

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

(12/6/56) DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN STRAFSAAK.

STEPHEN DUKER Appellant.

versus/teen

THE QUEEN Respondent.

(Dr. J. van der Merwe)
Appellant's Attorney Dr. J. van der Merwe Respondent's Attorney A.G.
Prokureur van Appellant Dr. J. van der Merwe Prokureur van Respondent

Appellant's Advocate E.H. Steyn Respondent's Advocate Mr. G.S. Thomas
Advokaat van Appellant Advokaat van Respondent

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

(WLD)
1, 4, 9, 10, 11.

Thursday, 13th December 1956

Mr Thomas not called on.

Agreed dismissed. (No written judgment)

J. van der Merwe

ON RESUMING on the 31st August 1956

at 3 p.m.

(Counsel address the Court in argument).

J U D G M E N T.

DOWLING, J:-

The accused in this case was originally charged with breaking into the store of the S.A. Textile Mills in November of last year, with intent to steal. He is charged with stealing 23 bales of "Jabula" blankets and 4 bales of "Bege" blankets the property
10 of the S.A. Textile Mills and in the lawful possession of Sam Sacks.

The indictment was amended so as to substitute the name Consolidated Textile Mills for that of S.A. Textile Mills with the consent of Counsel for the accused.

Sam Sacks the storeman employed by the Textile Mills testified that the premises were those of the company which were at a place called "Bata House", were broken into and that certain bales of blankets which were in the storeroom were taken out and were missing.
20 Twenty seven bales were missing altogether. A number of bales had been taken out and left on the stairs between the first floor and the ground floor. The bales had been taken from the fourth floor. The value of these blankets was put by the witness at about £1063. There is no doubt at all that the storeroom was broken into by some persons - I say persons because no one person could have handled these bales by himself. The bales weighed about 220 lbs. each

Certain Indians by the name of Darmalingum
30 Sakalingum and Singarum Sokalegum the son gave evidence.

/ The ...

The father carried on a business known as Pillay Taxis and used a green lorry T.J. 76839 a two ton lorry. He says on the 19th November after he had his lunch which he had on the rank he was approached by a native wearing a dust coat and carrying a bunch of keys. He described this native as being thickly built. He said he arrived in a blue van and negotiated with him for the hiring of his lorry to remove 12 bundles from a factory in Fordsburg. The witness said that he offered to move these bundles from that address to Doornfontein. He said, having been told what the dimensions of the bundles were, that he would have to take two trips and that his charge for that service would be £5. The thick set native whom we now know from the evidence of the defence was one Joe, said that he would consult with his "boss" on the question of whether the offer of transport at that figure would be accepted and apparently he must have done so, because he came back and engaged the lorry. He had said on the first occasion that if the "boss" would not agree to this figure he would transport the goods with "this van", referring to the van that he was driving. The native later returned and engaged the green lorry, guiding the witness to "Bata House" in Fordsburg, where there emerged from the doors of the building a number of natives who brought out bales and loaded them on to the lorry; the lorry in fact took seven bales - presumably that was it's utmost capacity. The lorry then proceeded under guidance of this native to an address in Sivewright Avenue, Doornfontein and there the lorry under the directions of the thick set / native ...

native reversed into the yard of that premises. In that yard there is carried on a business of panel beating and spraypainting. There is also a building, a dwelling house, on that yard or stand in which resided at the time certain Rachel Johnson and her husband who had a carpenter's shop there. The witness whose evidence I am recounting stated that he and his son and the native off loaded the bales by rolling them off the van or lorry on to the ground; having done that the
10 witness was requested to drive his lorry out to make way for another lorry which was expected soon. This he did and parked his lorry outside the gate of the premises at Sivewright Avenue. He said that his son remained in the yard in order to receive payment, which was agreed at £3 seeing that an extra bale had been included in the load. It seems that at this stage there was no question of the lorry making a second trip to Bata House. The witness said that his son returned for a while and they returned to their rank at Jeppe
20 station. He said that he did not see the accused at 27 Sivewright Avenue on that day.

