IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R 47 / 2017
Date heard: 2 May 2018
Date delivered: 26 June 2018

In the matter between

WILLIAM TAUTE Appellant

And

THE STATE Respondent

JUDGMENT

GOOSEN, J.

[1] The appellant was convicted in the Regional Court, Port Elizabeth of contravening s 61 (1) (c) of the National Road Traffic Act, 93 of 1996 (hereinafter 'the Act') and as sentenced to a fine of R4000 or 6 months' imprisonment. He appeals against this conviction with leave granted by this court on petition. The offence proscribed by the said section consists of a failure to render assistance to an injured person at the scene of an accident.

[2] The appellant was charged with five separate offences arising from an accident which occurred in Humewood Drive, Port Elizabeth on the evening of 26 February 2016. As a result of the collision a pedestrian was fatally injured and subsequently died and another was injured. The charges preferred against the appellant were: culpable homicide (count 1); driving a vehicle on a public road when his blood alcohol content exceeded 0.05mg/100ml (count 2); driving a vehicle on a public road whilst under the influence of alcohol (count 3); failing to render assistance to an injured person in

contravention of s 61(1) (c) of the Act (count 4); and failing to stop at the scene of an accident in contravention of s 61 (1) (a) of the Act (count 5).

[3] In respect of charges 1, 3 and 5 the appellant was discharged at the close of the state case. He was thereafter acquitted on count 2.

[4] It is therefore only necessary to deal with the evidence relevant to count 4. It was common cause that the accident occurred at approximately 18h45 on the evening in question. It occurred in the vicinity of the intersection between Humewood Drive and Perrot Avenue. The appellant was the driver of a VW Amarok which was owned by his employer. He was accompanied by a passenger, Ms Van Heerden to whom the vehicle had been assigned. They were travelling along Humewood Drive in a direction away from the downtown area towards the beachfront area. In the vicinity of the Perrot Avenue intersection, Humewood Drive consists of three trafficable lanes in both directions separated by a concrete centre island.

[5] Van Heerden testified that she was seated in the passenger seat of the vehicle. As they approached the Perrot Avenue intersection she noticed vehicles in the left and centre lanes. She said she saw children to the left running between the vehicles. She described what she saw as ‘heads bobbing’. There was a large SUV in the centre lane obscuring her vision. She then heard a loud bang on the side of the vehicle in which she was a passenger. She did not see what caused the noise. The appellant drove on but slowed. She suggested they stop to see what had happened. They couldn’t stop immediately because of the presence of other vehicles and drove on to the Kings Beach parking area. She said that ‘they’ i.e. both her and the appellant were shocked. When they got to the parking area the appellant got out to inspect the vehicle. She said the passenger side mirror ‘was hanging’ by

a cord. The appellant then phoned their 'boss', Mr Krantz. Thereafter they drove in the direction of the Humewood Police Station and they were pulled off the road by police officers near the Station.

[6] In cross-examination Van Heerden conceded that she had only seen 'heads bobbing' between the cars and that she had not seen what had caused the noise. She said she wasn't aware that there had been another accident in the intersection. She could not remember what had passed between her and the appellant immediately after the loud bang was heard. She said that the only safe place to stop was at the King's Beach parking area. She had not heard what had been said between Krantz and the appellant. She accepted that appellant had said he was going to report the accident at the Humewood Police station although she could not remember this.

[7] The appellant testified that he was driving the vehicle in the far left lane. As he approached the intersection he noticed that traffic was backed-up in the left and centre lanes. He therefore changed lanes into the right hand lane. When the traffic lights turned green he proceeded towards the intersection. A short distance before he reached the intersection he heard a very loud bang on the passenger side of his vehicle. He looked to his left but did not see anything. He looked in his internal rear view mirror but did not see anything. He slowed down as he did so. He noticed nothing untoward behind him. He proceeded through the intersection where he noticed that there had been a motor vehicle collision. He did not stop. He continued to drive along Humewood Drive until he reached the Kings Beach parking lot, a large parking area situated on the seaward side of the road, approximately 1 kilometer from where he had heard the bang. He stopped the vehicle and got out to inspect it. He noticed that the passenger side mirror was damaged. He then telephoned his supervisor, Mr Krantz, to tell him what had occurred. Krantz advised him to go to the nearest police station to report the accident. The appellant stated that he was driving to the Humewood Police Station when he was pulled

over by police officers near the station. What transpired thereafter is relevant only to the charges for which he was acquitted. It is therefore not necessary to relate these occurrences.

