277/1958

G.P.-S.1568732—1956-7—9,000. S. U.D.J. 445.

277/1958

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

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÊL IN STRAFSAAK.

ERIC WAHLHAUS & ORS.

Appellant.

versus/teen

MAGISTRATE, JOHANNESBURG & ANO.

Respondent.

Appellant's Attorney Goodricke [illegible] *Respondent's Attorney* AG., Pretoria
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate HC Nicholas *Respondent's Advocate* A J Heyns
Advokaat van Appellant *Advokaat van Respondent*

(leave - TPD) *Set down for hearing on:—* Monday, 11th May, 1959
Op die rol geplaas vir verhoor op:

2.5.7 (A) 9.45 - 10.30

(Schreiner, Malan, O'Thompson, Beyers, JJA, Holmes AJA)
Appeal dismissed. By Agreement
No Order is made as to Costs. (Reasons later).

[signature]
REGISTRAR
11/5/59

Record.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ERIC WAHLHAUS, in his capacity as director or servant of National Scrap Metals (Proprietary) Limited, and in his personal capacity.

RICHARD WOLFGANG ZILLIE

WALTER ROTHGIESSER .... Appellants.

and

THE ADDITIONAL MAGISTRATE (Presiding Judicial Officer in 'D' Court, Magistrate's Court, Johannesburg) .... 1st Respondent.

and

THE ATTORNEY-GENERAL FOR THE TRANSVAAL .... 2nd Respondent.

Coram: Schreiner, Malan, Ogilvie Thompson, A.B. Beyers, JJ.A. et Holmes, A.J.A.

Heard: 11th May, 1959. Handed in: ~~Delivered~~: 16th May, 1959

J U D G M E N T

OGILVIE THOMPSON J.A.:

This appeal was, at the conclusion of counsel's argument for Appellants, dismissed with - by consent - no order as to costs. It was intimated that the Court's reasons for dismissing the appeal would be furnished later. Those reasons now follow.

Appellants were charged with Fraud in the Magistrate's Court, Johannesburg. Broadly stated - I purposely

refrain ....../2

refrain from being more specific - the Crown avers that, in respect of each of the twenty-nine counts mentioned in the charge sheet and with intent to defraud, the accused, by means of the false representations set out in the charge sheet as amended by the Crown, induced the Railway Administration to convey and deliver by rail to the Globe Foundry certain specified quantities of scrap iron and steel at a rate lower than that rightly payable. The charge contained an averment that the accuseds' actions operated "to the loss of the said Administration and/or the actual or potential prejudice of the owners of the business known as Globe Foundry." After the Crown had furnished a full reply to a request for detailed further particulars, the Defence filed notices of Exception and Objection to the charge as amplified by the further particulars. The Exception taken was that none of the 29 counts reflected in the charge sheet "discloses any offence cognizable by the Court". In the Objection, the Defence sought, on the three grounds therein set out, to have the charge sheet quashed as being "calculated to prejudice or embarrass the Accused in their defence". One of these three grounds was the presence in the charge sheet of the above

cited ...../3

cited reference to the Globe Foundry and the Crown's refusal to elucidate that reference by way of further particulars. After hearing argument, the Magistrate, acting under the provisions of section 167(2) of the Code, ordered the charge sheet to be amended by deleting the averment therein of prejudice to the Globe Foundry and by adding the words "and prejudice", thus altering the above cited averment of prejudice in the charge sheet to read "to the loss and prejudice of the said Administration". For the rest, the Magistrate dismissed both the Exception and the motion to quash the charge.

Appellants then, on notice to the Magistrate and the Attorney-General for the Transvaal (as 1st and 2nd Respondent respectively), presented a petition to the Transvaal Division praying for an order:

> " 1. Reversing the First Respondent's Order dismissing the exception and granting an Order that the indictment should be declared invalid;
>
> Alternatively -
>
> 2. Granting an Order directing that the indictment, for the reasons hereinabove set forth, be quashed;
>
> Alternatively -
>
> 3. Granting your Petitioners such other or alternative relief as to this Honourable Court seems fit."

