CG CASE NUMBER: 142/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

VICTOR BRAN Appellant

and

THE STATE Respondent

CORAM: VAN HEERDEN JA, NICHOLAS et HOWIE AJJA

HEARD ON: 2 MARCH 1993

DELIVERED ON: 4 MARCH 1993

J U D G M E N T

HOWIE AJA

2 In the Court below appellant was convicted of attempted extortion and sentenced to 7 years' imprisonment. This appeal, brought with the leave of the trial Judge, was initially directed at both the conviction and the sentence but the appeal against sentence was later abandoned.

The indictment alleged that appellant threatened senior executives of a company operating retail stores countrywide that unless the company paid him Rl,5 m he would contaminate goods in various of its stores and inform the media that he had done so. Because of the obviously serious consequences which might have ensued had that allegation been publicised the trial was, without defence objection, held in camera. Appellant pleaded not guilty and, through counsel, informed the Court that he put the prosecution to the proof of its case. The commission of the offence having soon been plainly established, the essential issue which remained was whether appellant was proved to

have been the culprit. That is still the question. And because the conviction rests upon circumstantial evidence the enquiry, more specifically, is whether it is the only reasonable inference from all the proved facts that appellant was the person responsible.

The extortionate demand was contained in an undated letter received at the company's head office at Johannesburg on 28 September 1988. It was signed "Peter". The writer required that a message containing acceptance of his terms, together with a contact telephone number via which he could convey instructions for delivery of the money, be left at the head office switchboard. He stated that the operater would receive a call from Peter asking for the message.

Understandably, the company's senior management took the demand very seriously and arranged for the anticipated call to be tape-recorded. The call

came on 3 October and was recorded. (A transcript of the company's tape was produced in evidence.) The

caller, a man, was heard to speak with a noticeable accent of uncertain European origin. He wanted to know whether his "offer", as he called it, had been accepted. The company, having contacted the police without delay, were advised by the investigating officer, Colonel Eager, to adopt stalling tactics so as to enable him and his personnel to try to trace the person concerned. Accordingly, the company's spokesman told the caller that additional information was necessary. The caller asked what information was needed but allowed the conversation to proceed very little further before putting down his telephone.

On 13 October the company received a second letter. The writer, now referring to himself as "Pieter", said that the company had had sufficient time. He objected to what he referred to as an "attempt to intercept and trap the caller by telephone", and insisted on his instructions being fulfilled on pain of the company's "destruction". He gave it until 15

October to declare its acceptance by way of an insertion in what he called the "Personnel" column of the Natal Witness. That newspaper is published in Pietermaritzburg.

In the respective editions of 15 and 17 October, the company published in the personal column its acceptance in principle but added that it wanted discussions in respect of detail. It therefore requested time, for more communications and indicated that it might use the same column to make further contact.

The company received a third letter on 24 October. The writer refused discussions and demanded timeous compliance with his instructions. These would be conveyed in writing and the company was to reply through the newspaper. He said the money had to comprise used banknotes in specified denominations and to be made up in a parcel. He detailed the exact measurements of the parcel and the materials in which it

was to be wrapped. It had to constitute "a firm block". (A diagram of the required rectangular block was sent in a fourth letter which arrived on the same day.) After mentioning certain preliminary delivery instructions the writer demanded that the company's consent to deliver be published in the Natal Witness of 26 October. He concluded by warning against any attempt to trace him or to equip the parcel with a transmitting or explosive device.

The company did publish a response on 26 October but in order to gain time repeated that discussion on detail was in the parties' mutual interest.

On 3 November the last letter arrived. Further time was refused. As an inducement to expeditious action there was enclosed a strip of paper impregnated with poison. The company had to place an insert in the newspaper of 5 November stating its assent to delivery and specifying a Durban hotel at which its

"deliveryman" would collect a series of written instructions on 8 November.

On 5 November the company's press insert stated that its messenger would be unavailable on 8 November but would be at a named hotel in Durban on 10 November.

