G.P.-S. S: 445

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

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

WOLF HELLER

Appeliant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Israel, Sackstein & Simon
Prokureur van Appellant

Respondent's Attorney ~~A.G.(Pta.)~~
Prokureur van Respondent

Appellant's Advocate H.J.Hanson, Q.C., M.Horwitz
Advokaat van Appellant

Respondent's Advocate L.W.H.Ackermann; F.H.Grosskopf.
Advokaat van Respondent

Set down for hearing on 2.11.70 - 30.11.70
Op die rol geplaas vir verhoor op

4,8,9.

(W.L.D.) Holmes, J.A.; Trollip, J.A.; et Miller, A.J.A.

Postea on 3-12-70. Written Judgment by Holmes J.A. Trollip J.A. et Miller A.J.A. handed down the effect of which is set out overleaf.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between -

WOLF HELLER ..... Appellant

AND

THE STATE ..... Respondent

Coram: Holmes, Trollip JJ.A., et Miller, A.J.A.

Heard: ..... 2 - 24 November 1970

Delivered: ..... 3 December 1970

J U D G M E N T

HOLMES, J.A., TROLLIP, J.A., et MILLER, A.J.A.:-

The appellant was convicted by Nicholas, J., sitting in the Witwatersrand Local Division, on twelve counts of theft and two of fraud. He was sentenced to imprisonment as follows -

Count 4 - two years

8 - two years

9 - five years

10 - three years

2/... Count

Count 12	-	one year
15	-	two years
16	-	two years
19	-	two years
20	-	three years
21	-	two years
23	-	five years
24	-	three years
27	-	five years
29	-	five years
Total	-	42 years

All the sentences other than those on counts 8 and 9 were ordered to run concurrently with those on counts 8 and 9. Hence his sentence was, in effect, one of imprisonment for seven years. He appeals with the leave of the trial Court.

The appellant was acquitted on 17 other counts. Throughout this appeal the numbering of the counts will be the same as in the trial Court.

3/... The

The trial, from its inception until verdict, lasted from 28 October 1968 to 19 June 1970. The story which unfolded covered the period from March 1962 until the end of 1965. Before dealing seriatim with the counts which are the subject of this appeal, we think it would be helpful to set out the general background, as stated by the trial Court as follows -

"THE BEGINNING.

The story of this case began with the linking at the end of March 1962 of the destinies of two companies: Parity Insurance Company Limited ("Parity") and Trans-Africa Credit & Savings Bank Limited ("Trans-Africa"). They were the foundation of an inter-company structure which, during the period covered by the indictment, was added to and altered until there were included under its roof a large number of other companies.

The main architect of this structure was Mr. Wolf Heller, the accused. His chief assistant was Mr. Albert Montagu Saevitzon, an important witness for the State.

It will be convenient at this stage to make a brief reference to the history of Parity and Trans-Africa up to the beginning of the period covered by the indictment; and then to

4/... discuss

discuss the relationship between the accused and Saevitzon, and my impressions of Saevitzon's character, and that of the accused. The numerous other persons and companies involved will be introduced later in their due order.

PARITY INSURANCE COMPANY LIMITED.

Parity was incorporated on the 20 th July 1960. It was placed in final liquidation in December 1964. During the period of its existence it was an insurer registered under Section 4 of the Insurance Act, No. 27 of 1943, and a registered insurer under the Motor Vehicle Act,No. 29 of 1942. It was formed with an authorised share capital of R200,000.00, divided into 100,000 shares of R2. each. All 100,000 shares were issued but, as at the end of March 1962, an amount of only R1. per share had been called up. At this time, the Parity shares were held as follows:

Name of Shareholder	Number of Shares
H.B. Hanley	26,000
H.W. Robertson	18,500
N.T. Crawford	9,500
P.L. Irwin	11,000
J. Reisen	11,000
H.E. Silver	3,000
R.E. Somers-Vine & K.W. Murray	18,000
A.S. Posthumus	3,000
	100,000

When it started its operations, Parity's business was limited to comprehensive motor insurance, but shortly afterwards it entered the field of compulsory third party insurance under the Motor Vehicle Insurance Act, 1942. In this field it achieved a considerable success, rapidly becoming the largest writer of third party motor vehicle insurance in the Republic - at one stage it was underwriting some 40% of the total of this type of insurance. At the time of its liquidation, compulsory third party insurance constituted about 85% of Parity's total business.

The name of H.B. Hanley figures prominently in this case. In March 1962 he was the chairman and managing director of Parity. In his opening, leading counsel for the State informed the Court that Hanley was then serving a sentence of imprisonment as a result of his conviction, in this Division, in November 1967, of crimes of theft and fraud in relation to the affairs of Parity.

In February 1962, certain Mr. Abel Shaban and Mr. Vincent de Jager .... entered into a contract with the shareholders of Parity for the acquisition of all the issued shares for R850,000.00. This contract was terminated

6/... in

in the middle of March 1962 when a dispute arose on the question whether de Jager and Shaban had timeously furnished a cheque for the purchase price. They had planned to finance the transaction by obtaining a loan for the full amount of the price from the Chase Manhattan Bank, which was promised that, after Shaban and de Jager acquired control, Parity would make large deposits with the bank. Negotiations with the bank broke down when the bank received legal advice concerning the application to the proposed transaction of Section 86 /bis/ of the Companies Act. Thereafter, de Jager began negotiations with Hanley for the acquisition of a majority of the issued shares. It was at the time when these negotiations were reaching fruition that the short-lived relationship between de Jager and the accused began.

TRANS-AFRICA CREDIT & SAVINGS BANK LIMITED.

Trans-Africa was incorporated on the 11th May 1955 and had its principal office in Cape Town. In December 1959 it obtained registration as a deposit-receiving institution under the Banking Act. It had a wholly-owned subsidiary, another registered deposit-receiving institution, known as National Savings & Finance

7/... Corporation,

Corporation, Limited ("National Savings"), which had its chief office in Port Elizabeth and conducted business mainly in the Eastern Province of the Cape.

On the 4th December 1959, Tacshare Investments (Proprietary) Limited ("Tacshare") was incorporated with an authorised share capital of R200.00 divided into one hundred shares of R2.00 each. Only two of these shares were issued. Both of them were beneficially owned by the accused, who was the sole director of Tacshare from the 4th December 1959 to the 31st. August 1961. On the 8th December 1959 a total of 304,836 shares in Trans-Africa (constituting 56% of its issued share capital) were transferred into the name of Tacshare, which in consequence acquired control of Trans-Africa.

In July 1961, the accused borrowed from his brother-in-law, Mr. Dave Panovka, sums totalling R30,000.00. He furnished as security a pledge of the 304,836 Trans-Africa shares held by Tacshare. Soon after July 1961, there was concluded an agreement between the accused and Panovka. (This was referred to in the indictment and in the evidence as "the Heller/Panovka Contract".) In terms of this agreement, the accused purported to sell to Panovka

8/... the

the two issued shares in Tacshare for R46,000.00. As will appear later, this contract was not a genuine contract of sale, but was designed to put Tacshare beyond the reach of the accused's creditors, and at the same time to provide Panovka with better security for the loan of R30,000.00 which he had made to the accused.

Until September 1960 the accused was chairman of Trans-Africa, and he continued as a director until the collapse of Standard Finance in 1961, when he resigned. In 1962 the accused negotiated with one Guassardo for the sale of his Tacshare shares on the basis of a purchase price calculated at 7/6d. per share held by Tacshare in Trans-Africa. At the beginning of 1962 the accused heard that Guassardo was treating with directors of Trans-Africa with a view to obtaining control of the Trans-Africa board, which he then planned to use to issue to himself shares held in reserve and thus obtain effective control of the company. In order to block this move, the accused and Panovka transferred small blocks of Trans-Africa shares to a number of persons, who gave proxies for the annual general meeting of Trans-Africa held on the 15th March 1962. At this meeting Guassardo was removed from the board of directors and the accused's attorney, Mr. Solomon Ressel, was voted on to the board of Trans-Africa. De Jager and

Shaban had been associated with Guassardo in his move to acquire Tacshare and as a result de Jager had acquired some acquaintance with the affairs of Trans-Africa.

THE RELATIONSHIP BETWEEN THE ACCUSED AND SAEVITZON.

The accused was born on the 15th May 1908 in Lithuania, where he went to school until he came to South Africa in December 1922. He then knew very little English and, apart from attending book-keeping classes in Cape Town for about four months, he had no further schooling. At the age of 15 he started to work for a grocery firm in Cape Town, and later became a commercial traveller. In 1931 he started a dried fruit business in Worcester, Cape. From these small beginnings he built up a very large concern (Standard Canners Limited), the business of which he disposed of to Langeberg Co-operative for over £3,000,000-0-0d. in 1961.

He next acquired South African Druggists Limited, a company which he placed under the control of Standard Canners Limited. This company was now re-named Standard Finance Corporation of South Africa. It formed the nucleus of the "Standard Finance Group", which comprised approximately 150 companies in South Africa, the United Kingdom, the Central African Federation, and

10/... other

other parts of the world. Standard Finance had a share capital of over four and a half million pounds, and its shares were quoted on both the London and the Johannesburg Stock Exchanges. The total turnover of the group was of the order of £40,000,000-0-0d. per annum. Its activities covered a wide field, including the wholesale and retail distributive trades, industry, insurance and shipping, confirming and clearing, printing and stationery, and the provision of managerial and secretarial services. Another company controlled by the accused, Heller Organisation Limited (of which the accused was the chairman) was appointed manager and secretary of all the companies in the group. That the accused, with his limited education, was able from small beginnings to build up a business which he disposed of for over £3,000,000-0-0d. and then bring under his control a financial empire of this magnitude, is striking evidence of his financial acumen and his energy, industry and drive. He may well be described in the words used of him by one of his counsel in cross-examining Mr. Hill, a witness for the State - "a very intelligent man", "an astute businessman", a man "who obviously had immense experience of business and shrewd judgment of people and events and things". He was, as it was put to another State witness, Benater, "a person who talked with big ideas, broad schemes ..."

11/... In

In September 1961 the Standard Finance Group collapsed, and all of the companies in the group were placed in liquidation or under judicial management. Arising out of his activities in the group, the accused was charged in this court in September 1963 with having committed offences of fraud and theft and contraventions of the Companies Act. On the 22nd. November 1963, however, he was acquitted on all counts, save one of contravening a section of the Companies Act, for which he was fined R100.00 (see State v. Heller and Another (2), 1964(1) S.A. 524 (W)).

It is a mark of the accused's courage and resilience that, notwithstanding the fall of the Standard Finance empire and despite the shadow of prosecution which was then hanging over him, he began in the middle of 1962 to build a new empire, which started with the acquisition of a half interest in Parity.

The accused had come to know Saevitzon in about 1953 when, as a youth of 18, Saevitzon used to visit the accused's daughters at his house in Kenilworth in Cape Town. In 1953 Saevitzon became articled to a firm of accountants in Cape Town and in August 1958 he qualified as an accountant. The accused then offered Saevitzon employment in one of his companies.

12/... Saevitzon

Saevitzon accepted, and started work on the 1st January 1959 as the local secretary of a company called Pharmacy Holdings Limited, which was a wholly-owned subsidiary of South African Druggists Limited.

In June 1961 when the collapse of the Standard Finance Group was threatening, Saevitzon obtained employment as chief accountant in Southern Africa of Burroughs Machines.

Although their business association had now terminated, Saevitzon and the accused saw a great deal of each other, but whereas their relationship had previously been one of "big boss and small employee", now it was on a basis of friendship. In October 1961, Saevitzon got married, and he and his wife went to live in a flat in Killarney in Johannesburg, near where the accused was living. An extremely friendly association began and Mr. and Mrs. Saevitzon frequently visited the accused at his flat. After December 1961 Saevitzon was seeing the accused (who was now a lonely man) at least four or five times a week, and gave him a great deal of assistance in accountancy matters which related to the accused's troubles arising out of the collapse of Standard Finance.

In the early part of 1962 Saevitzon and the accused went into business together. They

13/... floated

floated a company (Stellaland Pharmacy Holdings (Proprietary) Limited) which acquired three pharmacies in Vryburg from the liquidators of South African Druggists.

After the accused acquired his interest in Parity in 1962, Saevitzon was appointed as administrative assistant to the managing director (Hanley), taking up his duties on the 1st August 1962. The evidence shows that, apart from his official duties in Parity, Saevitzon was there as the "eyes and ears" of the accused, through whom the accused was kept acquainted with what was going on in Parity, and largely through whom the accused exercised his influence in Parity. Hanley left Parity at the beginning of 1964, and the accused then obtained virtually complete control of the company. No appointment was made of a successor to Hanley as general manager or managing director. Saevitzon was then styled "Chief Administrator" and he was chairman of the management committee, which was responsible for the day to day administration of Parity. Saevitzon was from then on in the position of chief of staff to the accused, who, though he held no official position in Parity, was de facto in control of it.

It is clear that from the time that Saevitzon joined Parity, the accused reposed a great deal of

14/... confidence

confidence in him and there was a very close and intimate association between Saevitzon and the accused, not only in Parity, but also in other key companies of the accused which Saevitzon administered, and in regard to the accused's personal financial affairs.

The accused and Saevitzon held each other in high regard. The accused thought Saevitzon to be a young man "of very fine personality, full of life and very likeable". As secretary of Pharmacy Holdings, Saevitzon proved himself, in the eyes of the accused to be "very bright indeed", and as a man who came up with very bright ideas. The accused thought him to be competent, very capable, very quick-minded, and able to do a job properly and accurately. Saevitzon, for his part, said that "generally (the accused) has a tremendous persuasive personality; a man of very extreme drive, and, as I said, a super-salesman"; "... I held Heller in awe, I thought him almost a god - his business skills to me, at that stage (March 1964) were quite fantastic"; and "whatever the accused wanted me to do I virtually did. As I said before, I regarded him as a god".

The close relationship between the accused and Saevitzon continued until the beginning of

November 1964. Between the months of August and October 1964, the auditors of Parity had been uncovering irregularities, in some of which Saevitzon was deeply involved, and some of which gave rise to certain of the present charges against the accused. In a report dated the 13th October 1964, the auditors set out details of certain irregularities, and gave notice, calling upon the directors of Parity to rectify the irregularities, and to take steps to prevent the occurrence of similar irregularities in the future. They stated that, failing compliance with these demands, they would have to report the irregularities to the Registrar of Insurance and the Public Accounts and Auditors Board. They also insisted that Saevitzon and Hill, another employee of Parity, should be dismissed.

On the 6th November 1964, the accused and Saevitzon went to discuss with Mr. Attorney H. Schwarz, the accused's attorney, "the gravity of the auditor's report". In the course of the consultation, Saevitzon asked to see Schwarz alone. They went into the library, and there Saevitzon asked Schwarz if he would still be in trouble if the money referred to in the auditors' report was repaid. Schwarz

16/... replied

replied that it did not follow that in such a case there would be no further trouble, and he told Saevitzon that because he was the accused's attorney, Saevitzon should seek independent advice. Saevitzon then consulted with Mr. Advocate Oshry.

Saevitzon was now very much alarmed. He had a consultation with his father-in-law, who advised him and Saevitzon's wife that he should make a clean breast of everything and take the consequences. Saevitzon made up his mind to go to the police.

On the 11th November 1964, Saevitzon saw Brigadier Joubert of the South African Police. The Brigadier told him that if he wanted to make a statement, he should give it, but that he could make Saevitzon no promises that he would not be prosecuted.

Saevitzon did not make a statement on this occasion. Later he consulted counsel, who went with him to the police and there advised him to make a full statement. Later on the same day he agreed to meet Parity's auditors, and he answered numerous questions which were put to him relating to the acquisition of Parity by the accused, and the control of Parity.

Thereafter, he had frequent interviews with the police, mostly in order to hand over books

17/... and

and other documents which he had in his possession. His first statement was made in December 1964. In November or December 1964, the witness Hill said in evidence, Saevitzon telephoned Hill, who was deeply involved in the irregularities committed in Parity, and told him that he was in the office of Brigadier Joubert. He said: "I have made an absolute complete open confession to the police here and I'm ringing to find out whether you want to avail yourself of the same opportunity". Hill then decided that he too would make a statement to the police.

Eventually in September 1966, Colonel Huysamen of the South African Police, explained to Saevitzon the provisions of the Criminal Code relating to the indemnification of accomplices. Then, Saevitzon said, questions were for the first time put to him by the police and from these questions it became clear to him that the police wished to obtain information involving the accused.

CHARACTER OF SAEVITZON.

Saevitzon is a man of ability and personality and pleasing appearance. He has a quick intelligence and is clear-headed. His memory in regard to financial transactions was, in general, copious and accurate. In regard to

18/... certain

certain other matters, however, his memory was shown to be inaccurate and unreliable.

Despite his gifts, Saevitzon's character is seriously flawed. His admitted conduct demonstrated that he is a grossly dishonest man. Over a period of years, he participated, apparently without compunction, reluctance, or any qualms of conscience, in a series of thefts, frauds and deceptions. Even in the witness-box he gave no sign of contrition or even awareness of the enormity of his conduct. He was almost gleeful in telling what he had done, and seemed to be proud of what he regarded as his own cleverness in the crimes he committed. Mr. Hanson was undoubtedly correct when he referred in argument to "his obvious lack of probity, his overpowering conceit (and his) self-assurance", and in his description of him as a man "without any sense of morality ... without shame ... and without remorse or regret".

Saevitzon was an accomplice in most if not all of the crimes concerning which he gave evidence. For that reason alone it is necessary that his evidence should be approached with caution. But in addition, Saevitzon was admittedly anxious to be used as a State witness in order that he should save his own skin at the expense

19/... of

of giving evidence against the accused and others. (He agreed that between November 1964 and September 1966 he was in the position of "an anxious informer".) I accept that it is possible (although there is nothing to show that this in fact occurred) that he might have been tempted to falsely implicate others in order that he should be accepted as a State witness.

Before this trial, Saevitzon gave evidence in regard to matters which are covered by the indictment on four occasions - three of them were the Marais Commission, which was appointed to investigate the affairs of Parity, the trial in Cape Town of Ressel, the accused's attorney, and the trial of Hanley in this division. At those proceedings he was cross-examined, and the records of the evidence were available to the defence. He also gave evidence at a secret enquiry into the affairs of Parity held under the Companies Act. The record of the evidence at the secret enquiry was not, with the exception of the accused's own evidence, available to the defence at this trial. (See S. v. Heller, 1969(2) S.A. 361 (W).) It was apparent from the cross-examination of Saevitzon in regard to his evidence at the various other proceedings, that he has contradicted him-

20/... self

self in a number of important respects.

I do not think that there is any reason to doubt Saevitzon when he speaks of his own part in the crimes charged, especially where he has not been cross-examined in this connection. Where, however, his evidence implicates the accused, it would not in my view be safe to rely upon it in the absence of other reliable evidence or proved or admitted circumstances, which show that it is safe to accept it.

Mr. Hanson submitted that it became clear to Saevitzon during the period from when he first went to the police (November 1964) until the time he was offered an indemnity (September 1966), that if he was to avoid prosecution he would have to persuade the authorities that he was able to give evidence against the accused and against anyone else whom it was desired to prosecute. He was "kept on a string" for this long period; he became concerned to prove his value to the authorities; and his role, it was suggested, was the sinister one of giving the police false information in order to involve Hanley, Ressel and the accused.

Saevitzon volunteered to give evidence before the Marais Commission, and he agreed that

"a motivating cause was that I was trying to persuade the authorities as to how co-operative I could be". Mr. Hanson submitted that two particular pieces of evidence given by Saevitzon illustrate "the false role" he played in trying to implicate others. These pieces of evidence related to the negotiations with de Jager to acquire Trans-Africa at the end of March 1962, and meetings which were said to have taken place at the house of the accused on the 20th and 21st. April 1962. .... I must say at once that, unsatisfactory though Saevitzon's evidence was in relation to the negotiations between the accused and de Jager, there is in my view no ground for believing that in respect of either of these matters Saevitzon was playing a malevolent role and deliberately giving evidence in order to falsely implicate the accused or Ressel.

In my view, whatever the shortcomings of Saevitzon as a witness - and they were many - he set down naught in malice. I did not think,

22/... while

while he was giving evidence, that he showed any trace of vindictiveness towards the accused, or that he was actuated by any desire to falsely implicate the accused. On the contrary, there were a number of occasions on which, if he had wished only to incriminate the accused, he could have done so without danger of discovery that this was his motive. He did not do so but, if anything, went out of his way to give evidence which told in favour of the accused. It is sufficient for present purposes to refer to a striking example, namely, his evidence in relation to Count 6, in which it was alleged that the accused committed fraud in regard to the prospectus for Parity Holdings. Saevitzon gave evidence that in regard to three of the five misrepresentations charged, there was no intention on the part of the accused to defraud or deceive. It was this evidence which led the State not to rely on these three misrepresentations.

CHARACTER OF THE ACCUSED.

It is plain that the accused is a man of considerable abilities; intelligent, with considerable financial acumen, and with great drive and industry. It was also manifest - although the witness-box obviously was not the

23/... best

best environment for the display of such qualities - that he is a man capable of very great charm and persuasive force. It seems clear that all of those who were closely associated with him fell under his spell, and it is not difficult to imagine how potent this must have been.

As a witness in this court, however, the accused did not shine. In making my assessment of him, I have tried to make allowance for the strain to which he has been subjected since the collapse of Parity. He has lived for years under the threat of prosecution. He has seen a number of his former associates tried and sent to prison. He has had to undergo the long drawn out strain and suspense of this trial. And he has had to bear the enormous financial burden which, I have no doubt, it has placed upon him. He was in the witness-box for 34 days between the 13th October and the 12th December 1969, of which 28 days were taken up by a cross-examination which was exhaustive, and must for the accused have been exhausting.

In addition, I have kept in mind the fact that the accused labours under some disability in his hearing. My impression is that this is not a serious disability, but I noticed upon occasion that he sat with a hand cupped over

his ear, listening to a witness with strained attention. There were also occasions - not frequent - when it was plain that the accused and his questioner were at cross purposes as a result of the failure of the accused to hear properly the question which had been put to him.

But after making every allowance for him, I am of the view that the accused was a very bad witness. As will appear in the course of this judgment, he was shown again and again to be an untruthful witness. In the witness-box he shifted and shuffled, and twisted and turned, and tried to conceal behind a cloud of incoherence his inability to give a truthful answer to many of the questions put to him. He was frequently evasive, and refused, notwithstanding persistent pressure, to meet the point of a question. This was not, I am satisfied, because he misunderstood the question. The accused is not a stupid man. He is extremely quick and intelligent, and his failure to meet a question squarely was in many cases due to an attempt to avoid it, and to avoid the consequences of any answer which he might give. Sometimes he would embark on a long, rambling and irrelevant speech, designed to avoid an answer to a question, and with the hope of so obfuscating or obscuring the track

> that the cross-examiner might be thrown off it. At other times he would start an answer and stop on the realisation that what he had been about to say would lead him into trouble; and then continue, catching at straws and discarding them one after another as futile. This was the expedient of a man who could not tell the truth and could not find the acceptable lie. In the end the accused was entirely discredited, and he stood exposed as a man upon whose testimony, in general, no relience could be placed."

In this Court, counsel for the appellant submitted that the learned trial Judge must have overlooked certain evidence, and certain factors relating to the probabilities; that the witnesses were testifying to events which had happened several years previously, and that the learned Judge had made insufficient allowance for the haze of time; that the trial was a summary one and the defence had laboured under some difficulty because all available witnesses had been subpoenaed by the State and were not accessible to the defence for consultation;

26/... that

that the principal State witness, Saevitzon, was called towards the end of the State case, and that only then did the significance become apparent of various evidence given earlier in the trial; that it was not possible to obtain a statement from the appellant on matters canvassed in the indictment, save in the most general way; that the cross-examination of the appellant, for twenty-eight days, ranged from charge to charge and from point to point, with the witness under the constant necessity to relate the question to changing sets of circumstances; that a momentary loss of concentration or fatigue could well account for such matters as hesitation or subsequent correction; that, from the nature of the prosecution, the defence and the appellant did not have timeous consideration of all the surrounding circumstances; and that certain State witnesses might well have yielded to the temptation of co-operating with the State and would have tended to give evidence in conformity with the State's view, particularly in the light of the publicity which had been given to two earlier trials in which, so it was submitted, the

27/... appellant

appellant had been branded as somebody sinister. Counsel also dilated upon the character, motives and villainy of the main State witness, Saevitzon, who, like other witnesses for the prosecution, was an accomplice. Counsel urged the need for the greatest caution in approaching the evidence of Saevitzon who, he said, was a thief and a cunning plotter who had hoodwinked many people in pursuing his nefarious practices, and, as a witness, was a reckless inventor of facts to suit the exigencies of the moment.

