

SOUTH AFRICA / JUDGMENT

S v Van Der Westhuizen (527/88)

[1990] ZASCA 99 (21 September 1990)

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COURT

Supreme Court of Appeal

BEFORE

Nestadt, Nicholas, Nienaber

CASE / FILE NUMBER

527/88

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IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the appeal of:

A J VAN DER WESTHUIZEN Appellant versus THE STATE Respondent

CORAM: NESTADT JA, NICHOLAS et NIENABER AJJA DATE OF HEARING: 17 August 1990. DATE OF JUDGMENT: 21 September 1990

JUDGMENT NICHOLAS AJA: In 1986 Mr Albertus van der Westhuizen was a detective warrant-officer in the South African Police. He was attached to the CID at the Milnerton police station in

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the Cape. On Saturday 8 March 1986 he was investigating a charge of theft of gold rings against Miss Lewona du Plessis. In the course of his investigation he went with her to Gold Coin Jewellery Exchange, a jewellery shop in the Golden Acre in Cape Town. They drove in a police patrol car and they were accompanied by Constable Delpont, a uniformed policeman stationed at the neighbouring Table View police station. Van der Westhuizen had arrived there asking for someone to accompany him because, he said, he had a woman with him and he could not drive alone with her, and Delpont had volunteered. They were busy with inquiries in the shop when a coloured man entered and offered a ring for sale. When asked, he was unable to produce any form of identification and he left the shop. At Van der Westhuizen's behest, Delpont went after the man and brought him back and searched him. He found a gold ring with five diamonds on his right hand little finger; in his left

3trouser pocket a pair of gold earrings and a single gold earring; round his neck a necklace with a pendant containing a white stone; in his fob-pocket another pendant with a pearl drop; in his right pocket a string of pearls and a rose-shaped brooch; and in his back trouser pocket a red purse containing R91 consisting of four R10 notes, two R20 notes, a R5 note and three R2 notes.

The man gave his name as David Pienaar. Van der Westhuizen was not satisfied with his account of his possession of the goods and decided to investigate further. He drove to Cape Town police station, with Delpont sitting next to him and Du Plessis and Pienaar sitting at the back of the car. Van der Westhuizen first questioned Pienaar in the yard of the police station and then went into the charge-office where he perused the register of criminal cases to see if there were any charges of picking of pockets or a charge of theft which might be connected with

4the jewellery. Finding none, he took Pienaar out and, in the course of questioning him, assaulted him, in an attempt to force him to speak the truth. Pienaar then told Van der Westhuizen that he had got the jewellery from a coloured man at Belville station where they had robbed a white woman. Van der Westhuizen brought Pienaar back to the patrol car. He asked Delpont if he had a pair of handcuffs, which he did not have. But Delpont took out from the back of the car a piece of thick rope with which he tied Pienaar's hands in front of him and passed the rope around his neck. The party (comprising Van der Westhuizen, Delpont, Du Plessis and Pienaar) then set off for Belville.

At Belville police station Van der Westhuizen first telephoned the railway police to enquire whether any relevant cases had been reported during the previous month. The answer was negative. He then took Pienaar to the detectives' office at Belville and interrogated him in the

5presence of Det. Sgt. Horn. Pienaar's hands were tied behind his back and Sgt. Horn assaulted him, in order to get Pienaar to come out with the truth. Pienaar then said that he had taken the jewellery at a house in Pinelands where a medical doctor lived.

They drove to Pinelands, where Van der Westhuizen spoke to Dr Brink. She identified Pienaar as a man who had worked for a contractor which had in April of the previous . year erected a glass door on her patio. Van der Westhuizen showed her the jewellery, but she said that nonê of it was hers. En route back to Table View, Van der Westhuizen stopped his vehicle under a bridge at the Black River Parkway. He told Delpont that he could prove nothing and that he was going to let Pienaar go. He instructed Delpont to return to Pienaar R30,00 of the money taken from the latter, which Delpont gave him, together with the red purse. At the request of the accused, Du Plessis untied Pienaar.

