G.P.-S.117539—1954-5—5,000.

83/56

83/56

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

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

GERSHON H. BEHRMAN
Appellant.

versus/teen

THE QUEEN
Respondent.

Appellant's Attorney Levine & Black *Respondent's Attorney* A.G.
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate H.J. Hanson Q.C. & I. Bernstein *Respondent's Advocate* Mr. W.J. Byers.
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on: Thursday 22nd Nov., 1956.
Op die rol geplaas vir verhoor op: Friday, 23rd Nov., 1956

(TPD)
1, 3, 7, 10, 11.

22/11/56 9.45 – 12.50
2.15 – 4.20
23/11/56 9.50 – 12.45
2.15 – 3.25

Appeal dismissed
Sentences of Death
Imposed by Trial Court
confirmed.
J.A.

C.A.V.

Record.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION.

In the matter between :-

GERSHON HERSCH BEHRMAN ..... Appellant.

and

REGINA ..... Respondent.

CORAM: Centlivres, C.J., ~~Eagan~~ HOEXTER, Reynolds, Beyers, JJ.A. et Hall, A.J.A.

HEARD ON: 22nd and 23rd Nov. 1956. DELIVERED: 3rd Dec. 1956

J U D G M E N T.

HALL, A.J.A. :-

The appellant is an attorney who has been in practice in Johannesburg for some thirteen years and has acquired a large practice, consisting mainly of criminal cases, in the magistrate's courts of that city. He was convicted by a regional court of contravening section 2(b) of the Prevention of Corruption Act (No. 4 of 1918) and sentenced to six months imprisonment, and the conviction and sentence were confirmed upon appeal by the Transvaal Provincial Division. Leave to appeal to this court was granted by the Provincial Division.

The offence with which the appellant was charged had its origin in the prosecution of five Indians, named Wazar, who carried on business in Standerton. They were

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charged with stealing goods from the South African Railways and the appellant went to interview them at Standerton in connection with their defence. Captain Pretorius who is an officer in the South African Railways Police stationed in Johannesburg, was in charge of the investigation, and he had caused to be removed to Johannesburg the books of the Wazar's business and likewise a considerable quantity of goods which were found in their possession.

On the 4th April, 1955, shortly after his return from Standerton, the appellant went to Pretorius' office and asked him for the return of the unused portion of his client's cheque book. He had met Pretorius for the first time about six weeks previously in connection with another case which he was defending. It was arranged that the appellant would come back the following day and Pretorius then handed the unused cheques over to him and obtained his receipt for them.

After other police officials had left the office the appellant told Capt. Pretorius that he would like to give him a sucking pig and the latter refused the offer. The appellant then asked him how the case against the Wazars stood and Pretorius said that he could not give the matter his attention until the following week. The appellant then of-

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him that he was not interested in whiskey and that he should confine himself to the case under discussion. The appellant said that, as Pretorius had not had time to consider the case, he would come back the following week and discuss the matter with him. On the 13th April the appellant rang Pretorius up and asked whether he would see him about the Wazar case and an interview was arranged for the following morning. When Pretorius got home at 2 a.m. on the morning of the 14th April he found that a carton had been delivered at his house the afternoon before. It contained a turkey and six bottles of liquor, of which three were whiskey, and it was accompanied by a letter addressed to him stating that the parcel was sent with the appellant's compliments. He handed the parcel over to his commanding officer. Certain preparations were made by Pretorius in anticipation of the appellant's expected visit but he did not keep the appointment. On the afternoon of the following day, the 15th April, the appellant telephoned Pretorius, arranged a meeting with him and went up to his office; it is from this point that the evidence for the Crown differs from that for the defence.

Pretorius states that he met the appellant in the passage outside his office. They both went into the office, the appellant closed the door and they both sat down

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at the desk. The appellant asked Pretorius if he had received the parcel he had left at his house and the latter replied that he could not understand why he had been given a present of that kind. The appellant replied "Forget it, enjoy it." He then said "I want to leave a parcel with you" and he took an envelope out of an inside pocket and put it down on the desk. The envelope was open and Pretorius saw that it contained money. He did not take it, but left it on the desk. He then asked the appellant what he wanted him to do for him and the appellant said "Give me the low - down on the Standerton case" and he asked for the return of the Wazars' books. Pretorius demurred and the appellant said that he was in a hurry but that he would come back next day for a further talk. Pretorius insisted that the discussion should continue and the appellant asked him whether he could not take the tags and numbers out of the shoes which had been taken from the Wazars by the police. Pretorius raised objections and, after further discussion, the appellant said "At any rate, see what you can do, I'll see you right." During the course of the interview the appellant had said that the envelope contained £200 and that "there was some more coming"; and he left it with the money in it lying on the desk and went out of the

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office. Pretorius followed him and gave a pre-arranged signal. Major Krogh and a detective sergeant came down the passage and the former asked the appellant to go back into the office. There Pretorius said that the appellant had given him the envelope, stating that it contained £200, as a bribe to induce him to destroy marks on exhibits and to hand other exhibits back to him. The appellant denied this. Major Krogh arrested him on a charge of bribery and gave him the usual warning. The appellant then said "The officer" - pointing to Pretorius - "asked me for a loan of £200 and I gave it to him". The appellant was at that time upset. Pretorius said that there was no truth in the allegation. He then opened the envelope and the money was counted out in the appellant's presence and was found to consist of 34 £5 notes and 3 £10 notes, making £200 in all. The envelope and its contents formed an exhibit in the case. Pretorius said that, when the appellant was arrested, Major Krogh told Sergeant du Preez to search him and certain papers were found on him. One of them was a page from a pocket diary, on which a list of goods was written, and this was marked "Exhibit B".

