104/56

G.P.-S.117539—1954-5—5,000. U.D.J 445.

104/56

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

(Cape Provincial DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

1. MAHOMED ISMAIL,
2. KATHIJA ISMAIL,

Appellant.

versus/teen

REGINA

Respondent.

Appellant's Attorney Louw & B. *Respondent's Attorney*
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate A. Mendelow QC *Respondent's Advocate* J.B. Thom
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on:— Cape Prov. Div. 4/9/56
Op die rol geplaas vir verhoor op:—

(NPD) — Condonation granted by Schreiner, A/CJ 22/6/57

(A) Tuesday, 5th November 1957. Registrar

14.9.12. 2.15-4 9.45—12.50 4.15— 4.40—5.30

C.A.V. 22/6/57. Registrar

JUDGMENT: MONDAY, 25TH NOVEMBER, 1957.

Appeal allowed, Conviction and Sentence set aside.

Coram: Fagan, C.J., Steyn, Reynolds, (Acting), Malan et Ogilvie Thompson (JJA)

25/11/57 REGISTRAR

Record

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION.)

In the matter between:-

MAHOMED ISMAIL & KATHIJA ISMAIL ..... Appellants.

and

REGINA. ..... Respondent.

CORAM:- Fagan, C.J., Steyn, Malan, JJ.A. et Reynolds, Ogilvie Thompson A.JJ.A.

HEARD:- 5th November, 1957. DELIVERED:- 25th November, 1957.

J U D G M E N T.

REYNOLDS A.J.A.:-

I have read through the judgment of the Chief Justice in this matter and agree with him that the decision in Rex versus May is correct. Accordingly the question whether the summons in this case disclosed an offence under Section 36 of Act 62 of 1955 must be decided on the basis that that decision was correct, for Section 36 is really in the same terms as Section 1 of the Stock Theft Act. That means that in order to disclose an offence the summons must contain the essential averment that the goods in this case were "found in possession" of Appellants at a time when there was reasonable suspicion that they were stolen. It is not enough to constitute the offence that the suspicion arose after the appellants ceased to be in possession. But so long as the reasonable suspicion existed at a date when the

appellants were found in possession, it matters not whether the person who first found the appellants in possession had the suspicion, or whether a person afterwards actually finding them in possession had the suspicion.

It remains to be seen if this essential averment of the existence of suspicion on the 15th July 1955, when Appellants are alleged to have been in possession, has been sufficiently set out in the summons. The summons, to which Appellants pleaded not guilty on the 22nd August 1955, charge ~~accused~~ Appellants with contravening Section 36:-

"In that upon or about the 15th day of July 1955 and at "108 Prince Alfred Street in the said Regional Division "the accused were all and each or some or other of them "found in wrongful and unlawful possession of goods as "listed in the Schedule hereto in regard to which said "goods there is reasonable suspicion that they have been "stolen and in respect whereof the accused are unable to "give a satisfactory account of such possession."

It is of great importance to examine the Schedule of goods attached to, and forming part of, the summons. It consists of 32 types of goods making up some 313 pieces of goods.. These 313 pieces of goods included 53 pairs of boys' trousers, 37 gents' white vests, and contains items of

ladies'.....3.

ladies' wear, men's wear, babies' shawls, and, generally, clothing and other items one would expect to find in a shop selling drapery and the wear of men, women and children. It is obvious that prima facie the summons alleges that these goods were not only taken from the possession of Appellants but also that they are to be exhibits in the case against Appellants. Later will be pointed out that the allegation that on the 15th July the goods "were" found in possession, can only reasonably mean that they were then found to be in possession of Appellants and Appellants then deprived of possession.