6They then drove on, leaving Pienaar behind. The jewellery and the balance of the cash (R61) were retained. Van der Westhuizen did not issue Pienaar with a receipt for the seized goods and otherwise failed to comply with regulation 328 (1) of the Police Standing Orders, which provides as follows:

"Wanneer 'n lid ingevolge hoofstuk 2 van die Strafproseswet, 51 van 1977, besit neem van of beslag lê op enige eiendom, dit wil sê enigiets ten opsigte waarvan 'n misdaad werklik of vermoedelik gepleeg is of wat moontlik bewys kan lewer dat 'n misdaad gepleeg is, of wanneer dit vermoedelik bedoel was om 'n misdaad te pleeg, moet hy besonderhede daarvan in sy sakboek aanteken en aan die persoon van wie hy dit geneem het of 'n ontvangsbewys daarvoor gee of hom die aantekening in sy sakboek laat onderteken en sodanige eiendom of voorwerp, hierna die bewysstuk genoem, sonder versuim by die aanklagkantoor inhandig nadat hy die voorkant van 'n

etiket, SAP 13A voltooi en daaraan

7 geheg het."

When he eventually returned to Milnerton police station, Van der Westhuizen did not register a report of what had taken place. Although he was on duty on Sunday 9 March 1986, he did not during that day make any report or hand in the jewellery or money. It was only on Monday 10 March that any money was handed in by Van der Westhuizen or a report was registered of the occurrence.

Arising out of these incidents, Van der Westhuizen (whom I shall henceforward refer to as "the accused") was charged in the Regional Court sitting at Cape Town on two counts: (1) theft of the jewellery and cash amounting to R61 taken from Pienaar, and (2) defeating or obstructing the course of justice by releasing Pienaar from custody and by appropriating to himself exhibits relating to the prosecution of Pienaar. He was found guilty on both counts and sentenced each to two years' imprisonment, of which

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one year was conditionally suspended. It was ordered that the unsuspended portions of the two sentences should run concurrently. An appeal to the Cape Provincial Division was dismissed by Howie and Williamson JJ, with Nel J. dissenting.

With the leave of the court a quo the accused now appeals to this court against the convictions and sentences.

At the trial Delport was the main witness for the State, which also called a number of other policemen and Du Plessis. The accused was the main witness for the defence. His evidence conflicted in many respects with that of the State witnesses. It is not necessary to attempt to resolve all the conflicts, nor do I think that that would be possible. Even so, I shall have to retrace in detail some of the ground which has so far been sketched only in bare outline.

9Central to the accused's guilt in respect of each of the counts was the question why the accused let Pienaar go.

Pienaar's case was one to which s 36 of the General Law Amendment Act 62 of 1955 had application. This provides:

"Any person who is found in possession of any goods, other than stock or produce as defined in section 13 of the Stock Theft Act... in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction for theft."

(The position in regard to stock or produce is governed by the substantially identical provisions of the Stock Theft Act 57 of 1959.) S.36 is a powerful weapon in the police armoury for the combating of theft. Its virtue is that a conviction under it does not require evidence of a theft and¹⁰ that there is no call to seek for the victim. Pienaar was found in possession of goods (i.e.

jewellery). The accused admittedly suspected that they had been stolen. The suspicion was a reasonable one. There was a conflict between the accused on the one hand and Delport and Du Plessis on the other in regard to Pienaar's first account of his possession, but whichever it was, it was not a satisfactory account, either objectively or in the view of the accused. On the face of it, therefore, Pienaar was guilty of an offence. Why in those circumstances the accused spent the morning looking for a victim and for evidence of a theft instead of delivering Pienaar and the exhibits into custody at the Cape Town police station, within whose area Pienaar was found, is a question on which one can only speculate.

The reason was not that the accused was ignorant of the provisions of s 36. At the time of this occurrence

11he had been in the police force for about seven years. He had obtained rapid promotion to detective warrant-officer. He had been in charge of the CID branch at Table View. He had made many arrests on charges of theft and had often given evidence in court arising out of such arrests. He agreed that to a policeman the provisions were as well known as the sun and the moon.

