FILED 78.9.7. 202/78

G.P.-S. J 445

KYK LEER 116/78

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

(APPÈL DIVISION)
AFDELING)

APPEAL IN CRIMINAL CASE
APPÈL IN STRAFSAAK

N. PALMOS
Appellant.

versus/teen

DIE STAAT
Respondent.

Appellant's Attorney SYMINGTON & DE KOK *Respondent's Attorney* P.G. (PTA)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate E.H. Stafford *Respondent's Advocate* [illegible]
Advokaat van Appellant *Advokaat van Respondent*

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

(T.P.D)

Coram: Corbett, Miller, [illegible]

Appellant: [illegible]

Respondent: [illegible]

CAV.

The Court allows the said appeal and sets aside appellant's conviction and sentence on charge 7.

(Judgment per Corbett JA)

[illegible signature]

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

NICOLAS PALMOS ..... appellant

versus

THE STATE ..... respondent

Coram: CORBETT, MILLER et DIEMONT JJA
Date of Appeal: 16 November 1978
Date of Judgment: 30 November 1978

J U D G M E N T

CORBETT JA:

At the time of his arrest on 21 May 1978 the appellant, a qualified pharmacist, owned (through a private company) and conducted a business in Pretoria known as the Eastwood Park Pharmacy. Appellant had been in the pharmacy business since 1949. Prior to acquiring the Eastwood Park Pharmacy early in 1972, appellant had owned and conducted another similar undertaking in Pretoria called the Paragon

/ Pharmacy.....

Pharmacy. Some four months after his arrest appellant appeared in the Regional Court for the Transvaal, held at Pretoria, upon a number of charges, including a charge of theft (charge 7). He was convicted on some charges and acquitted on others. As regards charge 7 he was convicted of attempted theft and sentenced to a fine of R800 or 12 months imprisonment, plus 12 months imprisonment wholly suspended for 3 years upon appropriate conditions. An appeal to the Transvaal Provincial Division against the conviction on charge 7 having failed, the appellant now comes to this Court (leave having been granted by this Court) on appeal against this conviction.

It appeared at the trial that in essence the gravamen of the charge against appellant was that in the course of his business he had from time to time received from certain travelling representatives, acting on behalf of manufacturers and distributors of various types of

/ patent.....

patent medicines, quantities of such medicines; that appellant gave either cash or goods to the representatives in exchange for these medicines; that in so disposing of the medicines to appellant these representatives became guilty of the theft thereof from the manufacturers concerned; that at the time he received the medicines the appellant was aware that the disposal to him constituted theft by the representatives; and that despite such knowledge he took the medicines and kept them with the intention of selling them in the course of his business. (In one instance the person supplying appellant, a certain Kanowitz, was not a manufacturer's representative, but a chemist in the employ of the H.F. Verwoerd Hospital. As I shall show, however, Kanowitz and his transactions with appellant fall out of the picture when it comes to this appeal.) In view of this gravamen it is somewhat surprising that the State elected to formulate charge 7 as a simple indictment of theft instead of one of receiving stolen property. Had

/ the.....

the latter course been adopted, some of the difficulties which the State later encountered might have been foreseen and avoided.

Be that as it may, the substance of charge 7 was that the appellant was guilty of the crime of theft in that during the period 1974 to May 1976 and at Pretoria he unlawfully stole goods to the value of R14 617,72, as per annexed lists, the property of or in the lawful possession of the companies named in the lists. In these lists the goods are divided into seven groups and in respect of each item a description of the medicine and the name of the manufacturing company is stated. The division into groups accords with the source of the goods; in other words all the goods in a particular group are alleged to have been derived from a particular person.

The Magistrate acquitted appellant on the charge of theft as far as the goods listed in groups 4 and 7 were concerned; in the case of group 4 mainly because of the

/ unreliability...

unreliability of the evidence of the aforementioned Kanowitz, the person from whom the medicines in that group were alleged to have been received, and in the case of group 7 because the appellant claimed (and the claim was not rebutted by the State) that the medicines listed under this group were his own stock and were mostly goods which he had brought over from the Paragon Pharmacy. The State had conceded that it could not ask for a conviction in relation to these two groups of goods.