As to all the foregoing, it is clear that most if not all of these points were raised and considered at the trial. The learned Judge was quick to appreciate certain difficulties with which the defence had to contend. He was generous in the matter of adjournments; and in his appraisal of the appellant as a witness he made allowance for the position in which the appellant found himself. The trial Judge certainly did not, as was suggested by counsel for the appellant, [redacted] in regard to one of the counts, approach

28/... the

the case on the footing that the appellant was a guilty man on whom there was some onus to indicate his innocence. In this regard it is not irrelevant to point out that the learned Judge acquitted the appellant on 17 out of the 31 counts. With regard to the evidence of the accomplices, the learned Judge was conscious of the dangers inherent in their testimony, and of the particular need for the existence of some safeguard against wrong conviction. He bore this pertinently in mind in regard to Saevitzon. He said, "I do not think that there is any reason to doubt Saevitzon when he speaks of his own part in the crimes charged, especially where he has not been cross-examined in this connection. Where, however, his evidence implicates the accused, it would not in my view be safe to rely upon it in the absence of other reliable evidence or proved or admitted circumstances, which show that it is safe to accept it." I would add that, in terms of section 254 (1) of Act 56 of 1955, the trial Judge in his judgment granted an indemnity to Saevitzon and the other State witnesses who were accomplices, being satisfied that they had fully answered the questions put to them while giving evidence under oath. Furthermore, the trial lasted for many months. The appellant himself was in the witness box for a total of 34 days; and Saevitzon's evidence runs to some 1,500 pages. This is therefore pre-eminently a case in which the trial Judge, seeing and hearing the witnesses, observing their demeanour, and being steeped in

of the proceedings, had advantages of appraisal, in the matter of the witnesses and their testimony, which a court of appeal does not have. Moreover, it is evident from the conscientious and thorough judgment that the trial Judge was at considerable pains to weigh in the scales all the relevant pros and cons, and to be fair to both sides. Bearing all the foregoing in mind, we do not consider that there are ANY factors warranting interference on appeal with the general findings of credibility made by the trial Court, save as may otherwise appear in regard to individual counts.

Of course, the onus of proof being on the State and Saevitzon's implicatory evidence being suspect, the foregoing strictures on the credibility of the appellant do not necessarily preclude this Court from holding that the trial Court ought to have found, in the circumstances of any particular count, that the appellant's version thereon could reasonably be true. Indeed, this was largely the approach of counsel for the appellant.

With that prelude we turn to a consideration of the individual counts on which the appellant was convicted.

COUNT 4.

The appellant was convicted of the theft of R13,725 from Parity in Johannesburg on 10 September 1962. It is common cause that the appellant was a party to the payment of that amount from Parity's funds to the account of Waghan Investments (Pty) Ltd. (We shall refer to the latter as Waghan.) The

30/... basic

basic question on appeal is whether we are persuaded that the trial Court was wrong in holding that the appellant, in doing what he did, had the intention to steal the said sum from Parity.

Stated in simple outline, the facts, as found by the trial Court, are that [redacted] De Jager AND McALPINE brought certain proceedings in the Supreme Court, against, inter alios, Parity, the appellant, Hanley and Dave Panovka (the appellant's brother-in-law). The case was settled. The attorney acting for the respondents was Mr. Goss. He sent in his account for R14,332-50, which included counsels' fees. The question arose as to what proportion of this account should be borne by Parity, and what proportion by Waghan. The matter was referred to their counsel, who expressed the view that Parity should pay 75%. Accordingly, Parity resolved to and did pay [redacted] nearly R9,000. About a month later, Waghan wrote to Parity and, purporting to rely on the aforesaid "agreement", claimed payment from Parity of R13,725, being 75% of certain other sums, including some which Waghan and Panovka

31/... were

were obliged to pay in terms of clause 9 of the settlement deed with De Jager. This claim was unfounded, as will be indicated later. Nevertheless Parity paid Waghan this other sum of R13,725. The trial Court held that the appellant was a party to the letter from Waghan and the payment by Parity, well knowing that Parity was not liable; that he did so in order to get money from Parity into the coffers of Waghan; and that his conduct and intention amounted to theft from Parity.

In deciding whether we are persuaded that the trial Court was wrong in that view, it is necessary to refer to the facts more fully, including the background and certain other factors affecting the probabilities. The chronology may be summarised as follows -

1. In 1959 Tacshare Investments (Pty) Ltd., was registered. I shall refer to it as Tacshare. The appellant was the beneficial owner of the two issued shares. He purported to sell them to his brother-in-law, Dave Panovka, for R46,000. The trial Court found that this contract (re-

32/... ferred

ferred to as the Heller/Panovka contract) was not a genuine transaction, but was designed to put Tacshare beyond the reach of the appellant's creditors, and at the same time to provide Panovka with better security for a loan of R30,000 which he had made to the appellant. The appellant continued to exercise control and to act as though there had been no change of ownership. Tacshare held 63% of the shares in Trans-Africa Credit Corporation (Trans-Africa).

2. Waghan was incorporated in 1958. At all material times up to the conclusion of the Tacshare deal when Tacshare was sold to Parity on 10 July 1962 (to which we shall refer in a moment), Hanley beneficially held 990 out of 1,000 issued Waghan shares. At the time of the Tacshare deal the directors of Waghan were Hanley and Mrs. Thompson (later Mrs. Hanley).

3. On 28 March 1962 De Jager entered into an agreement with Panovka. This was negotiated

33/... by

by the appellant, on behalf of himself and Panovka, for the acquisition by De Jager of the shares of Tacshare.

4. On the same date Hanley and De Jager entered into an agreement for the acquisition by Hanley of shares in Parity for De Jager.

5. Hanley resiled from his agreement with De Jager, and the appellant was apprehensive that the purchase price of the shares of Tacshare would not be paid on due date.

6. Arising out of the foregoing agreements and events, on 5 June 1962 De Jager and McAlpine applied in the Witwatersrand Local Division for certain interdicts against the appellant, Parity, Trans-Africa, Hanley, Panovka and others.

7. On 10 July 1962 this litigation was settled. A deed of settlement was entered into. The appellant was one of the

34/... signatories

signatories to it. Arising out of it, Parity acquired Tacshare from the appellant and Panovka for R250,000. This amount was used to enable Panovka to acquire, on behalf of himself and the appellant, a half-share in Waghan. Panovka was merely the appellant's "front". Thereafter Hanley and the appellant controlled Waghan, as equal shareholders, at any rate up to 1964. Of the said amount of R250,000, Waghan was to use R200,000 to reduce a loan by Hanley from Trans-Africa. R31,800 was to be used in discharging certain obligations undertaken in clause 9 of the deed of settlement.

8. Clause 9 obliged Waghan and Panovka jointly and severally to pay various sums totalling R31,800 to De Jager, McAlpine, a company in their group, and their attorneys. The clause reads as follows:

> "9. WAGHAN (PROPRIETARY) LIMITED and DAVE PANOVKA jointly and

35/... severally

severally agree to pay -

(a) The sum of R10,000.00 (TEN THOUSAND RAND) to FINANCE GUARANTEE AND GENERAL HOLDINGS LIMITED being the amount advanced by the said Company to the said HANLEY as part payment of the shares purchased by the said HANLEY from R.E. SOMERS VINE and I.W. MURRAY;

(b) the sum of R4,000.00 (FOUR THOUSAND RAND) to VINCENT FRANCIS DE JAGER being an advance on account of the purchase price of the shares in TACSHARE INVESTMENTS (PROPRIETARY) LIMITED afore referred to;

(c) the sum of R1,000.00 (ONE THOUSAND RAND) to VINCENT FRANCIS DE JAGER in respect of monies paid to SOLOMON RESSEL or TRANS-AFRICA CREDIT AND SAVINGS BANK LIMITED;

(d) the sum of R800.00 (EIGHT HUNDRED RAND) to VINCENT FRANCIS DE JAGER being the costs disbursed by him in connection with the action taken by certain shareholders against certain RAISUN;

(e) the sum of R1,000.00 (ONE THOUSAND RAND) to VINCENT FRANCIS DE JAGER on account of various disbursements incurred by him;

36/... (f) the

(f) the sum of R5,000.00 (FIVE THOUSAND RAND) to M.L. ROSIN, ROSIN AND PARTNERS as a contribution towards the costs incurred by VINCENT FRANCIS DE JAGER and TOM MCALPINE in connection with the above matters;

(g) the sum of R10,000.00 (TEN THOUSAND RAND) to VINCENT FRANCIS DE JAGER and TOM MCALPINE in respect of any other claims which the said DE JAGER and the said MCALPINE may have against any of the Respondents referred to in either of the said applications."

9. In terms of Clause 15, this amount of R31,800 had to be paid by 11 July 1962. In fact, it was paid by Waghan on 10 July 1962.

10. On 25 July 1962 Goss, the attorney for the respondents in the said litigation, sent to Waghan, for the attention of Hanley, his account for R14,332-50, which included R4,332-50 for counsel's fees. (Actually, his debit for counsel's fees had already been paid by Waghan. The account just referred to was sent in by request, presumably for the information of Parity; see para 11, infra). A covering letter from Goss, of the same date, was in the following terms:

"I have communicated with Mr. Oshry and Mr. Levy who feel that the bulk of all fees should be borne by the Parity Insurance Company Limited, by virtue of the fact that the reason for this protracted litigation was to avoid any publicity which could

37/... have

have done the Company a tremendous amount of harm and, furthermore, the control of Parity could have passed into the hands of undesirables.

In the circumstances it is suggested that the fees be apportioned as 75% to Parity and 25% to Waghan Investments."

Mr Oshry and Mr. Levy were the counsel for [redacted] all the respondents, in the litigation.

11. That letter, and the account, were tabled by Hanley at a Parity board meeting held on the following day, namely 26 July 1962. It was resolved -

"that the Company contribute to the fees apportioned as to 75% to the Company and 25% to Waghan Investments (Pty) Ltd., as per the letter tabled from Mr. H. Goss dated 25 July 1962, addressed to Waghan Investments (Pty) Ltd."

12. On 28 July 1962, in pursuance of this resolution, Parity paid Waghan 75% of the legal fees set forth in the Goss account.

13. More than a month later, namely, on 7 September 1962, Hanley, on behalf of Waghan, wrote to Parity as follows -

"MATTER V.F. DE JAGER AND T. MCALPINE
VERSUS PARITY INSURANCE COMPANY LTD.
AND OTHERS.

In terms of the agreement between your company and Waghan Investments (Pty) Limited, it was agreed that

38/... Parity

Parity would be responsible for 75% of all legal expenses incurred in the above matter.

On the 25th July we received an account from Mr. H. Goss, Solicitor, for R14,332.50, 75% of which you forwarded to us. We have today received the other costs regarding the above matter being :-

(a)	T. McAlpine - Cession of name "Parity" in the United Kingdom from himself to Parity Insurance Co. Ltd.	R500
(b)	V.F. de Jager - various disbursements incurred by him.	1,000
(c)	M.L. Rosin, Rosin & Partners - contribution towards costs incurred by de Jager and McAlpine in the above matter.	5,000
(d)	De Jager - being costs disbursed by him in connection with action taken by certain shareholders against certain J. Reisen.	800
(e)	De Jager - Moneys paid to S. Ressel or Trans-Africa Credit & Savings Bank Limited re expenses.	1,000
(f)	De Jager and T. McAlpine - in respect of any other claims which the said De Jager and McAlpine may have against any of the Respondents referred to in either of the said Applications.	10,000
		R18,300

39/... Further,

> Further, in terms of our settlement one quarter of this amount, viz. R4,575 is for our account and the balance of R13,725 is to be paid by your goodselves and we look forward to receiving a cheque from you at your earliest convenience."

14. On 10 September 1962 Parity paid Waghan the amount of R13,725 claimed in this letter, and it was deposited in Waghan's bank account.

That sum should never have been paid by Parity to Waghan. On the question whether the appellant was implicated, the following factors are relevant -

(i) Saevitzon gave evidence to the effect that the appellant had told him, a few days before 8 September 1962, that he needed an amount of R3,000, and that this sum should be obtained from Waghan, and the appellant's loan account debited therewith. Saevitzon reported to the appellant that Waghan had insufficient funds to issue a cheque for R3,000. This was followed by a discussion between the appellant, Saevitzon, and Hanley, in the course of which reference was made to the fact that Waghan had paid out "the settlement costs",

40/... meaning

meaning the amounts referred to in clause 9 of the settlement deed, and that Parity should be liable for 75% of those costs.

(ii) The monies paid out by Waghan in terms of clause 9 of the settlement deed are referred to in paragraph 8 of the chronology, supra. They totalled R31,800. We point out here that (a) this sum included items amounting to R25,000 which were totally unrelated to costs, in the sense of legal fees and disbursements; (b) such remaining items, as were relevant to costs, related to those incurred by the applicants in the litigation, namely De Jager and McAlpine; and (c), Parity's decision to pay 75% related to a specific account received from the attorney for the respondents, namely, Goss.

(iii) Saevitzon also said in evidence that, after the discussion mentioned in (i) supra, he obtained details of the amounts which had been paid out by Waghan under clause 9 of the deed of settlement, and discussed them with the appellant, and it was decided that Parity should pay 75% of those amounts to Waghan. The letter dated 7 September 1962 (see item 13 in the chronology, supra) was then drafted and it was settled by the

41/... appellant,

appellant, Saevitzon and Hanley. It was agreed at the time that the appellant would be entitled to draw an amount of R3,000 against the R13,725 referred to in the letter.

(iv) Waghan also had need of money at this time. It had to find R10,000 to meet an account sent in on 6 September 1962 by Mr. Ressel, the attorney who was the Cape Town correspondent of Mr. Goss in the litigation referred to earlier. Waghan's credit balance on 10 September 1962, before Parity's cheque of R13,725 was paid in, was only R549-25.

(v) The R3,000 which the appellant was to receive from Waghan, as the result of Parity's payment of R13,725, reached him in a roundabout way, according to Saevitzon. When the R13,725 was deposited in Waghan's account, Waghan issued a cheque of R3,000 to Saevitzon, drawn in his favour, so that the appellant would not have to endorse it, and his name would not appear in Waghan's books. Saevitzon thereupon gave his personal cheque to the appellant for R3,000. Hanley also received R3,000 from Waghan, according to Saevitzon.

We do not think that there can be any doubt but that the appellant was implicated in the payment of this R13,725 from Parity to Waghan. Indeed, in this Court counsel for the appellant argued that the sole issue was whether the State proved that Hanley, Saevitzon and the appellant, in causing the payment to be made, did so with intent to steal.

As to the appellant's subjective state of mind in the matter, he gave certain explanations. There was more than one version. It will be noticed that the items in the Waghan letter of 7 September 1962 correspond with some of the items contained in clause 9 of the deed of settlement; see paragraphs 8 and 13 of the chronology, supra. At one stage of his evidence the appellant was emphatic that, when he signed the deed, he thought that clause 9 provided that Parity was to pay the amounts therein referred to. But it is fair to point out that he corrected this later, at page 8876. He then adopted the attitude, not that Parity agreed to pay them,

43/... but

but that he thought that it was equitable that Parity should and would pay the items. As to that, one has only to read the appellant's floundering answers in reply to the incisive questions by the trial Judge, to realise that the appellant had no such belief; see Vol. 104, page 8617, line 30, to page 8620 line 27.

The appellant's third version as to his belief was that, after the settlement, doubts arose as to whether clause 9 obliged Parity to pay the items referred to in clause 9; that he thought that Parity ought to pay these; that he instructed Goss to obtain an opinion or ruling on the point from the respondent's'

44/... counsel

counsel in the litigation; that he was later informed that counsel had advised that Parity should pay 75% of "all the expenses", i.e. INCLUDING all the sums payable under clause 9 of the deed; and that he was not privy to the drafting of and had no knowledge of Waghan's subsequent letter of 7 September. He admitted in evidence that in September 1962 he had asked Saevitzon for R3,000; but he denied that he had asked him to get it from Waghan, and he denied that he knew that a cheque had been drawn on Waghan in favour of Saevitzon, or that Waghan was the source of the R3,000 which he received by way of Saevitzon's cheque for that amount. He said that Saevitzon owed him more than this. He admitted that he knew of the claim for R10,000 which Waghan was called upon to pay on 6 September 1962; but he denied any knowledge that PORTION of Parity's payment of R13,725 was used towards payment of this claim. He agreed that Waghan did not have an income at the time; but he said that this did not matter because Waghan "had a budget". He denied that he was a party to any unlawful extraction of R13,725 from Parity; and said that he had no intention of taking anything

45/... to

to which he was not entitled.

The trial Court rejected this testimony as false. In this Court, counsel for the appellant urged that, at the least, it might reasonably be true. We proceed to examine the validity of counsel's argument.

It is difficult to believe that any "doubts" arose as to the meaning of clause 9. The wording is unmistakeably clear. Furthermore, Waghan and Panovka were the principal beneficiaries, on the respondents' side, under the deed. Moreover, the appellant had played an active part in the settlement negotiations. Hence the basis upon which he relies, for the taking of counsel's ruling, is unacceptable. The evidence of Saevitzon, the letter from Goss dated 25 July 1962, and the wording of Parity's resolution soon thereafter, all indicate that counsel were asked to rule on the proportions in which Parity and Waghan should pay the attorney and client account from Goss. Saevitzon's evidence-in-chief on the point reads -

> "Tell us briefly there what happened, who arranged this?
> -- This was arranged through the offices of attorney Goss by the accused in my presence.
> What did he ask Goss to do?
> -- To find out from counsel who should

pay this account. In other words, should Parity pay it, should Waghan pay it, or who should pay it.

And in due course did Goss report back?

-- I saw a letter from Goss stating that the account could be apportioned as to 75% of this account should be paid, or could be paid by Parity, and 25% by Waghan.

Did the accused know this?

-- He did.

Why do you say that?

-- Because he was instrumental in seeking this opinion from Goss."

In the cross-examination of Saevitzon, in relation to what was submitted to counsel, the following questions and answers are recorded -

"And the matter was submitted to Counsel?

-- Yes.

Tell me, was Mr. Heller's inquiry limited to counsel's fees or was it in relation to all the money that had been spent in that litigation?

-- I would say to costs incurred.

And the amounts incurred in the settlement, some of the amounts as incurred

in the settlement?

-- I would say Mr. Heller was relating to costs incurred, I don't remember further than that."

It is true, as counsel for the appellant pointed out in this Court, that Goss, in his evidence, did not specifically say that counsel's ruling did not relate to all the payments which had to be made under the settlement deed. But it seems to us that the tenor of his evidence does relate the ruling only to his account of 25 July 1962. Nothing else was suggested to him. And Saevitzon's evidence is explicit on this point.

In this Court, counsel for the appellant criticised Saevitzon for saying that after the receipt of the letter of 25 July 1962 the matter was referred to counsel, whereas that letter itself mentions counsel's ruling. This obvious discrepancy was not cleared up at the trial.

48/... Bearing

Bearing in mind all the foregoing, and the trial Court's finding of credibility as between the appellant and Saevitzon, we find ourselves unpersuaded that the learned Judge was wrong in holding -

> "All the circumstances point to the conclusion that Saevitzon's evidence was correct. The opinion which Goss communicated in his letter of the 25th July 1962, related only to the payment of his account. It is improbable that if he had been instructed to obtain an opinion in regard to <u>all</u> the expenses which had been incurred in connection with the litigation, he would not have done so. Nor is it likely, if those had been his instructions, that, when he furnished an opinion which related only to the payment of his own account, a question would not have been raised by the accused as to <u>all</u> the expenses."

We would add, on the probabilities, that, if counsel's ruling was as the appellant says he understood it was, this would have

49/... been

been present to Hanley's mind on the following day, 26 July 1962, when he tabled the resolution in relation to the account of Goss; and his resolution would also have dealt with the items in clause 9. But this was not done.

The amounts referred to in clause 9 were duly paid on the 10th July 1962 to De Jager's attorneys by Waghan out of the moneys paid by Parity in respect of the purchase price for the Tacshare shares. The appellant, under cross-examination, was unwilling to admit or deny that he had knowledge of such payment at the time. The trial Court found that he "must have known". In this Court, counsel for the appellant criticised this finding as being too facile. We are unable to agree with this criticism, because the learned Judge gave cogent reasons for the finding. He said, in regard to the appellant -

> "He had taken an important part in the settlement negotiations, and he was fully conversant with the terms of the settlement. It was a matter of considerable importance to him that payment should be effected in terms of Clause 15 - if it was not, the applications

50/... would

> would not be withdrawn and, presumably, the battle with De Jager would be renewed. One of the objects of the Tacshare deal was to put Waghan in funds on the 10th July 1962 inter alia so that it could make the payments provided for in Clause 9."

And it must be remembered that the appellant was one of the respondents in the litigation.

The appellant denied that he was a party to the Waghan letter of 7 September 1962. The trial Court found against him on the point. In this Court, counsel for the appellant contended that "Saevitzon nowhere says that either he or the appellant had anything to do with the drafting of the letter or with settling it". In our view the answer is that Saevitzon, in evidence-in-chief, specifically said -

> "This letter, the terms of this letter, were agreed between Hanley, the accused, and I."

The cross-examination thereon included the following passage, in which we have italicised certain words -

51/... "And

"And the total amount, I think, that was due was R32,000, you extracted these items totalling R18,300, you and maybe the accused, I'm not suggesting that there wasn't a discussion about it, as being items which it was thought would be covered by Counsel's ruling?
-- The accused, Hanley and I.

Is that correct?
-- Yes.

Parity was written to accordingly?
-- Yes, to formally place it on record."

As to the reason for writing the Waghan letter of 7 September 1962, the trial Court found that it was that the appellant and Waghan had a pressing need for money. There seems to be a significant coincidence of facts in this connection, namely (a) the only payment authorised by the resolution of 26 July 1962 related to the account of Goss; (b) there was no mention of Parity's contributing to the items under clause 9, although these had already been paid by Waghan on 10 July 1962; and (c) it was only several weeks later, when Waghan, low in funds, was suddenly in pressing need of money,

52/... that

that the claim was made in the letter of 7 September 1962.

As to the appellant's evidence of what was conveyed to him in the matter of counsels' ruling, we find no fault with the conclusion of the trial Judge -

> "Saevitzon said in evidence that the opinion of counsel expressed in Goss's letter was communicated to the accused. According to the accused, however, Saevitzon told him that counsel's opinion was, to use the accused's own words, '75% and 25% so far as all expenses'.
>
> It cannot reasonably be true that Saevitzon told the accused that this was counsel's opinion. As I have found, there was no instruction to Goss that any question as to the payment of 'all expenses' should be submitted to counsel, and Goss's letter itself clearly deals only with the payment of his account for fees. Even on his own version, the accused could not have been told that Parity should pay 'all expenses', since when the Waghan letter of the 7th September 1962 was drafted, it referred only to some of the expenses."

53/... IN

In all the circumstances, we do not consider that there are grounds for interfering with that finding.

Continuing with the question whether the State discharged the onus of proving on the intention to steal on the part of the appellant, the following further factors are relevant. The letter of 7 September 1962, to the terms of which the appellant was a party, was found by the trial Court to be "skilfully framed in order to deceive". The parties to be deceived were doubtless the secretary to Parity at that time, who was said to be a man with firm ideas of right and wrong, and the auditors. There was no resolution authorising the payment of the R13,725, and Hanley knew this. He did not and could not put the matter up to the board. Instead, the letter was dishonestly framed to serve as something in the nature of a voucher for the

54/... payment

payment. If he had thought that counsel's ruling covered the payment, it would not have been necessary to compose a dishonest letter. The learned Judge continued -

> "Hanley knew the terms of Goss's letter and the terms of the resolution passed by the Parity board on the 26th July 1962. He must have known, therefore, that it was not true that there was any agreement between Parity and Waghan that 'Parity would be responsible for 75% of all legal expenses incurred ...' It was also untrue, and Hanley knew that it was untrue, that Waghan had 'to-day received the other costs regarding the abovementioned matter ...' Those costs (most of which were in any case not 'legal expenses') had been known to Hanley on the day on which the settlement agreement was concluded, and, to the knowledge of Hanley, they had been paid Waghan on that day. Hanley must have known

55/... that

> that Waghan was not entitled to claim R13,725.00 from Parity. The letter was, plainly, nothing but part of a fraudulent scheme, under cover of which R13,725.00 was to be drawn from Parity into the coffers of Waghan in order to meet the pressing needs of Waghan and the accused ...."

Furthermore, Hanley received R3,000 personally out of the scheme.

It was in our view established clearly that the appellant's knowledge of the facts, including counsel's ruling, and the resolution of 26 July 1962, and his complicity in the drafting and sending the letter of 7 September 1962, were co-extensive with Hanley's. Moreover, the appellant was also found to have received R3,000 personally from the scheme. He said that this was in part payment of R24,000 which Saevitzon owed him in connection with the purchase of pharmacies in Vryburg. (This aspect of the matter is also material to count 19). The trial Judge did not believe that any such debt existed. In any event, the appellant lied so palpably in this part of his evidence that

56/... the

the only fact remaining is his admission that he asked Saevitzon for R3,000 and did receive that sum from Saevitzon at the time. The appellant must have known of the source of that sum: he must have known of Waghan's lack of funds for he had just bought an interest in the company.