[8] The magistrate accepted that the only place where the appellant could safely stop his vehicle was at the parking area approximately 1 km away from where the accident had occurred. It was on the basis of the acceptance of this fact that the magistrate discharged the appellant in respect of count 5, namely the alleged failure to immediately stop the vehicle as required by s 61 (1) (a). This court is bound by such finding and nothing further need be said in that regard. I shall deal with whether this has any bearing on the question before this court hereunder.

[9] It is appropriate to set out hereunder the portion of the magistrate's judgment which deals with his reasons for convicting the appellant on count 4 in full. The judgment reads as follows:

> In respect of count 4, it is my view that the situation is as follows. The accused did strike two young girls and they were injured. It was an accident. The accused did not go back to the scene to render assistance once he stopped at the Kings Beach parking area. I have already referred to his explanation in this regard. In my view there is simply no way the accused could reasonably have thought that he had hit a trolley or a seagull as he speculated about in his evidence and that that could have caused the damage to his vehicle. The extent of the damage, the nature of damage according to the photographs did not support this speculation at all. He knew that he was amongst cars at the time. He knows there was an accident of some sorts ahead of him. He knew he struck something or something struck him. That is clearly the reason why he later stopped at Kings Beach. The reasonable man, in my view, would have realised that he may have struck a person or a vehicle and would have gone back to the scene to check out the situation and render assistance where possible. The fact that there were other people, that there were other cars at the scene where this incident occurred, in my view, cannot mean that a duty to render assistance can be delegated to these persons. The fact that the accused got advice from Mr Krantz to report the incident, I did consider, but as I have said, a reasonable man in the circumstances would have realised on seeing the damage and having heard the loud banging noise that the accused describes, that there is a reasonable possibility is that someone may have been injured or some damage may have been caused and would then have gone back to the scene to go and inspect. The reasonable man, the reasonable driver would know his duties under this Act and I refer to Section 61 (1) of the Act, Act 93 of 1996. The accused's failure to go back to the scene to render assistance where he could possible render assistance in my view, constitutes a contravention of Section 61 (1) (c).

[10] The appeal was prosecuted essentially on the basis that the magistrate had adopted what was described as a "subjective" approach to the matter; that he had improperly strayed into the arena by the questioning the appellant by soliciting speculative answers and that he had, on the basis of such speculative answers, criticised the appellant for his explanation regarding his conduct immediately after the accident. It was also urged upon us that that the magistrate had, in effect, applied strict liability in relation to a contravention of the relevant section and had ignored the appellant's evidence which, so it was submitted, established that the state had not proved the requisite *mens rea* in relation to the commission of the offence. It was accordingly submitted that the magistrate had misdirected himself in convicting the appellant and that the appeal should succeed.

[11] I shall deal with the nature of the offence established by the section and what the state is required to prove in respect thereof, first, before dealing with the principal attack on the magistrate's judgment referred to hereinabove.

[12] Section 61 of the Act imposes upon the driver of the vehicle certain duties which arise in the event of a motor vehicle accident. In terms of s 89 (1), a person who fails to comply with any provision of the Act shall be guilty of an offence. A failure to comply with any of the duties imposed upon a driver of a vehicle in terms of s 61 is an offence. Section 89 (4) sets out the sentences which may be imposed for an offence in terms of section 61 (1).

[13] The statutory antecedent to s 61 was s 118 of Act 29 of 1989. Prior to the enactment of national legislation to regulate road traffic, each of the provinces regulated similar matters by way of Provincial Ordinances. Each of these Ordinances imposed certain duties upon drivers, similar to those enshrined in s 61 of the present Act. I am not aware of any reported judgment dealing with s 61 of the Act. There

is, so far as I have been able to ascertain, only one reported judgment which deals with s 118 of the now repealed Act. There are however several judgments which deal with the Ordinances as well as the legislation which applied in Rhodesia, as it was then known. These cases provide some guidance in addressing the question as to the form of *mens rea* required in order to found a conviction for the statutory offences created by s 61 of the Act.

