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G.P.-S.384—1952-3—10,000.

U.D.J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAKI.

1 David Louis PERLMAN,
2 Hendrik P. LAUBSCHER

Appellant.

versus

THE QUEEN

Respondent.

(Both: Frank)

Appellant's Attorney / *Prokureur van Appellant*

Respondent's Attorney / *Prokureur van Respondent*

Appellant's Advocate / *Advokaat van Appelant*

Respondent's Advocate / *Advokaat van Respondent*

Set down for hearing on:— Monday, the 11th July, 1955
Op die rol geplaas vir verhoor op:—

(C.A.D.)

31/8/55

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:-

DAVID LOUIS PERLMAN and

HENDRIK PIETER LAUBSCHER

Appellants

and

REGINAM

Respondent

Coram:- Van den Heever, Fagan et Steyn, JJ.A.

Heard:- 15th August, 1955.

Delivered:- 31/8/1955.

VAN DEN HEEVER, J.A.

J U D G M E N T

In the Paarl Circuit Local Division before Van Winsen, J., and assessors the appellants were tried jointly on a number of charges and counts. First appellant was convicted on 110 counts of forgery and uttering (Counts 9 to 118 of the indictment) and 32 counts of contravening Section 2 (b) of Act 4 of 1918 (Counts 149 to 180 of the indictment). On the convictions of forgery he was sentenced to five years imprisonment with compulsory labour and on the convictions in regard to the charges of corruption to three years imprisonment with

2/ compulsory .....

compulsory labour.

The second appellant was convicted on 32 counts of contravening Section 2 (a) of the Prevention of Corruption Act (No. 4 of 1918) (Counts 149 to 180 inclusive of the indictment) and was sentenced to three years imprisonment with compulsory labour of which one years imprisonment was suspended for three years on condition that the appellant does not within that period commit a similar offence.

With the leave of the Court a quo the appellants appealed against those convictions and sentences.

The arguments advanced on appeal render it necessary to refer to the wording of the indictment in the relevant counts. The Board referred to is the Wellington Board of Executors Limited.

The Crown's averments in counts 9 to 118 are pleaded in a globular manner with reference to a schedule. The indictment in as far as is relevant reads:-

3/ "in .....

"in that on or about the date set out in column 1 of Schedule "B" hereto ..... both accused did wrongfully, unlawfully and with intent thereby to defraud, and to the prejudice of the Board, forge a certain instrument in writing, to wit a promissory note purporting to be made by the person whose name is set out in column 2 of the said Schedule "B" in favour of D.L. Perlman, accused No. 1, for the amount set out in column 3 of the said Schedule "B" plus interest at the rate of 8 ½ % per annum and stamps, due and payable on the date set out in column 4 of the said Schedule "B", and thus both accused did commit the crime of forgery."

In respect of each count uttering is averred.

That method of pleading was adopted also in counts 149 to 180. The relevant averments read:

"in that ..... accused No. 1. did wrongfully, unlawfully and corruptly give or agree to give or offer to accused No. 2, who was then Secretary of the Board and as such an agent of his principal, the Board, and accused No. 2 ..... did wrongfully, unlawfully and corruptly accept or obtain or agree to accept from accused No. 1 for himself (accused No. 2) the gift or consideration set out in column 2 of the said Schedule "C" as an inducement

or reward to accused No. 2 for doing or forbearing to do, or for having, after the passing of the said Act, done or forborne to do an act in relation to the Board's affairs or business, to wit for assisting or having assisted accused No. 1 to discount promissory notes for the amounts set out in column 3 of the said Schedule "C" and thus accused No. 1 did commit the offence of contravening Section 2 (b) of Act 4 of 1918 and accused No. 2 did commit the offence of contravening Section 2 (a) of Act 4 of 1918."

At the end of the trial the Crown obtained an amendment of the above mentioned avermont alleging as an alternative quid pro quo for the gift or consideration:

"to obtain loans of the said amounts from the board."

First appellant was an attorney practising at Wellington. He also carried on an extensive business as an estate agent, employing a number of sub-agents or runners for the purposes of that business. He assisted would-be purchasers by advancing them sums of money on second bond or against promissory notes in his favour. Consequently, apart from the commission he earned, he benefited by the

5/ cumulation .....

cumulation of perquisites: [redacted] raising fees, interest and in some cases legal work arising out of sales.

The second appellant, a former bank manager, became secretary of the Board during 1949. According to the evidence - and it clearly emerges from the history of this case - he was a plausible individual to whose knowledge of financial matters the directors deferred. Their confidence in him more than bordered on the reckless.