The accused said in evidence that Pienaar's first account, given at the Gold Coin Jewellery Exchange, was that he came from Plettenberg Bay where he lived with his grandmother; and that he had taken the jewellery from his grandmother and was now selling it because he had come to Cape Town two weeks previously and he had no money. The accused did not think this account satisfactory

- that is why he assaulted Pienaar at the Cape Town police station. In his evidence the accused explained how the CID question

12suspects. (It is devoutly to be hoped that some of the techniques are not in common use.) He said that they employ various methods of interrogation. If a psychological approach does not succeed, then they have recourse to a form of violence. This does not work with everybody, but still it does work - they have achieved great successes; but he had often found that if you use certain methods, the suspect lies in order that you should stop assaulting him. He says, "Ons het net vir jou gelieg dat jy kan ophou om ons te versmoor". The accused said that in this case Pienaar had departed from his first story because he had been assaulted and in consequence he was prepared to say anything which would satisfy the accused; then when the accused began to talk nicely to him at Pinelands, Pienaar returned to his first story. The accused said that at that stage he believed that Pienaar had possibly got the goods at his grandmother's, and Delport was then pressing the accused

13to take him back to Table View because Delport wanted to go off duty. The accused said he told Pienaar that he was going to let him go; that he would keep the goods and hand them in at Milnerton, and he would investigate the matter further in order to ascertain whether he had got them at his grandmother's; if the accused found that he had not got them there, he would trace him and rearrest him; and if Pienaar was certain that he had got the goods at his grandmother's, he could fetch them at Milnerton CID. The accused asked Pienaar where he wanted to get out of the car and Pienaar indicated a place under a bridge.

This story of the accused's does not bear examination in the light of other evidence given at the trial.

Both Delpont and Du Plessis denied in their evidence that at the Gold Coin Jewellery Exchange Pienaar said that he had got the jewellery from his grandmother at Plettenberg Bay. He did not mention his grandmother. Delpont said that when Pienaar was asked where he had got the jewellery his reply was that he had got the ring from his mother, and the rest of the jewellery he had got from his sister (or from his girl-friend) who apparently lived in Kraaifontein. Du Plessis said that in answer to the accused's question where he had got the jewellery, Pienaar said that the chains were his girl-friend's and the ring was his mother's with whom he lived in Kraaifontein; and that Pienaar did not speak of his grandmother or Plettenberg Bay. Clearly the evidence of Delpont and Du Plessis is to be preferred to that of the accused. They corroborated each other on this point, which was not important in itself, but only became important because the accused gave the Plettenberg Bay story as the reason for letting Pienaar go; and it was not a point on which the two witnesses could have made a mistake. Moreover, the magistrate found that they were both very good witnesses.

The accused's explanation for believing at Pinelands that the Plettenberg Bay story might be a satisfactory account, cannot reasonably possibly be true. The accused did not regard it as satisfactory when, according to him, it was first made, and it could not become satisfactory merely because, on the accused's version, Pienaar returned to it after giving two lying accounts following on assaults.

One of the reasons why the story was in any event not satisfactory was that, as the accused was driven to concede, it evidenced at least theft from the grandmother:-

"AANKLAER: U sê hy het gesê hy het dit by sy ouma gekry?-- Van sy ouma geneem, so ek weet nie of hy dit gesteel het by sy ouma nie. HOF: Meneer, as die man nou goed van sy ouma geneem het en hy het dit uiteindelik

16 aangebied vir verkoop, dan het hy dit gesteel nie waar nie, dan is dit diefstal?— Ja. So, minstens op grond van sy weergawe dat hy goed geneem het, dat hy dit aangebied het vir verkoping, het hy diefstal gepleeg?-- Jy kan dit so Edelaagbare Sy weergawe wat hy aan u gegee het, het minstens diefstal geopenbaar?— Edelaagbare, ia."

He said under cross-examination:

"Of hy dit geneem het, het ek nie geweet nie en of hy dit gesteel het, het ek nie geweet nie, maar hy het dit daar gekry en dit is wat ek verstaan het wat hy vir my gesê het hy het dit by sy ouma gekry, so dit was daar van Plettenbergbaai afkomstig."

Having dropped off Pienaar, the accused proceeded to Table View. At the police station there, Sgt. Carstens, the charge office sergeant, came out to the accused's car and asked him to investigate a complaint relating to dagga at the Robin Hood Café. The accused agreed. Du Plessis¹⁷ was handed over to Carstens and the accused drove off to the Robin Hood Cafe with Delpont accompanying him.

