92/74

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.

MARK KAUFMAN

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Symington & de K *Respondent's Attorney* Dep.A.G.(Jhb.)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate L. Lawrence S.C. e *Respondent's Advocate* N. Fleischack (Miss)
Advokaat van Appellant J. Marcus *Advokaat van Respondent*

21-11-1974

Set down for hearing on 17-12
Op die rol geplaas vir verhoor op

(W.L.D.) Coram: Wessels Muller et Hofmeyr (AARR)

Lawrence 9.47-11.00; 11.15-11.25; 2.15-2.45;
Fleischack 11.25-12.40.

C.A.U.

Leave by Wessels. J.A. (82/74.

The Court allows the said appeal and sets aside the conviction and sentence.

(Judgment per Wessels J.A.)

29/11/74

Registrar

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

MARK KAUFMAN.....Appellant

and

THE STATE.....Respondent

Coram: Wessels, Muller et Hofmeyr, JJ A.

Heard: 21 November 1974

Delivered: 29 November 1974

J U D G M E N T

WESSELS, JA:

Appellant appeared before Nicholas, J., in the Witwatersrand Local Division on an indictment in which it was averred that

> "upon or about or during the period from the 25th April, 1973, to the 27th April, 1973 and at or near Boksburg North.....the accused did wrongfully and unlawfully steal six hundred and sixty four (664) crates of whisky, the property or in the lawful possession of Distillers Corporation (S.A.) Limited."

In.....2/

In the evidence there is also reference to cases of whisky. I shall throughout follow the wording of the indictment and refer to crates and not cases of whisky.

Appellant, who had pleaded not guilty, was convicted in respect of 218 crates. He was sentenced to three years' imprisonment of which one-half was conditionally suspended. He was, in addition, sentenced to a fine of R2 000 and, in default of payment, to a further one year's imprisonment. The appeal is before this Court pursuant to leave granted to appellant in terms of the provisions of section 363(6)(iii) of Act No. 56 of 1955.

The circumstances leading up to appellant's appearance before the Court a quo are summarised as follows in its judgment:

> *In the early morning of the 25th April 1973, a vehicle which was loaded with 664 crates of whisky having value of approximately R30,000-00 left the premises of the Distillers Corporation, Wadeville, Germiston, for the company's depot near Pretoria. The driver of the vehicle was Rennie Mashigo. The vehicle did not reach its destination. It was found on the following day at Kwa Thema Township, Springs. It was empty.

On.....3/

On 1st May 1973, the stolen liquor was recovered by the Murder and Robbery Squad, Springs, in circumstances to be more fully described, partly at the premises of the Angelo Hotel, Off-Sales, Boksburg, and partly at Dawson's Hotel, Johannesburg, and all of those then found to be connected with the liquor were arrested. They included Rennie Mashigo, Emanuel Kaufman, the manager of the Boksburg North Hotel Off-Sales at Witfield near Boksburg, and Mark Kaufman, the accused now before the Court, who is apparently a man of some substance. He is a director of Mark Kaufman Hotels (Pty.) Ltd., which runs the Central Hotel and the Central Hotel Off-Sales at Boksburg; of Dawson's Enterprises (Pty.) Ltd., which conducts Dawson's Hotel in Johannesburg; and of the Boksburg North Hotel (Pty.) Ltd., which conducts the business of the Boksburg North Hotel and Boksburg North Off-Sales. These three were charged jointly in this court with the crime of theft. On the date of the trial, Emanuel Kaufman did not appear. He had apparently left the country and his bail of R1,000-00 was estreated. Rennie Mashigo pleaded guilty, and there appears to have been a separation of trials. Rennie Mashigo was sentenced to a fine of R250-00 or

one.....4/

> one year's imprisonment and, in addition, to three years' imprisonment conditionally suspended. The trial against the present accused, who pleaded not guilty, was postponed until the 1st April and began before me on the 2nd April this year.*

Appellant, by his own admission, caused 218 crates of the stolen whisky to be conveyed from Angelo Hotel Off-Sales to a store-room at Dawson's Hotel during the morning of Monday, 30 April 1973. The crates in question remained in storage there until they were removed by the police after appellant's arrest on the following day. The appellant, who gave evidence in his defence, explained that it was his intention throughout to return this whisky to the complainant, and that, at all material times, his possession thereof was, therefore, innocent. Nicholas, J., for the reasons detailed in his judgment, concluded that appellant's exculpatory explanation relating to his possession of the 218 crates, could not reasonably possibly be true, and he accordingly rejected it as false. The crucial issue before

this.....5/

this Court is whether the Court a quo clearly erred in rejecting appellant's explanation.

