148/1959

G.P.-S.4706—1950-1—6,000. U.D.J. 445.

148/1959

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

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN KRIMINELE SAAK.

FRANK DAVIDSON

Appellant.

versus

THE QUEEN

Respondent.

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

Appellant's Advocate / *Advokaat van Appellant* I.S. Thomas. *Respondent's Advocate* / *Advokaat van Respondent* M.C. Tucker

(Case-WLD) *Set down for hearing on:—* / *Op die rol geplaas vir verhoor op:—* Dinsdag 8 Desember

Coram: Ogilvie Thompson, Botha, et Holmes. J.A.

8.12.59

Postea. Monday 14th December, 1959

Appeal dismissed.

Ogilvie Thompson J.A.
Botha A.J.A.
Holmes A.J.A.

— Rep.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

FRANK DAVIDSON ..... Appellant

versus

REGINA ..... Respondent.

Coram: Ogilvie Thompson J.A., Botha et Holmes A.JJ.A.

Heard: 8th December, 1959. Delivered: 14th December, 1959.

J U D G M E N T

OGILVIE THOMPSON J.A.:

Appellant was, together with another, charged in the Witwatersrand Local Division before BRESLER J., sitting with assessors, with housebreaking with intent to steal and theft. Appellant's co-accused, who was No. 1 at the trial, was acquitted; but Appellant was convicted as charged and sentenced to four years imprisonment with compulsory labour and to receive a whipping of four strokes. He now appeals, on leave granted, to this Court.

The indictment upon which Appellant was convicted averred a housebreaking on 13th September 1958 at Bezuidenhout Valley in the district of Johannesburg and the theft

therefrom ..../2

therefrom of a safe containing money, jewellery, and other valuables aggregating approximately £2,500 in all. The housebreaking and the theft of a safe containing the various articles listed in the indictment were duly proved at the trial by the evidence of the complainant, one Gergion. The Crown also proved, through the evidence of Detective Sergeant Pretorius, that on 21st November 1958 a safe was, in the circumstances hereinafter detailed, discovered in a disused mine-shaft situate between Maraisburg and Florida. This safe, when found in a damp spot some two hundred feet down the mine-shaft, was locked: two apertures had been cut in the back of the safe, thereby giving access to its interior. The safe, when found, was empty. This safe was produced at the trial and the complainant identified it as being the safe stolen from his house on 13th September 1958. The trial Court accepted this identification, but its sufficiency was challenged before this Court.

The complainant insisted that the safe produced was his because it bore two stripes, one thick and one thin, and because, he said, he could recognise the handle. The latter he claimed to know because he had "been working with it for

twelve ..../3

twelve years daily". This handle, however, appeared to be an ordinary steel handle lacking any distinctive mark, and under cross-examination the complainant was unable to say whether or not the handle was made of metal. The complainant said that the stripes were on the safe when he purchased it. He was not able to dispute that all safes of this make may have these two stripes painted upon them, and the Crown did not call any other witness to clarify the point. Accordingly, had the matter rested there, there would have been substance in the contention that the safe was insufficiently identified. The Crown, however, duly proved that the two keys of the stolen safe, which were produced by the complainant, unlocked the lock of the safe found in the mineshaft, and that, of the smaller keys produced by complainant as being the keys of two drawers inside the stolen safe, one key opened a drawer inside the safe produced. The lock of the other drawer in the safe produced was too rusted to function any longer. In addition, the Crown placed before the Court the evidence of ~~the~~ one Edworthy a locksmith of twenty-four years experience. Edworthy stated that there are no master keys for safes, and in addition gave some evidence regarding the

very ,.../4

very remote chances of the main lock of the produced safe having been duplicated. Under cross-examination, however, it appeared that this latter evidence was based on hearsay and such evidence was - very rightly - struck out by the learned trial Judge. Somewhat surprisingly, the Crown did not remedy this serious defect in Edworthy's evidence by calling the expert from whom he had obtained the information. In this connection it is not inapposite to mention yet once again that the burden rests upon the Crown of establishing all the essential elements of its case. Had Appellant's contention succeeded that the safe was insufficiently identified as that of the complainant, the Crown would only have had itself to blame.

