107/55

G.P.-S.384-1952-3-40,000. U.D.J. 445.

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

(..... DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAKI.

.....
Appellant.

versus

.....
Respondent.

Appellant's Attorney ..... *Respondent's Attorney* .....
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate ..... *Respondent's Advocate* .....
Advokaat van Appelant *Advokaat van Respondent*

Set down for hearing on:— Friday, 25th Nov., 1955
Op die rol geplaas vir verhoor op:—

10/15—5/30—C.A.V.

Original

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

J. P. KRUGER Appellant

and

R E G I N A Respondent

Coram: Schreiner, Hoexter, Reynolds, Brink et Hall, JJ.A.

Heard: 1st. March, 1956. Delivered: 9th. March. 1956.

J U D G M E N T

SCHREINER J.A. :- The appellant was charged in a magistrate's court on about twenty counts arising out of or connected with the sequestration of his estate, which took place on the 26th March 1953. He pleaded guilty to two of the charges (counts 7 and 11) and was found guilty on these and on a number of others. His appeal to the Orange Free State Provincial Division against the convictions in respect of which he had pleaded not guilty was allowed on most of the counts but was dismissed on five counts (Nos. 1,2,3,5 and 13). Having obtained leave to do so he now appeals to this Court against his conviction on the five counts and against the sentence on those counts and the two to which he pleaded guilty.

The/.....

The charges on counts 1, 2 and 3 allege contraventions of section 132(c) of the Insolvency Act (24 of 1936). To count 2 there is an alternative charge under section 135(1). Count 5 charges a contravention of section 132(d), and count 13 a contravention of section 132(b), with an alternative charge of theft. The convictions in respect of counts 2 and 13 were on the main charges. The provisions in question, so far as relevant, read -

"132. An insolvent shall be guilty of an offence and "liable to imprisonment for a period not exceeding three "years if at any time before or after the sequestration "of his estate he does any of the following acts, unless "it is proved that he had no intention to defraud; that "is to say, if he

"(b) conceals or permits the concealment of any assets "which ought to be placed at the disposal of the trustee; "or

"(c) otherwise than in the ordinary course of business "makes, or permits the making of a disposition of any "property which he has obtained on credit and has not "paid for; or

"(d) otherwise than in the ordinary course of business..... "makes a disposition of, or permits.....the making of a "disposition of, any assets in his estate if such..... "disposition has prejudiced or is calculated to prejudice "his creditors:

"Provided that -

"(ii) in any proceddings for a contravention of paragraph "(c) or paragraph (d) any disposition.....of assets,

"proved to have been committed shall, unless the contrary "is proved, be deemed to have been otherwise than in the "ordinary course of business.

"135(1) An insolvent shall be guilty of an offence and "liable to imprisonment not exceeding one year, if, prior "to the sequestration of his estate, he made a disposition "of any part of his property with the intention of prefer- "ring one or more of his creditors above the others or any "other if at the time when he made that disposition his "liabilities exceeded the value of his assets; Provided "that any such disposition which had the effect of pre- "ferring or was calculated to prefer.....shall, unless "the contrary is proved, be deemed to have been made with "the intention of preferring.....Provided,further, that "if the insolvent's estate was sequestrated within a period "of six months as from the date of making such a disposition "his liabilities shall be deemed to have exceeded the "value of his assets at that date, unless the contrary "is proved. "

Count 1 relates to 5 erven which the appellant had in April and May 1952 purchased from one van der Merwe, the Edenburg court messenger, by two contracts embodying hire-purchase terms, the ownership to remain in van der Merwe until certain amounts had been paid over a period, after which the appellant would be entitled to transfer against the passing of a bond for the balance. The two contracts were cancelled by agreement on the 2nd March 1953 and on the same day the 5 erven were sold to one Polivnick, a hotel keeper at Edenburg, by van der Merwe. The evidence of van der Merwe,Polivnick and

the appellant conflicted in some respects but the magistrate found that the three of them had agreed together that Polivnick, who was a large creditor of the appellant, should take over his rights in the erven, in order that both van der Merwe and Polivnick should be protected against loss, at the cost of the appellant's other creditors. The transaction was held to fall ~~under~~ within section 132(c) and to have been fraudulent and not in the ordinary course of business.

Counts 2 and 3 relate to certain movables bought on hire-purchase in 1951 and 1952 from two Bloemfontein firms. By August 1952 the appellant's liabilities exceeded his assets. On the 15th January 1953 he passed a notarial bond for £4000 over all his movable property in favour of Polivnick. Although at this time he acknowledged himself to be indebted to Polivnick in the sum of £4000 the indebtedness may not have been as much as that. On the 14th March 1953 the appellant handed over to Polivnick the keys of the premises containing the goods, thus giving him possession thereof. Part of the goods covered by count 3 were delivered to two other persons, but it is unnecessary to refer in detail to this circumstance. The goods had only been partly paid for and the magistrate

found/.....

found that the appellant had fraudulently and not in the ordinary course of business made dispositions of the goods to Polivnick and the two other persons which fell within section 132(c).