In his evidence the appellant, while admitting that he had sent Pretorius the turkey and the liquor as a present, denied that he had offered him the £200 as a bribe.

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He said that, on the 5th April after he had got the unused portion of the cheque book from Pretorius, the latter asked him to lend him £200 which he required for the purpose of paying his income tax. The appellant promised to lend the money in ten days time and then Pretorius asked him to bring it in cash because he had no banking account. He telephoned Pretorius on the 15th April, arranged an appointment and took the £200 with him. He met Pretorius in the passage and went with him into his office and he said to him "Here is the £200" and asked for a receipt for the money. Pretorius laughed and said "Dont you trust me" and put the money into his pocket. He did not insist upon a receipt He asked Pretorius whether he had got the parcel he had sent him and Pretorius said that he ought not to have sent it so openly. He then asked whether he could leave it with him and Pretorius said "Yes". Pretorius then asked him what he wanted and he said that he wanted all the books in the Wazar case. After some discussion, Pretorius asked him how he was going to get past the identification marks on the goods and the question of the tags in the shoes was brought up. The appellant denied everything that Pretorius had said in so far as it disagreed with his own story.

The Crown called one, Ayob Wazar, who was one of

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the five Indians who were arrested in connection with the theft of goods from the Railways. He stated that the appellant came to Standerton to discuss what steps were to be taken to defend the case. Two of the brothers met him and he told them that he knew all the police officers concerned and that he would see what could be done. They told him that he should make efforts to see that the tags should be removed from the B.G. shoes and the trade marks from the Veka shirts because they had no invoices for those goods. The appellant asked them "What about the money" and August Wagner told him that if he did the work properly he was prepared to give him £300. He gave the appellant a list of the goods for which they had no invoices on a page torn from a diary in his possession which he used to make notes on. He identified the list he had given the appellant as the exhibit marked "B". This was the list of goods from which it was essential to remove identification marks. He said that he mentioned to the appellant the names of two police officers, i.e. Capt. Pretorius and Sergeant du Preez. He likewise asked the appellant to endeavour to get hold of certain of the books of the firm and to return them to him. The only thing which he received from the appellant was the unused portion of the cheque book.

Pretorius stated in his evidence that he had,

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from the time that the appellant offered him presents, reported everything that happened between them to his commanding officer, Col. van Rensburg. He said that, on his suggestion, he had a microphone installed in his office on the 13th April and that that was connected with a tape recorder in Col. van Rensburg's office. Col.van Rensburg gave evidence regarding the receipt of the reports from Pretorius and also of his receiving from him a cartom containing a turkey and liquor. He corroborated Pretorius as to the installation of the tape recorder in his office. A great deal of evidence was led regarding the reliability of the transcripts from the record which the tape recorder made of the interview between Pretorius and the appellant on the 15th April, and to this some reference will be made later.

The magistrate stated in his judgment that Pretorius impressed the Court very favourably, that he gave his evidence fairly and without any malice to the accused and that there was no doubt at all that he had told the truth. He found that the accused was, in a number of ways, an unsatisfactory witness and that he regarded the story that he made Pretorius a loan of £200 as untrue. He stated that, after very careful consideration, he had come to the conclusion that Ayob Wazar

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had told the truth and that his evidence corroborated that of Pretorius. He stated, further, that the transcripts made from the tape recorder served likewise to corroborate Pretorius.

Mr. Hanson, who appeared for the appellant, contended that the magistrate had misdirected himself in two respects and that either of these misdirections was fatal to the acceptance of his judgment as correct. The two respects were that he had accepted the evidence of Wazar and had admitted the transcripts as evidence and (he) had stated that both of these were factors which corroborated Pretorius's evidence. He argued that, owing to the magistrate's having so misdirected himself, he adopted a wrong approach to the appellant's evidence and this was the basic cause of his refusal to believe it. Moreover, he overlooked a number of suspicious circumstances in Pretorius's behaviour. If he had taken these into consideration, he might well have come to the conclusion that the appellant's story that the £200 was a loan was true and that Pretorius, for motives known only to himself, had by falsely representing to the appellant that he required a loan caught him in the trap which he had prepared for him. He contended that no notice should be taken of the magistrate's findings as to credibility and that this court ought to find that the facts and probabilities disclosed by the record did

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not establish the crime beyond reasonable doubt.

