ON BAIL (BOTH)

43/75

43/75

G.P.-S. S. 445.

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

(Appèl DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

DAVID ISMAIL
MORRIS [illegible] & ~~[illegible] ISMAIL [illegible] [illegible]~~

Appellant.

versus/teen

DIE STAAT

Respondent.

Appellant's Attorney [illegible] Respondent's Attorney Dep. A.G. (J.b.)
Prokureur van Appellant Prokureur van Respondent

[illegible] Q.C., F. Zwanenstein S.C. R. Oosthuizen
Appellant's Advocate Respondent's Advocate
Advokaat van Appellant Advokaat van Respondent G. B. [illegible]
[illegible] S.C., [illegible] Benjamin

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

(W.L.D.) [illegible] Holmes, [illegible] J.A. [illegible]
9.45 am ——— 11.00 am
11.15 am ——— 12.45 pm
2.15 pm ——— [illegible]
C. A. V.

BOTH ON BAIL

The Court [illegible] the appeal of each appellant [illegible] [illegible] the [illegible]

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

MORRIS SHENKER — First Appellant

and

DAVID ISMAIL — Second Appellant

and

THE STATE — Respondent.

Coram: HOLMES, GALGUT, JJ.A., et KOTZÉ, A.J.A.

Heard: 11 March 1976.

Delivered: 26 March 1976.

J U D G M E N T:

GALGUT, J.A.:

The first appellant, Morris Shenker, was accused No. 1 in the Court a quo. I will refer to him

as.../2

as accused No. 1. He was found guilty in the Witwatersrand Local Division, of receiving stolen property, viz., 240 rings, knowing them to be stolen. He was sentenced to three years imprisonment of which eighteen months were suspended on condition that he reimbursed the complainant, one Oosthuizen, in an amount of R2 500 before 31st May 1975. The second appellant, David Ismail was accused No. 2 in the trial. I will refer to him as accused No. 2. He was found guilty of contravening section 36 of Act No. 62 of 1955 in that he was unlawfully in possession of eleven wrist watches in regard to which there was a reasonable suspicion that they had been stolen and he was unable to give a satisfactory account of such possession. He was sentenced to twelve months imprisonment. The learned Judge a quo, acting in terms of section 363 (1) of Act 56 of 1955, granted each accused leave to appeal against his conviction.

The applications for leave to appeal were made verbally after the passing of sentence. In terms

of section 363(2) of Act 56 of 1955 the grounds of appeal should have been taken down in writing and should have formed part of the record. This was not done. Written grounds of appeal were, however, filed on behalf of each accused. These deal only with the convictions. No grounds of appeal were filed in respect of the sentences imposed. It appeared from the heads of argument filed on behalf of each accused, that they were appealing also against the sentences. Counsel for the State, acting on instructions from the Deputy Attorney-General in Johannesburg, took up the attitude that the two accused were precluded from raising the question of sentence because leave to appeal was granted only in respect of the convictions and, furthermore, the grounds of appeal filed made no mention of an appeal against the sentences. This issue will be discussed later in this judgment.

It appears that during a weekend in October 1973 a jeweller's shop in Mossel Bay, belonging to the

abovementioned.../4

abovementioned Oosthuizen, was burgled. 784 Watches, 583 rings and 35 cigarette lighters, with a total value of R51 104 were stolen from the premises. After the burglary the thieves brought some, if not all of the stolen goods, to Johannesburg. There they got into touch with one Ismail Benjamin Charlie. I will refer to him as Charlie. He was aware of the fact that the watches and rings were stolen but nevertheless helped, as will be seen later, to dispose of them. He is presently serving a sentence of imprisonment for so doing. He, with the assistance of one Joseph Khan, sold 300 watches to a certain Hassim Baba at R10 per watch. The said Baba is a brother of accused No. 2. This aspect of the case is relevant to the appeal of accused No. 2. As reimbursement for his services in helping to dispose of the watches, Charlie was given some of the stolen rings. He fixed the number of rings at 240. Charlie then set about disposing of the rings on his own account. He, together with the

said.../5

said Khan went to one Baggott. Baggott sold the rings to accused No. 1 for R1 200 which sum Baggott handed to Khan. Baggott received R100 or R200 (this is not clear but it is not material) for his labours.

I will deal firstly with the appeal of accused No. 1 against his conviction. There is no need to set out the evidence of Charlie and Baggott in any detail. Charlie testified that, when the thieves handed the watches and rings over to him and Khan, they were in two leather boxes. He made no mention of any cloth. Nor was he asked, in cross-examination or otherwise, whether the rings were contained in a jewellers cloth. He said that he had pleaded guilty to having received 240 rings. He himself had not counted the rings, but the attorney acting for him at his trial, having investigated the matter, agreed with the prosecutor that he had received 240 rings. He handed all the rings to Baggott. Baggott did not count the rings. Having received the rings from Charlie, he

took.../6

took them to a friend of his, one Richter, who was a manufacturing jeweller. The latter told him to have nothing to do with the rings. Thereafter Baggott asked another friend of his, one Epperjessy, if he knew of any person who would buy the rings. Epperjessy introduced him to accused No.1. Baggott testified that he showed the rings to accused No. 1 in the latter's office; that he did not know how much to ask for the rings; that he later telephoned the accused who offered him R1 200; that he reported this to Charlie and was told that the figure was acceptable; that he then told accused No. 1 that he would sell the rings for R1 200; that he received R1 200 in cash and handed the rings to accused No. 1; that the rings were contained in a cloth and brown paper but not in a jewellers cloth.

Baggott insisted that he, at no time, suspected that the rings were stolen property and sought to explain why he had assisted Charlie to dispose of the rings.

There.../7

There is no doubt that Baggott was untruthful. In this regard the learned Judge a quo said the following:

> "Where the evidence of accused number one conflicts with Baggott, I will not prefer the evidence of Baggott unless he is corroborated or, unless the evidence of number one is inherently impossible.
>
> The evidence of Baggott is important only to supply the narrative of the transaction in respect of which accused number one is charged."

I turn now to the evidence given by Detective Sergeant Cooper in regard to the case against accused No. 1. He stated that his investigations led him to Baggott, who made a report to him; that pursuant thereto, he, on the 24th April 1974, accompanied by Baggott, went to interview accused No. 1; that he told No. 1 the case which he was investigating. His evidence continues:

> "En toe u dit vir hom vertel het, het hy enigiets gesê?---Hy het in Engels gesê 'Why pick on me?'. Hy het ook ontken dat hy enigsins juweliersware ontvang het van Baggott.
>
> Was Baggott teenwoordig?---Hy was teenwoordig.

En.../8

> En wat het u toe verder met beskuldigde 1 gepraat? ---Ek het toe vir beskuldigde gesê dat ek nou genoodsaak sal wees om sy plek te vîsenteer, en ook dat ek genoodsaak sal wees om n lasbrief te kry om sy besigheid te sluit, om my klaer toe te laat om te kyk of daar van sy ringe in die besigheid is.
>
> En het hy toe iets gedoen?---Hy het toe vir my gevra of hy my persoonlik kan spreek, en my uit sy kantoor geneem na n stoorkamer in die agterkant van die gebou, en daar het hy die houer met 120 ringe daarin aan my oorhandig."