In the final weighing up in regard to the issue of the appellant's intention to steal, we bear in mind also the following matters. Firstly, Saevitzon, under cross-examination, stated that he personally did not think that there was anything dishonest about the circumstances of Parity's payment of the R13,725 on 10 September 1962. Counsel for the appellant urged that that could also apply to his client. Against that, it must be remembered that Saevitzon only joined Parity on 1 August 1962. On 7 September 1962 he was, as a matter of probability, still feeling his way in the affairs of Parity and of the appellant, as a young man of 28 years of age.

Secondly, on receipt of the R13,725 Waghan paid Ressel R5,000 of his account of R10,000; and Saevitzon wrote to

57/... him

him suggesting that he send an account for the balance to Parity. This may reflect the personal view of Saevitzon, new to the scene, of the equities of the situation. The matter was not canvassed. However, as counsel for the State pointed out, it does not support the notion either (a) that the account was covered by the counsel's ruling or the resolution of 26 July, or (b) that Saevitzon thought so; for in either such event he would have asked that 75% of the account be paid by Parity.

Thirdly, Attorney Ressel's account of 6 September 1962 for R10,000 was sent by Goss direct to Parity. Does this indicate that Goss thought that counsel's ruling extended beyond the Goss account of 25 July 1962? This aspect of the matter was not investigated at the trial, and seems to us inconclusive.

To sum up, in our view the cumulative cogency of the several factors in favour of the State so overwhelmingly outweighs the cogency of the few factors in the other scale, that we are unpersuaded that the trial Court was wrong in its findings that it was safe to rely on Saevitzon's evidence to the extent mentioned above, and that the appellant intended to and did steal this amount of R13,725 from Parity.

The appeal on Count 4 therefore fails.

Before proceeding to discuss the next series of counts on which the appellant was convicted, it is necessary to provide, as it were, an index to some of the companies and names which will frequently be referred to. This index is by no means complete; other names not included in the list which follows, will be introduced and identified when we deal with the specific counts in which they figure.

Waghan Investments (Pty) Ltd. (Waghan)

This company has already been referred to and briefly described. It is necessary to add the following information concerning its control and management. As the result of a series of transactions which it is not necessary now to describe, Waghan became the owner, in July 1962, of 97% of the issued Parity shares (which were pledged, as will appear from the discussions of count 9) and the appellant's brother-in- law-, Panovka, in September, 1962, became the registered holder of 500 of the 1,000 issued shares in Waghan and became a director of the company. Hanley remained the beneficial owner of the remaining 500 issued shares until

February, ... /59

February, 1964, when his shares were taken over by a company, Fraternitas, controlled by the appellant. It was contended by the State and accepted by the Court a quo that not Panovka but the appellant was the beneficial owner of the 500 shares registered in the former's name and that Panovka merely acted as a "front" for the appellant in that regard; a finding which appears to have been justified on the evidence. From 1962 until February, 1964, therefore, Waghan was under the effective control of Hanley and the appellant, although Saevitzon played a substantial part in its administration and management. After February, 1964, as the result of the disposition of his shares by Hanley to an appellant-controlled company, the appellant was, in effect, in sole control of Waghan but was still assisted by his lieutenent, Saevitzon, until the investigations which led to the prosecution of the appellant alienated them from one another. It is also necessary to add that Waghan at no relevant time had an income of its own. The appellant and Hanley each had a loan account with Waghan.

Helsa.

The company referred to by that name in this judgment was registered (under a different name, which in October, 1963, was changed to "Helsa") on 7th May, 1962. The first issue of shares was made in May, 1963, when two shares were issued, one of which Saevitzon became the transferee on the very day of the issue and a man named Chimes, the transferee of the other. In September, 1963, the issued share capital was increased by 9 further shares which were issued to the appellant's three daughters who each held three shares. Very shortly thereafter, Saevitzon's one share was transferred to Ressel (an attorney of Cape Town, who was, in effect, a nominee of appellant) and the share held by Chimes was transferred to Saevitzon. The position, then, from October, 1963 until 30th November, 1964, was that the three daughters of appellant each held 3 shares of the total issue of 11 shares, Saevitzon held one and Ressel one. Saevitzon was the sole director of Helsa until 23rd October, 1963, when Ressel joined him as a co-director and they served

as ..... /61

as the only directors until Saevitzon ceased to hold that office in March, 1965.

There was much evidence relating to the question whether Saevitzon in truth had any financial stake in Helsa. It was contended by the State that he held the share registered in his name as the nominee of the appellant, who, it was said, was also the beneficial owner of the share held by Ressel. In other words, the contention was that the first two shares issued were issued to nominees of the appellant who throughout remained the beneficial owner of those shares. This contention was accepted by the Court a quo for reasons which appear to us to be valid. In any event, whether Saevitzon was or was not the true beneficial owner of the one share registered in his name, it is clear that the appellant, through his daughters who held 9 shares and through Ressel who held one, was in effective control of Helsa and this was not challenged on appeal. The question relating to Saevitzon's alleged financial stake in Helsa will be further canvassed when considering his possible motives,

in ..... /62

in relation to certain of the counts, in paying stolen money into the bank account of Helsa.

Both the appellant and Saevitzon were reflected in the books of Helsa as having loan accounts. Indeed, in regard to certain of the counts of theft from Parity, the stolen money was credited to Saevitzon's loan account. There was a dispute as to the true significance of Saevitzon's loan account; the appellant said that it was Saevitzon's own loan account and that he, the appellant, had no interest in it and did not even know until after the investigations had started that Saevitzon had a loan account with Helsa. Saevitzon claimed that the loan account in his name was in truth the joint loan account of the appellant and himself. His evidence on that score was vague, contradictory and manifestly unconvincing. For purposes of this judgment it will be assumed, in favour of the appellant, that it was not established that the loan account in the name of Saevitzon was not, in truth, Saevitzon's own loan account.

Almon.

The ..... /63

The company referred to by that name was incorporated on 21st October, 1963. Four shares were issued to Saevitzon and one to his wife. The company first opened a banking account on 21st November, 1963, and the first deposit made into that account was a cheque for R8,298, being part of the proceeds of the theft which is the subject of count 15. It was common cause that Almon was, in effect, Saevitzon's company which he controlled for his own purposes and that the appellant had no interest in or control over that company.

Stellaland Pharmacy Holdings (Pty) Ltd.

This company, which is referred to as "Stellaland" or "Stellaland Pharmacy", was incorporated in February, 1962, with the object of acquiring three pharmacies in Vryburg. Its significance in regard to some of the counts which are about to be considered, is that it was contended by the appellant that Saevitzon owed him R24,000 in respect of the establishment of, and issue of shares in, that company and that some of the payments made by Saevitzon for the credit

of ..... /64

of companies which the appellant controlled, were made in respect of that debt. In other words, the appellant contended that Saevitzon used the money, which he secretly stole from Parity, for the purpose of discharging his debt to the appellant. Saevitzon denied that he owed the appellant money and that issue was the subject of lengthy argument before us and, apparently, also in the Court a quo which dealt with it fully in its judgment and came to the conclusion that Saevitzon did not owe the appellant R24,000, or any sum, in respect of their Stellaland transactions. We do not find it necessary to enter into detail concerning the dispute, for reasons which will appear when we deal with the counts to which this issue is relevant. It is sufficient to say, for present purposes, that there does not appear to be justification, on the evidence, for a finding that Saevitzon owed the appellant R24,000 nor is there justification for a finding that he owed the appellant nothing. It is clear, and indeed Mr. Ackerman for the State, conceded it in argument before us, that as a result of the flotation of Stellaland

and ..... /65

and the advance of money made theranent by the appellant to enable Saevitzon and one Visser to take up shares, Saevitzon was indebted to appellant at least in the sum of R6,000. There is a possibility, on the evidence, that he owed the appellant R12,000 but that, on every consideration of the human and business probabilities, is the maximum amount which Saevitzon could have been called upon to pay to appellant. For purposes of our judgment we accept that it has not been shown that Saevitzon was not indebted to appellant in the sum of R12,000. It is necessary to observe in this connection that it was clearly anticipated by the appellant and Saevitzon that the pharmacies concerned would yield substantial profits and the arrangement or agreement between them was that the appellant would be re-imbursed his expenditure, in connection with the taking up of shares by Saevitzon and Visser, out of the profits. In truth, there were no profits at any of the relevant times and Saevitzon clearly knew that. Reliance by the appellant upon an acknowledgement of debt in his favour, signed by Saevitzon, in respect of R24,000,

does ..;.... /66

does not materially assist the appellant in regard to this issue, for two reasons: (a) the learned Judge a quo found that such acknowledgement of debt appeared, on the evidence, not to have been furnished as evidence of an actual indebtedness but merely "to serve as a shield against possible claims by the accused's creditors", a finding which enjoys some support from the evidence and the probabilities and (b) in any event, the acknowledgement of debt provided that the debt was not repayable for ten years.

Hill: Reference will frequently be made to the witness, Hill, who was called by the State. He admitted to participation in some thefts charged. Hill was employed by Parity in 1961 as marketing manager and became a director in April, 1964. The learned Judge a quo said that he could find no quarrel with the suggestion made by the defence that Hill was a "resourceful and intelligent criminal".

Goldberg: He, too, will not infrequently be mentioned. He was an attorney of Port Elizabeth whose firm was employed by Parity to act on its behalf in connection with claims made against it under third party insurance. He became a director of Parity and of Parity Holdings on 25th April 1963, and at the end of February 1964, he became chairman of Parity. He then took an office at Parity Centre in Johannesburg and was a close associate of the appellant. The learned Judge a quo regarded him as a credible witness.

Count/.....67

Count 8.

This count relates to the theft by Saevitzon, Reisen and Hill of a sum of R9135 from Parity. It was alleged by the State, and found by the trial Court, that the appellant was a party to the theft and he was accordingly convicted thereof.

The case sought to be made by the State depended in the main on the evidence of Saevitzon, Hill and a man named Soskin, and also, of course, on the circumstances surrounding the transactions in issue. It appears that during April, 1963, Waghan had several financial commitments to meet. It was required to pay Reisen an amount of R6812-28 which was due to him and it had also to provide considerable funds for the purpose of subscribing for shares in Parity Holdings; the minimum subscription required by the Registrar of ~~Companies~~ had not yet been achieved. In addition to these obligations, Waghan was required to pay to Consolidated Pharmacies a sum of R30,000 for which that company had given two post-dated cheques for R15,000 each to Trans-Africa. It appears that ..... /1068

that Pevsner, a nephew of the appellant, had obtained a loan of R30,000 from Trans-Africa under the pretext that the money was required for the purchase of two pharmacies by Consolidated Pharmacies. In truth, the money was required for other purposes and was paid into the bank for the credit of Waghan. (That transaction was the subject of Count 5, on which the appellant was acquitted, the Court a quo having found that it had not been proved that appellant was a party to the fraud.) It was in respect of that loan that Consolidated Pharmacies issued the two cheques, which were dated, respectively, 12th April and 16th April, 1963, and Waghan was required to re-imburse Consolidated Pharmacies the sum of R30,000, plus R1034-36, representing interest on the loan made by Trans-Africa.

According to Saevitzon, Waghan did not, at the time which is relevant to this Count, have sufficient money at its disposal to discharge all these obligations; there was a ~~shortage (estimated by Saevitzon) of about R10,000. It therefore~~ became necessary (again according to Saevitzon) to raise money for Waghan to make good the shortfall. It is the manner in

which ..... /0.69

which that money was acquired that forms the subject of this count.

In essence, the modus operandi was said by the State witnesses to be this:

Reisen was on terms of friendship with a man named Soskin who carried on business in Springs under the name of Central Signs. Soskin had in the past manufactured signs and other advertising material for Parity. As the result of a discussion which took place during April, 1963, between Reisen, Hill and Saevitzon, it was arranged that Soskin would meet them on 16th April. That meeting duly took place and Soskin's co-operation was solicited and obtained in a plan to enable money to be transferred from Parity to Waghan otherwise than by direct means. The idea was that a Central Signs invoice form would be used for presentation to and payment by Parity. At that time, Parity ~~in truth owed Central Signs an amount of R795-50 for past~~ services. A bogus statement was then prepared by Hill which reflected a total indebtedness by Parity to Central

Signs ..... /470

Signs of R9,930-50. This amount was made up of the true debt of R795-50 and a fictitious debt of R9135, in respect of which a fictitious invoice for the supply of 90 signs was prepared, also by Hill. Both the statement and the invoice were prepared on genuine Central Signs forms, supplied by Soskin. These documents were then submitted to Parity and on 16th April a Parity cheque for R9930-50, signed by Saevitzon and Reisen, was issued in favour of Central Signs and handed to Soskin who deposited it. At the same time Soskin signed and issued a cheque on behalf of Central Signs for R9100, payable to Waghan, which was in due course handed to Saevitzon, who endorsed it on behalf of Waghan and deposited it on 16th April, for the credit of Waghan's account. The reason why Central Signs gave a cheque for only R9100 in exchange for Parity's cheque for R9930-50 was that R795-50 was in truth due to Central Signs and a further R35 was deducted by Soskin to cover his expenses. The money thus deposited for the credit of Waghan was used by it as a contribution towards the funds which it required at that time to make the various payments I have already referred to.

The evidence establishes that Waghan paid, by cheque, R15,000 to Consolidated Pharmacies on 9th April, a further R15,000 on 16th April and a sum representing interest on the Trans-Africa loan (R1034-36) on 17th April. The amount of R6,812-28 owing to Reisen was paid to him by Waghan, by means of a cheque signed by Hanley and Saevitzon, on 10th April. In addition it disbursed the large sum of money required to achieve the minimum subscription for shares in Parity Holdings.

Reisen did not give evidence at all and neither Hill nor Soskin, both of whom testified to the arrangements I have described, implicated the appellant in this plot. But Saevitzon did. He said that on the 10th or 11th April, just before the Easter week-end, he discussed Waghan's problems with the appellant who recognized the need for raising money for Waghan. The appellant suggested that Saevitzon speak to Reisen and try to persuade him to provide the ~~necessary money by taking up more Parity Holdings shares~~ or by lending money to Waghan. Saevitzon was unsuccessful in his attempt to persuade Reisen and reported his failure to the appellant who then said that he, personally, would

~~speak .....~ 72

speak to Reisen. Later on the same day appellant reported to Saevitzon that he had come to an arrangement with Reisen and that Saevitzon should get in touch with him, which Saevitzon did with the results I have described.

Saevitzon said further that after the scheme had been executed, he, appellant and Hanley met in Hanley's office, on or about the 17th April, and discussed the matter. In the course of the discussion the appellant said that the whole scheme was merely a temporary expedient and that in due course Waghan would, in one way or another, re-imburse Parity the money thus taken from it. It is obvious that if Saevitzon's evidence is true, the appellant was party to the theft by Reisen, Saevitzon and Hill of R9135 from Parity.

The appellant denied Saevitzon's evidence. He said that no meeting such as was described by Saevitzon took place on or about the 10th or 17th April, or at any time, and that he had no knowledge whatever of the scheme regarding the preparation of fictitious invoices or statements for transferring money from Parity to Waghan. Indeed, he said

that ..... /73

that he was in Cape Town at the relevant times and was able to fix the dates of his absence from Johannesburg by reference to the Passover, for which occasion he travelled to Cape Town on 8th April in order to spend Passover with his family and remained there until after 20th April.

The learned trial Judge rejected the appellant's denial of complicity and accepted Saevitzon's evidence, holding that despite the absence of any direct corroborative evidence implicating the appellant in the theft admittedly committed by Saevitzon, Reisen and Hill, it was safe to act upon Saevitzon's evidence because it was supported by the probabilities and the circumstances, which the learned Judge described in some detail.

The complicity of the appellant was the only issue on this count, for it was common cause and clearly established by evidence that the theft was committed substantially in the manner described by the State witnesses.

Because Saevitzon said that he discussed the matter with the appellant in Johannesburg on 10th or 11th April - "just before the Easter week-end" - and again on 17th April, the appellant's evidence concerning his visit

to Cape Town assumes considerable importance. The trial Court did not reject the appellant's evidence that he travelled to Cape Town on 8th April in order to spend Passover with his family; the possibility that he did so was recognized by the learned Judge who considered, however, that even if appellant went to Cape Town on 8th April, he could easily have returned to Johannesburg at any time and been present on the occasions referred to by Saevitzon. The learned Judge reasoned, moreover, that it was

> "..... not credible that (appellant) would have been away from Johannesburg at the time of this crisis."

The crisis thus referred to related to the affairs of Parity, Parity Holdings and Waghan and was not confined to the alleged need of Waghan to raise about R10,000; it embraced also the transaction which is the subject of Count 9, in which an amount of R524,000 was involved. That transaction was concluded on the 16th April.

That the appellant went to Cape Town on or about 8th April and spent some time there appears, on the evidence, to be not only possible but probable. There

is evidence to support him that he was in Cape Town during the Passover week, which commenced on the evening of 8th April and there is no reason to doubt his evidence that he was there on 18th April when he attended the hearing in the Supreme Court of an application in connection with the affairs of Trans-Africa, in which he was interested. He said that the press reported his presence in Court on that day and he actually tendered as evidence a copy of a newspaper (which was not, however, received as evidence) in support of his statement. It is unlikely that he would have said this unless it were true for it would be an easy matter for the State to disprove if it were not true. It was common cause that the Court proceedings to which he referred took place on the day mentioned by him. Moreover, it appears from the evidence of Hill, who refreshed his memory by referring to his diary, that the appellant telephoned him in Johannesburg from Cape Town on 20th April. There was also evidence to the effect that the first two days of the Passover week are the important ones for those who observe the traditional

occasion. If the appellant went to Cape Town to be with his family for Passover (and his evidence to that effect was not rejected) it is probable that he would have remained there for the first two days at least (i.e. the 9th and 10th April). The learned Judge a quo appears to have accepted Saevitzon's evidence that he discussed the matter which is the subject of this Count with the appellant in Johannesburg on the 10th (or possibly the 11th) April. It is indeed difficult, on the merits of the appellant's own evidence in this regard, to find justification for the rejection therof; when the fully-merited strictures passed by the learned Judge on Saevitzon, upon whose testimony he said that he could not rely unless it were independently supported by other evidence or circumstances, are borne in mind, it becomes increasingly difficult, if not impossible, to find as an established fact that the appellant was in Johannesburg on 10th or 11th April and that he then had with Saevitzon the conversation to which that witness testified.

Mr. Ackerman sought to meet this difficulty by contending that Saevitzon was mistaken in saying that his

first conversation with the appellant in this regard took place on the 10th or 11th April; he pointed out that the meeting between Saevitzon, Reisen, Hill and Soskin took place on the 16th April and that the cheque by which the money was paid by Parity was dated 16th April. He also pointed to passages in Saevitzon's evidence, under cross-examination, in which Saevitzon appeared to have indicated that the first discussion with appellant might have taken place earlier on the very day on which the bogus invoice was prepared and Parity's cheque issued, i.e. 16th April; but his answers under cross-examination were vague and inconclusive, in contrast with his earlier emphatic evidence that the first discussion with appellant took place before the Easter week-end (Good Friday was on 12th April) and that Hanley had already left for Durban where he spent the Easter week-end. Certainly the learned Judge understood the over-all effect of Saevitzon's evidence to be that the first discussion with appellant took place on 10th or 11th April, because he found that as a fact and he could only have done so by accepting Saevitzon's

evidence, for there was no other evidence whatever of any discussion with the appellant prior to the meeting of Saevitzon, Hill, Reisen and Soskin on 16th April. The State case might indeed have been stronger if Saevitzon's evidence was clearly to the effect that the alleged conversation took place on 16th April, for that was the date on which the transaction involving a payment of R524,000 took place and if the appellant returned to Johannesburg from Cape Town at any time during that period, he would be more likely to have done so on the 16th than on the 10th or 11th. Not only, however, did the learned Judge not find that the disputed discussion took place on the 16th, but Saevitzon's very uncertainty and equivocation, which the State relies upon as an answer to the appellant's evidence that he was in Cape Town on 10th and 11th April, makes it impossible to find as a fact that such a conversation as was deposed to by Saevitzon actually took place on the 16th. In the circumstances, Mr. Hanson for the appellant was fully justified in contending that, when considering the wider question whether such

a conversation took place at all, the Court a quo did not give any or sufficient weight to the evidence relating to the appellant's visits to Cape Town and the implications thereof in regard to the veracity or reliability of Saevitzon, who, it might be added, said that appellant did not go to Cape Town at all at that time. By implication, the Court a quo did not accept that piece of evidence given by Saevitzon, for it would then not have recognized that appellant might have gone to Cape Town when he said he did.

There is a further aspect of Saevitzon's evidence which throws very substantial doubt on his veracity in regard to the alleged discussion or conversation with the appellant. When testifying to the theft which is the subject of Count 12, Saevitzon described in some detail how it came about that that theft was committed by Hill and himself. He said that during August, 1963, the appellant spent some time in his, Saevitzon's, office in Parity Centre and became familiar with the routine concerning the payment by Parity of accounts submitted to it. On one occasion

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the appellant said to him that it appeared to be an easy matter to get payment from Parity, for all that was necessary was for Saevitzon to approve an account submitted for payment and to issue and sign a cheque accordingly. A day or two after making that observation, the appellant, according to Saevitzon, conceived the idea of "slipping" a bogus invoice into the pile of accounts and invoices and getting Saevitzon to sign a cheque on behalf of Parity in "payment" of such invoice and asked Saevitzon whether that could be done as he needed money to discharge a personal obligation. Saevitzon agreed to do so and with the assistance of Hill practised the deception which resulted in the theft charged in Count 12. The significance of this evidence in relation to the Count now under consideration is that it clearly indicates that the idea of dishonestly getting money out of Parity by means of bogus invoices was then conceived for the first time by the appellant, who hit upon the scheme as a result of his newly-acquired familiarity with the routine in Parity's office. This was in August, 1963. But according

to Saevitzon's evidence in connection with count 8, the appellant had already in April, 1963, conceived or sanctioned such a device for extracting money from Parity and had enjoyed the fruits of the theft committed by means of such a device. Although the learned Judge a quo did not deal with this remarkable feature of Saevitzon's evidence in his judgment on count 8, he referred to it when dealing with count 12. He did not consider it to be improbable that a conversation such as was deposed to by Saevitzon in regard to count 12 would have taken place in the light of what Saevitzon said had happened in April and regarded the device referred to in count 12 as being distinguishable from the one resorted to in April. He said:

> "What was being explored here (in August) was a refinement of the earlier theft. There (in April) an invoice and statement (albeit false) had been furnished by an existing Parity supplier; here a false invoice from a non-existent person would be submitted. This difference might well have led the accused to ask whether money could be obtained in the way which he was now suggesting."

But these observations do not meet the point, which is whether it is conceivable (let alone improbable) that the appellant

would ..... /82

would have said in August what Saevitzon said he then said, if the appellant had in April been a party to a theft by Saevitzon and others by means of extracting money from Parity on the strength of a bogus invoice. The distinction drawn by the learned Judge between producing a false invoice in the name of a previous supplier and producing one in the name of a non-existent person is one of detail, not of method or device. In both cases, the method or device is to extract payment on the strength of an invoice which gives the appearance of being genuine but which is actually false, having been specially prepared for presentation to Parity as a genuine invoice. In any event, the August conversations deposed to by Saevitzon did not relate specifically to an invoice in the name of a non-existent person but simply to a false invoice; although in the result, the name of a fictitious person was used.

In our judgment, it is very highly improbable, if not inconceivable, that the August conversation deposed to by Saevitzon could have taken place in the terms described

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by him, if his evidence of the appellant's complicity in the April theft, with full knowledge of the method employed, is true; and conversely, if the account given by Saevitzon of the August conversation is true, it is almost inconceivable that his account of the April conversations is true. And this, of course, raises the further pertinent question, more especially when regard is had to the character and untrustworthiness of Saevitzon, whether either of the accounts he gave is true.

The main ground upon which the trial Court found that the appellant was implicated in the manner described by Saevitzon was that the money stolen from Parity was paid to and utilized by Waghan and therefore, ostensibly, for the benefit of the appellant and Hanley, whose loan accounts were credited in Waghan's books, in equal shares, with the proceeds of the theft. It was Saevitzon who made the book entries. He was uncertain as to when he made them and his evidence in that regard was vague. It was suggested in argument that he might well have made them, for the purposes of his own, long after the transaction had been concluded. But it is

at least clear that the total sum involved was paid into Waghan's banking account and the trial Court was undoubtedly justified in weighing that circumstance in the scale against the appellant. The question is whether in all the circumstances it provided sufficiently cogent corroboration of Saevitzon's evidence that the appellant was a party to the theft, to render it safe to act upon such evidence. In the course of his judgment the learned trial Judge, when discussing in general terms and not specifically with reference to this particular count, the inference to be drawn from the fact that stolen money is used for the benefit of another, said this:

> "A thief is not likely to deposit stolen money in the bank account of another without at least informing him of what he had done. And thieves are not ordinarily given to employing the fruits of their crimes in secret benefactions to their masters ..... In the absence of some alternative hypothesis, which is reasonably possible on the evidence, the unavoidable inference is that the owner of the bank account was privy to the thefts."