The words "wrongful and unlawful" are used to describe the legal effect of the possession of Appellants. It is quite clear that possession by Appellants can only be described as "wrongful and unlawful" if the suspicion arose on or before the 15th July when Appellants were still in possession of the goods and unable to give the necessary explanation. Suspicion arising after the appellants ceased to possess cannot be unlawful and an offence under Section 36, and so cannot be described as "wrongful and unlawful". But these words "wrongful and unlawful" cannot, by themselves be sufficient when they occur in a summons. They are merely a summation of facts stated in the summons in the sense that

they.....4.

they aver that these facts stated amount to "wrongful and unlawful"possession. Hence, apart from these words there must be allegations of fact showing that the reasonable suspicion arose, or existed, before or on the 15th July when Appellants were still in possession of the goods. These allegations may amount to an allegation of a contravention of Section 36 either by express statement or by implication ~

(Rex versus Jones and More 1926 A.D. 350)

Since the mere use of the words "wrongful and unlawful" cannot by themselves mean that an offence under Section 36 is revealed by the summons, it remains to see if, apart from them, sufficient facts are stated that the reasonable suspicion arose, or existed, on or before the 15th July when the appellants were still in possession of the goods.

Now, it would be quite easy to have drafted the summons to cover the allegation that the suspicion came into being before or on the 15th July and continued to exist. That has not been done here expressly and the word "is" has been used in regard to the existence of the reasonable suspicion. Now "is", standing by itself, does not mean "was" or refer to the past, or include something in the past. But in its context it may include the past as well as the present. When a person says "this is Bloemfontein" or

"this is the Appellate Division building", he certainly does not mean that the city or the building only came into being at the time he is speaking, but that it exists at present and did originate at or exist for some time past - whether that time be short or long. In the same way suspicion - which is a state of mind - may be so indicated. If a person says that "there is a suspicion A is a thief", he can hardly mean that the suspicion arose only at the moment of speaking, but that it arose before - at any rate the use of "is" is quite capable of referring to some time in the past. Indeed, it usually does refer to some past period - however brief - when a state of things or state of mind is mentioned. Thus when the summons in this case says that "there is reasonable suspicion that they (the goods) have been stolen", it can really only mean that prior in time to the drafting and service of the summons suspicion existed, even if it existed for a short time only. Hence the only real question on this essential of the existence of suspicion, is whether there are in any part of the summons any allegations to show how far back in the past the suspicions existed, and whether it is is sufficiently alleged that they existed as far back as 15th July. This is no contradiction of the meaning of the word " "is" in its context in the summons, but only an enquiry as to

its meaning in the context. But to show that the word "is" does relate back and include the existance of the suspicion onthe 15th July, it is not enough for the Crown to rely on allegations which may show it does, or is consistent with its so relating back. It can only rely on allegations sufficiently showing that the word "is" does really relate back and include the period before ~~and~~ or up to the 15th July. The question must now be examined as to whether it does do so.

It is clear that the alleged theft of the goods occurred, according to the summons, before the 15th July, for otherwise the appellants could not have been in possession of them on the 15th July. That does not necessarily mean that the suspicion arose before the 15th July for cases occur where goods are stolen, but not missed at the time by the owner, and sometimes only claimed when produced from the possession of someone. This point will be touched on later on. But it is clear that goods stolen before the 15th July were found in the possession of Appellants on the 15th July. It is equally clear that the 15th July is the one date on which the Crown was going to prove that the goods were found in possession and the summons does not aver a date later than

the 15th July.....7.

the 15th July on which the appellants were found in possession. The words "on or about" constitutes the usual formal phrase used and does not alter this. But the summons not only avers this date of the 15th July, but also says the appellants were then found in possession of the 313 articles named in the Schedule and which are quite plainly to be exhibits in the case against accused. It is difficult to see how these goods could have come into the possession of the authorities otherwise than having been seized by someone with some authority who found the goods in possession of Appellants on the 15th July. For the allegation is clear that the appellants were found in possession on the 15th July, and not after that. Even if found in possession after that date and the goods taken then out of their possession, the same position would occur that somebody had so taken the goods. But persons are not deprived of the possession of goods without cause, and the only cause here could be some suspicion then existing that the goods were stolen, or some reasonable suspicion that they were stolen existing in the mind of someone who then found and took possession of these goods. Prima facie the words of the summons, with the inclusion of the Schedule of the 313 articles mean:

(1)That the goods had been stolen before the 15th July,

(2)that they were found in possession of Appellants then

and.....8.