The first question to be decided in connection with these three counts is whether section 132(c) applies to dispositions of property made or permitted by an insolvent who had obtained possession of the property in terms of contracts suspending the passing of ownership to him. Is such property property which the insolvent "has obtained on credit and has not paid for," within the meaning of section 132(c) ? In Rex v. Stapelberg(1935 A.D. 1) the appellant had been convicted of contravening a provision which made it an offence for an unrehabilitated insolvent to obtain credit to an amount exceeding £10 without informing the other party that he was an insolvent. The appellant had obtained possession of two cows under a contract suspending the passing of ownership until the price had been paid in full. It was contended for Stapelberg that in such circumstance the section could not have been contravened. In rejecting this argument WESSELS C.J.said, at page 3, " The gravamen of the charge is obtaining credit "without the insolvent informing the person from whom it

was/.....

"was obtained that he was insolvent. What is the meaning "of 'obtaining credit'? The accused obtained the cows "and used ~~them~~ their milk. The seller of the cows trusted "him to pay him after a certain time more than £10 for the "cows. That was obtaining credit. The fact that the "cows were handed over with the condition that the accused "should pay for them in future means that the seller trusted "the person to whom he gave possession and thus the latter "obtained credit." The Court had been referred to two English cases, Regina v. Peters (16 C.C.C. 36) and Regina v. Juby (16 C.C.C.160), where a similar provision had been ~~construed~~ considered. From those cases and from Stapelberg's case itself it appears that, in cases falling under sections prohibiting an unrehabilitated insolvent from obtaining credit from persons ignorant of his status, the court is less concerned with the terms of the contract between the parties than with the fact that the insolvent is entrusted by the other party with his property when the latter would presumably not have parted with possession had he known of the insolvency. But under section 132(c) we ~~were~~ are concerned with a substantially different situation. There is no question of improper obtaining of credit, of gaining another's trust by fraudulent concealment. The question is whether

the/.....

the property of which the insolvent disposed was property of a certain kind, namely, property which he had "obtained "on credit". Now that expression seems to me to refer pointedly to the terms on which he obtained it and to require that those terms should amount to a credit transaction, normally a credit sale, as the law understands that expression. In our law ownership does not, despite delivery, pass to a buyer in cash sales until the price is paid; if property purchased on such a sale is disposed of before payment, section 132(c) is not infringed, for the property was not property obtained on credit. In the same way, it seems to me, property bought on hire-purchase, i.e. where the ownership is retained by the seller, is not covered by section 132(c), because there has been no sale on credit and the property has not been obtained on credit. If the ownership remains in the hire-seller the hire-purchaser may, in the case of movables, be guilty of theft, if he disposes of them, but he does not fall within section 132(c), which deals, not with cases where the insolvent has disposed of property that did not belong to him, but with the narrow case where he has disposed of property which, indeed, belonged to him but which he ought not to be allowed to dispose of fraudulently or out of the ordinary

course/.....

course of business.

The definition of property in the Insolvency Act specifically includes "contingent untebests "in property" other than the contingent interests of a fideicommissary heir or legatee, but although the hire-purchaser's rights include what may be called the contingent right to become the owner of the corporeals by paying the price, there is no obtaining on credit of such contingent right; it is paid for on a cash basis and its value increases as the instalments are paid.

Certain provisions of the Insolvency Act and of the Hire Purchase Act, 1942, modify the rights arising out of hire purchase agreements, but in my view they do not affect the meaning of section 132(c). On the true meaning of that provision the erven and movables of which the appellant disposed as alleged in counts 1, 2 and 3 were not property which the appellant had obtained on credit and not paid for, and the appeal in respect of those counts must accordingly be allowed.

It is necessary, however, to consider, in terms of section 98(2) of Act 32 of 1944, whether the appellant was or was not guilty under the alternative charge of count 2. That charge alleges that

on/.....

on the 14th March 1953, i.e. the day when he gave Polivnick the keys, he disposed of part of his property with the intention of preferring one or more of his creditors over the others in contravention of section 135(1). The main question here is whether the appellant's rights in the goods mentioned in count 2, which were purchased on hire-purchase, and possession of which was given to Polivnick on the 14th March 1953, formed part of the appellant's property, which by definition, as I have mentioned, includes contingent interests in property. It seems to me that by giving the keys to Polivnick the appellant made a disposition not only of the corporeals, which were still owned by the hire-sellers, but also of the rights, including contingent rights, therein which belonged to the appellant. The intention was to follow up the notarial bond by a delivery that would, it was hoped, give Polivnick security for the appellant's indebtedness to him, and this intention was carried out by the disposition of the 14th March 1953. It follows from what I have said that the disposition was of part of the appellant's property. There was no proof that the liabilities did not then exceed the assets nor that there was no intention to prefer - indeed the contrary was in each case clearly shown. The appellant,

therefore,/.....

therefore, contravened section 135(1) and his conviction for that offence must be substituted for the conviction under section 132(c) in respect of count 2.

Count 5 charged the appellant with having made a disposition of six erven to Polivnick on the 2nd March 1953 which disposition prejudiced or was calculated to prejudice the appellant's creditors. There was a bond for £2000 over the erven and the price payable by Polivnick was the sum of £2000, to be paid by his taking over the bond. The trustee in his evidence stated that the creditors were in fact prejudiced by the transaction and it was clearly calculated to prejudice them. The burden was upon the appellant to prove that he had no intention to defraud or that the disposition was in the ordinary course of business. In view of the circumstances, including the transactions covered by counts 1, 2 and 3, he clearly did neither and was therefore rightly convicted on count 5.