I will deal first with the argument as to the magistrate misdirecting himself through his acceptance of WAZAR'S ~~Wagon's~~ evidence. The appellant in examination-in-chief denied ~~from~~ all Wazar's ~~Wagon's~~ allegations of discussions of methods by which the identification marks could be removed from goods taken by the police and for which no invoices were available. When he was asked about the list of these goods which WAZAR ~~Wagon~~ had given him (Exhibit B), his reply was that he had asked WAZAR ~~Wagon~~ for a list of the books which the police had taken and he was given this list by Wazar ~~Wagon~~. In cross-examination he gave a completely different answer. He said that he had discussed with the WAZAR'S ~~Wagons~~ generally the goods which had been removed, and that Ayob WAZAR ~~Wagon~~ gave him the list but he just glanced at it and did not go into it fully. On this list appear shoes and shirts which Wazar ~~Wagon~~ in his evidence had stated to be those from which he had told the appellant that the identification marks must necessarily be removed, including the B.G. shoes. It was the removal of these identification marks from shoes which Pretorius said was one of the things which the appellant asked him to effect when he gave him the £200. The very fact that the appellant was found to be in the possession of a list obtained from WAZAR ~~Wagon~~ on which appeared the

very goods from which it was necessary to remove identification marks is proof of the truth of Wazar's evidence and it supports the magistrate's finding on his credibility. I am of opinion that he was justified in coming to the conclusion that Wazar's evidence was substantially true, and correct in holding that Pretorius's evidence was to some measure corroborated by that of Wazar.

It does not appear to me to be necessary to decide whether the transcript of the tape recording was admissible or not. Assuming that it is inadmissible and that the magistrate was wrong in placing reliance upon it, the evidence of Pretorius, corroborated by that of Wazar, is so convincing that it appears to me that he must necessarily have come to the same conclusion even if he had taken no notice whatsoever of it. For these reasons I am of the opinion that there is no force in Mr. Hanson's contention that the magistrate had, by misdirecting himself, been led to adopt a wrong approach to the evidence.

I shall now deal with Mr. Hanson's contention that the magistrate's findings as to the credibility should be ignored, and that the probabilities are such that there is a reasonable doubt as to the appellant's guilt. The appellant's defence is based upon his story that Pretorius asked him for a loan of £200 on the 5th April and that he went to the former's office on the 15th April for the purpose of giving him the money. There seem to me to be several inherent improbabilities in this

story. If it were true, why should Pretorius have immediately reported to his commanding officer the fact that the appellant had offered him a present, and have thereafter reported to him each time the appellant had made a further approach to him? If Pretorius was expecting to get a loan of £200 from the appellant why should he have brought the parcel containing the turkey and the liquor to his headquarters and handed them over to Colonel van Rensburg? Again, why should he have arranged for the instalment of the microphone in his office so that a conversation regarding the giving of a loan could be recorded? There does not appear to me to be a logical answer to any of these questions. If the appellant had promised to lend Pretorius £200, why did he not refer to it when he telephoned Pretorius on the 13th April and again on the 15th April? If he was bringing Pretorius the money on the latter occasion, he would surely have told him so, but he admits that he did not mention the loan on either occasion. If, as is suggested by Mr. Hanson, Pretorius was using the subterfuge of a loan for the purpose of trapping the appellant, then it seems reasonable to assume that he would have referred to it when the appellant telephoned him.

The reason which the appellant gives for taking the £200 in the form of notes, i.e. that Pretorius says that he had no banking account, does not sound convincing. If the trans-

action was a straight forward one of lending money, a cheque made out to Pretorius would surely have been much more convenient and it would have afforded proof that the money was paid to Pretorius. The appellant did not know Pretorius well and it consequently seems strange that he should have lent him so large a sum as £200 without requiring an acknowledgment of debt from him. When the appellant was arrested, as he was leaving Pretorius's office, Major Krogh charged him with bribery and warned him in the customary manner. He failed to deny the charge in a manner in which he might have been expected to do if he were innocent, and only after some delay did he state that he had given Pretorius the money as a loan.

The appellant's own admissions regarding the way in which he viewed the correctness of the manner in which he approached a police officer, who was in charge of the investigation of a case with the defence of which he was connected, cast considerable doubt upon his honesty. He said in cross-examination that he did not think that it was wrong for him to send the police officer a gift of a turkey and a quantity of liquor, nor did he think that there was anything improper in lending him £200.

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A further point raised by Mr. Hanson was that the accused was prejudiced by the failure of the magistrate to allow cross-examination on a material point. I am in agreement with Hiemstra, A.J. who said in his judgment in the court a quo that there was no suppression of cross-examination at all.

I am of opinion that the appellant has failed to show that any good reason exists for differing from the magistrate's finding that he is guilty. The appeal is accordingly dismissed.

E.G. Hall
A.J.A.

Concurred:

Centlivres, C.J., Hoexter, Reynolds, Beyers, JJ.A.