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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.

SOLISO MAJOLA
Appellant.

versus/teen

THE STATE
Respondent.

Appellant's Attorney Israel & Sachs *Respondent's Attorney* A.G. (C.T.)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate I.G. Farlam *Respondent's Advocate* J.F. Nelson
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 28-2-1975
Op die rol geplaas vir verhoor op

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(K.P.A.) *Coram:* Van Blerk, Trollip, Hofmeyr;

Farlam — 9.45 - 11.01, 11.16 - 12.04, 2.51 - 3.08;
Nelson — 12.04 - 12.47; 2.16 - 2.50.

C.A.V.

The Court allows the said appeal, to the following extent

P.T.O.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

COPISO MAJOLA ..... APPELLANT

AND

THE STATE ..... RESPONDENT

Coram: Van Blerk, Trollip et Hofmeyr, JJ.A.

Heard: 28 February 1975 Delivered: 27 March 1975

J U D G M E N T

Trollip, J.A.:

The appellant, a Bantu aged about 44 years, has appealed against his conviction in the magistrate's court .... /2

court at Wynberg, Cape, for dealing in dagga in contravention of section 2(a) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, No. 41 of 1971. The minimum sentence of five years imprisonment, made compulsory for a first conviction by section 2(i) of the Act, was imposed. The Cape Provincial Division dismissed his appeal but granted him leave to appeal to this Division. The appeal raises important questions concerning the correct interpretation of certain presumptions created by the Act against an accused. These were heavily relied on by the State for the conviction of the appellant. But for them, the Court a quo said, it was doubtful whether the State would have duly proved the alleged offence.

The proceedings against the appellant originated in this way. At 9.20 a.m. on Sunday, 28 October 1973, a Coloured Constable, Willem Johannes, acting on information, visited and entered the appellant's room in the municipal Bantu Hostel at Langa. He was not in

uniform .... /3

uniform. He found the appellant there, lying in or on his bed. A Bantu domestic servant, Angelina Loro, employed and resident at Bishopscourt, Newlands, was also present. She was sitting on a bench alongside of the appellant's bed. At the constable's request she stood up and he found a yellow suitcase underneath the bench where she had been sitting. He opened it in the room and found it contained paper parcels. He then and there opened one parcel and found it contained dagga. Subsequently all the other parcels were found to contain dagga too. The whole contents weighed 2 275 grams - indeed a substantial quantity. Angelina and appellant were subsequently charged with dealing in the dagga. She was acquitted, but the appellant was convicted and sentenced.

According to Angelina's evidence, which was accepted by the magistrate, she called in that morning to see the appellant on her way to tennis, it being her day-off. He is her cousin and she had heard he was

unwell .... /4

unwell. She knew nothing about the suitcase or its contents until the constable found and opened it and opened one of the parcels in the room. It is clear therefore that she did not bring the suitcase to the room, nor was she in possession of the dagga. Hence her acquittal.

The appellant denied all knowledge of the suitcase and its contents. His testimony can be summarized as follows. He came from the Transkei; he had only been in the Republic for eight months. He was sickly and still receiving out-patient treatment at the hospital. He was not working because of his illness, but now and then he bought and sold empty bottles for a living. As he had no fixed employment, he was not entitled to live at the hostel and was occupying the room unbeknown to the hostel authorities. He occupied the room with another, Mtotozele Gashi. A friend of the latter also stayed there over week-ends. Both Gashi and his friend had slept there the previous night, and they were in the "voorhuis" of the room when Angelina

arrived .... /5

arrived. She sat on the bench alongside of his bed, talking to him, while he was in bed. The constable then arrived. Prior to that the appellant had not been up and about. The first time he saw the suitcase was when the constable had it in his hands in the room. He had not seen it the previous evening when he went to bed; had it been there then, he would have seen it. Nor did he see it the following morning. Although he claimed to have noticed what went on in the room while the constable was there, he did not see the constable remove it from where Angelina had been sitting. He also denied that the constable opened it and one of the parcels of dagga therein in the room. He only saw the contents of the suitcase when he first appeared in court for remand. He did not see whether or not it was the constable who brought the suitcase into the room when he entered, but on his version, just outlined, he had to aver, in answer to the magistrate, that the constable himself must

have .... /6

have brought it into the room.