Count 13 charged that between March and June 1953, after his sequestration, the appellant received £10 from one Erskine as an instalment on a car which he had bought from the appellant. The latter did not hand the money to his trustee but used it. His

excuse/.....

excuse that he did not know that it had to go to his trustee was not accepted by the magistrate as convincing and there is no reason to disagree with this view. The question remains, however, whether there was a contravention of the section. Few cases have been reported upon this and similar provisions. In Southern Rhodesia there are the cases of Rex v. Gordon (1930 H.C.S.R. 74) and Rex v. Lambros (1939 H.C.S.R. 124).

Recently in Regina v. Sircoulomb (1954 (4) S.A. 237) CLAASSEN J. dealt with a case in which the insolvent, soon after his sequestration, had received two cheques for £152. 9. 9. and £84 12. 9. respectively from debtors of his and had paid them over to two of his creditors without telling his trustee about the existence of the cheques. The trustee found out about them from an examination of the insolvent's books. One of the cheques had been left by the drawer with the name of the payee blank and the insolvent filled in the name of the one creditor. The other cheque the insolvent endorsed and handed to the other creditor. CLAASSEN J. says at pages 238 and 239: "It seems to me that there is no evidence that "the appellant concealed these cheques with the intention of

"keeping/.....

"keeping them secret from the trustee. He merely failed to "disclose the fact that he paid two of his creditors with "these two cheques. There is no evidence that he entered "into any collusive agreement with these two creditors to "keep the existence of these two cheques secret. In my "opinion, before a person can be found guilty of concealing "assets under section 132(b) there must normally have been "an attempt on his part, either by himself or collusively "with one or more persons, to have kept the existence of the "assets involved secret in such a way as to prevent the "trustee from discovering these assets and including them "to the advantage of creditors generally in the assets..... "There was no secretive dealing by the appellant with "these cheques. They were openly handed to the creditors. "Both cheques passed through the banking accounts of the "respective creditors. There was no collusive arrangement "entered into with these creditors to keep knowledge of the "existence of these cheques from the trustee. In my "opinion such a non-secretive disposal of this type of "asset does not amount to a concealment of assets. In this "case the appellant endorsed the one cheque and in the "other one, where the payee had been left blank, he de- "liberately filled in the name of the payee. When one sends

"a/.....

"a document into the world which can be freely negotiated "from person to person, there is no concealment or secretive "dealing with such an asset. It can always be traced back "to the maker. Such a document leaves a public trail."

I do not find this reasoning convincing. The concealment referred to in section 132(b) is clearly concealment from the trustee and the fact that there was no general secretiveness in the handling of the cheques is hardly relevant thereto. I do not understand that the concealment must necessarily envisage a permanent hiding from the trustee. Especially in the case of negotiable instruments and money the only effective disclosure to the trustee is that which enables him to get possession of them for the benefit of the estate. It would not prevent a concealment from taking place that the insolvent throughout intended to inform his trustee of what he had done with the money or other assets after it would be difficult or impossible for the trustee to recover them for the estate.

No doubt the sum involved in this case was small but it ought to have been placed at the disposal of the trustee, instead of which the appellant used it and so effectively concealed it from the trustee. He disclosed the receipt not long afterwards, it is true, but

not/.....

not until the money had been spent. He did not prove that he had no intention to defraud since his only explanation was rejected; it follows that he was rightly convicted on count 13.

In regard to the appeal against the sentences, the magistrate on each of the counts 1, 2, 3, 5 and 13 imposed a sentence of 3 months imprisonment, 2 months of which were suspended on the condition that the appellant was not convicted of infringing the Insolvency Act. The two counts (7 and 11) on which the appellant pleaded guilty were less serious and periods of imprisonment for 3 weeks, of which 2 weeks were suspended, were imposed. It is unnecessary to refer to these counts in detail. I am satisfied that the sentences imposed were not excessive.

In the result the appeal on counts 1 and 3 are allowed and the convictions and sentences are set aside. The appeal against the conviction and sentence on the main charge in count 2 is allowed and there is substituted a conviction on the alternative charge of contravening section 135(1). The sentence will, however, remain the same as that imposed by the magistrate in respect of the conviction on the main charge. The appeal on counts 5 and 13 is dismissed, as also the appeal against the sentences on those counts and on counts 7 and 11.

D. Schreiner
7. 3. 56

Hoexter, J.A.
Reynolds, J.A.
Brink, J.A.
Hall, J.A.
} Concur

107/55

IN DIE HOOGGEREGSHOF VAN SUID AFRIKA.

(APPEL AFDELING)

JOHANNES PETRUS KRUGER .... Appellant.

teen

DIE KROON .... Respondent.

REKORD OP APPEL.

Teen die uitspraak van Sy Edelagbare Regter President E.M. de Beer en Regter A.J.Smit, gedoen in die Oranje Vrystaatse Provinsiale Afdeling van die Hooggeregshof van Suid Afrika op die 27ste Mei 1955 te Bloemfontein.

VERLOF TOEGESTAAN.

