en ingelewer kan word. "

Soos blyk uit die bewoording van sub-artikel (3), is dit, net soos Artikel 264(3) van die vorige Wet, gerig op die instandhouding van 'n bestaande reg. Daardie reg word nie in die Wet nader omskryf nie, en die beskoulings wat met betrekking tot die voorbehoue vraag daaromtrent in onsê howe uitgespreek is, is nie eendersluidend nie. In Rex v. de Wet (1933 T.P.A. 68) sê TINDALL R. die volgende :

"The common practice when the accused is undefended is to allow him to make a statement even where he does not give evidence under oath. That statement is really equivalent to an argument by the accused, and the practice is to record such a statement. I think where the accused is undefended it is very necessary that a statement of that kind should be recorded in order that the reviewing judge can see what attitude the accused took up and what contentions he wished to advance. But of course a statement of that kind is not evidence and cannot be regarded as such, and where the accused is defended he should not be allowed to make such a statement. The argument on behalf of the accused should be put forward by his legal representative. If the attorney wishes to put evidence before the court, then that evidence should be led under oath. "

Die gevolgtrekking dat 'n verdedigde beskuldigde nie self die onderhawige verklaring kan aflê nie, berus op die sienswyse dat so'n verklaring eintlik 'n beredenering van die saak is

en geen getuienis nie. Hierdie sienswyse word onderskryf in Malone en Ander v. Rex(1935 N.P.A.115) en Rex v. Tarling (1946(1) P.H. H 2. (Vgl. ook Rex v. Cohen,1942 T.P.A.226 op bladsy 277).

Aan die ander kant is die beskuldigde in Rex v. Sedi (1950(3)S.A.693) toegelaat om 'n onbeëdigde verklaring uit die beskuldigdebank te doen, hoewel hy deur 'n advokaat verteenwoordig was. In Rex v. Mazibuko (1947(4) S.A. 821 op bladsy 829) merk HATHORN R.P. met verwysing na de Wet se saak op:

"It is obviously correct to describe an unsworn statement as an argument, if in truth it is an argument, but the description of 'argument', should not apply, in my opinion, to unsworn statements which contain facts as opposed to argument nor to those which provide explanations in cases in which the accused is expected to make an explanation, upon pain of conviction. "

(Vgl. ook die uitspraak van REYNOLDS R. in Rex v. Bushula 1950(4) S.A.108 op bladsy 112).

Die verhoorregter verwys o.a. na die sake van De Wet, Sedi, Mazibuko en Bushula , en betuig sy instemming met die sienswyse dat die onderhawige verklaring uit beredenering, erkennings en getuienis of bewerings omtrent feite kan bestaan. Voorts verwys hy na die beslissing in Regina v. Matonsi (1958(2)S.A.450) betreffende die mate van

beheer/.....

beheer oor die voer van die verdediging wat by die advokaat vir 'n beskuldigde berus, en kom tot die gevolgtrekking dat 'n verdedigde beskuldigde (behalwe miskien ingevolge Artikel 169(5), wanneer hy pleit) nie self erkennings kan doen nie, en ook nie self die beredenering kan behartig nie. Sy beskouings met betrekking tot die onderhawige saak vat hy dan as volg saam:

"As an unsworn statement may consist of argument, or of admissions, or of a statement of facts or of all three, or of two only of them, and I do not know what the accused's proposed statement in this case is likely to comprise, I am not sure whether what is now proposed will not result in either or both being made or submitted by the accused himself. In my view, therefore, I cannot permit the accused himself to make a statement from the dock. "

Na my mening is die uitspraak in De Wet se saak, blykens die tersaaklike wetsbepalings, onjuis waar daarin te kenne gegee word dat die ooreenstemmende subartikel in die vorige Wet betrekking het op die reg van die beskuldigde om sy saak te beredeneer of om sy houding teenoor die aanklag te verduidelik of om sy standpunt te stel. Aangesien bedoelde bepalings ongewysig in die huidige Wet opgeneem is, noem ek in wat volg slegs die desbetreffende artikels daarvan en nie ook dié van die vorige Wet nie. Die woorde reeds "sonder dat hy ingesweer is", wat in Artikel

