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THE ATTORNEY GENERAL v GERHARD BRUHNS

MILLER, JA :-

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE

DIVISION) In the matter

between :

THE ATTORNEY GENERAL

Appellant

and

GERHARD BRUHNS

Respondent

CORAM CORBETT, MILLER, TRENGOVE, HEFER, JJA,
et SMALBERGER, AJA

HEARD : 25 FEBRUARY 1985

DELIVERED: 28 MAY 1985

JUDGMENT

MILLER, JA : -

The respondent was tried in a

Magistrate's

Court on two counts: - (1) that he contravened the pro=

visions of sec 118(a) of Ordinance 21 of 1966 (Cape) by

unlawfully /

unlawfully failing to stop the motor vehicle which he was driving on a public road after having been given a signal to stop by a police officer in uniform; and (2) that he contravened regulation 22.2 of the regulations in respect of the saving of petroleum products, made in terms of the Petroleum Products Act, /No 120 of 1977, and duly promulgated, by driving a motor vehicle which was propelled at a speed in excess of the maximum permissible speed laid down by the regulations, as amended.

He was convicted on both counts and sentenced on count 1 to a fine of R10 or 10 days imprisonment and on count 2, to a fine of R800 or 4 month's imprisonment. His appeal to the Northern Cape Provincial Division of the

Supreme Court was dismissed in respect of count 1 but
was

allowed /

allowed, by a majority, in respect of count 2. With leave of the Court a quo, the State appeals to this Court against the order of the Court a quo setting aside the conviction on count 2. (The case is reported under the name S v Bruhns at 1984(3) SA 580, but the report is strangely deficient and inaccurate in that (a) it omits in its entirety the judgment of BASSON, J; (b) it reflects ERASMUS, AJP, and BASSON, J, as concurring in the judgment of STEENKAMP, J, whereas ERASMUS, AJP, concurred in the judgment of BASSON, J, who dissented from the judgment of STEENKAMP, J.)

It was /

It was established at the trial (a) that on 25 June, 1982, at about 13h00, a red BMW sedan motor vehicle, carrying registration number CBK 9880, was being propelled on the public road between Kuruman and Vryburg at a speed of 164 kilometres per hour; (b) that a police officer, in uniform, signalled to the driver of the vehicle to stop but that such driver wrongfully disobeyed the signal; (c) that at the time in question the respondent was the registered owner of the motor vehicle thus driven.

Although /

Although the two police officers who testified (they were the only witnesses called by the State) were able to read the registration numbers on the vehicle and to make a note thereof they did not have a good view of the driver of the vehicle and neither of them was able to

identify such driver. The respondent neither gave nor led any evidence. The conviction on the first count, therefore, could only be, and was, founded upon the failure of the respondent to rebut the presumption contained in sec 155(1) of Ordinance 21 of 1966, which reads

as follows:

"155. (1) Where in any prosecution under the common law relating to the driving of a vehicle on a public road or under this Ordinance it is material to prove who was the driver of a

vehicle, it shall be presumed until the contrary is proved that such vehicle was driven by the owner thereof.

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This presumption, however, has no application to count 2, which was brought neither under the common law nor under the Ordinance, but under the regulations promulgated in terms of the provisions of Act 120 of 1977, which do not make provision for any like presumption.

Hence, not enjoying statutory aid, whether in the form of

a presumption or otherwise, in regard to proof of the allegations made in count 2, the State, in order to obtain

a conviction on that count, was required to discharge the

onus resting upon it of proving beyond reasonable doubt that the offence which the evidence showed to have been

committed was indeed committed by the respondent; i.e.

that the respondent was the driver of the motor vehicle

which at the relevant time and place was being
propelled

at need of 164 kilometres per hour.

The /

of first instance was alive to the problem created by the non-applicability to count 2 of the presumption created by sec 155 (1) of the Ordinance. In his judgment delivered at the end of the trial the Magistrate reasoned that the acts or omissions involved in the two offences charged were so closely associated with one another in point of time and place that they were for practical purposes inseverable ("onafskeidbaar"). That being so and having regard to the finding of guilty in respect of count 1, said the Magistrate, it followed that the person who failed to obey the signal to stop the vehicle which he was driving was the person who drove it at a speed of 164 kilometres per hour on the occasion in question. Later, after the noting of an appeal by the

respondent /

respondent, the Magistrate furnished written reasons for judgment in which he elaborated upon what he had previously said in regard to proof of the respondent's guilt on count 2 and referred, in support of his conclusion, to S v Khanyapa 1979(1) SA 824 (AD), and more particularly to what was said at p 839 B - 840 B.