and not later, (3) that they were taken away from that possession by someone, (4) that they were taken away because they were not the goods of Appellants, or because they were goods that Appellants were not entitled to possess, and (5) that the person who deprived Appellants of the possession had reasonable suspicion at that time that they were stolen. The appellants were quite sufficiently warned of all this so that they could then attempt to give a reasonalble account of their possession of the goods either by showing that they were the true owners or that they innocently came into possession of the goods. On the facts so far considered, it was shown that, in the context in which it was used, the word "is" not only could refer back in time to some extent at least - be it short or long - as regards the existence of the suspicion, but also, that if did refer back and included the the time of possession by Appellants viz: on the 15th July, in this matter. The use of the word "were " as regards possession by Appellants of the goods on The 15th July in no wise detracts from all this, for "were" is advisedly used to denote a single day, or fixed period of time, and is so used in its context in this case whereas "is" is in a different position owing to the context in which it is used, and can refer back. The only question is whether the allegations dealt with do sufficiently refer

back.....9.

back to the 15th July. The considerations so far dealt with, make the matter sufficiently clear in itself. It can, however, be reinforced by other considerations.

Section 36, as well as the summons, says "found in possession" of the goods. It is in no way necessary to refer to any evidence in this case to show what that must mean from the words in the summons. For a person to be found in possession of goods, of necessity those goods must be singled out by the finder - either the original finder or someone else - in order that they be shown to be in the possession of the appellants at all. They may be:
(1) All singled out from other goods in the possession of Appellants or pointed out, or (2) partly so singled out and partly found separate, or (3) all be found already separated from all other goods. If, (1) they are singled out from other goods in the possession of Appellants, then they can only have been singled out from the other goods lawfully in possession of Appellants by the finder for some reason, and <u>prima facie</u> that can only be because of some suspicion that they are not properly in the possession of Appellants and that Appellants are not entitled to the possession, and that the goods are in a different position from those goods not singled out since they belong to Appelants. But <u>prima facie</u> in this case the only reason for singling them out would be

because..10

because the goods were stolen, or reasonably suspected of having been stolen. That, moreover and in addition, is especially so when it is averred that the goods were actually stolen before the 15th July. The position is the same as regards (2) where they are partly singled or pointed out from others by any person who on the 15th July found the appellants in possession of these goods. As regards (3), if the goods were already separated out when found in the possession of Appellants, the position is then that a curious conglomeration of some 313 pieces of goods would be found in the possession of Appellants. It includes 53 pairs of boys' trousers, 37 gents'white vests, 41 boys'vests, 11 gents'white underpants, 31 babies' bibs, 16 pairs boys' blue serge knickers, 11 babies'shawls, ribbons, lace ladies' bloomers, some blankets and a list of miscellaneous articles - a regular conglomeration of articles. It is difficult to see how a person finding such a conglomeration separated out and in the possession of a private person would not have some reasonable suspicion that the goods were stolen and that the matter must be investigated. It is still more difficult, if the person in possession were a trader, to see how the finder would not then be reasonably suspicious and proceed to investigate. When in addition the possession of the appellants was terminated

by.....11.

by someone on the 15th July, it is still more difficult to see how this reasonable suspicion did not exist already at the 15th July. Whether this consideration now being discussed would be sufficient by itself to relate the suspicion back as existing on the 15th July need not be considered. It is sufficient to say that it reinforces what has been said in the first consideration examined in this judgment.

There is another consideration to be added. It is quite true that an owner may sometimes not miss goods at the time they are actually stolen, and may only discover the theft later on when the goods are produced to him. That is especially so with small items. But here we have a conglomeration of some 313 articles including the 57 pairs of trousers and other articles enumerated. Prima facie it is a little out of the way for so many articles not to be missed, nor do I think that at the stage of the sufficiency of the summons we should assume that the 313 articles were stolen from numerous owners, for they look like a conglomeration stolen from a place dealing with men's wonen's and children's wear and millinery and haberdashery. It is prima facie at this stage unlikely that those goods were not missed at once when stolen before the 15th July. But of course, that does not mean by itself that the person who

found.....12.

found the appellants in possession of this conglomeration knew of the previous theft. When, however, it is added that the finder, either the original finder or another, terminated the possession of Appellants on the 15th July, this is not without significance and can be used to reinforce what has already been said.

