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G.P.-S. J. 445.

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

(APPELLate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

1. JOHN GOMES KELLY; 2. ENVER BENEFIELD
Appellant.

versus/teen

THE STATE
Respondent.

L.C. Raal, Box 3439. Jhb.
Israel. Sachs & Simon
Appellant's Attorney *Respondent's Attorney* Dep. A.G. (Jhb.)
Prokureur van Appellant *Prokureur van Respondent*

G.A. Alexander S.C. ± S. Aaronson
Appellant's Advocate *Respondent's Advocate* M E Tucker
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 17 - 5 - 1971
Op die rol geplaas vir verhoor op 1-9-10

(W. L. D.)

Ogilvie Thompson C.J. Corbett A.J.A.
Kotzé A.J.A.

9.45um. - 10.30um.
10.30um. - 10.50um.
10.50um. - 10.53um.

C.A.U.

Appeal dismissed

BOTH ON BAIL.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JOHN GOMES KELLY ..... First appellant

ENVER BENEFIELD ..... Second appellant

and

THE STATE ..... Respondent

CORAM: OGILVIE THOMPSON, C.J., CORBETT et KOTZÉ, A.JJ.A.

HEARD: 17.5.1971. DELIVERED: 26.5.1971.

J U D G M E N T

KOTZÉ, A.J.A. : -

The two appellants, John Gomes Kelly and Enver Benefield both non-Europeans, to whom I shall jointly refer as the accused and to whom I shall separately refer as accused No.1 and accused No. 2 respectively, were tried before Claassen, J., in the Witwatersrand Local Division on a charge of robbery. It was alleged that on or about the 3rd December, 1969 and at Johannesburg they wrongfully and unlawfully assaulted Janko Grcic, to whom I shall refer as the complainant, by

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pointing a firearm at him and taking from his possession with force and violence the sum of R3.000-00. They pleaded not guilty, were found guilty and sentenced to imprisonment for a period of three years. Both accused now appeal pursuant to leave granted by the trial Judge.

The complainant, a Yugoslav by birth, has lived in South Africa for about ten years. He follows the occupation of a cabinet maker. His evidence-in-chief covers a period of five successive days during November or December, 1969. At about 2 p.m. on the first of these days he met accused No. 1, an earlier acquaintance, by chance in front of the Kontinental Hotel, Johannesburg. After greetings were exchanged, accused No. 1 told him that he wished to tell him something. Complainant was then busy and a meeting was arranged at the same venue for the same evening. Accused No. 1 kept the appointment and told the complainant that if he was interested he could sell him a parcel of diamonds. The complainant displayed some reluctance, was told that the diamonds were cut and could be bought legally. He was persuaded to agree to an inspection which was arranged for 8 p.m. on the day following.

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On the second day accused No. 1 called for the complainant. Accompanied by a friend of his, Zollner, the complainant on the directions of accused No. 1 drove his car to the Coronation Hospital. Whilst Zollner remained in the car, the complainant was taken by accused No. 1 to a Mercedes car some 50 yards away where accused No. 2 was introduced to him by the name of Tony. There accused No. 2 showed him 12 or 13 cut diamonds, said to range from 3 to ½ carat stones. A price of R4.000-00 was mentioned whereupon the complainant asked to take away one or two stones to enable him to determine the parcel's value. Accused No. 2 explained that he could not agree on his own accord but had to consult a friend who works in a diamond cutting factory. A further meeting in front of the Hospital was fixed for the next day at noon.

The parties met at the appointed place on the third day. Accused No. 2 told the complainant that he could not hand him a sample. After some negotiation the complainant was handed a ½ carat stone subject to an understanding that he would return it within an hour. The complainant did so after

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having consulted a watchmaker, Cooper, and having ascertained that the stone was a genuine diamond of poor quality valued at about R25-00 to R50-00. Negotiations were resumed and culminated in an agreement that the complainant would purchase the entire parcel at R3.000-00 and that pari passu delivery and payment would take place at the Coronation Hospital at midday on the following day.

