37/85

OMAR F PEER .....APPELLANT

and

MINISTER OF POLICE ... RESPONDENT

Case No. 321/82
mp

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

OMAR F PEER — Appellant

and

MINISTER OF POLICE — Respondent

CORAM: JANSEN, ACJ, JOUBERT, VILJOEN, HOEXTER et HEFER, JJA

HEARD: 7 March 1985

DELIVERED: 28 March 1985

J U D G M E N T

Hoexter, JA,

In the late afternoon of Thursday 6 March 1980

five .....

five members of the South African Police in plain clothes entered a two-roomed flat in Vrededorp, Johannesburg, conduc= ted a search therein and removed certain goods therefrom. The flat was the home of an attorney, Mr Omar Farouk Peer, the appellant in this appeal. The appellant conducted his practice, which consisted mainly of criminal work, from an office in Marshalltown. During the Rand Easter Show the appellant also ran a restaurant at the showgrounds. The appellant lived at the flat with his wife, to whom I shall refer as "Mrs Peer". I shall refer jointly to the appellant and Mrs Peer as "the plaintiffs". Also living at the flat was Mr Abdool Peer, a nephew of the appellant. For the sake of brevity I shall refer to the nephew by his first name. Abdool was an articled clerk in an accountant's office and a university student.

When the police entered the flat and began their search only Abdool was at home. The plaintiffs

arrived .....

arrived soon afterwards, however, whereupon an altercation took place between the appellant and one or more of the policemen. The upshot of the matter was that the police arrested both plaintiffs and removed them to the Jeppe Street Charge Office where they were detained in the cells for some hours before being released.

Following the events aforementioned the plain= tiffs (each in his or her own right) sued the Minister of Police, the respondent in this appeal, for damages. In their particulars of claim the plaintiffs alleged that they had been dealt with unlawfully by the policemen concerned, and that the latter were servants of the respondent acting at the time within the course and scope of their employment. Each plaintiff claimed damages in respect of (1) alleged unlawful entry of the flat and seizure of goods and (2) alleged unlawful arrest and detention. There was a further claim of damages by the appellant alone, based on an

alleged .....

alleged assault upon him by the police. This claim was not pressed at the trial. The plaintiffs' claims were resisted by the respondent. The trial Judge (MELAMET, J) gave judgment in favour of Mrs Peer in respect of her claim for unlawful arrest and detention of her person for which she was awarded damages in the sum of R2 500. Absolution from the instance was ordered on all the appellant's claims against the respondent. The respondent was ordered to pay 60% of Mrs Peer's costs. The appellant appeals against the trial Court's order of absolution in respect of the appellant's claims described in (1) and (2) above. On behalf of the appellant it is contended that in respect thereof the trial Court erred in not granting judgment with costs in favour of the appellant.

The background to the police search of the plaintiffs' flat on 6 March 1980 may be shortly sketched. In Charlton Terrace, Doornfontein, Johannesburg, there

lived .....

lived a man called York who, according to the evidence adduced at the trial on behalf of the respondent, was a buyer of stolen property such as jewellery, television sets, crockery and cutlery. Such stolen goods were sold to York at the aforementioned address by, among others, two young housebreakers and thieves named Douglas and Rathbone, former fellow-inmates of a reformatory, who were working in league. In due course the law caught up with Douglas and Rathbone. They were arrested, tried and convicted on some sixteen counts of housebreaking and theft. In such criminal proceedings the appellant acted as the attorney for Douglas and Rathbone and the appellant was paid for such services by York. After their arrest but before they stood trial, Douglas and Rathbone co-operated with the police and pointed out to the police not only the houses where they had committed their crimes but also certain addresses where they had disposed of the goods so stolen

by them. One such address was that of York in Charlton Terrace. At the time Major J C de Klerk was the officer in charge of the C I D at the Jeppe Police Station. On the strength of the disclosures made to the police by Douglas and Rathbone, Major de Klerk caused York's home in Charlton Terrace to be kept under observation and the movements of people going to and from the said address to be noted. The policeman primarily responsible for such surveillance was Det Sgt P J Cronje, but watch was kept by various members of the Force including Cronje himself, Captain (later Major) Labuschagne, two Detective Sergeants respectively named Enambiya and Schoeman, and constable Mohale. Matters were suddenly brought to a head when Sgt Schoeman reported to Major de Klerk his belief that some of the persons so observed had become aware that the police were following them. This development caused de Klerk to issue an instruction to the policemen concerned to carry out searches at the various addresses. The entry

into .....