Because Delpont's evidence of what happened at this stage is of importance in the decision of this appeal I set out the relevant extract from the record in full.

" Aanklaer : U moet gaan ondersoek instel na die bewering?— Dit is reg U Edele. Die beskuldigde het toe aan sersant Carstens gevra om die Kleurlingvrou na binne te neem. Ek het die twee pakkies juweliersware met die kontant, die een pakkie van die juweliersware van die Kleurlingman het ek uitgehaal en aan die beskuldigde gevra wat gaan hy hiermee doen met die idee om dit ook aan sersant Carstens te gee sodat hy dit kan loop inhandig vir ons. Die beskuldigde het aan my gesê dat hy in sy truspieëltjie gekyk het en gesien het dat die Kleurlingman nie die voertuig se nommerplaat geneem het nie, en dat ons die geld kan deel en die juweliersware wil hy, aangesien hy nog ou

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goud by die huis het, en dit wil smelt en die diamante daarvoor gebruik.Ja?— Die beskuldigde het aan my gesê dat, jammer ek het toe aan die beskuldigde gesê ek wil niks, ek wil nie betrokke wees hiermee nie, ek wil niks hiermee te doen hê nie. Die beskuldigde sê toe aan my ek moenie bekommerd wees nie, hy het dit al vorige kere gedoen en daar het niks van gekom nie. Ek het toe weer aan die beskuldigde gesê dat ek wil niks hiermee te doen hê nie en die twee pakkies gevat, die een met die juweliersware en die een met die juweliersware en die geld, en dit tussen die twee sitplekke neergesit op die 'console'. Ons is toe daarvandaan af na die winkel U Edele en terwyl ons soontoe beweeg, het die beskuldigde die pakkie opgetel met die geld en die juweliersware en die geld daaruit gehaal en aan my gegee.Al die geld?-- Nee U Edele, hy het, dit was R31,00 gewees, dit was een R20,00-noot, een R5,00-noot en drie R2,00-note. Ek wou nie hierdie kontant hê nie en die beskuldigde het dit toe op my regterkantse bobeen neergesit. Ons het gestop by die winkel en ek het weer geprobeer om die kontant aan die

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beskuldigde terug te gee, maar die beskuldigde het reeds uit die voertuig uitgeklim. Ons het uitgeklim en ek kon nie die geld in die voertuig los nie en ek het dit toe in my regterkantse baadjiesak gesit. Ons het die klagte ondersoek en gevind dat dit vals was en ons is toe terug na die polisiestasie en ek het nie weer met die beskuldigde gepraat nie, aangesien die beskuldigde 'n adjudant-offisier was en ek h konstabel was."

It was put to Delpont in cross-examination on behalf of the accused that his evidence in this regard was quite untrue; and that at one stage Delpont had remarked that he was "broke" and asked for a few rand; and that on the way back from the Robin Hood Café Delpont had said that the accused did not have to hand in the jewellery. All this Delpont denied.

Delpport's further evidence was that when the accused and he returned to Table View from the Robin Hood

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Café, he wanted to find a senior member of the SAP to whom he could return the R31 which the accused had pressed on him and to report the matter. It was then, however, well after 2 pm when he should have gone off duty, and he had to pick up his wife urgently, and so he drove off, still in possession of the R31. At about 9 pm on the same day he returned to the police station and outside the charge office reported what had occurred to W/O Meyer. Meyer took the R31, placed it in an envelope which he signed and put it in the safe in the charge office. When Delpport reported for duty on the following morning, the envelope was obtained from the safe and Delpport opened it at the entrance and took out the money in the presence of Const. Joseph. When the accused arrived at the police station at about 13h00 Delpport went to the accused's car and placed the money on the dashboard in front of the steering wheel, saying that he had reported the matter to W/O Meyer and that he wanted nothing

21to do with the money and he asked that the accused hand it in. He asked the accused what he was going to do now, and the accused replied that he was now going to the barracks to play darts with W/O Muller.