Detective Sergeant Cooper then went on to say that he noticed that some of the rings were marked "J.M."; that this caused him to believe they were part of the stolen rings he was seeking; that he asked accused No. 1 if he had ever bought rings from "J.M." of Cape Town; that accused No. 1 replied in the negative and added that he dealt in a cheaper line of ring. Detective Sergeant Cooper further stated that accused No. 1 admitted that he had bought rings from Baggot. In reply to questions put to him in cross-examination, he said: testified that accused No. 1

> "Hy het Baggott R1 200 vir die ringe betaal, hy het ook gesê dat hy die ringe uitgewerk het op R5 per ring."

.....

....-het/9

"..... - het hy gesê hy weet nie waarom hy die ringe gekoop het nie. Dit is nie die soort waarin hy handel dryf nie, hy handel in 'n goedkoper lyn, en toe hy die ringe gesien het, het dit hom soos 'n magneet aangetrek'---Hy het vir my gesê, dit is die woorde wat hy gebruik het."

Detective Sergeant Cooper further said that accused No. 1 then told him that some of the rings had been sold, and that some were in Durban with a traveller, named Rahman, and he emphasized that accused No. 1 thereafter co-operated with the police in every way.

Accused No. 1 stated in evidence that the name of the business which he controlled was M. Shenker Brothers (Pty.) Ltd. trading as Economic Wholesalers; that this was a firm of wholesale jewellers; that one Epperjessy had been a customer of the firm and he had known him for eight years and regarded him as a reliable and honest man; that Epperjessy had over this period bought watches from him; that Epperjessy asked him if he would purchase some rings, which, so Epperjessy told him, came from a manufacturing jeweller by the name of

Richter; that Richter was an alcoholic and was short of money; that he told Epperjessy he was a prospective purchaser; that Epperjessy then brought Baggott to him; that he counted the rings which Baggott brought; that there were 203 rings; that they were in a jewellers cloth; that he looked at the rings, and, having done so, suggested to Baggott that the latter try and sell them elsewhere as he did not generally deal in rings; that no price was mentioned; that, thereafter, Baggott telephoned him and asked him to make an offer; that he replied that he "might consider paying R1 200"; that Baggott called on him thereafter; that he paid Baggott R1 200 in cash; that this was paid, not from his firm's money, but from his own private money being cash winnings from the races and which he had in the firm's safe; that he was not given an invoice by Baggott; that he did not get a receipt from Baggott for the R1 200; that he later reimbursed himself by taking a cheque from his firm

for.../11

for R2 380 which covered the R1 200 and some other money which was due to him by the firm; that he made out a "slip" which he handed to one of two accounts clerks to record the purchase; that this slip got lost and hence there was no record in the firm's books of this transaction; that the rings were all different and did not run in a series; that this caused difficulty and inconvenience because "there are no sizes" and because replacements could not be easily ordered; that he did not usually deal in this type of ring; that he bought them because he regarded the purchase as a bargain; that he estimated that he would normally have had to pay R2 500 for the rings and could make a good profit on resale; that the rings were not recorded individually but as a job lot; that in his stock lists prepared at the end of the year there was reflected a job lot of rings but this included other rings; that these rings were kept in the same way as other rings, in trays in the firm's strong room;

that.../12

that when potential customers for rings came to the shop, the trays were taken out to the customers to enable them to view the rings; that some of the rings were handed by him to his traveller, Rahman, to sell in Durban; that in the invoices for the rings given to Rahman, these rings were classified by the letters "C.R." denoting "cash rings"; that in later invoices given to Rahman by other members of his staff, this classification was changed to "G.R." denoting "gold rings"; that some months later, Detective Sergeant Cooper came to his shop with Baggott and told him he was investigating the theft of rings in Mossel Bay and that he understood Baggott had sold him rings; that he at first denied having purchased rings from Baggott; that shortly thereafter he admitted that he had bought rings from Baggott; that he thereafter gave the police every assistance and told them some of the rings were with Rahman in Natal; that he telephoned Rahman to send the rings back. The above is a summary of accused No. 1's evidence in chief.

The form of the argument addressed to this

Court renders it necessary to set out, in some detail, certain of the answers given by the accused in cross-examination. He,

(a) denied having told Detective Sergeant Cooper that he had calculated the price of the rings at R5 per ring;

(b) said he had not asked for an invoice from Baggott because he did not think of it;

(c) said that, when purchasing rings from manufacturers, it was normal practice to receive an invoice which was then used to record the purchase in the purchase book;

(d) that he had not asked Baggott for a receipt because he did not think of it;

(e) that he had paid Baggott in cash because he had R4 000 of his own money in cash in the safe and did not wish to send the messenger to the bank with so much money. It appears, however, he did a day or two thereafter, deposit the balance of his cash

to.../14

to his private account with his own bank;

(f) conceded that there was no record of this transaction in the books of his firm but said that this was due to the fact that the "slip", which he handed to the accounts clerks, had disappeared;

(g) that he had not communicated with Richter because he relied on Epperjessy's statement to him that Richter was a manufacturer and wished to sell the rings;

(h) that it was not usual, when a traveller called, to communicate with the latter's principal and that he accepted that Baggott represented Richter because of Epperjessy's introduction of Baggott;

(i), that he had lied to Detective Sergeant Cooper because he "panicked" when he heard that the former was investigating the theft of rings from a firm in Mossel Bay;

(j) that he looked at some of the rings and noticed they were marked "J.M." and not "R" (for Richter) but that this did not cause him concern because it sometimes

happened.../15

happened that manufacturers would sell rings manufactured by others.

At the beginning of his judgment the learned Judge referred to dicta in the case of S. v. Ushewokunze, 1971 (2) 360 (F.C.) at p. 363 and also quoted the following passage from Hunt's S.A. Criminal Law and Procedure, Vol. 2 at p. 297:

> "In short, therefore, it is submitted that the accused has 'knowledge' if he actually forsees the real possibility that the goods have been stolen, and he nevertheless receives them, whatever his motive for abstaining from further enquiries, and even though his suspicions cannot be characterised as 'belief'."

It was urged that, having regard to the facts of this case, the learned Judge had erred in applying the above principles. I find no merit in this submission. As will be seen later, the learned Judge, relying on the accused's own conduct, found he must have known that he was acquiring stolen property. This appears from the extract from the judgment quoted hereunder. Having set

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out No. 1 accused's explanation, viz., that he, accused No. 1, had relied on Epperjessy's introduction of Baggott and had accepted that Baggott was an agent for a manufacturing jeweller, Richter, he went on to say:

> "I will now proceed to enumerate a number of important, nearly conclusive, factors which have a bearing on the possible truth of this explanation, and which will simultaneously have a bearing on the proof of the State case that the accused number one did in fact have guilty knowledge that the rings in question were stolen goods."

Later in his judgment, the learned Judge said:

> "With a view to the cumulative weight of all the factors and considerations which I have enumerated, I find that the explanation tendered by the accused, that he had bought these rings in good faith in relying upon the introduction of Epperjessy to Baggott, is untrue beyond any reasonable doubt.
>
> And, I find on the other hand, positively, that the State has proved that the accused purchased the goods knowing them to be stolen."