227(3) voorkom, laat sonder meer vermoed dat dit nouliks hier die bedoeling kon gewees het om na die beredenering of na so'n verduideliking te verwys. Inswering in die loop van 'n verhoor val geheel-en-al buite die bestek van of vereistes vir beredenering. Verduideliking van die beskuldigde se houding teenoor die aanklag of van die grondslag van sy verdediging kan geskied, luidens Artikel 169(5), wanneer hy op die aanklag pleit, of ingevolge Artikel 157(4), wanneer hy die Hof toespreek ter inleiding van die getuienis wat hy wil voorlê. Nóg by die een nóg by die ander kan daar sprake wees van 'n moontlike eed. Om in so'n verband vir 'n beskuldigde 'n reg te wil beveilig om 'n verklaring af te lê sonder dat hy ingesweer is, sou onvanpas en doelloos wees. Net soos vir laasbedoelde aangeleenthede in Artikels 157(4) en 169(5), word ook vir beredenering elders uitdruklik voorsiening gemaak nl. in Artikel 183(1) waar dan ook bepaal word nie dat 'n beskuldigde 'n reg het om 'n verklaring af te lê nie("to make a statement") maar dat hy op die aangewese tydstip die jurie of Hof kan toespreek ("address the jury or the court"). Die verskil in bewoording dui op 'n verskil in begrip. Ook uit die samehang van die sub-artikel met die res van die Artikel is af te lei dat dit nie betrekking het op beredenering of op

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'n verduideliking van houding of grondslag van verdediging nie. Die sub-artikel begin met die woorde "Geen bepaling van "hierdie artikel doen afbreuk." Luidens hierdie bewoording wil die wetgewer waak teen 'n moontlike gevolgtrekking uit sub-artikels (1) en (2) teen die reg om 'n onbeëdigde verklaring af te lê. Genoemde sub-artikels verklaar 'n beskuldigde tot bevoegde getuie maar verplig hom om, tensy die Hof anders gelas, vanuit die getuiebank te getuig of vanuit 'n ander plek waar die ander getuies hul getuienis aflê. Ek vind dit moeilik om te bedink hoe hierdie bevoegheid en verpligting enige afbreuk sou kon doen aan die uitdruklike voorsienings in Artikels 169(5) en 157(4) vir verduidelikings en inleidende opmerkings wat gedoen moet word voordat die punt bereik word waarop die beskuldigde die getuiebank ingaan, of aan die uitdruklike voorsiening in Artikel 183(1) vir die toespreek van die jurie of die Hof nadat al die getuienis reeds gelewer is. Dit is spesifieke bepalings wat, gesien hul doel en strekking, geen logiese beperking kan ondergaan nie uit hoofde van die feit dat 'n beskuldigde 'n bevoegde getuie verklaar word onder verpligting om sy getuienis vanuit dieselfde plek as ander getuies af te lê. Dit is na my oordeel bygevolg duidelik dat die wetgewer in hierdie sub-artikel nie

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enige reg tot beredenering of tot verduideliking wou beskerm nie. Waaraan genoemde feit wel moontlik afbreuk sou kon doen, is 'n bestaande reg om 'n onbeëdigde ~~xxxkixxxx~~ weergawe van die feite voor die Hof te lê. Die verleende reg om getuienis af te lê, vanuit dieselfde plek as ander getuies, met die meegaande veronderstelling van eedsaflegging en kruisverhoor, sou uit die aard van die saak twyfel kan wek omtrent die voortduring van 'n reeds bestaande reg om beweerde feite by wyse van 'n onbeëdigde verklaring onder oorweging te bring. (Vgl. Cowen and Carter, Essays on the Law of Evidence, ~~pege~~ bl. 205). Dit is na my mening op die behoud van laasgenoemde reg dat die sub-artikel gerig is.