As regards the remaining groups, i.e. groups 1 to 3 and 5 and 6, the Magistrate concluded as follows:

> "It seems quite clear that none of the medical representatives initially stole any of these goods from the manufacturers and it can safely be assumed that they were given these goods as samples for free distribution in order to advertise the products of their principals. The State, for reasons not divulged to the Court, elected not to call any of the manufacturers listed in groups 1 - 3 and 5 - 6 as witnesses. Consequently there is no evidence before this Court as to the contractual relationship which existed between representative and manufacturer.

/ This.....

> This Court can therefore not affirmatively conclude that any of the aforementioned goods were in fact stolen goods when the accused received them. In the view this Court takes of the matter, the accused can thus not be convicted in respect of either theft of the goods or receiving stolen goods, well knowing it to have been stolen."

The Magistrate went on, however, to consider a question, which had not been argued before him, viz. whether or not the evidence disclosed an attempt on appellant's part to steal the goods in question. He found on the evidence:-

(a) that the appellant received all the items listed in groups 1 to 3, 5 and 6, that it was his intention to keep and sell all these goods for his own advantage, and that, therefore, he had the intention of depriving the true owners of the property in the goods; and

(b) that when the appellant received the goods he was subjectively of the opinion or under the impression that the goods were stolen goods, and that he, therefore, had the requisite <u>animus furandi</u>.

/Relying.....

Relying upon a decision of this Court, R v Davies, 1956 (3) SA 52 (AD), which was reaffirmed and applied in S v W, 1976 (1) SA 1 (AD), the Magistrate held that in the circumstances appellant was guilty of an attempt to steal the goods listed under the afore-mentioned groups.

In R v Davies (supra) this Court was called upon to decide a matter which had previously given rise to some controversy, viz. whether an endeavour to achieve what turns out to have been impossible can be a criminal attempt at common law (see p. 59 H). The issue in that case related to acts done by an accused in order to bring about an abortion at a time when the foetus was already dead. For the completed common law crime of procuring abortion the foetus must have been alive at the time of the act charged. The question was whether the prior death of the foetus was a complete defence to the charge or whether the accused could, nevertheless, be found guilty of an attempt to procure

/ abortion....

abortion. SCHREINER JA, delivering the majority judgment, rejected an objective in favour of a subjective approach and after a full consideration of the problem stated (at p. 64 A):

> "To sum up, then, it seems that on principle the fact that an accused's criminal purpose cannot be achieved, whether because the means are, in the existing or in all conceivable circumstances, inadequate, or because the object is, in the existing or in all conceivable circumstances, unattainable, does not prevent his endeavour from amounting to an attempt."

To this formulation of the principle he added two "cautionary observations", the first of which is of present relevance. It is (p. 64 B):

> "If what the accused was aiming to achieve was not a crime an endeavour to achieve it could not, because by a mistake of law he thought that his act was criminal, constitute an attempt to commit a crime."

Applying this principle to the facts of the case SCHREINER JA held that the trial judge in that matter had correctly

/ instructed....

instructed the jury that where an attempt is made to commit an abortion and that attempt fails because there is no foetus to remove or the foetus is dead, the crime committed is attempted abortion.

In S v W (supra) the question which arose was whether a person who has intercourse with a female while under the delusion that she is alive, whereas in fact she is dead, under circumstances which would otherwise have amounted to rape is guilty of attempted rape. The question was not strictly necessary for a decision of the case, but the Court nevertheless, following R v Davies (supra), expressed the view that it should be answered in the affirmative.

It is of some interest to note that the English law on the subject, which was referred to in R v Davies (supra) and was considered very fully in Rex v Seane and Another, 1924 TPD 668, (a case which was held in Davies's case (supra) to have been wrongly decided) has recently been authoritatively expounded by the unanimous decision of the House of Lords in Haughton v Smith, 1973 (3) All E.R.