On 8 November the company received a telegram from Pietermaritzburg. The sender called himself "Pieter". The message was that 10 November was unacceptable and that the new time would be 12 November "from 4 pm". Confirmation in the newspaper was required immediately.

Confirmation of the amended date was duly published on 10 November. By this time the police investigation team needed no further delay. They made up a parcel of the specified dimensions containing nothing but paper. Captain van Molendorf was assigned to effect the delivery. This he did on the appointed date. It is unnecessary for present purposes to recount

the elaborate and finely detailed delivery instructions which the intending extortioner provided. Partly they were contained in some of the letters. The rest were left at various places commencing at the Durban hotel and ending at the delivery point.

As planned by the extortioner, Van Molendorf eventually arrived at the delivery point not long before midnight. The spot concerned was situated on an earth embankment alongside the N3 highway on the outskirts of suburban Pietermaritzburg. It consisted in a hole in the ground covered by freshly cut branches and lined with a wooden frame. Inside the frame was a canvas bag just big enough to take the parcel. Following instructions, Van Molendorf lowered the parcel into the hole and left the scene.

The police plan was that, having delivered the parcel, Van Molendorf would radio the exact locality to a waiting task force and the latter would proceed there to await and apprehend their quarry. Due to various

misunderstandings this plan failed. When the task force did reach the delivery point at some time between midnight and 1 am the parcel had been removed.

When the police examined the scene in the light of day the next morning they found pieces of wood that had been used to line the hole. They also saw that the hole was at the lower end of a trench which had been newly dug into the embankment. The trench had neat vertical sides and and was level at the bottom. It was just wide and deep enough to accommodate the parcel. It ran up the hill and ended at the top of the embankment immediately short of a vibracrete fence. The fence constituted the back boundary of a residential property. Between the fence and the top of the embankment was a narrow level stretch of ground. Van Molendorf, whose police training included tracker work, found evenly

consistent drag marks at various points in the trench from the hole upwards. These marks were also visible on the stretch of level ground. They led from the top of

0 the trench towards the fence. The fence was flanked by natural vegetation. Van Molendorf found no signs that anyone had recently passed through the vegetation at either end of the fence. The police therefore inferred that the parcel had been lifted over the fence into the residential property which it bounded. It is common cause that the property concerned was where appellant lived at all relevant times. In fact it belonged to his wife but for convenience I shall refer to it as if it was his house.

From the facts recounted thus far, which were proved in evidence or were undisputed, there are two inescapable inferences. They are, firstly, that the writer of the letters, the telephone caller and the sender of the telegram were one and the same person and, secondly, that that person dug the trench (or had it dug) and lifted the parcel (or had it lifted) over the fence into appellant's property.

The State case went on to establish the

following. Having ascertained that appellant lived in the house, and suspecting that he was involved in the extortion attempt, Colonel Eager telephoned appellant and recorded their conversation. That tape recording was also produced in evidence. Because Eager considered that appellant's voice and the voice in the company's tape were the same he ordered a search of appellant's property. The search revealed pieces of wood stacked in and alongside the garage. These pieces were similar in all material respects to the pieces of wood which had lined the hole.

The police investigation team traced the Post Office counter official who had dealt with the telegram and also the standard form on which the sender had written his message. The official, Brad Barnard, attended an identification parade and pointed out appellant as the sender of the telegram. He confirmed that identification in evidence.

The telegram form, completed in writing by the

2 sender, was subjected to analysis by a police handwriting expert, Captain Landman. His analysis involved a comparative study, firstly, of the telegram form (for convenience I shall call it "the telegram"), secondly, of specimens which appellant consented to write at Colonel Eager's request and, thirdly, documents bearing appellant's writing and emanating from the consulting rooms in Pietermaritzburg where he conducted a practice in what is termed alternative medicine. Landman concluded positively that appellant was the writer of the telegram and gave evidence confirming that conclusion.

The extortion letters were also expertly examined by Captain Landman who compared the print in which they had been typewritten with the print of typewriters which the police found at appellant's rooms and his house. Because Landman was unable to reach a positive conclusion on the typewriting aspect it is unnecessary for present purposes to say more about it.

