

30/1958

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

APPELLATE

DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN STRAFSAAK.

(Eng. Record)

SULIMAN OSMAN LATIB

Appellant.

versus/teen

THE

QUEEN

Respondent.

Lery. Rogaly + Cohen

Appellant's Attorney

Prokureur van Appellant

Respondent's Attorney

Prokureur van Respondent

Appellant's Advocate
Advokaat van Appellant

Respondent's Advocate
Advokaat van Respondent

M.W. Botha

Set down for hearing on: Monday 17th + 18th Nov., 1958.
Op die rol geplaas vir verhoor op:

3.5.6.7.8.

(B)

9.45-12.30

C.A.V.

17.11.58

JUDGMENT, THURSDAY, 27th NOVEMBER, 1958.

Appeal dismissed.

nam: Steyn, Bess, ...

...

1 / E.H. THAK.
27/11/58

Record.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

SULIMAN OSMAN LATIB

Appellant

and

R E G I N A

Respondent

Coram: Steyn, Beyers, Malan, Van Blerk et Ogilvie Thompson JJ.

Heard: 17th November, 1958.

Delivered: 27 - 11 - 1958

J U D G M E N T

STEYN J.A. :-

In the magistrate's court the appel-

lant, together with others, was tried upon 108 counts of the ^{fraud on} following charge :-

"IN THAT upon or about the dates or during the periods set out in column 2 of the attached schedule, and at Johannesburg in the district of Johannesburg the said accused did wrongfully, unlawfully, falsely and with intent to defraud give out and pretend, or cause to be given out and pretended, to the persons or firms set out in column 4 of the attached schedule, that the corporate bodies or concerns set out in column 6 of the said schedule were able and willing to pay for goods which the said accused there and then purported to order on behalf of the said corporate bodies or concerns from the said persons or firms, ~~and~~ and did by means of the said false pretences induce the said persons or firms, to their loss and prejudice, to supply to the said corporate bodies or concerns goods/.....

goods to the value of the amounts set out in column 5 of the said schedule, whereas in truth and in fact, the said accused, when they so gave out and pretended, or caused to be given out and pretended, well knew that the said corporate bodies or concerns were not able and willing so to pay. "

The appellant was convicted on 75 of these counts, the other accused being acquitted, and was sentenced to three weeks imprisonment with compulsory labour on each count. His appeal to the Transvaal Provincial Division against the convictions and sentence~~s~~ was unsuccessful, but he obtained leave from that Division to ~~prosecute a similar~~
^{to}
~~his~~ appeal ~~before~~ this Court.

The magistrate dealt fully and ably with the evidence and Mr. Dison, for the appellant, does not challenge the factual findings at which he arrived, but contends that the facts found do not establish the case brought against the appellant in terms of the charge.

Before dealing with the submissions made in this regard, it is necessary to refer very briefly to the facts. The appellant is an unrehabilitated insolvent whose trustees refused him permission to trade. On 17th June 1952 he caused two companies to be registered, namely Bital Holdings S... (Pty) Ltd. and Twentieth Century Mail Order (Pty) Ltd. He controlled both the companies and devised a scheme

whereby/.....

whereby goods purchased by the latter company would on delivery at its premises, be conveyed to the premises of the first mentioned company, to be sold for the benefit of that company and of the appellant himself, without accounting to the purchasing company. In November 1952, at about the time when the operations of the Twentieth Century Mail Order Company had to be discontinued as a result of demands by creditors and the severance by one of his co-accused of his association with the company, the appellant embarked upon another business under the name of A. de Vries (Pty) Ltd., which simply took the place of the Twentieth Century Mail Order Company in the fraudulent scheme in which he was engaged. There was some delay in the registration of the de Vries company and the relevant transactions figuring in the schedule to the charge were concluded before registration had been effected. In the running of these two bogus undertakings the appellant employed the services of the persons who were his co-accused at the trial, and of Alice Gamiet who gave evidence against him.

The charge is based on the implied representation of good faith which was made when goods were ordered on behalf of the Twentieth Century Mail Order Company and the de Vries concern.

The first submission is that the

charge/.....

charge relates to an implied representation made by the appellant himself, and not to any such representation made by any other accused or by any other person as his agent, whereas according to the facts found the representation was, with a few exceptions only, not made by the appellant personally. In my view this submission cannot be sustained. It is correct that in regard to the Twentieth Century Mail Order Company counts the magistrate came to the following finding: "The majority of the orders was given by the fourth accused, either verbally or by letter. In only a few cases did the first accused actually place the order." But the magistrate also stated that "the Court has no doubt whatever that the first accused dictated or gave full instructions for the placing of all the orders to the fourth accused. He therefore made the representations to the various complainants. Of course, the fourth accused also did so. They acted jointly." In regard to the de Vries counts, although the written orders had been signed by Alice Gamiet, under her more correct name of Alice de Vries, he made a similar finding. "The Court's conclusion, on the whole, is that the orders were placed by the first accused in all cases.....He either dictated the orders, instructed others to telephone them

"or/.....