The son, who is a youth and who assists his father in the business on Saturday afternoons, corroborated his father's evidence, but he added that he noticed that the van which was driven by the thick set native, who, he said wore a dustcoat and carried keys, had a red number plate - being a number plate which was used and may be used legally only by motor dealers. The father was questioned about this number plate but said
30 that it was an ordinary number plate not of the red kind. For reasons which I will give, I am satisfied
/ that ...

that the father in so saying was mistaken. I do not think the fact that he was mistaken in that respect is one which effects the credibility of his evidence, which is amply corroborated from other sources - that is to say his evidence of the actual hiring of the van, loading the seven bales and the unloading at Sivewright Avenue. As I have said the young Indian corroborates his father's evidence on all points except that he differed in regard to the red number plate;

10 but he had further evidence to offer on facts unknown to the father. He said that in regard to the payment he was in touch with the native Joe at Sivewright Avenue who had accompanied the van to Sivewright Avenue and given directions there. He says shortly after the lorry arrived at Sivewright Avenue he saw the accused and he heard a conversation between the accused and this native Joe which he could not understand, it being conducted in a native language which he did not understand. At that time his father was sitting in the

20 lorry waiting for him. He said that the thick set native gave him £3, which was the fare or the charge, but he only had a five pound note, so that the young Indian had to give him £2 change, which he did. The £5 note came from the accused and was given by the accused to the native after the conversation to which I have referred. This conversation, on the evidence, took some time and may have been five to ten minutes according to the young Indian. Some capital was made of this by Counsel for the defence, he saying

30 that it was most unlikely that the payment of an agreed figure would involve a long discussion. It is however

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to be borne in mind that the fee which had been originally agreed upon was £5 for the two loads and that ultimately an extra amount was added to £2.10.0. for reasons given by the older Indian. There may have been talk about this between the accused and the native. I should add that the evidence of these Indians as to the loading up of the bales at Bata House is corroborated by one A. Hattingh a coloured man who said that he
10 house of a friend that he was visiting that afternoon. He said that what took place there aroused his suspicions and that as a result of that he proceeded to the police station and made a report immediately. The events that I have reviewed took place after 1 o'clock on a Saturday when normally no business is being done in the businesses in that neighbourhood or for that matter anywhere.

No I pass to a consideration of what took place at Sivewright Avenue. The evidence of one William Maduna who was employed in the panel beating
20 business there was given; also that of Rachel Johnson to whom I have referred and an aunt of Rachel named Aletta, who was at the premises that afternoon and who was helping Rachel. I may say that Rachel very candidly admitted that she was carrying on a liquor selling business from the premises in question. Both Rachel and Aletta are persons who knew the accused from his having been in to this address and from his having been a customer of the liquor selling business there. It is also I think common cause that the accused from time
30 to time took his van there for repairs when necessary. He was known there to the people who conducted or assisted

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in the panel-beating business. Both Rachel and Aletta were, as submitted by Counsel for the Crown, reluctant witnesses. In fact Rachel went so far as to break down and weep bitterly when she gave her evidence. I think despite the criticisms that have been advanced by Counsel for the defence, that these two witnesses were honest witnesses. They had no reason or motive for falsely testifying against the accused and I find on their evidence that the accused did go to Sivewright
10 Avenue with his van - that is admitted although he said he was not there for more than $\frac{1}{4}$ hour. His story was that he had gone there and had asked for a drink and had been told that the drinks were finished and that he said he was leaving. The evidence of Rachel and Aletta goes considerably further. I should mention at this stage that it is admitted by the defence that the accused possessed a blue Chevrolet van, mounted on a motor chassis, the van being registered in the name of his wife. That van the accused said he used to go
20 into the country and buy fowls, selling them in the city. He said he did not use this van for any other commercial purpose.