(Kragtens Artikel 369 van Wet No. 31 van 1917, soos gewysig deur Wet No. 37 van 1948).

Advokaat van Appellant : Mnr. J.P.G.Eksteen.

" " Respondent : Mnr. E.W. Holden.

(Afskrifte van afskrifte

UITSPRAAK.

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA.

(ORANJE VRYSTAATSE PROVINSIALE AFDELING.)

JOHANNES PETRUS KRUGER ..... Appellant.

teen

DIE KROON ..... Respondent.

CORAM: DE BEER, R.P. en SMIT, R.

GEHOOR OP: 4 April 1955.

UITSPRAAK OP APPEL: SMIT, R.

Appellant kom in hoërberoep teen sy skuldigbevinding aan diefstal en oortredings van die Insolvensie Wet. Klagte 1, 2, 3 en 4 is beweerde oortredings van artikel 132 (c) van Wet 24 van 1936 deurdat Appellant wie 'n insolvent is, en wie se boedel op 26 Maart 1953 gesekwestreer is, sekere eiendom en/of goedere wat hy op krediet verkry het en waarvoor hy nog nie betaal het nie, wederregtelik, onwettiglik en met die doel om te bedrieg, op 'n ander wyse as 'n gewone besigheidswyse vervreem het of toegelaat het dat iemand anders dit doen.

Appellant was in die S.A. Spoorweë werksaam en het 'n besigheid, naamlik "Sonop Winkel" te Edenburg geopen wat sy vrou bestuur het. Appellant het later sy werk laat vaar en self 'n motorhawe besigheid te Edenburg begin en ook belang gehad in Krugers Garage te Bloemfontein. Hy het ook met woonhuise, vee en karre gespekuleer en het 'n boormasjien

/gehad.....

gehad. Hy het egter in geldelike moeilikheid geraak en al in Augustus 1952 het sy laste sy bate oorskry. Polivnick het hom blykbaar geldelike ondersteuning verleen met sy ondernemings en op 2 Maart 1953 het Polivnick erwe Nos. 94, 95, 129, 130 en 483 te Edenburg, wat Eiser van van der Merwe op huurkoop kontrak gekoop het, oorgeneem. Hierdie transaksie is die onderwerp van die eerste klag. Op dieselfde dag het Appellant ook aan Polivnick erwe Nos. 153, 154, 155, 131, 184, en 185 vervreem. Hierdie vervreemding is die onderwerp van die vyfde klag wat 'n oortreding van artikel 132(d) beweer. Die getuienis op hierdie twee klagte kan wedersyds in aanmerking geneem word as deel van die omliggende omstandighede en om die gedragslyn tussen Appellant en Polivnick te toon wat eersgenoemde se bates en verpligtinge teenoor laasgenoemde betref. (Pretorius' trustee versus Van Blommenstein 1949 (1) S.A. 277(O.P.D.) Rex versus Viljoen 1947 (2) S.A. 56 te bl. 63. (A.A.) Rex versus Hart 1939 O.D.P.A. 297.

Wat klagte 1 tot 4 betref is die bewyslas op Appellant om te bewys: (a) dat die eiendomme en goedere op 'n gewone besigheidswyse vervreem was, of (b) dat hy met hierdie transaksies geen bedoeling gehad het om te bedrieg nie. As hy (a) bewys is daar 'n end aan die saak, maar as hy dit nie kan bewys nie sal hy nog onskuldig wees indien hy (b) bewys. Hy kan hom natuurlik van hierdie bewyslas kwyt deur 'n oorwig van waarskynlikhede in sy guns te bewys. Op 2 Maart 1953 het Appellant geweet dat sy laste sy bates oorskry al vanaf Augustus 1952 af en het hy heelwat geld aan Polivnick geskuld: sowat £2000 volgens Polivnick, alhoewel hy 'n notariele verband vir £4000 gehad het wat op 15 Januari 1953 aangegaan

/was.....

was. Die feit dat die vervreemding plaasgevind het gedurende die tyd wat Appellant se laste sy bate oorskry het, belet egter nie dat die vervreemding op 'n gewone besigheidswyse kon geskied het nie. (Fourie's Trustee versus van Rhyn 1922 O.P.A., 4.) Die benadering van die vraag of goed wat op krediet gekoop is en nog nie betaal is nie, op 'n gewone besigheidswyse vervreem was, is in Rex versus Abrahamson 1920 A.A. op bl. 286 aangetoon. Die hof het daarop gewys dat nòg die wyse waarop die goed op krediet verkry was nòg die wyse waarop met die opbrengs daarvan na vervreemding gehandel was, ter sake is, maar

"th sole point to which their attention should be di-
"rected is whether the property, after it had been ob-
"tained on credit, had been disposed of otherwise than
"in the ordinary course of business." (op bl. 286)

In van Eeden's Trustee versus Pelunski & Mervis and Others 1922 O.P.A. op bl. 149 het de Villiers R.P. gesê:

"a disposition is in the ordinary course of business if
"it is in accordance with the principles, practices,
"usages and methods adopted de facto by or between sol-
"vent men of business, or which would be so adopted by
"them under the circumstances in question." (sien ook Rex v. Hart 1939 O.D.P.A. 295).