I propose setting out the substance of appellant's explanation of how the 218 crates came to be stored at Dawson's Hotel on Monday morning, 30 April. I can do no better than to incorporate herein the summary appearing in the following extract from the trial Court's judgment:

> "The accused gave evidence in his own defence. In the following summary of his evidence in chief, it is convenient to use the first person although the summary is by no means verbatim nor does it necessarily follow the exact order in which the accused gave his evidence.

He said:.....6/

He said: 'I reside at Dawson's Hotel, Johannesburg, where I share room 22 with my younger brother, Mannie Kaufman. At 7:30 on Thursday 26 April 1973, my brother told me that he had purchased a large quantity of whisky from a Bantu driver of the Distillers Corporation. He said that he had paid R6,000-00 in cash to the Bantu for this whisky. I went berserk. I demanded to know where he had got the R6,000-00 from. He told me that he had drawn a cheque on Boksburg North Hotel Off-Sales account for that amount. He had taken the cheque to Barclays Bank at Witfield, and had handed the R6,000-00 to the Bantu, whom he named as David. I told him he had no authority and no right to have done such a crazy thing. The whisky would have to go back to its owners. I wanted no part of such a purchase and I was holding him personally responsible for the repayment of the R6,000-00. I forced him to refund it which he did on 27 April. He drew the money from his own personal building society account and deposited it to the credit of the banking acount of the Boksburg North Off-Sales. (It may be mentioned in parenthesis that the money was in fact drawn from the building society and deposited to the bank account

on.....7/

on 28 April 1973). I had my doubts about Mannie's story. I could not believe that anyone could have done such a crazy thing. I said to him immediately after breakfast, 'We are going to confirm that you have done this'. We drove out in his car direct to the Angelo Hotel Off-Sales. I had last been there many months before. I had no personal financial interest in that business. I only made social calls on my way to Boksburg. I found this huge stack of various brands of whisky through the whole of the storeroom and also the rear of the shop. I asked him if all the whisky was there. I received a report from him. He told me he instructed his drivers to take 200 cases to Central Hotel and Central Hotel Off-Sales. These businesses are run by the Harris brothers who are my nephews. Gerald Harris is a co-director of mine in Dawsons Enterprises and in the Mark Kaufman Hotels which trade as Central Hotel and Central Hotel Off-Sales. I asked him if he had realised that he had now involved my nephews, and what he had told them. He said he had told Gerald Harris that he had bought it at a discount price. I was mad at him for doing the deal and for implicating the Harrises. We had all of us worked hard and in one moment of

sheer.....8/

sheer stupidity he had ruined the whole family. I told him that the liquor had to go back; that I could not trust him any further with the possession of the whisky. I warned him that he was not to touch one bottle of the consignment. I was going to remove it at my earliest convenience from his control and have it returned to its rightful owners. I was going to take it back to Distillers. From the Angelo Hotel Off-Sales I called my attorney, Mr. Harry Frank. I was in a quandary. My brother was deeply implicated, but he was still my brother. Mr. Frank was also a great personal friend and adviser, and I wanted to be able to return the whisky with his advice and see how best it could be done to extricate my brother from the mess. Although I 'phoned Frank's office, he was not available; it was said that he was ill. I got back to Dawson's Hotel at about lunch-time in a daze. I got hold of my maintenance manager, Mr. du Toit, and told him that I wanted him to prepare a storeroom for me. I told him to secure the windows with bars and to buy very good padlocks, and only I was to keep possession of the keys. I pointed out the place that was to be the storeroom. It was certain toilets

which.....9/

which had not been used for about two years. I knew that the whisky had to go back to Distillers. I did not want to make a move without legal advice from my attorney. I could not trust my brother with the control. I was in a hurry to take it away and keep it all in one place and at the right time return it to Distillers. I gave the instruction on Thursday the 26th April. On the Friday afternoon du Toit told me that it had been done, and he gave me the keys. I 'phoned Gerald Harris (this must have been on Thursday, 26 April) and told him that under no circumstances was he to touch or use any of the whisky, that it had to go back, it was being sent back. He was not to enter it into any of his liquor stock books. I also asked him to see if he could get transport from a friend of his with a transport business in Boksburg. On the Thursday afternoon he said he hoped to get a truck on the morrow, but he did not get a truck on Friday. It was the end of the month. I again 'phoned Frank's office, I do not know how many times. He was not available. When I called again the girl said he was sick and cannot be disturbed. Late on the Friday afternoon a message came to

tell.....10/

tell me not to panic. He hoped to be well on Monday and would come to see me at Dawson's Hotel. I myself tried to get transport, and eventually found a truck at Dan Perkins, Johannesburg. They told me I could only get it on the Saturday morning. They sent a 2-ton truck although I had asked for the biggest truck they could find. It arrived at Dawson's on Saturday morning and was left outside the hotel between 11:00 and 11:30 a.m. I was reluctant to cart it around over the week-end.'