The magistrate was not favourably impressed by appellant's demeanour as a witness. And, not suprisingly, he regarded appellant's version about the happenings in the room while the constable was there as being unsatisfactory. There is ample justification for that view. That either the constable or Angelina brought the suitcase there can be ruled out. It must have been there before they arrived. Being single quarters the room must be small in size. The appellant himself indicated that by saying that there was no open space on the floor for suitcases. Having regard then to the size of the room and the colour and position of the suitcase, the appellant must have been aware of its presence there, contrary to what he maintained. It is most improbable, too, that the advent and activities of a stranger in the room, the constable, would not have evoked enough curiosity in the appellant, despite his feeling

ill .... /7

ill, to watch and see what he did. Consequently, his statement that he did not see the constable remove it from where Angelina had been sitting must be untrue. And his denial that the constable opened it and one of its parcels in the room, which Angelina confirmed, is equally untrue. Hence, despite Mr. Farlam's efforts on appeal to rehabilitate appellant as a witness, I am not persuaded that the magistrate erred in the view he took of appellant's credibility.

On those facts and findings Mr. Nelson, for the State, contended on appeal that the State had duly proved as a fact, without using any of the statutory presumptions, that appellant possessed and was dealing in the dagga in contravention of the Act. That, however, was not the State's case as presented to the magistrate, nor found by him to be the position. The reason is not far to seek. Despite the weakness of appellant's evidence, it is clear from all the evidence that he was not

the .... /8

the sole occupant of the room. His evidence that Gashi lives there and his friend visits and stays there over week-ends was corroborated in substance by Angelina. His further evidence that they had slept there the previous night was partly corroborated by Angelina. She said the friend was outside the room when she arrived. It is true she also mentioned that Gashi was away visiting the Transkei at the time, but it is possible that she was mistaken. For, as the appellant said, she, not being resident there herself, would not necessarily know precisely when Gashi was and was not there. Neither Gashi nor his friend was called by the State to testify against appellant. Hence, the possibility that the dagga belonged to them cannot be altogether ruled out. It is also possible that the reason for his lying about not seeing the constable's finding the suitcase under the bench and opening it and its contents in the room was his wanting to protect either or both of the other occupants of the room.

Afterall .... /9

After all, he might have been dependent upon Gashi's goodwill for being able to share the room unbeknown to the authorities. In any event such untruthfulness does not necessarily prove that it was he who possessed the dagga (cf. S. v. Mkize 1975 (1) S.A. 517 (A.D.) at p. 525 B). All that must have evoked the uncertainty in the mind of the Court a quo that, without the aid of the presumptions, the State would not have been able to prove beyond a reasonable doubt that appellant possessed and dealt in the dagga. I share that uncertainty. If, however, the onus is on the appellant to prove the contrary, different considerations arise, as will presently appear.

I therefore turn now to the presumptions invoked by the State. The first one relied on is that contained in section 10(3) of the Act which reads:

> "(3) If in any prosecution for an offence under this Act it is proved that any dependence-producing drug or plant from which such drug could be manufactured was found in the immediate vicinity of the accused, the accused shall be deemed to have been found in possession of such drug or plant, unless the contrary is proved."

The two questions that arise are, (1) did the State prove beyond a reasonable doubt that the

dagga was found "in the immediate vicinity of" the appellant; and, if so, (2) did the appellant prove "the contrary", i.e., that on the balance of probabilities he was not found in possession of it, which means in the present circumstances that he did not possess the dagga?

The expression "in the immediate vicinity of the accused" is not defined in the Act. Its ordinary meaning must therefore apply. According to the Oxford English Dictionary "in the vicinity (of)" means "in the neighbourhood (of), near or close to." That connotes physical proximity between the drug or plant and the accused. The word "immediate" qualifying "vicinity" is of importance. Firstly, it emphasizes that the drug or plant must be found very near or close to the accused, and, secondly, it implies that there must be no person or thing so-placed between it and the accused that the latter is thereby effectively separated or dissociated from it, as, for example, by an intervening physical feature

or .... /11

or another person. For unless the presence of this other person was merely fortuitous or transient, the drug or plant would then ordinarily be in his and not the accused's immediate vicinity. See the various meanings of "immediate" given in the Oxford English Dictionary, and, in particular the third meaning, which reads:

> "Having no person, thing or space intervening, in place, order, or succession; standing or coming nearest or next; proximate, nearest, next; close, near. In reference to place often used loosely of a distance which is treated of no account."