The transactions to which the charges relate were negotiated between the two appellants Perlman, the attorney and estate agent, and Laubscher, the secretary to the Board. For brevity I henceforth refer to them by name. Both were unsatisfactory witnesses whose evidence the trial Court rejected on many points and for good reason. Their stories in so far as they tallied or were supported by real or other evidence were summarised by the learned trial Judge as follows:

> "The initial transactions were between Perlman and Zuidmeer, the Board merely acting as Zuidmeer's representative and administering the transactions

6/ on .....

on his behalf. The arrangements in this regard were to the effect that Perlman brought batches of bills made in favour of himself and endorsed by him in blank, which bills were payable at Barclays Bank, Wellington, at future dates varying from 77 days to as much as 371 days. The bills bore interest at 8% - later increased to 8½% - and commission at 2½%. These bills were handed by Perlman to Laubscher who then caused a schedule to be prepared in the Board's offices showing the maker of the bill, the period for which it ran, interest and commission, with a final column for the total amount due on due date. This schedule, being in the form of the exhibits D. 1 to D. 33, was then sent to Perlman who wrote out, in respect of each bill, a cheque for the total amount shown in the final column relative to that bill in favour of the Board, the cheque being post-dated to the date upon which the bill in respect of which it was given fell due. Perlman then handed these cheques to an official of the Board. In addition Perlman made out a cash cheque, signed by himself, for an amount equal to 2½% of the aggregate face value of the bills then being dealt with, which cheque was delivered to Laubscher who subsequently deposited it in his private banking account. A Board cheque for the aggregate face value of the bills handed by Perlman to the Board was then given to Perlman, which cheque was made payable to him. The money so paid to him came in the earlier transactions, which commenced in August, 1949, from Zuidmeer. Later on in 1950, and 1951,

7/ the .....

the money came in some cases from the Board and in other cases from Zuidmeer. The transactions on behalf of Zuidmeer ceased in December, 1951, and from then on, except for a few isolated transactions undertaken with Perlman by the Board on behalf of one Basson, the money paid to Perlman came from the coffers of the Board. When the bills fell due they were not presented for payment, but Perlman's post-dated cheques were paid into the Board's banking account and thereafter, under cover of a letter, the the relative bill was returned with a receipt for the face value of Perlman's cheque. Life policies on the life of Perlman were ceded to the Board in respect of these transactions, and in addition certain shares were later pledged with the Board in the same connection."

I may interpolate here that when Zuidmeer ultimately came to examine the life policies and shares as security, he was shocked by their hopeless inadequacy. By whatever name kx one chooses to call these transactions he found that through the Board and Laubscher he had in the aggregate advanced some £160,000 to Perlman. His shock was obviously his main reason for calling a halt. He was exceedingly lucky and bore no loss.

The learned Judge continues:

"The transactions detailed above were described by all

parties concerned as discounting of the bills in question. The xkx schedules issued to Perlman were headed "wissels verdiskonteerd", and the minutes in which these transactions are referred to also describe them in like terms. Perlman's post-dated cheques were xxxy over a number of years duly met on due date. The first cheque not to be met was post-dated to the 27th September, 1953, and thereafter all cheques shown on schedules D. 1 to D. 6 - save the first three cheques on D. 1 and the first cheque on D. 2 - were dishonoured on presentation for payment."

The promissory notes given by Perlman to Laubscher and purporting to have been made in Perlman's favour by a number of his clients were spurious. Perlman had manufactured them himself by copying or tracing the signatures of clients appearing on documents in his possession.

Perlman admits the forgery and admits that Laubscher, with whom he dealt, did not know that the notes were not genuine. His defence was, however, that they were not made to deceive and did not deceive. Laubscher, he says, informed him that Zuidmeer was prepared to lend money against cession of life insurance policies at 8% interest and 5% commission. As the loans were

usually short term loans income and commission would exceed the limits permitted by the Usury Act. Laubscher suggested that this difficulty could be overcome by Perlman furnishing promissory notes to be discounted. Perlman was loth to do this as it would disclose the identity of his clients to the Board, his competitor in business. It was agreed between them, so Perlman avers, that the loans should be disguised as discounting transactions; Perlman would furnish such notes but subject to three conditions: no addresses of the makers would be supplied by Perlman, no bank reports on the makers would be obtained and under no circumstances were the notes to be presented for payment. The notes were handed to Laubscher merely to cloak a usurious loan. This practice, without any variation of the agreement, simply continued when Zuidmeer stepped out of the picture and the Board's own money was advanced to Perlman. The Board could under this agreement not avail itself in any way of the notes to which it had no right or title whatever. The notes were mere "scraps of paper" as far as the Board was concerned, which looked to his cheques for payment. The falsity of the notes could therefore not have prejudiced the Board in any way or have induced it to part with its money. The copied and traced signatures

were merely devices to achieve verisimilitude and perfect the cloak. Withholding the true facts from Laubscher was merely a ruse within a ruse.