The summons is not well drawn and was probably drawn with the intention of following the wording of Section 36. That fact, however, cannot assist the Crown if the necessary averment does not appear. But the necessary averment relating the suspicion prima facie to the 15th July does appear, as indicated. I do not think that the use of the word "is" settles the matter finally and means that the context in which it is used as shown by the allegations already dealt with can be ignored. Accordingly I think that on the essential of the Crown having to aver that the reasonable suspicion existed on the 15th July, the summons, considered as a whole, and including the Schedule, does sufficiently allege that this reasonable suspicion then existed. If the appellants desired further particulars they could have applied for them under the ruling in Rex versus Herschel 1920 A.D. at p. 581)

Taking this view, it is not necessary at all to

rely.....13.

rely on the words "wrongful and unlawful" appearing in the summons and they can be, and are, treated merely as stating the Crown's contention that the allegations of fact set out in the summons established the possession on the 15th July to be "wrongful and unlawful".

The only other point ~~alleged~~ to be considered as regards the defectiveness of the summons ~~by Mr. Mendelow~~ is that there was an insufficiant allegation that on the 15th July the appellants were unable to give a satisfactory explanation of their possession. It may be argued that the words "are unable to give a satisfactory explanation of such possession" could not relate back to the 15th July at all and cover it. But the words "are unable" is used without qualification, and certainly with no qualification of time. When they were so used, they covered and meant that at no time have the Appellants been able to give a satisfactory explanation, and really assert they cannot do so at trial, too. The statement is quite wide enough to relate back, and include the 15th July. Moreover, it has already been pointed out that there was a sufficient allegation of the existence of reasonable suspicion on the 15th July, and that is a further reason

why.....14.

why the words "are unable" refer back, and include that date. There would hardly be an allegation in these terms if the Crown did not contend that at all times the Appellants were unable to give a satisfactory ~~xp~~" explanation. The word "are" is only the plural of "is" and if only one person were charged the phrase used would be "is unable" and yet "is unable" in that context would cover the past up to the 15th July. That shows how "is" can be used in its context to relate back. But I do not think this helps to ascertain the meaning of "is" in another context, so this cannot help the Crown in construing the meaning of the summons on the point of the existence of the reasonable suspicion on the 15th July.

On both essentials I think the summons did disclose an offence under Section 36. As the majority of the Court are of a different opinion, it will not avail to discuss the merits of the case on the facts.

Record

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

MAHOMED ISMAIL & KATHIJA ISMAIL Appellants

&

R E G I N A Respondent

CORAM : Fagan C.J., Steyn, Malan JJ.A. Ogilvie Thompson, Reynolds A.JJ.A.

Heard : 5th November 1957. Delivered : 25-11-57

J U D G M E N T

FAGAN C.J. :- The appellants, together with one Ndimande, appeared before a regional magistrate on a charge of housebreaking with intent to steal and theft, alternatively of contravening section 36 of Act 62 of 1955.

At the end of the Crown case Ndimande was discharged. Applications for the discharge of the two appellants were refused, and after evidence had been given by them and led on their behalf, they were both found guilty on the alternative charge. The first appellant was sentenced to eighteen months' imprisonment with compulsory labour. The sentence passed on the second appellant - who is the step-mother of appellant No. 1 - was twelve months' imprisonment with compulsory labour, of which

nine months was suspended for two years on condition of her not being again within that time convicted of any crime involving dishonesty.

An appeal by the two present appellants to the Natal Provincial Division was dismissed, but leave was given them to appeal to this Court.

Mr. Mendelow, for the appellants, submitted at the outset of his argument that on the alternative charge - the one on which the appellants werefound guilty - the indictment discloses no offence. The point was not taken either in the magistrate's court or in the Provincial Division, but if Mr. Mendelow's submission is correct we would nevertheless have to quash the convictions, for no matter when the point is brought to the attention of the Court, a conviction cannot stand on a charge which discloses no offence - vide Rex v Standard Tea and Coffee Co. (Pty.) Ltd. (1951 (4) S.A. 412 at p. 417, and authorities there mentioned.