In ...../4

In support of the relief thus sought the Petition, after outlining the course of events before the Magistrate and indicating - at times somewhat argumentatively - the submissions which, as Appellants contend, were wrongly rejected by him, goes on to aver that, by reason of the submissions thus advanced, the charge against them is both bad in law and vague and embarrassing. Appellants also aver in their Petition that the twenty-nine charges against them "raise matters of considerable complexity involving several hundred pounds loss allegedly sustained by the Railway Administration"; that the trial is likely to last "for several weeks"; that, in the absence of a ruling from the Supreme Court, they will not know what case they have to meet; and that they will be gravely prejudiced should the trial proceed on the charge as it stands.

When the Petition came before the Provincial Division for hearing, Counsel for the Attorney-General stated, at the commencement of the argument, that he raised no objection to the procedure which Appellants had adopted. The Court (HILL and GALGUT JJ.) thereupon heard argument on the merits and reserved judgment. Thereafter the learned Judges called for further argument on the questions of whether it was

competent for the Court to grant the relief sought and, if so, whether the present was an appropriate case for such grant. Ultimately the Provincial Division, after considering various decided cases, came to the conclusion that a present determination of the issues raised in the Petition would be to create "a most undesirable precedent". It accordingly dismissed the Petition without expressing any opinion on the merits thereof, but also granted leave to appeal to this Court.

Mr. Nicholas, for Appellants, argued that this Court should refer the Petition back to the Provincial Division for consideration on its merits. This contention he rested upon two main submissions: the first being that the Provincial Division should have treated the Petition as an application for a declaration of rights; and the second - advanced in the alternative - being that the Provincial Division should have granted the relief claimed on the basis that the Petition was "in effect an appeal from the Magistrate".

In support of the submission - advanced for the first time in this Court - regarding a declaration of rights, Counsel sought to rely upon Attorney-General of Natal v.

Johnstone & Co. Ltd. 1946 A.D. 256. That was, however, a wholly different, and very special, type of case. There the commission, or otherwise, of an offence by the employer depended upon the proper construction of a Wage Determination, all parties concerned consented to the procedure, and no facts were in dispute. It was pointed out - vide pages 261 and 262 of the report - that, owing to difficulties which not infrequently arise in the interpretation of Wage Determinations, there is often room for differences of opinion as to their effect and that, short of "rearranging his business in such a way as to assume all questions of doubt against himself", an honest employer might, in the absence of a declaratory order, have no means of avoiding a possible conviction. In all the circumstances, the case was held to be an appropriate one for a declaratory order. It was, however, stressed that, by reason of the considerations I have indicated above, the case fell into a category distinguishing it from most other cases involving criminal offences. That aspect of the decision must again be emphasized.

The present case has no special features and can not rightly be brought within the ambit of the Johnstone & Co.

decision (supra). Apart from the fact that the Petition neither referred to, nor sought any relief by way of, a declaration of rights, it is clear that the present would not be a suitable case for the granting of the very special relief entailed in the Court's exercising its discretion under section 102 of Act 46 of 1935 to make a declaratory order in relation to a criminal case. The Appellants are alleged to have committed a crime. The normal method of determining the correctness, or otherwise, of that allegation is by way of the full investigation of a criminal trial. There is a total absence of any of the types of consideration which induced this Court to make a declaratory order in the Johnstone case (supra). Nor, indeed, does the case even contain any law point which, if resolved in Appellants favour, would dispose of the criminal charge, or a substantial portion of it. Even if it be assumed that, as contended by Appellants, the representations deducible from the terms of the consignment notes of the scrap metal in issue fall short of a representation that such metal was consigned to the Globe Foundry "for use thereat for foundry purposes" within the meaning of Clause 253 of the Official Tariff Book

(a matter ..../8

(a matter upon which ~~the Crown~~ this Court expresses no opinion), that would not necessarily exculpate Appellants: for it is clear that, in addition to the written representations of the consignment notes, the Crown also relies upon representations made verbally and by conduct. Mr. Nicholas' first submission, accordingly, failed.