In Rex versus Abrahamson (supra) het die hof aanvaar dat die artikel gemik is op die verkryging van goed op krediet en om dit daarna teen 'n verlies te verkoop. Voorbeelde is genoem soos die geval waar die goed aan vriende weggegee word of verkoop word

"at a substantial loss when there was no need for him

/to do.....

UITSPRAAK.

"to do so" (bl. 286)

Die Kroon het bewys dat daar vervreemding van hierdie erwe was, maar die verweer in die eerste plek is dat dit 'n vervreemding aan die eienaar van die eiendom - van der Merwe - was en dat hy en nie Appellant nie, dit aan Polivnick, soos in die klagstaat beweer word, vervreem het. Dit was verder aangevoer dat Appellant die erwe aan van der Merwe teruggegee het op 'n gewone besigheidswyse deur die huurkoopkontrakte te kanselleer omdat hy nie langer in staat was om sy verpligtinge daaronder na te kom nie en ook dat daar geen bedoeling was om te bedrieg nie. Op die oomblik egter toe Appellant hierdie kontrakte gekanselleer het was hy nie met enige paiemente agterstallig nie en daar was geen noodsaaklikheid om die erwe terug te gee nie. Op daardie tydstip het Appellant blykbaar omtrent £40 vir erfbelasting geskuld waarvoor van der Merwe hom gedagvaar het, maar laasgenoemde het getuig dat hy nooit gedreig het om hierdie koopkontrakte op daardie of enige grond te kanselleer nie. Appellant het getuig dat hy die erwe teruggegee het weens die druk wat van der Merwe op hom uitgeoefen het en gladnie geweet het wat van der Merwe met die erwe wou maak nie. In sy getuienis by die eerste vergadering het hy verder gegaan en gesê van der Merwe het hom aangeraai om dit aan hom terug te gee. Dit word regstreeks deur van der Merwe weerspreek. Hy het getuig dat Appellant nooit met hom oor die kansellasie van die kontrakte gepraat het nie maar dat Polivnick hom 'n paar keer daaromtrent genader het en ook dat hy nooit vir Appellant gevra het om te kanselleer nie. Sy getuienis is dat Polivnick hom gevra het om te koop as Appellant kanselleer. Hy het gesê dat die kontrakte gekanselleer is met Appellant omdat Polivnick

/onderneem het.....

onderneem het om die erwe oor te neem vir die bedrag nog daarop verskuldig. Dit is duidelik volgens die getuienis van van der Merwe dat die kansellasie van die huurkoopkontrakte slegs die wyse was waarop die erwe aan Polivnick deur Appellant vervreem was en dat dit altyd 'n transaksie tussen Appellant en Polivnick was want hy sê

"hy weet nie waarom die transaksie deurgevoer is tussen "beskuldigde en Polivnick nie".

Die kansellasie het plaasgevind slegs na van der Merwe die onderneming gegee het dat hy die erwe aan Polivnick sou oormaak. Hierdie transaksie was na my mening 'n vervreemding deur Appellant van die erwe aan Polivnick. Die vraag is nou of Appellant bewys het dat hierdie erwe op 'n gewone besigheidswyse aan Polivnick vervreem was. Appellant het die erwe in die eerste klag vir £900 goedkoper verkoop as wat hy daarvoor betaal het. Dit was aangevoer dat daar geen getuienis is om te toon dat Polivnick nie die volle waarde daarvan op daardie datum betaal het nie. In sy getuienis by die eerste vergadering het Appellant gesê dat Polivnick £2000 vir die woonhuis wat op twee van die erwe staan, betaal het maar erken het dat hy daardie tyd 'n ander koper gehad het wat hom £2800 sou betaal, maar ongelukkig het die koper 'n ander huis gekoop. Die vermoede volgens die wet is dat die vervreemding nie op 'n gewone besigheidswyse plaasgevind het nie en dit was dus vir Appellant om te bewys, as hy kon, dat hy die erwe teen die markwaarde verkoop het, al sou hy 'n verlies daardeur gely het. Die getuienis wat daar is toon dat hy dit teen 'n verlies verkoop het en op 'n tydstip toe dit nie noodsaaklik vir hom was om dit te doen nie. Die feit dat Appellant ook op dieselfde dag sy ander erwe, wat die onder-

/werp.....

werp is van die vyfde klag, aan Polivnick vervreem het vir slegs die prys van die verbande daarop, is ter sake as deel van die omliggende omstandighede en gedragslyn van die partye. Appellant het hom sekerlik nie van die bewyslas gekwyt nie deur te bewys dat hierdie transaksie waarin die erwe in die omstandighede van hierdie saak oorgemaak was, in die gewone loop van besigheid plaasgevind het of dat dit nie bedoel was om die ander krediteure te bedrieg nie. Dit het kort voor sekwestrasie geskied op 'n tydstip toe Appellant geweet het dat sy laste sy bate oorskry en was duidelik bedoel om die een krediteur te bevoordeel en daardeur die ander te bedrieg. Die appèl teen die skuldigbevinding op hierdie klag kan nie slaag nie.

