

188/54
J.D.J. 445.

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

(STANDARD MATERIALS SYSTEM FOR RECORDS MANAGEMENT) **DIVISION).**
AFDELING).

**APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAKI.**

Appellant.

VERFOLG

Respondent

Appellant's Attorney.....
Prokureur van Appellant

Respondent's Attorney.....
Prokureur van Respondent.....

Appellant's Advocate.....
Advokaat van Appellant

Respondent's Advocate.....
Advokaat van Respondent

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

Vol. 2 1900
The [unclear] [unclear] [unclear]
[unclear] [unclear] [unclear]
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[unclear] [unclear] [unclear]

G. Loring
Rt. Secy

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :-

1. AMOD CASSIM PEER
 2. ABDOOL HACK CASSIM PEER
 3. EBRAHIM MOHAMED MOOLA
- Appellants

&

R E G I N A

Respondent

CORAM :- Centlivres C.J., van den Heever et Hoexter JJ.A.

Heard :- 18th March 1955. Delivered :- 29-3-55

J U D G M E N T

CENTLIVRES C.J. :- The first appellant carries on business in Glencoe, Natal, under the name of P. C. Ebrahim and employs the second and third appellants in that business. On February 23rd, 1953, Ben Nkwanyane (to whom I shall refer as Ben), an employee of the firm, was sent to the railway station to receive delivery of certain goods which had been consigned to the firm/ and which were specified in certain goods advice and delivery notes. By a mistake on the part of some railway worker a bale of goods, (not specified in those goods advice and delivery notes) in respect of which the freight amounted to fifteen shillings and nine pence, was also handed to Ben who delivered all these goods to the first appellant's shop. This bale had been trucked from Durban by a firm which had sold the goods therein to the first appellant. On February 24th,

1953, the first appellant's firm received a goods advice and delivery note from the railways in respect of the above bale of goods and an employee of the firm took this note to the railway station at Glencoe, paid the freight of fifteen shillings and nine pence and asked for the bale. It was then discovered that the bale was not there and the goods advice and delivery note was endorsed "missing from shed." Immediately thereafter, Oosthuizen, a detective in the Railway Police, went to the first appellant's shop where he interviewed the second appellant. The latter told the detective that the bale in question had not been received. The detective then asked the second appellant to show him the native who took delivery of the goods on February 23rd, and was told that the ^{native} ~~native~~ was only a "togt" boy for February 23rd and that he had left. The third appellant told the detective the same story. The detective told the second appellant that he had received information that the native whom he wished to trace had been at the shop on February 24th and the second appellant then admitted that the native was working at the shop on that day and that he had been sent out to deliver goods in the town to a person whom the ^{second} ~~second~~ appellant named. The detective went to this person but did not find the native. He then returned to the

shop and the second and third appellants undertook^k to advise him immediately the native returned. The second appellant said that he did not know the name of the native and the third appellant said that he thought the native's name was Ben or Jan. The detective was unable to interview the first appellant on February 24th, as he was told that he had left for Durban and would return on the following day. Later on the same day the detective again interviewed the second and third appellants who denied that the native sought for slept on the premises of the shop or that he worked on a monthly basis. On February 25th the detective interviewed the first appellant who told him that the native in question was only a "togt" boy on the 23rd and 24th and denied that he slept on the premises or worked on a monthly basis. The first appellant also informed the detective that he had satisfied himself that the goods in question had not been delivered to the shop. On February 26th the detective searched the ~~shop~~ native quarters at the back of the first appellant's shop and found two letters addressed to "Dear Ben" and "Dear boatie Ben" respectively. One of these letters was identified by Ben to whose evidence I shall refer in greater detail later.