These general observations are valid and there can be no doubt that in general, proof that stolen money was placed by the thief to the credit of another's bank account would furnish strong corroboration of the thief's direct evidence that such other

knew thereof and was a party to the theft. But whether it would be sufficient to establish the guilt of the owner of the bank account (even where he gave no evidence at all or gave false evidence) would depend on the circumstances of the particular case. The thief's evidence might be so lacking in quality and he so lacking in integrity, that even the fact that he deposited the stolen money in another's bank account might be insufficient to raise his evidence of the owner's complicity to a safe level of dependability. And this would especially be so if the facts and circumstances of the case, including the character and the established proclivities of the thief, revealed a reasonable possibility that the thief secretly acted as he did for reasons of his own or with the object of accommodating, by means of what he did, some person other than the owner of the bank account.

The general defects of Saevitzon's as a witness and as a person need not again be described. That was done by the learned Judge in very clear terms and the relevant extracts from his judgment have been reproduced elsewhere

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earlier in this judgment. Saevitzon's evidence with reference to this particular count is especially suspect and unconvincing. Not only is there room for very grave doubt concerning his veracity when he said that he discussed the matter with the appellant prior to the commission of the crime, but there are features of his account of the terms of such alleged discussion which appear to be highly improbable. For example, he claimed that the appellant, when the matter was first raised, told him to ask Reisen to advance the shortfall to Waghan. When it is borne in mind that Reisen had at that time already advanced R28,000 for the purpose of subscribing for shares in Parity Holdings and that he was then demanding payment of R6,812 which Waghan owed him, it seems unlikely, to say the least, that the appellant or any person in his position and with his alleged knowledge of the situation, would have said that the solution to the problem of Waghan's shortage of money was to be found in persuading the clamant creditor to advance more money to Waghan. It would be more readily understandable if the appellant had suggested an approach to Reisen to defer

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his claim for payment of the money due to him, for Reisen was financially interested in the successful flotation of Parity Holdings and would have realized that the minimum subscription would not be achieved unless Waghan had the necessary funds at its disposal. But this is not what Saevitzon said that the appellant suggested nor did he say that any attempt was ever made to persuade Reisen to await more favourable times for repayment of the money due to him by Waghan. As has already been pointed out, Reisen did not give evidence. It was explained at the trial that he had fled the country. There is no doubt that he derived some benefit from the theft, for if Waghan was short of funds to discharge all its obligations at that time, Reisen might well have been the one to remain unpaid, bearing in mind that the paramount necessity was to achieve the minimum subscription to Parity Holdings and that that commitment would obviously have enjoyed preference, so far as the appellant was concerned, over other payments which had to be made by Waghan. If Reisen then needed the money which Waghan owed him (and the

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State evidence is to the effect that he was insistent upon being paid) he could hardly, in the circumstances, be said to have been a disinterested party to the theft in the sense of not deriving personal benefit therefrom. When in addition to this circumstance, it is borne in mind that according to the evidence it was Reisen who introduced Soskin, a friend of his, as the medium by which money could be transferred from Parity to Waghan without appearing to have been so transferred and that Reisen was in fact paid the amount due to him on 10th April which was the very day, according to Saevitzon's evidence in chief, on which the plot was hatched, the contention advanced on behalf of appellant that it is reasonably possible that the theft was committed by Saevitzon, Hill and Reisen in order to accommodate Reisen and was kept secret from the appellant, is not without substance and cannot simply be dismissed as a fanciful theory finding no support whatever in the evidence or surrounding circumstances. The fact that not simply the sum owing to Reisen but a larger amount was stolen, was said to militate against the possibility

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now being considered. It is, of course, a factor which must be considered and taken into account, but it is by no means a conclusive answer to the appellant's contention. By the same token it may be said that the fact that only R9100 was stolen militates against the State's contention that the theft was committed solely for the benefit of Waghan in order to make good the shortfall in its funds, for it appears from the evidence afforded by Waghan's books of account that despite the receipt of the R9100, Waghan was still short of some R2000 for the payment of all its obligations. It is also relevant to observe in this context that no satisfactory or convincing explanation was forthcoming from the State as to why a false invoice for precisely R9135 was presented, instead of an invoice for a larger sum which would ensure that Waghan had sufficient funds for its purposes. Like several other aspects in connection with this Count, this feature remains obscure and affords matter for speculation or conjecture. The actual perpetrators of the theft could reasonably be expected to remove the obscurity but they did not do so.

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It was argued for the State that the appellant must necessarily have known that R9100 had been deposited for Waghan's credit and that the fact that he made no inquiry as to the source of that deposit revealed that he was aware of its source. But the first part of this proposition either depends upon acceptance of Saevitzon's evidence that he frankly discussed the shortage of funds and ways of remedying it with appellant (which would beg the question with which we are now concerned) or it would rest upon an inference or assumption. The inference, in the circumstances surrounding this transaction, is not justified. The R9135 taken from Parity represented at that time a very small percentage indeed of the funds which were being handled by Waghan. The main concern of the appellant was unquestionably the problem of raising sufficient money to ensure compliance with the demand of the Registrar ~~of Companies~~ concerning the minimum sub-scription for shares in Parity Holdings and it is clear that enough money for that fundamental purpose was available even if there was insufficient money available to meet all other obligations as well. It is very clear that at that stage

of their relationship, the appellant relied very considerably on Saevitzon to keep him informed as to the affairs of the various companies with which they were concerned. There is no evidence to show that the appellant personally scrutinized the bank statements, deposit slips and cheque books of Waghan or Parity; on the contrary, it appears that Saevitzon furnished him with facts, figures and budgets from time to time. To argue that Saevitzon must necessarily have told him that R9,100 had been paid for the benefit of Waghan is to assume that Saevitzon had no purpose or desire to keep that transaction hidden from the appellant and is therefore no answer to the question whether Saevitzon and his partners in crime could reasonably possibly have committed this theft for purposes of their own and without the knowledge of the appellant.

It was also contended that whatever the truth might be in regard to the alleged discussion between the appellant and Saevitzon prior to the theft, the Court a quo was rightly satisfied that Saevitzon's evidence of the discussion which he, the appellant and Hanley had on 17th April was true.

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It will be remembered that Saevitzon's evidence was that on that occasion they discussed the theft which had been committed on the previous day and that the appellant assured them that it was merely a temporary expedient and that the money would be refunded to Parity in one way or another. There are several difficulties in the way of accepting that contention. Having regard to what has been said earlier herein concerning the appellant's evidence of his visit to Cape Town, it is by no means clear that his evidence that he was still in Cape Town on 17th April is false. But even if it is to be assumed that he was in Johannesburg on 17th April, because of the circumstance that the important transaction in connection with the Parity Holdings flotation was concluded on the previous day, the only direct evidence of the meeting of the three men is that of Saevitzon. Hanley was not called. It appears that he was at that time serving a sentence of imprisonment resulting from his conviction on charges in connection with the affairs of Parity and could have been called as a witness. It was said that there would have been no purpose in the

State's calling him to support Saevitzon because he was tarred by the same brush as Saevitzon but that is not strictly accurate for whereas Saevitzon was a witness anxious to secure an indemnity against prosecution, Hanley had already been sentenced and would stand to gain nothing by falsely implicating the appellant. It is a matter for speculation whether Hanley would have supported or refuted Saevitzon's evidence, just as it is a matter for speculation whether Hanley was a party to the theft. It is true that Hill testified to a discussion which he had with Hanley on the evening of the 17th April, concerning this theft, but quite apart from the circumstance that Hill, too, was an accomplice whose evidence has to be regarded with caution, he did not claim to have any knowledge of the meeting between the appellant, Hanley and Saevitzon and in no way directly implicated the appellant, although his evidence was certainly calculated to implicate Hanley.

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On a final analysis, therefore, it is apparent that the State case depends in very large measure, if not entirely, upon acceptance of Saevitzon's evidence. Not only is his evidence naturally suspect because of his role of accomplice turned informer, but there is very much more than a suspicion, as we have shown, that in regard to the conversations which he claimed to have had with the appellant, he was deliberately lying. And for the reasons set out above, the feature upon which the learned Judge a quo most strongly relied as furnishing corroboration of Saevitzon's evidence, is at best equivocal because of the reasonable possibility that the money was stolen for a purpose other than that of benefiting the appellant and that the theft was therefore kept secret from the appellant. It is germane to observe, moreover, that the very factors which were regarded as being corroborative of Saevitzon, depended in some measure upon what Saevitzon himself said and upon what he did. As we have pointed out, it was Saevitzon who dealt with the proceeds of the theft, it was he who made the book entries upon which the State relied and it was he, and only he, who testified to the appellant's complicity.

The appeal on count 8 succeeds.

of this offence has already been briefly indicated in the course of dealing with count 8. It will be remembered that it was found, when considering count 8, that Saevitzon's version of the alleged conversations in relation to count 12 was so remarkably incompatible with the conversations he described in relation to count 8, that it was scarcely possible that both accounts could be true and that it was therefore not possible to say which of the two accounts, if any of them, was true. It is necessary to add, however, that in relation to this particular theft, Saevitzon said that when the appellant requested or instructed him to "slip in" a fictitious invoice for payment by Parity, he explained that he required the money for the purposes of paying his brother-in-law, Panovka, R1500 in respect of interest. He added that he wished to discharge that debt to Panovka as he proposed to sever all ties with him. The necessity for employing the device of a fictitious invoice was said to be that Helsa was short of funds and the debt to Panovka could therefore not be discharged by drawing on Helsa's bank account unless it were enriched by

a sufficient deposit of money.

It is not necessary to describe in full detail the mechanics of this theft. It is sufficient to say that the false invoice having been prepared by Hill, a cheque was issued and signed by Saevitzon on behalf of Parity, was endorsed by Hill on behalf of "Brille Bros." (the fictitious payee) and was then returned to Saevitzon who handed it to a friend of his, named Chafkin, who in return, gave his own cheque for R1575 to Saevitzon. (R10 was deducted by Chafkin "for commission or expenses" which he incurred.) Saevitzon then deposited Chafkin's cheque for R1575 to the credit of Helsa's bank account on 8th August, 1963, crediting the total amount to his own loan account in the books of Helsa. Shortly after depositing the cheque to the credit of Helsa, Saevitzon drew two cheques on Helsa; one was for R200, payable to himself and the other for R1000 payable to a company known as "Randspaar". The latter payment was reflected in the books as being an "investment". It is common cause that no part of the

R1585 stolen from Parity was used for payment of any interest which might have been owing to Panovka.

The learned Judge a quo was alive to the fact that Saevitzon's evidence "with all its manifold deficiencies" required strong corroboration before it could be safely accepted. He said that he found such corroboration in "the circumstance that the money was deposited in Helsa and used for the benefit of the accused". That the money was deposited in Helsa is clear but that it was used for the benefit of the appellant was by no means established. As we have seen, R200 was very soon withdrawn by Saevitzon, apparently for his own use, and R1000 was paid by Saevitzon to Randspaar. To regard that payment as an investment made for the benefit of the appellant is to speculate. The identity of Randspaar was but faintly investigated. Only Saevitzon and the appellant were asked about Randspaar. Saevitzon said that it was a company which the appellant owned or in which he had an interest but he gave no further information, nor was any book or document produced nor any other

evidence ..... /99

evidence led to support his bald assertion. The appellant said that he did not know who or what Randspaar was, that he did not own or have an interest in it and that he knew nothing of the investment alleged to have been made therein. And there the matter rested. The fact that the appellant was justifiably found by the trial Court to be, in general, an untruthful witness can hardly assist the State on any issue in which the only evidence set up against the appellant's is that of Saevitzon whose sole evidence is not the stuff of which findings of fact, beyond reasonble doubt, are made. Nor does the circumstance that the appellant advanced a theory that Saevitzon may have paid the money into Helsa in reduction of a debt for R24,000 which the appellant said he owed him in respect of the affairs of a company known as Stellaland Pharmacy, assist the State. The question of the alleged debt of R24,000 may assume significance in connection with certain other counts which will be dealt with later herein. But on this count it has no significance for it has not been shown that the stolen money was applied

for ..... /100

for the purposes of appellant, whose defence was simply a denial that he had any knowledge of or played any part in the theft.

In the circumstances, since no reliance whatever can be placed on Saevitzon's evidence of the conversations he said he had with the appellant concerning this theft and as it has not been shown that the stolen money was used for the benefit of the appellant or that he had knowledge of the payment into Helsa or of the investment said by Saevitzon to have been made for his benefit, it follows that it cannot be found that the appellant's complicity was established beyond reasonable doubt.

The appeal on this count must succeed.

COUNT 9. (THEFT)

The gist of the charge was that the appellant, acting with common purpose and in concert with Saevitzon and Hanley, stole R524,000 from Parity Holdings for the benefit of Waghan, during the period 14 - 16 April 1963.

The factual background is as follows -

(a) Waghan was indebted to Trans-Africa in the sum of R487,324.

(b) Trans-Africa held, as security for this indebtedness, a pledge of 97,000 Parity shares owned by Waghan.

(c) Trans-Africa was placed in liquidation at the instance of the Registrar; and in consequence there was some risk that, if the said debt were not paid, the liquidators might sell the said Parity shares.

(d) Parity Holdings was floated primarily to raise the funds to pay this debt and free these shares.

(e) The prospectus of Parity Holdings made provision for the adoption of an agreement called the Vale agreement, dated 21 February, 1963, in terms whereof one Vale, as trustee for Parity Holdings,

had agreed with Waghan to purchase the 100,000 Parity shares from Waghan for a consideration of one million Parity Holdings shares and an additional payment of R485,000, both of these against the delivery of the Parity shares. The R485,000 was to be paid by means of a banker's guarantee, furnished within fourteen days of the granting of a certificate to commence business, and payable against delivery of the 100,000 Parity shares. A further R65,000 was to be paid within twelve months. The Vale agreement was adopted by Parity Holdings at a board meeting held on 27 March 1963.

(f) To enable Parity Holdings to achieve the minimum subscription of R525,000, it was found necessary for Waghan to subscribe for an additional 200,000 shares at 50 cents each. To enable Waghan to do this, an overdraft of R100,000 was arranged with the Standard Bank, Harrison Street Branch. Its letter of 30 March 1963 stated that the overdraft was granted on the security of a pledge of the 97,000 Parity shares, to be released to WAGHAN and replaced by (i) a million Parity Holdings shares when these were issued, and (ii) a cession of the R65,000 to be paid by Parity Holdings to Waghan within 12 months.

(g) The existing pledge of the 97,000 Parity shares to Trans-Africa was thus a complication. In order to secure their release, R487,234 would have to be paid to Trans-Africa by Waghan. As to that -

(i) Waghan could only pay this amount if it received the purchase price from Parity Holdings, and in terms of the Vale agreement it was obliged to deliver the 100,000 Parity shares to Parity Holdings in order to secure simultaneous payment.

(ii) In terms of section 84(3) of the Companies Act, any payment made by Parity Holdings prior to its receiving a certificate to trade would constitute an offence.

(iii) Such certificate to trade, in terms of section 84 of the Act, is issued on the furnishing of an affidavit that the minimum subscription has been achieved.

(iv) In terms of section 81 no allotment of shares can take place until the minimum subscription has been achieved.

It was the manner in which the appellant, Saevitzon and Hanley set about solving this vicious circle, that consti-

tuted, in the judgment of the trial Court, the crime of stealing R524,000 from Parity Holdings for the benefit of Waghan. The method employed was as follows.

On or about 16 April 1963 Waghan's banking account was in credit in excess of R53,000, and Parity Holdings was in credit in excess of R340,000. On the same date Waghan (through its directors Hanley and Saevitzon) wrote the following letter to the bank -

> "We would be obliged if you would be kind enough to arrange the following -
>
> 1. The transfer from Waghan Investments (Proprietary) Limited to Parity Holdings Limited of R183,486.33. This will then have the effect of temporarily putting Waghan Investments (Proprietary) Limited into overdraft for R130,087.08.
> 2. Then transfer from Parity Holdings Limited (who will be in credit for R525,000. in view of the above) to Waghan Investments (Proprietary) Limited of R524,000. This then will now have the effect of putting Waghan Investments (Proprietary) Limited in credit to the extent of R393,912.92, which together with the overdraft facilities of R100,000 will make a grand total of R493,912.92.
> 3. Will you kindly pay Trans-Africa Credit & Savings Bank Limited, through your Adderley Street Branch, Cape Town, the

sum owing to them up to a maximum of R487,500 against delivery of 97,000 Parity Insurance Company Limited shares in good negotiable order. The amount owing to them being in terms of the original loan agreement plus interest.

4. We would be obliged to receive an official receipt from your Bank, stating that you hold 97,000 shares in the Parity Insurance Company Limited, which shares will be transferred to Parity Holdings Limited in due course in terms of arrangements made with your Bank, and that you have repaid Trans-Africa Credit & Savings Bank Limited in full.

5. We have for the sake of our calculations regarding the above amounts, presumed that the balance to the credit of Waghan Investments (Proprietary) Limited, as at midday on the 16th instant, is R53,399.25 and to the credit of Parity Holdings Limited, as at midday on the 16th instant, R341,513.67.

After all the above transactions have been completed, the balance on hand on the Parity Holdings Limited Account should be R1,000.00 and on Waghan Investments (Proprietary) Limited R6,412.92."

The letter was countersigned by Hanley and Reisen as directors of Parity Holdings Ltd.

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On 16 April 1963 the bank effected the transfers and payments referred to in the foregoing letter. The shares in question were delivered to Parity Holdings on 4 July 1963. It was the payment of R524,000, instructed in paragraph 2 of the letter, which is relevant to the conviction of theft on count 9.

The indictment alleged, and the trial Court found, that the payment of R524,000 by Parity Holdings was a private payment not made upon the authority of the company, and was made with the intention to steal; that its object was to enable Waghan to pay Trans-Africa R487,500 and so secure the release of the 97,000 Parity shares pledged with Trans-Africa; and that the appellant was a party to the entire scheme.

The aforementioned letter to the bank was authorised by two directors of Waghan and two directors of Parity Holdings. We shall assume, without deciding, in favour of the State, that the board of Parity Holdings did not authorise the letter, in other words that it amounted to an unauthorised variation of the Vale agreement which was adopted by the board on 27

March 1963.

In this Court, counsel for the appellant contended that the scheme could have been carried out in such a manner that there would be no time-lag between the payment and delivery of the shares, e.g. by the bank acting as trustee for all the parties; or the board of Parity Holdings could have been approached to vary the contract by agreeing to a delay in the delivery of the Parity shares until Parity Holdings was in a position to allot and deliver one million of its shares due to Waghan, its obligation so to do being made conditional on the simultaneous transfer to it of the Parity shares. We shall refer to this later in considering the mens rea of the appellant.

The main contentions on behalf of the appellant in this Court were -

~~(a) that there was insufficient~~ proof of a conspiracy, or that the appellant was implicated in it, or that he was

108 /... aware

aware of the result of the arrangements;

(b) Alternatively, if the appellant was aware of the result of the arrangements, and of the absence of authority from the board of Parity Holdings authorising premature payment, there is a reasonable possibility that he had the honest belief that the board of Parity Holdings would approve the arrangements; and therefore he did not have an intention to steal.

We proceed to examine those contentions.

109/... As to

As to (a), we do not consider it necessary to deal with this in any detail. The trial Court found as a fact that the appellant was aware of and a party to the arrangements reflected in the letter to the bank, with knowledge of the Vale agreement and the terms of Waghan's overdraft; and we are not persuaded that this finding was wrong.

As to (b), the crux of the appeal on this count is whether there is a reasonale possibility that the appellant bona fide believed that the board of Parity Holdings would have approved of the payment of the R524,000 pursuant to the letter to the bank.

Now it must have been obvious to the four members of the board of Parity Holdings (Hanley, Reisen, Panovka and Maritz) when they adopted the Vale agreement on 27 March 1963, that some adjustment would be necessary in the giving of effect to the agreement. This is apparent, because of what is indicated in paragraph (g) of the recital of the factual background, supra. In the absence of some adjustment, the very object of the flotation of Parity Holdings

110/... would

would have been frustrated; such object being the acquisition from Waghan of its Parity shares, 97,000 of which were pledged with Trans-Africa (now in liquidation), and which were thus in critical danger of being sold by the liquidator. The appellant must have known this too. He also knew that two of the four directors of Parity Holdings (Hanley and Reisen) had discussed the matter with directors of Waghan and with the bank; and that the bank had agreed to handle the transaction. He also knew that the arrangement with the bank was conceived in the interests of Parity Holdings, in that it preserved THE res vendita from the risk of being sold in execution by the liquidators of Trans-Africa. He said that, as far as he was concerned, he left the detailed mechanics to the bank and he thought that the bank could properly have acted as trustee, safeguarding the interests of Parity Holdings, Waghan, the bank, and the liquidators of Trans-Africa, on the obtaining by Parity Holdings of the minimum subscription and the required certificate to commence business.

111/... On

On the question whether the board of Parity Holdings would, acting properly on all the facts, have sanctioned the arrangement, counsel for the State relied strongly on the fact that the payment of R524,000 to Waghan on 16 April 1963 was premature on the ground that it included R39,000, of the R65,000 which was payable at any time within 12 months, and that this rendered impossible the cession to the bank of the claim for the R65,000. (See paragraph (f) of the recital of the factual background, supra.) Without giving such cession, continued counsel, it was plain to all, including the appellant, that Waghan could not substitute the Parity Holding shares for the Parity shares as security for its overdraft; with the result that the bank could continue to hold the Parity shares as security, and the payment of the R524,000 could expose Parity Holdings to the risk of uncertainty as to when it would receive these shares for which it had paid.

That is so, if regard is had solely to the bank's letter of 30 March 1963. (See paragraph (f) of the factual background, supra). But the answer is that one is

112 /... here

here considering the mens rea of the appellant on 16 April 1963 when the bank made the payments, as it had undertaken to do, in pursuance of the letter of that date. That letter is silent as to cession of the claim for R65,000. That letter, and the bank's undertaking to act on it, give the impression that the bank was no longer insisting on the cession relating to the R65,000. We say this because it must have been obvious to the bank, from its knowledge of the facts and a perusal of the letter, that the payment of the R524,000 would include the greater part of the R65,000, the right to which could not then be ceded to the bank by Waghan. In that event, i.e. if the cession was no longer being insisted upon, there would have appeared to be no difficulty, on the obtaining of the certificate to commence business, about the bank's arranging for payment and delivery of the released Parity shares to take place pari passu. Both Waghan and Parity Holdings had their banking accounts with the bank with which the arrangements in question were made. The certificate to commence

113 /... business

business was applied for on 19 April. It was received on 26 April. There seems no reason why it could not have been sought and obtained on 16 April. The shares were eventually released and delivered to Parity Holdings on 4 July 1963. The delay is not explained in the record. But this cannot affect the state of mind of the appellant on 16 April 1963. It seems to us that there is a reasonable possibility that the appellant did believe, as he says he did, that the bank could and would act as trustee for all the parties involved, safeguarding all their rights, and that the Parity shares would be tendered to Parity Holdings on payment of the R524,000.

Counsel for the State also drew attention to the fact that the early payment of portion of the debt of R65,000 left Parity Holdings with a working capital of only R1,000, instead of the R25,000 referred to in the prospectus. This is so, but the point seem to us peripheral, for the fundamental question for decision by the board of Parity Holdings, if it were considering the payment of the R524,000,

114/... would-

would have been whether Parity Holdings would have to go out of business or not, since the Vale agreement with Waghan, in its original form, was not capable of implementation, in the circumstances of the parties, without some adjustment.

Furthermore, it will be noticed that, whereas the bank's letter to Waghan of 30 March 1963 provided for the 97,000 shares to be released to Waghan on payment of its overdraft, the new arrangement, as reflected in the paragraph numbered 4 in the letter of 16 April, provided for the Parity shares to be released to Parity Holdings. This supports the view that the arrangement of 16 April 1963, to which the appellant was a party, was not intended to benefit Waghan at the expense of Parity Holdings.

In all these circumstances we cannot exclude the reasonable possibility that the appellant bona fide believed that the board of Parity Holdings would sanction what was done by two of its directors in the interests of Parity Holdings, in the matter of the instructions to the bank.

115 /... In

In other words, there was no proof beyond reasonable doubt that the appellant intended to steal.

The appeal on Count 9 therefore succeeds.

COUNT 10 (FRAUD).

The State alleged and the trial Court found that Hanley fraudulently concealed material facts from Parity and its directors in the passing of a certain Parity resolution on 25 April 1963.; and that the appellant was a party to the fraud.