The question I have to decide is whether he did use it for the purpose of transporting seven of the bales of blankets to which I have referred. I find proved by these two witnesses that the van in question, which was known to the employees of the business there as being the van upon which they worked from time to time, that this van (which may have been driven by the man
30 described as the thick set man) was taken to this address into the yard and that it arrived there shortly after

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the bales had been unloaded from the lorry. I find that these bales were loaded on to the van as testified to by both Rachel and Aletta and that they were taken away in the van. I find that the van made either two or three trips. I think I have mentioned that the older Indian, who, we may presume to have knowledge of these matters, said that the van would not take more than four bales at one time. If the van did take seven bales away it must have made two trips
10 at least. Rachel gave the important evidence - and as I have said she is a witness who has no animosity against the accused, that she noticed on the afternoon in question that the van was carrying a red number plate. This of course would indicate a desire to conceal the identity of the van's owner. She knew the van, it had arrived with a number of natives which natives included the accused, who was connected with this van and the loading operation on the stand where this business was situated. That is the effect of
20 the evidence of Aletta and Rachel.

Counsel for the defence has criticized certain divergencies between the evidence of these two witnesses but I have not been persuaded that it will be unsafe to rely upon those features of their evidence which I have embodied in my findings. They are now giving evidence as to events which took place long ago - the Preparatory Examination was held in December last year. The actual housebreaking took place in November - so that a very long time elapsed
30 since the events to which they now testified and it would be very surprising indeed if there were not
/considerable ...

considerable divergencies as to the details of what each of them observed. The witness Maduna who was employed in panel beating on the premises corroborated that evidence to this extent that he said this van which he knew came to the premises and loaded bales which were there. He said that he did not see the accused there that day. The evidence of Aletta and Rachel convinces me that the accused was there that day, and that William is mistaken, but if he failed to see the accused
10 it is not because the accused was not there. This witness gave me the impression he was trying to assist the accused. I have come to the conclusion that the money for the cartage of the bales was supplied by the accused, and that the van was under his control and that therefore he was in possession of the stolen goods. I infer from the fact that the accused paid for the van and from his association with this thick-set native called Joe, from his assumption of responsibility for the cartage fees, from the use of his van to transport
20 the goods, and from certain false denials to which I will later refer, that he was aware of their origin.

I must now deal with the evidence of the accused which it will be gathered in advance, I have rejected. The accused stated that he did make a payment to Joe. He was the person who first gave this native Joe, a name. He said that he was approached by Joe for a loan of £3 and that although he was reluctant, he did make that loan to Joe for purposes which Joe did not specify. That statement is most improbable; it represented, if
30 it is true, a loan of three quarters of the earnings of the accused on his own showing, for a week. It would

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have meant probably saying goodbye to the money.

Joe was not a person upon whom he had any reason to rely; he was nothing more than at best a drinking friend. I recognise however that mere improbability of the story of the loan is not sufficient ground for rejecting that story outright. I couple the improbability of this loan with my findings of fact regarding the actions of the accused that day, and his actions and conduct at the time when he was arrested.

10 He was arrested by a Detective Sergeant by the name of Engelbrecht. I have no reason at all to reject any of the evidence of Sergeant Engelbrecht. It was given in a perfectly honest way, the witness refreshing his memory from notes made near the time of the events, recording the statements to which he testified. He said that he arrested the accused on the 22nd November and that he explained to him the nature of the charge and warned him according to the Judges Rules. His testimony reads: "Die beskuldigde was gevra of hy goed
20 verwyder het op die 19de November vanaf 27 Sivewright laan, Doornfontein en hy het verklaar dat hy nog nooit in sy lewe daar was nie, en dat hy daardie dag die hele dag by sy huis was te 62 Goverstraat Pimville. Hy het ontken dat hy die eienaar van 'n lorrie is en gesê dat hy die lorrieverkoop het aan 'n kleurling met die naam van Charles Martin, en dat hy nie weet waar hy nou woon nie aangesien hy die lorrie in die straat aan hom verkoop het." Sergeant Engelbrecht further stated on recall that at 2 p.m. on the day when he arrested
30 the accused on the 22nd November he was looking for the van of the accused. He said "I took him the accused to