1109. This decision, which removes much of the uncertainty which had hitherto existed in England on the point, opts decisively for the objective approach and is more in conformity with Rex v Seane and Another (supra) than R v Davies (supra). The pith of the decision (according to the headnote) appears to have been that a person can only be convicted of an attempt to commit an offence in circumstances where the steps taken by him in order to commit the offence, if successfully accomplished, would have resulted in the commission of that offence; and that a person who carries out certain acts in the erroneous belief that those acts constitute an offence cannot be convicted of an attempt to commit that offence because he took no steps towards the commission of an offence. In such cases of legal impossibility the question as to whether it derived from a mistake of fact or law on the part of the accused was, according to Lord HAILSHAM, "hardly relevant" (see p. 1118 e; and see also Viscount DILHORNE at p. 1126 e-g).

/ I.....

I turn now to the evidence in the instant case. In order to establish its case on count 7 the State called three manufacturers' representatives, Messrs De Smidt, Reynecke and Littleford, two police witnesses, Lieut. Van Rensburg and Lieut. Jooste (he is in fact a police reservist), and one Schreiber, a former employee of appellant. As remarked by the Magistrate, no evidence was led from any of the manufacturing companies concerned, the persons from whom the goods were alleged to have been stolen.

The evidence of the three representatives followed very much the same pattern. De Smidt, who was alleged to have been the supplier of the goods constituting group 2, stated that he was at the material time in the employ of Abbott's Laboratories. Prior to the trial of appellant, he (De Smidt) had been convicted (upon a plea of guilty) of the theft of some of the goods listed under group 2. These goods belonged originally to his firm. They had been given to him by his firm as samples for him to distribute, in his discretion, to doctors, chemists and clinics in the course

of his rounds, visiting customers of the firm. He supplied them to appellant in return for cash payments calculated at the cost price less 50%. Asked by the prosecutor whether his conduct had been regular ("regmatige optrede") he replied:

> "Wel, nie in sover as wat ek geld ontvang het daarvoor nie, maar ek was geregtig om die monsters onder normale omstandighede te gee aan apteke, dokters en ook klinieke soos ek wel genoem het".

He explained, however, that his employer placed no restrictions on the quantities of samples that could be delivered to an individual customer: it was left entirely to his discretion. This point was driven home in cross-examination by appellant's counsel:

> "En daar was nie 'n beperking op u geplaas ten opsigte van hoeveel u kon gee as monsters, is dit reg?-- Geensins.
> Ten opsigte van enige persoon. So u kon 'n groot hoeveelheid soos dié aan een persoon gegee het?-- Dit is korrek."

Reynecke, who was employed by Allen and Hanburys, deposed to the goods listed under group 3. These were samples given to him for distribution to doctors, institutions

/ and.....

and chemists. He gave them to appellant in exchange for goods from appellant's chemist shop. He conceded that his dealings with appellant were irregular ("onreelmatig") vis-a-vis his company, but denied that he had stolen the goods from the company. His contract with the company was a written one. He was asked by appellant's counsel about his powers in regard to the distribution of such samples and gave the following evidence in that regard:

> "... Met ander woorde u kon maak daarmee wat u wou onder sekere voorwaardes?-- Volgens my eie diskresie ja, maar nie in die hoeveelhede wat ek aan beskuldigde gegee het nie.
>
> Maar dit is nou 'n siviele kontrak wat u nou gehad het met die maatskappy, korrek, wat u oortree het in sekere opsigte, is dit reg?-- Ja, ek het maatskappybeleid oortree in dié opsig dat daar nie soveel - so 'n groot hoeveelheid aan een persoon gegee sou word en vir my eie voordeel nie.
>
> Ja. U het uself, en u beskou uself tot vandag toe nie as 'n dief nie?-- Ek het die produkte vir my eie voordeel gebruik. Ek weet nie of die Hof dit as 'n dief sal wil interpreteer nie.
>
> Maar u beskou uself nie as 'n dief nie?-- Ek glo nie.
>
> En as u uself nie beskou as 'n dief nie, ek neem aan u sou nie vir beskuldigde gesê het hierdie goedere is gesteel nie?-- Wel, soos ek aan die Hof verduidelik het, ek het die goed nie gesteel nie.