Hieruit volg dat 'n beskuldigde, by die uitoefening van hierdie reg, nie gelyktydig die saak kan beredeneer nie, onverskillig of hy verteenwoordig word al dan nie, en dat 'n regterlike beampte so'n beredenering kan stopsit. Die aangewese tydstip vir die beskuldigde of sy verteenwoordiger om sy argument voor te lê, is in elk geval eers nadat die aanklaer geleentheid gehad het om die Hof toe te spreek, en volgens gevestigde praktyk word die bewuste verklaring gedoen voordat dit gebeur.

Wat erkennings deur 'n verdedigde

beskuldigde betref, verstaan ek die uitspraak in Regina v. Matonsi (supra) nie in die sin dat die feit dat 'n beskuldigde 'n advokaat het, hom ombevoeg maak om, wanneer hy getuienis onder eed aflê of 'n onbeëdigde weergawe van die feite aan die hof voorlê, 'n feit te erken waarvan hy kennis dra en wat sy advokaat gevoeglik ingevolge Artikel 284 sou kan erken nie. Toe die advokaat in hierdie geval vir die beskuldigde die geleentheid vir 'n onbeëdigde verklaring versoek het, het hy vermoedelik geweet of sy klient van plan is om enige erkenning te doen, en as hy geweet het wat sy klient gaan erken, sou sy beheer oor die saak hom in geen opsig ontval het nie as die erkenning van die klient self sou gekom het, ~~nie~~. Maar al sou die beskuldigde 'n erkenning doen wat sy advokaat geen rede gehad het om te verwag nie, sou ek dit nog nie sonder meer as 'n onbevoegde erkenning kan beskou nie. As hy eenmaal getuienis onder eed aflê of 'n onbeëdigde verklaring doen, staan dit hom vry om, binne die perke van toelaatbare getuienis, erkennings en ontkennings te doen, volgens sy eie kennis van die feite, en daaraan kan die omstandigheid dat hy 'n advokaat of 'n prokureur het, niks verander nie. Doen hy 'n erkenning wat buite sy eie kennis van die feite val, sou die vraag wel kan ontstaan of dit toelaatbaar is; maar selfs al

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sou dit in bepaalde omstandighede nie toelaatbaar wees nie, dan kan die blote moontlikheid dat hy dit sal doen, net so min as die moontlikheid dat hy tot beredenering sal oorgaan, hom nie die reg ontneem om sy weergawe van die feite by wyse van so'n verklaring voor die Hof te lê nie. Uit die aard daarvan is dit nie 'n verklaring wat 'n advokaat namens die beskuldigde kan doen nie en ek kan geen rede vind waarom 'n beskuldigde bedoelde reg sou verbeur omdat 'n advokaat sy saak behartig nie.

Die onderhawige bepaling is in ons wetgewing bykans woordeliks uit Artikel 1(h) van die Engelse "Criminal Evidence Act", 1898, oorgeneem, en die reg wat instandgehou word is aan die Engelse gemene reg ontleen. Die gevolgtrekking dat die reg nie verval as 'n advokaat of prokureur vir die beskuldigde optree nie, skyn in ooreenstemming te wees met die Engelse reg (Archbold, Criminal Pleading, Evidence and Practice, 33ste. Ed. bl. 192; Cowen and Carter, o.c. bl. 207). Omdat die Strafproseswet voldoende uitsluitsel gee op die vraag en omdat dit my nie duidelik is nie dat die tersaaklike bepalings daarvan met die afleidings wat daaruit gemaak moet word, heeltemaal met die Engelse reg en praktyk ooreenstem nie of bedoel was om volkome

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daarmee saam te val nie (vgl.Artikel 292), gaan ek nie verder daarop in nie.