On November 9th, 1953 the detective had another interview with the second appellant who told him that the reason why

he had not yet submitted a claim against the Railways in respect of the missing bale of goods was because he (the detective) had not yet returned the copy of the goods advice and delivery note. On November 13th the detective again visited first appellant's shop and the first appellant told him that he had not yet received the missing bale. The detective then produced a search warrant and the first appellant "immediately started stuttering and informed me that he did receive the bale" and pointed out rolls of material which had been in the bale. When asked about the whereabouts of Ben, the first appellant remained silent.

The appellants were charged in the Natal Provincial Division before Caney A.J. sitting alone, on two counts which were as follows :-

- " 1. THEFT
 2. ATTEMPTING TO DEFEAT OR OBSTRUCT THE COURSE
 OF JUSTICE.

Count 1. In that upon or about the 23rd day of February 1953, and at Glencoe, in the district of Dundee, in the Province of Natal, the accused did wrongfully and unlawfully steal one bale of soft goods weighing 159 lbs, or thereabouts the property or in the law^{ful} possession of the South African Railways and Harbours Administration.

Count 2. Whereas during the investigation by the South African Railways and Harbours Police into a case of suspected theft by the accused at Glencoe, of a bale of material from the South African Railways and Harbours

" Administration it became necessary to ascertain from one Ben Nkwanyane, a native male, whether he had delivered to the accused 7 packages or consignments received by him on or about the 23rd February 1953, from the South African Railways and Harbours Administration and Whereas, the accused all or one or more of them well knowing that the said Ben Nkwanyane had received the 7 packages or consignments aforesaid and had delivered the said 7 packages or consignments to the accused or to one or more of them, and knowing that the said Ben Nkwanyane was able to give material evidence in the case then being investigated did on or about the 24th day of February 1953, and at or near Glencoe in the Province of Natal, wrongfully, unlawfully with intent to defeat or obstruct the course of justice and with intent to prevent the South African Railways and Harbours Police from ascertaining from the said Ben Nkwanyane whether he had received the 7 packages or consignments aforesaid and whether he had delivered them to the said accused, entice or convey the said Ben Nkwanyane away from Glencoe and instruct or induce him falsely to adopt the name of John Kumalo and falsely to inform any member of the police who might make enquiries about the case that he had received only 6 and not 7 of the parcels or consignments aforesaid ; and thereafter the accused all or one or more of them, did prevent and hinder the said Ben Nkwanyane from returning to Glencoe and thus the accused did attempt to defeat or obstruct the due course of justice."

On the first count the first appellant was found guilty of being an accessory after the fact to the crime of theft and

the remaining two appellants were found guilty of theft. On the second count all the appellants were found guilty of attempting to defeat or obstruct the course of justice. The trial court granted the appellants leave to appeal on both counts.

No fault can be found with the following passage in the judgment of the trial court :-

" The full terms of the contract between the supplier of the goods and the consignee are not in evidence, but it appears to be perfectly clear that the sale of the goods to the consignee was on credit, and that the carriage of them by the Railways Administration was on behalf of the consignee, since the charges were to the account of the consignee, with the consequence that the delivery of the goods by the supplier to the Railways Administration in Durban amounted to delivery of them for the purpose of the contract of sale and purchase. The consignee therefore became the owner of them at that point. "

The indictment alleged that the appellants stole the bale "the property or in the lawful possession" of the Railway Administration. It is clear that the bale was not the property of the Administration but was, as the learned judge correctly found, the property of the first appellant. Prior to the delivery

by mistake, the Administration had the lawful possession of the bale and under Sec. 22 of Act 22 of 1916 it had a lien on the bale for the freight chargeable thereon. To the extent that it had that lien it had an interest in the bale and it was not bound to deliver it until the freight thereon had been paid. If the Administration voluntarily and intentionally parts with its possession of goods which are subject to the lien it is clear that that lien is destroyed and it cannot re-claim possession of the goods for the purpose of re-instating the lien but where it parts with possession by mistake it may be assumed that it has a right to re-claim possession and that a person, who is in possession of the goods and conceals his possession from the Administration with the object of defeating its claim for freight, is guilty of theft. Such an object must, of course, be proved by the Crown beyond reasonable doubt. The learned judge said in his judgment : " I do not "consider that Ben's evidence goes the length of indicating "that either of these two accused" (the second and third appellants) " even checked the packages to discover what they "were." The learned judge was referring to February 23rd when Ben brought the seven packages from the Railway station to the first appellant's shop. If the second and third