Later that day W/O Muller (who was the officer in charge of the CID at Milnerton) came to Delpport and said that he had spoken to W/O Meyer and asked him to explain what had taken place. Delpport told Muller the story. At about 11 o'clock that evening and at Muller's request Delpport accompanied Muller to the accused's house. There the accused was roused and Muller asked him the whereabouts of the jewellery. After some discussion and a short delay to enable the accused to dress, the accused emerged from his house, and went and unlocked his car and took out the jewellery which was lying loose there. Muller asked the whereabouts of the money which had been seized and instructed that it be brought to him the following day.

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Muller and Delpport returned to Table View police station and Delpport found that the jewellery included all the items taken from Pienaar except for the string of pearls and the brooch.

W/O Meyer, W/O Muller and Const. Joseph all gave evidence corroborating parts of Delpport's evidence.

Thus Meyer said that on 8 March 1986 he was on duty at Table View police station. At about 9 o'clock that evening Delpport, who was on duty at the time, approached him and made a report and handed some money to him. Meyer did not count the money, but he saw that it included a R20 note. He gave instructions that the money was to be sealed in an envelope which was to be locked in the charge office safe. At the earliest opportunity the money should be given to the accused for him to hand in "in die SAP 13 register". At about 5 o'clock on the afternoon of Sunday 9 March W/O Muller arrived at the charge office. Meyer informed Muller²³ of what had occurred the previous evening. Muller said that he would take over the case.

Const. Joseph said that he was on duty at the Table View police station on Sunday 9 March, when he saw Delport come out of the charge office with a brown envelope in his hand. He opened it and took out some cash, made up of a R20 note, a R5 note and some R2 notes.

Muller said that on Sunday 9 March 1986 W/O Meyer made a report to him at about 5 o'clock in the afternoon. In consequence he spoke to Delport and received information from him. That night he asked Delport to accompany him to the accused's house at Melkbosstrand. They arrived there just after midnight. Muller knocked at the door which was opened by the accused. Muller asked him what he had done with the jewellery which he and Delport had seized. After an interval the accused went to the car, opened it and pointed out the jewellery which was lying in an open

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container just behind the gear lever. As a result of the information Delport had given him, Muller asked the accused what had become of the R61, and the accused replied that the money was in his office. Muller left the accused there and returned to Table View where the jewellery was handed in. On the following day, 10 March 1986, the accused came into Muller's office and handed him R61 made up of six R10 notes and a R1 coin. He said to Muller, "Delport het hierdie geld gesteel en nou word ek daarvoor verantwoordelik gehou".

On the basis of all this evidence the following facts must be taken as established - indeed, the accused was not in a position to dispute them. Delport was on 8 March in possession of R31 of the R61 seized by the accused from Pienaar. He reported his possession to Meyer at about 9 o'clock on the evening of that day. He gave the R31 to the accused at about 1 pm on Sunday 9 March. Although no details of his reports to Meyer and Muller were given in

25evidence, there can be no doubt that he must have reported , to them what on his version the accused had said of his intention in regard to the jewellery which had been seized from Pienaar. The accused had not reported the seizure and was still in possession of the jewellery (except for the brooch and the pearl necklace) at midnight on 9 March.

The accused's version of what took place between him and Delport during the excursion to the Robin Hood Cafe was quite different. In his evidence-in-chief he said that on the way to the Robin Hood Café Delport said to him that he was broke and asked the accused for a few rand. He was referring to the seized money which he then had in his hand. Accused took no notice - he did not take it seriously. On the way back to Table View, Delport asked him what he was going to do with the jewellery and whether he was going to hand it in, whereupon the accused told him that he was going to hand it in at Milnerton so that he could

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investigate the case. At Table View, when Delpont was about to drive off in his Volkswagen, this conversation remained in his mind and he ran to Delpont just before he drove off, and asked him where he had put the seized goods. Delpont said that he had put them in the cubby-hole of the patrol car. The accused went to his vehicle. He found nothing in the cubby-hole, but on the "console" between the two seats next to the gear lever, he saw the jewellery lying and his pocket book with the bank notes protruding from it.