At 12.30 p.m. on the fourth day complainant reached the Hospital. He had meanwhile persuaded a man, Millard (who was also shown the ½ carat stone), to advance the purchase price of R3.000-00 on the understanding that they would each have an equal share in the diamond-buying project. The two accused awaited the complainant's arrival. They entered his car. Accused No. 2 took a front seat and accused No. 1 a rear seat. In reply to a question by accused No. 2 the complainant confirmed being in possession of the money. On a request so to do, the complainant drove to a deserted spot near a graveyard behind the Hospital. In reply to a question the complainant told accused No. 2 that the money was in front of him in

the cubby hole where indeed it was made up of R10-00 notes. Accused No. 2 told the complainant that the diamonds were at his nearby house and he directed him where to proceed. At a certain place he was told to stop. Accused No. 2 directed his attention to the right where he said his house was. The complainant felt something against his temple which he ~~considered~~ assumed to be a gun. Accused No. 2 took the money out of the cubby hole and they both ran away. The complainant endeavoured to pursue them, enquired from two men where they had gone but failed to set eyes on them again. He returned to the city where he reported to and consulted Millard.

The following day, the fifth, he reported the events to the police.

The cross-examination of the complainant established that he was a man fully prepared to embark on negotiations for the purchase of stolen diamonds. On his own admission, after an earlier dishonest denial, he was a man who in the past indulged in illicit diamond dealing. It was further elicited from the complainant in cross-examination

that he refunded to Millard, by payment to his attorney, Mr. Goss, half of the amount lost viz. R1.500-00.

Cooper, the watchmaker, confirmed the complainant's evidence that he (the complainant) called on him early in December, 1969, when he showed him a cut diamond of poor quality which he regarded as being worth R20-00 or R30-00. In cross-examination Cooper stated that some weeks before the event mentioned in his evidence-in-chief the complainant enquired from him whether he would be interested in buying diamonds.

Zollner confirmed the complainant's evidence that he met accused No. 1 through the complainant and that he accompanied the two of them round about 8 o'clock one evening to Coronation Hospital in order to enable accused No. 1 to show the complainant some cut diamonds. He also confirmed that the complainant went to a Mercedes car with accused No. 1 and that he returned after about ten minutes.

The defence version, testified to by both accused No. 1 and accused No. 2, disputed the robbery but

admitted that certain negotiations for the purchase of cut diamonds did take place between them and the complainant. In brief the defence version was to the following effect: -

During December 1969 a chance meeting did take place between complainant and accused No. 1 at the Kontinental Hotel. The complainant raised the question of diamonds whereupon he told him that he was financially embarrassed. The complainant desired to know how he could communicate with him in future. It was arranged that No. 1 accused would show the complainant that evening where he lived. They met as arranged. Complainant, Zollner and accused No. 1 proceeded by car to Coronation. They picked up two coloured girls, went to the Bosmont Hotel which the girls entered. They returned to the car after about 30 minutes. Complainant took accused No. 1 to his house and arranged a meeting for the next day in order to look for diamonds.

On the second day accused No. 1, the complainant, Zollner and two other Europeans embarked from the Kontinental Hotel on a search for diamonds. They drove to a shebeen house

in Nancefield. In the course of some beer drinking accused No. 1 introduced the complainant to Tony (accused No. 2) and some of his other friends. In due course it was arranged that accused No. 2 would show the complainant some diamonds the following day.

The third day accused No. 1 met the complainant at the Kontinental Hotel. The two of them, Zollner and two Europeans drove to the Coronation Hospital. Accused No. 1 took complainant to a car where he met accused No. 2 who showed him some cut diamonds. A discussion ensued in regard to price. Accused No. 2 quoted a price of R6.000-00. Complainant responded by saying that they would meet again the following day. It was agreed that the meeting time would be 12.30 p.m.

At the meeting on the following day, the fourth, the complainant requested to be allowed to take away one diamond to be tested. He took one of the smaller ones, undertook to be back in an hour's time but returned after three hours. In response to the suggested price of R6.000-00, the complainant counteroffered R400-00. Negotiations broke down. The complainant was cross and admonished accused No. 1 and accused

No. 2 for wasting his time. They then parted company and did not meet again.

