Case No 15496 IN

THE SUPREME COURT OF APPEAL

In the matter between:

FAROUK JASAT Appellant

and

THE STATE Respondent

CORAM: NIENABER, SCOTT et PLEWMANJJA

HEARD: 19 FEBRUARY 1997

DELIVERED: 7 MARCH 1977

JUDGMENT

/NIENABER JA

NIENABER JA:

The appellant, charged before the regional court with housebreaking with intent to steal and theft, was convicted of "housebreaking with intent to trespass and trespass". He was sentenced to a fine of R3000,00 or, failing payment, to three months imprisonment. An appeal to the Natal Provincial Division (Hugo J and Nicholson AJ) against his conviction failed. Leave to appeal to this court was granted to him on petition.

The core facts are:

1. The appellant is an attorney in Pietermaritzburg of some 20 years standing. Attorney Baboo Akoo, a colleague of his, occupied a suite of offices in a building in Loop Street, Pietermaritzburg. Akoo agreed to accommodate the appellant by allowing him storage facilities in his office for a filing cabinet. The appellant accordingly kept some

of his own files and papers in Akoo's office. He requested this favour, so he explained, in order to deny his own partner, who happened to be his brother, access to certain files and papers. According to the appellant he retained the only key to the cabinet.

2. On Friday 2 April 1993 Akoo, for reasons not explained during the trial, abandoned his practice and absconded to the United Kingdom.

3. On Sunday 4 April 1993 Akoo telephoned his articled clerk, the witness Chutterpaul, from London, to inform him that he was not returning to South Africa. He reassured Chutterpaul about some missing items of office equipment and suggested to him that he should take some others for himself, including the office law reports. Chutterpaul refused and caused the matter to be reported to the Natal Law Society.

4. On Monday 5 April 1993 the witness Rees, an executive officer of the Natal Law Society, arrived at the premises. He immediately made arrangements that the lock to the front door of the premises be changed and that a duplicate key be made for the filing cabinet which Chutterpaul identified to Rees as "containing files of work which Mr Akoo dealt with for Mr Jasat [the appellant]/'

5. According to the appellant he learnt of Akoo's flight on that Monday. He telephoned Rees and enquired from him how he could get hold of his files in Akoo's office. Rees mentioned the duplicate key. He also told him that no files would be released to the appellant until the Law Society had been appointed as curator bonis and the appellant had signed the customary form indemnifying the Law Society.

6. That evening Akoo telephoned the appellant from London.

According to the appellant he agreed with Akoo to arrange for the return of a Mercedes Benz motor vehicle belonging to Bankfin. In addition, to quote the appellant:

> "He indicated that he had asked his wife to return some of the files to me and in addition, had told Mr Chutterpaul to return the cabinet to me."

7. On Tuesday 6 April 1993, then a public holiday, at approximately 9 a.m., the witness Pienaar, a consulting engineer, was working in his office adjoining the premises occupied by Akoo. As he left it to go to the toilet he encountered two men in the entrance hall, one a white man carrying a box of files, the other an Indian man who was busy wiping the aluminium frame of the double swing-door leading to Akoo's offices. Pienaar confronted them, having earlier heard rumours that attorney Akoo had fled the country. The white man, in the presence of his companion, replied that they were from "Special Security Services" and that they were sent to collect files

from Akoo's office. Pienaar was suspicious. He returned to his office and was occupied in drafting a contemporaneous note of the incident when the security guard to the building, the witness Dlamini, appeared and made a report to him. It was then, on further examination, that Pienaar saw scratch marks near the lock of Akoo's front door. The lock, so it was later established, had been forced. Pienaar telephoned the police and when they arrived he entered Akoo's premises with them and noticed some open drawers in a filing cabinet with conspicuous gaps as if certain files, corresponding in appearance to those he saw in the possession of the white man, had been removed. 8. Dlamini was a security guard on duty at the building in Loop street where Akoo and Pienaar's offices were located. Part of his duties consisted of patrolling the premises and entering in a register the registration numbers of motor vehicles parked in the parking area. This register was handed in as an exhibit. It contained an entry by Dlamini showing that a vehicle, NP 1470, a white City

Golf, had parked in bay 38 at 08h45. NP 1470, it is common cause, was a vehicle registered in the name of Monty's Motors, a company of which the appellant was the sole director. According to Dlamini the car was driven by an Indian male. Dlamini asked him whether he worked in the building. The man told him "that he was waiting for a white person who was going to bring a computer up to his office." A little later he saw the same Indian male in the company of a white man inside the building. He approached them for an explanation. They told him there was a fire upstairs. He was not, however, diverted and followed them outside where he saw them entering the white Golf NP 1470 which was then parked in the street. He made a note of the number on the palm of his hand. They were carrying files and something that looked like a computer. Dlamini rushed upstairs, knocked on Pienaar's door, and saw that the door to Akoo's office had been damaged.

