130/69

G.P.-S. A: 445

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

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

IAN HENDERSON JONES

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Herwitz & Lewis *Respondent's Attorney* A.G. (Cape Town)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate I. Kühn *Respondent's Advocate* K. von Lieres
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 5-3-1970 / 3-5-6
Op die rol geplaas vir verhoor op

(C.P.D.)

Na aanhoor van Adv. Kühn namens die appellant,
Gelas die Hof,
dat die saak uitgestel word om appellant die geleentheid te gee om die nuwe getuienis te oorweeg en om die nodige aansoek, indien enige, behoorlik aan hierdie hof voor te lê vir oorweging.
Die saak word uitgestel tot n datum wat deur die Griffier, gedurende die Mei sessies, bepaal sal word.
5/3/70.

21-5-70. 3.5.6.

APPEAL DISMISSED.

REGISTRAR.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

Between:

IAN HENDERSON JONES ..... Appellant

AND

THE STATE ..... Respondent

Coram: Rumpff, Holmes, et Wessels, JJ.A.

Heard: 21 May 1970. Delivered: 29 May 1970

J U D G M E N T

HOLMES, J.A.:

In the regional court in Cape Town the appellant was charged on fifteen counts of malicious injury to property, in that he damaged vegetation in a forest belonging to the City Council of Cape Town by starting fires therein. He pleaded guilty to the third alternative to the first count, namely that of contravening section 22 (2) (e) read with section 24 of the Forest Act, No. 72 of 1968, by dropping a burning match or other burning material in a private forest. He pleaded not guilty on the remaining counts. He was convicted on all fifteen counts of malicious injury to property. He was sentenced to imprisonment for two months on each of the counts, half

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of which was suspended for three years. His appeal to the Cape Provincial Division failed. He now appeals to this Court with the leave of the Court a quo.

Only on the first count was there direct evidence by eye-witnesses that the appellant deliberately lit a fire. It was about midnight, on the side of the mountain, and he made no effort to put it out. On the other fourteen counts the evidence was circumstantial. As to that, in the circumstances of this case I do not think that there is any doubt but that the Court, in considering the evidence on any one count, can look also at the evidence of what the appellant did on the occasions of the other similar counts. In respect of any count, such evidence is relevant to the issue of his guilt in that it bears on the question whether he started the fire charged in that count, and it diminishes the possibility of coincidence between his admitted presence and the occurrence of the fire. The weight or cogency of such evidence is a separate matter.

At this point I append a list of the counts, in chronological sequence, with details of the date, time, place and extent of the fires. At the trial the counts did not appear in chronological order: hence the irregular sequence in regard to the number of each count in the left hand column of this list.

COUNT	DATE	TIME	PLACE	DESCRIPTION
14.	20.11.68	3.39 p.m.	Kloofnek	20' x 20'
15.	20.11.68	4.24 p.m.	Kloofnek	Big fire, 6 acres
13.	9.12.68	12.42 p.m.	Table Mountain road	10'x10'. Small fire just off a very quiet road.
12.	11.12.68	12.47 p.m.	Kloofnek	15' x 15'
6.	5. 2.69	10.45 a.m.	Boyes Drive - near road	Small fire
7.	5. 2.69	2.40 p.m.	Boyes Drive - near road	Small fire
5.	7. 2.69	9.00 a.m.	Boyes Drive - near road	Big fire, 5-6 acres, Strong wind blowing at time.
11.	16. 2.69	10.38 a.m.	Camps Bay Road	18' x 9'
8.	16. 2.69	12.25 p.m.	Kloof Road	-
9.	16. 2.69	Shortly after 12.25 p.m.	Kloof Road	6' x 6'
10.	16. 2.69	12.40 p.m.	Kloofnek - near road	-
4.	27. 2.69	12.52 a.m.	De Waal Drive near road	Big fire
3.	27. 2.69	2.00 a.m.	Kloof Road - near road	Big fire 150' x 150'
2.	27. 2.69	4.50 a.m.	De Waal Drive near road	Near place in Count 4
1.	28. 2.69 to 1. 3.69	±midnight	Kloofnek - near road	Small fire, 9' x 9'

The appellant was a traffic officer employed by the City Council of Cape Town, and as such he rode a motor cycle. All fifteen of the fires were in private forests and nature reserves within the municipal area; and they occurred during a period of three months, namely, from 20 November 1968 and 28 February 1969.