In an able argument Mr. Bloch, for Perlman, contended that if the trial Court had come to the conclusion that first appellant's version of what transpired might reasonably be true, it would have acquitted him. From the reasoning in the judgment it would appear that Mr. Bloch might be right, but I do not think that the Court would have been right in acquitting.

Whatever the original rule of Roman Dutch Law in regard to forgery may have been (See de Wet and Swanepoel, Strafreg, p. 358 et seq.) one has to take account of modifications effected by judicial practice. The definition of the crime given in Gardiner and Lansdown (Vol 2 p. 1574) correctly reflects the elements of the offence as accepted by the courts viz. "the making of a false document with intent to defraud resulting or calculated to result in some prejudice to another". The indictment avers prejudice to the Board.

There can be no doubt that Perlman manufactured the notes with fraudulent intent, even if his story be accepted. As an attorney he must have realised that he was exposing himself to grave risks by passing off forged notes to Laubscher even as a ruse. The natural inference is that he must have been badly in need of money to adopt such an expedient and he must have known that his failure to furnish valid negotiable instruments would have caused the whole scheme to founder and would have shaken Laubscher's faith in his financial stability. On a true construction of Laubscher's evidence it would seem that although he primarily relied on Perlman's personal credit for repayment, he did not regard the notes as mere scraps of paper. In the final transaction pursuant to which Perlman obtained £10,000 of the Board's money Laubscher was aware of the fact that the apprehensions of the directors had been aroused and that not only his wisdom but also his authority to conclude these negotiations were being

questioned. If he thought that the notes produced by Perlman and lodged with him conferred no rights on the Board, he would have been rushing into self destruction by issuing the cheque for that amount. The inference is inescapable that he did so because of the forged notes. It seems to me probable beyond a reasonable doubt that at the back of his mind he must throughout have harboured the thought that if Perlman defaulted on a cheque, the Board could not be held to an undertaking not to present the notes. In view of the inadequacy and the evanescent nature of the collateral security he had given, it must have been plain to Perlman that if Laubscher, the Board's chief executive officer, had been aware of the fact that the notes were not worth the stamps attached to them, that source of easy money would promptly have dried up. If only in selfpreservation Laubscher would have been compelled to desist from these transactions and would undoubtedly have insisted on more and better security. It seems clear to me therefore that Perlman received these ~~xxxxx~~ advances, whatever we choose to call the transactions pursuant to which they were made, by means of a fraudulent device.

The prejudice to the Board seems to me equally clear. By palming off the spurious notes upon Laubscher, whatever the conditions may have been, he lulled Laubscher and through him the Board into a sense of false security. At the very least the Board was deluded in thinking that it was in possession of executable property of considerable value and that their debtor in his turn was a creditor in respect of large amounts of money. This lapping in lambswool extended to the auditors who, but for the fraud, would surely have warned the Board. It is not to be supposed that the Board would have preferred the risk of losing tens of thousands of pounds to the risk of being fined for contravening the Usury Act. That there was potential prejudice to the Board is obvious. If Zuidmeer had lost money on the transactions it seems plain that he would in all probability have instituted an action against the Board for gross negligence. Potential prejudice to the Board seems to me to have threatened more directly and with as much probability of realisation as that which was held to be sufficient to support the charge in R. v. Seabe,

(1927 A.D. p. 28).

This being my view of the case, it becomes unnecessary to examine Mr. Bloch's argument that the Court a quo erred in rejecting Perlman's story, for his own evidence convicts him. I may say in passing, however, that in my judgment that fantastic story was rightly rejected in spite of the fact that to some extent it received reluctant and dubious support from Laubscher.

I turn now to Perlman's convictions under the Prevention of Corruption Act (No. 4 of 1918). Section 2 (b) of the Act reads:

> "If any person corruptly gives or agrees to give, or offers, any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs, or business ..... he shall be guilty of corruption ....."