The learned Judge enumerated twelve reasons, the cumulative effect of which caused him to find that the State had proved its case against accused No. 1. To

these.../17

these he later added four minor reasons. I will later discuss the sixteen reasons because it was urged that in each case he had misdirected himself. In doing so I will deal with these reasons and criticisms in the same order as did the learned Judge. I find it advisable to stress that the important findings are those numbered v, vi and vii below. They, as will be seen, deal with No. 1 accused's failure to obtain an invoice, the payment in cash and the failure to obtain a receipt from a man with whom he had had no previous transactions, who was representing a manufacturer who was not only not known to accused No. 1, but with whom he had never had any previous dealings. These factors were all present to the mind of the learned Judge when he enumerated his reasons. I proceed to discuss these reasons:

i. The learned Judge found it strange that accused No. 1 had relied on Epperjessy's introduction for his faith in Baggott, as a seller of rings having regard

to.../18

to the fact that Epperjessy had for eight years purchased only watches and thus was unlikely to be concerned with the sale of rings. Whilst I do not agree with the submission that this was a misdirection I do find it an unconvincing reason. Epperjessy was not himself selling the rings. He was merely, as far as accused No. 1 was concerned, introducing a seller of rings.

ii. The learned Judge said:

> "The second point I wish to refer to is that a manufacturer's representative will normally rely on his goods and his personal presentation, to effect a sale, and will not rely on an introduction by a mutual acquaintance to effect a sale."

I agree with the submission by counsel that a personal introduction to a potential buyer may well aid a salesman and will not be regarded as strange by the potential buyer.

iii. The learned Judge found it "unbelievable and highly improbable" that accused No. 1 did not "contact" Richter especially as Baggott was a "new sales

representative"../19

representative" selling a job lot. It was pointed out by counsel that Baggott had been introduced by Epperjessy and further that accused No. 1 had stated that it was not usual to communicate with the principal of a sales representative. Hence it was urged that it could not be said that, on these grounds, the failure to "contact" Richter was "unbelievable and highly improbable". If the learned Judge a quo intended that such conduct was strange in the light of the fact that the sales representative did not fix a price, did not issue an invoice, did not issue a receipt and accepted cash, then I agree that it is more than strange that a man of the experience of accused No. 1 did not communicate with the salesman's principal.

I am of the view that the reasons in ii and iii (as stated by the learned Judge) are not convincing. I do not think they can be regarded as misdirections.

iv. No. 1 accused's failure to examine all the rings and to inquire why some of them bore the

mark.../20.

mark "J.M." and not an "R" especially as he had not dealt with either Baggott or Richter before, was regarded by the learned Judge as a -

> "conscious attempt to refrain from an enquiry which might yield some distressing result to a purchaser keen to procure the rings whatever their origin might be."

No. 1 accused stated that manufacturers did sometimes buy and sell rings manufactured by other manufacturing jewellers. That may well be so, but it should perhaps have appeared strange to the accused that none of the rings were marked with an "R".

v. The learned Judge said of No. 1 accused's failure to demand an invoice:

> "Every rule of procedure and logic prescribes that where an experienced purchaser buys a substantial quantity of goods from a new seller - I am referring to the manufacturing jeweller - through new representative, Baggott, that he would at least require an invoice for his purchase and not allow that purchase to remain completely anonymous both, in his books and in his own memory. Inevitably the question must be posed, why could there be a failure to demand an invoice

unless.../21

> unless it were a further attempt, specifically, to evade the investigation which might yield an unwelcome result?"

vi. The learned Judge rejected No. 1 accused's explanation as to why he paid Baggott in cash.

vii. As to the failure by No. 1 accused to obtain a receipt, the learned Judge said:

> "..... no man in his good senses, will pay R1 200 to a representative of a third party who is the real seller, without obtaining some proof of that payment if the payment is not made by cheque, but in cash in respect of which no proof whatsoever exists."

Despite everything that was said by appellant's counsel, I find myself in full agreement with what the learned Judge said, as reflected in paragraphs v. vi and vii. I would add that the fact that Baggott (and Richter) were strangers to accused No. 1 adds weight to the above remarks.

viii. The learned Judge preferred the evidence of Baggott to that of accused No. 1 in regard to whether the rings were wrapped in a jewellers cloth or

vi.

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vii.

vii.

in an ordinary piece of cloth and brown paper. We were referred to passages in Baggott's evidence and were asked to find that Baggott had contradicted himself as to the wrapping. I have examined his evidence and am not persuaded that Baggott's evidence on this aspect is as contradictory as is suggested. Furthermore, the probabilities favour Baggott's evidence. It will be remembered that Charlie said the rings were in leather bags, no mention was made of a jewellers cloth. Then too, at the stage when Baggott was first asked about the cloth, he could not have known of the importance thereof, or that accused No. 2 would say the rings were in a jewellers cloth. In any event, I find this to be a minor point and I am not persuaded that the learned Judge misdirected himself.

ix. Of the fact that the classification of the rings was changed, in the later invoices to Rahman, from "C.R." to "G.R.", the learned Judge said:

> "...the specific identification of CR for "cash rings", was judiciously dropped after it had first been used in November."

In.../23

In my view this aspect should not have been given undue weight. It is something which had to be considered. It cannot be said to be a misdirection.

x. The learned Judge commented that the fact that the rings were included with other rings, in what was described as a job lot in the stock lists rendered identification of the rings impossible. This is so. Having regard to what is said in v. vi and vii above, it certainly was a ground for suspicion. I do not regard this as a misdirection even though I do not attach much importance to this aspect of the case.

xi. The fact that accused No. 1 lied to Detective Sergeant Cooper, was regarded as significant by the learned Judge. Our attention was drawn to the following dicta of HOLMES, J.A. in S. v. Letsoko and Others, 1964 (4) S.A. 768 (A.D.) at p. 776:

Generally.../24

"Generally speaking, the falsity of an explanation to the police, especially if given on the spur of the moment, should weigh but little in the scales against an accused. Sometimes it is a mere make-weight;....."

however,
In this case, accused No. 1 was in control of a business with a turnover of R1 000 000 per annum. He is not an ignorant man. He was not giving a false explanation, but he denied buying rings from Baggott. He is the type of person from whom one would have expected an immediate "Yes, I bought the rings from Baggott because he was introduced by an old and trustworthy customer". Then too this lie must be considered in the light of the circumstances in v., vi and vii above. So considered, the lie was one which the learned Judge was justified in taking into consideration. He did not overemphasize the fact that accused No. 1 made this false statement. I am not persuaded that he misdirected himself on this aspect.

xii. The learned Judge found it strange that accused No. 1 made no inquiry from Baggott as to

his.../25

his principal, Richter. This, accused No. 1 explained by saying he relied on what Epperjessy told him. Whilst I do not find the learned Judge's reason a convincing one, I do not think it can be said to be a misdirection.

There still remain for discussion, the four lesser factors which the learned Judge considered. These were:

xiii. the rings were not the type of stock normally carried by No. 1 accused in his business;

xiv. that the rings were not in a series as to size and hence would be inconvenient to handle;

xv. that, as a wholesale jeweller, who was not a newcomer to the trade, the possibility of "fences" - trying to sell stolen goods - ought to have occurred to him especially when regard is had to the fact that no invoice or receipt was furnished and cash was accepted by the seller, Baggott;

xvi.../26

xvi. the failure to call Epperjessy on behalf of the accused.