The facts in the Khanyapa case, in so far as they are relevant to the present inquiry, may be very briefly summarized. The accused was charged with (1) the murder of his father-in-law and (2) an assault, with intent to kill, upon his (the accused's) wife. The wife was a competent witness against her husband in respect of the second charge but not in respect of the first charge. The two charges were heard together at one and the same

trial /

trial. While testifying in respect of the second charge the wife, in response to a question put to her in cross-examination by the accused's counsel, gave an answer which constituted a damning piece of evidence against her husband in respect of the first count, that is, the charge that he murdered her father. On appeal it was held by this Court that that piece of evidence, despite the fact that it was given in answer to a question by counsel for the husband, was not admissible against him because his wife was not competent to testify against him on count 1. (See Khanyapa's case, at pp 833 - 837, where the questions of competence and compellability of spouses to give evidence against one another and the admissibility,

generally, of evidence given by one spouse against the
other, were dis=

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cussed; and see, more particularly in regard to
adverse evidence given by a wife against her husband
under cross-examination on behalf of the husband, p 836
E - H.) It is unnecessary for purposes of this appeal
to consider or comment upon the law of evidence in
these respects,

nor upon the admissibility of adverse evidence
elicited from a wife under cross-examination by her
husband's

Counsel. (Cf. S v Batyi 1964(4) SA 427 (E).)

The relevance of Khanyapa's case to the

present

inquiry lies in the course taken in the majority judgment, following upon the conclusion of the Court that when considering the case against the husband on the murder charge, not only the damning piece of evidence elicited from the wife under cross-examination (for the nature of which, see

the /

the majority judgment at p 831 D - H) was to be excluded, but also all the evidence of the wife relating

to the assault upon her, in so far as inferences against her husband might be drawn therefrom. (See p 835 A - "Ek sal die oorkonde dus benader asof die klaagster nie as getuie in die saak teen die appellant geroep is nie".)

But after examination of all the evidence, both direct and circumstantial, as at the closure of the defence case (the accused not having testified) the majority of the Court concluded that the guilt of the accused on count 2 had been firmly established both by the evidence of the wife (Lilian) herself, which she was

competent to give, and by certain supporting factors,
and that the fact of the accused's conviction on that
count was a factor to

be taken /

be taken into account when considering whether the guilt of the accused on count 1 had also been established. It is clear from the majority judgment that it was held that the fact of the accused's conviction on count 2 was relevant to and receivable for purposes of the murder charge as an independent ("onafhanklike") fact, distinct from the evidence upon which it was based, and that it was proper to consider such independent fact even although the conviction on count 2 was in fact based on Lilian's evidence which was therefore "indirek gebruik . nl via die skuldigbevinding op die klag van aanranding " in respect of the murder charge. (See p 839 G - H.)

In the /

In the result the Court used the fact of the accused's conviction, inter alia, in support of a finding

that the accused's evidence concerning the alleged visit on the night of the assaults of two strange men at the house

where the assaults took place, was false. The inference drawn was that by reason of the close relationship of the

two assaults in regard to the time and place of their occurrence, it must have been the accused who assaulted his wife's father after assaulting her. (See Khanyapa's case, p 838 C - H and at p 841 A - B; and see G A Barton,

3 SACC, 1979, at p 109 in fine - p 110.)

It was this approach of the Court in

Khanyapa's

case that was relied upon by the Magistrate in the case
now before us and, indeed, in certain respects the two
cases are similar. Here, as in Khanyapa's case, the two
offences /

13 offences charged against the accused were very closely associated in regard to time and place. Moreover, in the Khanyapa case evidence (the wife's) was admissible in regard to one count but not the other, and in the case now before us a statutory presumption in regard to proof was operative in respect of one count but not in respect of the other.