Turning now to Counsel's second submission, it must be mentioned at the outset that Appellants' petition reveals no ground for reviewing the Magistrate's decision on account of any irregularity, as that term is generally understood: nor do Appellants' complaints fall within any of the specific grounds of review listed in section 19 of Proclamation 14 of 1902(T). If, as Appellants contend, the Magistrate erred in dismissing their Exception and Objection to the charge, his error was that, in the performance of his statutory functions, he gave a wrong decision. The normal remedy against a wrong decision of that kind is to appeal after conviction. The practical effect of entertaining Appellants' petition would be to bring the Magistrate's decision under appeal at the present, unconcluded, stage of the criminal proceedings against them in the Magistrate's Court. No statutory

provision exists directly sanctioning such a course. Section 103(1) of the Magistrates' Court Act (Act 32 of 1944) - in contrast with sections 103(2) and 104 conferring rights of appeal upon the Attorney-General - only confers a right of appeal upon an accused who is "convicted of any offence by the judgment of any Magistrates' Court". Nor, even if the preliminary point decided against the accused by a Magistrate be fundamental to the accused's guilt, will a Superior Court ordinarily interfere,- whether by way of appeal or by way of review - before a conviction has taken place in the inferior Court. (See Lawrance v. A.R.M. of Johannesburg 1908 T.S. 525 and Ginsberg v. Additional Magistrate of Cape Town 1933 C.P.D. 357). In the former of these two cases INNES C.J. said at p. 526

> " This is really an appeal from the magistrate's decision upon the objection, and we are not prepared to entertain appeals piecemeal. If the magistrate finds the applicant guilty, then let him appeal, and we shall decide the whole matter".

It is true that, by virtue of its inherent power to restrain illegalities in inferior Courts, the Supreme Court may, in a proper case, grant relief - by way of review, interdict, or mandamus - against the decision of a Magistrates' court given

before conviction. (See Ellis v. Visser & Another 1956 (2) S.A. 17 (T) and R. v. Marais 1959 (1) S.A. 98 (T) where most of the decisions are collated). This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of Gardiner and Lansdown (6th Edit. Vol.I page 750) state:

> " While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained. .... In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available."

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the Magistrates' Court. I would merely add two observations. The first is that, while the attitude of the Attorney-General is obviously a material element, his consent does not relieve the Superior Court from

the necessity of deciding whether or not the particular case is an appropriate one for intervention. Secondly, the prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, in a Magistrates' Court before he is accorded an opportunity of testing in the Supreme Court the correctness of the Magistrate's decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not per se necessarily justify the Supreme Court in granting relief before conviction (see too the observation of MURRAY J. at p.123/4 of Ellis' case supra). As indicated earlier, each case falls to be decided on its own facts and with due regard to the salutory general rule that appeals are not entertained piecemeal.

Reverting to the facts of the present case, the petition fails to reveal any such special circumstances as rendered interference by the Provincial Division with the Magistrate's decision necessary, or even highly desirable. It will, of course, be open to Appellants, if so advised and should they be convicted and thereafter appeal, to raise, at at that stage, the contentions now advanced in the petition. I accordingly refrain from expressing any opinion on the

merits of those contentions. It is sufficient to say that nothing was put before us in argument to show that any grave injustice or failure of justice is likely to ensue if the criminal trial against Appellants proceeds upon the charge sheet in its present form and as amplified by the further particulars furnished by the Crown. The decision in Behrman v. Regional Magistrate Southern Transvaal & Another 1956 (1) S.A. 318, upon which Counsel for Appellants sought to place some reliance, is distinguishable: for there the Provincial Division was of opinion that the charge - in respect whereof the Magistrate had declined to order the Crown to furnish further particulars - "stopped short of the essential information" required to enable the accused to know the case they had to meet. That is not the situation in the present case. The Court *a quo* was, in this Court's judgment, quite correct in refusing to entertain Appellants' petition.

N. Ogilvie Thompson

SCHREINER, J.A.
MALAN, J.A.
BEYERS, J.A.
HOLMES, A.J.A.
Concur.