As to xiii, xiv and xv above, these are, as the learned Judge said, minor points. They were, however, points which the learned Judge was entitled to consider and whilst each taken by itself, is not a convincing reason, it cannot be said that having regard to the factors in v, vi and vii, they have no weight.

As to xvi above, counsel for accused No. 1 at the trial did explain that the reason why Epperjessy was not called, was that it was clear that he was an accomplice and it had also been ascertained that he had several previous convictions. It followed that he would probably not be believed, and that he would probably refuse to answer incriminating questions. In these circumstances this criticism of No. 1 accused's case is not merited. The learned Judge did, however, regard it as a minor matter.

The.../27

"The line between misdirection and unconvincing reasoning may be fine, as also may the line between a misdirection that amounts to an irregularity and one that does not."

per SCHREINER, J.A. in R. v. Bezuidenhout, 1954 (3) S.A. 188 (A.D.) at p. 198 D.

Section 369 (1) (a) of Act 56 of 1955 provides that:

"(1) In case of any appeal against a conviction.....

.....

the court of appeal may -

(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or

(b) .....

(c) .....

Provided that, notwithstanding that the

court...../28

court of appeal is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record of proceedings, unless it appears to the court of appeal that a failure of justice has, in fact, resulted from such irregularity or defect."

The above proviso was discussed in S. v. Tuge, 1966 (4) S.A. 565 (A.D.) at p. 568 where HOLMES, J.A. , said:

"In S. v. Bernardus, 1965 (3) S.A. 287, this Court held that what a Court of appeal really has to do is to decide for itself whether, on the evidence and the findings of credibility unaffected by the irregularity or defect, there is proof of guilt beyond reasonable doubt. See the following passage in the judgment of the CHIEF JUSTICE at p. 299 F - G:

> 'Ek stem saam met my kollega HOLMES dat dit wesenlik daarop neerkom dat 'n Appèlhof moet besluit of daardie getuienis, sonder die onreëlmatigheid of gebrek, buite redelike twyfel bewys dat die veroordeelde inderdaad skuldig is.'

This the Court of Appeal must decide in the performance of its function as imposed by the afore-mentioned proviso."

Lower down on the same page HOLMES, J.A. goes on to say:

> "In other words, the test is simply whether the Court hearing the appeal considers, on the evidence (and credibility findings if any) unaffected by the irregularity or defect, that there is proof of guilt beyond reasonable doubt."

Dicta to the same effect are to be found in S. v. Yusuf, 1968 (2) S.A. 52 (A.D.) at p. 57.

To.../29

To revert to paragraphs v, vi and vii above. These show that accused No. 1 was a wholesale jeweller controlling a large firm. He bought the rings, from a manufacturer who was unknown to him and represented by an agent with whom he had had no previous dealings, without obtaining an invoice. This in itself was conduct which requires an acceptable explanation. Then there was the payment in cash, taken from his private savings and not from the firm's money. To these factors must be added the failure to get a receipt from a person who was to all intents a stranger to accused No. 1 and who was representing a manufacturer not known to him. The explanations given in respect of each of the above factors are completely unacceptable. The conduct of accused No. 1 permits of no doubt. He bought the rings knowing them to be stolen. Even assuming the learned Judge did misdirect himself in one or more of the respects alleged, the facts proved, and properly taken into consideration against accused No. 1 were so strong, that no failure of

justice.../30

justice resulted from any such misdirection. Using the approach set out in Tuge's case quoted above, I am satisfied that, the guilt of accused No. 1 was proved beyond a reasonable doubt.

In coming to the above conclusion I have not overlooked the submissions that the learned Judge did not give sufficient heed to the following factors:

(a) that the rings were purchased during normal business hours;

(b) that accused No. 1 had not falsified his books;

(c) that accused No. 1 had given the police full co-operation;

(d) that the rings were openly displayed;

(e) that accused No. 1 did not embellish his evidence;

(f) that the State case (so it was said) rested in the main on Baggott's evidence and Baggott was an untruthful witness;

(g) that accused No. 1 believed that Richter was the true seller of the rings and that he was in financial difficulties hence accused No. 1 believed

that.../31

that Richter would sell the rings cheaply.

I will deal with each of these submissions in the same order set out above.

ad (a) The fact that the rings were bought during normal hours, does not, in my view assist the accused. The negotiations were of short duration and took place in No. 1 accused's private office.

ad (b) The answer to this submission flows from the following evidence given by accused No. 1:

> "Mr. Shenker, at the office of your company, do you keep the books? Do you do the bookkeeping?---No, it is not my function.
>
> Who is the bookkeeper there?---Mrs. Lewis and Mrs. Shing, her assistant.
>
> And do you check on the bookkeeping yourself, or do you employ an auditor? ---An auditor does.
>
> Have you particular knowledge of the books?---No, I haven't. Not a very good knowledge."

This evidence shows that the accused would have had to enlist the aid of the bookkeeping

staff.../32

staff to falsify the books. He would not be likely to run the risk of his staff finding out that he was doing so. If he himself made any entries these would be easily traced.

ad (c) It will be remembered he at first told Detective Sergeant Cooper a lie and it was only after Detective Sergeant Cooper threatened to close the business and procure a search warrant, that he admitted buying the rings. Having done so, he obviously had to produce them. As to the rings with Rahman in Durban, he would have been foolish not to disclose their existence because this would most probably have come to light either from Rahman or some other members of his staff who had sent rings from this "job lot" to Rahman.

ad (d) This is an overstatement. The rings were kept in trays in the strong room which were

only.../33

only brought out when a potential customer for rings came into the shop. Other rings were also in these trays.

ad (e) Once accused No. 1 had admitted he bought the rings no good purpose could have been served by embellishing his evidence. He had no invoice, he had no receipt, he had paid in cash. These facts could not be covered up.

ad (f) This submission has no merit. The strength of the State case, rested on the evidence and conduct of accused No. 1. Furthermore, the learned Judge a quo, as we have seen, did not accept Baggott's evidence save where it was corroborated or where the probabilities were such as to make it acceptable.

ad (g) It was not suggested by accused No. 1 that he thought that the rings were being sold at such a cheap price because Richter was said to be in financial difficulties. Nor was it

suggested.../34

suggested that a manufacturing jeweller, like Richter, would have found it difficult to sell rings at half their normal cost to a wholesaler.

A further point of criticism of the judgment was the fact that the learned Judge found that 240 rings were bought by accused No. 1 whereas he said he only bought 203 rings. The learned Judge relied on the evidence of Detective Sergeant Cooper for the finding. It is, of course, true that it did not in any way benefit accused No. 1 to say he bought only 203 rings. He said he paid R1 200 for the rings which would have normally cost him, as a wholesaler, R2 500. The number of rings purchased did not, in any way, affect these figures. It was submitted that Detective Sergeant Cooper's evidence was not reliable. I have considered the grounds on which this submission was made. I am, however, not satisfied that the learned Judge was wrong in accepting the evidence of

Detective.../35

Detective Sergeant Cooper. In any event, whether the number was 240 or 203 rings does not, in any way, affect the issue of the guilt of No. 1 accused.

It follows, from what has been said above, that the appeal by No. 1 accused against his conviction must fail.

I turn now to discuss the appeal of accused No. 2.