The circumstances might be such, however, that the drug or plant can be said to have been found in the immediate vicinity of the accused and another person, as for example where it is very near or close to both of them and neither intervenes and separates or dissociates it from the other.

The above broad approach to the meaning of "immediate vicinity" fully conforms to the rationale for the operation of the presumption in section 10(3),

namely .... /12

namely, that the drug or plant should be found so close and so circumstanced in relation to the accused that it suggests that he must have "possessed" it, i.e., he was keeping or storing it or had it in his custody or under his control or supervision (see the definition of "possess" in section 1). For the rest it is essentially a question of fact to be decided in each case on its own circumstances.

Mr. Farlam contended that, because the provisions of section 10(3) were drastic, the expression "in the immediate vicinity of" should be restrictively interpreted. He referred to certain dicta in S. v. Blaauw 1972 (3) S.A. 83 (G) at p. 85 A - B, and S. v. Mweli 1974 (4) S.A. 259 (N) at p. 260 G to p. 261 A in support of that contention. But since the ordinary meaning of the expression is reasonably clear, there is no room for a restrictive interpretation. What is called for is a restrictive application of the expression to the facts in doubtful cases. In other words, if because of the intervening distance, physical feature, or another person,

between .... /13

between the drug or plant and the accused, it is doubtful whether or not it is in his immediate vicinity, then, of course, the presumption cannot operate.

Turning now to the facts of the present case. Mr. Farlam contended that the dagga was not proved to have been found in the immediate vicinity of appellant, since there was no evidence of the distance between him and the dagga, and, in any event, when it was found, Angelina was closer to it than he was. That argument cannot prevail. After all, he lived in the room. It was moreover a small room, and the bench, underneath which the dagga was found, was right next to his bed on which he was then lying. So the dagga was found very near or close to him. It was correctly not suggested that the bench itself effectively separated or dissociated him from the dagga. As to the presence of Angelina, the constable testified that she too lived in the room. If that had been true, there might have been substance

in .... /14

in the argument that the dagga was found in her and not appellant's immediate vicinity; or alternatively, in those particular circumstances it might have been said that her presence did not effectively separate or dissociate appellant from the dagga and it was therefore found in the immediate vicinity of both of them. It is unnecessary to express any view on those possibilities. For, on the totality of the evidence adduced it was proved and held by the magistrate that the constable was wrong. In fact, Angelina was merely a casual visitor; and her transient presence there did not therefore effectively separate or dissociate appellant from the dagga found there. Hence, the magistrate correctly held, in my view, that it was found in his immediate vicinity and that the presumption operated.

Did the appellant discharge the onus of proving on the balance of probabilities that he did not possess it? On his credit side are the important facts, already adverted to, that he is not the sole occupant

of .... /15

of the room and that the other occupants had slept there the previous night and were somewhere in the neighbourhood that morning. They might have brought the dagga there. On the debit side, the appellant's lack of fixed employment, manner of earning a living, unlawful occupation of the room, and his brief sojourn in this country, do not inspire any confidence in his stability or integrity as a person. (That is of some relevance in a case like the present one, but its importance must not be pushed too far.) Moreover he was, as already mentioned, an unsatisfactory and unreliable witness. His averment of ignorance of the suitcase and its contents cannot therefore be accepted. Indeed, as I have already mentioned, he must have been aware of the presence of the suitcase in the room before the constable arrived. That he blatantly lied about the constable's activities concerning the finding and opening of it and its contents, whilst not necessarily proving that he himself was in possession thereof, does sustain at

least .... /16

least a probable inference that he must have known that it contained dagga. True, it is possible that the dagga belonged to Gashi or his friend and that he so lied in order to protect them, as has already been mentioned. But is that probable? On balance, I think not, especially as he did not claim to be particularly friendly with either of them. In the circumstances it is significant that he did not endeavour to fasten possession of the suitcase on to either of them but on to the constable. And as he was defended by an attorney, he had every opportunity and assistance of fully presenting his defence. I think that he probably knew more about the person to whom the suitcase and its contents belonged than he professed and that he was trying to insulate himself therefrom. I conclude, therefore, that on balance the appellant might well have brought or had the suitcase there himself, that he thus failed to discharge the onus of proving on the probabilities that he did not possess the dagga, and that

the .... /17

the magistrate correctly so held.