The resolution was that Parity would pay P.M.C. Brokers a commission of 12½% on direct business and 2½% on business brought in by agents.

As to the background, the State contends that the evidence showed that Hanley and the appellant and Saevitzon were party to a pretence that an agency known as P.M.C. Brokers was introducing Parity business and was entitled to a 10% commission thereon; that such commissions were paid into P.M.C.'s banking account, and that part of this money was

116/... siphoned

siphoned off for the benefit of the appellant and later of Parity Holdings; whereas the true facts were that Parity itself (or a branch) was securing and handling the business in question, and that no commission was payable thereon; that Hanley and the appellant then decided to increase their personal benefits by increasing the "commissions" payable to P.M.C.; and that that was why the Parity board was asked to pass the resolution on 25 April 1963, supra. At that meeting of five directors (with Hanley in the chair) the facts alleged, and found, to have been concealed by Hanley were -

(1) that there existed no agent doing business under the name or style of "P.M.C. BROKERS";

(2) that "P.M.C. BROKERS" was simply the name of a banking account (hereinafter called "the P.M.C. Brokers" account) at the Harrison Street South, Johannesburg, Branch of the Standard Bank of South Africa Limited;

(3) that the P.M.C. Brokers' account was operated by EXCELLENT MANAGEMENT for its own account;

117/... (4) that

(4) that, as a director of EXCELLENT MANAGEMENT, and as the beneficial owner of half the issued share capital of EXCELLENT MANAGEMENT, HANLEY had an interest in the said contract;

(5) that no benefit would enure to PARITY by payment of commission in terms of the said resolution, and that the said contract was solely in the interests of EXCELLENT MANAGEMENT, the ACCUSED and HANLEY;

(6) that neither P.M.C. BROKERS nor EXCELLENT MANAGEMENT would render any services to PARITY (whether by soliciting or procuring business for PARITY or in any manner whatsoever) warranting the payment of any commission by PARITY to P.M.C. BROKERS or EXCELLENT MANAGEMENT;

(7) that such commission as would be paid by PARITY to P.M.C. BROKERS in terms of the said contract would be calculated, not on business solicited or procured for PARITY by P.M.C. BROKERS or any agent of P.M.C. BROKERS or by EXCELLENT MANAGEMENT or any agent of EXCELLENT MANAGEMENT, but that such commission would be calculated and paid -

(a) on business conducted at 106 Fox Street, Johannesburg, being premises whereat PARITY was conducting

118/... business

business;

(b) on business conducted solely and exclusively by persons who were employees of PARITY and whose salaries would be paid by PARITY;

(c) on business conducted by existing agents of PARITY;

(8) that the said contract did not constitute a bona fide contract in the interests of PARITY or in the ordinary course of PARITY'S business, but was part of a fraudulent scheme whereby money taken from PARITY would be paid to EXCELLENT MANAGEMENT for the benefit of EXCELLENT MANAGEMENT, the ACCUSED and HANLEY".

We pause here to observe that, in the appeal on this Count, nothing seemed to turn on the fourth of the foregoing non-disclosures.

Dealing further with the factual background, the judgment of the trial Court states -

"Parity's head office administration was conducted, until February 1963, at premises at 106 Fox Street, Johannesburg. The ground floor of those premises was occu-

119/... pied

pied by the Southern Transvaal Branch of Parity, of which the manager was Mr. Botha.

In February 1963, Parity's head office moved to Parity Centre in Jeppe Street, Johannesburg. The ground floor premises there were not yet ready for occupation. For obvious reasons it is an advantage in an insurance business such as Parity's, which dealt with members of the public on a large scale, to have premises on ground level, where the public have easy access. The lease of the ground floor portion of the Fox Street premises was due to expire on the 30th June 1963. The campaign for the sale of motor vehicle insurance in respect of private vehicles for the insurance period 1963/1964 was to take place during the months of April and May 1963. Renewal notices for third party motor vehicle insurance, bearing the address of Parity at 106 Fox Street, had already been sent out, and it was to be expected that applications for insurance together with premium moneys would be sent to that address. Because Parity had been doing business at 106 Fox Street through its Southern Transvaal branch for some years, there was a goodwill attaching to these premises. In these circumstances it was plainly to the advantage of Parity that the Southern Transvaal branch should continue to do business there, at any rate for the duration of the third party insurance campaign."

120/... At

At this stage it is necessary to mention the company of Excellent Management (Pty) Ltd. It was registered in June 1962. (At that time its name was Excellent Holdings, but nothing turns on that). Its issued share capital consisted of two shares of 10 cents each. The first two shareholders were Hanley and Panovka, and they were also the first directors. Two months later Saevitzon and Mrs. Thompson (now Mrs. Hanley) were added as directors. The trial Court found that it was a company without substance, and that it did no business. All it had was a bank account.

The story is now taken up by Saevitzon. His evidence is summarised in the judgment of the trial Court as follows -

> "Saevitzon said in his evidence that at the end of March 1963 Hanley, the accused and he were casting about for ways and means of raising money in order to subscribe for shares in Parity Holdings. In the course of a discussion between them it was suggested that as the office at Fox Street had not yet been closed down and as a third party campaign period

121/... was

was approaching, a new agency should be formed which would take over and do business in Parity's old office, and the profits made could be used to take out shares in Parity Holdings. Hanley mentioned that he was a director of a company, Excellent Management (Pty) Ltd., which could be used in this connection. It would trade under the name of P.M.C. Brokers. It was accordingly decided that the then directors of Excellent Management, (namely, Hanley and Panovka) should resign, and that Silver and Botha should be appointed as directors, as the nominees of Hanley and the accused. .... It was decided that commission on business done at the Fox Street premises would accrue to P.M.C. Brokers; and that all expenses incurred for rent, telephone, staff, etc. would also be borne by that company. Any profit made would accrue to the accused and Hanley."

In April [redacted] 1963, Parity began making payments of commissions to Excellent Management "trading as P.M.C. Brokers", in respect of Parity business handled at the Fox Street premises. By 13 July it had made payments totalling R42,192.

/122... These

These amounts were deposited to the credit of a banking account opened on 8 April 1963 in the name of Excellent Management (Pty) Ltd., "t/a P.M.C. Brokers".

The substantial issues in the appeal on this count are twofold. First, whether P.M.C. Brokers was genuinely doing agency work for Parity, for if it was not, the non-disclosures at the meeting of 25 April 1963 were fraudulent. Second, whether the appellant was implicated in the scheme.

As to the first question, the following facts are relevant.

1. A man named Silver gave evidence. He carried on business as a panel beater, and was also a Parity agent under the name of Saverand Finance (Pty) Ltd. About the end of March or the beginning April 1963 at a meeting at which Saevitzon and Hanley (inter alios) were present, Silver was asked whether he was willing to put his agency into P.M.C. Brokers and participate in the profits. Silver was reluctant and, as the trial Court found,

123/... that

that part of the scheme was not carried out. But, according to Saevitzon, it was decided to use Silver's name. So he became a director of Excellent Management and one share therein was transferred to him for no consideration. He at no time became engaged in the business conducted at 106 Fox Street. He did not attend any directors' meetings. He received no fees or dividend. On 26 June 1963 , at the request of Saevitzon in the presence of Hanley, he resigned as a director and signed a form transferring his one share to Parity Holdings for no consideration. It is plain that he was a nominee director, as the trial Court found.

2. Botha gave evidence. He was in the employ of Parity as the branch manager of the Southern Transvaal branch at 106 Fox Street. At the request of Saevitzon he became a nominee director of Excellent Management. Like Silver, he received one share, but later transferred it to Parity Holdings, at Saevitzon's request, all for no consideration, and resigned. He did not regard himself as entitled to any proceeds of the P.M.C. Brokers scheme. It was he who, on being

124/... told

told to do so, opened a banking account in the name of Excellent Management, trading as P.M.C. Brokers. This was on 8 April 1963. Saevitzon's description of him was that he was a junior employee who did what he was told. Botha himself said that he did not know what was happening in Excellent Management and that he simply carried out instructions.

3. It is common cause that, when Parity moved to its new offices in Parity Centre during February 1963, Botha and several female employees of Parity remained behind at Parity's old premises at 106 Fox Street. (It was only during July 1963 that they moved to Parity Centre.) These Parity employees remained on the Parity pay roll, remained members of the Parity pension fund, and were regarded by Parity's auditors and by other members of Parity staff as Parity employees, and not as employees of P.M.C. Brokers. They were also kept in the dark about the existence of P.M.C. Brokers. Furthermore, no signs whatever were displayed at 106 Fox Street to indicate that P.M.C. Brokers, and not Parity, was doing business at those offices. Moreover, no indications

125/... whatever

whatever were printend or stamped on documents handed to the public at 106 Fox Street to show that P.M.C. Brokers, and not Parity, were now doing business at that address. It was a case of business as usual. Stead, who was Parity's auditor at the time, regarded the office at 106 Fox Street as the Johannesburg branch of Parity. Botha said that at the time the Fox Street office was regarded as the Southern Transvaal Branch of Parity. (He was the manager). Swart, the secretary of Parity at the time, formed the same impression.

4. On 8 April 1963 Botha was asked to sign an agency application, as "director" of P.M.C. Brokers. As to that, it suffices to say that the information therein disclosed, as well as the information withheld, indicate that it was a matter of going through the motions, for the sake of appearance.

5. Documents issued at 106 Fox Street were issued in the name of Parity. There was on them no reference to any other firm. Premiums received were banked

126/... daily

daily to the credit of Parity's banking account. The rental payable in respect of 106 Fox Street continued to be paid by the lawful lessee, Parity. All the costs and expenses incidental to the business being conducted there, continued to be borne by Parity.

6. It is true that there were "repaid" by P.M.C. Brokers to Parity the foregoing salaries, rent and incidental costs. But, looking at the picture as a whole, it is clear that this was done to lend some semblance of respectability to the unlawful scheme - rather like the agency application in 4, supra.

There is a passage in the evidence of Saevitzon, in the criminal proceedings against Hanley, to the effect that the P.M.C. Brokers agency was honest in its conception and that at first it was carried on as an honest and legitimate scheme. This piece of evidence must yield to the overwhelming factors establishing the contrary.

The position was, in our view, well summarised by the learned trial Judge as follows -

127/... "'P.M.C.

> "'P.M.C. Brokers' was merely a business name used by Excellent Management. But Excellent Management was not itself in business. All it had was a bank account. Although it had concluded an agency agreement with Parity, it did not conduct an agency. The business in respect of which Excellent Management was paid a commission was the business conducted by Parity's Southern Transvaal branch. That business had not been disposed of by Parity. There existed no contract in terms of which Excellent Management could have acquired it, and there did not exist any authority by the Parity Board for the disposal of that business. ... I am satisfied that Excellent Management was no more than a false front erected around Parity's Transvaal Branch, from behind which moneys, the property of Parity, could be diverted into the bank account of Excellent Management."

To sum up so far, the first issue raised in the appeal on this count (namely whether P.M.C. Brokers was genuinely doing agency work for Parity and was thereby entitled to commission) was rightly answered in the negative by the trial Court.

It follows that Hanley's non-disclosures at the board meeting were fraudulent. There is in our view no substance in

128/... the

the submission that the appellant is recued by the absence of evidence to show that prior to the meeting the members of the board did not know the matters which were not disclosed. A person makes a misrepresentation to a company if he makes it to the board of directors, even if all of them are aware of its falsity; see R. v. Kritzinger, 1953 (2) P.H., H.109 (A.D.), a case which in our view merits inclusion in the official reports.

We proceed now to the second issue, namely whether the appellant was implicated with Hanley in the whole scheme, including the resolution of 25 April 1963. The appellant denied any complicity and, for the most part, denied any knowledge of it. The nature of his denials is set out in the judgment of the trial Court as follows -

> "In his evidence-in-chief the accused said that at the time of the move from Fox Street to Parity Centre, Hanley told him that he did not want anyone to get the banking hall on the ground floor at 106 Fox Street, because this

129/... banking

banking hall was well-known. He was keen to establish there an agency business, which would deal, not only with motor insurance, but also with other classes of short-term insurance. These premises would later be used by Parity for the Parity Motor Club.

Of the business to be carried on at 106 Fox Street, the accused said that he knew the following: the business would be carried on by Excellent Management trading as P.M.C. Brokers; Excellent Management was to be a subsidiary of Parity Holdings 'from the inception'; if P.M.C. Brokers earned money, Parity Holdings would receive the benefit of any profit; P.M.C. Brokers would pay all expenses; and the Parity staff would remain at Fox Street and Excellent Management would pay their salaries.

As to everything else, the accused professed complete ignorance. He said he never discussed the details with Hanley - 'I was never a man for discussing details'. The arrangements were attended to by Hanley and the accused took no part in carrying out the plan. He professed not to know that a

130/... banking

banking account had been opened in the name of P.M.C. Brokers or who the authorised signatories were. He denied that he participated in any discussions regarding the moneys which were coming into P.M.C. Brokers. He said that he did not know during March, April and May 1963, that substantial commissions were accruing to P.M.C. Brokers. He professed ignorance of payments which were made out of P.M.C. Brokers' banking account .... He professed ignorance of any discussions relating to the increase of commissions payable to P.M.C. Brokers from 10% to 12½%, ..."

The trial Court rejected the appellant's denials as false. The learned Judge said -

"I am satisfied beyond any doubt that the accused was dissembling in so professing ignorance. Even on a superficial view, the scheme was a dishonest one, and nobody, with any knowledge of it, could honestly have believed that it would offer any advantage to Parity. If the accused is to be believed, then Hanley, his partner, and

131/... Saevitzon,

Saevitzon, his lieutenant and confidant, carried out, without his knowledge, a scheme whose manifest object was to milk funds from Parity, in which the accused had a 50% interest - and they were to do this, not in their separate private interests, but in the interests of Hanley and the accused. The suggestion is absurd. According to the accused, Hanley told him something of the scheme. That 'something' must have been very much more than is now admitted to by the accused.

It is inconceivable that the accused would not have been told what was in fact going on. He was one of the controllers of Parity. He was very close to Hanley. There existed the closest of relationships between himself and Saevitzon. There was no reason why the facts should not have been kept from him. He was vitally interested in all the affairs of Parity and especially in those affairs which could provide him with cash. The facts could only have been kept from him if he had been indifferent to what was going on. Lack of interest would have been quite out of character so far as the accused was concerned. He was a man

132/... of

of energy and drive and questing curiosity in the companies in which he was concerned, and I have no doubt that he would have kept his finger on the pulse and would have kept himself informed of all the important activities of Parity."

We are unpersuaded that there is any fault in the foregoing reasoning and finding. But knowledge of itself is not enough. Was there also complicity on the part of the appellant? As to that, Saevitzon implicated him in the whole scheme, and his evidence is rendered credible by the cumulative effect of the following factors -

1. The appellant's mendacity as a witness in respect of this count.
2. It is common cause that Parity made the following payments to the banking account of P.M.C. Brokers -

   from 16 April 1963 to 11 July 1963, amounts totalling R3,616.41
   on 9 May 1963 R7,436.87
   on 3 June 1963 R18,908.03
   on 29 June 1963 R6,785.01
   on 13 July 1963 R5,445.86
   Total - R42,192.18

133/... During

During the period 8 April 1963 to 7 November, no other deposits from any source whatever, were made in the bank account of P.M.C. Brokers.

As against these payments from Parity, from 15 May to 24 October 1963 amounts totalling R8,717.33 were paid from the P.M.C. Brokers account to Parity. These were the ostensible"expenses"referred to earlier herein.

3. It is also common cause -

that on the 28 May 1963 Excellent Management drew a cheque in the sum of R5,000 in favour of Silver's company, Saverand;

that on the 28 May 1963 Silver caused Saverand, in exchange for the abovementioned R5,000 cheque, to draw a cheque in the sum of R5,000 in favour of Helsa;

that on the 29 May 1963 the R5,000 Saverand cheque was deposited in Helsa's banking account; and that this deposit was the very first deposit ever made to the credit of Helsa's banking account;

that this R5,000 payment was credited by Saevitzon in the books of Helsa to an account styled "Commission received";

134/... that

that on the 6 November 1963 Excellent Management drew a cheque in the sum of R5,000 in favour of Helsa, which said cheque was deposited to the credit of Helsa's banking account; and

that this R5,000 payment was credited by Saevitzon in the books of Helsa to an account styled "Commission received". On the same day Saevitzon caused Helsa to pay R5,000 to Stellaland Pharmacy. Helsa was a company used by the appellant to hold his assets.

4. Furthermore, on 29 June 1963 Parity Holdings took over Excellent Management, and the latter paid it R20,000 from its P.M.C. Brokers account. Saevitzon says that he discussed this in advance with the appellant, who agreed because Parity Holdings was short of working capital. The appellant was aware of this take-over. He and Hanley were the beneficial owners and controllers of Excellent Management.

5. Although most of the foregoing payments were made after 25 April 1963 (the date crucially relevant to this count), they

135/... do

do indicate the improbability of any notion that the appellant's partner, Hanley, with whom he had a close relationship, and the appellant's trusted confidant, Saevitzon, conspired, without him, (a) unlawfully to siphon monies from Parity, in which the appellant had a substantial interest, and pay them to P.M.C. Brokers; and thereafter (b) to pay the proceeds to the appellant's company, Helsa, and to Parity Holdings, which was a company controlled by the appellant and Hanley.

6. From the manner in which the appellant kept his finger on the Parity pulse, he cannot but have been aware of the foregoing flow of money from Parity, both before and after the board meeting of 25 April 1963, and of the unlawfulness thereof as dummy commissions.

7. Furthermore, Silver gave evidence corroborating that of Saevitzon to the effect that the appellant was present when Silver exchanged the first Excellent Management cheque of R5,000.

136/... Reviewing

Reviewing all the foregoing evidence and the probabilities the trial Judge came to the conclusion that -

> "The cumulative effect of all the evidence points irresistibly to the conclusion that Saevitzon was telling the truth when he said that the accused was a party to the P.M.C. Broker's scheme, that he was kept fully informed of developments, and that he derived benefits from the scheme ... I accept that the accused had full knowledge of all the material facts. He must have known that board approval would be necessary for an increase in the commission payable to P.M.C. Brokers to 12½% and for the payment of an over-riding commission of 2½%, and he must have known that that approval could only be obtained by fraud. I am, therefore, satisfied that Hanley, in committing the crime charged in this count, must have been acting in concert and with common purpose with the accused."

In all the circumstances we are not persuaded that that finding was wrong. We need hardly add that the non-disclosures at the board meeting, and the resultant resolution, were calculated to and did prejudice Parity, which was debited with dummy commissions of a high order.

The appeal on Count 10 fails.

Count 15.

It is common cause and was established by evidence that on two different occasions during November 1963, Saevitzon and Hill submitted to Parity fictitious invoices in the name of Mayfair Litho Works (Pty) Ltd. One was for an amount of R8,298-15 and the other for R3,025. The invoices were made on printed forms which were headed by the name of the fictitious company together with an address and a post office box number. In fact, the box number was one used by Saevitzon, the appellant and Helsa. That Saevitzon and Hill prepared the false invoices which reflected a post office box number readily identifiable with Saevitzon himself or with a company with which he was closely identified is a measure both of their confidence at that stage that they could thieve with impunity and of their impudence. On both invoices were imprinted, by means of a rubber stamp, the words "All cheques payable to Almon Management Services (Pty) Ltd." (i.e. Almon). On 20th November and on 2nd December 1963, Saevitzon caused two Parity cheques to be issued, ostensibly in

payment ..... /138

payment of the "invoices", for R8298-15 and R3025, respectively. The cheques were made payable to Almon and were on 21st November and 3rd December, respectively, deposited by Saevitzon for the credit of Almon's account. It will be remembered that the first of these cheques was the first payment made into Almon's banking account. On 26th November, Saevitzon drew a cheque on Almon for R6750 and on 3rd December, a cheque for R3,000. Both these cheques were deposited to the credit of Helsa's bank account and thereafter Saevitzon credited his loan account in Helsa's books with these amounts. It is not in any way disputed that this theft from Parity was committed by Saevitzon and Hill and here, as in counts 8 and 12, the issue was and is whether the appellant was a party to the theft.

There was on this count, as on the two counts just referred to, direct evidence by Saevitzon implicating the appellant. Saevitzon said that he and Hill had prepared a large quantity of invoices in the names of imaginary firms, including Mayfair Litho, and that he had, before the commission of the theft now being considered, exhibited the invoices

to ..... /139

to the appellant for his approval. He also said that he kept the appellant informed as to the issue of the cheques and the payment of the amounts concerned to Almon and thence to the credit of Helsa. The appellant denied Saevitzon's evidence and claimed to have had no knowledge of the theft or of the receipt by Helsa of part of the proceeds thereof.

The evidence afforded by the books and other documents relating to this matter, quite apart from Saevitzon's own evidence, shows that at about that time, the appellant was required to meet several demands on his financial resources. He was indebted to his attorney, Goss, in a sum of R31,436 for fees and disbursements in connection with the appellant's trial on charges arising from the collapse of the Standard Finance Company. Judgment in that case was delivered on 22nd November, 1963. The appellant was acquitted of the charges then preferred against him. In addition to that substantial debt, the appellant owed a company, Associated Assessors, which was owned by Goss, R2,000 for the purchase of shares in Parity Holdings and he also owed his nephew,

Pevsner, ... /140

Pevsner, R5,000 for the purchase of shares. It was established that Helsa paid R5,000 to Pevsner on 25th November, R2,000 to Associated Assessors on 3rd December, R3,000 to one Wilfred Robin on 5th December and R2,609 to Goss on 10th December. It is not disputed that all those payments, except the payment of R3,000 to Robin, were made to creditors of the appellant. Concerning the payment to Robin, the appellant denied that he owed him any money but there was clearly some transaction between them. Robin had been charged jointly with the appellant in the trial to which reference has been made above and it appears from the evidence that appellant had undertaken to discount a bill for Robin.

Mr. Hanson attacked the credibility of Saevitzon and contended that his evidence that he exhibited a batch of bogus invoice forms to the appellant was incredible. We set little store by the evidence given by Saevitzon concerning conversations which he claimed to have had with the appellant and which implicate the latter in crimes committed by Saevitzon and would not sustain the conviction on his evidence standing

alone ..... /141

alone, without strong support. But his evidence that the appellant was in this instance aware of the deposits made for the credit of Helsa and of their source appears to be strongly supported by the surrounding circumstances and the probabilities. Notwithstanding that Saevitzon credited his own loan account with the payments made for the credit of Helsa, the inference is irresistible that the money was used to pay the appellant's debts, for the state of Helsa's banking account at that time was shown to be such that without the infusion of fairly substantial deposits, it could not meet the payments which were in fact made out of it between 25th November and 10th December. The payment of appellant's debts by Helsa followed hard upon the deposits made for the credit of Helsa's account by Almon, which deposits followed hard upon the theft of Parity's money. The thread linking this trinity of transactions is too strong to be severed at any point by the blunt scissors of the appellant's denials. The State's contention that Almon was used simply as a pipe for the transfer of money from Parity to Helsa for the appellant's purposes appears to us to be fully justified and

acceptable ..... /142

acceptable.

Unlike the situation which emerged upon an examination of the circumstances surrounding the thefts dealt with under counts 8 and 12, the situation here is one which renders hardly possible, on any reasonable assessment, that the appellant was ignorant of the obligations he owed and of the approximate state of Helsa's banking account. There was little money in the bank to the credit of Helsa before the theft from Parity and the addition of what was in that context a comparatively large sum (R9,750) could hardly have passed unnoticed. Nor is it reasonable to conclude that the appellant could have remained unaware that some of his creditors had been paid. If he did not inquire of Saevitzon by whom or from what source they were paid, the probabilities point strongly to knowledge on his part of the source of the money which enabled them to be paid.

In an attempt to meet the difficulty presented by the circumstance that a substantial part of the stolen money was paid into Helsa, which was in effect his family company, and was used to pay some of his personal debts, the appellant

suggested ..... /143

suggested that Saevitzon, having stolen the money from Parity, utilized it really for his own benefit, viz, to reduce his indebtedness to the appellant in the sum of R24,000 arising from the Stellaland transactions. Accepting for present purposes (as we have indicated earlier herein) that Saevitzon was indeed indebted to the appellant in a sum of R12,000, there are insuperable difficulties in the way of appellant's suggestion or theory. In the first place, there is nothing to indicate that any payment by Saevitzon was due at that time, bearing in mind that Stellaland had not yielded profits and also bearing in mind that, in any event, in terms of the acknowledgement of debt upon which the appellant relied, payment was due only after ten years. And secondly (and this is more important) there is a very high degree of improbability involved in a suggestion that Saevitzon (or, for that matter, any debtor) would be at pains to conceal from his creditor payments made in discharge or reduction of his debt. Mr. Hanson contended that this was not as unlikely as it might appear to be, if regard were had to the character of

Saevitzon ..... /144

Saevitzon and to the fact that he had stolen the money with which he paid a portion of his debt. Saevitzon might have been reluctant, so the argument ran, to tell appellant that he had paid the money into Helsa's account in reduction of his debt, for fear that the appellant might inquire of him where he had obtained the money. This argument is untenable. As we have pointed out, Helsa's bank account, unlike Waghan's at the relevant time in connection with count 8, was not handling very large sums of money and it could not be supposed by Saevitzon that the deposit of R9,750 to Helsa's credit would long remain unnoticed by the appellant. Sooner or later, and probably sooner, he would be asked what the source was of the R9,750.