appellants did not check the packages brought by Ben on February 23rd it cannot be said that they then knew that the bale in question had been mistakenly released by the Administration or that they then decided to defraud the Administration of the freight thereon. Up to that stage therefore there is no direct proof that the bale was not innocently received by the second and third appellants.

There is no proof that, at the time when another Native was given the goods advice and delivery note in respect of the bale in question on February 24th and told to pay the freight and fetch the bale from the Railway station, the second and third appellants then knew that the bale had already been delivered. But in any event the payment on that date of the freight due on the bale negatives any intention on the part of the appellants to defraud the Administration of the fifteen shillings and nine pence which was due to it.

The learned judge said that "their" (i.e. the second and third appellants') "own actions on the 24th February and "their stories to Detective Sergeant Oosthuizen convince me "that they knew that the bale had come into the ^{premises on} ~~possession of~~ "the 23rd February, and that they knew this before payment of

"the Railway Administration's charges." There is, as I have already pointed out, no direct evidence to this effect and it is clear that the learned judge inferred from the conduct of the second and third appellants after they had paid the freight that they knew before they had paid the freight that the bale had been delivered to the shop. In my opinion that is not the only inference that can be drawn. An inference that might reasonably be drawn from the denial to the detective by the second and third appellants that they had received the bale is that they intended to submit a claim to the Administration for the value of the bale - an intention which was conveyed to the detective on November 9th, as appears from the evidence which I have quoted above. Moreover the second and third appellants may have discovered that they had already received the bale after the ^{native} ~~native~~ had returned from the railway station on February 24th without the bale. This native presented the goods advice and delivery note at about 3 p.m. and the detective commenced his investigation at the shop at about 5 p.m. But in any event there does not seem to be any room on the proved facts for an inference that the appellants intended at any time to deprive the Administration of the freight due to it.

The conclusion at which I arrive is that the Crown has

not proved beyond reasonable doubt that the second and third appellants knew before they paid the freight on the bale in question that that bale had been delivered to the shop and that in the absence of such proof they should not have been found guilty of theft. Their convictions on the first count should therefore be set aside and it follows that the conviction of the first appellant as an accessory after the fact should also be set aside.

The learned trial judge on the second count found that the second and third appellants removed Ben from Glencoe on February 24th with the intention of preventing the Police from interviewing him and knowing, as they then did, that Detective Oosthuizen was investigating the case ; that their purpose was to assure, if they could, that information should not be given to the Police by Ben which might result in proceedings against them ; that although there was no evidence that the first appellant took part in the removal of Ben on February

24th, he did subsequently take part in steps designed to ensure that Ben remained away from Glencoe by conveying him from Ladysmith to Piet Retief and giving him instructions to that end.

Ben stated that he had worked for the first appellant for two and a half months and that he was paid at the end of each month . He slept in the native quarters at the first appellant's shop. When he had finished his work at the first appellant's shop on February 24th, he was instructed to go to the third appellant's home to do some work there and after he had finished that work he was asked to wait. At about 9 p.m. the second and third appellants arrived in a motor car and he was instructed to get into the car. He was driven to Ladysmith and on the way he was told by the second and third appellants not to say how many parcels he ^{had} received on February 23rd, and that, if he was asked his name, he must say it was Ben Kumalo or John Kumalo. Ben was left on a farm about 15 miles outside Ladysmith where Abdulla Nanabawa had a store. He was told to stay on the farm. He stayed there for about six months after which Abdulla took him to Ladysmith from where the first and second appellants took him to his home in Piet Retief. They left Ladysmith at 4 a.m. and arrived at Piet Retief at 1 p.m. When he arrived at Piet Retief the

first appellant in the presence of the second appellant told him that if he were asked where he worked he must say that he was working on a farm in the district of Ladysmith and that he must not mention the name of the person for whom he had worked. He was also told not to mention the names of the appellants. When he was at home the Police interviewed him. Such in broad outline was the evidence given by Ben.