Uit die voorgaande wil dit blyk dat dit 'n mistasting was om die appellant te belet om 'n verklaring vanuit die beskuldigdebank te doen. Daardeur is hy verhinder om die feite aan die Hof te stel op 'n wyse waarop hy geregtig was. Dit is aangevoer dat die gevolge van die mistasting daaraan getoets moet word of 'n redelike Hof die appellant onvermydelik sou moes skuldig bevind het, selfs indien hy toegelaat was om die verklaring te doen.(Regina v. Moleko, 1955 (2)S.A.401; Regina v. Pethla, 1956(4)S.A.605). By die oorweging van hierdie kontensie is die bewyswaarde van so'n verklaring ter sake. Dat dit nie die gewig van beëdigde getuienis kan dra nie, behoef geen betoog nie. Dat dit nie van alle gewig ontbloot is nie, spreek uit die feit dat die wetgewer dit goed geag het om die reg tot die aflê daarvan in stand te hou. Hoewel onbeëdig, maak dit, soos die geval kan wees met 'n onbeëdigde buite-geregtelike verklaring of 'n onbeëdigde verklaring wat 'n beskuldigde by 'n voorlopige ondersoek gedoen het, deel van die bewysmateriaal uit wat 'n Hof verplig is om te oorweeg. Met betrekking tot so'n buite-geregtelike verklaring merk GREENBERG R.A. op in Rex v. Valachia and Another (1945 A.D.826 op bladsy 837):

"Naturally/.....

"Naturally, the fact that the statement is not made under oath, and is not subject to cross-examination, detracts very much from the weight to be given to those portions of the statement favourable to its author as compared with the weight which would be given to them if he had made them under oath, but he is entitled to have them taken into consideration, to be accepted or rejected according to the Court's view of their cogency. "

'n Verklaring ingevolge die sub-artikel gaan mank nie slegs aan die afwesigheid van 'n eed sowel as die geleentheid vir kruis-verhoor nie, maar ook daaraan dat dit, in die reël altans, anders dan 'n buiteregtelike verklaring, gedoen word met die vooropgesette doel om 'n eed en kruisverhoor te vermy. Dit moet nog verder afdoen aan die bewyswaarde daarvan. Desnietemin moet so'n verklaring, met inagneming van sy gebrekkige oortuigingskrag, oorweeg word om te bepaal of dit in die lig van die ander getuienis, redelik moontlik waar kan wees. Waar dit reëlreg in stryd is met duidelike geloofwaardige getuienis onder eed sou so'n moontlikheid nouliks aanvaar kan word, maar dit sou tog voorkom dat so'n verklaring aanknopingspunte in die beëdigde getuienis vind wat dit, ten spyte van sy tekortkomings as bewys-materiaal, onmoontlik maak om dit sonder redelike twyfel as vals te verwerp, of dat die saak teen die beskuldigde so aanvegbaar is dat so'n verklaring wat geen ernstige onwaarskynlikheid bevat nie, as voldoende antwoord daarop sou kan dien.

In/.....

In die huidige geval is die getuienis teen die appellant, na my oordeel, nóg duidelik nóg oortuigend. Die klaagster is 'n kreupele met 'n spraaksgebrek en is geestelik nie normaal nie. Volgens die getuienis wat die verhoorhof aanvaar het is sy verstandelik traag en raak maklik verward. Op die dag van die beweerde misdaad was sy by die hut of kraal tesame met haar grootmoeder wat feitlik blind en bedlêend is. Toe die appellant daar aangekom het was haar moeder en ene Ebinah 'n end weg besig met wasgoed. Volgens die klaagster het die appellant buite vir haar gewink, sy het na hom gegaan, hul is die bos in, hy het haar te kenne gegee dat sy sy nooi is, haar gegryp en laat lê, en daarop volle gemeenskap met haar gehad hoewel sy geweier het om dit toe te laat. Onder kruisverhoor sê sy aanvanklik dat die gemeenskap in die hut plaasgevind het, maar dan keer sy terug na haar oorspronklike verhaal en sê dat sy na die appellant in die bos gegaan het en na die hut teruggekeer het nadat hy haar verkrag het. Sy ontken die bewering insake die verhouding tussen hulle. Haar moeder verklaar dat sy onderweg terug van die wasplek af na die hut, ontstelde uitroepe gehoor het. Die grootmoeder sou uitgeroep het: "Cele, what are you doing to my child, the child which "is ill". Voordat sy die hut ingegaan het, het sy ook die

klaagster/.....