[14] Section 61 of the Act provides as follows:

> (1) The driver of a vehicle at the time when such vehicle is involved in or contributes to any accident in which any person is killed or injured or suffers damage in respect of any property, including a vehicle, or animal shall –
>
> (a) immediately stop the vehicle and report the accident on the prescribed form and in the prescribed manner, the officer concerned shall deal with the report in the prescribed manner and chief executive officer must ensure that the accident is recorded in the register of accidents in the prescribed manner and within the prescribed period;
> (b) ascertain the nature and extent of any injuries sustained by any person;
> (c) if a person is injured, render such assistance to the injured person as he or she may be capable of rendering;
> (d) ascertain the nature and extent of any damage sustained;
> (e) if required to do so by any person having reasonable grounds for so requiring, give his or her name and address, the name and address of the owner of the vehicle driven by him or her and, in the case of a motor vehicle, the licence number thereof;
> (f) if he or she is not already reported the accident to a police or traffic officer at the scene of the accident, and unless he or she is incapable of doing so by reason of injuries sustained by him or her in the accident, as soon as is reasonably practicable, and in the case where a person is killed or injured, within 24 hours after the occurrence of such accident, or in any other case on the first working day after the occurrence of such accident, report the accident to any police officer at a police station or at any office set aside by a competent authority for use by traffic officer, and there produce his or her driving licence and furnish his or her identity number and such information as is referred to in paragraph (e); and
> (g) not, except on the instructions of or when administered by a medical practitioner in the case of injury or shock, take any intoxicating liquor or drug having a narcotic effect unless he or she has complied with the provisions of paragraph (f), where it is his or her duty to do so, and has been examined by a medical practitioner if such examination is required by a traffic officer.

[15] The introductory portion of section 61 (1) makes it clear that the duties defined in the succeeding sub paragraphs arise upon the occurrence of an accident in which the vehicle is involved or to which it contributes. Such accident that must involve the death or injury of the person or damage in respect of

property. Such property includes a vehicle or animal, the definition of which is set out in s 61 (5) of the Act. It is not a requirement for the duties to arise that the manner of driving of the vehicle needs to be negligent or blameworthy (see *R v Van Vuuren* 1957 (4) SA 739 (O); *R v Dhlodhlo* 1968 (1) SA 315 (R) at 317 B – C; *S v Mcelu* 1975 (2) SA103 (TkHC)).

[16] Section 61 (1) creates several separate duties which are imposed upon the driver of the vehicle upon the occurrence of an accident. They include the duty to immediately stop the vehicle; to ascertain the nature and extent of any injury sustained; or any damage to property and the obligation to render assistance to the person so injured. There are also the several duties relating to the reporting of the accident to the appropriate authorities. The failure to comply with any one or more of these duties constitutes an offence.

[17] In *S v Bruce* 1970 (1) SA 291 (N) the court dealt with section 135 of Ordinance 21 of 1966, Natal. That section was framed in almost identical terms to the subsequently enacted s 118 of the now repealed Act. The latter provision, in turn, is substantially the same as the present section 61, save that subparagraph (1) (a) introduces a duty to report the accident as an adjunct to the requirement that the vehicle be brought to an immediate stop. In the *Bruce* matter the court came to the conclusion that the legislative intent was to create separate offences in respect of each of the duties. It held that, to the extent that the facts giving rise to the breach of the duty may overlap, this can be addressed by the court in its treatment of the sentence to be imposed for such offences.

[18] The significance of this for present purposes lies therein that it underscores the need to construe the purpose of the section in its entirety and to evaluate the legislative intention in regard to the form of the requisite *mens rea* in each of the separate offences.

[19] The general rule is that in construing statutory prohibitions the legislature is presumed, in the absence of clear indications in the statutory provision to the contrary, not to have intended that mere innocent violations of the prohibition are punishable (*S v Arenstein* 1964 (1) SA 361 (A) at 365 C – D; *S v Du Toit* 1981 (2) SA 33 (C) at 36 E-H).