The second presumption relied on by the State is in section 10(1)(a). It reads:

> "If in any prosecution for an offence under section 2 it is proved that the accused was found in possession of -
>
> (i) dagga exceeding 115 grams in mass;
>
> (ii) any prohibited dependence-producing drugs,
>
> it shall be presumed that the accused dealt in such dagga or drugs, unless the contrary is proved."

Both the lower Courts held, and Mr. Nelson on appeal contended, that, with the aid of the presumption in section 10(3), the State proved that appellant was found in possession of dagga exceeding the prescribed weight and that the above presumption, therefore, also operated. Mr. Farlam argued that "it is proved" in the sub-section means actual and not presumptive proof, that "found in possession" means actual and not deemed possession, and that the presumption in section 10(3) cannot be used for the purpose of applying the one in section 10(1)(a). He relied on R. v. Moosa & Others 1960 (3) S.A. 517 (A.D.) and S. v. de Klerk and Another 1975 (1) S.A. 760 (T).

Moosa's ..../18

Moosa's case was decided on the relevant provisions of The Medical, Dental and Pharmacy Act, 13 of 1928, as amended. Section 90 bis, which the present Act has repealed, prescribed two presumptions that could operate in criminal proceedings against an accused. Firstly, it provided that if "it is proved" that the accused accompanied any vehicle on which any habit-forming drug was found, he was presumed, until the contrary was proved, "to have been in possession of that drug". Secondly, it also said that, if "it is proved" that the accused "was found in possession of" dagga exceeding four ounces in weight, he was presumed, until the contrary was proved, to have possessed that dagga for the purpose of sale. This Court, by a majority, held that on the proved facts the first presumption operated and was not rebutted; in other words, it was proved, with the aid of that presumption, that the accused were "in possession" of the dagga found on the vehicle. As the dagga exceeded four ounces in weight,

the .... /19

the same problem then arose that we are concerned with, namely, whether the second presumption also operated. This Court held that it did not, for two reasons - (1) it was only proved, with the aid of the first presumption, that the accused were "in possession" of the dagga, and not that they were "found in possession" of it, as the second presumption required; and (2) the second presumption dealt with a situation distinct from that dealt with in the first presumption and the finding in possession mentioned in the second presumption must be proved as a fact and cannot be presumed as a matter of law from the mere existence of circumstances giving rise to the first presumption (per Schreiner, J.A., at p. 530 B - F).

The first reason is of no application here because the cardinal phrase "found in possession", occurs in both presumptions, in section 10(1)(a) and (3), so that, if the one in section 10(3) operates and is not rebutted, it could ordinarily be said that it is then

proved .... /20

proved that "the accused was found in possession of" the dagga within the meaning of such an expression as is used in section 10(1)(a). Indeed, Mr. Nelson contended that the use of that same expression in both provisions strongly indicates the intention that the presumption in section 10(3) could be used to render the one in section 10(1)(a) operative. There is some force in that contention. But,as against that, the question still remains, what is meant by "it is proved" in the context of section 10 (1)(a)? It is here that the second reason given in Moosa's case is important. For section 10(1)(a) and (3) also relate respectively to two somewhat distinct situations. The former relates to dealing in dagga and "prohibited dependence-producing drugs" (i.e., those referred to in Part I of the Schedule to the Act - see the definition of the latter expression in section 1) in contravention of section 2(a) of the Act, for which section 2(i) and (ii) prescribe drastic penalties - a minimum of five years for

a .... /21

a first conviction and a minimum of ten years for a second or subsequent conviction. On the other hand, section 10(3) relates to merely possessing "any dependence-producing" drug, i.e., any substance in Parts I, II, and III of the Schedule, in contravention of sections 2(b) or (d) or section 3(b), for which less severe penalties are prescribed.