klaagster hoor huil en hard hoor skree dat Cele haar beetpak. In die hut het sy die klaagster, die appellant en die grootmoeder aangetref. Die klaagster was op haar rug en die appellant was besig om van haar af op te staan, met sy oorpak nog af tot by sy middellyf. Onder kruisverhoor ontken sy ~~dat~~ sy dat sy by die voorlopige ondersoek verklaar het dat die appellant aan haar gesê het:"Mother I will not leave her she is my "girl friend, I love her.", maar erken tog dat die landdros ~~haar~~ getuienis teø dien effekte aan haar teruggelees het. Ebinah verklaar dat sy saam met die moeder was en dat sy die klaagster hoor huil het. Dit blyk egter nie op welke stadium sy dit gehoor het nie. Sy sê dat dit nie was toe hul na die hut toe aangekom het nie. Sy bevestig dit dat hulle die appellant op die klaagster gevind het en beweer dat, met die appellant se oorpak voor oop, sy skaamdeel ontbloot was. Die verdere getuienis is dat die appellant aan die end van die voorlopige ondersoek verklaar het R" I know nothing about this allegation, "These people hate me." Volgens die distriksgeneesheer was daar geen beserings aan die klaagster nie. Die maagdevlies was nog aanwesig en geredelik rekbaar, en die vagina het twee vingers toegelaat en hy sou nie verwag dat penetrasie, indien dit plaasgevind het, enige letsel sou veroorsaak het nie.

Die verhoorhof het bevind dat

die/.....

die klaagster 'n betroubare getuie is, dat haar getuienis voldoende gestaaf word vir 'n prima facie saak teen die appellant en dat die strekking van sy kruisverhoor, nl. dat daar ~~in~~ 'n liefdesverhouding tussen hom en die klaagster bestaan het en dat sy toegestem het, verskil van sy verklaring by die voorlopige ondersoek. By onstentenis van 'n antwoord op die prima facie saak teen hom, het die Hof tot die gevolgtrekking gekom dat hy aan poging tot verkragting skuldig is.

Dit is nie nodig om in te gaan op die vraag of hierdie gevolgtrekking/s reg was nie. Ek sou tog egter wil opmerk dat dit merkwaardig is dat die klaagster, indien haar moeder en Ebinah die appellant in die hut op haar gevind het, so verward kon wees omtrent die plek waar die misdaad gepleeg was. In dié verband het sy herhaaldelik na die bos en slegs by wyse van afwyking na die hut verwys. Sy het ook met alle beslistheid verklaar dat volle penetrasie plaasgevind het, en volgens die distriksgeneesheer kon daar penetrasie sonder enige letsel gewees het. Tog het die verhoorhof daaromtrent getwyfel en besluit dat ~~die~~ nie meer dan 'n poging tot verkragting bewys is nie. Daarbenewens sou 'n verkragting in die onmiddelike nabyheid van die grootmoeder nie van onwaarskynlikheid vry te pleit wees nie. Sy is byna blind, maar daar is geen suggestie dat sy hardhorend is nie, of dat die

appellant/.....