It appears that he and his brother, one Hassim Baba, carried on business as general dealers under the style of Page View Supply Store, in a shop situate in 11th Street, Vrededorp. Under the same roof was a store room in which goods were kept. No. 2 accused lived in a flat above the shop and store room.

The witness Charlie testified that, having received the watches and the rings from the thieves, he and the said Khan went to the shop in 11th Street; that Khan went inside and came out again with Hassim Baba and

from.../36

from there the three of them proceeded to the house of Hassim Baba; that there they showed him the watches which they had, viz., 300; that the watches still had the "tags" on (i.e. the tags of the complainant); that Hassim Baba bought them at R10 a watch.

Detective Sergeant Cooper testified that pursuant to a report from Charlie, he went to Page View Supply Store on 24 April 1974 and there he interviewed No. 2 accused; that he told him the purpose of his visit; that he was told that Hassim Baba, had gone to India; that he asked No. 2 accused if his brother, Hassim Baba, had any watches there; that thereafter, No. 2 accused replied that he, No. 2 accused, knew nothing about watches; that he suggested to No. 2 accused that they should go upstairs to the flat; that he there found a small case which was locked; that he shook it and, because of the rattling sound, suspected it contained

jewellery;.../37

jewellery; that, in reply to a question, No. 2 accused said his wife had the key; that, when the wife came in shortly thereafter, she gave him the key and he opened the case; that there were eleven watches in it; that one of these still had a "tag" on it on which were marked complainant's code number and figures; that he suspected that the eleven watches were part of the stolen watches; that he asked No. 2 accused from whom he had obtained the watches; that he replied that he had received them as gifts from friends in Cape Town; that No. 2 accused was unable to give him the names of these friends. It was not put or suggested to Detective Sergeant Cooper that No. 2 accused, at any stage, told him that the watches belonged to his brother. Detective Sergeant Cooper also testified that two of the stolen watches were found in the possession of Hassim Baba's wife. She was prosecuted and became accused No. 4 in the case. It should be mentioned that the wife of accused No. 2 was also prosecuted. She became accused No. 3 in

the.../38

the case. The two wives were acquitted at the end of the trial.

No. 2 accused stated in evidence that he and his brother were partners in the grocery business; that his brother, for his own benefit and account, ran a "job-buying business"; that he kept the goods for the job-buying business in the store-room; that the brother left for India on 31 December 1973 to wind up the estate of their father who had died in India; that difficulties had arisen in India which kept his brother there. His evidence then continues:

> "After my brother left for Bombay, I went into the storeroom to clean the storeroom and on the shelf of the storeroom there was a packet and these watches were in the packet on the shelf. I looked in the packet and I saw these watches. They appeared good, expensive watches, they were on the shelf, there was a bantu servant who had access to the storeroom for cleaning. I took these watches and I placed these watches into the jewellery box that is now before the court, Exhibit 9.
>
> Why did you do that, that you put them in the jewellery box?---I left it in the jewellery box because I thought of giving it back to my brother when he returns back."

.....

I.../39

I want to come now to the sequence of events when det. sgt., Cooper arrived at your premises. Now we have had it from det. sgt. Cooper, and I think it is common cause, that he arrived there, asked where Hassim was, you told him that Hassim was in Bombay - that is all correct, I assume?---That is correct.

The he said he was inquiring about stolen watches, and he asked you if you knew anything about stolen watches and you said no, you knew nothing about them?---That is correct.

That was untrue?---That was not true.

Why did you tell an untruth to sgt. Cooper when he saw you?---I was asked by sgt. Cooper if I knew about the stolen watches and I told him a lie.

Yes, but why?---He went upstairs where I stay with my family. There Exhibit 9, the jewellery box, was taken out.

Yes, and Sgt. Cooper's evidence is that you told - he showed you the watches and said 'What about these' and you said they came from Cape Town. I take it you agree with that?---At that stage my wife had the key to that box. It was openend.

Yes, and det. sgt. Cooper took these watches out and showed them to you and said 'What about these', and you said they came from Cape Town?---That is correct.

That was also a lie?---That was also a lie.

What.../40

What I want to know is why you told these lies?--- I was frightened and panicked. I thought I would be in gaol, my wife would be removed to gaol, my sister-in-law was in trouble, and for that reason I told a lie."

.....

"Now apropos this key, is it often in her possession, is it sometimes in your possession, or what is the position, the key to Exhibit 9?---No, the key is at times in her possession, at times in my possession, but on that particular instance it was in her possession."

Accused No. 2 then went on to say that after he had been released on bail, he wrote to his brother and told him of the events; that the brother then telephoned him and told him the watches were a job lot which he had bought and that he, No. 2 accused, should tell the police that they belonged to him, Hassim Baba; that he wrote his brother several letters thereafter asking him to return; that the brother was detained in India winding up the estate.

The following extracts from his evidence in cross-examination, are relevant:

Now.../41

"Now did you ever tell the police who the watches actually belong to?---On the first occasion I did not tell the police the correct story.

When did you tell the police the correct story, if ever?---At the Brixton Police Station I mentioned that to the police, that the watches belonged to Hassim.

Did you say this to sgt. Cooper?---There were other police with sgt. Cooper.

But you said it to Sgt. Cooper?---I mentioned that when there were other police with sgt. Cooper.

So sgt. Cooper heard it?---That I could not say.

Did you know that sgt. Cooper was the investigating officer in this case?---I am aware of that.

Therefore he would be the person you would give information to, not so?---Correct.

Do you know that sgt. Cooper made absolutely no mention of this explanation that these watches came from your brother in his evidence at all?--- Sgt. Cooper did not mention that."

.....

"You told this to sgt. Cooper?---Not to sgt. Cooper but to a constable who was present there.

So sgt. Cooper wasn't present there at the time?--- I could not well remember if he was there because I was in a panic state at the time."

.....

Now.../42

"Now after the telephone call which you received from your brother, did you then go to the police and make a statement that you had earlier told a lie and that you were now wanting to correct your lie to them?---No, I did not go to sgt. Cooper again."

In reply to further questions put to him No. 2 accused said that he had the keys to the store-room and when asked why he had removed these watches, he said:

"My bantu servant has access to the storeroom and this being an expensive item I removed it".

As to the events after Detective Sergeant Cooper had found the jewellery box, his evidence in cross-examination reads:

"And when he shook the box and he heard the noise, did he ask you what was inside?---Yes, he did shake the box. At that time I did not have the key to that box. My wife had the key.

Did he ask you what was inside?---Yes, he asked me what was inside and I mentioned that we would open the box and see inside."

.....

"When the box was opened and I saw the watches

inside.../43

inside, then I recollected putting the watches from the storeroom into that box. At that stage I realised there was some trouble. When I saw those watches I panicked, I got frightened that I would be arrested, my wife would be arrested anddd we will be in big trouble, and for that reason I told a lie."

.....

"Why didn't you take the watches to your brother's wife, accused No. 4, and leave it at her house? ---Because I was in charge of the storeroom at that time, I found it there and I left it in my house to give it back to him when he returns."

In terms of Section 36 of Act 62 of 1955

"any person who is found in possession of any goods, other than stock or produce..... in regard to which there is a reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence. ...."