As the evidence stands, however, I am of opinion that, in the absence of any evidence to suggest that in fact duplication of locks does occur on safes of this type, the safe produced was sufficiently identified as being that of the complainant. For, although the stripes on the safe and its handle are, when considered alone, but fallible identifying features, when there is added the further feature that complainant's keys fitted the main lock of the safe produced,

the ..../5

the cumulative effect of these various features is, in my view, such as to constitute proof beyond reasonable doubt that the safe produced was complainant's safe. (See R. v. de Villiers 1944 A.D. at 508/9).

The only evidence led by the Crown implicating Appellant with the crime was that of Detective Sergeant Pretorius. This officer deposed that on 21st November 1958 he interviewed the two accused, who were then in custody. After informing the two accused that they were alleged to have broken into complainant's house and to have stolen therefrom a safe containing valuables, Pretorius administered the usual warning. Thereafter the same day - so Pretorius's evidence continued - the two accused took him out to an old disused mine shaft between Maraisburg and Florida. On arrival there, Appellant pointed out two steel plates which were lying in a passage at the entrance to the mine-shaft. While still at the entrance to the mine-shaft, the two accused - to cite Pretorius's own words - "supplied me with certain information". As a result of this information - so Pretorius testified - he, after first obtaining a rope and a light, went down the mine-shaft where, some 200 feet down, he found

the safe produced. The safe was locked and two pieces of metal had been cut out of the back of the safe. The two steel plates pointed out by Appellant at the entrance to the mine-shaft fitted these two apertures in the safe. Under cross-examination, Pretorius rejected the suggestion that he had taken the two accused to the mine-shaft and insisted that the two accused had directed the way to the mine-shaft. Under further cross-examination Pretorius conceded that the record of his evidence as given at the preparatory examination contained no mention of Appellant having pointed out the two steel plates at the entrance to the mine-shaft, but only a statement that he had found these two plates there. Pretorius went on to explain that, after the preparatory examination, he made a further statement "to the prosecutor and to the Attorney-General" wherein he mentioned that Appellant had pointed out the two steel plates. An application was made at the conclusion of the Crown case for the discharge of the accused, but was refused. Thereupon the defence closed its case without calling any evidence.

Mr. Smeath-Thomas, for Appellant, submitted that, having regard to the above indicated variation between

Pretorius ...../7

Pretorius's evidence at the preparatory examination and at the trial respectively, the trial Court was not justified in finding that Appellant had in fact pointed out the two steel plates at the entrance to the mine-shaft. There is no substance in this submission. The relevant question put to Pretorius by the Prosecutor at the Preparatory Examination was "En wat het jy daar gevind?" To this Pretorius replied: "Voor die skag het ek die twee plate voor die Hof aangetref". This answer, was therefore, merely a direct reply to the specific question asked. The Trial Court, after having had its attention directed to the point under consideration, and after having seen Pretorius, accepted his explanation as to why it was only at the trial that he made specific mention of Appellant having pointed out the two steel plates. In the absence of any evidence to the contrary, no sufficient warrant exists for this Court to differ from the trial Court's finding that Appellant did in fact point out the two steel plates as testified by Pretorius.

No suggestion was advanced at the trial that any form of inducement or pressure had caused the accused to take Pretorius to the mine-shaft or to furnish him with - once

again ...../8

again to cite Pretorius's exact words - "certain information". That being the case, it was not - nor, indeed, could it have been - in any way questioned before us that Pretorius's evidence was, in terms of section 245 of the Code as explained in R. v. Tebetha 1959 (2) S.A. 337 (A.D.), admissible against Appellant. Mr. Smeath-Thomas's main submission in support of the appeal was that BRESLER J. misdirected himself in relation to a passage occurring in one of the judgments in Tebetha's case and, alternatively, that, in any event, Pretorius's evidence was not necessarily inconsistent with Appellant's innocence, that, accordingly, it was not incumbent upon Appellant to give evidence, and that the Crown's case against him was not proved beyond reasonable doubt.

The alleged misdirection was based upon a sentence occurring in the penultimate paragraph of BRESLER J.'s judgment where, after citing a passage from the judgment of SCHREINER J.A. in R. v. Tebetha (supra), summarising counsel's submissions, and expressing the view that the evidence against No. 1 accused was less strong than that against Appellant, the learned Judge, referring to Appellant, said:

" He ..../9

> " He is not entitled to the benefit of a consideration of all the possibilities and inferences which have been advanced on his behalf."