appellant die klaagster se mond of keel toegedruk het nie. As die getuienis van die moeder waar is, dan moes die appellant boonop voortgegaan het met die verkragting ná die uitroep van die grootmoeder, wat die moeder op 'n afstand van die hut af gehoor het, want toe sy die hut ingaan was hy, volgens haar en Ebinah, nog op die klaagster. Dit is my verder nie duidelik nie dat die appellant se verklaring by die ~~xxxkax~~ voorlopige ondersoek onbestaanbaar is met die strekking van sy advokaat se kruisverhoor. Wat hy met die woorde "I know nothing "about thia allegation" wou te kenne gee sou kan wees dat hy niks weet van die bewering dat die klaagster nie toegestem het nie. Dit wil my dus voorkom dat daar geensins 'n sterk saak teen die appellant uitgemaak is nie. Indien die hof hom op die afgelegde getuienis, ten spyte daarvan dat hy nie daarop geantwoord het nie, sou ontslaan het, sou ek geen ernstige fout daarmee kon gevind het nie.

Dit is met hierdie bedenkings in gedagte dat die reeds genoemde mistasting en die moontlike gevolge daarvan benader moet word. Waar die inhoud van die verklaring wat 'n appellant wou aflê onbekend is, sou 'n terugverwysing na die verhoorhof om die verklaring aan te hoor en te oorweeg, moer ~~xxxxxxxx~~ bevorderlik vir geregtigheid kan wees. In die huidige geval bestaan daar geen sekerheid omtrent die inhoud van die ø voorgenome verklaring nie, maar uit die kruisverhoor is dit duidelik dat die appellant na alle waarskynlik-

heid/.....

-heid sou beweer het dat die klaagster sy nooi was en dat die gemeenskap met haar toestemming geskied het. Dit is trouens die bewering wat sy advokaat uitdruklik aan die klaagster gestel het. Met hierdie gegewens en met die oog op die bedenkings wat ek reeds genoem het, kom dit my verkieslik voor om die saak nie terug te verwys nie en die appél af te handel ooreenkomstig die toets wat in die saak van Pethla en ander dergelike sake aangewend is. By die toepassing van daardie toets is dit teen die onbevredigende getuienis vir die vervolging dat die waarskynlike verklaring van die appellant beoordeel moet word. Ten dele vind daardie verklaring 'n mate van bevestiging in die getuienis van die klaagster en haar moeder. Die klaagster erken dat die appellant op die betrokke dag toe hy met haar gemeenskap wou voer, die houding ingeneem het dat sy sy nooi is. Haar moeder ontken dat hy, nadat sy op die toneel verskyn het, haar van sy beweerde verhouding met die klaagster verwittig het, maar uit haar antwoorde by die ondervraging omtrent haar getuienis by die voorlopige ondersoek is eerder af te lei dat hy dit waarskynlik wel gedoen het en dat sy dit by die verhoor raadsaam geag het om dit dig te hou. Indien dit daar inderdaad so'n verhouding bestaan het, is dit goed denkbaar, dat die klaagster se beweerde onwilligheid tot gemeenskap sy oor-

sprong/.....

-sprong daarin kon gevind het dat haar grootmoeder agtergekom het wat gaande was en haar misnoeë luid kenbaar gemaak het. Na my beskouing moet dit gevolglik toegegee word dat 'n redelike verhoorhof sou kan bevind dat bedoelde verklaring redelik moontlik waar kan gewees het. Dit kan derhalwe nie aangeneem word nie dat so'n hof die appellant onvermydelik sou moes skuldig bevind het, selfs indien hy toegelaat was om 'n verklaring af te lê.

Na my mening slaag die appél. Die skuldigbevinding en straf word vernietig.

1. v. Steyn.

de Beer, R.A.

Beyers, R.A.

~~Ogilvie Thompson, R.A.~~

Smit, W.R.A.

Stem saam.

12 years of age, is a cripple with an impediment in her speech. Her deformity and impediment apparently resulted from an illness some years ago; her tongue shrank after that illness thus causing the impediment in her speech. After that illness she became a cripple and unable to walk. The Court interpreter had some difficulty in fully appreciating what she said in answer to questions put to her. Shortly before the conclusion of her evidence-in-chief, by consent, the services of a native police sergeant were enlisted to help the interpreter to appreciate to the full exactly what it was that the complainant said in Zulu to him.