[20] In the *Du Toit* matter, which concerned a contravention of the regulations promulgated in terms of the Petroleum Products Act, 120 of 1977 (which prohibited, *inter-alia* the storage and / or conveyance of petrol without a permit), the court (at 37 B – G) found that a negligent failure by motorists to obey the regulations, amounts to an offence. It found therefore that *culpa* was the required form of *mens rea* in the circumstances. In coming to the conclusion that *mens rea* is an essential element of the offences, the court took into account the purpose of the regulations and the severity of the penalties set out for failure to comply and the absence of any indication that *mens rea* was not required. The court went on to consider the objects of the Act and regulations and the public policy considerations underlying the adoption and promulgation of those regulations to conclude that the regulations postulated a high degree of care in regard to the use of petrol by motorists and accordingly that *culpa* was the requisite form.

[21] In the present instance there is no clear indication in s 61 itself which suggests that *mens rea* is not a requirement in relation to the offences created by the section. This accords with the approach adopted in a number of matters dealing with the legislative antecedents to s 61 (cf. *Rex v Siqono* 1950 (1) SA 286 (A.D.); *R v Kok* 1958 (1) SA 59 (SR) at 63 C; *R v Breingan* 1966 (3) SA 410 (RAD); *S v Munks* 1972 (2) SA 651 (RAD); *Van Zyl v S* [1996] 1 All SA 336 (W)).

[22] In the *Kok* matter it was held at 63 C – D that:

> The present is one of the cases where, in our view, the law does not impose an absolute prohibition. The Crown discharges its duty by proof of an accident involving personal injury and the driver's failure to investigate or render assistance: but the driver can escape criminal responsibility by proof of reasonable ignorance of such facts as would impute criminal intent (*vide, Halsbury*, 3rd ed., vol. 10, p. 283, para 524).

[23] In *Breingan* (*supra* at 415 H – 416 A) the court dealt with the passage quoted from *Kok* in the following terms:

> There can be no doubt that the learned CHIEF JUSTICE, in speaking of "reasonable ignorance", had in mind the test formulated in such cases as *R. v. Mbombela, supra* and *Stainer v. R., supra*; that is to say, an objective test based upon the conduct of a "reasonable man" in the circumstances in which the accused person found himself. The test is expressed in the following terms by DE VILLIERS, J.A., at P. 272, in *Mbombela's* case:
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> > 'The "reasonable man" is in this connection the man of ordinary intelligence, knowledge and prudence. It follows that mistake of fact is not reasonable if it is due to lack of such knowledge and intelligence as is possessed by an ordinary person, or if it is due to such carelessness, inattention and so forth, as an ordinary person would not have exhibited."
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> While cogent arguments can be advanced in favour of the view that the section imposes an absolute duty on drivers to stop if they are aware that they have been involved in, or contributed to, an accident, there are equally cogent reasons for adopting MURRAY, C.J's, interpretation of the section and *Kok's* case must be accepted as decisive of the question of *mens rea*.

[24] The form of *mens rea* that was held to be required depends upon the particular offence for which the driver is charged, as is to be gleaned from the court's summary of its conclusions (at 416 F– 417 A), where the following is stated:

> My conclusions may be summed up as follows:
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> (1) If the Crown proves that the accused was
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> "the driver of a vehicle upon or near a road at the time when such vehicle is involved in or contributes to any accident in which injury or damage is caused to any person, property or animal or in which any person is killed"
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> and that the accused failed to stop or, having stopped, failed to carry out one or more of the duties imposed by sec. 221 (2) or sec. 221 (6), the requirements of the section are *prima facie* satisfied and the *onus* then rests upon the accused to prove that the violation of the law which has taken place was committed innocently. See *R v Siqono*, *supra* at p. 292; *Stainer v. R.*, *supra*.
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> (2) The *onus* resting upon the accused may be discharged by establishing on a balance of probabilities that he was ignorant that he had been involved in an accident *of any kind whatsoever*. In the case of total ignorance the test is subjective and a defence based on total ignorance is not defeated by the fact that such ignorance arises from "culpable inadvertence" (*Martin's* case), or "a failure to drive with due care and attention." "(Per LORD GODDARD, C.J., in *Harding v. Price*) or, to use the words of the DE VILLIERS, J. A. in *Mbombela's* case, "is due to such carelessness, inattention and so forth, as an ordinary person would not have exhibited."

