206/54

G.P.-S.384—1953-3—10.000.

U.D.J. 445.

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

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

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

.....

**Appellant.**

*versus*

.....

**Respondent.**

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

*Appellant's Advocate* D. COHEN *Respondent's Advocate* J. MARAIS
*Advokaat van Appellant* *Advokaat van Respondent*

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

Before: Greenberg, Hoexter & Fagan JJ.A.

9.45 a.m. – 12.40 p.m.
2.15 p.m. – 3.5 p.m.

C.H.V

Judgment on 7/3/55:

Appeal of 1st Respt. allowed, & conviction & sentence set aside.

Appeal of 2nd Respt. dismissed.

Greenberg, Hoexter & Fagan, JJ.A.
7-3-55.

Registrar

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

ARTHUR JOHN VAN DEN BERG First Appellant

JOHN STANLEY VAN DEN BERG Second Appellant

and

R E G I N A

Coram: Greenberg, Hoexter et Fagan, JJ.A.

Heard: 23rd.February, 1955. Delivered: 7 - 3 - 1955

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J U D G M E N T

GREENBERG J.A. :- The appellants were convicted in the Paarl Circuit Local Division by STEYN J. sitting with assessors, of the crime of arson and were given leave by the learned Judge to appeal to this Court. The indictment on which the appellants were brought to trial sets out the charge in these terms :-

"In that upon or about the 15th July,1953,and at Paarl in "the district of Paarl,the accused did wrongfully,unlawfully "and maliciously set fire to and set on fire a certain "garage, the property of the said accused,with intent to burn "and destroy it and to defraud a certain Company carrying on "business under the name and style of The Seven Provinces "Assurance Company Limited of the money or portion of the

"money/.....

"money or portion of the money for which the said Company "had insured the said garage and the goods therein against "damage or destruction by fire."

After the close of the Crown case and after the evidence of one witness for the defence had been concluded, the Crown applied for leave to amend the indictment by inserting, after the word "accused" where it first appears in the body of the indictment, the words "who "carried on business in copartnership under the name and style "of 'A.J.Motors' ". This amendment was objected to on behalf of the appellants, but was allowed.

I do not propose to set out the facts in any detail, as they are comprehensively and clearly set out by the learned Judge in the reasons given by him for conviction. It is sufficient, in regard to the causation of the fire, to say that it was first detected by two constables on patrol duty at 2.14 a.m. on the 15th. July, 1953, and that from the observations made at that time and shortly afterwards it was clear that the fire had been deliberately started. The trial court found that when the constables first detected the fire the doors of the building were locked or barred, one from the inside and one from the outside and that the panes of all the windows were intact and the windows were on latch.

The/.....

The finding as to the windows was challenged in argument before us, but no sufficient reason was advanced to justify our interference with this finding. There was also evidence, accepted by the court, that paraffin had been used in the premises in order to assist the process of burning. In regard to the question of motive on the part of the appellants for starting the fire, it appears that the premises with equipment were bought some two years earlier for £6000 and that the premises and contents were shortly afterwards insured for £10,000. After the fire the appellants made a claim against the insurers for £6896 in respect of the pfemises and £1342 in respect of the movables therein contained. In June 1953 the appellants had caused the premises to be put up for auction and the highest bid was not more than £5000. The business itself, for the year preceeding the fire, showed a loss of about £1200.

It appears from the evidence of the appellants that from the early evening of the 14th.July, the day before the fire, until the next day the only key to the premises was in the possession of the second appellant who had been inside them that evening some time befer after the place had been closed for the day; his evidence was that he had gone there in order to put petrol in his car, had then gone to Cape Town and had retubned to his home in Paarl at about

11 p.m./.....

11 p.m. and had spent the rest of the night there until after the fire he was notified by constable Swart of the fire. Swart says that this happened at 3.25 a.m. on the 15th. but that at 2.50 a.m. he telephoned to the second appellant's house but received no reply; also that, although the second appellant's house was not further from the premises than a ten minutes' drive, the latter did not come there until 4.5 a.m. when he arrived by car. The trial court's acceptance of Swart's evidence on these points cannot be successfully challenged. In regard to the first appellant, there is no adequate ground for rejecting his evidence that he spent the night at home in bed.