(The accused then went on to describe the week-end which he spent, and said that on the Monday morning he was in quite a state).

He proceeded: 'I told my brother I was going to take the truck and bring the whisky back to Dawson's so that he would not have a chance of doing anything reckless. I took some of my own boys and drove the truck myself and loaded it up. I found the truck would only take 111 cases. We brought it back to Dawson's at about 9:00 a.m. and put the liquor into the storeroom I had prepared. I asked du Toit to keep count and specially told him the liquor was not to be mixed up with any of the liquor belonging to the hotel, and that it was to be returned to the company. I went back

on.....11/

> on the same Monday morning and fetched the second load of 107 cases, and this again was put into the storeroom. Du Toit assisted and kept count. I had 218 cases in my storeroom. At about noon Mr. Frank arrived together with Mr. Hoppenstein, who was his counsel in a divorce case he had been concerned with that Monday morning. I told him the entire story, telling him what had transpired and what I had done, and asked his advice, which he gave me.' *

It is not disputed by the prosecution that Mr. Frank advised appellant to return the stolen liquor to Distillers without further delay, and also that the return of the liquor could not be coupled with any condition regarding the possible extrication of his brother. If regard is had to the evidence of appellant and that of Mr. Frank, as to what was discussed at the consultation, it is, in my opinion, clear that appellant sought advice on the basis that all the stolen liquor, and not merely a substantial proportion thereof,

was.....12/

was to be returned to Distillers. Mr. Frank stated that although he could not recollect the exact figure mentioned by the appellant, it was his impression that "664, 646 something like that" was mentioned. It is, however, clear that Mr. Frank's advice was given on the footing that all the stolen liquor would be returned to Distillers. And appellant's evidence was that he in fact sought advice on that footing. Miss Fleischack, who appeared on behalf of the State, both in this Court and at the trial, conceded that the advice must have been sought and given on that footing. In my opinion, the concession was made both fairly and correctly. It was submitted by her that, prior to the consultation with Mr. Frank, and for a reason not disclosed in the evidence, appellant had reconsidered his earlier decision to steal the 218 crates of whisky, and had decided to return all the stolen liquor to Distillers. It is not necessary, therefore, to consider appellant's conduct subsequent to the consultation with Mr. Frank,

because.....13/

because the evidence in regard thereto does not furnish any basis for holding that appellant had once more changed his mind after the consultation and decided, notwithstanding Mr. Frank's advice, to retain the 218 crates of whisky for his own benefit. In any event, his conduct subsequent to the consultation is substantially more consistent with an intention to return all the stolen liquor to Distillers than with an intention to return only a portion thereof.

Mr. Du Toit, appellant's maintenance manager at Dawson's Hotel, testified on behalf of the State. He stated

that.....14/

that appellant had instructed him on Thursday (the 26th) to convert a toilet-room, which was not being used as such at the time, into a store-room by adding burglarbars to the windows and strong padlocks to the doors. Mr. Du Toit carried out his instructions, and the store-room was available for use as such on the following day (Friday). He also testified in his evidence in chief, that he was in charge of the off-loading operations at Dawson's Hotel during Monday morning (the 30th). He confirmed that two loads were handled by him, involving 111 and 107 crates respectively. As to appellant's instructions to him after the 107 crates had been off-loaded, Mr. Du Toit testified as follows in his evidence in chief:

> "En waar was die whisky wat afgelaai is gesit? --- Weer by die ander wat ons die vorige keer afgelaai het.
>
> In die spesiale stoor? --- In die spesiale stoor. Toe het die beskuldigde daar aangekom, hy noem my op my naam en hy het vir my gesê, Fanie asseblief moenie dat die drank meng met ander nie. Want dit moet teruggaan.

DEUR DIE HOF: Was dit die tweede keer? --- Dit was toe die 2e keer.
ADV. FLEISCHACK: Ek het gedink hy was nie die 2e keer daar nie? --- Hy was nie daar toe hulle dit afgelaai het nie. Hy het na my toe gekom.