The alternative charge reads :

" That the accused are guilty of the offence of contravening section 36 of Act 62 of 1955.

In that upon or about the 15th day of July 1955 and at 108 Prince Alfred Street in the said Regional Division the accused were all and each or some or other of them found in wrongful and unlawful possession of goods as listed in the Schedule hereto in regard to which said goods there is reason-

" ...file explanation that they have been stolen and in respect ...thereof the accused are unable to give a satisfactory account of such possession. "

The Act referred to is the General Law Amendment Act of 1955, and section 36 reads :

" Any person who is found in possession of any goods, other than stock or produce as defined in section 1 thereof of the Stock Theft Act, 1923 (Act No. 26 of 1923), in respect to which there is a reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction for theft. "

I should also quote section 1 of the Stock Theft Act, No. 26 of 1923. It reads as follows :

" A person who is found in possession of stock or produce in respect to which there is reasonable suspicion that the same has been stolen and is unable to give a satisfactory account of such possession shall be guilty of an offence. "

This enactment applies to stock or produce while the section derived from the 1955 Act relates to goods other than stock or produce, but in other respects the description of the offence in the two enactments is in identical wording.

In Rex v Ely (1924 O.P.D. 274), the section in the Stock Theft Act was interpreted by De Villiers J.P., with the concurrence of Juglne A.J., as follows, in order to constitute

" able suspicion that they have been stolen and in respect whereof the accused are unable to give a satisfactory account of such possession. "

The Act referred to is the General Law Amendment Act of 1955, and section 36 reads :

" Any person who is found in possession of any goods, other than stock or produce as defined in section thirteen of the Stock Theft Act, 1923 (Act No. 26 of 1923), in regard to which there is a reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction for theft. "

I should also quote section 1 of the Stock Theft Act, No. 26 of 1923. It reads as follows :

" A person who is found in possession of stock or produce in regard to which there is reasonable suspicion that the same has been stolen and is unable to give a satisfactory account of such possession shall be guilty of an offence. "

This enactment relates to stock or produce while the section quoted from the 1955 Act relates to goods other than stock or produce, but in other respects the description of the offence in the two enactments is in identical wording.

In Rex v May (1924 O.F.S. 274), the section in the Stock Theft Act was interpreted by De Villiers J.P., with the concurrence of Blaine J., as requiring, in order to constitute

an offence, that (1) an accused person must be actually found in possession of stock or produce, (2) a suspicion founded on reasonable grounds then appearing must exist in the mind of the finder (or possibly some other classes of persons) that that stock or produce has been stolen, and (3) the reasonable suspicion must come into existence in the mind of the person either at the time of the finding in possession, whether it be the first "finding in possession" or a second or subsequent finding, or possibly at any time during the accused's possession, but not after the accused has ceased to be in possession. In respect of the giving of a satisfactory account of the possession, the learned Judge-President considered the question of time to be of minor importance. "For" he said, "if at "the time of being found in possession the accused gives an "account which is subsequently held by the magistrate to have "been satisfactory, then clearly the accused is not guilty "under the section, for he is not unable to gave a satisfactory account. On the other hand, if he gives no account "when found in possession, or then gives an account which is "proved to be unsatisfactory, but subsequently gives an account "which the magistrate holds to be satisfactory, then again he "is clearly not guilty, for he is not unable to give a satis-

"factory account. So that if at any time he is able to give "a satisfactory account, he is not guilty." (p. 281).

In Rex v July (1925 T.P.D. 878) Curlewis J.P., said of Rex v May : "One cannot help feeling that the interpretation which the Orange Free State Court put on Section 1 may lead, in some circumstances, to very extraordinary results" (p. 882). He said, however, that he did not wish to express any view on the decision in May's case, as it was not necessary for the purposes of the case before him to do so.

In Rex v Tobesa, 1926 T.P.D. 459, Stratford J., in a judgment concurred in by Greenberg J., mentioned Rex v May and said : "The difficulty that I had was whether we could "follow that decision in this case. After hearing argument, "it is unnecessary to decide that point, because whoever must in "law entertain the suspicion mentioned in the Act, or whatever time must be taken when that suspicion must be entertained, on "the facts of this case it makes no difference" (p. 460).