The only possible explanation consistent with the absence of responsibility on the part of either or of both the appellants is that some other person had gained access to the premises by unlocking the door that was locked, had started the fire and had then departed after locking the door. The evidence for the defence was that there had originally been two keys to this door but one had been lost some time before and it was suggested that the incendiary had either found this key or had used some other key that fitted the lock. In aid of the contention that some other

person/.....

person had been on the premises, evidence was adduced for the defence that some articles had been stolen from the premises during the night of the 14th or the early morning of the 15th. In regard to the burglary, the learned Judge, in giving the reasons for conviction, at one stage said "I am by no means satisfied that burglary was committed on "the night in question," ( he later said "Satisfied as we "are that there are no burglars") but he rejected the suggested explanation of the fire by examining the possibility of an incendiary other than, and not acting on behalf of, the appellants. I propose to follow the same line. If the person who started the fire came there solely for burglarious purposes it is difficult to understand why, after removing the articles that it is alleged were missing, he should start a fire and then carefully lock the door on leaving. If he came there both for this purpose and to vent his spite on the appellants by burning down their premises, again it is not understood why he should lock the door and why he should not have made sure, before attempting to burn the premises, that they were not so heavily insured that a fire would be a benefit and not a loss to the appellants. There may be another possibility, viz. that he knew of the insurance and that the

object/.....

object of his actions, apart from turning a dishonest penny by the alleged theft, was to conduct his operations in such a way as to indicate that it must have been the appellants who caused the fire, and thus deprive them of the benefit of the insurance and expose them to the risk of prosecution. This idea is far-fetched and would moreover involve an accurate calculation on his part which would ensure that the fire would be detected and extinguished before it had progressed sufficiently to obliterate the proofs of arson that he had so carefully laid - and this might well have happened if the two constables on motor patrol had not noticed the fire when they did and had not been able to ensure that the fire brigade should arrive on the scene within ten minutes of their having first noticed the fire. In my opinion the possibility of the existence of this hypothetical incendiary is too remote to be regarded as a reasonable one.

In regard to the second appellant, his possession of the key during the time when the fire must have been started, i.e. shortly before it was detected, makes it clear that he was the person who had access to the premises at the relevant time. Additional factors against him are his apparent absence from his home when constable Swart first telephoned and his delay in reaching the garage

after/.....

after he received the message at 3.25 a.m. Counsel for the appellants posed the question as to whether this delay connoted any responsibility for the fire; I am unable to suggest how it indicates any responsibility but the fact that the 2nd. Est. appellant, instead of explaining the delay, falsely denied that there had been one, is a factor to be taken against him. In view of the motive that he had for setting the premises alight, the absence of any reasonable suggestion as to who other then the appellants could have had any reason for doing so and the other circumstances to which I have just referred, it cannot be said that the trial court erred in convicting him.

The case against the first appellant stands on a different footing. In the reasons for conviction, after the second appellant had been adjudged to be guilty, the learned Judge said "....we are driven to the conclusion... "that although No. 2 may have set fire to the premises, it "does not mean that No.1 was totally unaware of what was "going to be done or that he did not conspire with No.2 to "commit the crime. But even if he was completely unaware of "the acts of No.2 then it seems to me that he was hit by the "provisions of sub-section 7 of section 348 of Act 31 of 1917."

This sub-section reads :- "When a member of an association "of persons (other than a corporate body) has, in carrying "on the business or affairs of that association or in further- "ing or in endeavouring to further its interests, committed "an offence (whether by the performance of any act or by the "failure to perform any act), any person who was, at the "time of the commission of the offence, a member of that "association, shall be deemed to be guilty of the said offence, "unless it is proved that he did not take part in the com- "mission of the offence, and that he could not have prevented it."

After citing these provisions, the learned Judge said :- "It seems to me that even assuming that there is not sufficient "evidence before the court of a deliberate planning or con- "nivance between the two accused in regard to the setting on "fire of the premises, nevertheless accused No.1 must also be "found guilty, as in my view the act committed by No.2 was "an act committed in endeavouring to further the interests "of the partnership."