into and the search of the appellant's flat took place pursuant to the instruction so given by Major de Klerk. The five policemen who entered and searched the appellant's flat were Det Sgt Cronje, Det Sgt Nagel, Det Const Schoeman and two constables named Whitehead and Parsons. Nagel had not taken any part in the surveillance carried out at York's home but he was the senior police officer of the party who entered and searched the flat.

In his plea the respondent raised the following defences to the claims of the plaintiffs. In response to the claims based on the entry into the plaintiff's flat and the seizure of their goods, the respondent denied that the entry was an unlawful one. The respondent alleged that permission so to enter had been given to the policemen concerned by Abdool. In the alternative, so ran the respondent's plea:-

"5.2.2. The .....

"5.2.2 The said five policemen, on reasonable grounds and bona fide, believed that:

5.2.2.1 the crime of theft or of con= travening section 36 or 37 of Act 62 of 1955 was being committed or would probably be committed or that arrangements for the commis= sion of such crimes were made in the said premises;
and

5.2.2.2 goods which could lead to the proo of or which were contemplated to be used in the commission of the said crimes were kept in the said premises;
and

5.2.2.3 a warrant, as contemplated in section 25(1) of Act 51 of 1977 (as amended), would have been issued if applied for;
and

5.2.2.4 the delay caused by an application for such warrant would have defeated the purposes thereof."

For the reasons set forth in paragraph 5.2.2 of the plea, quoted above, the respondent likewise pleaded that the seizure of the plaintiffs' goods had been a lawful seizure

in .....

in terms of Act 51 of 1977.

Affecting paragraph 5.2.2 of the respondent's plea the plaintiffs requested the following further parti=culars:-

"(a) Did each of the said policemen so believe? If not, which of them had such belief?

(b) What were the said grounds? Full parti=culars are requested of the factual basis for the belief and the inferences to which it gave rise.

(c) Upon what grounds was it believed that a delay would have defeated the purpose of such warrant?"

In response to the above request the respondent answered as follows:-

"(a) Each of the policemen did so believe.

(b) A certain Douglas and Rathbone were 'engaged' in a wave of housebreaking and were bringing stolen property to the home of one York, obviously for distribution.

The police kept surveillance on the place of abode of York and noted who were frequent visitors to this address which is in Doornfontein.

One such frequent visitor was the First Plaintiff (the appellant).

(c) On the 6th day of March late in the afternoon the police became aware of the fact that the said York had realised that he was being kept under surveillance.

It was therefore realised that the homes of all suspects should be immediately searched before the stolen goods would be removed."

In response to the claims based on the arrest and detention of the plaintiffs the respondent pleaded that such arrest and detention had been lawful for the following reasons:-

"8.2.1 The said policemen were peace officers as contemplated in section 40 of Act 51 of 1977 (as amended);

and

8.2.2 The said policemen, on reasonable grounds and bona fide, suspected the Plaintiffs of having committed the First Schedule offence of theft.

Alternatively

8.2.3 The Plaintiffs were in possession of the said goods which the said policemen on reasonable grounds believed to be stolen

property .....

property or goods obtained in a dishonest manner and the said policemen on reasonable grounds suspected the Plaintiffs of having committed the crimes of theft or contravention of sections 36 or 37 of Act 62 of 1955 in respect thereof."

Affecting paragraph 8.2.2 of the respondent's plea certain further particulars were sought and furnished. The appellant wished to know which of the policemen had suspected the plaintiffs of having committed theft and on what grounds they had formed the suspicion. The respondent replied that each policeman had so suspected. As to the grounds for the suspicion the respondent repeated his earlier averments (already quoted above) in regard to Douglas, Rathbone and York and the appellant's frequent visits to York's home. In addition thereto the respondent set forth as grounds for the suspicion that:-

"(i) there .....