At Milnerton, he said, he took out his pocket book in order to write it up, but he had to go out to attend to a number of complaints which had come in. On the Sunday at Table View, Delpont leaned in at the window on the driver's side of his car and put down R31, saying, "Dit is die geld van gister". The accused said that he had no doubt that Delpont had taken the money the previous day and was now returning it. The accused told Delpont that he could be

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glad that he had not yet handed in the seized articles. The accused returned to Milnerton and, opening his pocket book, saw for the first time that it contained only R30, whereas he had seized R61. He then threw the money (the R30 and the R31 which Delpont had given him) into a small tobacco box wherein he kept his own money - there was R50 of his own at the time - and set off for Kuilsrivier where he was to attend a braai with his in-laws.

Asked by his counsel if he could suggest why Delpont had given the evidence which he did, the accused said that he could only infer that Delpont had taken the money from the patrol car on the Saturday and that later he had realised what he had done and then tried to find a way to get the money back to the police station in order to exculpate himself. Delpont's account was definitely a distorted one.

In my opinion the suggestion that Delpont had on

28 the Saturday stolen the R31 is so far-fetched as to verge on the fatuous. One shares the incredulity which Muller expressed when being cross-examined:

"Toe hy die Maandagoggend in my kantoor instap en hy gooi die geld voor my neer en hy sit die blaam op die ander polisieman wat saam met hom was, toe het hy my gedwing om h saakdossier te laat oopmaak. Hy het gesê hierso is die geld en toe het hy vir my gesê Delpont het die geld gesteel, en my antwoord aan hom was, Mnr Van der Westhuizen, wil jy vir my sê dat h konstabel vat geld waarop jy beslag lê en hy steel dit."

It is not credible that a police constable would steal money seized in a criminal investigation from under the nose of the detective warrant officer in charge, especially after he had been told that the seized articles were to be handed in; that he would put at risk his future career in the police force for a paltry R31, for discovery of the theft would necessarily have been swift and inevitable. It is not

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credible that when, as the accused said, he learned of the theft, he would have said to Delport only "You can consider yourself lucky that I've not yet handed in the money", and that he would not have reprimanded Delport and reported him.

The suggestion, that Delport's story of what the accused had said to him on the way to the Robin Hood Cafe, was a fabrication is equally far-fetched. On the accused's version Delport could not have known that the accused was not going to hand in the seized articles

- the accused had told him that he was going to hand them in at Milnerton. If that were true, it is not credible that Delport, in order to extricate himself from the consequences of a theft of R31, would invent a story involving grave allegations against his senior officer - allegations which, so far as Delport knew, could be instantly rebutted. Delport's conduct was not that of a man trying to exculpate himself:

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he brought his possession of the R31 to official notice, and if his charge against the accused misfired, as it was likely to misfire if the accused had told him that he was going to hand in the seized articles, his attempt would have been self-destructive.

In my opinion the evidence of Delport regarding what the accused told him and the pressing of the R31 on Delport was rightly accepted by the magistrate.

This is a convenient stage to summarize the main facts which, where they were not common cause, were established beyond peradventure by the evidence:-

1. On Saturday 8 March 1986 Pienaar was taken by the accused into lawful police custody on suspicion of the theft of the jewellery found in his possession.

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2. The accused seized the jewellery from Pienaar and R91 in cash.
3. Later that day the accused released Pienaar from custody. No lawful justification existed for the release, and the accused could not have believed that any such justification existed.
4. Upon the release of Pienaar, the accused retained possession of the jewellery and R61 of the R91 which had been found on Pienaar.
5. Thereafter, the accused told Delport at or near the Robin Hood Cafe that they would share the R61 and he would keep the jewellery for his own purposes. He pressed on Delport an amount of R31 and retained R30. On the following day (Sunday) Delport returned the R31 to the accused. The accused either dealt with the money for his own purposes, or mingled it with his own money. On 32 the Monday the accused handed to Muller R61 made up of six R10 notes and a R1 coin. 6. The accused did nothing about reporting the case until the Monday morning. He did not of his own volition hand in the jewellery at any time, but he handed it to Muller only when the latter demanded it at his house at midnight on the Sunday.

The important question remains, what was the intention of the accused in releasing Pienaar and in retaining possession of the seized money and jewellery? Some light is thrown on the question by the events which occurred in the vicinity of the Robin Hood Cafe. Further light is thrown upon it by the circumstances of Pienaar's release and the subsequent conduct of the accused in relation to the money and the jewellery.