In Rex v Kumalo (1946 O.P.D. 417) the interpretation put on the statute in May's case was strongly criticised by Van den Heever J., who said : "If one considers the general "scheme of the Act, it seems difficult to imagine that Parlia- "ment meant anything more than this : where it is proved that

"the accused is or was in possession of stock in circumstances "which cause in the mind of the Court a reasonable suspicion "that such stock is stolen, the accused is criminally liable "unless he can account for his possession of such stock to "the satisfaction of the Court. The object was to shift "the normal onus in certain circumstances and subject to "certain conditions" (p. 422).

The learned Judge, however, while indicating that this was the interpretation he would have adopted had the matter been res nova, considered himself bound by the decision in Rex v May, which in the meantime had been followed in other provinces. In any event his remarks were obiter, as he considered that Kumalo's appeal should succeed "whatever construct-"ion one places on the section" (p.424), and Horwitz A.J., who sat with him, held that "the facts in this case dictate the "success of the appeal irrespective of the decision in Rex v "May" (p. 425).

The array of cases in which the interpretation given to the section by De Villiers J.P. has been adopted and followed is indeed formidable. I do not even exhaust the list when I mention : Rex v Coetzer, 1928 E.D.L. 159 ; R. v Lolosi, 1929 E.D.L. 275 ; R. v Kabonie, 1930 C.P.D. 129 ; R. v Valentyn,

1930 C.P.D. 175 ; R. v Nguni, 1931 T.P.D. 184 ; R. v Maloy, 1931 T.P.D. 193 ; R. v Sinetile, 1932 E.D.L. 213 ; Mgubane v Rex, 1933 N.P.D. 748 ; R. v Noble, 1938 C.P.D. 514 ; R. v Louw, 1946 O.P.D. 80 ; R. v Motau, 1947 (1) S.A. 667 (T.P.D.) ; R. v Lebenya, 1957 (2) S.A. 160 (O.P.D.) ; and R. v Hunt, 1957 (2) S.A. 405 (N.P.D.).

In Lebenya's case the charge - as in the case now before us - was one of contravening section 36 of the Act of 1955, but it was held, as had already been held in R. v Armugan (1956 (4) S.A. 43 (N.P.D.)), that the use of identical words in the two enactments calls for the same interpretation. To my mind there can be no doubt that the Legislature's choice of the same language in 1955, when making the offence created by the 1923 enactment of wider application, shows a clear intention that the words should in both cases bear the same meaning.

Against the May decision, then, we have only the dissenting dicta of Van den Heever J, the slightly critical remarks of Curlewis J.P., and the apparent uncertainty of Stratford J. In support of it there is the long line of cases I have mentioned, plus the significant fact that the Legislature, which should not be presumed to have been

ignorant of them, chose in 1955 to repeat the exact words which had in one case after another since 1924 been construed in this particular way by the Courts. Although these decisions are not binding on us, I should hesitate to depart from an interpretation so consistently given to the statute in all the provinces over a period of a third of a century, strengthened by the indication I have referred to that it bears the approval of the Legislature, unless I was strongly convinced that it is wrong. I am far from being convinced that it is. The formulation of the offence in the words I have quoted from the judgment of Van den Heever J. may give it a logical meaning that will avoid the "very extraordinary "results in some circumstances" which were foreseen by Cuw-lewis J.P. and probably may be found in some of the later cases. It sets a wider net for the possessor under suspicious circumstances than does the formulation of De Villiers J.P., which requires certain conditions in addition to the possession, its suspicious nature and the accused's inability to account for it to be complied with before a charge can be successfully laid. But on a literal reading of the section those conditions are found in it, and the Legislature may well have put them there with the deliberate object of

circumscribing the new offence which it was creating and limiting it to cases where the suspicion arises while the man to be charged is still in possession, which would mean that in the ordinary course he would then be warned and called upon to account for his possession and not be lulled by the absence of suspicion until it may be difficult for him to produce evidence of the innocence of his possession. Applying the maxim : "In poenis strictissima verborum significatio accipienda est" - Hollandsche Consultatien 3(2).336.12 (p. 685) - I prefer the safe course taken by De Villiers J.P.