U het die goed nie gesteel nie?-- Ek het dit nie gesteel nie."

Littleford worked for a firm known as Scherag Products and at one stage held the position of area manager. He had also, on a plea of guilt, been previously convicted of theft ~~-6~~ in his case of the medicines listed in group 6. He had supplied these goods to appellant, sometimes in exchange for goods, at other times in return for money, i.e. calculated at approximately cost less 50%. Under cross-examination it appeared that several of the items in group 6 had been given to appellant as free examples. His contract with his company was a verbal one. He also conceded that the irregularity committed by him was taking remuneration:

> "..... So the irregularity that you committed was that in respect of certain of these articles which you were meant to dispose of free of charge, you received a remuneration therefor. Is that correct?-- Correct."

He was asked about authorization from his company:

/"You.....

[illegible]
[illegible]"

Littlefield worked for a firm known as [illegible] Products and at one time held the position of area manager. He had also, on a plea of guilt, been previously convicted of theft -- in his case of the medicine listed in group 6. He had supplied these goods to appellant, sometimes in exchange for goods, at other times in return for money, i.e. calculated at approximately cost less [illegible]. Under cross-examination it appeared that several of the items in group 6 had been given to appellant as free examples. His contract with his company was a verbal one. He also conceded that the irregularity committed by him was taking remuneration:

"..... So the irregularity that you committed was that in respect of certain of these articles which you were meant to dispose of free of charge, you received a remuneration therefor. Is that correct?-- Correct."

He was asked about authorisation from his company:

/"Yes.....

"You did not have any authorization from your company, is that correct?-- Well, neither either you know, they did not say no or did not say yes.

Yes, they did not say yes or they did not say no?-- Quite correct.

This question of authorization was never discussed with the accused?-- No. The only time I realised I did something incorrect was when this happened.

When they came and said that you did something incorrect?-- Yes.

So you were under the belief that it was a bona fide transaction?-- Well, being a qualified pharmacist, I thought there was no harm in giving a qualified pharmacist any medicines. They weren't drugs, HFD's.

And also in obtaining a little bit on the side for yourself as well? Did you think that that was also bona fide?-- Well, possible there I might have done wrong.

You might have done wrong, is that correct?-- Correct".

It appeared also from the evidence of these representatives that what they had done was a fairly wide-spread practice amongst representatives of medicine manufacturers; and that there was a fair amount of "swopping" of samples between representatives of different companies. A further point canvassed by appellant's counsel in cross-examination was

/ the.....

"You did not have any qualification for, and certainly, is that correct? -- Well, not for either you know, they did not ... did not say so.

Yes, they did not say so, and they did not ... -- Quite correct.

This question of qualification was never discussed with the accused -- No. The only time I realised I did something incorrect was when this happened.

When the police came and told you that you did something incorrect? -- Yes.

Do you were under the belief that ... bona fide practitioner? -- Well, being qualified ... I thought there was no harm in giving a practical pharmacist any medicines. They weren't dangerous, ...

And also in obtaining a little bit on the side for yourself as well? Did you think that this was bona fide? -- Well, possible there I might have done wrong.

You might have done wrong, is that correct? -- Correct".

It appeared also from the evidence of these representatives that most of them had done quite a fairly wide-spread ... trade ... of medicine ...; and that there was a fair amount of swopping of samples between representatives of different companies. A further point ... [illegible]

....../9...

the dates when the goods in the various groups were delivered to appellant. This aspect was important because the charge sheet had limited the offence alleged under charge 7 to the period 1974 to May 1976. In the result, on the evidence of the representatives, only the goods listed under group 3 (apart from one item) and supplied by Reynecke were shown to have been received by appellant duringthis period.