As we have seen the indictment avers that on the occasions mentioned in a schedule Perlman wrongfully, unlawfully and corruptly gave to Laubscher who was the agent of his principal, the Board, certain gifts or considerations "as an inducement or reward .....

for doing or forbearing to do, or for having done or forborne to do an act in relation to the Board's affairs or business, to wit for assisting or having assisted" Perlman "to discount promissory notes".

It was contended on the authority of de Villiers v. Roux, (1916 C.P.D. p. 298); Moser v. Meiring, (1930 O.P.D. p. 74) and Naidoo v. Von Gerrard, (1931 A.D. p. 374) that the transactions between Perlman and the Board were at no time true discounting transactions; they had features consistent only with loans. Consequently, it was argued, the Crown cannot rely upon the agreement relating to the discounting of promissory notes, but had to rely on the amendment which alleged that the act "in relation" to the Board's affairs or business for which the consideration was corruptly given was "for assisting or having assisted accused No. 1 ..... to obtain loans of the said amounts from the Board". In nine counts upon which Perlman was convicted, the loans were obtained from Zuidmeer, not the Board as alleged. Therefore, it was argued, the offences, if any, were not covered by the indictment and the convictions cannot stand.

16/ It .....

It is an ingenious argument but I do not think it sound. Those cases are not in point. The question now is not whether the transactions in issue were loans within the contemplation of the Usury Act, but whether as required by Section 127 of the Criminal Procedure Code the indictment sets forth the offence with which Perlman was charged in such manner and with such particulars as are reasonably sufficient to inform him of the nature of the charge.

As was pointed out by Lord M'Laren in Buchanan and Company v. Macdonald, (33 Sc. L.R. 200, 201):

> "The word "discount" has no technical or universal meaning. In what is perhaps its most common meaning it is equivalent to the payment of interest in advance; as for example, when a bank advances the amount upon a bill of exchange which is not yet due, discounting the interest up to the day of payment."

But, as Lord Sumner remarked in Brown v. National Provident Institution, (1921 (2) A.C. 222 - H.L.), more than interest may enter into the calculation. There are two economic elements, "the one the value of the usufruct forgone, as measured by the interim interest, and the other the

17/ risk .....

risk that the money will never be repaid at all .....
It is all one thing, discount, whether the return to the lender is compounded of premiums for risk and interest or money in one ratio or another".

(Cf. Lomax v. Peter Dixon and Company Ltd., 1943 (2) A.E.R. p. 255). In the Shorter Oxford English Dictionary the verb "discount" is said to mean "to give or receive the present ~~xxxx~~ worth of (a bill or note) before it is due".

This advance of money on a note not yet due is the essential feature of discounting a promissory note and if by collateral agreement the rights of the person who advances the money are less than those normal in practice, that would not render the expression "discounting" applied to such a transaction one which is not readily understood. In the negotiations to which the charges relate all parties made their own dictionary. They called these transactions "discounting transactions". Moreover the indictment with the schedules annexed averred full details of each transaction concerned. Perlman cannot therefore be heard to say that the expression did not

17(a) / sufficiently .....

sufficiently convey to him the nature of each charge.

It follows then that if Perlman gave the alleged gifts and considerations to Laubscher with the intent charged, he is guilty of corruption as defined in the Act, for whatever the source of the money the act of discounting was "an act in relation to the Board's affairs or business". Laubscher was the Secretary and chief executive officer of the Board and acted as such throughout. Where it was the Board's money he advanced he was obviously engaged in the Board's affairs or business in doing so. That applies, too, where the money was Zuidmeer's. For each "discounting" was an exercise of the administration which Zuidmeer had entrusted to the Board and for which the Board was being paid ½% ~~(by Zuidmeer)~~

~~(transactions on behalf of Gabriel)~~

It was contended on behalf of Perlman that Laubscher appropriated the 2½% commission or raising fees to himself without Perlman's knowledge; that Perlman in every case intended the 2½% to go to the lender. The trial Court entertained no doubt that Perlman offered Laubscher the 2½% for himself and that he never intended this sum to go to the lender. After giving anxious consideration to the arguments advanced by Mr. Bloch against the correctness of this finding, I am not persuaded that the Court a quo erred in coming to that conclusion. Perlman never attempted to discount a promissory note with the Board if he could not deal with Laubscher personally. If he thought Laubscher was a disinterested officer of the Board there would have been no reason for this selectivity. His course of conduct is inconsistent with his story. Laubscher was paid by cash cheques in respect of half the 5% commission. One would have expected payment in full to the Board. His subsequent conduct is consistent only with his having something to hide. When it must have been clear to him, after Laubscher's