Wat die erwe, die onderwerp van die vyfde klag, betref is die getuienis dat Polivnick hulle oorgeneem het vir die bedrag van die bestaande verband nl. £2000. Appellant het getuig dat die erwe 153, 154 en 155 alreeds voor die tyd aan Polivnick oorgemaak was maar nog nie in sy naam registreer was nie. Hy het egter geen kontrak i.v.m. daardie erwe getoon nie en hierdie erwe was ingesluit in die verkoopskontrak waarin al die erwe verkoop was. Hierdie erwe is dan ook aan Polivnick vervreem op dieselfde dag as die erwe genoem in die eerste klag, kort voor sy sekwestrasie en terwyl hy bewys was dat hy in insolvente omstandighede verkeer. Die trustee het getuig dat die krediteure daardeur benadeel was Appellant het ook erken dat Polivnick voordeel gekry het ten koste van die ander krediteure ten bedrae van £2000. Die Kroon het dus bewys dat daar 'n vervreemding was wat sy skuldeisers benadeel het of sou kan benadeel. Die bewyslas het as gevolg op Appellant oorgegaan om te toon of dat die

/transaksie.....

UITSPRAAK.

transaksie op 'n gewone besigheidswyse geskied het dan wel dat hy geen bedoeling gehad het om te bedrieg nie. Die erwe is aan Polivnick vervreem vir slegs die prys van die verband wat daarop verskuldig was nl. £2000. Daar is geen onafhanklike getuienis wat bewys wat dat die waarde destyds van hierdie erwe was nie en dit was vir Appellant om daardie getuienis voor te lê. Daar was geen noodsaaklikheid nie vir hom om te verkoop op die wyse waarop hy wel verkoop het; daar is geen bewys dat hy met enige paaiemente of rente agterstallig was nie of dat die verbandhouer hom vir betaling gedruk het nie en deur te verkoop het hy geen kontant in hande gekry nie om die ander krediteure mee te betaal nie. Appellant het getuig dat hy die erwe vervreem het omdat van der Merwe en Hunt hom gedreig het. Maar hy het nie aan hulle vervreem nie, maar aan 'n ander skuldeiser Polivnick - wat geen bewese aanspraak op daardie eiendomme gehad het nie en Appellant het geen kontant vir sy vervreemding gekry nie en die eise van van der Merwe en Hunt te vereffen nie. Appellant het nie bewys dat hierdie vervreemding op 'n gewone besigheidswyse geskied het nie en ook nie, vir dieselfde redes as wat die eerste klag betref, dat hy nie die bedoeling gehad het om te bedrieg nie. Die appèl teen hierdie klag kan ook nie slaag nie.

Klag 2 is ook 'n bewoerde oortreding van artikel 132(c) van die Insolvensie Wet. Die Kroon het bewys dat die goedere daarin vermeld onder huurkoopkontrak van Modern House Furnishers, Bloemfontein, gekoop was in 1951 en 1952. Appellant het erken dat op 14 Maart 1953 hierdie goed aan Polivnick oorhandig was op sterkte van die Notariele verband gedateer 15 Januarie 1953 en dat die goed op daardie datum nog nie voor betaal was nie. Appellant is op 26 Maart 1953 sekwestreer.

/Mnr. Eksteen.....

UITSPRAAK.

Mnr. Eksteen, namens Appellant, het erken dat hierdie vervreemding nie op gewone besigheidswyse geskied het nie, (vgl. Rex versus Meyers 1931 T.P.A. 309) maar het aangevoer dat Appellant nie die bedoeling gehad het om te bedrieg nie. Appellant het getuig dat hy verplig was deur Polivnick om die sleutels van die huis waarin die goed was aan hom te gee. Maar hy het geen poging aangewend om Polivnick daarvan te verwittig dat dit huurkoop goed was nie of om die eienaar van die goed in kennis te stel van Polivnick se beweerde optrede nie. Appellant het nie bewys dat hy nie die bedoeling gehad het om te bedreig nie en die Appèl teen hierdie skuldigbevinding moet ook misluk.

Wat die derde klag betref was dit erken dat die goedere goedere daarin genoem op krediet gekoop was en nog nie afbetaal was nie to die vervreemding aan Polivnick en Britz plaasgevind.het. Dit was aangevoer dat hierdie hof liewers Appellant se verduideliking in verband met die beweerde vervreemding aan van der Walt moet aanneem. Maar die laerhof het van der Walt se getuienis aanvaar en daar is geen rede wat hierdie hof sou regvaardig om met daardie bevinding in te meng nie. Ten opsigte van hierdie klag is dit ook aangevoer slegs dat Appellant nie die bedoeling gehad het om te bedrieg nie; maar hy het nie in die bewys daarvan geslaag nie. Hy was bewus dat die goedere op huurkoopkontrak gekoop was, dat sy finansiële posisie baie swak was en moes besef het dat deur die goed te vervreem en die geld vir sy eie doeleindes te gebruik, hy besig was om sy krediteure te bedrieg. Die appèl ten opsigte van hierdie klag kan ook nie slaag nie.

/Wat die.....

UITSPRAAK.