" (i) there was a television set in the bedroom which had no aerial and no plug;

(ii) under the bed there were 8 cardboard boxes which could not be seen save by getting right down to look under the bed. The contents were stainless steel teapots, coffee pots, sugar pots, milk jugs, gravy holders, salt and pepper pots and one whole cardboard box full of knives and forks.

These were far in excess of the normal requirements of a household and were very suspiciously hidden away and were not being used;

(iii) the suspicions were aggravated by the fact that no explanation for the possession was forthcoming and was in fact on direct questioning refused."

So much for the pleadings as amplified by particulars. I turn to the evidence. At the trial Abdool, Mrs Peer and the appellant testified in support of the plaintiffs' claims. On behalf of the respondent the following witnesses were called: Warrant-Officer (formerly Sergeant) Cronje; Det Sgt (formerly constable) Schoeman; Douglas; Rathbone; Major de Klerk; Major (formerly Captain) Labuschagne;

and .....

and Det Sgt Nagel. In the judgment of the Court below the testimony of each and every witness in the case is set forth in great detail. It is unnecessary to do so again in the judgment of this Court. For the purposes of the appeal it will be enough to indicate in very broad outline some of the more significant parts of the evidence.

At the time when the police were keeping their watch on York's house the appellant was the driver of a beige BMW motor car ("the BMW") with the registration number NGL 1231. The BMW was registered not in the appellant's name but in the name of one Moolla who lived in Glencoe. Cronje told the trial Court that he noticed the BMW at York's house on a number of occasions. A grey Volkswagen motor car was seen regularly at York's house and was often followed by the police. On one occasion, so testified Cronje, he followed the Volkswagen to the appellant's address. There were four people in the car, inclu= ding the appellant. The appellant was not then known to Cronje. The Volkswagen stopped at the appellant's address where the appellant alighted from the car. According to Schoeman he saw the appellant at the same address on two or three occasions.

Douglas .....

Douglas testified that upon his discharge from a reformatory he was introduced to York and that he joined a gang of criminals who stole and sold stolen goods to York. According to Douglas he went regularly to York's home. On two or three occasions he had seen the appellant at York's house; but he had not been introduced to the appellant. On this part of the case the appellant in his evidence told a very different story. He told the trial Court that so far from visiting it he did not even know where York's house was; and therefore, so said the appellant, the BMW was never at York's house.

The incoming reports of the policemen keeping observation at York's house were collated by Captain Labuschagne who was the second-in-command of the Jeppe Police Station. Cronje was the investigating officer in the case against Douglas and Rathbone. Major de Klerk instructed Cronje to take statements from witnesses with a view to applying for a search warrant when the need therefor should arise. When Schoeman reported to de Klerk his suspicion that the persons being observed had become aware of this fact de Klerk decided that time was of the essence. De Klerk was an experienced officer

who had been in the Police for thirty years. In his evidence in chief he described his state of mind and the reasons prompting his decision to order immediate searches in the following words -

> "Het u ondervinding in dié tyd opgedoen ten opsigte van die handelswyse van .....ontvangers van gesteelde goedere? -------Ja, Edele, ons weet dat volgens Wet moet jy hom in besit kry .....Nou, toe sersant Schoeman nou sê dat die mense het nou bewus geword dat hulle onder observasie gehou word, het ek toe almal bymekaar geroep en ek het toe besluit dat aangesien dit nou duidelik is dat hulle van ons observasie bewus is, en omdat ek bang was dat hulle van die gesteelde eiendom wat ons vermoed het, hulle besit, kon verwyder, het ek toe opdrag gegee dat ons onmiddellik die verskillende adresse moet besoek en deursoek en dan kyk of ons gesteelde eiendom kry.
>
> As u byvoorbeeld sou gewag het om 'n lasbrief in die hande te kry, wat, volgens u mening, sou gebeur het? --- Wel, dit was laat in die middag en dit sou definitief baie tyd geneem het om op daardie stadium 'n lasbrief te bekom. Dan sou dit die doel van deursoeking heeltemal belemmer het.
>
> Hoekom? -----Omdat hulle dan genoeg tyd sou gehad het om die gesteelde eiendom te verwyder."