Mr. Hanson also contended that apart from Saevitzon's evidence, there was nothing to show that the appellant's creditors were pressing for payment and that if they were not pressing, it was unlikely that appellant would resort to a theft of this nature for the purpose of paying them. But whether the creditors were pressing or not, the

fact ..... /145

fact is that money was due to them and every probability points to a conclusion that they were expecting to be paid. In the ~~other~~ case of the debt owing to Goss, for example, it appears that by far the major portion of his account for over R31,000 represented disbursements for counsel's fees in connection with the successful defence of the appellant in the trial which had then just been concluded. It is more than likely that Goss expected to be paid a portion, if not all, of his account, and he was in truth paid some R2,000 early in December and a further substantial sum shortly thereafter. Similarly, the claims of Associated Assessors and Pevsner were in respect of payments made by them on behalf of the appellant and it is very probable that Saevitzon was correct in saying that they were asking for payment.

It remains to consider at this stage an argument presented by Mr. Hanson not specifically with reference to this count but in general terms in regard to those counts relating to direct thefts by Saevitzon, the proceeds of which he paid into Helsa's banking account. Counsel argued that

a ..... /146

a reasonably possible explanation of Saevitzon's conduct, which would be consistent with the appellant's innocence, was that Saevitzon had a financial interest or stake in Helsa and that he was concerned secretly to build up a credit balance in his name, which he could in due course utilize for his benefit. This point has already been briefly touched upon in the prefactory remarks concerning Helsa which precede the discussion of count 8 in this judgment. As we observed in the course of those remarks, Saevitzon's evidence as to the reason for his having a loan account with Helsa was not clear or satisfactory and it is not possible, on the evidence, to determine precisely what the genesis of his loan account was, just as it is not possible to establish with certainty whether the one share held by Saevitzon in Helsa was beneficially owned by him. As previously indicated, our approach to this question is that it was not established that Saevitzon was not the beneficial owner of that share. In addition to the circumstances that Saevitzon was registered as the owner of a share in Helsa and had a loan account in the books,

Mr. Hanson emphasized and relied upon one passage in his evidence in which he said, in answer to questions put to him by the learned Judge a quo relating to his loan account;

> ".... the only thing is that it was at one stage contemplated that Helsa Trust would be the parent company of all the Heller interests, and afterwards this was abandoned for another company, Land and Industrial. In this regard I was going to get certain assets. The accused was going to either give me or sell me for a nominal value certain assets, which never did take place in the end, but nevertheless it was envisaged at the beginning that this would be the way it was done."

It was argued that this evidence gave a clue to the probable, or at least possible, motive or purpose which influenced Saevitzon to pay money which he stole from Parity into Helsa's account and to credit his loan account in the books.

That Saevitzon entertained hopes and was ambitious in regard to benefits which might come his way as a result of his close association with the appellant may be accepted. We are satisfied that Saevitzon would not be blind to the possibilities which presented themselves through his association with and position of trust in the affairs of a man such as the appellant, who had created financial empires and was endeavouring to create another. Nor do we doubt,

having regard to the character of Saevitzon, that he would not have been scrupulous in furthering his own interests. But if, in this theft from Parity, he was concerned only to feather his own nest, he would hardly have sought to do so in the round-about manner of employing the major part of the proceeds in the payment of the appellant's debts, leaving himself the problematic and uncertain prospect of one day in the remote future, gaining a benefit. If he had resolved to steal from Parity for his own purposes and to keep the theft secret from the appellant, it is so unlikely as to be incredible that he would have dealt with the proceeds in a manner which gave him only a spes of profit and was, moreover, certain to expose him to the appellant, sooner or later. This count differs materially from count 8, where, as we have seen, there existed a reasonable possibility that the theft was committed in order to accommodate Reisen and where, because of the vast sum of money which Waghan was handling, Saevitzon might reasonably possibly have expected to be able to keep secret from appellant the deposit of a comparatively trivial sum.

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It also differs from count 12, in which it was not shown that the stolen money was used for the appellant's benefit but was, certainly in regard to R200 thereof and very possibly in regard to a further R1,000 thereof, used for the benefit of Saevitzon himself. It seems to us that in so far as the count now under consideration is concerned, the argument advanced is no more than a theory, speculative in nature and remote from the established facts. We have not lost sight of the fact, brought to our notice by Mr. Hanson, that it appeared from the auditors report that there had previously, in October 1963, been a payment of R767 by Parity to Mayfair Litho, which he suggested showed that Saevitzon and Hill had used fictitious Mayfair Litho invoices prior to the alleged discussion with the appellant. But this merely indicates that if Saevitzon on that occassion secretly stole R767 from Parity by this device, he did not use the money for the appellant's benefit, for there is no suggestion at all that the appellant knew of ~~or participated~~ in the proceeds of that theft. That does not assist the appellant in regard to this count but serves, indeed,

to ..... /150

to emphasize that if Saevitzon in this instance stole the money secretly for himself, he would have used it for himself, as the suggestion is that he did in October, and not employed it in payment of the appellant's debts.

In all the circumstances, we have not been persuaded that the Court a quo was wrong in rejecting as false the appellant's evidence that he had no knowledge of the payments involved in this count. There was no explanation or reasonable hypothesis to offset the inference normally to be drawn from the circumstance that stolen money was paid into the appellant's company and used for payment of his debts. Whether Saevitzon's account of the prior conversations which he claims to have had with the appellant is accurate or not, his insistence that the appellant knew of the payments and of their source and was fully implicated in the theft, receives weighty and decisive support from the established facts and the probabilities and we are unable to find that the Court a quo erred in the conclusion to which it came.

The appeal on this count fails.

COUNT THURSDAY .../151

Count 16.

Shortly after the theft related under count 15 was committed, Saevitzon and Hill again resorted to dishonest means of extracting money from Parity. On this occasion they used not fictitious invoices but fabricated claims for compensation, purporting to have been submitted by attorneys on behalf of claimants under third party insurance with Parity. The "attorneys" and "claimants" were fictitious. In all, five such claims were submitted during the period 6th to 13th December, 1963, the total amount of the claims being R16,950. Saevitzon caused five Parity cheques, totalling R16,950, to be issued. Each cheque was made payable to the fictitious attorney named in the claim and was reflected in the books as having been paid in settlement of a third party claim. The cheques were handed to Hill who procured two friends of his (Lyons and Sellar) to hand him their cheques in exchange for the Parity cheques. This having been done, the cheques received by Hill were deposited by Saevitzon to the credit of Almon's banking account and thereafter Saevitzon issued two cheques on behalf of Almon,

in ..... /152

in favour of Helsa; one was for R4,375 and the other for R7,000. These two cheques, totalling R11,375, were deposited for the credit of Helsa's bank account on 13th and 14th December 1963, respectively, and the total amount was once again credited by Saevitzon to his loan account in Helsa's books. The five Parity cheques in question were duly paid and Parity's account debited accordingly. It was at all times common cause and the evidence clearly established that R16,950 was thus stolen from Parity.

In regard to this theft, it was not said by Saevitzon that the matter was discussed with the appellant before the Parity cheques were issued. Saevitzoh's evidence was that he and Hill decided upon this course on their own initiative, without any prior consultation with the appellant, but he said that before the actual deposit of the money to the credit of Helsa's account on 13th December, he told the appellant what they had done and informed him that the money was to be paid into Helsa's account. According to Saevitzon, the appellant registered approval of the operation because he needed the money at that time. Once again, the appellant denied all knowledge

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of this theft, his contention being that this was yet another theft committed by Saevitzon who now wished falsely to implicate the appellant, to serve his own ends.

Here , as in the case of count 15, the money paid into Helsa's account was used for the benefit of the appellant. It will be remembered from what has been said in connection with count 15, that payments were made out of the proceeds of that theft to Pevsner, Associated Assessors, Robin and Goss, the last of those payments being on 10th December. After the deposit of the two cheques on 13th and 14th December, totalling R11,375, the following payments were made by Helsa to creditors of the appellant:-

On 13 December - R153.69 for rent of a flat.

On 17 December - R5,000 to Pevsner for shares.

On 17 December - A further payment of R3,500 to Goss, for legal fees.

After these payments had been made, Helsa had a credit balance in the bank of only R171-82, which demonstrates in the clearest terms that but for the infusion of the R11,375, the three

payments .;..... /154

payments could not have been made by Helsa without substantially overdrawing its account.

The argument advanced on behalf of appellant on this count followed the lines of the argument on count 15 and fails for substantially similar reasons to those stated previously herein. It is true, as Mr. Hanson pointed out, that there were material conflicts between Saevitzon and Hill as to the circumstances in which this theft was committed but we agree with the learned trial Judge that they have no real bearing on the question of the appellant's complicity which depends not so much on what Saevitzon or Hill said was discussed with appellant but on the fact that the admittedly stolen money was paid and used for the benefit of the appellant in circumstances which render it not reasonably possible that he was ignorant of the matter as he falsely claimed to have been. We agree with the Court a quo that the appellant was shown to have been a party to the theft and the appeal on this count must be dismissed.

Count...../155

Count 19.

It appears that two of the many agents appointed by Parity in various areas of the Republic for the purpose of handling third party insurance business and collecting premiums, were indebted to Parity in large amounts of money representing premiums collected by them but not accounted for to Parity. One of these agents was Mr. Lethaby, of Germiston, and the other Mr. Bower, of Cape Town. In February, 1964, Lethaby owed Parity more than R30,000 and Bower owed about R21,000.

Lethaby's accounts were in a chaotic state and Hill visited him in Germiston to try to discover what the true position was. Having satisfied himself that an amount of approximately R30,000 was owing and fearing that Lethaby might go insolvent, Hill reported back to Saevitzon, as a result of which they had a meeting with Lethaby. An amount of R8,000 was then paid by Lethaby and according to Saevitzon, he then sought the appellant's advice concerning what steps should be taken to recover the balance of about R22,000. The appellant, according to Saevitzon, was opposed to the

suggestion ..... /156

suggestion that Lethaby be sequestrated and advised Saevitzon to settle the matter with Lethaby on the basis of taking such assets as Lethaby had, in settlement of the debt. In due course a settlement was arrived at between Lethaby and Parity (represented by Saevitzon and Hill) in terms of which Lethaby undertook to pay R3,000 in cash, to deliver to Parity 3,333 shares in Parity Holdings, in due and transferable form, and to deliver to Parity two motor cars and a motor boat. Pursuant to that arrangement, Lethaby's attorneys, Messrs. Witkin and Nat Bregman, issued a cheque, dated 19th February, 1964, payable to Parity, for R3,000 and later delivered the shares, the motor cars and the motor boat. Saevitzon received the cheque for R3,000. He said in evidence that he informed the appellant of the receipt of the cheque and that appellant told him "not to deposit it" but to "just hold on to it".

Saevitzon had also entered into negotiations with Bower in order to obtain such payment as he could from him. As a result of those negotiations, a deed of settlement was concluded on 7th February, 1964, in terms of which

Bower ..... /157

Bower agreed to authorize his attorney, Mr. H. Goss of Johannesburg, to pay Parity R5,000 which Goss held in trust for Bower. Goss later paid R5,000 by cheque dated 21st February, 1964, which Saevitzon received on behalf of Parity. In this instance, too, Saevitzon said that he informed the appellant of the receipt of the cheque. In his evidence in chief, Saevitzon said no more than that, but under cross-examination he elaborated upon what he had said and, to an extent, vacillated. For example, he said in answer to cross-examining counsel that when he told the appellant of the receipt of the Lethaby cheque, he also mentioned that a cheque for R5,000 from Bower was still to come. He added that the appellant then suggested that they might use that money for Waghan. In his evidence in chief concerning the occasion of his telling the appellant about the Lethaby cheque, he certainly made no mention of the appellant's suggestion that the money be used for Waghan. Later in cross-examination, Saevitzon said that it was not on the first occasion that the appellant made that suggestion but in the course of some other conversation he had with him.

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Finally, he said that he could not remember whether the appellant told him also to "hold on to" the Bower cheque, though he never departed from his evidence that that was said to him with reference to the Lethaby cheque. We shall return to Saevitzon's evidence on these points at a later stage.

Whatever the position might be regarding the alleged conversations between Saevitzon and the appellant, it is clear that Saevitzon caused the two cheques to be paid into Parity's bank account and a cheque for the total amount of R8,000 to be issued by Parity in favour of Waghan. He accomplished this, apparently, by telling Swart, Parity's secretary, that the cheques for R3,000 and R5,000 had erroneously been made payable to Parity instead of to Waghan. Saevitzon then deposited Parity's cheque for R8,000 to the credit of Waghan's bank account. Swart testified that the two amounts of R3,000 and R5,000 which were paid into Parity's account were entered by him in Parity's books under an account styled "Cash in Banks", which he said was a special account used for "contra entries."

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It is common cause that the R8,000 paid by Lethaby and Bower was Parity's money and that Saevitzon, by causing that sum to be paid over to Waghan, stole R8,000 from Parity. As in all the counts falling within this group of offences, the issue is whether it was established that appellant was a party to the theft.

Although the appellant denied that he had any knowledge of the thefts or of the payment of the proceeds thereof for the credit of Waghan, he did not deny that he had knowledge of the debt owing to Parity by Bower. The appellant said, and Bower confirmed it, that he interviewed Bower in Cape Town and endeavoured to make arrangements with him for payment of what was due to Parity. Bower thought that that meeting took place towards the end of 1963, which would place it an appreciable time before Saevitzon came to terms with him in February. He said that appellant suggested that he settle the debt by paying fifty cents in the rand. He also said that appellant appeared to know that the amount owing was approximately R21,000. The appellant said that Saevitzon

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was present at that meeting; Bower did not corroborate him in that respect and Saevitzon denied that he was present on that occasion. The learned Judge a quo appeared to accept that Saevitzon was not present and concluded that when Saevitzon negotiated with Bower at a later stage he was ignorant of the appellant's previous discussion with him. It does not appear to us to be of much importance whether Saevitzon was present on that occasion for it has little bearing on the question whether he later told the appellant, as he said he did, that a cheque for R5,000 was expected from Bower. What is important in regard to the Cape Town meeting is that it reveals very clearly that the appellant was interested in the Bower debt and played an active part in trying to settle the matter. When that is borne in mind, it appears to be strange that the appellant should thereafter have lost interest in the matter and not inquired at all as to what had been achieved in ~~the way of obtaining some payment from Bower. Every probability~~ supports the conclusion that the appellant informed himself or was informed of the developments in connection with the

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claim against Bower and there appears to us to be no reason for doubting Saevitzon's evidence that he told the appellant that Bower was to pay R5,000. The Lethaby transaction is on a somewhat different footing, for there is no evidence to show that appellant personally busied himself with that matter and it is only Saevitzon who says directly that the appellant knew of the negotiations with Lethaby and was informed of the payment of R3,000.

In addition to the argument founded on the general unreliability of Saevitzon and the suspect nature of his evidence, counsel for the appellant contended that there were inherent improbabilities in his evidence on this count. He argued that it was extremely unlikely that appellant would have countenanced a direct transfer of money from Parity to Waghan because of the risk of detection which would be involved therein; and he also contended that appellant was not so foolish as to permit the payments due to Parity to be transferred to Waghan, while Parity's books would still reflect the debts of Lethaby and Bower as being unpaid. But ~~in~~ the evidence of

Bower .... /162

Bruwer, Parity's auditor, is that the debts of Lethaby and Bower were not reflected in Parity's books at the relevant time. This not only neutralizes the appellant's above contention but also indicates that if Saevitzon had been of a mind to appropriate the two cheques to his own use he could have done so in a manner otherwise than by causing a Parity cheque to be issued and payed into Waghan; and he could the more easily have done so if the appellant had no knowledge of the payments made by Lethaby and Bower. The manner in which Saevitzon dealt with the two cheques is consistent, rather than inconsistent, with his version that the appellant knew of them and was aware that the proceeds of the cheques had found their way into Waghan's bank account. The State's case that the appellant had full knowledge of the transaction and was not kept in the dark by Saevitzon also gains some support from a letter which Saevitzon addressed to the appellant on 28th February ~~That letter commences with the words "I list below the budget~~ I have worked out". There then follows a list of items calculated to show what the cash resources of Waghan would

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be at that time. Included in such list is an item "Cash in Waghan - R30,000". It was common cause that that referred to the amount then standing to the credit of Waghan's bank account and that the R30,000 included the R8,000 which had recently been paid in as a result of the Lethaby and Bower payments to Parity. The furnishing of such a budget tends to support Saevitzon's evidence that the appellant was at that time keenly interested in the state of Waghan's finances because he was concerned to raise sufficient money to increase Parity's capital in accordance with the requirement of the Registrar. It is true that the intimation that Waghan had R30,000 cash in the bank would not necessarily serve to inform the appellant that the R8,000 had been deposited; that would be a necessary inference only if it were shown that appellant kept a day to day check on Waghan's bank balance, which was not shown. But the budget furnished by Saevitzon certainly does not support any suggestion that he was concerned to mislead the appellant or to conceal the payment of R8,000; on the contrary it bears the mark of frank disclosure by Saevitzon of the true position.

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It must be appreciated that whether the appellant knew or did not know what the bank balance was a few days prior to 28th February, Saevitzon probably did not have certainty as to what the appellant knew in that regard.

A further factor which may properly be weighed in the scale against the appellant's assertion of ignorance of the deposit of R8,000 is that the witness, Benater, who carried out an investigation of Waghan's books during 1966, said that he questioned the appellant concerning the source of the R8,000 paid into Waghan's and received the reply that the money represented legal fees due by Parity to Waghan. This, of course, was not true. The appellant neither denied nor admitted that he had told Benater this. He said that he was unable to recollect clearly what he had told Benater. On appeal, it was argued on behalf of the appellant that if he did give that explanation to Benater, the appellant was probably confusing the R8,000 deposit with earlier payments made by Parity in connection with legal fees. Apart from this being a conjectural submission, it is unlikely that the appellant

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would have been confused in that regard. The occasion on which Parity transferred money to Waghan in respect of legal fees was very much earlier than February, 1964, and the amount paid for legal fees was not R8,000. It must be emphasized that the appellant himself did not claim that he was confused in that manner; he merely said that he could not remember what, if anything, he said to Benater. It is, of course, necessary to make due allowance for the lapse of time between the date of the deposit of R8,000 and the date of Benater's inquiry, but the fact that the appellant gave an explanation which was untrue may properly, and should, be taken into account, provided undue weight is not assigned to it. It is not irrelevant to observe that if the appellant was indeed uncertain at the time of Benater's inquiry what the reason for the payment of R8,000 was, one might have expected, if he was concerned to give an honest answer, that he would have told Benater that he did not know.

It is apparent, therefore, that this is not simply a case of a conflict between the unsupported implicatory

evidence .... /166

Lethaby to Parity and which were, after long delay, registered in the name of Helsa. It is not necessary to deal with that argument because it does not, in our judgment, even accepting that the criticism of Saevitzon's evidence in that regard is well-founded, detract in any way from the force of the considerations, dealt with above, which establish that the appellant had knowledge of the theft and of the deposit of the money in Waghan and was a party thereto.

The appeal on this count fails.

Count 20.

To describe the factual background to this count we cannot do better than to quote in full the introduction to it by Nicholas, J. The facts set out therein were common cause in this appeal.

"This count arises out of a fixed deposit of R105,000.00 made on the 7th March 1964 by Parity with National Savings. The State alleges that this payment was not a payment made upon the authority of Parity, but was a private payment made with intent to steal by the accused and Saevitzon acting with common purpose and in concert.

This payment was one of a series of inter-company payments which were made during the first seventeen days of March 1964, and which are depicted in a diagram submitted by the State (Diagram WH.23) a copy of which is Annexe "B" hereto. The State case is that this series of payments was devised by the accused in connection with the increase of Parity's share capital. (We here interpolate to repeat that at that time the authorised capital of Parity was 100,000 shares of

R2 each, all issued, but on which only R1 had been called up on each share, i.e. R100,000 had only been paid up. All these shares were directly or beneficially owned by Parity Holdings. The majority of the latter's shares, about 68%, were held by Waghan and Fraternitas which were controlled by the accused.)

The Registrar of Insurance had since the 23rd March 1962 been pressing Parity to increase its paid-up capital to R500,000, and as the months passed he became more and more exigent.

Between the months of March and June 1963, Parity realised a capital profit amounting to over R600,000.00 on the disposal of its share investments. On the strength of this profit, Parity made an issue of 400,000 bonus shares to Parity Holdings. If this issue had been valid, the difficulty regarding the increase in Parity's share capital would have been overcome. In their letter dated the 28th November 1963, however, Parity's auditors, Barton, Mayhew & Ryder (B.M.R.)

expressed the view that -

'... As a result of the loss which the company had sustained in its activities during the financial year under review, we are of the opinion the dividend which was paid by means of the issue of bonus shares, has been paid out of capital and is consequently not only ultra vires the powers of the directors in terms of the Articles of Association, but also the company and is therefore illegal. The payment of such dividend in our opinion constitutes an irregularity within the meaning of the Insurance Act and a material irregularity within the meaning of the Public Accountants and Auditors Act.'

In the same letter B.M.R. stated:

'If our conclusions as set out above are correct, and unfortunately we believe that they are, the company's liabilities as at 30th June, 1963 exceeded ..... /171

exceeded its assets at the date by R694,562.00 calculated as follows .....'

The accused agrees that he was aware at the time of the contents of this letter. He was also aware at the time of the contents of a letter by the Registrar to Parity dated the 12th December 1963 in which the Registrar stated:

"3. In view of the foregoing, I wish to inform you that the irregularities reported by the auditors are of such a serious nature that I have no alternative but to act in accordance with the provisions of Section 30 of the Act.

4. I therefore shall seek the consent of the Minister to apply to Court for an order in terms of paragraph (c) of sub-section (3) of Section 30".

(The reference was to Section 30(3)(c) of the Insurance Act, 1943, which empowers the Registrar of Insurance, with the consent of the Minister of Finance, to apply

to ..... /5172

to court for an order of judicial management or for a winding-up order of a registered company.).

The receipt of this letter was followed by an approach on behalf of Parity to the Minister, and, later, by a meeting with the Registrar of Insurance. At this meeting, agreement was reached on a number of matters as recorded in a letter dated the 6th January 1964 which Hanley, on behalf of Parity, wrote to the Registrar, namely -

a. The Registrar granted an extension of three weeks as from the 6th January, 1964 in order to enable three firms of accountants (the auditors B.M.R.; the consultant auditors, Van Zyl & Scheepers; and Clothier, Poole & Dreyer) to investigate the affairs of Parity and to report to the Registrar on the matters in question.

b. In order to cover what the Registrar considered might be a possible deterioration in Parity's

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affairs during this period of three weeks, Parity undertook to furnish an approved guarantee for the sum of R50,000.00, which was "to cover specifically the position of claimants in respect of accidents and resultant claims between the period commencing today and ending on the expiration of the three weeks granted".

c. Parity was to furnish a further guarantee to provide for 20% of the premium income of each new M.V.A. policy issued by the company during the period of three weeks.

d. The agreement was subject to the condition that if, at the expiration of the three weeks' period, the auditors' report showed that Parity was solvent, then both guarantees would ~~fall away and would be of no further force~~ and effect.

(In terms of paragraph (b) above, Parity

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Holdings furnished the guarantee for the sum of R50,000.00)

The joint report produced by the three firms of accountants was dated the 27th January 1964. In this report it was stated that Parity's assets were estimated to exceed its liabilities by R302,996.00. The accused admitted that he was fully aware of the terms of the joint report.

Of the surplus of assets over liabilities of R302,996.00, R100,000.00 represented share capital, and the remaining R202,996.00 constituted reserves.

On the 29th January 1969, there took place a meeting between representatives of the board of Parity Insurance Company Limited, representatives of the three firms of accountants who had submitted the joint report, and officials on the staff of the Registrar. At this meeting, agreement was reached inter alia on the following matters (I quote from a letter from the Registrar to Parity dated the 22nd February, 1964.) -

"(a) The paid-up capital of Parity will be increased by R200,000.00 before the

end of March, 1964 to bring the total paid-up capital of the company to R500,000.00;

(b) Before the 1st April, 1964 your company will increase its M.V.A. premiums to a rate at least equal to that charged by the tariff companies;

(c) If the conditions set forth in paragraphs (a) and (b) above are not complied with on or before the 31st March, 1964, your company will cease writing third party insurance business on the 1st April, 1964 ....'