Wanneer? --- Terwyl ons besig was om die goed in te vat.

Is dit nou die 2e klomp? --- Dit is die 2e klomp.

Ja hy sê moenie dat dit meng nie? --- Ons moet dit nie met die drank van die hotel meng nie want die goed moet teruggaan.

Is dit al wat hy gesê het? --- Dit is al."

Miss Fleischack submitted that in view of the relationship between appellant and Mr. Du Toit, very little weight, if any, can be given to the above-quoted evidence. He was, however, a witness called by the State, and gave the evidence not as a result of leading questions in cross-examination, but, as I have already indicated, during his examination in chief. I can find no basis, either in the evidence or in the judgment of the trial Court, for

holding.....16/

holding that Mr. Du Toit gave false evidence in order to assist his employer. I will, however, bear in mind the possibility that appellant's instructions to Mr. Du Toit may have been intended to mislead him as to what his real intention was, i.e., as was contended on behalf of the State, an intention to steal the liquor in question.

It is common cause that early on Monday morning appellant used a hired truck, which had been made available to him during the previous Saturday morning (the 28th), in order to convey the 218 crates from Angelo bottle store to Dawson's Hotel. It was not disputed that his brother, Emanuel, accompanied him on both trips, nor that he was assisted by his Bantu employees both in the loading and off-loading of the liquor. The loading at Angelo bottle store commenced shortly after 7 a.m. and, according to Mr. Du Toit, the last load arrived at Dawson's Hotel somewhere between 8 and 9 a.m. The off-loading and stacking of the crates in the store-room took quite some time.

It.....17/

It appears from the trial Court's judgment that appellant's evidence, that he was in no way associated with the theft committed on Wednesday (the 24th) by his brother and Rennie Mashigo, was accepted as truthful or, at any rate, as being reasonably possibly true. It is also apparent from the judgment that Nicholas, J., accepted it as "clear on the evidence" that on the Tuesday (1 May) appellant was engaged in preparations for the return of all the liquor to the Distillers Corporation, or, at any rate, the liquor from Central and Angelo. He added, however, that "accepting that he intended to return all the liquor at that stage, that cannot help him if it can be proved beyond any reasonable doubt that he had already made himself a party to the crime of theft on the previous day". In the result, the trial Court rejected appellant's evidence as to his intention in removing 218 crates to Dawson's Hotel as not being reasonably possibly true. The trial Court

held.....18/

held, further, that it was "presumably as a result of" the consultation with Mr. Frank on the Monday "that the accused engaged in preparations for the transportation of the whisky back to Distillers Corporation the following morning". On the trial Court's finding, therefore, appellant's dishonest possession terminated during or shortly after the consultation. I revert to the concession made by Miss Fleischack as to the nature of the discussion between appellant and Mr. Frank. The evidence of the latter, an attorney of high repute (he was at the time a member of the Council of the Transvaal Incorporated Law Society, had on three occasions been its president and had also been the president of the Association of Law Societies of the Republic of South Africa), furnished material corroboration for the appellant's evidence notwithstanding the trial Court's valid, but sole, criticism of Mr. Frank's evidence on the ground of its vagueness in several respects. Even though he was somewhat vague as to the precise number of crates involved, it

was.....19/

was his impression that it was in excess of 600. What is, however, of far greater importance, in my opinion, is his evidence that appellant made it "quite clear" to him that he wanted to return to Distillers the whisky which his (appellant's) brother had "purchased" from Rennie Mashigo, but that "he wanted me to advise him as to how he could help or protect his brother". There is no suggestion in the evidence, and none arises on a consideration of the probabilities, that the problem presented to Mr. Frank involved the return of part of the stolen liquor only. Appellant could not possibly have been so naive as to entertain any hope that Distillers might "let his brother off the hook" consequent upon the return of approximately two-thirds of the stolen liquor. In my opinion, the evidence of Mr. Frank justifies a positive finding that appellant sought and was given advice on the footing that all the liquor was to be returned. Appellant's problem, as presented to Mr. Frank, was more particularly concerned with

the.....20/

the procedure to be followed in returning the liquor with due regard to appellant's desire of getting his brother "off the hook". I reiterate, therefore, that Miss Fleischack's abovementioned concession was correctly made. I am not overlooking the fact that, if it were to be proved beyond any reasonable doubt that appellant intended stealing the 218 crates when he caused them to be removed to Dawson's Hotel, it does not avail him to say that he thereafter changed his mind and then formed an intention to restore them to Distillers. At best, it could be relevant on the question of sentence. Mr. Frank's evidence corroborates that of appellant as to the numerous occasions on which the latter telephoned the former's office in order to make an appointment. Mr. Frank also explained that, because of illness, he could not see appellant before the Monday. In passing, I might mention that an advocate was present at the appellant's consultation with Mr. Frank.