Turning .....

Turning from the events leading up to Major de Klerk's instruction that the appellant's flat be searched to the search itself, there is, save in one minor respect, no dispute as to the nature and condition of the goods found by the police in the flat. Under a bed in the front room of the flat the police discovered eight cartons full of crockery and cutlery. In the next room there was found a portable television set. The dispute relates to whether or not the television set was in regular use at the time. Abdool and the plaintiffs claimed that the television set was in daily use. The policemen, and more particularly Schoeman, who carried the set away, testified that its electric cord was not fitted with a plug and that the set was covered in dust. A more fundamental conflict is presented by the rivalling versions of the plaintiffs and Abdool on the one hand, and on the other hand that of the policemen, as to the circumstances surrounding the search,

and .....

and more especially in regard to the issues (1) whether Abdool gave his permission to the search; (2) what was said or not said by the plaintiffs and the policemen respectively; and (3) in what manner the appellant comported himself.

Abdool denied that he gave the policemen permission to search the flat. In the judgment of the Court a quo the effect of the police testimony on this issue is accurately summed up in the following words -

> ".. the aggregate of the evidence on behalf of the defendant is that the said Abdool Peer did not actively object to the searching of the flat, although he was unhappy about the said conduct."

According to Abdool one of the policemen told him that they were detectives and that they were looking for stolen property. This was said to him before the arrival of the appellant. The evidence shows that at a stage in

the search after the police had discovered the eight cartons under the bed in the front room, Mrs Peer entered the flat. At that juncture the appellant was reading a newspaper outside the flat in the car in which the plaintiffs had come home. Abdool said that he went down to the car and reported to the appellant that some white people were searching the flat, but that he could not recall whether he told the appellant that the searchers were detectives and that they were searching for stolen property. Upon the entry of Mrs Peer into the flat, and in response to a request by the police, Mrs Peer handed over to them the key of her wardrobe in order that they might examine its contents. The police thereupon searched the wardrobe and removed her belongings therefrom. Mrs Peer testified that the policemen told her that they were looking for stolen goods; but she added that she omitted to convey this information to the appellant when he came into the flat very shortly afterwards. When the police were removing the television

set, ...

set, so Mrs Peer said in her evidence, she told them that she had an invoice for the set but that the invoice was in Glencoe. She maintained further that she explained to the police that the crockery and cutlery in question had been bought for use at the Rand Show; and that they had invoices in respect of these goods. On the other hand Cronje told the trial Court that when he had asked Mrs Peer for an explanation in regard to the property found by the police she had referred them to the appellant, saying "Ask my husband - these are his goods." Nagel's evidence was to the same effect. Cronje denied that Mrs Peer said that the goods in question had been bought for use at the Rand Show.

According to the appellant he was summoned from his car outside the flat by a shout from Abdool. When he got to the doorway of the front room of the flat he found Cronje. Cronje informed him "that he's the police and they're searching the flat". The appellant says he

reacted .....

reacted to this information by asking Cronje whether the police had a search warrant and whether he could produce proof of his identity as a policeman. What happened then was described by the appellant in his evidence in chief in the following words:-

> "He (Cronje) was in the process of taking out his identity document from his shirt pocket, when somebody from the next room rushed me, rushed from the next room and pushed me out of the doorway, gripped my arm at the back and virtually carried me down, out of the courtyard, down the stairs and into a yellow police van, beige I think it was. Whilst I was being taken down, I was being hit in the back, I was being punched in the back."

In cross-examination it was put to the appellant that Cronje had tried to tell him that they were looking for goods suspected to have been stolen, but that the appellant had simply shouted him down by repeatedly demanding production of a search warrant. The appellant denied this. He further said that he had been quite calm when he was

frog-marched down the stairs. Abdool likewise testified that the appellant never shouted or screamed; and that as far as he (Abdool) knew, the appellant was not asked by the police for an explanation in regard to the cutlery. Abdool also said that when the appellant inquired whether Cronje had a search warrant one of the men in the search party rushed out, punched the appellant on the back, and carried him away. According to Mrs Peer the police simply refused to listen to the plaintiffs. She told the trial Court that when the appellant asked the police to produce a search warrant and to identify themselves "they just held him and pushed him down the stairs." The police hit the appellant on the back "and they didn't give him a chance to talk or anything."