Bearing in mind the relevance of the evidence on other counts, as mentioned above, I shall start with the earliest count in point of time, namely count 14, in relation to a fire at Kloofnek. The evidence of the witness Werner was that he is attached to the Forestry Department at Kloofnek. On 20 November 1968, at 3.39 p.m., he received a report of a fire. He went to the scene but the fire had already been put out by the Sea Point Fire Department. It had been a very small fire, about twenty feet by twenty. It was alongside the road. In addition to the men from the Fire Department, he saw the appellant there with his motor cycle. He said that if any traffic came past, the appellant regulated it. But the witness was vague about this and did not say what traffic passed. One now

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turns to the other fourteen counts, and the following picture emerges. All fifteen of the fires were started close to a mountain road within the municipal area. The appellant, with his motor cycle, was present at every one. Not one of them was started near a picnic spot or popular scenic spot where members of the public might have carelessly dropped a match or a cigarette. With the exception of the first occasion, where there is a suggestion of his having regulated some traffic, the appellant did not help in any way. On most occasions he just stood around, as it was said. When the appellant was transferred to Muizenberg, fires began to break out there too. The appellant was an unsatisfactory witness at the trial. The witness Steyl, who is attached to the Forestry Department of the municipality, said that they had never before found a traffic officer at a fire, unless thay had called one out. Hence it is unique and significant that the appellant should be at these fifteen fires, and within a period of three months. And in respect of one count it was proved, by the direct evidence of eye-witnesses, that he deliberately started the fire. His conviction on this count is not challenged.

In addition there are other factors which, although

not common to all the fires, nevertheless tend to diminish the possibility of coincidence between the appellant's presence and the origin of the fire with which I am dealing, i.e. in count 14. I list them as follows. Although some of the fires were small and had only just started, the appellant appeared on the scene within a matter of minutes. One of the fires, a small one which is the subject of count 13, occurred near a road along the contours of Table Mountain and which is very seldom used, yet the appellant was the only person present, other than the fire-fighting officials. One one day - 16 February 1969 - as many as four fires occurred within a matter of two hours, and the appellant was present at each of them. Some of the fires occurred in the early hours of the morning when the appellant had no reason to be there at all. The three fires on 27 February 1969 were close together in situation, all in the early hours of the morning, yet the appellant was again there.

Each of all the foregoing factors could, (save the one admitted conviction), by itself, be capable of a

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possible innocent explanation; but it is their cumulative effect and weight which must be considered.

What is there in the other scale? There were some fires which were started after the appellant had left at the end of February 1969. And there were some fires during the relevant period at which the appellant was not seen to be present. The question therefore arises whether it is reasonably possible, in respect of any one of the counts, e.g. No. 14 with which I am at present dealing, that the fire at which he was present was started by somebody else. Accepting this as a possibility, one weighs against it the cumulative effect of all the factors which I have already referred. In my opinion their cumulative weights and effect is so cogent, so overwhelming, that there is no room for any other reasonable possibility than that the appellant did start the fire which is the subject of the count with which I am at present dealing.

The same process of reasoning produces the same conclusion in relation to each of the other counts. In the result I am not persuaded that the magistrate was wrong in convicting the appellant on all counts. The appeal therefore fails.

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I pass now to refer to another aspect of the appeal. At the hearing in this Court the appellant applied for the conviction and sentence to be set aside and the case to be remitted to enable him to adduce further evidence before the magistrate. He sought to explain its absence at the trial by saying that his attorney had decided not to lead it. After hearing argument in limine we dismissed the application and indicated that reasons would be filed later. The main reason is that the evidence, if led, would have no material bearing on the case. Doubtless that is why the attorney elected not to lead it. The witnesses whom the appellant wished to call were the police at the Camps Bay station and at the Muizenberg station; and the officer in charge of the fire stations at Muizenberg and Roland Street. He also wished to put in his report books to prove that he had recorded the fires which he had reported. In my view the answer is that at the trial it was never disputed that the appellant had at times reported fires. It was not part of the State case that he never reported fires.

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He was not cross-examined when he said that he had. The magistrate did not rely on any failure to report. Much the same applied with regard the appellant's report books, which were available in court at the trial. Indeed, the only reference to the matter of reporting and books was a statement in the judgment of the Court a quo, made per incuriam I think. In our view this evidence which it is now sought to lead does not affect the issues. Hence our refusal of the application.

To sum up, the appeal is dismissed.

G.N. HOLMES

JUDGE OF APPEAL.

Rumpff, J.A.
Wessels, J.A. } CONCUR