Although paragraph (a) of the letter is obscure, it is common cause that it was envisaged that the increase of share capital to R500,000.00 would be effected in the following manner -

i. Existing share capital R100,000.00

ii. Capital reserves, (the R202,996.00 referred to above) which could be

utilised to issue bonus

shares, about R200,000.00

iii. Additional share capital

required, about R200,000.00

R500,000.00

It is clear that the controllers of Parity could not, until the meeting of the 29th January 1964, have known that the Registrar would permit Parity, subject to an increase in its share capital, to continue its existence. (By way of interpolation we emphasize that on the 29th January 1964 they knew that unless the additional capital was raised by the 31st March 1964, its business would have to cease and it would face liquidation).

On the 11th March 1964, the Parity auditors signed the balance sheet and accounts for the year ending 30th June, 1963. The figures contained in these documents were, however, known to the Parity management

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by the end of February or the beginning of March 1964. The figure reflected that Parity's assets exceeded its liabilities by an amount of only R269,308.80, which was made up as follows:

i.	Share Capital	R100,000.00
ii.	General Reserve	R100,000.00
iii.	General Investment Reserve	68,000.00
iv.	Profit & Loss Account	1,308.80
		R269,308.80

In consequence, there was now available for the issue of bonus shares not R200,000.00, as had been contemplated on the 29th January 1964, but only R169,308.80, and as a result a further amount of approximately R31,000 had to be budgeted for.

The probability is that the figures became known to the management of Parity only after the 28th February, 1964, since in Saevitzon's budget bearing that date (which is set out in the discussion of Count 19) there still appeared as an item for which

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provision had to be made: 'Capital increase R200,000.00".

On the 11th February 1964, Parity had resolved to increase its capital to R500,000.00 by calling up the balance of R1 each on the issued shares and issuing an additional 100,000 shares of R1. each out of the unissued capital. On the same date Parity Holdings resolved that it could find the necessary funds to meet the call of R1. per share on the shares already issued, and to take up the new issue of 100,000 shares at R1. each.

In the minutes of the board meeting of Parity held on the 3rd March 1964, the following appears:

"Bonus Shares

It was brought to the attention of the board by the chairman that the 400,000 bonus shares of R1. each issued to the holding company, Messrs. Parity Holdings, Limited, were issued erroneously and incorrectly. It was resolved that it be recommended to Parity Holdings Limited that these shares be cancelled.

IT WAS FURTHER RESOLVED that they be requested to sign a waiver of notice in order to call an exraordinary general meeting of shareholders to finalise this matter".

At the annual general meeting of Parity held on the 16th March 1964, the following resolution was passed:

"It was unanimously resolved that the unpaid amount of R1.00 on each of the 100,000 issued shares be called up. It was further resolved that 131,000 shares at R1.00 each be issued at par as fully paid out of the authorised share capital of the company. It was noted that Messrs. Parity Holdings Limited express their willingness to take up such issue. It was resolved that 169,000 bonus shares of R1.00 each be issued to Messrs. Parity Holdings Limited."

In the minutes of a meeting of the board of directors of Parity Holdings, held on the 5th May,

1964 the following appears:

"It was noted that R1.00 (one rand) per share on each of the 100,000 issued shares of Parity Insurance Company Limited have been called up and paid for amounting to R100,000.00 (one hundred thousand rand).

It was further noted that 131,000 shares of R1.00 (one rand) each have been issued by this company and were paid for by Parity Holdings Limited.

It was also noted that Parity Insurance Company Limited had issued 169,000 bonus shares of R1.00 (one rand) each to the holding company".

The accused admitted that he was a party to the decision in Parity to call up the unpaid portion of the issued capital and to issue the new capital, and that he was a party to the decision in Parity Holdings to meet the call on the issued shares and to

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take up the new issue.

In order to meet the call and to take up the the new issue of shares, Parity Holdings needed an amount of R231,000.00, less the R50,000.00 which would come back to it from the guarantee furnished by it to the Registrar. Parity Holdings did not have that amount of money at its disposal. Trans-Africa was indebted to Parity Holdings in a substantial amount arising out of the money advanced by Parity Holdings in connection with the compromise in Trans-Africa. But Trans-Africa did not have liquid assets with which to pay this indebtedness. Trans-Africa was, however, possessed of book debts and claims, and the accused conceived the idea of Trans-Africa selling these assets to National Savings. But there was a difficulty. National Savings did not have enough money to buy these assets from Trans-Africa. The transaction could not, therefore, take place unless National Savings could be placed in funds sufficient to pay for the book debts.

(The majority of the shares in Trans-Africa, we interpolate, were held by

Jackshare ..... /182

Tacshare which was controlled by the appellant who also thereby controlled Trans-Africa. Indeed its directors were his nominees. It owed Parity Holdings at this time approximately R291,793 in respect of the compromise with its creditors. National Savings was its wholly owned subsidiary. It was a sound registered banking institution.)

At the end of February 1964, the accused accordingly devised the scheme which is depicted in Diagram WH.23. It involved:

(a) A fixed deposit of R105,000 by Parity in National Savings.

(b) The payment by National Savings to Trans-Africa of R155,000.00 for the book debts.

(c) A payment by Trans-Africa to Parity Holdings of R165,000.00 in respect of Trans-Africa's ~~indebtedness~~ arising out of the compromise; and

(d) A payment of R181,000.00 by Parity Holdings ..... /183

ings to Parity in connection with the increase in Parity's share capital.

This scheme was duly implemented, and transfers of money took place as indicated on Annexe "B". The first payment was a payment of R105,000.00 by Parity to National Savings on the 7th March 1964, which was effected by Saevitzon, on the instructions of the accused, under cover of a letter in the following terms:-

"We have today remitted to you per telegraphic transfer through your bank, Barclays Bank D.C.O., Main Street, Port Elizabeth, the amount of R105,000 being:-

R35,000 fixed deposit for 12 months from date hereof, at 5% interest.

R35,000 fixed deposit for 24 months from date hereof, at 5½% interest, and

~~R35,000 fixed deposit for 36 months from~~ date hereof, at 5½% interest.

Would you be kind enough to let us have your fixed deposit receipts in due course."

This is the payment which is the subject-matter of the -

charge of theft in this count of the indictment."

At the outset it is necessary to consider certain aspects of the crime of theft that are relevant not only to this count but also to counts 21 and 27.

The fixed deposits of R105,000 were made by Saevitzon's withdrawing that amount by cheque from Parity's banking account and paying it in to National Savings. It was submitted on the appellant's behalf that the withdrawal of that money from Parity's account in one financial institution, where it was not earning interest, and the placing of it in Parity's name in another financial institution, where it did earn interest, was not "a deregation of any of Parity's rights". That includes a contention that there was no contrectatio of Parity's money. To that extent the submission, we think, is unsound. It is true that, according to S.v.Kotze 1965(1) S.A. 118 (A) at pp. 124H to 125A, Parity did not own the money in its banking account. (If the dicta of Fagan, C.J. in R.v.Herholdt & Others 1957 (3) S.A. 236 (A) at pp.257H to 258A can be construed as meaning the contrary, they must now be

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regarded as having been modified in the above respect by Kotze's case.) Nevertheless, the money in that account was under Parity's control and at its disposal, and it could protect that money against any unauthorised interference by a third party; Parity thus had a "special property or interest" in it (see Rex v. Von Elling 1945 A.D. 234 at p. 236); and the money could therefore justifiably be described as being in its "lawful possession" so as to found a charge of the theft of it (see Kotze's case at pp. 125H to 128A). It is not necessary to say whether or not that right of Parity was a real or quasi-real right (cf. Herholdt's case, supra). Now in Kotze's case it was held that the withdrawal of money from a principal's bank account by a cheque drawn by his agent which is then paid to a third party for the agent's own purposes constituted a contrectatio. Does it make any difference if, as in the present case, the cheque is paid to a third party for the credit of the principal as a fixed deposit? We do not think so. For the purposes of the contrectatio issue, the essence of both transactions is

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the same; the removal of the money from the principal's possession. That the third party to whom the money is transferred is obliged by contract or otherwise and intends to repay the amount of the money is irrelevant to this issue. Thus in Rex v. Milne & Erleigh (7) 1951 (1) S.A. 791 (A) - count 12, involving the Rooderand Company - and R. v. Herholdt, supra, relating to counts 8 and 9, the simplified facts were that in each case the money was extracted from the principal's banking account by cheque drawn by its agents and lent in the principal's name to a third party who was obliged by contract to repay the principal. In the former case the majority of this Court (Centlivres, C.J., and Greenberg, J.A.) assumed, and in a minority judgment Schreiner, J.A. held, that that constituted a contrectatio (see pp. 833 and 865). In Herholdt's case this Court must have reached by implication a similar conclusion for the convictions for theft on those counts were upheld. In S. v. Kotze, supra, (pp.126/7) this Court quoted those conclusions with approval.

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Consequently, in our view the withdrawal of R105,000 by Saevitzon from Parity and the placing of it on fixed deposit with National Savings did constitute a contrectatio of Parity's money.

Was that contrectatio unauthorised, as the Court a quo found?

Parity, in the ordinary course of its business as an insurer of motor vehicles, was entitled and obliged to invest its substantial surplus funds from time to time, inter alia, by way of fixed deposits at interest with suitable financial institutions. That method of investment was approved by the Registrar. It appears from the minutes of meetings of Parity's board of directors held in 1963 that the practice was for the management of Parity to make such investments from time to time without prior authority from the board and to report such investments to the board at its next meeting when they were "tabled, noted and accepted." A number of such investments are recorded in the minutes for 1963, varying in amounts from R45,000 to R300,000, in periods from 3 to 29 months, and in interest rates from 3% to 5½%, but

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mostly at 5%. Indeed, that practice was expressly approved by the board at its meeting of 28 May 1963 at which it resolved that "the Board has no objection to the management of this company making investments at the best possible rates, provided that Fixed Deposits are made with Approved Deposit Receiving Institutions, as approved by the Registrar of Insurance, and that moneys be placed 'on call' pending such Fixed Deposits." Parity must have continued investing its surplus moneys on fixed deposit at interest during 1964 in the course of carrying on its ordinary business. The minutes for that year, however, do not record any confirmation of such investments. Presumably, they were left entirely in the hands of the management. Who "the management" of Parity was for that purpose is not clear. Hanley, its chairman and managing director, withdrew from administering its business at the beginning of that year and formally resigned on 2nd March 1964 when his interest in Parity was bought out for the appellant. Goldberg was appointed chairman, but no one was formally appointed managing director in Hanley's place.

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A management committee, comprising the heads of the various departments, was inaugurated on 26 February 1964 with Saevitzon as chairman. Indeed, the board appointed the latter as chief administrator of Parity, but it is not clear what his precise duties were. They probably were those of a general manager. The management committee was probably not concerned with its investments but, as its composition suggests, merely with its ordinary day to day administration. As previously stated, although the appellant held no formal, official position in Parity, he was virtually in complete control of it, and with the acquiescence of the board of directors, he actually exercised such control over its affairs. Therefore, contrary to Mr. Hanson's submission, it is safe to infer that after Hanley left, the appellant succeeded him as the de facto managing director of Parity.

Consequently, in the absence of any evidence to the contrary, the onus of proof being on the State, we must accept that in 1964 the appellant, as de facto managing director, and Saevitzon, as chief administrator of Parity, had

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authority in the ordinary course of managing its business to make fixed deposits of that kind on its behalf at the best possible rates of interest with deposit receiving institutions approved by the Registrar of Insurance in terms of the board's resolution of the 28 May 1963.

Now National Savings was a sound, registered deposit receiving institution, which was approved of by the Registrar, and whose rates of interest were not less than the prevailing rates. The contrary was not contended. Notwithstanding that, did the appellant's and Saevitzon's above mandate authorise them to make the particular fixed deposits of R105,000 with National Savings? That question arises because the State submitted that the series of transactions starting with those deposits had to be considered as a whole; so considered, it was only the board of directors and not the appellant or Saevitzon who could authorise them, for they were not normal deposits being made in the ordinary course of Parity's business; and in any event they were made mainly for the benefit of the appellant and not of Parity. In regard to

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the last submission, it is clear law that, in the absence of anything to the contrary in an agent's mandate, he is obliged to act for the benefit of his principal; hence, if he acts for the benefit of himself or someone else, then even though the act falls within the scope of his mandate, it is nevertheless unauthorised (see Rex v. Milne & Erleigh (7) 1951 (1) S.A. 791 (A) at p. 828 D-E; R. v. Herholdt & Others 1957 (3) S.A. 236 (A) at p. 258 D-G). The meaning and effect of that legal principle is, we think, really this: the agent's authority and hence his duty is to act solely for the benefit of his principal. For if he were allowed to act for the principal's and also his own or another's benefit, situations could easily arise in which his duty to his principal might conflict with his interest to serve himself or the other person; and it is the policy of the law, in sustaining the fiduciary relationship between the parties, to avoid and not to encourage or facilitate such situations. Hence, unless otherwise agreed, the agent is not authorised so to act (see S. v. Kotze, supra, at p. 127 G). That his principal is not prejudiced by his so

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acting is irrelevant; the position simply is that the agent's act falls outside the ambit of what his principal bargained for. Story on Agency, 9th Edition, sums up that position lucidly in section 210 by saying:

> "This rule (that agents cannot bind their principals where they have an adverse interest in themselves) is founded upon the plain and obvious consideration, that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may; and, even if impartiality could possibly be presumed on the part of an agent, where his own interests were concerned, that is not what the principal bargains for ....."(Our italics).

On the other hand, the fact that the agent or a third person also derives a benefit from the agent's act

does ..... /193

does not necessarily mean that his act is unauthorised, for apart from cases where that is actually within the parties' agreement, it might be merely an inevitable or incidental consequence of the agent's duly performing his mandate with the sole intention of benefiting his principal. To take a simple but apposite example: that a managing director of a company also derives an advantage as a shareholder thereof from a transaction which he duly carries on on its behalf and for its benefit obviously would not render his act unauthorised.

Now we shall assume that it is correct, as the State submitted, that for the purposes of this count the series of transactions, starting with the fixed deposits by Parity and ending with Parity Holdings' providing the increase in capital required by Parity, should be viewed as a whole. So viewed, we think that these transactions were devised and ordered by the appellant for the benefit of Parity, and that Saevitzon, who was fully aware of the reasons for the scheme, made the fixed deposits on Parity's behalf with that intention.

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In that regard it will be recalled from the above recital of the facts from the judgment of the Court a quo , that, on the Registrar's insistence, Parity had undertaken at the meeting on 29 January 1964 to increase its capital to R500,000 by 31 March, failing which it would cease business. Goldberg, who attended that meeting and became chairman of Parity during February 1964, testified that he had no doubt that the Registrar's requirements had to be complied with. Consequently, unless Parity could raise an additional R181,000 (that being the balance of the amount it ultimately required), within the comparatively short period of two months, it would have been in serious difficulty. Not only would it have been precluded from participating in the annual campaign for selling compulsory third party insurance, which was about to commence, but worse, it would have faced liquidation. At that stage liquidation would not have been in the interest of its shareholder, creditors, or policy holders, for its assets exceeded its liabilities by over R200,000. The scheme was therefore devised and carried out to provide Parity with the additional

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capital within that brief period and to eliminate those difficulties. It achieved that object. In due course, too, as contemplated by the scheme, National Savings repaid the R105,000 with the stipulated interest. The whole scheme was therefore manifestly for both the immediate and the ultimate benefit of Parity. That is what the appellant, in effect, maintained in his testimony, and, despite the fact that he was generally wanting in credibility, that part of his testimony should have been accepted as being true.

The learned trial Judge, however, found to the contrary. He said:

> "It is clear that this was a payment made in the interests of the accused. If it had not been made, Parity would not, after the end of March, have been able to continue in business."

It is true that Parity Holdings and the appellant, through his substantial interest in Parity Holdings, also derived an advantage from the scheme as a result of Parity's having been rescued from its difficulties and Parity Holdings'

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preserving its sole shareholding in Parity intact. Although that, of course, was also contemplated by the appellant and Saevitzon, it was merely an incidental or consequential advantage which flowed from implementing the scheme to save Parity; in other words, it was the kind of benefit that is usually derived by an owner of shares from a transaction duly devised and carried out to benefit the company in which the shares are held. With respect we therefore think that the above finding was erroneous.

To revert to the question of the appellant's and Saevitzon's authority to make the fixed deposits on Parity's behalf. The relevant facts are as follows: that on 11 February 1964 Parity's directors had resolved to have its share capital increased as required by the Registrar; that they knew that the directors of Parity Holdings' on the same day had resolved to provide it with such additional capital; that the appellant and Saevitzon had authority ordinarily to make fixed deposits on Parity's behalf and solely for its benefit; that the amount of R105,000 was within the ordinary range of fixed deposits that Parity was accustomed to make; and that the

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making of these fixed deposits with National Savings was to earn interest and ultimately provide the additional capital for the benefit of Parity. In those circumstances we are inclined to think that the making of those deposits did fall within the appellant's and Saevitzon's abovementioned authority. But we are prepared to assume the contrary, that is, that a resolution of the board of directors was necessary, as the Court a quo found, since the deposits, if looked at in the context of the whole scheme, were unusual.

We turn therefore to consider the other requisite of the crime of theft, the subjective element. The inquiry here is whether the State proved that the unauthorised contrectatio was carried out with intent to steal the R105,000 from Parity. According to R. v. Sibiya 1955 (4) S.A. 247 (A) at p.257C the intention to steal comprises (a) an intention "to terminate the owner's enjoyment of his rights or, in other words, to deprive him of the whole benefit of his ownership", and (b) the absence of a belief that the owner had consented or would have consented to such a termination or deprivation. In

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relation to consumables like money, (a) has been explained to mean an intention to consume the money taken, even if the intention is to return other monay in its place (Rex v. Milne & Erleigh (7) 1951 (1) S.A. 791 (A) at p. 865 E to H; R. v. Herholdt & Others 1957 (3) S.A. 236 (A) at pp 257 H to 258 A). In relation to a company, (b) has been explained to mean that, where the taker is its agent, he did not believe (i) that he had the necessary authority to take the thing and (ii) that the person or persons (such as the directors) having the authority to consent thereto, being fully informed of the facts and acting honestly, would have authorised or ratified his ~~act~~ act (R. v. Milne & Erleigh at pp. 830A to B and E, 865H; R. v. Herholdt & Others at pp. 257 E to F, 258A to 259A).

Adverting for a moment to (a) again - the intention to consume money. That intention maybe equated with the intention to deprive the owner of the whole benefit of his ownership of the money because the latter intention in usually inferable from the former. (As a result of S. v. Kotze, supra, "the whole benefit of his ownership of the money"

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in regard to money in a banking account must be taken to mean "the whole benefit of his 'possession' of the money".) But that inference will not necessarily or invariably be drawn. After all, the question whether or not such a deprivation was intended is essentially one of fact, and the facts of a particular case may show that, although the money was taken for consumption, the taker did not intend thereby to deprive the owner of the whole benefit of his possession of the money.

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To put it another way, in common parlance and common sense the taker did not intend to steal the money nor should he be stigmatised as a thief (see R. v. Sabiya 1955 (4) S.A. 247 (A) at p. 257A to B read with p. 251H).

To return to the facts of count 20. That Parity had the R105,000 available for investment at the time must be accepted. In the absence of any evidence to the contrary it must also be assumed in appellant's favour that Parity, in the ordinary course of its business, would have invested that sum in any event on fixed deposit. Quite possibly that would have been done with National Savings, for the latter was a sound and approved institution, its interest rates were favourable, and it was in the same group of companies as Parity. Indeed, Goldberg, the chairman of Parity, said that at the time he would have encouraged Parity to invest in National Savings. Therefore, by placing the R105,000 on fixed deposit in Parity's name with National Savings, the appellant and Saevitzon merely did what they knew Parity could and would be doing in any event in the ordinary course of its business. Consequently,

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in the circumstances of this case, the first requisite of the intention to steal was not proved to be present, that is, that they thereby intended to deprive Parity of the whole benefit of its possession of the R105,000. Nor was the second requisite proved to be present. Having regard to the positions and functions of the appellant and Saevitzon in Parity, the practice of Parity's making fixed deposits in the ordinary course of its business, and the immediate and ultimate benefit to Parity from making these particular fixed deposits, we do not think that the State proved an absence of belief by the appellant and Saevitzon that they had the necessary authority to make them. They might well have had that belief. It is true that the appellant testified that at the time he thought a directors' resolution was necessary. But his evidence, generally and on this particular aspect, was so unsatisfactory that it is very doubtful whether he did entertain any such a thought, especially being the autocrat in conducting Parity's affairs that he was. If, however, that piece of his testimony is to be accepted, as counsel for the State maintained it should be, there is no reason why his further evidence on this aspect

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should not also be accepted as being possibly true. The effect of that evidence was that he left it to Saevitzon to get the necessary resolution and he was confident the directors would pass it, for the whole scheme was to save Parity from liquidation. For the reasons given above we think that such confidence would have been justified: the board, if fully informed of the whole scheme and acting honestly, would have been in duty bound to approve of the scheme and to authorise or ratify the fixed deposits. In that respect we are constrained to differ from the view of the learned trial Judge to the contrary.

Counsel for the State maintained that the whole scheme was devised for the benefit of the appellant, that neither he nor Saevitzon could have believed that they were authorised to carry it out, and that no honest, fully informed board of directors would have approved it. The reasons submitted were as follows: (1) That the whole scheme contravened or possibly contravened section 86 bis of the Companies' Act, No.46 of 1926, as amended; (2) that it was contrary to the views expressed by the Registrar about the manner of increasing

Parity's ...../203

Parity's capital; (3) that the additional capital could have been raised by some other method that conformed with the Registrar's views and did not contravene section 86 bis; and (4) that such method would inevitably have meant the dilution of the sole shareholding of Parity Holdings in Parity and was avoided solely because that would have prejudiced the substantial interest of the appellant in Parity Holdings.

As to (1), the relevant part of sub-section (2)of section 86 bis provides:

> "No company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in any company to which it is subsidiary: Provided that nothing in this section shall be taken to prohibit -
>
> (a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;"

For the appellant it was contended that section 86 bis (2) was inapplicable for these reasons:

(a) The giving of "financial assistance" does not include a payment made for the purchase of goods under a bona fide contract of sale or a payment made on account of a debt that is due and payable (see Gradwell (Pty.) Ltd. v. Rostra Printers Ltd. and Another 1959(4) S.A. 419 (A)). Hence, as the R105,000 deposited with National Savings was intended to be used for the purchase of Trans-Africa's book debts and then for the part-payment of Trans-Africa's debt to Parity Holdings, it did not constitute the giving of "financial assistance".

(b) The giving of "financial assistance" for paying calls made on shares was not hit by the sub-section; its operation was confined to such assistance for purchasing or subscribing for shares. Of the R231,000 additional capital required by Parity, R100,000 was for calls on shares. Of the R105,000 deposited with National Savings less than R100,000 was used by Parity Holdings in paying Parity the R181,000, and that amount must be regarded as having been used solely for

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paying the calls.

(c) That the making of fixed deposits fall within the scope of the expression "the lending of money" in proviso (a) to the sub-section (see for example, Voet 16.3.1., Gane, Vol. 3 pp. 174/5), that the making of such deposits by Parity was thus part of the ordinary business of Parity, and that the R105,000 was deposited with National Savings in the ordinary course of its business, a fortiori because it was done to solve Parity's problems about raising the additional capital.

Counsel for the State joined issue on those contentions. We need not express any final views on them. It suffices to say that we think that there is substance in them. The applicability of section 86 bis (2) to the scheme is therefore doubtful. The appellant testified that, because of senior counsel's opinion given on section 86 bis in a previous, somewhat similar matter, he thought the section did not apply to his scheme. He and Saevitzon could honestly have believed that, and so could a fully informed board of directors.

As to the contention for the State in (2) - the views of the Registrar. The views relied on were contained in a letter written by the Registrar to Parity on 15th February 1963 requesting it to increase its capital. It said: "This increase must be effected by the injection of additional risk capital which must be obtained on the open market. Under no circumstances may the funds of Parity or for that matter the available assets of any other financial institution with which Parity is associated, be used to effect the required increase."

The Registrar gave evidence explaining that passage in his letter. If his letter and evidence mean anything more than that section 86 bis should not be contravened, it is difficult to understand what precisely that something more was. However, by 29 January 1964, when the Registrar finally insisted on the increase in capital, circumstances had substantially changed, for Parity Holdings had been publicly floated and had acquired all Parity's shares. It is most significant, as Mr. Hanson pointed out, that the Registrar, with knowledge of that new situation, did not then repeat his previous caveat

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COUNT.	DATE OF DEPOSIT.	AMOUNT OF DEPOSIT.	DATE OF MATURITY.
-	27th August 1962	R50,000	28th August 1964
7	1st April 1963	100, 000	27th March 1965
7	19th April 1963	60,000	19th April 1964
11	20th July 1963	30,000	20th July 1964
11	20th July 1963	40,000	20th July 1964
11	6th August 1963	25,000	6th August 1964
		R305,000	

(We add that the accused was acquitted on all those counts.)