In his evidence Cronje said that the contents of the cartons were similar to the stolen goods involved in several of the cases concerning Douglas and Rathbone

investigated .....

investigated by him. The condition of the television set and the cartons concealed under the bed led him to suspect that these were stolen property. Upon the appellant's arrival at the flat, so testified Cronje, the appellant was hostile and aggressive. The appellant began by shouting at the police. When Cronje produced his certificate of appointment the appellant brushed it aside as being meaningless and demanded a search warrant. The appellant said that he was an attorney and that he was not prepared to produce any documents. When Cronje told the appellant that if he failed to give an explanation for his possession of the goods in question he would have to arrest the appellant, the latter said "Do what you like". According to Cronje, Nagel came from outside to support him. Nagel said that he was going to arrest the appellant because he could not explain his possession of the goods.

According .....

According to Nagel the position of the cartons under the bed led him to suspect that their contents were stolen property. Upon the appellant's arrival he shouted in rage and demanded the production of a search warrant from Cronje. When the latter pointed out the goods under the bed the appellant simply carried on screaming. The appellant said that he was an attorney and that he would take the matter further. Nagel further testified that he told the appellant that the appellant and his wife were obliged to explain the presence of the goods on their premises, but that the appellant shouted him down. Nagel said he then decided to arrest the appellant. He arrested both the appellant and Mrs Peer in the front room of the flat. The decision to arrest both plaintiffs was solely his, said Nagel. He arrested Mrs Peer because she could not or would not give an explanation as to the possession of the goods. Her only response was to say "Ask my husband." The

appellant would not walk, so testified Nagel, and accordingly he put his arms round the appellant, carried him out of the flat and put him in the van.

From Schoeman's evidence it appears that he played a minor role in the search. According to him the man who took the initiative was Nagel. From the condition of the television set and the quantity of cutlery and crockery discovered in the flat Schoeman said he thought that these might have been stolen goods. Also according to this witness the appellant displayed animosity towards the police. Shortly after the arrival of Mrs Peer at the flat Schoeman went downstairs. Upon his return to the flat he heard an argument between Cronje and Nagel on the one side and the appellant on the other. Nagel demanded an explanation from the appellant. Schoeman says he saw Nagel putting his arms around the appellant and carrying him out of the flat. He did not see Mrs Peer being arrested.

To .....

To complete the chronicle brief reference should be made to certain developments following upon the arrest of the plaintiffs. To the first of these the appellant alone testified. The appellant told the trial Court after he had ordered and consumed some food in the cell, a white man in plain clothes entered his cell and inquired of the appellant who had instructed him to act for Douglas and Rathbone. The appellant replied that his questioner did not have to bring him to the cells in order to find that out. His questioner then left. The further developments are mainly common cause. At about 8 pm a conversation took place between the appellant and Cronje. In the course thereof the appellant offered to take Cronje to his (the appellant's) office and there to produce to him documentary proof of the appellant's ownership of the goods found by the police at the flat. What induced the appellant to make this offer appears from the following passage in the appellant's evidence in chief in which he

described .....

described his conversation with Cronje on this occasion:-

> ".....if I was alone here, I would have told you: Look come and see me in the morning, but my wife is here and that's why I'm going to now .....I mean, if you want to, I will take you to my office and I can show you the invoices and whatever you want to know about ....."

Cronje accepted the offer and shortly afterwards the appellant, Cronje and a constable went by car to the appellant's office where the appellant showed Cronje various documents including two cheques drawn by the appellant in favour of an auctioneer; and a portion of a receipt reflecting the purchase of goods similar to those seized during the search of the flat. In addition the appellant produced a written catering contract concluded between him and the Witwatersrand Agricultural Society. From the appellant's office the party proceeded to a shop in central Johannesburg where the appellant pointed out certain furniture, being portion of the goods bought from the auctioneer aforementioned, required by the appellant for his catering at the Rand Show. The party then

returned .....

returned to the Jeppe Police Station. There Cronje telephoned his officer who instructed him to release the plaintiffs. The plaintiffs were then allowed to go home.