It is to be observed that, unlike the present case, in Tebetha's case nothing was discovered in consequence of the pointing out by the accused: there the policeman Booysen, to whom there had been a pointing out, was already in possession of the relevant information. That, as was emphasised by SCHREINER J.A. at pp. 343/344 of the report, was an important aspect of the enquiry; but the view taken by the majority of the Court was that Booysen's evidence was, nevertheless, rendered admissible by the terms of subsection 245(2) of the Code. The relevant portion of the passage from the judgment of SCHREINER J.A. in Tebetha's case which was quoted by BRESLER J. reads:

> " One of the contentions advanced on behalf of the appellant was that in the absence of the exact context in which the 'pointing out' at the two places took place no inference could properly be drawn that the appellant was disclosing his knowledge of the details of and therefore his association with the crime. In my view this contention is unsound. It is true that the mere act of pointing at a place or a movable object does not necessarily prove a prior personal acquaintance with it. One may point at a place for a variety of reasons unconnected with such acquaintance. But the object of the Legislature in enacting sec. 245(2) was

clearly ..../10

> " clearly to enable inferences to be drawn from the evidence made admissible by the sub-section and that would always be impossible if every pointing out must be rendered colourless by the consideration that there are innumerable possible reasons, consistent with innocence, for pointing anything out."

Mr. Smeath-Thomas's submission was that the passage cited above from the penultimate paragraph of BRESLER J.'s judgment reveals that the learned Judge understood SCHREINER J.A. to have laid down that, once a pointing out by the accused, admissible in terms of section 245 of the Code, has been proved, that necessarily carries with it an inference unfavourable to the accused and excludes other possible inferences which may be favourable to the accused. That is certainly not the meaning of the above cited passage from the judgment of SCHREINER J.A. in Tebetha's case. The meaning of that passage, as I understand it, is that the mere circumstance that it may be possible to conjure up a variety of reasons which, by the exercise of a lively imagination, could conceivably have motivated the pointing out, will not by itself preclude the Court from drawing, from the evidence made admissible by section 245, an inference of knowledge on the accused's part of the details of, and

therefore ..../11

therefore of his association with, the crime. The appropriate inference to be drawn in any particular case will, of course, depend upon the particular facts and must always be drawn with due regard to the cardinal principle that it is for the Crown to establish the accused's guilt.

To revert to the present case, I confess to some difficulty in appreciating why the trial Court, while convicting Appellant, should have acquitted his co-accused. The evidence against the latter was the same as that against Appellant except in regard to the pointing out of the steel plates. The use by the learned Judge a quo of the expression that Appellant was "not entitled to the benefit of a consideration" of the possibilities and inferences urged on his behalf was somewhat unfortunate; and, coming as it did immediately after a reference to Appellant's having pointed out the steel plates, lends some colour to Mr. Smeath-Thomas's submission. Nevertheless, I am not satisfied that the learned Judge a quo did actually misdirect himself in the manner submitted by counsel. For, after citing SCHREINER J.A.'s above quoted remarks and referring to defending counsel's submissions regarding the variety of ways in which the accused

might ...../12

might have acquired knowledge of the safe's situation, the learned Judge went on in his reasons to examine, and to reject, those submissions. And, for reasons which now follow, I am of opinion that the Court a quo rightly found Appellant guilty.

Situate as it was, down a disused mine-shaft, it is grossly improbable that Appellant could casually have come across the safe by accident. It is suggested that he might have learned of its whereabouts from the real criminals. This suggestion fails to accord due weight to the circumstances, proved in evidence, that, after having been warned in relation to this specific housebreaking, Appellant showed the Detective Pretorius the way to the mine-shaft and there pointed out the two steel plates which were later seen to have been cut out of the back of the recovered safe. In the absence of any explanation, the cumulative effect of this evidence is such as, in my opinion, to point strongly towards Appellant's having participated in this crime. Reference may here be made to R. v. Samhando 1943 A.D. 608. In that case, decided before section 245 took its present form, the accused in a murder case had under compulsion pointed

out the blood-stained clothing of the deceased concealed in the branches of a tree. Referring to this, WATERMEYER A.C.J. said at p. 612:

> " I think that evidence of the fact that accused pointed out the clothing is evidence from which it can be inferred that accused knew where the clothes were to be found, and in the absence of any explanation by him it is very strong evidence of his complicity in the crime."