Wat die vierde klag betref is dit duidelik dat Appellant die goed wat hy van Herbst vervreem het, persoonlik van Modern Furnishers op krediet op operekening gekoop het en dat benalwe vir 'n geringe deposito hy nie daarvoor betaal het nie. Maar vir die Kroon om te slaag moet die getuienis toon dat hierdie goed vervreem was op 'n wyse anders as 'n gewone besigheidswyse. Soos alreeds daarop gewys is, berus die bewyslas op Appellant om te toon dat die goedere op 'n gewone besigheidswyse vervreem was. Hy was 'n handelaar wat goed op krediet koop en dit dan weer verkoop nog voor hy daarvoor betaal het. En as dit verkoop word om 'n skuld te vereffen maak dit ook nie saak nie solank hy die volle waarde van die goedere kry. In hierdie geval het hy die volle waarde gekry en Herbst moes nog £20 inbetaal het op die koop. Wat Appellant daarna met die geld gemaak het verander nie die aard van die transaksie nie. (Rex versus Abrahamson 1920 S.A. bl. 286). Die Magistraat het fout gemaak deur die huurkoopkontrak, bewysstuk H, te beskou as van toepassing op hierdie klag. Dit het betrekking op die tweede klag. Hierdie goed was op ope rekening gekoop en die Magistraat het gedwaal toe hy sy bevinding gemaak het op die veronderstelling dat dit huurkoop-goedere was. Die appèl slaag t.o.v. hierdie klag.

Klag No. 8 beweer 'n oortreding van Artikel 135 (3) (a) wat dit 'n misdryf maak waar die insolvent voor die sekwestrasie van sy boedel:

"'n skuld van vyftien pond of meer, of skulde
" van gesamentlik vyftig pond of meer aangegaan
" het, sonder dat hy 'n redelike verwagting had

dat..../

UITSPRAAK.

" dat hy daardie skuld of skulde sal kan vereffen."

Dit word vermoed dat die insolvent die skuld aangegaan het sonder dat hy 'n redelike verwagting gehad het dat hy dit sal kan vereffen as die skuld of skulde aangegaan is

" (i) op 'n tydstip tot sy skulde meer as sy bate bedra het; of

(ii) binne die tydperk van ses maande wat aan die sekwestrasie van sy boedel onmiddellik voorgegaan het."

Die klag t.o.v. Wilder en Hirschon het die Kroon laat vaar. Dit is aangevoer dat daar geen aanneemlike bewyse is wanneer hierdie skulde aangegaan was nie en dat die bewyslas dus nie op appellant is nie om te bewys dat hy 'n redelike verwagting gehad het dat hy hierdie skuld sal kan vereffen. Appellant het erken dat hy aanspreeklik is vir die ander skulde uiteengesit in die lys van bewysde eise. Maar daardie lys toon nie aan wanneer die skulde aangegaan was nie. In sy getuienis egter, het hy vertel dat die transaksie met Meiring in Februarie 1953 aangegaan was; dat die goed van Navias Bros. en Pincus gekoop was gedurende die betrokke periodes wat duidelik na die periodes aangegee in hierdie klag verwys. So vertel hy ook dat hy gedurende hierdie periode £600 van Coetzee geleen het, en Coetzee vertel dat dit in November 1952 was. Lindström het vertel dat die skuld met hom aangegaan was gedurende Desember 1952 en Januarie 1953. Dit is dan net t.o.v. die bedrag aan Lurie en Firestone (S.A.) Pty. Ltd. verskuldig wat die datum nie...../

die bewys is nie, en hierdie items moet dan van hierdie klag wegval. Wat die skuld aan Meiring betref, het beskuldigde erken dat hy dit in sy skedules opgegee het maar volgens sy getuienis blyk dit dat dit 'n fout was want hy verklaar dat hy en Meiring ooreengekom het in verband met 'n ou vragmotor wat aan Meiring behoort het; dat as Appellant dit kon regkry hy dit van Meiring vir £75 sou koop. Appellant sê hy kon dit nie regkry nie en dit het Meiring daarvan gesê. Die ou vragmotor is egter nog by Appellant. In hierdie omstandighede vind ek nie dat dit bewys is bo redelike twyfel dat Appellant hierdie bedrag aan Meiring skuld nie, en hierdie item val ook weg.

Wat die ander skulde betref moet onthou word dat die bewyslas volgens Artikel 135 swaar rus op 'n handelaar wat insolvent gaan en ek stem saam met respek met wat De Wet R. in Rex versus Baddock, 1933 T.P.A., op bl. 529 gesê het, naamlik dat:

" in determining whether he has discharged that
" onus, one must take a reasonable view; one
" must regard the particular circumstances of
" each insolvent and the particular circum-
" stances of his business, and must not take
" an extreme view. I do not think it was the
" intention of the Legislature that any trader,
" as soon as he finds himself in a tight corner,
" should at once surrender his estate. If he
" sees a reasonable prospect of pulling through
" by adopting the procedure and the methods which

other...../

" other traders in his position would reasonably
" adopt, and in spite of that fails, I think it could
" never have been the intention of the Legislature
" that he should be branded as a criminal."

En in Rex versus Joseph 1933 O.P.A. op bl. 162 is neergelê dat:

" Where a merchant carries on business and in the
" course of that business contracts debts for the
" purposes of that business and in amounts which
" are normal for his business he may be said to
" have a reasonable hope of being able to pay the
" same unless there are particular circumstances,
" which would indicate that this hope was not justifiable."