The third appellant gave evidence but neither the first nor the second appellant gave evidence.

The learned judge said in his reasons that he observed Ben as carefully as he was able to do whilst he gave his evidence and thought, as far as he could see, that his demeanour was satisfactory but that it might be that he ~~was~~ over-emphasized what might at first appear to be a story almost of captivity at Abdulla's shop on the farm in the Ladysmith district.

The learned judge accepted Ben's evidence that he was conveyed to the farm on February 24th supported as it was by what the second and third appellantstold Oosthuizen. Proceeding the learned judge said :-

" I also accept Ben's evidence that the 2nd accused told him, in the 3rd accused's presence, on the journey from Glencoe to Abdulla's, to use a false name and, if questioned about the Railway deliveries on the 23rd February, to say

" that he had received six and not seven packages. In addition, I accept his evidence that when he eventually left Abdulla's it was the 1st accused, who, with the 2nd accused, conveyed him from Ladysmith to Piet Retief and gave him instructions designed to ensure that he should not return to Glencoe. I disbelieve the evidence of the 3rd accused in relation to this, as I do in other respects. The 1st and 2nd accused have themselves not denied the evidence of Ben, and although the 3rd accused gave evidence to the effect that the 1st accused was ill at the time when Ben left Abdulla, the evidence in this regard was vague and unconvincing. "

In the report furnished by the learned judge in terms of Sec. 372 bis of Act 31 of 1917 he said that the convictions on the second count were not based on Ben's evidence alone.

Mr. Friedman, who appeared on behalf of the appellants, contended that Ben was a very unsatisfactory witness, that he came into conflict with another witness (Dhlamini) for the Crown in respect of the conditions of his service with Abdulla and that the trial court should have rejected his evidence in toto. It is clear from the report of the learned judge that he did not overlook the conflict referred to by counsel and that it was because of Dhlamini's evidence

that he suggested in his judgment that Ben had over-emphasized the story of the conditions during his stay with Abdulla. In my opinion this Court, sitting as a Court of Appeal, would not be justified in finding that the learned judge was wrong in accepting the evidence of Ben on the main issues on the second count. The learned judge accepted the evidence of Detective Oosthuizen and I can see no ground for thinking that that evidence should not have been accepted. It is clear from the summary I have given above of that evidence that all the appellants tried to conceal the fact that Ben had been secretly removed from Glencoe and that all three appellants pretended, until November 13th when Oosthuizen was armed with a ^{search}~~second~~ warrant, that the bale in question had not been received. The Police were trying to find Ben in order to ascertain what had become of the bale and all the appellants thwarted the Police by pretending that they did not know where Ben was and told a false story that Ben was only a "togt" boy - a story which, if true, would tend to support their feigned ignorance of Ben's whereabouts.

Counsel for the appellants contended that it was dangerous to convict the first appellant on the second count because such a conviction would have to rest on the single

evidence of Ben that the first appellant conveyed Ben to his home at Piet Retief from Ladysmith. The answer to this is that the trial court accepted Ben's evidence on this point and that there is nothing improbable in that evidence in view of the fact that the first appellant ^{look} ~~to~~ a by no means minor part in misleading the detective during his investigations.

The result is that the appeal is allowed on the first count and the convictions and sentences on that count are set aside.

The appeal on the second count is dismissed and the convictions and sentences on that count confirmed.

van den Heever J.A. }
 Hoxley J.A. } concur.

Reid J. Bonthuis

On 23rd September, 1954:

J U D G M E N T .

CANEY, A. J.