Against the above summary of the main evidence in the case, and before examining the trial Court's findings of fact, it is necessary here to indicate what impressions some of the chief witnesses on either side created upon the mind of the learned Judge who listened to and observed them. In regard to Abdool the judgment of the Court below points out that he was a witness who not only conceded to harbouring feelings of hostility towards members of the S A P but whose evidence in fact betrayed such an attitude. The trial Court noted that in his evidence Abdool "minimised any lack of co-operation" on the part of the appellant. The demeanour of Mrs Peer was not found to be unsatisfactory but the learned Judge nevertheless noted that she had - understandably perhaps -

coloured .....

coloured her evidence to the extent of presenting the actions of the appellant in the best possible light. The appellant did not make a good impression upon the trial Court. Of this witness the learned Judge remarked that -

> ".. he was loquacious and used such loquacity to avoid or evade answering questions put to him."

And again:

> ".....in the witness box he created the impression of being an excitable person who would stand on what he considered to be his rights."

Cronje, Nagel and Schoeman all impressed the trial Court as hesitant witnesses who were lacking in candour.

Dealing first with the plaintiff's claims based on the alleged unlawful entry into the flat and seizure of goods, the trial Court pointed out in its judgment that in the light of all the evidence it could hardly be suggested that Abdool had expressly consented to the search by the

police . .....

police. The learned Judge found it unnecessary to consider the validity of the defence of consent raised by the respondent. However, on the respondent's alternative defence to the first claim the trial Court came to the conclusion that the respondent had proved on a balance of probabilities -

> "that Major de Klerk was justified in terms of section 25(3) of Act 51 of 1977 in ordering that the premises ..... be entered and searched."

It must be borne in mind, of course, that in paragraph 5.2.2 of his plea the respondent sought to rely not on any belief entertained by Major de Klerk, but on a belief alleged to have been held by each of the five policemen who made up the actual search party. Commenting on this feature of the case the learned Judge expressed the following view of the matter -

> "This is not the justification claimed in the pleadings, but on the other hand, this is an issue which was fully canvassed in the trial, and if an amendment was sought it would have been granted."

I pause here to say that a reading of the record of the proceedings clearly reveals that at the trial neither side sought narrowly to confine this part of the case to the pleadings; and that the issue in question was in fact thoroughly explored. In argument before this Court counsel for the appellant wisely did not contend that the appeal should be confined strictly to the pleadings. In upholding the respondent's defence based on the provisions of sec 25(3) of Act 51 of 1977 the trial Court rejected as untrue the appellant's denial that he had ever visited York's home. In this connection the learned Judge remarked:-

> "It is stretching coincidence to breaking point that the cream BMW motor car with the regi= stration number noted and described by Sergeant Cronje, is that of first plaintiff, although not registered in his name. There is the evidence of Warrant Officer Cronje and Sergeant Schoeman, that the car was seen at the house of York on two or three occasions, and the witnesses are certain that they saw the first plaintiff at the car - as also the car, outside the residence. There is also the evidence of Douglas that he saw the first plaintiff

at the house of York in discussion with York."

The trial Court further concluded that on the facts before them the police had reasonable grounds for believing that the appellant's visits to York were in connection with the latter's criminal activities as a receiver of stolen property.