9. Rees, having been alerted that a break-in had occurred,

arrived at the premises at about 11 o'clock that morning. The first thing he noticed was that the filing cabinet for which he had had a key made was missing. Pienaar met Rees at Akoo's office and reported to him what had happened. On the strength of Pienaar's description and the conversation he had with the appellant the previous day, Rees immediately suspected the appellant.

10. On two later occasions Pienaar again saw the Indian male in the vicinity of the building. The first time was when the man was in the company of another person driving a Porsche motor car. The other occasion, some two weeks or so before the trial, was when he saw him in the company of someone else getting into the same white City Golf, NP 1470, of which Dlamini had earlier made a note. He duly reported this to the police. Although Pienaar was mistaken as to the colour of the Porsche on the first occasion and as to the identity of the Indian man's companion on the second occasion, it was not denied by the appellant that he was indeed the person Pienaar saw on

both occasions.

So much for the facts.

Pienaar positively identified the appellant as the person he saw in the presence of a white man at Akoo's office on the morning of 6 April 1993. The appellant's defence was an alibi. It was suggested on his behalf that Pienaar, though honest, was mistaken. The trial court accepted the evidence of Pienaar and disbelieved the appellant and his supporting witness, his cousin, Y. Akoo. The court a quo found no reasons to differ from the assessment of the evidence of the trial court and its conclusion as to the identity of the appellant. Nor do I.

Pienaar was clearly an impartial and credible witness. Although Dlamini was unable to identify the appellant at an identification parade, his evidence does lend powerful support to Pienaar's identification through the entry in his register of a motor vehicle directly linked to the appellant. The appellant was unable to give a

convincing explanation for the presence of the car at the premises that morning. The appellant, as appeared from the evidence of Rees, was anxious to recover the files which presumably contained confidential material. No one else had a similar motive. It was suggested in passing during argument that the appellant's brother who resembled him physically might have been responsible for the break-in but that suggestion was never proffered in evidence and is in any event highly improbable. If one discounts the possibility that the appellant's brother may have been the culprit, it would indeed be a considerable coincidence if another Indian male, answering so closely to the appellant's description, happened to be on the scene that particular morning. Furthermore, the appellant failed to impress the trial court as a witness and on a reading of his evidence in cold print it cannot be said that the trial court was wrong in its assessment. The evidence of the appellant and his supporting witness in regard to the alibi, mooted for the first time when the appellant testified, is far from

convincing. In short, the trial court and, following the trial court, the court a quo, did not in my view err in accepting Pienaar's identification of the appellant as the person whom he saw that morning wiping the door of Akoo's office with a cloth in the company of a white man wearing brown gloves and carrying a box with files.

On that analysis of the facts what offence, if any, had been committed by the appellant? The appellant was charged with housebreaking with intent to steal and theft. The trial court found that it had not been shown that the property removed by the appellant was not his own. And because an owner cannot steal his own property, so it was reasoned, a conviction of housebreaking with intent to steal and theft would not be competent.

I am by no means convinced that on the facts found the reasoning is sound. This may well have been the type of case where the Natal Law Society, having been invited to assume control over the premises of an absconding member pending its appointment as curator

bonis, and having refused access to such property to another of its members pending further investigation, exercised the kind of right to, or interest in, the possession of the property which could have sustained a charge of furtum possessionis (ct South African Criminal Law and Procedure,vol. II: Common-Law Crimes 3rd ed. 603-4; Snyman Strafreg 3rd ed. 505). But it is not necessary to delve more deeply into the matter for I am prepared to approach it, in favour of the appellant and following the trial court, on the footing that it involved, if anything, the lesser offence of trespass rather than theft. The appellant's first line of attack was that trespass as such is not recognised as a crime by the common law. It is a statutory offence, enacted by the Trespass Act 6 of 1959, the relevant provisions of which are quoted below. But that does not mean, as was contended on behalf of the appellant, that a conviction of housebreaking with intent to commit trespass and trespass, is an incompetent verdict and that the appellant is for that reason alone

entitled to be acquitted. To uphold that contention would be to defer to extreme formalism. The appellant, after all, was not convicted of an offence which in law did not exist; he was convicted of an offence which did exist but which was too tersely formulated in the judgment. The correct description of the offence would have been "housebreaking with intent to contravene s l(l)(a) of the Trespass Act, 6 of 1959, and the contravention thereof. There could never have been any doubt in the minds of anyone concerned with the trial that in essence that was the result the trial court sought to achieve. Counsel for the appellant fairly conceded that if the appeal should otherwise fail no reason exists why this court should not substitute a proper description of the offence for the less accurate one of the trial court.