His.....21/

His presence did not relate to appellant's purpose in having the consultation - Mr. Frank had invited him to lunch. During that morning Mr. Frank and the advocate were concerned in the settlement of a divorce trial. It is of some interest to note that the presence of the advocate did not inhibit appellant from making a relatively complete disclosure of his brother's theft and his own conduct subsequent thereto.

In holding that appellant's exculpatory explanation of his possession of the 218 crates of whisky was not reasonably possibly true, Nicholas, J., relied on the cumulative effect of several facts detailed in his judgment. The learned Judge referred to the fact that it was a significant feature that 218 crates were removed to Dawson's Hotel. As to this, the judgment reads as follows:

> "Nor are the figures without significance. The stolen whisky was deposited in three places, Angelo Hotel Off-Sales, Central Hotel Off-Sales and Dawson's Hotel. There was no evidence

as.....22/

as to the precise count of cases of whisky at the first two places respectively. There was some evidence that there were approximately 200 cases at Central. No doubt, Gerald Harris could have given an exact figure, but he was not called as a witness by either side. It was, however, established that the quantity of whisky found by the police at Angelo on the 1st May (which whisky had come from both Central and Angelo) was 443 cases. This, ignoring the fraction, was two-thirds of the stolen whisky. It is conceivable that this was fortuitous, but was it fortuitous that the first load moved by the accused consisted of 111 cases which, again ignoring the fraction, was one-half of one-third?

The accused could give no explanation why this figure was carried, except that the vehicle was then full. Nor could the accused explain why, on the second trip, 107 cases were received at Dawson's if 111 cases could have been carried. There was no evidence, other than that of the accused, as to what number was loaded for the second trip. But was it fortuitous that three cases were found to be missing in the final count, and that if these three cases had been carried on the second trip, the load would have been 110 cases, and that the two loads together would have amounted to 221

cases.....23/

cases which, again ignoring the fraction, is precisely one-third of the stolen whisky?

These figures point to the conclusion that the figure of 218 cases stored at Dawson's Hotel was no fortuitous figure; that the accused did not fortuitously abandon the operation after he had transported the two loads; but that he did so because he had received the quota to which he was entitled, that is, one-third of the stolen consignment.

Mr. Mendelow argued that figures can be made to prove anything. That is said to be true of statistics. But it can hardly be an accident that the figures in this case can so clearly point to an arrangement that the accused was to get one-third of the consignment and that the other ~~two~~ two-thirds between Emanuel Kaufman and the Harrises."

I have given careful consideration to the reasoning which led Nicholas, J., to conclude that "it can hardly be an accident that the figures in this case can so clearly point to an arrangement" that appellant was to get one-third, his brother one-third and the Harrises one-third of the whisky. In my opinion, however, the figures in this

case.....24/

case are not all that significant. For one thing, there is no basis in the evidence which gives rise, even as a matter of probability, that the Harrises received, or were to receive, a one-third of the 664 crates. Appellant's evidence regarding 200 crates of whisky being sent to the Harrises, is based on what his brother Emanuel told him on the Thursday morning. It appears, however, from the evidence of a State witness, Solomon Marshedi, who was employed at the Central Hotel Off-Sales bottle store, that the Harrises probably received only 200 crates of whisky. He testified that on Tuesday (1 May) he was instructed by appellant to convey liquor from Central Hotel and its Off-Sales bottle store to Angelo bottle store. According to him, he loaded 50 crates at the bottle store and 150 crates at Central Hotel. Later that morning, when the police arrested appellant and others at the Angelo bottle store, whilst they were in the process of loading

the.....25/

the crates to be returned to Distillers, 443 crates were accounted for. It follows from this, as a matter of probability, that from Wednesday (the 25th) until Thursday (1st May) the Harrises were at no time in possession of more than 200 crates. Furthermore, after the 200 crates were conveyed to the Harrises, 464 crates remained in storage at the Angelo Hotel until Monday morning, when appellant removed the 218 crates to Dawson's Hotel. Appellant's brother, therefore, retained possession of 246 crates. Upon the assumption that there was an arrangement between appellant, his brother and the Harrises that each was to get a one-third share of 664 crates, the question may well be asked why the Harrises had not by Tuesday (1 May) received their quota of 221 crates , why appellant's brother remained in possession of 246 crates up to the last-mentioned date and why appellant off-loaded 218 and not 221 crates on Monday morning (30 April) at Dawson's Hotel.