> (3) If the accused is aware that he had been involved in, or contributed to, an accident, ignorance that the accident had one or more of the consequences mentioned in sec.222 (1) will only be a defence if the accused establishes on a balance of probabilities that he believed honestly and on reasonable grounds that the accident was not one falling within the section. The test in these circumstances is both subjective and objective and ignorance of the consequences based on "culpable inadvertence" or unreasonable failure to stop and investigate will not constitute a defence.

[25] The approach set out in *Breingan* was followed in *S v Munks* 1972 (2) SA 651 (RAD). Leaving aside for the moment the formulation which places an *onus* upon an accused which would not, in my view, accord with Constitutional principles, the approach set out *Breingan* posits different *mens rea* requirements depending upon the nature of the offence. In the case of an alleged failure to stop immediately the subjective intention of the accused must be established. The above quoted passage indicates that it will not be sufficient to establish criminal responsibility for failing to stop if the failure to stop is based on 'culpable inadvertence'. Where, on the other hand, it is established that the accused was aware that an accident had occurred, thus bringing into question compliance with the other duties which flow from the duty to stop, criminal responsibility may be established on the basis of *culpa.*

[26] A contrary position was adopted in *Van Zyl* (supra). That matter concerned a contravention of s 118 (1) of the statutory predecessor to the present Act. In that matter the accused had pleaded necessity as a defence to charges of failing to stop at the scene of an accident; the failure to ascertain whether any person had been inured; and the failure to ascertain the nature and extent of damage caused. The trial court had rejected the defence. The appeal court agreed with the finding but proceeded to consider whether the state had proved beyond reasonable doubt that the accused's belief in the existence of a threat did not exclude knowledge of unlawfulness.

[27] The head note in that matter records that the court held that the form of *mens rea* that was necessary to be proved for the conviction of a contravention of section 118 (1) (a) was *dolus* and not *culpa*. The relevant portion of the judgment, (at 339I -340B), reads as follows:

> Daar is nie betoog dat *culpa* die verskyningsvorm van *mens rea* is wat die wetgewer in gedagte gehad het toe die misdaad wat in artikel 118 (1) (*a*) daargestel is, omskryf is nie. Ek sal derhalwe aanvaar dat *mens rea* in die vorm van *dolus* deur die wetgewer bedoel is om 'n element van die betrokke misdaad te wees. Die Staat moet gevolglik beide elemente van *dolus* teen 'n beskuldigde bewys, naamlik, 'n doelbewuste handeling wat die verbod in artikel 118 (1) (*a)* oortree, asook wederregtelikheidsbewussyn.

[28] The court went on to consider the evidence and the accused's conduct upon leaving the scene of the accident. It concluded that this evidence established that the accused's subjective belief in the existence of a threat to him should he stop and remain at the scene was reasonably possibly true. The court therefore concluded that the state had failed to prove the second element of the requirement for *dolus* i.e. 'wederregtelikheidsbewussyn'. The conviction was accordingly set aside. The court further found that in relation to the other charges (i.e. the contravention of s 118 (1) (b) and (d)) the defence of putative necessity also applied.

[29] The finding that the form of *mens rea* required for a conviction under s 118 (1) (a) (now s 61 (1) (a)) – failing to immediately stop at the scene of an accident – in my view accords with the approach and test outlined in the line of cases set out above. A careful reading of the judgment in *Van Zyl* however indicates that the conviction in relation to the failure to ascertain the nature and extent of any injuries suffered by a person was set aside on the basis that the state had not proved that any person had been injured. It was held that this was an essential element of the offence. The court nevertheless expressed the view that an absence of 'wederregtelikheidsbewussyn' established that the requisite

mens rea was not established. The *Van Zyl* matter did not deal with the equivalent section to s 61 (1) (c), which is at issue in the present matter.

[30] I have already indicated that it is a separate offence in respect of which the requisite *mens rea* must be established. In deciding whether the form of *mens rea* required is *dolus* or *culpa* regard must be had to the nature of the duties that s 61 imposes and the circumstances in which such duties arise.