At a later stage, after dismis- sing a contention advanced on behalf of the first appellant that "furthering the interests of the partnership" in the sub- section must be by an act within the scope of the partnership

business, the learned Judge proceeded :- " I must say that "Mr. Steyl who appeared for the Crown advanced fairly strong "reasons in support of the Crown's case that No.1 had con- "spired with No. 2 to commit the crime. Even if unaware of "the cause of the fire he nevertheless associated himself "with No. 2 in their claim upon the Insurance Company. He "did not discharge the onus which rested on him of proving "that he was unaware of the fire and that he could not have "prevented it. It seems to me, therefore, that No. 1 must "also be deemed to be guilty. "

With great respect, there is some confusion in thought in this process of reasoning. In the passages I have cited it is twice conceded that the first appellant may have been unaware of the act of the second appellant in causing the fire, and if he was so unaware, then he has proved, in terms of the sub-section, that he did not take part in the commission of the offence and could not have prevented it; it may be that ignorance caused through deliberately abstaining from making enquiries ~~or possibly even through negligence~~ may not avail a member of an association but this position does not arise here. In the last passage that I have cited the learned Judge does say that the first appellant did not

discharge/.....

discharge the onus of proving that he was "unaware of the fire "and could not have prevented it" but I think that his reason for saying this is not that the court did not believe that the first appellant did not know that his brother intended to set the premises alight but that "he associated himself with No. 2 "in their claim upon the Insurance Company." But even if, after the damage had been caused, he became aware of the act of arson, his making a claim would not make him guilty of arson - whatever might have been the position on a charge of fraud. I have therefore a difficulty in agreeing with the ground on which the first appellant was found guilty but, as this point was not raised and we have not had the benefit of argument on it on behalf of the Crown, I think it advisable to deal with one that was put before this Court, although it was not raised in the trial court.

The contention was that it was not competent to convict the first appellant on the provisions of the sub-section on the indictment in this case which alleges that he (and the other appellant/) "set on fire" the premises. The grounds on which the first appellant has been convicted are that the second appellant was a member of an association of persons, viz. a partnership, that he committed arson in furthering or endeavouring to further the interests of the

partnership/.....

partnership, that at the time of the commission of the offence the first appellant was a member of the partnership and is therefore deemed to be guilty of the offence. It may be that the amendment to which I have referred was applied for in order to bring the sub-section into operation if the need arose, but it alleged only one of the elements on which the Crown had to rely in order to obtain a conviction under the sub-section. In my opinion, the conviction was not competent as the indictment did not set out the essentials of the crime on which the conviction was based; the indictment alleged that the first appellant was guilty of the crime of arson because he had set fire to the premises, but on the facts found he could only have been convicted on the ground that he was deemed to be guilty of that crime because his partner had committed it in furthering the interests of the partnership and he had not discharged the onus mentioned in the sub-section. It is this allegation, that the arson was committed in the interests of the partnership, which is missing. This defect in the indictment could not be cured by evidence establishing the fact, for that was not the charge which the first appellant was called on to meet. I have considered whether the allegation in the indictment contained in the concluding passage, viz.

"and to defraud a certain Company carrying on business "under the name and style of The Seven Provinces "Assurance Company Limited of the money or portion of the "money for which the said Company had insured the said garage "and the goods therein against damage or destruction by fire."

cannot be used to supply the gap, but it does not ~~cover~~ aver that the premises were insured for more than their value, which allegation ~~would be necessary~~ might be sufficient to show that the burning was in the interests of the partnership. Counsel for the Crown did not contend that the conviction could be supported on a reliance on the sub-section, but that on the evidence it should be held to have been proved that the first appellant, even if he had not physically participated in the setting alight to the premises, ~~he~~ was privy to the act. In my opinion this is not so. It is true that it may not be probable that his brother and partner would have endeavoured to obtain the proceeds of the insurance which would have enured to the benefit of both of them, without at least the approval of his partner but this improbability falls far short of proof beyond reasonable doubt that he was privy to the arson and the other points invoked in aid of the contention do not advance it to any material extent. The main factors relied upon related to the first appellant's vacation of the flat in the building, the giving of the key~~s~~ to his brother the evening before the fire and his conduct when he received the news of the fire; neither singly nor cumulatively are they inconsistent with innocence and the trial court, which had

the advantage of hearing his evidence, was not prepared to go to the length of finding that he had conspired with the other appellant. For these reasons I am of the opinion that his conviction cannot stand. In the result, the appeal of the first appellant is allowed and his conviction and sentence are set aside; the appeal of the second appellant is dismissed.

Leo Greenberg

Hoexter, J.A. )
) Concur
Fagan, J.A. )