In.....26/

[illegible]

[illegible] ([illegible]) [illegible]

[illegible] ([illegible])

[illegible]

([illegible]) [illegible]

[illegible] ([illegible]) [illegible]

[illegible] .... [illegible]

In passing, the fact that the Harrises were in a position to return the 200 crates on the Tuesday, tends to support appellant's evidence that he had warned the Harrises on the previous Thursday not "to touch" any of the liquor which they had obtained from his brother. The fact that on Tuesday (1 May) all but 3 of the 664 crates of stolen whisky were recovered is, at least, consistent with appellant's evidence that he not only warned the Harrises not "to touch" the stolen whisky, but also his brother. The trial Court considered it significant that the first load consisted of 111 crates which, ignoring the fraction, represented one-sixth of 664 crates. It also referred to the fact that on the second trip the load consisted of 107 crates. If the 3 missing crates were to be brought into account as being part of appellant's share, the total figure is 221, which, ignoring the fraction, represents one-third of 664 crates. Nicholas, J., also considered it significant

that.....27/

that no further liquor was conveyed to Dawson's Hotel that morning before appellant saw his attorney at lunch-time.

The significance given to the 111 crates conveyed on the first trip, is apparently based upon an assumption that that number was deliberately loaded at Angelo bottle store, i.e., that that number of crates was counted and loaded onto the truck without regard to its capacity. In my opinion, the assumption cannot be justified at all. There is no evidence that on both occasions the truck was not loaded to its full capacity - in fact, appellant stated that on both occasions the truck was overloaded to an extent which made it difficult, indeed dangerous, to drive it. No effort was made by the State to challenge or rebut this evidence. There is no reason to suppose that the truck was not available to the State. As to the discrepancy in the number of crates conveyed on each of the two trips (i.e., 111 and 107 respectively) appellant explained that the stolen

liwuor.....28/

liquor was comprised of several different brand of whisky and that the crates were not all of uniform size. The State did not rebut or challenge this evidence. On the assumption that the crates were counted at Angelo bottle store, it remains unexplained why appellant did not load his one-third share (221 crates), unless appellant's evidence is accepted that on each trip the truck was loaded to its full capacity. Furthermore, if the crates were counted at Angelo bottle store, there does not appear to have been any reason why appellant should have instructed Mr. Du Toit to count the crates which were off-loaded at Dawson's Hotel. Appellant and his brother were at all times personally in charge of the truck, and would have known how many crates were being conveyed on each trip. It might possibly be suggested that the purpose of Mr. Du Toit's count was to control whether the number of crates which were off-loaded at Dawson's Hotel tallied with that loaded at Angelo bottle store. But then one would have expected

that.....29/

that appellant would have told Mr. Du Toit how many crates were loaded at Angelo bottle store. Mr. Du Toit's evidence is not to that effect. In my opinion, it is reasonably possible, if indeed not probable, that on each trip the truck was loaded to its full capacity at Angelo bottle store without the number of crates having been counted by appellant or anybody else. Furthermore, the number off-loaded at Dawson's Hotel was 3 short of appellant's "one-third share". In my opinion, therefore, it is reasonably possible, if not indeed probable, that it was a purely fortuitous circumstance that 218 crates were off-loaded at Dawson's Hotel, and that that number was determined not by appellant's intention to convey 218 crates which, as I have already pointed out above, was 3 short of his supposed "one-third share", but by the capacity of the truck and the shape and size of the crates. If so, it is, in my opinion, clear that the number of crates off-loaded at Dawson's Hotel is of

no.....30/

no significance in considering whether or not appellant's exculpatory explanation regarding his possession of 218 crates of the stolen whisky may reasonably possibly be true. The evidence relating to the number of crates in the possession of the Harrises and appellant's brother on the Tuesday (1 May), i.e., after appellant had removed 218 crates to Dawson's Hotel, also tend to negative the possibility that there was any arrangement between them and appellant such as that referred to in the judgment of the Court a quo.