Calling attention to the unfavourable impression of Cronje and Schoeman as witnesses formed by the trial Court, counsel for the appellant vigorously urged upon us that the learned Judge had erred in that he had failed to subject to critical examination the evidence of these two witnesses on the crucial point whether the appellant had ever been seen at York's house. I do not think that the judgment of the Court below is open to attack on this score. The blemishes and contradictions in the testimony of Cronje and Schoeman appear from the full exposition of the evidence in the trial Court's judgment and need not here be

recounted .....

recounted. Suffice it to say that, more particularly in the case of Cronje, his explanation of the striking similarity between his written statement and the written statements of other police witnesses recorded by him, and his evidence in regard to a further document of which he was the author and which was very properly made available at the trial by the respondent's counsel to counsel for the appellant, reflect seriously upon the credibility and reliability of Cronje. It is to be noticed, however, that Cronje's evidence was sharply criticised by the learned Judge in that part of his judgment dealing with the claims based on the arrest and detention of the plaintiffs, and it is, I think, very unlikely that when the trial Court considered whether the respondent had discharged the onus of establishing the alternative defence raised by the respondent to the claims based on entry and search of the flat, the defects in the evidence of Cronje and Schoeman would not have been present

to the mind of the learned Judge. In any case the evidence of Cronje and Schoeman in regard to the presence of the appellant at York's house not only gains support from the evidence of Douglas in this connection but is significantly fortified, I consider, by the probabilities arising from the feature of the case to which the learned Judge alludes, namely, that the BMW was not registered in the name of the appellant. Cronje was nevertheless able to supply Captain Labuschagne with the address of the man who was the driver of the BMW. In the course of his judgment the learned Judge observed that if the appellant or the BMW had never been seen at the house of York it would be difficult to imagine a reason for the search of the flat by the police. In argument counsel for the appellant suggested as a possible explanation for the search the fact that the appellant was acting as the attorney for Douglas and Rathbone. Accepting for the purposes of argument the truth of the appellant's evidence as to the question addressed to him when he was in the cell at the Jeppe Police Station by an unidentified white person,

the evidence as a whole, and more especially the testimony of Major de Klerk, in my opinion excludes such an explanation as a reasonable possibility. Having given due attention to all the arguments advanced by counsel for the appellant on this part of the case I am not persuaded that the learned Judge was wrong in concluding that the respondent had established on a balance of probabilities that Major de Klerk not only entertained the requisite subjective belief in terms of sec 25(3) of Act 51 of 1977, but that such belief was furthermore based on grounds which were objectively reasonable.

I turn to the appellant's claim based on his arrest and detention by the police. The trial Court ap= proached this question by considering what sort of goods had been stolen by Douglas and Rathbone and what sort of goods were found by the police in the appellant's flat. The learned Judge concluded that against the background of facts known to the police, and in the absence of any explanation

by the appellant, the suspicion on the part of the police that the goods discovered by them in the flat were stolen property was a reasonable suspicion. There is, in my view, no good reason for disturbing this finding by the trial Court. I should add, perhaps, that in my opinion the conclusion reached by the Court below appears to be well-founded whether or not the portable television set found in the flat was in daily use. The learned Judge resolved this disputed issue of fact in favour of the police. The fact that a television set may be in daily use, viewed in isolation, does not serve as an indication that its possessor has come by it honestly. However, little turns on the point. Pointing out that the police had found eight cartons of unused cutlery under a bed in circumstances exciting suspicion, the learned Judge in his judgment further remarked -

> "This would have been sufficient justification of the entry into the flat and the removal of the goods."

I .....

I find myself in complete agreement with the above statement of the position.

It is common cause that during his confrontation with the police in the flat the appellant did not in fact give any account of his possession of the goods in question. The version of the appellant and his witnesses is that he was given no opportunity so to explain. The version of the police is that the appellant was invited to explain his possession of the goods but that he obdurately refused to do so. The crucial question, therefore, is whether or not the appellant was asked to give an account of his possession of the goods.

Mention has already been made of the fact that in dealing with this part of the case the Court a quo was critical of Cronje's qualities as a witness. Having cited examples of the defects in Cronje's evidence the learned

Judge proceeded to comment adversely on the testimony of four of the other main characters involved in the search of the flat -

> "Criticism can, with justification, be levelled also against the evidence given by Sergeant Nagel and Sergeant Schoeman. Criticisms can be levelled with justification against the evidence of first plaintiff (the appellant) and Abdool Peer."