The evidence of the police witnesses, Van Rensburg and Jooste, related to the investigations conducted by them on 21 May 1976, when they visited the Eastwood Park Pharmacy, and subsequently. It appears from their evidence that they arrived at the pharmacy at about 12 noon. Appellant was there. Van Rensburg introduced himself and told appellant that he had reasonable grounds for thinking that there were stolen goods on his premises. Appellant denied this. Van Rensburg asked where the office was. Appellant denied the existence of an office. The policemen then searched the premises and found a room off the dispensing area at the

/ back.....

back, described by appellant as a "store-room", but equipped as an office. Here they found a large quantity of medicines. Appellant, on being asked from where he had obtained these, told them that he had bought them from the wholesalers. Eventually, after further prevarication and after he had been asked to produce invoices or other documentary proof of purchase, appellant admitted that he had obtained the goods from representatives. At this stage the appellant appeared to become very flurried ("baie verbouereerd"). He was asked how representatives could supply medicines in such large quantities and replied that he bought the goods.

Jooste's evidence proceeds:

> "Ek het vir hom gesê dat dit is onmoontlik dat verteenwoordigers sulke groot hoeveelhede van n item dra. Hulle dra slegs monsters en of hy nie dink dit is dalk gesteelde goed nie. Sy antwoord was baie pertinent: Hulle het dit gesteel, nie ek nie, ek het daarvoor betaal".

Van Rensburg's account of this rather damaging admission is slightly different:

/ "In.....

> "In die apteek, in die kantoor, het die beskuldigde vir my gesê dat - dit is die eerste keer toe daar gepraat was van 'cost less 50' van hierdie hele transaksie, toe sê die beskuldigde vir my, op my vraag, dat hy weet, veral mnr Kanowitz, maar hy weet dat die verteenwoordigers hierdie goed gesteel het, maar dat hy dit nie gesteel het nie, en dat hy dit wettiglik gekoop het, en as gevolg daarvan het ek van hierdie persone wat nou op hierdie kaartjies verskyn het gespreek."

After further questioning appellant revealed that he had further medicines at his home. He and the two policemen then went there. Quantities of medicine were found in his study, in a bedroom and in an outside store-room. Appellant was then arrested and taken to Van Rensburg's office. There they unpacked the medicines and arranged them in the aforementioned groups. On the same day appellant made a sworn statement (Exh. "B"). On 25 May 1976 he made a second, more detailed statement (Exh. "A"). I shall later refer to certain statements contained in one of these exhibits.

The evidence of Schreiber did not add much to the aforegoing. It merely confirmed that appellant did purchase

/ "samples"....

"samples" from representatives on a substantial scale and that he used such goods in the course of his business. He also deposed to the erasure in some instances of markings on the goods to show that they were samples.

It is to be noted that no evidence was led from the representatives who supplied the medicines falling under groups 1 and 5. In the case of group 1 appellant was unable to recall the name of the representative; and in the case of group 5 the representative named by appellant in his disclosures to the police, one Daniels, the area manager for Rio Ethicals, was not called as a witness.

The appellant gave evidence in his own defence. Generally, he denied having committed or been party to the theft of any of the goods in the groups under consideration. He stated that at the time he received the goods he understood the position to be that each of the representatives concerned had the right to dispose of the goods according to his dis-

/ cretion.....

cretion. In no instance did he think that by taking goods from the representatives he committed a theft of the goods from the manufacturers concerned or was receiving goods which the representatives were stealing, or had stolen, from the manufacturers. He bought the goods bona fide from the representatives. When asked about the above-quoted admission which he is alleged to have made to the police - to the effect that the representatives had stolen the goods, not he; he had lawfully purchased them - appellant stated that he did not, and could not, have made this statement. He admitted having made the written statements, exhibits "A" and "B", and conceded that they had been made freely and voluntarily. He did, however, aver that certain passages therein had been "virtually dictated" by Van Rensburg.