In resolving the two conflicting versions presented by the evidence the learned Judge accepted the complainant's evidence and rejected the evidence of the accused. In so doing he prefaced his finding by saying: -

> "Before an accused person can be convicted the State's case must be proved beyond reasonable doubt. Credibility must play an important role in the finding of the Court."

Mindful of the reluctance of an appellate tribunal to upset credibility findings by a trier of fact Mr. Alexander, on behalf of the accused, conceded at the outset of his argument that his task would be a formidable one unless he could show, as he submitted he could, that on an analysis of the judgment the learned trial Judge was not disposed merely to rest his decision on credibility but that his credibility finding flowed from certain safeguards which do not stand the test of objective criticism. Counsel based his argument on the eighth, tenth and eleventh principles set out

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in the judgment of DAVIS, A.J.A. in Rex v. Dhlumayo and another, 1948 (2) S.A. 677 at 706: -

> "8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.
>
> 10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.
>
> 11. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter."

The factors which in the opinion of the trial Judge safeguard his acceptance of the complainant's evidence are set out in the judgment as follows: -

> "(a) There can be no valid reason, on the story of accused No. 1 and No. 2 for complainant to report his friends to the police on a very serious charge.
>
> (b) By doing so, complainant knew he was exposing himself to the police as an illicit diamond dealer, and for the rest of his life he would be suspect, possibly even running the risk of being deported.

(c)/....

(c) By reporting he would likewise expose his friend, Millard, as a potential illicit diamond buyer, and making him a lifelong suspect as far as the police were concerned. He and Millard would possibly also have been liable to prosecution and/or to deportation.

(d) He must have known that the police could immediately have checked with Millard the truth or untruth of this story that Millard had become involved in the illicit deal and had advanced R3.000-00.

(e) The fact that he had repaid Millard's attorney, Mr. Goss, only half of the R3.000-00, namely R1.500-00, seems to confirm that he and Millard were in the deal jointly and in equal shares, otherwise the full amount would have had to be returned if it had just been a loan.

(f) Complainant said that he had paid the R1.500-00 to Mr. Goss, Mr. Millard's attorney, and that Mr. Goss knew all about this whole story. When he said that in the witness-box, he must have known that the whole thing could have been checked with Mr. Goss as to its truth or untruth, if the story was questioned."

In regard to the firstmentioned factor the submission made on behalf of the accused was that the learned Judge in effect adopted a wrong approach in law by posing the question whether any reason could be imagined why the complainant should give false evidence and then proceeding to answer the question in the negative. This contention,

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although not without substance, loses much of its force in the light of the particular circumstances of the instant case where the making of a false complaint by the appellant would of necessity reveal his own participation in an illegal transaction. This consideration bears directly on the attack made on the second and third factors viz. that the transaction to be disclosed related to the purchase of cut diamonds and not to illicit dealing in uncut diamonds. This attack also fails to carry conviction inasmuch as the circumstances revealed by the complainant's version point very strongly, almost inevitably, to the negotiation of a sale of stolen diamonds.

The submission made on behalf of the accused in regard to the fourth safeguarding factor is that Millard would never have committed the indiscretion of confessing to unlawful conduct. He certainly or at least probably, so it was argued, was possessed of less knowledge of the suspicious features than the complainant and would have been able to give a convincing account of a lawful transaction relating to cut diamonds. After all the stone exhibited to him was a cut stone

of low value. The intended purchase price of R3.000-00 was not manifestly low and indicative of dishonest dealing. This contention advanced by Mr. Alexander certainly is one of substance and serves to indicate that this factor, seen as as safeguard by the learned Judge, is of doubtful value as a circumstance reinforcing his finding. Yet on the other hand it requires a bold person to lay a complaint if in truth an advance of R3.000-00 was never made by Millard. This might not amount to a corroborative circumstance but it does tend to inspire confidence in the complainant's version.

In regard to the fifth factor, counsel correctly pointed out that it was no part of the complainant's version that Millard extended a loan to him. The remaining part of the submission was to the effect that in the absence of a legal or moral duty to make partial reimbursement to Millard, the payment to Goss was inconsistent with a robbery, seems to me to be unconvincing. If indeed Millard and the complainant embarked on a joint venture it seems reasonable that all losses, albeit of an extraordinary nature, would be shared.