Bearing in mind the poor calibre of these five witnesses and the natural proclivity of Mrs Peer to present the conduct of the appellant in a favourable light, it is not a matter for surprise that the trial Court sought to answer the question whether or not the appellant had been asked by the police to give an account of the goods by an appraisal of the proba= bilities in the case. The learned Judge's assessment of the probabilities is reflected in the passages from his judgment quoted below -

> "It is contended that in view of the fact that the first plaintiff (the appellant) was in a

position .....

position to give a satisfactory account of his possession of the articles, that it is highly improbable that he was given the opportunity to explain the presence of such goods. This might well be, but on the other hand, on his own evidence he only agreed to give an explanation as to the ownership of the goods later that night because his wife had been incarcerated and he felt bad about her being detained in prison.

Another factor against the police not having given the first plaintiff (the appellant) an opportunity of explaining the presence of such goods, is the fact that both Abdool Peer and second plaintiff (Mrs Peer) were admittedly asked for an explanation. It is common cause that this was the position, and if it was done in their case, why was it not done in the case of first plaintiff (the appellant)? The probabilities would appear to be in favour of the version of the policemen, that first plaintiff (the appellant) did not give the policemen an opportunity of having a discussion with him, but that he shouted them down in demanding what he considered to be his rights, the production of a search Warrant."

And again:

".....I am of the opinion that the probabilities favour the version of the policemen, that first plaintiff (the appellant) came into the flat in

an .....

> an aggressive frame of mind, determined to demand and get production of a search Warrant, and in pursuit of this aim, was not prepared to co-operate with the policemen. He did not have regard to the provisions of Section 36 of Act 62 of 1955, and in the course of his evidence in this court, professed to not knowing that failure or neglect to furnish a reply was in itself an offence.
>
> The probabilities are that first plaintiff (the appellant) was so incensed, and so wrapped up with his demand for the production of a search Warrant that he overlooked the conse= quences of failing to reply to the questions of the South African Police. The probabilities are that he refused to communicate with them until they had produced a search Warrant."

On behalf of the appellant it was submitted that the police version as to the alleged shouting by the appellant was an inherently improbable one. An important factor, however, in the assessment of the probabilities in regard to the appellant's reaction to the police search is the whole personality of the appellant. Quite apart from the evidence of the policemen a perusal of the bare record of appellant's

own evidence in the Court below conveys an impression that he is an impetuous and volatile individual much given to garrulity. In the estimation of the trial Judge, by whose impressions as to the demeanour of the appellant we must also be guided, the appellant was an excitable person likely to stand on what he considered to be his rights. Having regard to the particular sort of individual that the appellant would appear to be and bearing in mind the particular circumstances in which the appellant found himself at the time of the police search, the argument that the police version of his unruly and vociferous behaviour runs counter to the probabilities cannot, in my opinion, be sustained. Then it was said that the appellant's version was rendered more probable by the fact that at the time of the search Nagel believed that a search warrant had in fact already been obtained. In my view this fact is not really helpful in deciding whether or not the appellant was asked by the police to give an account of his possession of the goods in question.

It .....

It was further contended in argument that an inference adverse to the respondent should be drawn from his failure to call as witnesses the remaining two members of the search party, Constables Parsons and Whitehead, who were available and had in fact been present at Court during the trial. In all the circumstances of the present case it does not seem to me that any inference adverse to the respondent should be drawn from such failure. The respondent called to testify on the issue in question the three senior policemen in the party, one of whom was the policeman who had taken the decision to arrest the appellant and Mrs Peer. In my opinion the respondent was entitled to rest his defence to the plaintiffs' claim on this part of the case upon evidence which he considered adequate to enable him to discharge the burden of proof which he bore.

The trial Court in my view correctly held that the appellant was found in possession of goods reasonably

suspected of having been stolen. If the appellant was required to give an account of his possession and he refused to do so then Nagel was legally entitled to arrest and detain him. On appeal all the findings of the learned Judge in respect of this part of the case were subjected to minute and critical scrutiny. Notwithstanding the full argument addressed to us by counsel for the appellant I remain unpersuaded that the trial Court erred in dismissing also the appellant's claim based on his arrest and detention.

The appeal is dismissed with costs including the costs of two counsel.

G G HOEXTER, JA

JANSEN, JA)
JOUBERT, JA) Concur
VILJOEN, JA)
HEFER, JA)