Since there was no lawful justification for Pienaar's release, the accused must have had reasons of his

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own. What those reasons were, he did not vouchsafe to the court. In my view, however, the inference to be drawn from all the circumstances is clear. It is plain that the accused must have been confident that he had seen the last of Pienaar. So far from giving a satisfactory account of his possession of the jewellery, Pienaar had told four or five different stories, and it was unlikely that he could later come up with anything better. He must have considered himself fortunate to escape from the clutches of the police with the loss only of some money and the jewellery, and to be given R30 in travelling money to boot. It was extremely unlikely that he would in the circumstances risk putting his neck into the police noose again.

The accused had not complied with Regulation 328(1) of Police Standing Orders which is quoted above. In consequence Pienaar had nothing to substantiate a story which on the face of it was so bizarre that the telling of³⁴ it would excite only incredulity. The accused could explain his omission to comply with the regulation only by saying -

"Edelagbare dit is h ding wat h gewoonte is by ons, ons pas dit nie toe in die praktyk nie, daar is baie min speurders wat dit wel toepas."

This, coming from a man in authority like a detective warrant officer, is not credible. The strong probability is that the accused did not comply because he wanted to create no written evidence of his contact with Pienaar.

The accused was unable to give an acceptable

explanation for his failure to hand in the seized articles on the Saturday or on the Sunday. In regard to the Saturday he said:

"Edelagbare die hoofrede omdat die goed nie ingehandig is nie, is omdat ek haastig was. Ek weet dit is staande ordes, dit is

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regulasies dat die goed ingehandig moet word dieselfde dag, maar dit word nie altyd gedoen nie, ek het dit in die verlede al baie nie gedoen nie, dan handig ek dit die Maandagoggend in voor die parade of so en dit is wat ek sou gedoen het."

One is aware that individual policemen like individuals in other walks of life do not always show a scrupulous and strict regard in the performance of their duties, but one must treat such evidence from a warrant officer with scepticism.

In regard to the Sunday the accused was unable to give an acceptable explanation of why, when he was on duty on Sunday and had ample opportunity to do so, he did not hand in the money or the jewellery, but left the money lying in his office and drove around with the jewellery lying open to view in the patrol car. When pressed by the prosecutor on the point, he could only say variously, "(Ek) het nie

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daaraan gedink nie", "Ek glo dit was laksheid aan my kant" and "Dit was agtelosigheid gewees". He agreed that there was remissness on his part and when it was put to him that his conduct amounted to recklessness in the conduct of his duties he agreed, saying, "Ja ek was traak-my-nie-agtig gewees oor my werk op daardie stadium".

The accused was not an inexperienced constable with a "maleesh" attitude towards his work. He was a senior detective who had been a branch commander of the CID branch at Table View. He had received rapid promotion in the police. His zeal and vigour in the performance of his detective duties had been demonstrated on the Saturday morning. But now he would have it that his zeal had dissipated. His omission to hand in the money and the jewellery without delay was in my view to be attributed, not to irresponsibility and carelessness, but to dishonesty.

There is another important circumstance which

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throws light on the intention of the accused in retaining possession of the R61 and the jewellery.

Asked by the prosecutor what he intended to do with the R61 of Pienaar's money which was not repaid when Pienaar was released, the accused said that he would have handed it in on the Monday. When it was pointed out to him that it formed no part of the jewellery, he could reply only that it was found on the accused and that his idea was that if the owner could not be traced it would be forfeited to the State. He would not say that he suspected that the money was stolen money. He did not know why he did not give it back to Pienaar. Pressed on this question, he said eventually, "Edelagbare, daardie besluit wat ek gemaak het was in h paar minute gewees. Ek kan u werklik nie nou sê wat ek toe gedink het nie". The accused could not dispute that on the Sunday Delport returned to the accused R31 made .. up of one R20 note, one R5 note and three R2 notes. On the 38 Monday the accused handed to Muller R61 made up of six R10 notes and a R1 coin. Plainly the accused must either have disposed of some of the 'notes which made up the original R61, or, if his own evidence is true, that he had mingled this money with his own money which he kept in the tobacco box. On either basis, this evidences an intention on the part of the accused to appropriate the money to his own use.