dismissal by the Board, that Laubscher had converted a moiety of the rasing fee to his own use one would have expected him immediately to inform the directors. Six months later at a meeting of creditors he still stated that he did not know who had to get the 2½%. The suggestion that this was a device to cloak the nature of a usurious transaction does not merit serious consideration. Perlman was the most likely person to provoke the provisions of the Usury Act and he could hardly have misled himself. Taking all the circumstances into consideration the inference is inescapable that Perlman knowingly rendered these douceurs to Laubscher in order that he should part with the money of the Board or its clients with less circumspection than he would have practised if unbiassed.

But for an incident during the trial to which I refer later, not much need be said of Laubscher's appeal against his conviction. His contract of employment did not entitle him to accept a rasing fee or commission on promissory notes discounted by or on behalf of the Board. He received these commissions amounting to thousands of pounds in a furtive manner and never disclosed the fact of their receipt to Zuidmeer or the Board. Throughout

the relevant transactions over a term of years Laubscher, exploiting the trust which the Board placed in him, accommodated Perlman with such bountiful munificence and ~~xxx~~ with such disregard of the interests of his principals and their clients that one is compelled to conclude that he was either a rogue or a fool. At every turn, when Perlman's interests clashed with those of the Board, he furthered those of Perlman with such zeal that he did not scruple to pull the wool over the eyes of his directors or actively to mislead them. But Laubscher was no fool. He was an experienced business man who had been a bank manager. One can only conclude, therefore, that Perlman's douceurs had done their work. There can be no reasonable doubt that the one had given and that the other had accepted them corruptly.

The incident during the trial relied upon by both appellants was the following. The defence called a witness Kriegler who had been a director of the Board while Laubscher was secretary. He testified that the Board was aware of Laubscher's discounting transactions with Perlman and gave some details. In crossexamination

a previous contradictory statement on oath made by him at the request of the police was put to him. In re-examination Counsel for Laubscher reminded the witness of this statement and asked: "Sê vir die Hof wat u presies met daardie woorde bedoel het?" The Court ruled that the words spoke for themselves and that the witness could not be asked what he had meant by that statement.

It was contended that this ruling was wrong; that had Kriegler been allowed to explain, the Court may not have rejected Kriegler's evidence; consequently the appellants were prejudiced. I do not think there is substance in the argument. Mr. Broeksma, for Laubscher, and the Court virtually put the same question to the witness in the form of circumlocutions. From reading the record one gains the impression that the witness had ample opportunity to explain the apparent conflict. If that is correct there has in fact been no prejudice. Moreover, although this selfcontradiction on the part of the witness was the main ground mentioned by the Court for rejecting his evidence, it is clear from the judgment that there were others which the Court did not consider it necessary to discuss. A perusal of Kriegler's evidence

makes it clear that he was hopelessly confused and befogged. Even his in some way rejuvenated recollections of events are so vague and indefinite that they cannot carry weight.

The hearing of this appeal lasted nearly three days. To deal in detail with every argument advanced would extend this judgment to inordinate lengths. I have considered all and dealt with the salient ones. I am not persuaded that this Court would be justified in holding that the appellants were not rightly convicted.

There remains the question of the sentences. These are undoubtedly severe, but then the offences in respect of which they were imposed were grave. In regard to Perlman there is not much to be said. As yet it is impossible to say what the Board's loss in respect of his transactions will ultimately prove to be; but that it will run into many thousands of pounds seems certain. Systematically and over a period of years he defrauded the Board. The optimism with which he hoped to retrieve the situation out of the fruits of land speculation does not weigh much with me. Every thief who seeks salvation on

the race course is supported by such hope. I can find no grounds for interfering with the discretion exercised by the learned trial Judge in this regard.

Laubscher abused his position of trust in a lamentable manner with very serious consequences to his principals. The maximum penalty under the Act is imprisonment with hard labour for two years and a fine of £500 in respect of each count. He was found guilty of 32 such offences spread over a period of years. The Court took into consideration, as a mitigating circumstance the laxness with which the directors exercised their powers of control and other factors advanced by Mr. Broeksma in his behalf. In his case, too, I cannot see any justification for interference by a Court of appeal.

In my judgment both appeals are dismissed and the [redacted] sentences confirmed.

J.J.D. Heever.

Fagan, J.A.
Steyn, J.A. } Concur.