Notwithstanding the strong evidence, indicated above, of Appellant's complicity in the crime, he elected to give no evidence. As is well known, there is no obligation upon an accused to give evidence: but his failure to do so is a feature to which consideration may properly be given (R. v. Nyati 1916 A.D. at 324). "Considerations which may have to be taken into account in any particular case are the strength or weakness of the Crown case, the apparent certainty with which the accused could have answered that case, if he were innocent, and the probability or improbability of the accused's failure to testify being explainable on some hypothesis unrelated to his guilt on the charge in question." (per SCHREINER J.A. in R. v. Ismail

1952 (1) S.A. at 210). Applying these various considerations to the present case, it appears to me that, for the reasons indicated above, the Crown case pointed strongly to Appellant's guilt; that, had he in fact acquired knowledge of the situation of the safe in an innocent manner, Appellant could readily have said so; and that, on the record as it stands, it is wholly improbable that Appellant's failure to testify derived from some hypothesis unrelated to his guilt on the charge of housebreaking and theft. In this last mentioned connection, it was suggested by counsel that Appellant's failure to testify might possibly have been due to his having been a party, not to the housebreaking itself, but to some later stage of the crime. I see no reason why such a possibility should enure to the benefit of Appellant. As was pointed out in R. v. Ismail (supra), if an accused elects not to give evidence he takes a risk. If, as I have already held, the [redacted] inference to be drawn from Pretorius's evidence is that of Appellant's complicity in the housebreaking and theft, Appellant, by not giving evidence of any lesser crime, took the risk of being convicted on the main charge. Similar considerations, in my opinion,

invalidate ..../15

invalidate counsel's further submission that a lesser verdict than guilty as charged ought to have been brought in. Considering the evidence as a whole, including Appellant's failure to give evidence, I am of opinion that it constituted proof beyond reasonable doubt and that Appellant was correctly convicted by the trial Court.

The appeal is accordingly dismissed.

(Signed) N. OGILVIE THOMPSON.

BOTHA A.J.A.
HOLMES A.J.A. } Concur

23rd June, 1959.

J U D G M E N T.

BRESLER, J.: The Crown alleges that upon or about the 13th September, 1958, at or near Bezuidenhout Valley, Johannesburg, the two accused wrongfully and unlawfully broke and entered the house of Anton Gergion and then and there stole a safe containing jewellery and money valued roughly at £2500.

The evidence discloses that complaint, Mr. Gergion, left his house locked and secured on the evening of the 12th September, 1958, and that on his return much later he found a native constable on guard outside. He then ascertained that his house had been broken into and that his safe had disappeared. At an inspection the safe which was produced and identified by Mr. Gergion as his, it was shown that two policemen experienced difficulty in lifting and moving it.

Complainant told the Court that he had handled the safe for some 12 years and that though he did not know the make of the safe, he could inter alia identify it by the feel of the handle. A broken portion of a handle was produced which he said was the one which had been attached to the safe. He also pointed to two lines which he said were characteristic of the safe. These lines were not placed there by complainant himself but were features of the safe when bought, being common to safes of the variety, it may be presumed, of the one before the Court. The complainant did, however, produce two large keys which fitted the dismantled lock of the safe and two small keys which could open one of the small drawers the other being apparently too rusty to be opened.

As the result of an inspection in loco it was noted on the record that there was nothing characteristic or particular about the external aspect of the safe or about the handle. What was of greater consequence was that two plates which were produced fitted respectively into apertures in the rear of the safe, indicating that access to the contents had been secured by some means or process resulting in the excision of the two plates.

One Edworthy, a locksmith of some 24 years standing, testified to the difficulty of duplication but his evidence lacked scientific basis and he did not pose as an expert saying that he had obtained his information from an expert whom the Crown did not, or could not, call. What he seemed to be able to say from his own experience was that master keys would not be able to unlock the doors of the safe. Mr. Smeath Thomas did, however, produce a key which could fit and open the one small drawer - a key which belonged to an ordinary bunch of keys, he said but clearly it is the two big keys that matter.