"or placed them personally over the telephone.....the first
"accused, assisted in part by Gamiet and the second accused,
"and on one or two counts by the fourth accused, made the re-
"presentations to the various complainants." In substance,
therefore, the magistrate found that although in most cases
the orders were placed or signed by a co-accused or an em-
ployee, they were placed and signed in every such case on the
instructions of the appellant. Such a finding does not ^{appear} ~~offer~~
to me to be at variance with the charge, which alleges that
~~the~~ the accused did give out and pretend "or cause to be given
"out and pretended" that the buyers were able and willing to
pay for the goods ordered. The evidence shows and the magis-
trate found in effect that in those cases in which the appel-
lant personally had not placed or signed the order, he had
caused the order to be placed or signed by the instructions
he gave to those in his employ, and had in that way made him-
self a party to the placing of the order.

The next submission with which I
propose to deal relates to the inability of the appellant,
at the times when the orders were placed, to pay for the goods
ordered. At the trial neither the financial position of the
appellant and his company Bital Holdings S.A.(Pty)Ltd., nor

those/.....

as to ability to pay is a representation by the purchaser of a present belief that he will be able to pay when payment falls due, rather than a representation as to what his financial condition will in fact be at a future date. If his belief is genuine, even though somewhat optimistic, the representation is not false, whatever his financial position may turn out to be at the due date. His ability to pay at the time of purchase and his prospects in relation to the date of payment, would, of course, be relevant to show whether or not he did in fact entertain such a belief, but what is placed in issue is a state of mind rather than a financial condition. The same applies in a cash transaction. ^{The} ~~For~~ instant ability to pay may there be of ~~more~~ decisive importance, but ^{even} ~~also~~ in such a transaction a buyer whose money has been stolen or who has inadvertently overdrawn his account at his bank, may unexpectedly find himself quite unable to pay for a purchase already concluded. That the representation here in question is primarily a representation as to the state of mind of the accused, appears from Rex v. Persotam ^{supra} (~~1530 L.D. 92~~). In that case it was contended, upon an indictment in terms similar to this charge, inter alia that it did not allege a representation of present intention. In that connection

STRATFORD J.A. observed: "The representation alleged is that
 "the accused was 'able and willing to pay' on the day and
 "place stipulated. In my judgment a representation of this
 "kind can only mean 'I am bona fide in making this bargain, I
 "intend to implement it '. The representation is the exact
 "antithesis of saying 'I am mala fide - I have no intention
 "of paying you.' I agree with the learned judge, therefore,
 "when he says that the allegation in the indictment 'at
 "least involves a representation that the purchaser intends
 "to meet the draft on presentation'.....The truth is that
 "there is always an implied representation of good faith by
 "the purchaser of goods on credit." Referring to Rex v.
Havenga (1925 T.P.D. 349), the learned judge pointed out that
 there was a like implication in a cash sale. It would seem,
 therefore, that in the present context ability and willing-
 ness to pay must be taken to refer to a composite state of
 mind which may properly be described as a bona fide intention
 of paying for the goods ordered or purchased. Where it is
 proved that the buyer in fact had no belief in his ability
 to pay, it would be difficult indeed to avoid the conclusion
 that he had no intention of paying. Where, on the other hand,
 it appears that he had such belief, that would tend to show

that/.....

that he intended to pay, but the conclusion in favour of such an intention would by no means suggest itself with equal force. Logically ability to pay is not a negation of unwillingness to pay. Both may well exist at the same time, and where they do, the intention of paying would none the less be absent. The falsity of a pretence comprising both ability and willingness, is not cured, therefore, by truthfulness in regard to ability only; and where there is no intention of paying, the substance of the false pretence, would remain, in spite of the ability to pay. It must follow, I think, that inadequate proof of inability to pay, is not in itself fatal to a charge of this nature. It is sufficient for a conviction on such a charge if unwillingness is established. In the present case, as already indicated, however ~~however~~ inconclusive/ the evidence as to inability may be/ there cannot be any doubt as to the complete absence at all relevant times of any intention to pay for ~~xxx~~ the goods ordered.

Some point was also made of the omission from the charge of any specific reference to the time when payment was to be made, but it is obvious, I think, that in its context the phrase "able and willing to pay" must be read to refer to the appropriate time for payment. There

can/.....

can hardly be any doubt that it must have been understood by the accused in that sense.

Mr. Dison made various other submissions^{/s} with which I do not propose to deal. It is sufficient to say that in my view there is no substance in them.

The appeal is also against the sentence. Having regard to the deliberate and elaborate manner in which the frauds were planned, the appellant's persistence in his fraudulent scheme and the large amount of over £6000 in the aggregate which is involved, I do not find it possible to reduce the sentence.

The appeal is accordingly dismissed.

Beyers, J.A.

Malan, J.A.

Van Blerk, J.A.

Ogilvie Thompson J.A.

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} Concur
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L. B. J.