I have come to the conclusion that if the accused are guilty on the charge of theft, this must arise out of the events of the 23rd and 24th February, prior to the payment of the charges due to the Railway Administration. The full terms of the contract between the supplier of the goods and the consignee are not in evidence, but it appears to be

10. perfectly clear that the sale of the goods to the consignee was on credit, and that the carriage of them by the Railways Administration was on behalf of the consignee, since the charges were to the account of the consignee, with the consequence that the delivery of the goods by the supplier to the Railways Administration in Durban amounted to delivery of them for the purpose of the contract of sale and purchase. The consignee therefore became the owner of them at that point. When the charges of the Railway Administration were paid on the afternoon of the 24th

20. February, the Administration, in my opinion, ceased to have any right to the goods in question. Up to then it had had the right to retain the goods until the charges were paid, but payment was made on behalf of the consignee, and from that time, in my view, the Railway Administration's interest or right in the goods ceased.

Mr. Redpath, for the Crown, contended that the Railway Administration continued to have a real and substantial interest in the bale of goods for, he said, it was liable to the consignee for delivery of them and there was always

30. the risk of a claim being made upon the Railway Administration; but the fact is that the goods had already, as I shall indicate later, been received into the premises

and....

JUDGMENT.

and business of the consignee, so that there was no legal liability on the Railway Administration's part thereafter to the consignee. If I am correct in this view, the enquiry is narrowed down to the question whether the accused or any of them received the bale and retained it prior to the payment of the Railway Administration's charges, knowing that it had been wrongly released from the Railway goods shed.

It is common cause that the bale was released by an
10. unexplained error to the consignee's employee, Ben Nkonwane, on the 23rd February. There was no admission by any of the accused of the fact of its having been received into the consignee's premises on that or any subsequent day until, on the 13th November, the 1st Accused admitted to Det. Sgt. Oosthuizen that the bale had come in. He made this admission after being confronted with a search Warrant, having immediately prior to that denied the receipt of the bale. There is no evidence that the 1st Accused was present in the premises on the 23rd or 24th February, and I propose
20. to defer consideration of the case against him until after I have considered the case against the 2nd. and 3rd. Accused.

Now the evidence of Ben, in relation to the taking delivery of the bale from the Railway goods shed, was that seven packages, being five cartons and a small bale and a large bale - the latter being the one in question - were given to him at the door of the Railway goods shed; that he took them in two separate loads in a barrow to the consignee's shop; that when he arrived with the first load the 2nd.
30. Accused came and examined the packages and instructed him to fetch the other goods; that on his arrival with the second load, he placed it where he had placed the first load.....

load, before the 2nd. and 3rd. Accused. He said he did not see them examine the packages, and he was unable to say whether the bale in question was in the first or in the second load. His evidence is that the bale was brought into the consignee's premises and placed before the 2nd. and 3rd. Accused along with six other packages. It does not, of course, necessarily follow that they then and there checked the packages, or that these were then and there opened. Ben was not cross-examined on this part
10. of his evidence, and the 2nd. Accused did not give evidence to refute Ben's evidence of the bringing in of the bale with the other six packages.

The 3rd. Accused gave evidence in which he admitted that Ben brought in goods from the Railway on that day. He said he did not pay particular attention to the packages. I accept it that the seven packages were brought in by Ben, and that the 2nd. and 3rd. Accused were aware of the fact at the time that a number of packages had come in. I do not consider that Ben's evidence goes the length of
20. indicating that either of these two accused even checked the packages to discover what they were.

