

265/54

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

(----- DIVISION).  
AFDELING).

APPEAL IN CRIMINAL CASE.  
APPEL IN KRIMINELE SAAK.

①  
② EPHRAIM Dhladhla Appellant.

versus

Respondent.

Gaek 7.

Appellant's Attorney  
Prokureur van Appellant

Respondent's Attorney  
Prokureur van Respondent

Appellant's Advocate  
Advokaat van Appellant

Respondent's Advocate  
Advokaat van Respondent

(not called upon)

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

See 1/58 (1<sup>st</sup> Div 2)  
1, 6 + 7.

Friday, 25<sup>th</sup> March, 1958.

took.

BY THE COURT: In a straight line?---It is from the place where the van stopped there is a downhill and then there is a flat country throughout.

Could you reach four miles in an hour?---I myself could reach four miles in an hour very easily.

BY ACCUSED NO. 1: Is it possible that when one vehicle is being chased by another vehicle with people inside it that people can stop the front vehicle and get out without being observed?---

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PRICE, J.: The point is that Head-Constable Verster is only giving evidence about the time. You cannot ask other questions. That is all finished.

ACCUSED NO. 1: That is all.

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FREDERICK JACOBUS ENGELBRECHT (recalled by the Court - still under oath):

DEUR DIE HOF: Hoelank nadat die twee beskuldigdes gearresteer is was dit voordat Hoof-Konstabel Verster opgedaag het?---n Kwartuur - ek het op my horlosie gekyk.

MR. CILLIE: No questions.

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MR. TAYLOR-SMITH: No questions.

ACCUSED NO. 1: No questions.

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- J U D G M E N T -

PRICE, J.: The two accused in this case are charged with two crimes, both of them serious crimes. Count (1) is that on the night of the 25th August of this year they stole the motor van which was in the custody of the first witness, Brodie. The second count is that on the same night they broke into the shop called Subel's Dressed poultry and stole a number of articles, which are set out

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in the indictment, consisting of blankets and clothing which were in the custody of Mr. Marais.

The story of the Crown is that the van, with the name of Hubert Davies printed in large letters on the back and on the side, was left outside at about 6 p.m. in the street in Sydenham, opposite Mr. Brodie's house, and at 9 p.m. it had disappeared. When it was recovered a housebreaking implement was found in the car, consisting of a jemmy. The van was recovered on the following day, early on the 26th.

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The evidence as to the breaking in was given by Mr. Marais, who is the manager of the firm at Morgenson which was broken into. That evening he had locked the windows and the door of the shop and he was called early the next morning between three and four o'clock. He went to the shop and found a broken pane of glass which is large enough for a man the size of accused No. 1 to get through. The clothing was subsequently recovered in the van and £400 worth of clothing was missing. Another feature which has perhaps some slight significance is that there were signs that an attempt had been made to break open the door, but the burglars did not succeed in breaking the door open. The fact that the jemmy was found in the car may have some bearing on that point, because it is an instrument which could have been used to break open the door and would leave marks if so used.

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The next witness is Kleinbooi, who is a respectable, decent native and who is a night watchman employed to keep an eye on the shop that was broken into. He says that a number of natives drove up in a motor vehicle, which he cannot identify, and assaulted him by seizing him and putting him into the car, pretending it was a pick-up van

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and they were policemen arresting him and taking him to gaol for some unknown crime. He says that he saw these natives, of whom he says there were about five, collecting clothing which they took from the shop and packed into the van while he was being held in the van by one or more of the natives. He says that No. 2 accused was the driver of the van and accused No. 1 was the person who first caught hold of him.

The next afternoon, that is on the 26th, an identification parade was held, organised by Sergeant Frazer, consisting of 14 men. On this parade there were three suspects - there was No. 1 accused and accused No. 2 and another person who is not before the Court to-day. According to the Crown evidence the parade was assembled in a proper manner; the identifying witness was kept out of sight and out of hearing while the parade was assembled, and he was then called in. He was told to point out the natives who had arrested him the night before and had burgled the shop, and he pointed out Nos. 1 and 2 accused without difficulty and without hesitation. I should mention that both No. 1 and No. 2 accused have fairly distinctive faces. It is not easy for a European to identify a native because his face is dark and the features of a dark face are more difficult to see than the features of a white face, but natives seem to be able to recognise each other without any great difficulty. There is this circumstance which is very much in favour of this parade and that is that it was held within a matter of hours after the events concerning which the identification parade was being held. Very often, of course, identification parades are necessarily held some considerable time later because accused persons are not immediately arrested in

all cases, and after a period identification becomes less reliable, and the longer the period the less reliable the identification becomes. One knows that mistakes in identity are not uncommon and, naturally, the Courts are very careful when a case depends largely on identification.