It was conceded that accused No. 2 was found in possession of goods in regard to which there was a reasonable suspicion that they were stolen. The issue, therefore, is whether the explanation given was a satisfactory one. .../44

one. In South African Criminal Law and Procedure, Vol. 2 at p. 628 by Hunt, the learned author, states that it must be proved that the accused -

> "was unable at any time to give a satisfactory account of his possession. It is not enough that he was unable to give a satisfactory explanation or chose to remain silent, when actually found in possession, for a satisfactory account at trial shows that he was able all along to give satisfactory account."

That this is a correct statement of the law appears from a study of the cases cited by the learned author.

Accused No. 2, on his own evidence, lied to Detective Sergeant Cooper when the latter found the watches in his possession. He did not, thereafter, give any explanation to the police. The issue then, is, can it be said that the account given by accused No. 2 in the Court a quo is satisfactory. The learned Judge a quo held that it was not, and rejected the evidence of accused No. 2 as being "totally incredible". It was urged that this finding as to the accused's evidence was not justified in that the State witness, Charlie,

corroborated.../45

corroborated the version of accused No. 2 in the following material respects:

(a) The transaction was concluded with Hassim Baba, not the accused.

(b) Hassim Baba left the shop and concluded the transaction at his house.

(c) The watches were counted and money passed at Hassim's house.

(d) There was no evidence to suggest that Appellant was party to the transaction or even knew of it.

It was further submitted that the evidence of accused No. 2, to the effect that his brother conducted the jobbing business for his own benefit from the store room, had not been challenged and could not be said to be false. In these circumstances it was said that the learned Judge should have found that accused No. 2's explanation was reasonably possibly true. There is some merit in these submissions.

However.../46

However the case must be viewed in the light of all the evidence. The learned Judge detailed his reasons for rejecting the evidence of accused No. 2. I will discuss them in the same order as he did.

aa. Accused No. 2, when asked by Detective Sergeant Cooper whether he knew anything about the stolen watches, denied all knowledge of these watches. It appears from the extract from his own evidence above, that he told him a lie.

bb. Accused No. 2 did nothing to assist the police in their search. It was only after the jewellery box was found that he told them his wife, who was not at home had the key. Moreover, when the box was found and Detective Sergeant Cooper asked him what was inside, he "mentioned that we would open the box and see inside". The learned Judge found that this was not the conduct of an innocent man.

cc. .../47

cc. In his evidence accused No. 2 said that he had forgotten that the watches were in the jewellery box. The learned Judge found that this was obviously untrue as he, himself had, on his own version, taken them from the storeroom because they were expensive and he was afraid that they would be stolen by the Bantu servant. Thus, he could not have forgotten about the watches between the 31st December 1973 and 24th April 1974.

dd. Accused No. 2 admittedly lied to Detective Sergeant Cooper when the rings were taken out of the jewellery box. He said they were gifts from friends in Cape Town.

ee. Accused No. 2 stated that he found the watches in the storeroom and removed them to ensure that the Bantu servant, who had access to the storeroom, would not steal them. The learned Judge rejected this explanation. The Bantu servant would

have.../48

have had the same access to the storeroom while the brother was in Johannesburg, and, on No. 2 accused's story, the brother did not think it necessary to remove them. Why then should accused No. 2 have moved them. He was the only one with the key.

ff. Accused No. 2, when asked whether he had at any time told the police that these rings belonged to his brother, at first said he had told a constable in the presence of Detective Sergeant Cooper. This was varied later when he said that he told it only to a constable and Detective Sergeant Cooper was not there. He knew that Detective Sergeant Cooper was in charge of the case and there was no reason to tell a police constable. The learned Judge found this story to be false.

gg The learned Judge found that accused No. 2 "displayed shiftiness in his evidence as to the number of telephone calls he had received from his brotehr." It must be remembered that the

learned/49

learned Judge saw him in the witness box. His evidence takes up nineteen pages of the record. He, therefore, had ample opportunity to observe accused No. 2.

Despite counsel's submissions, I am not persuaded that the learned Judge was wrong in any of these findings set out in paragraphs (aa) to (gg) above.

It was further submitted that the learned Judge had placed too much weight on the untruths told by accused No. 2 to Detective Sergeant Cooper and had not taken into account the fact that these lies may have been told because of fear or panic. Reliance was placed on the dicta in S. v. Letsoko and Others, 1964 (4) S.A. 768 (A.D.) at p. 776 and S. v. Ivanisevic, 1967 (4) S.A. 572 (A.D.) at p. 576. These submissions overlook the fact that there were several lies told by accused No. 2 and that they were not all on the spur of the moment. The accused was untruthful on the following aspects:

(i).../50

i. When he told Detective Sergeant Cooper that he knew nothing about the watches. This could be regarded as being on the spur of the moment.

ii. When he told the Court a quo that he had forgotten that the watches were in the jewellery box. This was during his evidence.

iii. When he told Detective Sergeant Cooper that he had been given the watches as presents by friends in Cape Town. This was told only after the police had found the box and they had waited for the key from his wife. He had had some time to think about the matter.

iv. When he told the Court a quo that he had told the police that the rings belonged to his brother.

v. His reasons for lieing are improbable. He says he was afraid that he would be arrested, as also his wife and his brother's wife. Such arrests could have been avoided more easily by saying the rings belonged to his brother. This becomes more

evident.../51

evident when one realises that he knew that his story would not be accepted i.e. after he was unable to name the friends who were supposed to have given him these watches.

In view of what has been set out in paragraphs i - v above, it cannot be said that the learned Judge attached too much weight to the cumulative effect of the untruths told by accused No. 2. Counsel in this Court, dealt with each of the matters set out in paragraphs (aa) to (gg) and argued that accused No. 2 should be given the benefit of the doubt in each case. It is only necessary to repeat the following dicta of DAVIS, A.J.A. in R. v. de Villiers, 1944 (A.D.) at pages 508 and 509:

> "The Court must not take each circumstance seperately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled

to.../52

> to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence."

It follows from what has been said above, that I have not been persuaded that the learned Judge erred in convicting accused No. 2. Hence his appeal against his conviction must fail.

I turn now to deal with the appeals against the sentences. As stated earlier, leave to appeal was granted in terms of section 363 (1) of Act 56 of 1955 but only in respect of the convictions. It appears that accused No. 2 did apply for leave to appeal against his sentence. This was not dealt with by the learned Judge. Grounds of appeal were filed on behalf of each accused. These refer only to the appeal against the conviction. No mention is made of an appeal against the sentence. Counsel for the State, acting on instructions, took up

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the attitude that it was not open to the two accused to argue the question of sentence and submitted that this Court could not entertain the appeals against the respective sentences. It was submitted on behalf of each accused that as there had been a general grant of leave to appeal, this included an appeal against sentence. Both counsel stated that this Court had, in other cases, permitted an appellant to appeal against his sentence even though leave to appeal had been granted only in respect of the conviction. They were unable to refer this Court to any case in which this had been done. In the alternative they asked for condonation of the failure to obtain leave to appeal against the sentence. This Court heard argument on sentence and intimated that it would give its decision later as to whether the two accused would be allowed to appeal against their sentences.

The Criminal Procedure Act No. 56 of 1955 sets out the procedure to be followed and the powers of this Court in criminal appeals emanating from the Court

of.../54

of a provincial or local division. The relevant sections for the purposes of this judgment are 363(1), 363(2), 363(6), 367, 369(1) and 369(2).