The final safeguard referred to in the judgment was, so it seems to me, rightly criticised as an equivocal consideration. At best confirmation of the complainant's testimony by Mr. Goss would amount to corroboration by the complainant of his own story.

The submission that this Court is at large to disregard the trial Judge's findings was further reinforced by a contention that some material considerations were overlooked: -

Attention was directed to what seems to be an unequivocal denial by the complainant early in his cross-examination that he had dealings with accused No. 1 prior to December 1969 and a subsequent retraction which he was driven to make when he was confronted in cross-examination by one Raschid Petersen who figured in an illicit diamond transaction with the complainant and accused No. 1 some six years before. In dealing with what appears ex facie the record initially to have been a deliberate untruth, the trial Judge euphemistically states in his judgment: - ".... in his denial....he was wrong." It cannot be gainsaid that the learned Judge placed

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a charitable appraisal on the passage in question but he certainly cannot be faulted in the sense that he overlooked a shortcoming in the State case. This feature of the evidence was clearly present to his mind as will presently appear.

A further contention advanced in support of the submission that features of importance were overlooked concerns what Counsel termed "the patent improbability" that a robbery such as that described by the complainant would be committed in broad daylight by two men who are known to the complainant after having exposed themselves to him and Zollner. It is unlikely in the extreme that this feature did not engage the attention of the trial Judge. In any event an answer to the contention is readily at hand in the probability that the accused were entitled to hope and expect that the complainant, an immigrant, would be dissuaded from bringing to the attention of the police authorities a robbery which flowed from serious unlawful conduct in which he played a prominent part.

A further criticism advanced against the judgment is that it overlooks the possibility that the complainant

may well have considered it easier to invent a story of a robbery, to tell Millard about it and so enrich himself to the extent of at least R1.500-00. This suggestion was not put to the complainant in cross-examination, is speculative and somewhat farfetched. In my view the failure to mention this possibility does not detract from the judgment of the Court a quo.

I pass now to a consideration of the question whether, regard being had to the argument summarised above, it has been shown that the conviction of the accused was wrong in the sense that the trial Judge should have had a reasonable doubt as to the guilt of the accused.

The judgment of the Court a quo reveals that the learned trial Judge considered the evidence with considerable care, that he weighed the State version against the defence version with due regard to the onus and that he clearly recognised that in the decision of the case findings on credibility are of crucial importance. He paid meticulous attention to the personalities of the witnesses. In respect of the complainant the learned Judge said: -

> "I observed the complainant closely. He is a foreigner of Yugoslav origin. He speaks in the English language which is not his own language. He admitted a previous attempt at buying a diamond in Kimberley. He knew that the proposed deal was not an honest one. He was a single witness as to a robbery. He must be considered also as an accomplice in a proposed illegal deal. I warn myself that I must be extremely careful in accepting the evidence of such a man. I am fully aware of the caution to be exercised when dealing with a single witness and with an accomplice. The Court must warn itself of the dangers inherent in the evidence of such a person. One must therefore look to safeguarding factors, reducing the risk of a wrong conviction..... As I said, the complainant made a good impression on me."

In respect of the accused the trial Judge found that they made a poor impression and he gave convincing reasons for holding that they were unreliable.

Viewed against the care with which the learned Judge approached the decision of the case, the argument presented against upholding the conviction loses much of its force. The approach adopted seems to be a correct one. While admittedly some criticism can be levelled against part of the reasoning of the learned Judge, and while it is true that he did not mention every feature stressed in argument, I find myself

unable, in the light of the careful approach which was adopted and heeding the advantages derived from being immersed in the atmosphere of a trial, to hold that the criticisms referred to either singly or cumulatively amount to misdirections or that the learned Judge was shown to be wrong in concluding that the alleged offence was proved beyond reasonable doubt.

The appeal is dismissed.

KOTZE, A.J.A.

OGILVIE THOMPSON, C.J. }
CORBETT, A.J.A. } Concur.