The Court a quo also regarded it as a circumstance of significance that after he had conveyed the 218 crates to Dawson's Hotel, appellant returned the truck to the company from which he had rented it. It was held that he did so, because, having conveyed his share of the stolen liquor to Dawson's Hotel, he no longer required the truck. Appellant's explanation was to the effect that he temporarily ceased removing liquor from Angelo bottle store to Dawson's Hotel

mainly.....317

mainly for two reasons. Firstly, he stated that the inadequate capacity of the truck would have necessitated the undertaking of several trips to remove the balance of the stolen liquor (446 crates) during the Monday morning. He explained that he was an experienced truck driver, and realised that it was dangerous to drive the hired truck when it was overloaded. According to him the truck was in fact overloaded on both trips. Secondly, he explained that he was expecting to see Mr. Frank at lunch-time, and was most anxious to keep the appointment. The explanation does not, in the circumstances strike me as being unreasonable at all.

Nicholas, J., stated in his judgment that a further significant circumstance was that, notwithstanding appellant's "urgent haste on the Thursday, he let matters rest until the Monday morning". In my opinion, the observation is not justified. According to appellant's evidence, which was not

rebutted.....32/

rebutted and not really challenged in cross-examination, he did not *let matters rest* until Monday morning. On the Thursday, after his brother had told him of the theft, appellant acted as follows:

1. He instructed his brother not to dispose of any of the stolen liquor.

2. He warned the Harrises not to touch any of the liquor which they had obtained from appellant's brother on the Wednesday.

3. He requested the Harrises to obtain the loan of a truck.

4. He unsuccessfully attempted to see his attorney, Mr. Frank.

5. He instructed Mr. Du Toit to convert a toilet-room at Dawson's Hotel into a store-room.

6. He instructed his brother to repay out of his own funds the sum of R6 000 which had been used by him to *purchase* the liquor from Rennie Mashigo.

On.....33/

On the State's case, as I see it, the appellant, his brother and the Harrises must then have come to some arrangement on the Thursday to divide the stolen liquor between them. But then, so it would seem, the Harrises had already received 200 crates the previous day (which were returned to Angelo bottle store on Tuesday (1 May)). And the question may well be asked - why did appellant seek an interview with his attorney?

On the Friday, having been told by the Harrises that a suitable truck could not be obtained, appellant himself attempted to obtain the loan of one. He explained that it was the end of the month, and that trucks were not readily available. Eventually, Dan Perkins (a firm which supplies trucks on loan) promised to let him have one on the following day (Saturday). He repeatedly telephoned Mr. Frank's office in order to make an appointment. Appellant stated that he was by then in a state of panic.

Late.....34/

Late that afternoon he received a message from Mr. Frank's office to the effect that he "was not to panic" and that Mr. Frank would see him on Monday (30 April). On Friday, appellant expected that a suitable truck would be available the following morning.

On Saturday morning the truck was delivered. Appellant stated in evidence that he immediately realised that the capacity of the truck was such that he would not be able to convey the stolen liquor (464 crates) from Angelo bottle store to Dawson's Hotel that morning. It is reasonable to suppose that appellant trusted the Harrises, and that the removal of the liquor in their possession was, therefore, not a matter of urgency. It was explained by counsel, who appeared for appellant, that it is unlawful to convey liquor during certain hours, and that on the Saturday no conveyance could lawfully have been undertaken during the afternoon nor, for that matter, during Sunday. On the assumption that

appellant.....35/

appellant only required the truck for the purpose of conveying his one-third share of the stolen liquor to Dawson's Hotel, it is somewhat strange that he did not undertake the conveyande thereof immediately after receiving the truck on Saturday morning. It was not suggested that the truck was "too puny" for the conveyance of some 220 crates to Dawson's Hotel during the time available to appellant on that Saturday morning. However that might be, at that stage appellant perforce had "to let matters rest" until Monday.

From what I have set out above, it is apparent that on Thursday and Friday appellant made several attempts, (1) to obtain the loan of a suitable truck and, (2) to make an appointment to interview his attorney. Appellant had no reason to anticipate that neither object would be achieved on either Thursday or Friday. One is tempted to speculate as to the probable course of events if both objects were to have been achieved either on Thursday or Friday.

Appellant would presumably then have done precisely what he did after his interview with Mr. Frank on the Monday. It was not suggested that appellant's purpose in seeking an interview changed between Thursday and Monday.

In my opinion, appellant's conduct during the period from Thursday to Saturday was, at least, as consistent with innocence as with guilt. On Sunday appellant's brother evinced an intention to flee, but appellant told him not to act foolishly. Appellant's evidence was that he hoped throughout that it might still be possible to get his brother "off the hook".