Mr. Caminsky, for the accused, pointed out that the consignee firm was receiving goods by rail in frequent deliveries, and that the accused could well fail, in all honesty, to observe that an extra package had been delivered from the Railway goods shed. Such an omission might well be brought about, he said, by the fact that a number of different employees might handle packages coming into the premises, and also that the packages might not all be
30. checked or opened for some days. I can appreciate these contentions, but the Defence has offered no evidence as to who.....

who handled the packages which Ben brought in, nor as to when they were checked or opened. Nevertheless if the case stood there I might hold that the Crown had not made out its case, but there is the evidence of interviews which Det.Sgt.Oosthuizen had with the 2nd. and 3rd.Accused on the 24th February in the late afternoon. He said that he produced to the 2nd. Accused a Delivery Note for the bale in question and asked him whether the bale referred to in it had been received by mistake on the

x 10. previous day. The 2nd. Accused, he said, answered in the negative. Det.Sgt. Oosthuizen said he then asked the 2nd. Accused to produce the native who had taken delivery of the goods on the 23rd February, and the 2nd Accused said that the boy was only a togt boy employed on that one day and had now left. Det.Sgt.Oosthuizen then spoke, according to his evidence, to the 3rd. Accused about the boy and obtained the same answer. He then left. On information which led him to believe that the boy had worked on that day, the 24th, he subsequently on the same day again

20. approached the 2nd. Accused and obtained from him an admission that the boy was working there on the 24th and at the same time was ~~making~~^{making} out deliveries of goods. Later that afternoon Det.Sgt. Oosthuizen returned to the shop, when the two accused were in the process of closing up for the night. The 2nd. Accused told him, he said, that the boy had not yet returned from delivering, and that he did not know the boy's name, and the 3rd. Accused told Det.Sgt. Oosthuizen the boy's name was Ben or John. Det.Sgt. Oosthuizen said they both undertook to inform him immediately the boy returned. Later that evening, Det.Sgt. 30. Oosthuizen said, the 2nd. Accused told him the native had

not.....

not yet returned and he was unable to say where he was. Both accused told him that the native did not sleep on the premises and did not work on a monthly basis.

I accept the evidence of Det.Sgt. Oosthuizen, and it follows that it must have been perfectly clear to the 2nd. and 3rd. Accused that Det.Sgt.Oosthuizen was very anxious to interview the boy who was an employee of the consignee, and who had taken the goods from the Railway goods shed on the previous day. That boy was Ben Nkonyane.

10. Det.Sgt.Oosthuizen's evidence went on that on the following day, the 25th February, he interviewed 1st.Accused, whom he had not previously been able to see. He asked him to check up and discover whether the bale had been received. When asked about the native, the 1st. Accused told him he was only a "togt " boy employed on the 23rd and 24th February. He denied that he slept on the premises and denied that he was employed on a monthly basis. Later on the same day the 1st Accused assured Det.Sgt.Oosthuizen that the bale had not been received. Det.Sgt.Oosthuizen also said that he made enquiries at the shop on further occasions about the boy, but was always told he was not there and there was no information about him. Then on the 9th November the 2nd. Accused told him that no claim had been presented to the Railways Administration in respect of the missing bale for the reason that the consignee had no copy of the delivery note. The implication, of course, was that the bale had not been received, but four days later the 1st Accused, as I have said earlier, when confronted with a Search Warrant, admitted that it
20. had been received.
- 30.

Now the 1st. and 2nd. Accused did not give evidence, and that there was no answer from them to the evidence of D/Sgt.

Det. Sgt. Oosthuizen. The 3rd. Accused gave evidence and said Ben brought in the goods from the Railway goods shed on the 23rd February, but he made it appear that Oosthuizen's questions concerning the native were so vague that he did not appreciate that they related to Ben, the boy who had brought in the goods. The 3rd. Accused's evidence was unconvincing, and he appeared to me to become very uncomfortable in the witness-box as his evidence progressed. I have no hesitation in rejecting his evidence as untruthful.

10.

I accept the evidence of Det. Sgt. Oosthuizen as being truthful and substantially accurate. I also accept Ben's evidence of his bringing in seven packages, and his manner of disposing of them.