I deem it desirable to discuss the provisions of section 369 first. Subsection 1 reads:

> "(1) In case of any appeal against a conviction or any question being reserved as aforesaid, the court of appeal may -
>
> (a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or
>
> (b) give such judgment as ought to have been given at the trial, or impose such punishment as ought to have been imposed at the trial; or
>
> (c) make such other order as justice may require:
>
> Provided that, ...(the proviso is not relevant)...".

Subsection 2 reads:

> "(2) Upon an appeal under section three hundred and sixty-three against any sentence, the court of appeal may confirm the sentence, or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial."

There.../55

There is a distinct contrast between the opening words in sub-sections 1 and 2. In sub-section 1 in any appeal against a conviction, the court of appeal has been given the power inter alia, "to impose such punishment as ought to have been imposed at the trial". In sub-section 2 in an appeal against any sentence the court of appeal may, inter alia, also "impose such punishment as ought to have been imposed at the trial". The wide powers conferred in sub-section 1 in themselves indicate that, even if the appeal is against the conviction only, the court of appeal is empowered to deal with the question of sentence. The contrast in the wording of the two sub-sections leaves no doubt that the court of appeal has this power whether the appeal is against the conviction or the sentence.

Section 363 reads:

> "(1) An accused convicted of any offence before a superior court may, within a period of fourteen days of the passing of any sentence as a result of such conviction, apply -
>
> (a).....

(b)....., to the judge who presided at the trial,.....

for leave to appeal to the appeal court against his conviction or against any sentence or order following thereon....."

(2) Every application for leave to appeal shall set forth clearly and specifically the grounds upon which the accused desires to appeal : Provided that if the accused applies verbally for such leave immediately after the passing of the sentence, he shall state such grounds and they shall be taken down in writing and form part of the record."

Subsection 2 is explicit. The grounds must be clearly and specifically set out. It follows that an applicant for leave to appeal would have to set out whether he is appealing against the conviction or sentence or both.

However, even if this was not done or even if the trial Judge refused leave to appeal against the sentence, the court of appeal is not precluded from exercising the powers granted to it by section 369 (1) (b).

In.../57

In the case of S. v. Maepa, 1974 (1) S.A. 659 A.D. the appellant had been convicted in a regional court of culpable homicide and sentenced. He appealed unsuccessfully to the Transvaal Provincial Division against his conviction only. An application to that Court for leave to appeal to the Appellate Division against the conviction, was refused. Thereafter he applied, in terms of section 21(3) (a) of the Supreme Court Act, 59 of 1959, for leave to appeal against the sentence. The Appellate Division held that since there was no decision by the Provincial Division in respect of sentence, it had no jurisdiction to consider the appeal. MULLER, J.A., who delivered the judgment of the Court said at page 666:

> "Ten slotte wil ek net die volgende opmerkings maak. Indien die appellant deurgaans van bedoeling was om ook teen sy vonnis te appelleer - en dit is nie alleen moontlik nie, maar ook waarskynlik dat hy so bedoel het - dan skyn dit asof dit sy regsverteenwoordigers se fout was (n fout wat deurgaans gemaak is) om nie aan daardie bedoeling uitvoering te gee nie. Die deur is egter nie heeltemal vir die appellant gesluit nie. Hy

kan, .../58

> kan, met aantekening van appèl teen sy vonnis en 'n daarmee gepaardgaande aansoek om kondonasie, nog poog om die gepastheid en redelikheid al dan nie van die vonnis in hoër beroep te laat oorweeg."

In R. v. Mpompotshe and Another, 1958 (4) S.A. 471 (A.D.) the Court was concerned with a conviction on a charge of murder. In his application for leave to appeal he, the appellant, had raised several grounds of appeal. The Judge in the Provincial Division granted leave to appeal generally. SCHREINER, A.C.J., said at p. 473:

> "A general grant of leave to appeal covers all issues, but a question may arise whether leave to appeal granted on grounds framed on the lines of those in this case is to be construed as covering all issues appearing on the record, or at any rate all such issues as relate to the factual basis of the verdict."

In an unreported case, R. v. Goliath No. 181/1958, heard in this Court in September 1958, the Court was dealing with a case in which the appellant had applied to the Provincial Division, on three distinct grounds enumerated as A, B and C, for leave to appeal against the conviction. The Judge in the Provincial Division granted

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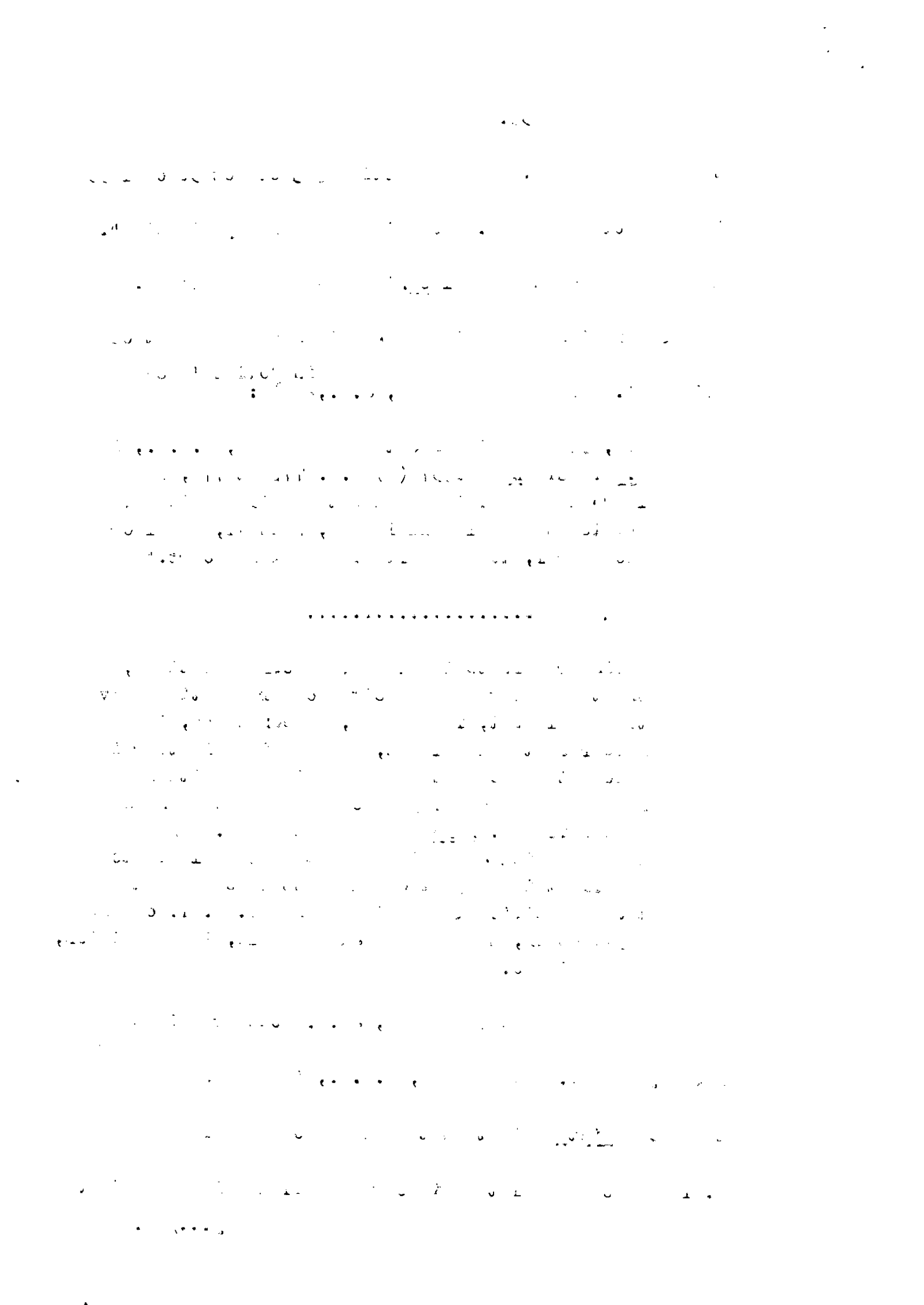
the appellant leave "under section 363 of Act 56 of 1955 in terms of section A. 1 of his aforesaid application". That ground was the usual omnibus clause and reads:

"The conviction was against the evidence and weight of evidence". OGILVIE THOMPSON, J.A., in Goliath's case said:

> "Now, as was pointed out by SCHREINER, A.C.J., in R. v. Nzimande 1957 (3) S.A. 772 at 774, when leave to appeal is granted this will ordinarily suffice to enable all issues, factual, legal or procedural, to be dealt with by this Court."
>
> .....
>
> "Having regard to the foregoing considerations, the terms of the above cited order granting leave to appeal must, in my view, be construed, in favour of the Appellant, as enabling him to raise before this Court the alleged irregularities listed under paragraph B of his application and upon which Mr. Lane now seeks to rely. Had the learned Trial Judge intended to refuse leave to Appellant in respect of all matters other than those specifically mentioned in Sec. A. 1. of his application, the learned Judge would, in my opinion, have said so."

DE BEER and MALAN, JJ.A. concurred in the above judgment. SCHREINER, A.C.J., in agreeing with the above dicta said that the ground of appeal A. 1 was so general that it covered all the issues raised

by.../60.



by the appellant. HOEXTER, J.A., however said:

> "The application to the trial judge listed a large number of grounds on which leave to appeal was sought. The trial judge gave leave to appeal on one ground only, that ground being listed as A 1, and thereby refused leave on the other grounds listed in the application."

I have quoted from the above cases in order to demonstrate that, despite the fact that section 363(2) requires the grounds of appeal to be "clearly and specifically" stated, this Court has not limited the appellant to the grounds stated where leave to appeal was granted generally. To use the words of OGILVIE THOMPSON, J.A. in the Goliath case quoted above such a grant of leave "will ordinarily suffice to enable all issues, factual, legal or procedural to be dealt with by this Court". The foregoing dicta refer to a general grant of leave to appeal in respect of a conviction. They do, however, show that the Appellate Division in its anxiety to prevent a failure of justice, will not pay undue attention to form and prevent an appellant from

putting.../61

putting his case to the Court. There can be little doubt that the Court's approach in regard to sentence will be the same. That this is so also appears from the above dicta of MULLER, J.A., in Maepa's case. Apart from what has been said above I repeat that it is my view that, once the appellant is properly before this Court, section 369 (1) (b) confers on it the power "to impose such punishment as ought to have been imposed at the trial".

It follows that the request by the two accused for leave to argue the question of sentence, must be allowed and the objection raised by the State must be overruled. I will return to the issue of sentence later.

Nothing in this judgment must be read to mean that applicants for leave to appeal need not comply with section 363(2). They should always set out "clearly and specifically" the grounds upon which they desire to appeal. This is necessary because firstly they will assist the Judge to decide whether to grant leave to appeal;

secondly.../62

secondly they will assist the Judge in preparing his report as required by section 367 of the Act. Furthermore, it is implicit that, if the trial Judge has refused leave to appeal, these grounds will in some form or another be incorporated in the petition for leave to appeal addressed to the Chief Justice in terms of section 363 (6) of the Act.

This Court was referred to the case of S. v. Rabie, 1975 (4) S.A. 855 A.D. and in particular to pages 861 and 862 of the report. It was said on behalf of both accused that having regard to the matters discussed in that case, the prison sentence in respect of No. 1 accused should have been wholly suspended and in the case of No. 2 accused, should have been suspended.

The following factors were urged on behalf of No. 1 accused:

(a) He is a man of 47 years and this is his first offence.

(b) As a result of the conviction he will not be entitled to hold office as a director.

(c).../63

(c) A substantial quantity of the rings purchased by him were recovered, namely 138.

(d) As to the balance of the rings it was a condition of the suspension of part of the sentence that R2 500 be repaid to the complainant as a contribution towards the latter's loss.

(e) Accused No. 1 co-operated with the police in getting back the rings which had been sent to Rahman in Durban.

(f) The value of the rings purchased was R2 500 and not between R4 000 and R5 000 as found by the trial Judge.

(g) The trial Judge had erred in holding that accused No. 1 took steps to ensure that the records of the business did not reflect the purchase of the rings.

We have given full consideration to all of the above. However, accused No. 1 was a wholesale jeweller dealing in the kind of goods which he received. As such his criminal transaction was a greater danger to the

public.../64

public than would otherwise be the case. He was taking a chance of making a substantial profit by buying cheaply what he knew belonged to another trader. If persons placed in the accused's position, receive stolen property, thieves will find it easy to dispose of the stolen goods. In these circumstances we have not been persuaded that the sentence imposed is inappropriate.

On behalf of No. 2 accused the following matters were urged:

(i) That the trial Court misdirected itself in finding that "in view of the value of the articles involved —— a term of imprisonment cannot be excluded".

(ii) That, because of the finding in (i) the trial Judge precluded himself from taking into account the personal factors viz., that accused No. 2 was a married man with four children and this was his first offence.

(iii)..../65

(iii) That the goods consisted of eleven watches and their value, which was not proved, could not have been so high as to warrant a period of one year's imprisonment in the case of a first offender.

We do not think that it can be said that the finding in (i) above caused the learned Judge to overlook the other factors placed before him. More should not be read into the finding than, that the value of the goods was such, that, notwithstanding the other factors, a period of imprisonment was a proper sentence. In this case the accused is also a shopkeeper. A man in his position should be able to give a satisfactory explanation of his possession of goods. If shopkeepers are unable to give satisfactory explanations of goods in their possession, the danger of stolen goods finding their way into the shops, become greater. It must also be remembered that section 36 of Act 62 of 1955 provides that a person who contravenes the section "is liable on conviction to

the.../66

the penalties which may be imposed on a conviction of theft."

In the light of the above we have not been persuaded that the sentence imposed on No. 2 accused is excessive.

In the result -

(a) the appeal of each appellant in respect of his conviction and sentence is dismissed.

(b) In the case of the first appellant (Shenker), the date for payment of the R2 500 to the complainant, set out in the condition suspending part of his sentence, is altered to read "1st May 1976."

O. Galgut.

O. GALGUT.
JUDGE OF APPEAL.

HOLMES, J.A. }
KOTZÉ, A.J.A. } Concur.