Die feit dus dat Appellant se bate sy laste al in Augustus 1952 oorskry het beteken nie dat hy dadelik moes ophou om handel te dryw nie en sy boedel oorgee nie. Polivnick het hom daardie tyd geldelik ondersteun en ek dink dit was billik van Appellant om te verwag dat Polivnick hom weer sou help om aan die gang te bly en dat hy uiteindelik sou deurkom. Dit was eers in Januarie 1953 wat hy sê hy in 'n benarde toestand geraak het, en nie die skulde kon betaal nie. Appellant was algemene handelaar en motorhawe-eienaar en die goed wat hy van Navias Bros. & Pincus gekoop het was vir die winkel gekoop in die gewone loop van besigheid en so ook was die petrol van Lindström geleen vir die motorhawe. Die rede blykbaar waarom die petrol nie dadelik teruggegee was nie was weens 'n tekort aan petroldromme en spoorweë moeilikhede.../

moeilikhede. Daar is geen rede na my mening waarom die verwagting van Appellant dat hy hierdie skulde sou kan betaal, nie as redelik aanvaar kan word nie.

Die skuld aan Coetzee is die balans van 'n lening van £600 wat Appellant van hom in November 1953 gekry het. Coetzee het getuig dat hy daardie tyd op Edenburg onderwys gegee het. Hy wou 'n huis van Appellant huur maar Appellant het hom gesê dat hy £600 nodig het en die huis sal moet verkoop, maar as Coetzee hom die geld leen, sal hy die huis aan hom verhuur. Appellant se verklaring is dat hy later die huis sou verkoop het en sodoende die bedrag terugbetaal het. Coetzee staaf dit en sê dat Appellant hom 'n ander huis sou gegee het om in te woon maar dat die verkoop deur die mat geval het. Toe hy die skuld aangegaan het, het Appellant blykbaar redelike vooruitsigte gehad om dit te vereffen deur die huis te verkoop maar dat die verkoop later deurgval het en Mnr. Hunt hom begin druk het tot so 'n mate dat hy aan hom £10 per dag moes betaal het. Na my mening kan dit nie bevind word nie dat Appellant nie redelike verwagting gehad het toe hy die skulde aangegaan het om hulle te vereffen nie. Die appèl teen die skuldigbevinding op hierdie aanklag slaag ook.

Klagte 14, 16, 18, 19, 20 en 21 is soortgelyk en elkeen bevat die bewering dat Appellant diefstal van die motorvoertuig daarin vermeld gepleeg het. Die getuienis toon t.o.v. elke klag, dat Appellant die voertuig op huurkoopkontrak gekoop het, waarin bepaal word dat die eiendomsreg in die voertuig nie na Appellant die...../

oorgaan nie en dat hy nie die voertuig sonder die eienaar se skriftelike toestemming kan verkoop nie. Op al hierdie klagtes is Appellant se verweer dat hy nie die bedoeling gehad het om te steel nie, daar hy onder die indruk was dat hy wel kon verkoop deurdat hy die mondeling of stilswyende toestemming van die eienaars daartoe gehad het. Appellant het getuig dat die eienaars bewus daarvan was dat hy die voertuie koop om dit weer te verkoop voordat die huurkoopprys daarvan betaal was en dat almal daarvan bewus was dat hy met motors handel dryf en hulle toestemming gegee het. Die eienaars het ken dit maar die vraag is of Appellant se verduideliking nie redelikerwyse moontlik waar kan wees nie. En na my mening kan dit. Hy is 'n motorhawe eienaar en die persone wat aan hom tweedehandse motors verkoop het moes geweet het dat hy nie al daardie motors vir sy persoonlike gebruik sou koop nie. Hy word dan ook deur die getuie Erskine gestaaf. Van Blerk, die bestuurder van Tahan Motors, die klaers ten opsigte van klagte 18 en 19 het getuig dat Appellant geen toestemming van hulle gehad het om die motors onderworpe aan die huurkoopkontrak te verkoop nie. Maar Erskine het getuig dat van Blerk vir hom laat verstaan het dat hulle Appellant die reg gegee het om die motor te verkoop voordat die prys afbetaal is. Fourie het getuig dat van Blerk dit ook aan hom gesê het, en bygevoeg het dat die huurkoopkontrakte aangegaan was om dit te kan verdiskonteer. Na my mening is daar 'n twyfel of Appellant bedoel het om te steel en die voordeel daarvan moet aan hom gegee word. Die appél

slaag..../

UITSPRAAK.

slaag dus t.o.v. klagtes 4,8,14,16, 18, 19, 20, 21 en die skuldigbevinding en vonnis t.o.v. elkeen daarvan word ter syde gestel. Die skuldigbevinding t.o.v. klagtes 1, 2, 3, en 5 word bekragtig.

Appèl is ook aangeteken teen die vonnisse maar na my mening is dit nie bewys dat die Magistraat nie sy diskresie behoorlik uitgeoefen het nie. Die gevangeskap is billik en daarbenewens word twee derdes daarvan opgeskort. Die vonnisse word dus bekragtig.

(get.) A. J. Smit,

Ek stem saam: E. M. de Beer.

Bloemfontein,
26 Mei 1955.