[31] Section 61 in my view imposes what may be termed a primary duty – an obligation to immediately bring the vehicle which contributed to or was involved in an accident to a stop. The purpose of imposing upon a driver of such a vehicle this duty, is to enable the driver to determine the nature of the injuries suffered by the person and to enable him to render to that person such assistance as he is able to (see *R v Siqono* (*supra*) at 291). Once the driver of the vehicle has brought it to a stop at the scene of the accident, further obligations arise. They are to investigate the injuries; to render assistance; to investigate damage and to report the accident.

[32] The determination as to whether a driver has complied with the particular duties imposed upon him necessarily involves an evaluation of whether the steps taken by the driver meet the requirements imposed by the section. Such evaluation, in my view, will involve subjective and objective elements and a culpable failure to comply with the obligation to render assistance to an injured person will establish the requisite *mens rea.*

[33] In this instance that is what the magistrate concerned himself with. It must be remembered that the magistrate accepted that the appellant had brought his vehicle to a stop as contemplated by s 61 (1)

(a). Although the appellant was located at a distance from the scene of the accident, his stopping had occurred immediately after the accident. The appellant was therefore in the position where he was obliged to act in accordance with the further duties imposed upon him by the section i.e. he was required to investigate and act in accordance with such investigation. The finding that a reasonable man in the position of the appellant would, on seeing the damage to his vehicle, have realised that it may have been struck by a person or vehicle cannot be faulted. In such circumstances the reasonable driver would have returned to the scene to render assistance, such as he was able to render. The failure to do does not meet the standard of a reasonable driver in the position of the appellant. That finding, it seems to me, meets the test of culpable conduct and accordingly the requisite *mens rea* on the part of the appellant was established.

[34] Some reliance was placed on the fact that he appellant had telephoned his superior, who was an ex-policemen, and that he had relied upon the advice given to him to go to the nearest police station to report the accident. Although not expressly argued, as I understood it, it was suggested that this advice established a justification for not returning to the scene to render assistance.

[35] The appellant's evidence was that he had telephoned Krantz and that Krantz had told him to report the accident. His evidence does not indicate that he told Krantz precisely what had happened and what the circumstances were. Krantz's evidence in turn was that he had told the appellant that he must report the accident because it was a company vehicle. This evidence falls short of establishing that the appellant sought and obtained advice regarding his duties in relation to the accident and that he relied upon such advice. It certainly does not establish that his failure to return and render assistance as required by s 61 (1) (c) was not culpably negligent.

[36] That brings me to the second aspect of the appeal, namely the so-called “subjectivity” with which the magistrate approached the matter.

[37] It was submitted that the magistrate had drawn out of the appellants by questioning, speculative answers regarding what might have caused the damage to the vehicle and that the magistrate had thereafter used those speculative answers to dismiss the appellant’s version.

[38] It is indeed so that the magistrate addressed several questions to the appellant in order to understand what it was that the appellant considered might have given rise to the damage which he observed. The magistrate correctly, in my view, considered that the failure to give consideration to the possibility that a person had struck the vehicle was unreasonable in the circumstances.

[39] To the extent that the argument based on ‘subjectivity’ sought to impute bias on the part of the magistrate it is without merit. The magistrate’s comment to the effect that he was ‘reluctant’ in acquitting the appellant on the count 3 (driving a motor whilst his blood alcohol content was in excess of 0.05mg/100ml) was, no doubt, unfortunate. A reading of the judgment however indicates that the magistrate was disturbed by the conduct of some of the police witnesses who had testified about the timing of the relevant blood tests that were conducted. The magistrate’s comment does not however point to a ‘biased’ or ‘subjective’ attitude towards the evidence relating to count 4. On the contrary the treatment of this evidence in the judgment reflects no misdirection of fact or law.

[40] It follows from what is set out above that there is no basis to interfere with the magistrate’s verdict on count 4.

[41] In the result I make the following order:

The appeal is dismissed.

G. G. GOOSEN
JUDGE OF THE HIGH COURT

BLOEM, J.

I agree.

G. H. BLOEM
JUDGE OF THE HIGH COURT

Appearances: For the Appellant

Adv. T. N. Price SC

Instructed by A. Griebenouw Inc.

C/o Netteltons Attorneys

For the Respondent

Adv. H. L. Obermeyer

Director of Public Prosecutions