The difference between the modes of proof

(i.e.

evidence on the one hand and an unrebutted presumption on

the, other hand) was the subject of the disagreement between the members of the Court a quo. BASSON, J, (with whom ERASMUS, AJP, agreed) considered that the majority judgment in Khanyapa's case was not to be

under= stood as establishing that any conviction could
be proved.

and /

and used as evidential material; at most, so it was suggested, that case decided that a conviction, provided that it was founded upon evidence, could be independently proved and used as evidence. Consequently the learned Judge held that Khanyapa's case was not authority for the use of respondent's conviction (in the case now before us) on the first count, based as it was not on evidence but on a statutory presumption, for the purpose of establishing his guilt on the second count. STEENKAMP, J, although he considered that new ground was broken by this Court in Khanyapa's case, the limits or scope of which have not yet been clearly determined, concluded that there was no justification for restricting the reception and use of evidence of the fact of a conviction to cases in which

such /

such conviction was founded upon evidence, and that therefore, notwithstanding that the respondent's conviction on the first count was founded upon a statutory presumption, the fact of that conviction was operative against him in respect of the second count despite the non-applicability of the presumption to the second count.

The problem arising from the majority judgment in the Khanyapa case, does not relate to the question of admissibility, in general, of evidence of the fact of a conviction, nor to the quality of the evidence upon which the conviction of the accused on the charge of assaulting his wife was based, nor to the propriety of such conviction. It relates to the use, for purposes of the murder charge, of the fact of the

conviction, based as such conviction was

(whether /

(whether wholly or in part) on evidence given by the wife which she was held not to have been competent to give against her husband in regard to the murder charge and which, if tendered directly, instead of indirectly

via the conviction, could not properly have been received or used against him. If the principle is sound that otherwise inadmissible evidence may be indirectly brought

before the Court by way of proof of an independent fact, namely, a conviction standing aloof from the evidence on which it was based, then by parity of reasoning the mere conviction of the respondent in this case on count 1 could be used against him when

considering count 2, even although such conviction

stemmed from a statutory presumption of

guilt /

guilt which could not be applied to count 2. The statutory provision would, in principle, be the counterpart of the inadmissible (against her husband) evidence of the wife in the Khanyapa case, in the sense that the statutory provision, which could not be invoked against the respondent in regard to count 2 was indirectly invoked, via the conviction on count 1, to secure a conviction on count 2.

Mr Strydom, for the respondent, asked us to find

that the principle espoused by the majority in the Khanyapa

case was unsound and should not be followed and he referred

us to criticisms of the approach of the majority

judgment

in that case. (See Barton, 3 SACC, 1979 at pp 105 - 113;

HIEMSTRA, 5 SACC, 1981, at pp 22 - 29; Hoffman and

Zeffert,

SA Law /

SA Law of Evidence, 3rd Ed, at p 299, note 5, where the Khanyapa judgment is referred to as "a strange decision".)

It is clear, too, that the approach of the majority did not find favour with the remaining members of the Court as then constituted, who had serious reservations to which

VILJOEN, AJA (with whom KOTZÉ, JA agreed) gave expression

at pp 841 - 843. Considerations which clearly lay at the root of the minority's misgivings were the notion that

the conviction on count 2 was to be regarded as 'n onafhanklike feit of abstraksie wat los staan van die getuienis

wat daaraan ten grondslag lê", (p 842 A) and the circum=

stance that even if the fact of the conviction was a

fact

which could stand independently of the evidence upon

which

it was founded, it would nevertheless remain,

essentially,

as the /.....

as the wife's inadmissible evidence in a different
guise

(" .. haar getuienis in 'n ander gedaante"")

(p 842 F - G).

with great respect to the majority of the
Court

in the Khanyapa case, I share the misgivings of KOTZÉ,
JA,

and VILJOEN, AJA (now JA). If it is correct that the
wife's evidence (Including such parts of it, adverse to
her husband, as may have been elicited by his counsel
in cross-examination) could not properly be used
against

him on the murder charge (as was held in the majority
judgment), it could not become proper to use it merely
because not the evidence itself but the fact which that

evidence established, was placed before the Court.

(See the comment by G A Barton, supra, at p 112.) To

hold /

hold otherwise would be to subjugate substance to form.

It would also run counter to the decision of this Court

in R v Baartman and Others 1960(3) SA 535 (AD). What

happened in that case was that one of five accused

persons charged with murder made a confession in terms

which implicated the others. There was evidence to show

that the men were together some time before the murder

and at some time thereafter. Such evidence, however, was

insufficient to justify an inference that any one of

them participated in the commission of the offence

charged, unless regard were had to the confession. When

considering the case against two of the men who had not

confessed, the trial Court rightly excluded from

consideration the inculpatory statements against them

made in the confession

which /

which were, of course, inadmissible against them.