The situation then is that the bale in question was brought in from the Railway goods shed, from which it was released by mistake to Ben on the 23rd February. The 2nd. and 3rd. Accused knew there were a number of packages brought in, and by the late afternoon of the 24th February

20. they were telling Det. Sgt. Oosthuizen false stories concerning the whereabouts of their employee, and his general particulars, which were required for the identification of him - that is to say, the employee who had brought in the seven packages. They first denied that he worked there on the 24th February and then asserted that on that day he was out delivering goods. Now clearly the object of the two accused was to prevent Det. Sgt. Oosthuizen from interviewing Ben. The fact is that either he was still

30. employed on that day and was conveyed by them to Abdulla's shop on the night of the 24th February, or, as the 3rd. Accused said in evidence, they had conveyed him there on

the...

the night of the 23rd February. I shall discuss that aspect of the case later, but whichever is the correct view of the facts in this respect, the two accused knew at all relevant times where Ben was. They had already either taken him to Abdulla and if they had been honest they would have told Det.Sgt. Oosthuizen so, or he was still in Glencoe until the night of the 24th February, when they conveyed him to Abdulla's. The fact that they were anxious, by telling false stories, to prevent Det.Sgt.

10. Oosthuizen interviewing Ben, leads me to the irresistible conclusion that they had guilty minds that afternoon of the 24th February.

It was suggested that they had perhaps only discovered the presence of the bale in the consignee's premises after payment of the Railway Administration's charges and were now preparing a way for making a fraudulent claim on the Administration, but that prior to payment of the Administration's charges they were completely innocent in relation to the presence of the bale, and consequently not guilty

20. of the theft of it. It is perhaps a possibility that their minds were directed towards making a fraudulent claim, and that the bale was not actually discovered in the premises until subsequently; but neither of these two accused gave evidence which justifies me in coming to that conclusion. Their own actions on the 24th February and their stories to Det.Sgt.Oosthuizen convince me that they knew then that the bale had come into the premises on the 23rd February, and that they knew this before payment of the Railway Administration's charges. In other words
30. they were conscious of the fact of the bale having come in and were aware of the fact that it had been released from

the.....

the Railway Goods shed by mistake, since the Goods Delivery and Advice Note for it had not been presented, but were determined to retain possession of it on behalf of the consignee, with a view, no doubt, of later making a fraudulent claim on the Administration. The 3rd. Accused's evidence about the bale was such as to lead to the conclusion that he was endeavouring to hide the fact that he knew of its existence in the premises. He pretended complete ignorance about it. He maintained that he at no

10. time came to know of its existence. The only conclusion to which I can come is that the 2nd. and 3rd. Accused, knowing of the presence of the bale, decided to retain it against the rights of the Railway Administration, and that they are consequently guilty of the charge of theft.

Now so far as concerns the 1st Accused - there is no evidence that he was present in the shop on the 23rd or 24th February, and some evidence (for what it is worth) that he was not. On the 25th February he assured Det. Sgt. Oosthuizen that the bale had not come into the shop. This

20. he might conceivably have done in ignorance of the true facts. There is no further evidence in relation to him particularly until the incident of the 13th November, when, in the first instance, he persisted in a denial that the bale had been received, until he was confronted with the Search Warrant, whereupon he made an admission. At no earlier date than the 13th November did he volunteer information of what he must have known for some time prior to making the admission on that day. In the absence of any explanation from him, I can only conclude that he must have adopted a negative stand with the object of shielding the 2nd. and 3rd. Accused from the consequences of what

they.....

they had done on the 23rd and 24th February. Consequently I find the 1st Accused guilty as an accessory after the fact of the crime of theft.