Moreover, the purpose of the numerous presumptions in section 10 is to assist the State in securing convictions by partly alleviating its burden of proof. That the assistance afforded is partial is clear, for in each case certain factual premises have first to be established by the State with the requisite degree of proof before the particular presumption can be invoked. Each provision (with certain irrelevant exceptions) starts by saying: "if in any prosecution for an offence ..... it is proved that .... " The factual premises are then prescribed. In that context "it is proved" ordinarily means proof by adducing the necessary evidence in the usual way. Doubtlessly,

in .... /22

in most of the presumptions in section 10, that is the only way contemplated. Why should that not also apply to section 10(1)(a)? No reason emerges why it should not. Hence, in the absence of plain and unambiguous language to the contrary, I think that actual and not presumptive proof that the accused was found in possession of the dagga was intended. Having regard especially to the drastic penalties prescribed for dealing in dagga, etc., it is unlikely that the intention was that the State should be further assisted in such prosecutions by also relieving it in certain cases of having to establish the factual premises for the operation of the presumption. If that had been intended, section 10(1)(a) could easily have said so, and, I think, it would have said so, especially in view of the decision in Moosa's case. (Cf. Steyn, Die Uitleg van Wette, 3rd. ed., p. 127.)

In my view, therefore, Moosa's case is applicable and decisive. But even if that view is wrong, the words "it is proved" in section 10(1)(a) are at least

also ..... /23

also reasonably susceptible of the above interpretation, in which case they ought to be restrictively interpreted as meaning actual and not presumptive proof (see Rex v. Milne and Erleigh (7) 1951 (1) S.A. 791 (A.D.) at pp. 822/3, and Steyn, Die Uitleg van Wette, 3rd Ed., at pp. 110/1). That was the approach in S. v. de Klerk and Another 1975 (1) S.A. 760 (T) at p. 761 C - E, the other authority relied on by Mr. Farlam.

It follows that, as the State did not actually prove that appellant was found in possession of the dagga, the presumption in section 10(1)(a) was wrongly applied. Mr. Nelson contended, however, that it could be inferred as a fact from the quantity of dagga involved, 2 275 grams, that appellant must have possessed it for "dealing" in it. "Deal in" is given an extensive definition in section 1. It includes, as far as is relevant here, "performing any act in connection with the collection ....

supply .... /24

supply .... sale ..... transmission thereof." The quantity of dagga is substantial, but there is no evidence of its value or indicating that the appellant, despite his lack of fixed employment, could not have afforded to acquire it for himself. Nor was it proved, and, as far as I am aware, it is not notorious, that that quantity so greatly exceeds the personal requirements of a man like the appellant over a reasonable period of time that it can be inferred, beyond a reasonable doubt, that he must have possessed it for supply, sale, or transmission, or that he must have collected it. That section 10(1)(a) specifies a criterion of a quantity in excess of 115 grams as being presumptive of "dealing in" it, is some evidence thereof, but, since that presumption can be rebutted, it cannot be regarded, without more, as proving beyond a reasonable doubt that 2 275 grams must have been possessed for that purpose. Suspicion, even grave suspicion, is not enough, for on this particular aspect the onus of proof rests on

the .... /25

the State. And the lack of evidence of the kind mentioned indicates that the State was content merely to rely implicitly on the presumption in section 10(1)(a).

The conclusion is, therefore, that the State only proved that the appellant had the dagga in his possession. At most, he could thus only have been convicted under the alternative charge of contravening section 2(b). Mr. Farlam finally contended, however, that mens rea is an element of that statutory offence, which the State had to prove, but failed to do so.

The offences creates by section 2 are as follows:

> "Notwithstanding anything to the contrary in any law contained, any person -
> (a) who deals in any prohibited dependence-producing drug or any plant from which such dependence-producing drug can be manufactured; or
> (b) who has in possession or uses any such dependence-producing drug or plant; or
> (c) who deals in any dangerous dependence-producing drug or any plant from which such drug can be manufactured; or
> (d) who has in his possession or uses any dependence-producing drug or plant referred to in paragraph (c),
> shall be guilty of an offence ....".