Three points have been made by the first accused and by Mr. Taylor-Smith, who appears for the second accused. The accused, one or other or both of them, say that they had swollen faces because they were assaulted by the police and, as they were on the parade with swollen faces, the 10 identifying witness was able to identify them because he would assume that those persons, who had marks on them, were the persons whom he was supposed to point out. This point was not put in cross-examination either by Mr. Taylor-Smith or by the first accused, and the Court can only infer that accused No. 2 had not informed his counsel of this. Accused No. 1 also did not put this point in cross-examination. Then a further point is made by accused No. 2 and that is that the identifying witness Kleinbooi was alleged to have been present and to have seen the two 20 accused with handcuffs on, so that he would know that they were suspected persons. The same remarks apply to this feature as regards cross-examination as I have already made in regard to the alleged swollen faces. This point was never put in cross-examination. As a result of the point not being put in cross-examination, in order to clear up the uncertainty, the witnesses who were present at the parade were recalled, and also witnesses who saw the accused before the parade, persons who arrested them and who were with them shortly after they were arrested, 30 were all recalled and they all state that there was no visible mark on the faces of the accused which any of them

signalled to them to stop but they drove past him. The fact that they did not stop and went on at a very high speed and dashed through every traffic light, favourable or unfavourable, confirmed his suspicion that he was after the right people who were up to no good. He chased the van and was not able to overtake it, and at a certain point he found the van standing deserted on a road and there were no persons near it. He then assembled his forces and made a circuit on two sides, arranging with Constable Engelbrecht that he would go round one area while Head- 10 Constable Verster went round another area, hoping by that means to overtake the persons who had been in the stolen van. That is the van that belonged to Hubert Davies and was stolen on the same night as the burglary. Verster's calculations worked out very accurately. Engelbrecht came upon two natives about four miles, as the crow flies, from where the deserted van was. Those two natives were arrested and brought back to the van in handcuffs. It is a curious incident, if the identification by Kleinbooi is mistaken, that he should have picked out two men who 20 were found in that proximity, within a distance from the van which they could have reached from the time that the van stopped until they were arrested. The distance is four miles, and about an hour had elapsed from the time they left the van - if they were in the van - until they were arrested. One may assume that they hurried and did not walk in a leisurely way.

That is not the only evidence against the two accused. Head-Constable Verster found a shoe mark just outside the driver's door of the van. It was a clearly defined mark 30 showing a rubber heel of a certain make - it is a 'Drifoot Ace' rubber heel. He preserved this mark by putting a box

over it, and when the two accused were brought on to the scene by Constable Engelbrecht he took accused No. 2 to the place. He had already pointed out this mark to Constable Engelbrecht and given him instructions in regard to the shoes that might be on the feet of anybody that he encountered and Engelbrecht had taken the shoes of the two accused and handed them to Head-Constable Verster. Verster then took No. 2 accused to the mark which he had covered with the box and a few feet away he made an impression with one of the shoes which was handed to him by Engelbrecht and which Engelbrecht has told us he took from accused No. 2, which No. 2 accused was wearing. Verster made a mark on the sand and drew No. 2 accused's attention to the fact that that mark was identical to the mark that he found next to the car when he found the car, but No. 2 accused did not make any comment. Then Mr. Hoft was called - he is an expert in lifting spoors from tracks - and he took a plaster of Paris imprint of this original mark in the road, not the one made by Verster. This is produced and the shoes which were worn by No. 2 accused were also produced, and there is no doubt that the impression is an impression made by a 'Drifoot Ace' heel, and the heel of the shoe is identical to the mark shown on the plaster of Paris cast. That does not prove that it was made by the same shoe; it only proves that someone wearing a heel of that kind got out of that car, because Verster says it was a new mark and must have got there when the person got out of the car, when the car was left on the road.

It seems to me that if one takes the evidence of Kleinbooi, the place where the accused were arrested, and the fact of the shoe mark, there is a sufficient case

against accused No. 2. The evidence of No. 2 accused does not carry the case any further. He merely denies that he was there. I do not believe a great many of the statements of the two accused. It only helps to destroy their defence. The evidence against No. 1 accused is not as fully proved as against accused No. 2, because in the case of No. 2 accused there is the shoe mark and there is no similar mark in the case of accused No. 1. The evidence in relation to No. 1 accused is weaker, but he was also pointed out by Kleinbooi, and if I find that No. 2 accused is one of the persons who broke into the shop in question, then I find that No. 1 accused was in his company and had been in his company during that evening up to his arrest because Constable Engelbrecht says there were marks of golf shoes next to the marks of the 'Drifoot Ace' heel at other places or at another place on the way or near to where he arrested the accused persons, showing that No. 1 and No. 2 accused had been together that evening. What is more, both No. 1 and No. 2 accused state that they had been together because they said that they pointed out to Engelbrecht where they had slept that night, which shows that they were together.

I think that the police have done a very good job here, a most expert job with great promptitude and with great intelligence. They have done a very good piece of work.

I find both accused guilty on both counts.

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(No. 1 accused admits previous convictions; No. 2 accused has no previous convictions.)

PRICE, J.: No. 1 accused has two previous convictions for housebreaking.

(Court adjourns 6.40.)