Appellant gave evidence in his defence and denied the charge. I shall refer to his version presently. Through counsel who appeared for him pro deo at the trial, and on appeal, he called a number of witnesses. One was Sid Cunha who had been one of appellant's acupuncture patients and was attended to by appellant on ten occasions between April and August 1988. Cunha testified in chief that two or three times between August and November of that year he passed appellant's consulting rooms at night and saw lights burning. It was appellant's explanation to Cunha, and in evidence, that he never worked at night. I shall revert to the matter of the inference which appellant wished the trial Court to draw from this evidence. What is significant, however, is that under cross-examination Cunha, who confirmed that he knew appellant's voice well from speaking to him in person and over the telephone, was asked to listen to the company's tape and to Eager's tape. Having done so, he said without

4 hesitation or reservation that appellant's voice was on both tapes.

From the above-summarised State evidence, supplemented by Cunha's voice identification, the trial Judge inferred appellant's guilt. Before reaching that ultimate conclusion he carefully evaluated the evidence for and against it. The testimony which he found wanting or ineffectual, apart from appellant's, was that of Lieutenant Curlewis, Graham Shelwell, an attorney and Professor Annette Combrink, Head of the English Department at Potchefstroom University.

The evidence of Curlewis and Shelwell bears upon Barnard's identification of appellant and I shall deal with that subject and also appellant's evidence in due course.

Professor Combrink was consulted just before and during the trial. She was requested by defence counsel to conduct such tests as would show whether appellant wrote the extortion letters. She agreed and

5 asked him to write a number of compositions on topics which she set. These she compared with the letters. The comparative exercise she undertook involved a close analysis of i.a. spelling, grammar, word usage and style. She concluded that because of dissimilarities revealed by her comparison it was "highly improbable" that appellant wrote the letters.

In response to this evidence the prosecution, with the leave of the Court, re-opened its case and led the evidence of Dr Ernest Hubbard, a senior lecturer in Linguistics in the University of South Africa, whose opinion was that there was a strong probability that appellant wrote the letters.

Because counsel for appellant eschewed any reliance on Professor Combrink's evidence it is unnecessary to discuss it. I may say that in adopting that approach counsel, who conducted his case on trial and appeal with commendable diligence and pertinence, exercised a wise discretion. As a result it is also

6 unnecessary to deal with Dr Hubbard's testimony.

In his evidence, Barnard said that the sender of the telegram, although signing himself as "PIETER" in the body of the telegram, omitted to insert his initials, surname and address as called for by the relevant form. When Barnard drew this to the sender's attention and asked for these details he received what he described as a blank stare and no response at all. This, he said, made an impression on him. Because he did not want to cause unpleasantness, Barnard left the matter there. Later in the day a Post Office security official asked Barnard if he could recall who had sent the telegram and he was able to furnish a description of the person. He was also able, he said, to furnish a description to the police some months later.

On 3 February 1989 Barnard attended the identification parade. It was admitted by the defence that the formalities of a properly held parade were observed. It was also common cause that appellant was

the last in the line of nine men, that is, he was furthest from the door giving access to the parade room.

Barnard testified that when he got to the third person he stopped. He said it was because this man seemed somehow familiar although he could not say why. He then asked the policeman in charge of the parade what he had to do if he was unsure. The officer told him to look carefully at all the people. Barnard's evidence-in-chief then reads as follows:

> "Then I continued on along the line, and then when I got to the last person, I recognised him immediately, and I had a good look, took my time and then I identified him, pointed him out."

Asked what made him think appellant was the sender of the telegram, Barnard said:

> "Well, there was like a picture formed in my mind, m'lord, and his beady eyes, you know, he struck me as having beady eyes and I just suddenly remember those beady eyes and his picture just fell into place in my mind."

Under cross-examination Barnard said he did

8 not notice whether the sender wore glasses or had a beard or moustache. He could also not recall whether he had ever seen appellant before the day the telegram was sent but he did say that he had served him several times subsequently. His mental picture of appellant he described as a "professorial type".