Appellant was cross-examined at length by the prosecutor. It is not necessary to canvass this cross-examination in detail, but one or two matters should be men-

/ tioned.....

tioned. At no stage during his cross-examination did appellant depart from his assertion that he did not know or suspect that the goods were stolen and that he did not steal them himself. He did, however, concede that in distributing quantities of samples at cost less 50% or in exchange for goods and in pocketing the money, the representative could have acted irregularly or in "breach of faith" towards his firm. The irregularity lay in the pocketing of the money. He suspected that this ~~is~~ was what was happening. He was asked about a passage in the statement, exhibit "A", relating to the goods in group 2 (acquired from De Smidt) and reading:

> "I suspected that the seller had illegally acquired the goods but this was only a presumption, and I could not prove it."

He said that "illegally" was not his own word, but was dictated to him: he would have preferred the word "irregular".

The Magistrate's reasons for arriving at the conclusion that when the appellant received the goods he was subjectively of the opinion that the goods were stolen and, therefore,

/ that.....

that he had the requisite animus furandi, may be summarized as follows:

(1) Appellant's feigned ignorance of the existence of the office ("kantoor") when first approached by the police. If the appellant had in fact received the goods bona fide, one would have expected him to openly divulge the existence of this office to the police and the fact that a large quantity of medicines was stored therein.

(2) The appellant's initial prevarications, already referred to, when asked from where he had obtained the goods. The Magistrate commented in this regard:

> "An honest, aboveboard pharmacist, who had nothing to hide, would certainly not have acted in this fashion when questioned by the Police".

(3) The appellant's statement to the policemen, referred to above, that "he did not steal the medicines from the different manufacturers, but that the representatives did so".

/ (4) .....

(4) The evidence of Jooste that Van Rensburg asked appellant in the office: "Is daar nog enige verdere gesteelde voorraad?" To which appellant replied: "Ja, by my huis". (It is of some significance that Van Rensburg gave a slightly different version of this incident. He said: "Ek het toe aan die beskuldigde gevra of hy enige verdere medisyne het wat hy op n onwettige basis bekom het. Ek het dit spesifiek gedoen omdat daar baie medisyne in die apteek was en aan my as ondersoekbeampte was dit onbekend watter is in die normale besigheid. Beskuldigde het vir my meegedeel dat hy het nog by die huis". The differences in the two versions - compare "gesteelde voorraad" and "medisyne... op n onwettige basis bekom" - indicate the hazards of placing too much reliance upon the precise wording of conversations recalled in evidence several months later.)

In this Court appellant's counsel submitted that the Magistrate's finding as to <u>animus furandi</u> on the part

/ of.....

of the appellant was incorrect. I proceed now to consider this submission.

The fact that the State failed to prove that the goods in question were stolen either by the representatives or by appellant is of importance not only to the question as to whether appellant could be convicted of theft on charge 7, but also as to the question of animus furandi on the part of appellant. It was by no means a straightforward case of theft. Presumably, the case which the State had hoped to establish against appellant was that in disposing of the goods to appellant the representatives misappropriated goods entrusted to them and thereby committed theft; and that appellant knew it. The dividing line between a misappropriation of this nature and a mere breach of the contract between the individual representative and his employer is a fine one; and in the circumstances of this case, where the representatives apparently had a wide discretion as to the disposal of the goods, it could, even with full information as to the contractual relationship between the representatives and their

/employees....

employees, be a difficult one for the Court to draw. How much more difficult would it not have been for a layman, in the position of the appellant, with an imperfect knowledge of all the facts to unravel the legal subtleties involved and come to a conclusion on the question as to whether or not a theft of the goods was being committed. When one adds to this the facts (i) that all the representatives who gave evidence (as State witnesses) denied that they had committed theft and contended that at most they had acted irregularly in taking remuneration for the goods; (ii) that it seems unlikely that they would have given any different account of the position to appellant at the time when the various transactions took place; (iii) that, according to appellant, the two representatives who did not give evidence adopted the same general attitude as those who did; and (iv) that it was primarily on the representations and attitudes of the representatives that appellant would have relied in forming his own mental attitude to these transactions, it seems to me that the probabilities are against appellant having thought

/ subjectively

subjectively at the time when he received the goods that they were stolen goods or that theft was being committed when the goods were disposed of to him.