The most important evidence led by the Crown came from Det. Sergeant Pretorius, who said that on the 21st November, 1958, he interviewed the two accused and warned them whereupon they took him to a disused mine shaft where No. 2 pointed out the two steel plates produced which were lying in front of the entrance to the shaft in question. Each of the accused supplied him with certain information which he was not however called upon or see fit to divulge. The shaft was an inclined one and he returned later and with the help of certain mine officials was able to bring the safe to the surface, and it is the safe before the

court/...

cart together with the 4 keys, two large and two small ones handed to him by the complainant. The two accused, he said under cross-examination, indicated the route and the destination and he adhered to his evidence that it was No. 2 who pointed out the two steel plates to which reference has already been made. At the preparatory he referred generally to the finding of the plates saying that he came upon them at the shaft. He used the word "aangetref". Under cross-examination he said that he gave fuller details after the preparatory examination to the public prosecutor at the request of the latter. He stated, for example, that the two accused corroborated each other. Mr. Smeath-Thomas for the accused criticised the evidence of this witness as vague and said that the concluding portions just referred to could not be accepted.

This completed the salient features of the case for the Crown and when the latter closed its case Mr. Smeath-Thomas applied for the discharge of the accused. The application was refused and the defence then closed its case.

Mr. Tucker, for the Crown, then submitted that the Crown had proved its case beyond a reasonable doubt pointing out that the knowledge of the accused in the absence of an explanation in the light of the available evidence amounted to guilty knowledge. The pointing out by No. 2 took place, he pointed out, in the presence of accused No. 1 and there was a clear inference that they both knew the fate of the safe and of its contents. Their participation in the housebreaking and the theft was, he contended, adequately established and he relied

on the/...

on the decision in R. v. Tebetha, 1959(2) S.A.L.R., 337.

In this case the Appellate Division discussed the effect of Section 245(2) of Act 56 of 1953 which seems to have been enacted in consequence of judgments such as R. v. Duetsimi, 1950(3) S.A.L.R., 674; the majority judgment was delivered by HOEXTER, J.A., and I propose reading from page 346 of R. v. Tebetha (supra), viz. : "When a person points out a thing, the pointing out is his act and proves that he has knowledge of some fact relating to that thing. In the case of the discovery by the police of a thing, there is no ppoof of knowledge of any fact in relation to that thing on the part of the person under trial unless there is proof that the discovery was made in consequence of information given by such person. In my opinion sec. 245(1) by itself did not make it clear that evidence of knowledge on the part of the person under trial was admissible. But the enactment of sub-sec. (2) has made it quite clear that such evidence is now admissible. In the case of the pointing out of a thing, the mere pointing out, which is the act of the person under trial himself, is sufficient by itself to prove his knowledge of the thing pointed out or of some fact connected with it. In the case of the discovery of a fact or thing, evidence merely of such discovery would prove no knowledge on the part of the person under trial, and therefore the sub-section permits proof of such knowledge by making admissible the evidence that the discovery was made in consequence of information given by such person. It may well be that the sub-section would have achieved a better result if it had insisted on discovery of some thing as the result of the pointing out,

but that/...

but that doesnot entitle the Court to do violence to the language of the Legislature".

I may point out that there was of course valuable discovery made as the result of the information provided and more particularly there was the pointing out by No. 2 of the steel plates. Despite the word "aangetref" in the preparatory examination it is clear that No.2 on the evidence of Pretorius in this Court did point out the steel plates. He, Pretorius, did not, it is fair to infer, appreciate the legal implications of this evidence and was asked after the preparatory examination to enlarge upon it. Clearly no thing would have been discovered but for the assistance of the two accused.