But it used against them the fact of the confession, which was admissible only against the confessor, "to establish an essential part of the chain of inference leading to their conviction, namely, that Honey (the confessor) had taken part in the murder". This was held by the Court, per SCHREINER, JA, to be "clearly wrong". (See at p 542 C - E.)

I find myself therefore, unable to accept as correct or justifiable the line of reasoning adopted by the majority of the Court in Khanyapa's case whereby there was used against the appellant in that case, in regard to the charge of murder,, the fact of his conviction

on another count which was founded upon evidence held by

the /

the Court to be inadmissible against him on the murder charge. Accepting that this Court will be slow to depart from its own decisions, it will not hesitate to do so in certain circumstances. (See, for example, Collett v Priest 1931 AD 290 at p 301; R v Nxumalo, 1939 AD 580 at p 586; C I R v Estate Crewe and Another 1943 AD 656 at p 680; Harris and Others v Minister of Interior and Others 1952(2) SA 428 (AD).

There is no question here of disturbing rights or principles which have long been established and accepted. (See John Bell & Co Ltd v Esselen 1954(1) SA 147 (AD) at p 154 A.)

I wish to add that nothing in this judgment is intended to imply or to suggest that the Court

ought to

have /

have upheld Khanyapa's appeal in respect of the murder charge.

It was found in the minority judgment, without recourse to the conviction of the appellant on the charge of assaulting his wife, that the evidence established his guilt on the murder charge and it is noteworthy that in the majority judgment it was found, without reliance on the conviction on the assault charge, that the appellant's extra-judicial statement relating to the visit of two strangers was inherently so improbable that it could not reasonably be believed. (p 83).

Turning back to the appeal now before us, it was accepted by Counsel on both sides, both before us

and

in the Court a quo, which also accepted, that if the

reasoning /

reasoning in Khanyapa's case was unsound or not applicable

to this case at all, the conviction of the respondent on

count 2 fell to be set aside. This appears to me to

be correct. Without the aid of the, presumption in sec

155(1) of the Ordinance, which is of specified application

only, the case against the respondent on count 2 was

simply that a motor vehicle registered in his name was

being driven at an excessive speed on the occasion in

question. Taking into account against him the circum=

stance that the respondent chose not to give evidence

in his defence, an inference that he was the driver

of the

vehicle at the time in question could not safely be drawn;

nor did the Magistrate or the Court a quo draw such an

inference /

inference. The decisive factor in the conviction of the respondent on count 2 was the mere fact of his conviction on count 1, which in turn was based on a presumption entirely inapplicable to count 2. We come back, therefore, to the situation of a court convicting upon "evidence" (i.e. the presumption) which could not be used against the accused in respect of count 2 but was sought to be introduced for use in a different form, i.e. in the form of a conviction standing apart from its genesis.

The presumption applicable to count 1 could not be directly

applied to count 2 (cf. S v Majola 1975(2) SA 727 (AD)

at pp 734 - 5) nor, without reliance on the reasoning

in

Khanyapa's case, could it be indirectly applied via the

fact of conviction on count 1.

In my/

In my judgment the appeal fails. The respondent asked for the costs of the appeal. I can see no reason why the costs should not follow the result.

It is ordered that the appeal is dismissed, with costs against the State, in terms of Sec 311(2) of the Criminal Procedure Act, No 51 of 1977.

S MILLER
JUDGE OF APPEAL

HEFER, JA)
)
CONCUR SMALBERGER, AJA)

IN THE SUPREME COURT OF SOUTH
AFRICA (APPELLATE DIVISION)

In the appeal of :-

THE ATTORNEY GENERAL appellant

versus

GERHARD BRUHNS

respondent

Coram: Corbett, Miller, Trengove, Hefer
JJA, et Smalberger, AJA.

Appeal heard: 25 February

1985 Judgment delivered

28 May 1985

JUDGMEN

T CORBETT et TRENGOVE

JJA

We concur in the judgment of MILLER JA. We

were party to the majority judgment in Khanyapa's case,
but, having heard the argument in this case and having
read the judgment of MILLER JA, we are persuaded that in
so far as

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the majority judgment in Khanyapa's case held that the fact
of the appellant's conviction on the assault charge was a
separate piece of factual evidence, which could be used,
together with other evidence, to establish the guilt of the
appellant on the murder charge, it was, for the reasons
stated by MILLER JA, wrong and should not be followed in the
present case. We would, however, point out that in Khanyapa's
case the Court was unanimous (though for different reasons)
in dismissing the appeal.

M M CORBETT

J J

TRENGOVE