Complainant's mother said of her present mental ability: "Sometimes she gets mixed up. Her brains are not quite alert." The district surgeon who examined her on the 3rd January of this year - that is the day after the alleged rape - did not complete the whole of the medical examination form U.D.J. 88 but only that part known as "B" relating to his examination of her genitals. He said, in evidence in this Court, that she was, at the time, unco-operative, embarrassed and coy and that she giggled and would not speak to him at all. He said that by questioning the woman who accompanied her and by her actions, he decided that she was simple. The district surgeon is not a Zulu linguist and utilized his native servant girl as an interpreter. The impression that we formed of the complainant was that she was anxious to assist the Court and to tell the Court, to the best of her ability, what actually happened. She did her best tomake herself understood. She seemed to us to be a candid witness but one who was easily tired mentally. As Mr. Thompson, for the defence, said, she had a pleasing personality. He went on to describe her as being only too willing to oblige and to please

everyone, a description which we do not accept. We think that complainant's mother's description of her mental capacity more closely approximates to her real condition then the doctor's description of her as being simple minded.

Bearing in mind the caution and special treatment that is required in this case because the charge is one of a sexual offence and complainant is a young person, we have endeavoured to examine complaiant's evidence with special care and to asses what weight, if any, can be attributed to her statements. We realise that it would be inadvisable to convict the accused unless we are satisfied that there is some corroboration of the complainant in some material respect. I would add that we also realise that we should not over stress the fact that the accused has elected not to give evidence on oath.

I propose, therefore, to consider in the first instance whether, at the end of theCrown case, there was evidence on which a reasonable person might find the accused guilty. The Crown evidence consisted of that of the doctor, the complainant, the complainant's mother and another native woman, Ebinah Nxumalo.

The doctor's evidence was that complainant's hymen was not ruptured but easily stretched; that his examination was easy; that there was a copious discharge which looked like a non-venereal infection; that he was unable to say whether complainant was or was not raped and whether or not intercourse had taken place. Patiwe Nxumalo, complainant's mother, gave evidence to the effect that she and Ebinah had been to the river for the purpose of washing; she had left complainant at home because she cannot walk; the only other occupant of the hut was an old bedridden woman who cannot see properly. On her way home, complainant's mother heard a noise of people crying out; she heard the cry "mayi

babo" and also "What are you doing to the child?". She entered her hut and found the accused getting up from being on top of the child. His garments were down to his waist. When she got there the complainant (whom she referred to as "the child"), who had been on her back, got up, and she saw that the child's body was wet. She then said to the accused; "What are you doing to the child?" and accused him of, as she put it, having got up to mischief with complainant. Under cross-examination she denied that the accused replied: "Mother, I will not leave her as she is my girl friend, I love her." It was furthermore put to her that she had said to the magistrate at the preparatory examination; "When I entered complainant was crying. I said to the accused 'What are you doing to my child, you know my child is deformed.'" She denied using the word "deformed". It was also put to her that she had said at the preparatory examination: "Accused replied: 'Mother, I wont leave her, she is my girl friend, I love her.' I told accused to go away from my house. Accused refused until I took a stick and threatened him and then he left." She denied that she had said accused replied: "Mother, I wont leave her. She is my girl friend. I love her." Under cross-examination she also denied that she had any grudge against the accused or any quarrel with him.

Ebinah Nxumalo, who also lived at the kraal with Patiwe, said that before actually reaching the kraal, she heard the complainant crying out and that they hurried back. She saw that the accused's overalls were open in front and came down to his hips. She saw the front of his body when he got up and his penis was exposed. Ebinah Nxumalo was an impressive witness and we accept her evidence and that of the complainant's mother notwithstanding the searching cross-examination to which the latter was subjected.