There is nothing to suggest that the accused had one intention in regard to the money and another in regard to the jewellery. If, as I think, the intention to steal the money was clearly proved, then it follows that the accused had a theftuous intention in regard to the jewellery.

The cumulative effect of all the evidence is therefore to lead to the conclusion, beyond reasonable doubt, that at the time of the release of Pienaar the accused had formed the intention of retaining the seized

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articles for his own purposes.

It was argued on behalf of the accused that the State case on the first count of theft was deficient inasmuch as a contrectatio had not been proved: the money and jewellery taken from Pienaar were held in trust, and the evidence was not of such a nature that the omission to hand in these articles constituted a contrectatio.

In regard to the cash, it was contended that the act of the accused in handing the R31 to Delport did not constitute a contrectatio: under the principle referred to in Hunt's South African Criminal Law and Procedure 2nd ed, vol II, p 634, there is no contrectatio when the holder of trust money has a liquid fund available to cover the sum involved. The argument is misconceived. This was not a case where the accused was entitled to use the money which had been seized ostensibly for production as an exhibit at any trial which ensued. By giving R31 to Delport and by⁴⁰ mixing the money with his own, there was a contrectatio by the accused.

In regard to the jewellery, it was argued that there was no proof that at the time of the seizure the accused had a theftuous intention, and that the accused did not handle the jewellery thereafter.

I am prepared to assume in favour of the accused that the original seizure of the goods did not constitute an unlawful contrectatio. But by retaining the jewellery after he had formed an intention to steal it, there was a sufficient contrectatio in law. Because the accused already had control, it would be an absurd fiction to require fresh contrectatio. (See Hunt, *op cit*, 608.) The position is not dissimilar in principle from that of a constitutum possessorium.

Finally in regard to the convictions, it was

⁴¹ argued that the conduct of the accused was not such as to constitute the crime of defeating or obstructing the course of justice. The crime of defeating or obstructing the course of justice consists in unlawfully doing an act which is intended to defeat or obstruct and which does defeat or obstruct the due administration of justice (Hunt, South African Criminal Law and Procedure, vol II, 2nd ed, 143).

The acts laid to the charge of the accused in count 2 were -

1. the release of Pienaar from arrest or custody, which had the result that Pienaar was not, or could not be, prosecuted, or that the prosecution of Pienaar was hampered or delayed; and

2. the unlawful appropriation of the exhibits which had been seized, which had the result that the prosecution of Pienaar was frustrated, obstructed or hindered.

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The acts and their consequences were clearly established. It was argued on behalf of the accused that Pienaar was not officially under arrest and that mere neglect of duty by a police official was not necessarily a crime.

The first submission was based on the evidence of

the accused, who said that he did not regard Pienaar as being under arrest; he himself did not use the word arrest, and Pienaar had made no objection to being taken on the

investigation. There is no merit in this submission. Pienaar was in police custody. A piece of rope was tied around his hands and his neck so that he would not escape; the fact that he voiced no objection to his treatment does not mean that he was not in custody.

The release was unlawful. Quite apart from the

applicable provisions of the Police Regulations it can hardly be suggested that a police officer acts lawfully if he releases a suspect within his custody in order that he should escape trial. On the evidence that was plainly the accused's object. In regard to the cash and jewellery, it was plainly the intention of the accused that they should not be produced as exhibits at a trial of Pienaar; he knew that if they were not handed in they could not be produced; and even though his immediate intention was to enrich himself, he must have known that that intention would not be realised unless the trial of Pienaar was frustrated.

This was not merely a case of neglect of duty by a policeman; these were acts of commission by the accused aimed at defeating the course of justice.

The last argument was in regard to sentence. It was contended that the effective sentence was strikingly inappropriate and should have been suspended in toto: the accused is a young man who on all the indications had made a valuable contribution to society until he committed the first offence; there was no adequate proof of the value of the jewellery; the indications are that the accused did not initially have an intention to steal, so that the court was not here dealing with a case where goods were removed from the possession of the owner *animo ferandi*.

In his judgment on sentence, the magistrate gave careful consideration to all relevant factors, and it is not suggested that he misdirected himself in any respect. I do not regard the sentences as at all inappropriate. There is no basis for interference by this court.

The appeal is dismissed.

H C NICHOLAS

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