Mr. Mendelow's objection to the indictment should therefore be considered by us on the basis of an acceptance of the correctness of the decision in R. v May.

Mr. Mendelow's submission is that in the phrase "in "regard to which said goods there is reasonable suspicion "that they have been stolen", occurring in the indictment, the use of the present tense, "is reasonable", renders the charge bad, inasmuch as, on the decision in May's case, the statute requires that the suspicion should have existed at a particular time or period of time in the past, to wit, while the accused was in possession. The essentiality of this

requirement was stressed in a number of the cases I have mentioned above ; in many of them the conviction was quashed because there was no evidence that anyone had a reasonable suspicion at the crucial time. In this regard I may mention R. v Kabonie, R. v Valentyn, R. v Nguni, R. v Maloy, Mgubane v Rex, R. v Noble and R. v Lebenya.

In the enactment itself the word "is", present tense, occurs three times : "Any person who is found in possession "of any goods..... in regard to which there is a "reasonable suspicion that they have been stolen and is un- "able to give a satisfactory account of such possession....." Obviously an indictment will have to turn the first of the three into the past tense, as was done in the indictment we have under consideration, which alleged that on or about a specified date the accused were found in possession of the listed goods. I do not think that, if the first of the three verbs is put in the past tense, the use of the present tense for the other two can be said to be describing the offence "in the words of the law creating the offence, or in "similar words," so as to justify the wording - if it cannot be otherwise supported - by invoking section 315(2)(a) of the Criminal Procedure Act, No. 56 of 1955. Changing the tense of one verb may affect the others. Acts or occurrences

which, by the use of the same tense, may be indicted as happening contemporaneously, may by the use of separate tenses be indicated as happening at different times, one in the past and the other in the present.

And that, indeed, seems to me to be what the indictment before us does indicate. In respect of the phrase "is "unable to give a satisfactory account of such possession" that does not matter, for an inability is a continuing state and the enactment does not - as has been held to be the case in respect of the reasonable suspicion - require its existence contemporaneously with the possession. I agree with the decision in R. v Hunt (1957 (2) S.A. 465 (N.) - departing from some earlier cases but followed in R. v Herringer (1957 (3) S.A. 761 (C.) - that the use of either the past or the present tense here would be good, for -

" The common sense of the matter is that the charge will be good if it alleges the accused's inability to give a satisfactory account ; it does not matter whether the words used are 'is unable' or "was unable'. Where 'is unable' is used the allegation will clearly be of an existing inability. Where 'was unable' is used, the position is really the same because the prosecutor in framing the charge has in mind the position when he frames it, so his reference to the past will include the whole period right up to that instant of time. It is true that he must not relate the inability so

" exclusively to the period of possession as to indicate to the accused that no account subsequently can relieve him of guilt. That was the mistake that the prosecutor made in Armugan's case..... in my opinion Malakeng's and Mokoena's cases are also distinguishable ; if they were not I should with respect decline to follow them. " (per Broome J.P. in R. v Hunt at p. 469).

The reference is to R. v Armugan, 1956 (4) S.A. 43 (N.), R. v Malakeng, 1956 (4) S.A. 662 (T.) and R. v Mokoena, 1957 (1) S.A. 398 (T.). I agree with the learned Judge President's comments on them.

The position seems to me to be different, however, in respect of the allegation of a reasonable suspicion that the goods have been stolen. I do not see how a statement that there is reasonable suspicion that the goods have been stolen, following on a statement that the accused were at a specified time found in possession of the goods, can be read as averring that the suspicion and the possession were contemporaneous ; yet, on the construction placed on the statute in May's case and the series of decisions that followed it, that contemporaneousness is an essential ingredient in the offence. The averment of the finding in possession having - quite correctly - been put in the past tense, the averment of the existence of a reasonable suspicion that the

goods had been stolen should, in my opinion, also have been in the past tense.

I therefore consider that the charge disclosed no offence and that consequently the appeal should be allowed and the conviction and sentences should be set aside.

H. H. Fragen

Steyn J.A.
Malan JA.
Ogilvie Thompson A.J.A. } Concur.