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his house at the address given. There was no van there. I made a search for the van and found nothing." His entry was in the police docket and it was made on that day. The accused denied that he had stated that he had sold the van and that he was taken by Sgt. Engelbrecht to his house in Pimville. He averred that he still had the van in his possession and that it was at a garage undergoing repairs. He denied that he had said that he had spent the 19th at his house. He denied
10 that he had said to Sergeant Engelbrecht that he knew nothing about any place at Sivewright Avenue, that he had never been there in his life and knew none of the people there. He denied that his van that day carried a red number plate. The accused in my opinion is lying when he makes these denials and I attach importance to these false denials, more importance than I would if his denial had merely been of any complicity in the theft. One must be very careful in the use which one makes in criminal proceedings of false denials by an accused
20 person. The denials in this particular case are of such a nature as to indicate to me clearly a guilty mind on the part of the accused. He desired to disassociate himself from any circumstance which might point to his guilty. One cannot criticize an accused person for making no statement to the police after being warned that they need not make a statement and if it is made it will be used as evidence, but one can criticize an accused person who makes denials and false statements as did the accused in this case.

30 Certain of the evidence to which I have referred would not be evidence against the accused unless the

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accused was privy to the witness in the events under investigation. The discussion between what took place between the young Indian and the thick set native would in the ordinary course be inadmissible as res inter alias acta unless there is a certain relationship between the accused and the native Joe amounting to a conspiracy between them to commit the offence under consideration, or I think a relationship of principle and agent or master and servant where the
10 agent or servant is acting within the scope of his employment. I find that one or either of these relationships existed in the present case and I have given my reasons for so finding.

The question now arises of what offence the accused should be convicted. I strongly suspect that the accused in this case was implicated in the actual housebreaking either by his presence and assistance or by his directions, but I am not entirely free from doubt in that regard. The receiving by him of the stolen
20 property is at least the offence of theft, and I accordingly find him guilty of the theft of the seven bales of blankets which I find were removed in the van belonging to the Indian transport contractor.

I will direct an entry on the record that the Indian witness Darmalingum Sakalegum and Singarum Sokalegum shall be immune from prosecution in respect of any offence which they may have committed in handling the stolen goods.

I think I should supplement my judgment by
30 referring to the evidence of the witness Dennis Jacobs called by the defence. I should have mentioned in the

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course of my judgment the view which I took of the evidence of Dennis Jacobs, which was to the effect that he had met the accused on the afternoon of the 19th November at the premises at 27 Sivewright Avenue, that he had been using dagga in some form the whole morning and in the afternoon had had a drink of brandy described as a "nip", that being I understand half of half a bottle. He said that he was intoxicated and in view of his condition as a result of the dagga and the
10 drink he requested the accused whom he knew who had a motorcar to drive him to Benoni where he lived. He said that the accused agreed to do so for the fee of £2 and that agreed with the evidence of the accused. In the first place I do not think it possible that a witness could in this distance of time remember the details deposed to by him, never having had his mind directed to them until very recently in connection with the present trial. It is most unlikely moreover that a man in his financial position - which he explained
20 to the Court - would have been prepared to spend £2 on a taxi to Benoni when he could have got transport in some other more economised way. He gave as a reason for not taking a share in a native taxi to Benoni that it was too far for him to walk to the nearest taxi rank. He admitted that he could walk. There was no reason if that was in his mind, why he did not try to persuade the accused to drive him then to a nearby taxi rank. Moreover apart from that criticism his evidence cannot stand in the face of the evidence which I have accepted
30 from sources which deem to be truthful. This man was a self confessed dagga addict and drinker.

ACCUSED ADMITS PREVIOUS CONVICTIONS.

COUNSEL ADDRESSES THE COURT /

HIS LORDSHIP:

Ask the accused whether he is prepared to disclose the whereabouts of these blankets? --- I know nothing about the matter. If I had any knowledge I would have told the police about it.

- S E N T E N C E -

DOWLING, J:-

The accused is sentenced to $3\frac{1}{2}$ years imprisonment with compulsory labour.

Counsel for Defence applies for leave to appeal.

COUNSEL ADDRESSES THE COURT /

DOWLING, J:-

I am prepared to grant leave to appeal.

Bail to stand pending the appeal.