Part I of the Schedule, as amended, lists about 20 "prohibited" drugs, including dagga, and Part II, as amended, about 100 "dangerous" drugs, all by name. The possibility of innocent possession of any one of those multifarious forbidden drugs is thus self-evident. Moreover, section 2(iii) and (iv) specify, subject to section 7, penalties of a minimum of two years' imprisonment for a first conviction and of five years' imprisonment for subsequent conviction(s) for a contravention of section 2(b) or (d). In view of the formidable lists of offending drugs and the severe penalties imposable for possessing any of them, it is highly unlikely that the penalizing of possession was intended to be absolute and that innocent possession was also meant to be punished. Mens rea must therefore be regarded as being an essential ingredient of such an offence (see Rex v. H. 1944 A.D. 121 at p. 126, R. v. Langa 1936 C.P.D. 158, and cf. R. v. Moyage and Others 1958 (3) S.A. 400 (A.D.) at p. 414 G).

What .... /27

What is still controversial, however, is whether the State must prove its presence or the accused its absence. The authorities on each side of the controversy are collected in S. v. Mofokeng 1973 (2) S.A. 89 (O). In solving the problem here, no assistance can be derived from the presumption in section 10(3). For "deemed to have been found in possession of such drug or plant" does not mean that the accused must also be deemed to have had a guilty mind about such possession which he must therefore also disprove. It might be different with the presumption in section 10(1)(a) in relation to "dealing in" drugs - see S. v. Pillay 1974 (2) S.A. 470 (N) - but no view need be or is expressed thereanent. I can consequently safely assume, without deciding, that the onus of proving the requisite mens rea for a contravention of section 2(b) is on the State. That also renders it unnecessary to decide whether or not S. v. Fouche 1974 (1) S.A. 96 (A.D.), which dealt with another statute, but was heavily relied

on .... /28

on by Mr. Farlam for placing the onus on the State in the Act under consideration, is applicable here. Nor need I consider the problem as to what precisely constitutes mens rea in regard to possessing an offending drug in contravention of section 2(b) - see S. v. Naidoo 1974 (4) S.A. 574 (N) - for clearly it would suffice if the State proved a guilty mind or knowledge on appellant's part in possessing the dagga (cf. Moyage's case, supra, at p. 414 to p. 415 C).

If the state of mind of an accused at the relevant time is in issue, the fact that he lied in testifying on important and relevant matters usually assists the State in discharging its onus of proof. (See, for example, R. v. Deetlefs 1953 (1) S.A. 418 (A.D.) at p. 422 F - G). Here, the offending drug in question is a well-known one. The appellant obviously knew that it was a forbidden drug. Consequently, his blatant lying about the constable's activities concerning the finding and opening of the suitcase and its contents affords, in the

absence .... /29

absence of any other acceptable evidence to the contrary, sufficient proof of a guilty mind or knowledge on his part about the dagga contained therein. A conviction under the alternative charge of contravening section 2(b) is therefore justified.

As to sentence, the prescribed minimum is two years, but according to section 7 a lesser sentence (or possibly a wholly or partly suspended sentence - cf. section 2 A) can be imposed for this offence, if the circumstances warrant it. As a result of the magistrate convicting the appellant of the more serious offence under section 2(a), for which no lesser sentence than five years could have been imposed, the personal circumstances of the appellant were not investigated to ascertain whether a lesser sentence was warranted. The appellant has a clean record (except for a minor, irrelevant previous conviction) and is in ill-health. Apart from that, and a letter which he wrote from jail after his conviction and sentence, which, of course, cannot be used, there is no evidence of his

personal .... /30

personal circumstances on which we could ourselves impose a just sentence. An opportunity should, therefore, be afforded the appellant and the State to adduce evidence and argument, on sentence, if either so wish, before the court of first instance.

In the result, the appeal succeeds to following extent:

(a) the conviction is altered to one of guilty under the alternative charge of contravening section 2(b) of Act 41 of 1971;

(b) the sentence is set aside;

(c) the case is remitted to the magistrate's court to impose sentence afresh after hearing any evidence and argument relating to sentence which the appellant or the State may wish to tender.

W.G. Trollip, J.A.

Van Blerk, J.A.)
Hofmeyr, J.A.) concur