I now come to the charge of attempting to defeat or obstruct the course of justice. The Crown case is based upon the fact of the 2nd. and 3rd. Accused having conveyed Ben away from Glencoe and upon an averment that the 1st. and 2nd. Accused later conveyed him from Ladysmith to Piet Retief. The 3rd. Accused admits in evidence that he and 10. the 2nd Accused conveyed Ben away from Glencoe to the store or shop of Abdulla Cassim Nanabawa, in the district of Ladysmith. The 3rd. Accused says this was done on the night of the 23rd February in all innocence, because Abdulla had some time earlier asked them to find a native to do some building work for him. The Crown case is that they conveyed Ben away with the object of preventing the Police from interviewing him, so that he should not be available to give evidence or information relating to the matter of the bale in question. The Crown case is that 20. he was conveyed away on the night of the 24th February after the 2nd. and 3rd. Accused knew that Det.Sgt. Oosthuizen was investigating the matter of the missing bale. It is significant that, if, as the 3rd. Accused said in evidence, Ben was taken by them to Abdulla on the night of the 23rd February, in all innocence, they both of them pretended to Det.Sgt.Oosthuizen on the afternoon of the 24th February complete ignorance of Ben's whereabouts.

I have come to the conclusion that the 2nd. and 3rd. Accused conveyed Ben away on the night of the 24th February. 30. Ben says so in his evidence, and he stated what he was doing on the 24th. Not only this, but Det.Sgt.Oosthuizen's evidence is clear that the 2nd. and 3rd. Accused told him
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in the late afternoon of the 24th February that Ben was working for the 1st Accused in the business on that day, engaged in delivering parcels. Unless Det.Sgt.Oosthuizen is untruthful, or completely mistaken - so mistaken that his evidence is completely unreliable - there can be no doubt that on the accused's own stories to him, Ben was in Glencoe on the 24th February.

Jackson Qwavu, a young native employed by the 1st Accused's brother, said in his evidence that he did not
10. see Ben in Glencoe during the whole of the 24th February and indicated that he was absent, but I was not impressed by Jackson's evidence.

Mr.Caminsky criticised Ben's evidence and asked me to discard it in its entirety. I observed Ben as carefully as I was able to do whilst he gave his evidence, and I thought, so far as I could see, that his demeanour was satisfactory. It may be that he over-emphasized what might at first appear to be a story almost of captivity at Abdulla's, but I think the overall effect of his evidence
20. was that he was himself in fear of the Police, both in relation to payment of taxes and more particularly because of what he had been told by the 2nd. Accused about the missing bale - a matter of considerably greater import than that of unpaid taxes. I think his evidence indicates that he was torn between a desire to return home to Piet Retief, on the one hand, and an urge to remain hidden at Abdulla's, on the other hand. Be that as it may, I accept his evidence that he was conveyed there on the 24th February, supported as it is by what the 2nd. and 3rd. Accused told
30. Det.Sgt. Oosthuizen. I also accept Ben's evidence that the 2nd. Accused told him, in the 3rd. Accused's presence, on the.....

the journey from Glencoe to Abdulla's, to use a false name and, if questioned about the Railway deliveries on the 23rd February, to say that he had received six and not seven packages. In addition, I accept his evidence that when he eventually left Abdulla's it was the 1st Accused, who, with the 2nd Accused, conveyed him from Ladysmith to Piet Retief and gave him instructions designed to ensure that he should not return to Glencoe. I disbelieve the evidence of the 3rd Accused in relation to this, as I do

- x 10. in other respects. The 1st and 2nd Accused have themselves not denied the evidence of Ben, and although the 3rd. Accused gave evidence to the effect that the 1st Accused was ill at the time when Ben left Abdulla, the evidence in this regard was vague and unconvincing.

- The conclusion I come to is that the 2nd. and 3rd. Accused removed Ben from Glencoe on the 24th February, with the intention of preventing the Police from interviewing him, knowing, as they then did, that Det. Sgt. Oosthuizen was investigating the case, and their purpose was to assure, 20. if they could, that information should not be given to the Police by Ben which might result in proceedings against them. Although there is no evidence that 1st Accused took part at that stage, that is to say in the conveyance of Ben on the 24th February, I find that he did take part in the later steps designed to assure that Ben remained away from Glencoe, by conveying him to Piet Retief and giving him instructions to that end.

Accordingly I find all three accused guilty of the charge of attempting to defeat or obstruct the course of justice.