The Court a quo regarded it as significant that on the Monday morning appellant commenced with the conveyance of the liquor from Angelo bottle store to Dawson's Hotel. At that time he knew that he would be seeing his attorney at noon or thereabouts. Why did he not delay the removal of the liquor until after the interview? The

appellant.....37/

appellant admitted that he might have acted foolishly, but explained that after the worst week-end he had ever experienced, he was in "quite a state" on Monday, particularly because of his brother's threat to flee the country. He felt that his brother might act irresponsibly and dispose of some of the stolen liquor in order to obtain money. There is some substance in the criticism of this part of appellant's explanation. It must, however, be borne in mind that the purpose of the interview with Mr. Frank did not, so it would seem, relate to advice regarding the intended removal of the stolen liquor from the control of appellant's brother. As I understand appellant's evidence, the main purpose of the consultation related to the return of the stolen whisky to Distillers in a manner best calculated to achieve appellant's aim of getting his brother "off the hook" if possible.

The trial Court held, further, that there was no real likelihood that appellant's brother would have tried to

dispose.....38/

dispose of any of the stolen liquor, and that there was, therefore, no urgent need to commence removing the liquor on the Monday morning. Viewed objectively, it would appear that there probably was no real likelihood that appellant's brother would have disposed of any of the stolen liquor. On the other hand, it must be borne in mind that appellant was in a state of panic. He had nobody to turn to for advice. He could not refer either to the police or to Distillers. He quite obviously desired to discuss the matter with his attorney before broaching the return of the liquor to Distillers. His brother had committed a most foolhardy theft on the previous Wednesday and had on that same day disposed of 200 crates to the Harrises. On the Sunday he had threatened to flee the country - which would have been an act of desperation. In any event, appellant knew his brother.

The learned trial Judge also regarded it as of some significance that appellant decided to convert the toilet-room

into.....39/

into a store-room. It was suggested that he could have used storage facilities available elsewhere, or could have hired a security guard to control the liquor at Angelo bottle store. The appellant stated that it never occurred to him to hire a security guard. As to availing himself of storage facilities elsewhere available, appellant explained that he would then not have been in control of the liquor.

From what I have set out above, it appears that the Court a quo was not justified in drawing any inference of guilt from the number of crates conveyed from Angelo bottle store to Dawson's Hotel on the Monday morning. It appears, further, that the Court a quo gave undue weight to certain circumstances which are, upon a proper analysis, at least as consistent with innocence as with guilt. In addition the trial Court gave no, or no sufficient, weight to the following circumstances:

1.....40/

1. The appellant had no economic need to obtain money by means of theft. He had substantial financial interests in the hotel and retail liquor trade. It was suggested that he might have been motivated by greed. That is, of course, a possibility.

2. The unchallenged and uncontradicted evidence of appellant that he had warned the Harrises on the Thursday not to dispose of any of the liquor which they had obtained from his brother because it had to be returned. This consignment remained intact until Tuesday morning (1 May).

3. Both on Thursday and Friday appellant attempted to obtain the immediate loan of a large truck. On both days he also attempted to make an appointment to consult his attorney. If appellant planned theft, it is difficult to appreciate what purpose appellant had in mind in seeking to consult Mr. Frank.

4. On Monday morning (30 April) appellant told Mr. Du Toit that the 218 crates were to be returned.

5. At.....41/

5. At lunch-time on Monday appellant, in the presence of an advocate, revealed most, if not all, of the material facts to Mr. Frank. In the main, the evidence of the latter corroborates that of appellant as to what was discussed at the consultation.

6. Appellant stated in evidence that there was at all times a very cordial relationship between him and Distillers, who had given him considerable assistance in the building up of his business. He stated that he would never have entertained conduct detrimental to that firm.

The above-mentioned circumstances are, in my opinion, either wholly, or substantially more, consistent with innocence and inconsistent with guilt. I may add that the Court a quo did not refer in its judgment to the appellant's demeanour as a circumstance bearing adversely on his credibility. Furthermore, it is noteworthy that in most of the material respects in which it is possible to test the correctness of appellant's evidence by means of reference to

evidence.....42/

evidence given by other witnesses (including those called by the State), it appears that he was truthful. In certain respects his evidence was neither challenged in cross-examination nor rebutted by the State.

Having regard to the cumulative effect of the circumstances referred to above, I am satisfied that the Court a quo erred in concluding that appellant's exculpatory explanation regarding his possession of the 218 crates of stolen whisky could not reasonably possibly be true. In my opinion, it was probably true.

In the result, the appeal is allowed and the conviction and sentence are set aside.

Muller, JA)
Hofmeyr, JA) concur