It is true that the witnesses De Smidt, Littleford and Reynecke, particularly the former two, appear to have been amicably disposed to the defence. De Smidt and Littleford denied that they had stolen the goods, in spite of previously having themselves pleaded guilty of charges of theft relating to the same goods. One does not know, however, the nature of the charges against them or why and upon what basis they pleaded guilty. And in any event they are the witnesses whom the State chose to call to establish a charge of theft against appellant. It is also true that, in spite of the wide discretion claimed by the representatives in the disposal of samples and quite apart from the question of taking remuneration, it seems unlikely that they would have had authority to pass on such quantities to a single customer as were received by appellant. While here the probabilities appear to favour the State, the

evidence of the representatives themselves was generally to the effect that they had an absolutely free hand and in the absence of evidence from the manufacturers it is not possible to say that they were not telling the truth.

It must also be conceded that the appellant was not a completely satisfactory witness. A reading of his evidence gives the impression that he was fairly evasive as to a number of points canvassed in cross-examination. His explanation of certain passages in his statement, viz. that they were dictated by the police, is particularly suspect. The two police witnesses, Van Rensburg and Jooste, were, on the other hand, found to be trustworthy witnesses by the Magistrate and I find no reason to differ from that assessment. In so far as the case depends upon conflicts between the evidence of Van Rensburg and Jooste on the one hand and appellant on the other, that of the former must generally be preferred. That is, of course, not to say that everything deposed to

/ by.....

by the police should be accepted as conclusively accurate. As I have indicated, in matters of detail, e.g. the precise words used in verbal exchanges, there may be room for doubt as to the accuracy of their recollection.

Having said all this, there is no doubt, to my mind, that everyone concerned, the representatives and appellant, appreciated that what they were doing was, to adopt the word used by appellant himself, "irregular". He, appellant, must further have realised that he was making himself party to transactions which were not wholly "above board" and were contrary, at any rate, to the spirit of the relationship between the representatives and their firms. That appellant had a guilty conscience about these transactions and the goods themselves seems clear. But that is a far cry from an animus furandi at the time of the receipt thereof.

Reverting to the Magistrate's reasons for finding, despite the appellant's denial, that he had such an animus furandi, reasons (1) and (2) do not, to my mind, necessarily

/ point.....

point to an animus furandi at the time of receipt. They are equally consistent with a guilty conscience acquired in the manner suggested above. Furthermore, when the police raided the pharmacy on 21 May 1976, announced that they suspected the presence of stolen goods on the premises and asked to see the office, it seems to me that it is at least reasonably possible that at that stage appellant realised or inferred for the first time that the goods were possibly stolen or that the representatives had possibly committed theft when disposing of the goods to him. If so, that would not only further explain his feigned ignorance and prevarications but also account for the various statements referred to in reasons (3) and (4). If the police referred to the goods as stolen goods and he then for the first time suspected that they might be stolen - or even thought that they were stolen - it would not be anomalous for him to speak of the goods as stolen or illegally acquired and to excuse himself on the basis that it was not he, but the representatives, who stole. All this, of course, takes no further the State

/ case.....

case that he had this animus furandi at the time of the receipt of the goods.

Before this Court respondent's counsel submitted that certain passages in the statement exhibit "A" indicated an animus furandi on appellant's part. (One of these passages was also relied upon by the Magistrate.) The one passage, in which he said that he suspected that the seller, De Smidt, had "illegally acquired the goods", has already been quoted. I think that this statement should be read as reflecting appellant's state of mind at the time of receipt, but I find the word "illegally" in this context too vague and uncertain to draw the inference that appellant suspected that the goods were stolen. The other passage appears later in the statement. I do not propose to quote it because it does not appear to refer to the goods falling into the groups with which this Court is concerned. The relevance of the passage is obscure. It may refer to the goods

/received.....

received from Kanowich, in respect of which he was acquitted and which, therefore, fall outside the ambit of this appeal. Accordingly these passages do not materially advance the State case.