Initially it was put to Barnard that appellant would testify that on a particular day he asked Barnard to cash a postal order. The latter responded that it was no longer valid. A quarrel then took place because Barnard insisted on the completion of certain forms and this caused appellant a delay of over twenty minutes. This prompted appellant to report him to the lady supervisor. Barnard answered that he would have remembered such an incident and that it did not occur. An amended proposition was then put according to which the encashment was requested of a learner counterhand whom Barnard had to assist. When this resulted in the delay referred to, appellant went to the supervisor and

9 she disposed of the matter. Appellant did not speak to Barnard at all. Barnard's response was once again that no such occurrence took place.

Asked whether the third man, who had caused Barnard to hesitate, looked very similar to appellant, Barnard replied that there was some slight resemblance in respect of their eyes, height, build and hair.

Counsel then confronted Barnard with the entry which the parade officer, Detective Warrant Officer Bosh, had made in the regulation form completed by him with regard to this parade. Referring to Barnard it read:

> "The witness says he is not sure and then without hesitation points out the suspect Victor Bran."

Barnard explained that it was in relation to the third man that he had said he was unsure and Bosch was not called to refute that explanation.

Lieutenant Curlewis was called on appellant's behalf to express his opinion on two points: firstly,

that in these circumstances in which the telegram form was handed to Barnard were not such that there was reason for the latter specifically to remember the sender; and, secondly, that he (Curlewis) would doubt the "recollective capabilities" of someone who regarded the third man on the identification parade as similar to appellant. With reference to various photographs produced in evidence, Curlewis said the only point of similarity was height.

On the first aspect Curlewis said that fear or shock usually led to someone in a bank teller's position having reason to recall, say, a robber's appearance. That sort of factor, he said, was not there in the present case.

In my view this evidence did not detract from Barnard's testimony. Powers of perception and recollection are highly individual, as are an observer's reasons for taking particular note. Barnard had understandable reasons for looking inquisitively at his

1 customer on this occasion. Those reasons were not discounted by Curlewis's generalisations based on his past experience of across-counter identifications by clerks and tellers. He did not claim to have made a specific study in that regard. Moreover, as Curlewis conceded, Barnard's recollection would have been reinforced when he was asked the same afternoon to furnish a description of the sender.

In the result he could not dispute that Barnard was still fully able to make a correct identification of that person. And as to the physical comparison of appellant with the third man on the parade, Curlewis conceded that the average untrained observer might well have seen an overall similarity between the two.

What must be emphasized, I think, is that Barnard at no stage asserted that the third man was the person who sent the telegram. Barnard was merely struck by something familiar but could not fathom what it was.

This was a natural reaction. More importantly, however, he had had not yet observed appellant on the parade. It was not a case of uncertainty after having seen both men. Once Barnard did see appellant he said he had no hesitation and that was confirmed by Bosch's entry in the parade form.

Shelwell's testimony was largely based on notes which he took at the identification parade as appellant's legal adviser. According to those notes, as transcribed the same day, Barnard's pointing out occurred thus:

> "After some hesitation (he asked Warrant Officer Bosch what he should do if he was not sure and was told just to do what he was going to do) and he thereafter placed his left hand on Dr Bran's left shoulder."

That description conforms chronologically to Barnard's account but omits to indicate at what stage Barnard said he was unsure. No doubt because of that uncertainty Shelwell was asked by appellant's counsel when that moment was. He said, speaking now from memory, that

Barnard walked along the length of the parade, got to the end and then asked Bosch what to do when he was more or less opposite appellant. Referred to Barnard's evidence that he hesitated when he got to the third man, Shelwell said that that was not his recollection. In cross-examination he did concede that the third man and appellant were very similar in height and build but said that his recollection was clear that Barnard's exchange with Bosch occurred at the end of the line.