The next line of attack was that the appellant was prejudiced when the trial court, without prior warning that it proposed to do so, convicted the appellant of one offence when he was charged with

another. The judgment itself does not reveal whether that intended course of action was debated during the argument. Nevertheless it was submitted that the appellant should have been forewarned during the course of the trial that the trial court contemplated a conviction on a different albeit lesser charge; and if that had been done, so it was further contended, the appellant would doubtless have conducted his defence differently.

It was not disputed that a conviction of housebreaking with intent to contravene the Trespass Act and such a contravention, would have been a competent verdict in terms of s 262(1) of the Criminal Procedure Act, 51 of 1977, on a charge of housebreaking with intent to steal and theft. Any qualified lawyer would know that a main charge also comprehends every verdict which is a competent one on such a charge, and that in preparing his defence an accused should be alive to the eventuality of such a conviction (cf S v Human 1990 (1) SACR 334 (C) at 337i-j). The appellant was not an undefended

accused. The learning which requires that an undefended accused should in some manner be forewarned of the pitfalls of a competent verdict (cf S v Velela 1979 (4) SA 581 (C)) accordingly did not apply to him. The appellant was an experienced lawyer who was defended by senior and junior counsel. He could accordingly not have been taken by surprise, once the trial court went against him on the facts, that the verdict was a lesser competent one. His defence was an alibi. If the main charge had been one of housebreaking with intent to commit statutory trespass and such trespass, the defence would still have been an alibi. It is difficult to conceive, even after having heard argument, how the appellant would have conducted his defence differently, by means of cross-examination or the tendering of evidence, if the charge had been formulated along the lines on which the appellant was ultimately convicted. If the test is prejudice to the accused, as I believe it is (cf for an a fortiori situation, .S v Mwali 1992 (2) SACR 281 (A) at 284b-285a), the appellant had no cause for

complaint. There is no substance to this line of attack.

The last line of attack was that the state failed to establish a contravention of s l(l)(a) of the Trespass Act, 6 of 1959. The sub-section reads:

> 1. Prohibition of entry or presence upon land and entry of or presence in buildings in certain circumstances
>
> (1) Any person who without the permission -
>
> (a) of the lawful occupier of any land or any building or part of a building; or
>
> (b) of the owner or person in charge of any land or any building or part of a building that is not lawfully occupied by any person,
>
> enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building."

On the assumption that Pienaar had correctly identified the appellant as the person he encountered outside the entrance to Akoo's premises, two points were made. The first was that the state did not prove that the appellant had entered or was present in Akoo's premises on the day in question, which is a requirement for a conviction in

terms of the section. The second point, postulating the failure of the first, was that it had not been shown, one, who the lawful occupier of that part of the building was and, two, that the appellant did not have his or its permission to enter or be present in the premises.

Neither point, I believe, is good. As to the first the appellant was found wiping the aluminium frame to the entrance door to Akoo's premises, the lock of which had been forced; his companion was carrying a box with files and gave an explanation in the appellant's presence which, though false, did suggest that they were leaving (and thus had earlier entered) the premises. So too, although Dlamini was unable to identify the appellant, the overwhelming likelihood is that it was the appellant who gave Dlamini a false explanation for his presence. And finally it was never the appellant's testimony that although he was in the entrance hall where Pienaar saw him, he had in fact never entered Akoo's office. All those factors point to the inescapable inference that both the appellant and his white companion

had entered the premises and that Pienaar surprised them as they were in the process of leaving the office while covering their tracks.

The second point (that the state failed to prove absence of permission from the lawful occupier) is equally unconvincing. The state undoubtedly proved that someone had entered the premises with force and stealth after Chutterpaul handed the keys to the Natal Law Society and the Law Society had had the locks changed. Akoo, when he spoke to Chutterpaul from London, did not mention the appellant or authorise Chutterpaul to release anything to the appellant. The Law Society specifically refused the appellant access to the particular filing cabinet in Akoo's office until the matter had been investigated. The appellant, when he spoke to Akoo by telephone in London, did not ask for or receive permission to enter the premises to remove the property he claimed to be his own. The appellant accordingly had no permission to do so, not directly from Akoo, nor indirectly via Chutterpaul, and not from the Law Society. Whoever the de jure

occupier may have been, the appellant did not have his or its permission to enter the premises. In those circumstances it is fanciful to suggest that there was a gap in the state case of which the appellant was entitled to take advantage.

The following order is made:

(1) The following wording is substituted for the wording used by the trial court in convicting the appellant:

"The accused is convicted of housebreaking with the intent of contravening s l(l)(a) of the Trespass Act, 1959, and the contravention thereof."

(2) Otherwise the appeal is dismissed.

P M Nienaber Judge of Appeal Concur:

Scott JA
Plewman JA