I propose now to deal with the evidence of the complainant herself. The complainant said that accused beckoned to her while she was outside the hut and that she went to him; that accused got hold of her and made her lie down on her back; that he got on top of her and she said: "Get off me"; that he lifted her dresses and took his overalls down; that she saw his penis and that he inserted his "thing" into her private parts, she felt it at the time, but that he did not eject semen. She said she had never had intercourse with anyone before and that she cried out and said to him; "What are you doing?". Under cross-examination, she said that she was not friendly with the accused at that stage but that when he called her to the bush he said that she was his girl friend. She denied that that was the relationship between them and said she was not his girl friend. She also denied under cross-examination that the accused said she was his girl friend and she did not agree that she consented to intercourse. To the best of my recollection, the question was put to her in this form; "Accused says you were his girl friend and consented to his doing this to you?" and her answer was; "No, I did not agree to his doing this thing." Bearing in mind what I have already said about complainant, I would add that we formed a favourable impression of her as a trustworthy witness and we have no hesitation in accepting her evidence in general even although she, on occasions, said that the alleged rape took place in the bush and, on another occasion, she said it took place in the hut. But, because it is possible that complainant may not be quite accurate when she says: "Accused's thing entered my private parts", and because the doctor is unable to say that in fact complainant was raped, we give the accused the benefit of the doubt as to whether

there was actual penetration. From what I have already said, it will be appreciated that the line of cross-examination differs from the attitude taken by the accused at the preparatory examination where, when the charge was put to him and he was told he was not obliged to make any statement, he said; "I know nothing about this allegation. These people hate me."

In our view, there is sufficient corroboration of the evidence of complainant to warrant a conviction on a charge of attempt to rape and that, at the end of the Crown case, the Crown had prima facie discharged the onus which rested upon it. There was evidence on which a reasonable person might find the accused guilty of the crime of attempted rape.

When the Crown had closed its case, accused elected not to give evidence on oath. His counsel stated that accused would make a statement from the dock. After argument, I decided that it was not competent for the accused to make such a statement for the reasons which I gave at the time. Mr. Thompson, for the accused, thereafter announced that he did not propose to make any statement on the accused's behalf and gave his reasons for not doing so. He thereupon closed the case for the defence. Hence the prima facie case established by the Crown remains unanswered and it is for those reasons that we have found the accused guilty of attempt to rape, which is the verdict of the Court.

- : COUNSEL ADDRESSES ON SENTENCE : -

HENOCHSBERG, J: You have heard that you have been found guilty of attempt to rape. You have one previous conviction, which was one of theft, in December 1953 but I am not taking that into serious account. You have been in gaol for four months; you have no convictions for offences of a sexual

nature and it would seem that very little violence was used and that complainant did not suffer any physical injuries. Complainant is, however, a cripple, unable to defend herself and, in all the circumstances, I feel that a sentence of Twelve Months Imprisonment with Compulsory Labour and Four Strokes will meet the case.

I direct that the accused be treated as an unconvicted prisoner until the question reserved has been decided.

COUNSEL ADDRESS COURT ON RESERVATION OF A SPECIAL QUESTION OF LAW.

HENOCHSBERG, J.:- In this case, during the course of the trial, after I gave my ruling this morning, Mr. Thompson, for the accused, applied for a special entry of an irregularity in terms of section 364 of the Code and argument thereon was postponed. Immediately after the accused had been convicted and sentenced, Mr. Thompson withdrew that application and substituted for it an application in terms of section 366 of the Code for the reservation of a question of law. The question which I decided this morning was one which I feel is of considerable importance. It is a question that has been left unanswered for some years and may possibly involve a decision as to the status of an unsworn statement made from the dock. It was my intention in any event mero motu to reserve the question for the consideration of the Court of Appeal even if no such application as the present one had been made. The Crown does not oppose the present application.

I shall, therefore, reserve for the consideration of the Court of Appeal the question: "Is an accused person who is legally represented by counsel personally entitled to make an unsworn statement from the dock after the close of the Crown case and before the close of the defence case