It is to be noted that Shelwell's version on this aspect was not put to Barnard and the omission detracts from the value of Shelwell's evidence. It is also inherently improbable that having just indicated uncertainty when he reached appellant, Barnard would then forthwith point him out, as Bosch noted, "without hesitation". It is manifestly more likely that Barnard felt uncertain and made the inquiry when he reached the person who was, by all accounts, vaguely similar in appearance to appellant.

Appellant denied in evidence that he was the person who handed the telegram form to Barnard. As to the parade, he gave a version which differed from both Barnard's and Shelwell's respective accounts. He said Barnard entered the room from the side nearest to him, passed along the entire line and then returned. While returning, said appellant, Barnard stopped for a while at the third person. However he did not address Bosch at that stage but only when he was almost opposite appellant. Apart from conflicting with Shelwell's version, appellant's evidence on this score is open to the same criticisms as apply to Shelwell.

This, then, was the evidence which concerned Barnard's identification of appellant as the sender of the telegram.

As far as the handwriting on the telegram form is concerned, Landman's evidence was that having compared that writing with the specimens emanating from appellant he found thirty-five points of similarity and

no dissimilarities. He gave detailed evidence illustrating his findings and setting out his reasons for his positive identification of appellant as the writer. It is unnecessary to set out a summary of that evidence. Defence counsel's cross-examination was not aimed at challenging any of the similarities or at establishing differences. It was essentially confined to criticising Landman for not taking into account that what appeared to him to be individual writing characteristics might, in view of appellant's having learnt to write when, in his youth, he lived variously in Europe and England, simply be characteristics typical of another country, region or group. Landman's answer was to the effect that given the number and degree of the similarities, consideration of appellant's personal history would have made no difference to his conclusion.

Reverting to the matter of appellant's evidence, I have already referred to his testimony in

6 relation to the identification parade and to his denial that he was the sender of the telegram. He went on to allege that during the period July to December 1988 he lost a set of his consulting room keys and subsequently he missed several stamped envelopes which he kept for dispatching statements to patients. Assuming in appellant's favour that in an oblique way he intended by this evidence to convey that the true culprit had for some reason contrived to make it appear that appellant was the offender, it is significant that he never sought to advance any such reason or to suggest who it might be. And if someone else was indeed seeking to lay a false trial leading to appellant, the inherent probability is that the trail would have been even more obvious and more incriminating if the other person was intent on diverting attention away from himself.

As to the origin of the wood which was used to line the hole at the lower end of the trench, appellant said that he replaced his wooden roof in about 1985 and

that the old planks were stored in and outside the garage. Some of that timber he used in demarcating his vegetable garden. This was at the boundary overlooking the freeway. Subsequently the Provincial Administration altered the boundary line and the new fence was brought closer to the house. This resulted in part of the vegetable garden and some of the wooden planks now being outside the fence. In this way, so appellant seemed to imply, there were planks lying about on the embankment which the extortioner used in the hole and which the police later discovered. None of this, however, was put to the relevant State witnesses, particularly the policeman who testified about finding the planks. And it was certainly not suggested that the planks he found were more weathered, as they probably would have been, than those which had been stored under cover for the preceding three years. On the undisputed evidence the planks found at the hole appeared no different from those found on the property.

Having weighed all the salient evidence the trial Judge rejected the defence evidence where it conflicted with the State case. He accepted Barnard's evidence and concluded that his identification of appellant was reliable. Landman's evidence was found to be convincing and conclusive on the handwriting aspect. Some of the similarities he highlighted were, I may say, lethally tell-tale. Cunha's voice identification was also damning. Finally, once it is clear that the parcel was manoeuvred over appellant' s wall on to his property, it is not reasonably conceivable that anyone but he would have done so.

In my view the trial Judge's findings on credibility and the proven facts were fully justified. The case against appellant, taken cumulatively, was really unanswerable. There was no other reasonable inference other than his guilt.

The appeal is therefore dismissed.

C T HOWIE ACTING JUDGE
OF APPEAL

VAN HEERDEN JA)
CONCUR
NICHOLAS AJA)