In all the circumstances I am of the opinion that the State case did not establish beyond a reasonable doubt that when he received the goods appellant was subjectively of the opinion that the goods were stolen and, therefore, had the requisite animus furandi. It follows necessarily from this conclusion that appellant should not have been convicted of attempted theft.

In addition, however, it seems to me that there is another fatal flaw in the State case. Even if it be postulated that appellant had the subjective opinion attributed to him by the Magistrate, this would not avail the State if appellant's subjective opinion that the goods were stolen (which must be taken to have been incorrect because the goods were not found to have been stolen) were based upon a mistake of law, i.e. a mistaken view on appellant's

/ part.....

part of the consequences of the transactions entered into between him and the representatives. This has reference to the first "cautionary observation" of SCHREINER JA in R v Davies (supra), quoted above. And it seems to me that in a case such as this the onus would be upon the State to show that the appellant's incorrect view of the situation was not based upon such a mistake of law, i.e. did not fall within the cautionary observation (cf. R v Shongwe, 1966 (1) SA 390 (SR.AD)). This was conceded by respondent's counsel. In the peculiar circumstances of this case I am not convinced that, even if appellant were shown to have had this subjective opinion, there is not a reasonable possibility that this opinion was based upon a misconception as to the legal consequences of the conduct of the representatives; in other words, that appellant mistakenly thought that what they did in law constituted theft. As I have already explained, this is not a straightforward case of either theft or receiving and there is, thus, room, as a reasonable possibility, for such a mistake of law. Whatever the State may have proved

/ in.....

part of the consequences of the transactions entered into between him and the representatives. This his reference to the "first cautionary observation" of [illegible] JA in R v Davies (supra), quoted above. And it seems to me that in a case such as this the onus would be upon the State to show that the appellant's incorrect view of the situation was not based upon such a mistake of law, i.e. did not fall within the cautionary reservation (cf. R v Sharpe, 1968 (1) SA 35[illegible] (SWA)). This was conceded by respondent's counsel. In the peculiar circumstances of this case I am not convinced that, even if appellant were shown to have had this subjective opinion, there is not a reasonable possibility that this opinion was based upon a misconception as to the legal consequences of the conduct of the representatives; in other words, that appellant mistakenly thought that what they did in law constituted theft. As I have already explained, this is not a straightforward case of either theft or receiving and there is, thus, room, for a reasonable possibility, for such a mistake of law. However this may be, I have proved

....

in regard to appellant's subjective state of mind, it did not establish precisely the basis for that state of mind. Consequently, the evidence leaves room for several reasonable possibilities, one at least of which was such a mistake of law. An example of this might be a misapprehension on appellant's part that because the representatives took money or other remuneration for the goods they stole the goods themselves.

In connection with the decision in R v Davies (supra) the learned authors of De Wet and Swanepoel, Strafreg, 3rd ed., at pp. 167-8, contend that in applying the first cautionary observation a distinction should be drawn between what they term a mistake giving rise to a putative crime ("putatiewe misdaad") and a mistake of law in regard to an essential element of a crime ("regsdwaling.... oor 'n wesentlike bestanddeel van 'n misdaad"). Only the former should correctly be regarded as falling within the ambit of the cautionary observation. I am not sure that SCHREINER JA had such a distinction in mind when formulating the principle in Davies's case, but even if the distinction be accepted as

/ law.....

law it seems to me that the possible mistake I have postulated above would fall rather under the head of a putative crime than a mere error as to an essential element of the crime of theft.

In view of these conclusions the conviction for attempted theft cannot stand. It is accordingly not necessary to consider the further arguments advanced on appellant's behalf and particularly those based on the contention that the bulk of the goods were not shown to have been disposed of during the period alleged in the charge.

The appeal is allowed and appellant's conviction and sentence on charge 7 are set aside.

M.M. CORBETT.

MILLER JA)
DIEMONT JA) Concur.