Mr. Smeath-Thomas submitted inter alia that it has not been proved that the safe before the Court was the one removed from the house of the complainant on or about the date alleged in the indictment. It seems to us, however, that the concatenation of evidence shows that a reasonably safe inference can be drawn that the safe produced is the one belonging to Mr. Gergion and in this regard the keys produced do play an important part. The lines even if part of the stock design assist in showing that it is more than a coincidence that Mr. Gergion could identify the safe as his property. The handle which was produced was also identified by Mr. Gergion and although it is simple in design it creates another link in the chain of identification. It has been pointed out in R. v. Mtembu, 1950(1) S.A.L.R., 670 that a trier of fact is not obliged to isolate each piece of evidence in a criminal case and test it by the test of

reasonable/n..

reasonable doubt and I take it that the term "evidence" used therein is wide enough to cover the description of the various features relied on to prove the identification of the safe in question. As further pointed out in R. v. Mtembu (supra) at page 679 every factor bearing on the question of guilt must not be treated as it were a separate issue to which the test of reasonable doubt must be dictinctly applied.

The next point requiring consideration is that the two accused failed to give any evidence and in this regard Mr. Smeath-Thomas referred to the case of R. v. Mabena & Another, 1948(1) S.A.L.R., 1078, the headnote of which reads: "The failure of an accused person to give evidence in his own defence is an element to be weighed in connection with the other facts of the case not only where there is evidence directly implicating the accused but also when the case against the accused consists of circumstantial evidence. The wieght to be given to such failure depends on the strength of the circumstantial evidence against the accused; the stronger the Crown case, the stronger will be the expectation that an accused will give evidence if innocent; the weaker the Crown case is, the less importance can be attached to the accused's failure to give evidence".

The failure to give evidence at the close of the Crown case by an accused is a matter which has been treated by various Courts not always however with complete unanimity but the case of R. v. Mabena (supra) will be applied as it no doubt represents the case the defence relies upon as being most of all in its favour.

It is moreover not clear to us that the case

for the Crown is a weak one. Circumstantial evidence can be of high probative value. by reason of the exclusion of mendacity and of the defects of observation - and the fallibility of inference need be no greater than in the case of direct evidence. Each type of evidence, that is direct and circumstantial, in any case admits of every degree of cogency - Phipson, p. 2, 8th Edition. At the same time failure to give evidence must not be exaggerated. What must be taken into account is the nature of the circumstances presented by the case as well as the seriousness of the charge. Once that is done the failure to give evidence may be relied upon as a factor and in the present case we do not propose to go any further than that. We have been referred to R. v. Erasmus, 1945 O.P.D., the passage on page 73 : "If an accused person is assured that the Crown has failed to rpove an essential element in the charge preferred against him, he is perfectly within his rights if he elects not to go into the witness box and the mere fact that he exercises his election in this manner cannot logically prove what the Crown has failed to prove; such a deduction would be a complete non sequitur".

In the present case the accused one or other of them at least cannot feel assured that an essential element of the charge has not been proved; in other words a grave risk may have been incurred at least as far as one of the accused namely No. 2 has been concerned because as far as No. 2 is concerned a reasonable inference can be drawn from his conduct in accompanying Sergeant Pretorius, indicating the route to be followed to the mine shaft and pointing to the steel plates. The pointing out he made

does not/...

does not as a mater of course incriminate No. 1 but the degree of knowledge No. 2 shows is high.

In R. v. Tebetha (supra) SCHREINER, J.A. (whose judgment on this point was not dissented from) said this: "One of the contentions advanced on behalf of the appellant was that in the absence of the exact context in which the 'pointing out' at the two places took place no inference could properly be drawn that the appellant was disclosing his knowledge of the details and therefore his association with the crime. In my view this contention is unsound. It is true that the mere act of pointing at a place or a movable object does not necessarily prove a prior personal acquaintance with it. One may point at a place for a variety of reasons unconnected with such acquaintance. But the object of the Legislature in enacting sec. 245(2) was clearly to enable inferences to be drawn from the evidence made admissible by the sub-section and that would always be impossible if every pointing out must be rendered colourless by the consideration that there are innumerable possible reasons, consistent with innocence, for pointing anything out. On the facts of this case once the evidence given by Booysen is held to be admissible it seems to me that the inference drawn by the trial Court is so strong as, coupled with the rest of the evidence, to leave no doubt as to the appellant's guilt".

It was said by Mr. Smeath-Thomas that no adverse inference could be drawn against his clients who in the 2½ months or so since the commission of the crime could in a variety of innocent ways have become conversant

with the/...