At this time, the accused was in need of further funds. In terms of the Conisby Contract, Trans-Africa was to have discounted the bill for R50,000. 00. (We interpolate here to clarify that under the Conisby Contract, concluded in writing on 2 March 1964, Hanley sold his half interest in Waghan to the accused in the name of Fraternitas for R50,000 for which a bill was given. Trans-Africa undertook to discount this bill. Waghan thus became the accused's Company through Helsa and Fraternitas). In the event, this was not done. Waghan itself

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paid the amount of R50,000 to Hanley's attorney on the 17th March 1964. The due date for repayment of Waghan's loan of R50,000 from Trans-Drakensberg was the 22nd March 1964. Because it was impossible for Waghan to pay both the R50,000.00 to Hanley's attorney and the R50,000.00 to Trans-Drakensberg, the accused entered into negotiations with Trans-Drakensberg with a view to obtaining a solution to this problem.

On the 9th March 1964, there took place in Durban a meeting which was referred to in the indictment as "the Durban meeting", and which was attended by the accused and Saevitzon on the one side, and Edelson, van Tonder and von Falkenhauser on behalf of Trans-Drakensberg on the other. At this meeting an arrangement was reached which was referred to in the indictment as "the Heller/Trans-Drakensberg arrangement". The main points were as follows:

(a) ..... /212

(a) Waghan and Helsa would jointly and in their own names take over the four loans totalling R105, 000.00 mentioned in the first table above;

(b) Trans-Drakensberg would advance a further R45,000.00 to Waghan and Helsa jointly. The total indebtedness of Waghan and Helsa to Trans-Drakensberg would thus be increased to R105,000 .00, of which Waghan and Helsa undertook each to be liable for R75,000.00;

(c) The R75,000.00 owing by Helsa to Trans-Drakensberg would be repayable on the 22nd September, 1965 and the R75,000.00 owing by Waghan to Trans-Drakensberg would be repayable on the 22nd December, 1965.

(d) Parity would extend the maturity dates of its fixed deposits totalling R305,000.00 with Trans-Drakensberg for a further period of two years from their respective dates of maturity.

(e) Parity would invest a further sum of R45,000.00 by way of fixed deposit with Trans-Drakensberg for a period of two years.

According-

According to Saevitzon, the accused told him before the 9th March 1964 that he had discussions with Edelson, and that Edelson had told him that Trans-Drakensberg could undertake to do the deal. When they went to Durban, therefore, Saevitzon took the Parity cheque for R45,000.00 with them and gave it to Edelson on the 9th March. The accused agreed that there must have been a prior telephone discussion, because otherwise they would not have taken the cheque with them."

Other relevant facts that were found by the Court a quo or established by the evidence were:-

(a) The cheque was drawn on Parity's banking account and duly paid.

(b) The fixed deposit of R45,000 was for 24 months at interest of 5½% per annum.

(c) The fixed deposit and the loan of R45,000 to Waghan and Helsa were independent in the sense that unless the fixed deposit was made with Trans-Drakensberg it would not make the loan to Waghan and Helsa. The transaction must therefore

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be looked at as a whole. It should, however, be emphasized here that the repayment to Parity of the fixed deposit on due date did not depend in any way upon the repayment by Waghan and Helsa of the loan.

(d) The fixed deposit was not authorised by the directors of Parity, nor did it fall within the authority of the appellant, as de facto managing director, or Saevitzon, as chief administrator, of Parity, since it was made mainly for the benefit of the appellant and only incidentally for the benefit of Parity (see count 20).

We are also prepared to assume in favour of the State that the appellant and Saevitzon could not have believed that they had the necessary authority or that Parity's board of directors, if fully informed of the whole transaction and acting honestly, would have approved or ratified it.

The only remaining issue is whether the State proved the first requisite of the intention to steal mentioned in count 20. The narrow inquiry is, Did the appellant intend to deprive Parity of the whole benefit of its possession of the

R45,000?

Again, as in count 20, it is clear that Parity had the R45,000 available for investment and it must be assumed, in the absence of any evidence to the contrary, that it would have placed it on fixed deposit. The amount was well within the range of its usual fixed deposits. Possibly, too, Parity might have placed that amount on fixed deposit with Trans-Drakensberg in any event in the ordinary course of its business, for the latter was a sound and approved financial institution, its interest rates were favourable, and Parity had previously made such deposits with it from time to time, totalling R305,000. It is true that a string was attached to the fixed deposit for the appellant's benefit: Trans-Drakensberg had to lend an equal amount to Waghan and Helsa. But that would not prove an intention to steal if such intention were otherwise absent. The important thing is that no string was attached to the repayment of the fixed deposit on its maturity.

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In that sense it was an ordinary fixed deposit. Consequently, in the respect presently under inquiry, it did not differ from those fixed deposits considered in count 20. For the reasons there given we do not think that the State proved that the appellant intended to deprive Parity of the whole benefit of its possession of the R45,000.

The appeal therefore succeeds on count 21. The conviction and sentence are set aside.

Count...../217

Count 23.

The salient facts relevant to this count are as follows:

1. Prior to the events presently to be related Parity conducted branch offices at various places in the Republic, and in particular at Johannesburg, Pretoria, Germiston, East London, and in the Eastern Province and Orange Free State. Parity's premium moneys, collected on its behalf by each of those branch offices, were banked daily to Parity's credit with a branch of the Standard Bank.

2. Before March 1964 the appellant conceived a scheme of forming separate companies to take over the above branch offices as agents of Parity. These companies were referred to as "the agency companies". As an entity, separate from Parity, each company would be entitled to collect Parity's premium moneys at the branch and pay them into its own bank account, subject, of course, to a duty to account in due course to Parity for them

3. The main reason for the scheme was to provide

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the appellant with an income from Parity. Despite his substantial interest in Parity he could derive no income from it, since the Registrar had prohibited it from paying any dividends. The appellant was therefore to be the main beneficiary of the profits made by each agency company. In addition he would get control, temporarily at any rate, of the large sums of money deposited in each company's banking account. The appellant maintained that the scheme would, or that he thought it would, benefit Parity too in certain respects. He said that it would peg each branch's expenses at 15% of the premiums received, being the amount of its commission, and that would assist Parity to reduce its own expenses to within 18% of its premium income, which the Registrar had directed it to achieve within two years. The Court a quo rejected that evidence. It held that there was no advantage to Parity in the scheme at all and none could have been contemplated; it was solely for the benefit of the appellant. That issue need not be entered upon in this appeal for reasons that will presently emerge.

4. On the appellant's instructions six agency companies .... /219

companies were formed between 2 and 17 March 1964. The seventh, for the East London branch, was formed on 20 May 1964. Each took over its particular branch office and went into operation. Thus, the company named Parity Agencies (Johannesburg) (Proprietary) Limited took over the Johannesburg branch office, and so on. Each agency company

(i) had a share capital of R100 of 100 shares of R1 each of which the appellant beneficially owned 74% and Parity Holdings (in which the appellant through Waghan held about 70% of the shares) the remaining 26%;

(ii) took over the branch office's premises, the staff of Parity working there, and its office furniture and equipment;

(iii) commenced and continued collecting Parity's premium moneys at the branch concerned and paying them into a banking account opened in its name in the Volkskas bank.

5. The total amount of such moneys received and banked by the agency companies up to 9 September 1964 was R3,152,542.

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Of that amount R507,207 was proved to have been so deposited by 30 April 1964.

6. On 30 April 1964 a meeting of the Parity board of directors, under the chairmanship of Goldberg, resolved "that the various Parity Agencies Companies be and are hereby authorised to endorse over to themselves all cheques made payable to Parity Insurance Company Limited". By that time the six agency companies had been operating for at least six weeks. Goldberg, whose evidence was accepted by the Court a quo said: "This resolution is merely to facilitate the taking over by the Agencies, and the endorsement by the Agencies of cheques that may have come in payable to the branches which were there before the existence of the Agencies. To me this was a routine matter."

7. During March to August 1964 amounts totalling R129,193 were paid out of the premium moneys collected by the agency companies to various persons, including R55,000 to Helsa and R20,000 to Waghan. The State alleged that these payments were made for the personal and private interests of the appellant,

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Saevitzon, Hill, Helsa, Waghan, and Consolidated Pharmacies (a company controlled by the appellant). The appellant admitted the payments to Helsa and Waghan; he said that they were loans; he denied all knowledge of the others.

8. Ultimately, on 9 September 1964, at the insistence of Parity's auditors, Parity took over all the shares of the agency companies.

Arising out of those facts the appellant was charged with the theft of the R3,152,542 mentioned in paragraph 5 above. Because of the main argument for the appellant the precise terms of the indictment are of importance. The relevant parts read as follows:-

"(M) AND WHEREAS -

As from the respective dates of incorporation of the AGENCY COMPANIES :-

(1) At the instance of the ACCUSED, SAEVITZON (acting with common purpose and in concert with HILL and BOTHA) instructed the Parity employees to cause the Parity premium money collected at the Parity branch offices in the said towns to be deposited daily to

the .... /222

the credit of the AGENCY COMPANIES at the banking accounts (hereinafter called "the Agency Companies banking accounts") of the AGENCY COMPANIES in the said towns at the different Bank branches respectively set forth in the fifth column of Table B;

and

(2) In execution of the instructions described in (1) above, and until or about the 9th September 1964, Parity premium money in the sums respectively set forth in the sixth column of Table B and totalling R3,152,542-03 (herein after called "the said amount of R3,152,542-03"), was deposited to the credit of the AGENCY COMPANIES at the Agency Companies banking accounts;

(N) - - - - - - — — — — —

(O) AND WHEREAS -

(1) The deposits of Parity premium money in the said amount of R3,152,542-03 to the credit of the AGENCY COMPANIES during or about the period the 2nd March 1964 to the 9th September 1964, and

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in the manner described in paragraph (M) above, constituted private payments made by the ACCUSED, SAEVITZON, HILL and BOTHA (acting with common purpose and in concert), and were not payments made upon the authority of PARITY;

and,

(2) The ACCUSED, SAEVITZON, HILL and BOTHA (acting with common purpose and in concert) caused the said deposits of Parity premium money in the said amount of R3,152,542-03 to be made with the intention to steal;

(P) NOW THEREFORE -

During or about the period the 2nd March 1964 to the 9th September 1964, ...;.... the ACCUSED, SAEVITZON, HILL and BOTHA (acting with common purpose and in concert) did wrongfully and unlawfully steal money in the said amount of R3,152,542-03, the property of PARITY, in the lawful possession and control of PARITY, and did appropriate and convert the said amount of R3,152,542-03 to the use and benefit of the ACCUSED, SAEVITZON, HILL, the AGENCY

It is therefore clear that the gravamen of the offence alleged in the indictment was theft, committed by diverting Parity's premium moneys from the branch offices to the agency companies' banking accounts without the authority of Parity. The State had thus to prove, first and foremost, that Parity had not consented to or authorised the conversion scheme. That is how the learned trial Judge understood the indictment too. He found the appellant guilty of stealing R507,207 only, the reason being the resolution passed by Parity's board of directors on 30 April 1964 - see paragraphs 5 and 6 above. In that regard Nicholas, J., said:

> " There is nothing in the evidence to show that the passing of the resolution was procured by any fraud for which the accused was responsible. No such fraud is alleged in the indictment and there has been no investigation of the question. The resolution was prima facie valid, and I think that it constituted an authority to the agency companies to deal with Parity cheques

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according to its terms. In regard to such dealings, I am of the opinion that no theft was committed.

The resolution could not, of course, affect the criminal nature of acts which were committed before it was passed. It is common cause that up to the 30th April 1964, the total of the premium moneys deposited in the bank accounts of (the agency companies) was R507,207.07. ..... In regard to at any rate R507,207.07 of that money, there was no authority from Parity, and the accused knew it. He accordingly had an intention to steal that money, even though it was his intention at a later stage to hand all of it (less 15%) over to Parity."

Now it is true that prior to 30 April 1964 there was no formal resolution of Parity's board of directors authorising the conversion scheme. But the evidence established that the project was much discussed between the appellant and the officials and directors of Parity; and it is a reasonable inference from all the State evidence that the directors

agreed ... /226

agreed to the conversion scheme. For example, Saevitzon said "the formation of these agency companies was discussed virtually with just about all members of the Board" and that he thought he or Hill had prepared a memorandum on the scheme in order to justify its implementation to Goldberg and the auditors. Goldberg confirmed that he was given such a memorandum. He said: "After the crises .... I discussed ways and means of saving money with Mr. Hanley, with Mr. Saevitzon, with my co-directors, with the Accused, with certain members of the staff ... I was given a Memorandum ..... which dealt with the saving which would eventuate if the branches of Parity in other centres were converted to agencies". Although he did not say so expressly, it was accepted by the State in leading his evidence that he did consent to the conversion scheme, as the following extract shows:

> "Now ..... would you have consented to this idea of converting the branch offices into Agency Companies if you had known that Parity would not be the beneficial owner of the issued shares of these private companies? - No, M'Lord."

The appellant, too, said that he discussed the scheme with Goldberg and the other directors. They were all "very much in favour"of it. By that he meant that they agreed to the scheme, for he then gave Hill and others instructions to form the agency companies expeditiously. The urgency was the imminence of the 1964 campaign for selling third party insurance. The appellant expected, he said, that the board of directors would in due course pass a resolution approving the scheme and authorising the conversion. His evidence in those respects did not conflict with that for the State. In fact the agency companies were formed and went into operation apparently without objection from the directors. The learned trial Judge himself observed: "the Parity board of directors was aware of the formation of the agency companies" and was aware that "the branches of Parity were now operating under the names of agency companies". The testimony of the appellant was therefore supported by the State's evidence that Parity's directors did assent to the conversion scheme from its inception.

The Court a quo, and the State in this Court,

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relied on the absence of a formal resolution of Parity's board of directors authorising the conversion. If a formal resolution was necessary to confirm the informal assent of the directors, the one passed on 30 April 1964 (see paragraph 6 above) served that purpose. By then six of the agency companies had been operating for at least six weeks and the board must have been aware of that; indeed, the very terms of the resolution seem to assume that they had been established and were operating under the scheme; consequently, by passing the resolution the board must be taken to have formally ratified the conversion scheme from its inception.

A necessary concomitant of the agency companies operating as separate entities was that each would have its own banking account into which Parity's premium moneys would be paid. This was the essence of the scheme and was one of the main differences between conducting a branch office and running an agency company. Parity's directors must have known that; there is no evidence that they did not. By passing that resolution therefore they must also be taken to have formally

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ratified that procedure from its inception. Indeed, that the resolution was passed routinely and merely to facilitate the conversion strongly suggests that they were not only sanctioning the procedure for the future but confirming it for the past.

The learned trial Judge, however , said: "The resolution could not, of course, affect the criminal nature of acts which were committed before it was passed". That was based on a finding that prior to 30 April 1964 no authority whatsoever existed for the diversion of Parity's premium moneys into the agency companies. Without deciding whether or not an act originally theftuous can be rendered innocent by subsequent ratification, we point out that in this case the previous informal assent of Parity's directors to the conversion cannot be ignored. It is true that the assent of directors should ordinarily be expressed formally in a resolution duly minuted. But an informal assent is sometimes regarded as effective in certain circumstances (compare, for example, C.I.R. v. ~~Rechnin~~ Richmana and Estates (Pty.) Ltd. 1956 (1) S.A. 602 (A) at p. 606 D to H; Robinson v. Randfontein Estates Gold Mining

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Company Ltd. 1924 A.D. 168 at pp.181, 217/8; in re Knight's Case (1867) 2 Ch. App. 321 at p. 327). Here the informal assent was sufficiently effective either to operate per se as authority for the diversion of Parity's premium moneys or to be subsequently ratified with retrospective effect, which is what the resolution of 30 April did.

In our view, therefore, the State did not prove that Parity did not authorise the diversion of its premium moneys to the agency companies and on the indictment, as framed, the appellant should have been acquitted.

Certain contentions advanced by the State remain to be dealt with.

It was contended that no agreements of agency were concluded with the agency companies and they therefore were not entitled to pay the premium moneys into their own banking accounts. It is true that no written agreements were drawn up or signed. According to the appellant, Parity's attorney should have attended to that but did not; but, appellant said, he concluded verbal agreements with

the ... /231

the directors. That evidence was so unsatisfactory and unconvincing that the Court a quo correctly rejected it. However, someone must have appointed the agency companies as agents for they operated as such for a long time. Hill probably did that. He was the marketing manager of Parity, and as such he had authority to appoint agents. He said that he received instructions from the appellant to form the agency companies and he carried them out. In doing that he travelled throughout the Republic in connection with their formation and "administrative matters allied thereto". And his evidence proceeded:

> "Just tell His Lordship briefly what you had to do in this connection? --- I visited the various branches that there were, explained to the branch managers as to how this new setup would affect them. I appointed auditors for these various companies, I went to the banks and arranged for the opening up of banking accounts, because prior to this it had been more or less just on a deposit basis. I instructed the staff as to how the change would affect them, and that is what was necessary for me to do, and that is why I

visited .... /232

visited these various branches. I also interviewed some of the more senior or bigger agents of Parity and advised them that there had been a structural change, but that it would not really affect them in any way."

In the absence or pending the conclusion of a written agreement, it must be accepted that each agency company was appointed an agent on the usual or customary terms. Whatever those terms were they would have authorised the agency company to pay the premium moneys into its own banking account. Hence, that contention for the State cannot prevail.

It was also argued for the State that the premium moneys were trust moneys of Parity in the hands of the agency companies, and that the appellant was at least guilty of misappropriating and converting to his own use R129,193 thereof. (That amount is explained in paragraph 7 above.) But that is a case of a different kind. It postulates that by agreement Parity authorised the payment of premium moneys to the agency companies on condition that they were to be treated by the latter as its moneys, that is, they were to be held in trust on its behalf.

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That is not alleged in the indictment, the quintessence of which is that there was no authorisation by Parity at all.

It seems that Parity's real complaint in this count was not theft but fraud; that is, not that the diversion of its premium moneys was unauthorised, but that its authorisation of the diversion was induced by the fraudulent misrepresentation that the agency companies would be wholly owned subsidiaries of Parity. That is epitomised by the last passage from Goldberg's evidence quoted above. But again that is a wholly different case from the one alleged in the indictment. In this regard it was also contended for the State that as Parity's authority was induced by fraud, it was no authority at all. That too is untenable. If the fraud was proved (about which we express no view) the authority was not void but voidable; it remained effective until Parity rescinded it (see Preller and Others v. Jordaan 1956 (1) S.A. 483 (A) at p. 496 E to F; Dalrymple, Frank & Feinstein v. Friedman & Another 1954 (4) S.A. 642 (W) at p. 646 C to E). Parity in fact did not rescind it. What happened eventually was that it took over

all .... /234

all the shares of the agency companies, but its authority to them to divert the premium moneys into their banking accounts apparently remained.

It was ~~fully~~ finally contended for the State that all the above issues were fully ventilated at the trial, and that the appellant would therefore not be prejudiced if the case against him was dealt with as if those allegations were contained in the indictment or on its being suitably amended by this Court.

In a summary trial of this complexity, magnitude, and multiplicity of counts, the material allegations in the indictment relating to any one count are all important, and a Court will be very slow, at a late stage of the proceedings, to sanction any radical departure therefrom (such as those involved in the above contentions) for fear of prejudicing the accused. Here we are by no means satisfied that the issues

raised by those contentions were fully canvassed at the trial and that the appellant would not be prejudiced by adopting the suggested course. This contention for the State therefore also fails.

The appeal on this count thus succeeds. The conviction and sentence are set aside.

Count...../236

Count 24.

The theft which is the subject of this count has been referred to in the proceedings as "the triangle theft", for reasons which will become apparent from the description given by Nicholas,J., at the commencement of his judgment on this count, of the method by which the theft of R30,375 from Parity was committed. It will be convenient to reproduce in full that part of the judgment.

"During June 1964, the management committee of Parity was considering means of promoting Parity's sales of third party commercial vehicle insurance in respect of the insurance period November 1964 to October 1965, In particular, it had under consideration a proposal to give each person insuring with Parity a pair of road-safety triangles for use when the vehicle was stationary on a public road.

At a meeting of the management committee held on the 24th June 1964, however, the following was noted:

'The chairman reported that at a meeting of the board of directors of the company,

it .... /237

it was resolved that the idea of triangles be dropped.'

Saevitzon and Hill, however, did not drop the idea. They evolved a scheme by which the idea could be exploited in order to extract money from Parity.

In pursuance of this scheme, Hill obtained from Pretoria Road Equipment Sales (Pty.) Limited ('Pretoria Road Equipment ') a blank letter-head and a blank invoice form. (This company was owned by Mr.V.C.Lyons, a friend of Hill's, to whom reference has already been made). Hill and Saevitzon used the letter-head to fabricate a quotation in the form of a letter to Parity dated the 15th June 1964, the body of which reads as follows

'Dear Sirs,

ROAD SAFETY TRIANGLES.

We hereby confirm our discussion of today with your Messrs. Saevitzon and Hill,

whereby ..... /238

whereby we offered to manufacture for your goodselves

60,000 (30,000 Sets) of SAFETY TRIANGLES as per sample submitted to us, and conforming to technical specifications as laid down by the Provincial Authorities, at a cost of

97½ Cents per Unit.

7½ Cents per Plastic Envelope

Price per set .... R2.02½.

NETT PRICE PER YOUR ORDER OF 30,000 Sets ... R60,750.00 (Sixty Thousand, Seven Hundred and Fifty Rand.)

Further, should our quote be acceptable to your goodselves, we shall require the firm order to be placed not later than 7th JULY, 1964, to enable us to effect delivery before 15th OCTOBER, 1964, together with your cheque of R30,375.00 representing, as agreed 50% advance of placement of order.

Looking forward to your esteemed order in due course.

Yours ..... /239

Yours faithfully,

MANAGER.'

They used the blank invoice form to fabricate an invoice to Parity from Pretoria Road Equipment, which was dated the 7th JULY 1964. The body of this invoice reads as follows:

'60,000 (Sixty Thousand) Road Safety Triangles as per our quotation dated 15th June,1964.

Packed in Plastic Envelopes ... R.60,750.00

Amount payable on 7th JULY,1964 R.30,375.00

Balance Due on Delivery as arranged.

E. & O.E. NETT. R.30,375.00.'

These two documents were submitted to Parity in the early part of July, 1964.

As the next step, Hill again broached the subject of road safety triangles at a meeting of the management committee held on the 6th July 1964. Goldberg, who was present at this meeting, told the meeting that he wished the matter to be discussed at the next board meeting of Parity, and it was accordingly resolved that 'the board

must .... /240

must decide whether they are in favour of buying these triangles'. Saevitzon did not attend the meeting.

Despite this resolution, Saevitzon caused to be drawn, on the same day, a Parity cheque for R30,375.00, dated the 6th July 1964. This was signed on behalf of Parity by Saevitzon and Swart, in favour of Pretoria Road Equipment. Still on the 6th July 1964, Hill took this cheque to his friend Lyons, and exchanged it with him for a cheque drawn by Pretoria Road Equipment for R30,375.00 payable to 'Cash'. Parity's cheque was duly cashed by Lyons and the amount of it was debited to Parity's bank account.

On the following day, Saevitzon took a private charter flight to Dundee in Natal, where he met the accused by arrangement and with him inspected the premises of Dundee Coal Company at Dundee.

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While Saevitzon was away, Hill cashed the exchange cheque at the branch of the Bank in Bramley, Johannesburg, and conveyed the cash by armoured car to Parity Centre, where Hill deposited the money in Saevitzon's safe.

On the 11th July 1964, after his return from Natal, Saevitzon deposited the following amounts to the credit of Helsa in its bank account:

Cash		R34,000.00
Cheques:	Waghan Investments	R33,250.00
	M. Goldberg	17,500.00
	Premium Investments	24,500.00
	M.Goldberg	1,000.00
		R110,250.00

The bulk of the R30,375.00 extracted from Parity in the execution of this scheme was included in the cash deposit of R34,000.00.

It is not in dispute that there was no contract between Parity and Pretoria Road Equipment

for the supply of road safety triangles; that no road safety triangles were supplied by Pretoria Road Equipment to Parity; and that Parity was at no time indebted to Pretoria Road Equipment in the amount of R30,375.00 or any other amount.

On these facts, Saevitzon and Hill were plainly guilty of the crime of stealing R30,375.00 from Parity.

The State alleges in this count of the indictment that when Hill and Saevitzon committed this theft they were acting with common purpose and in concert with the accused."

The evidence reveals that at some time before the triangle theft was accomplished, the appellant became aware of an opportunity to purchase 20,757 shares in the Dundee Coal Company (which will be referred to as Dundee Coal) from members of the Hepburn family who were apparently willing to sell their shares for approximately R95,000.. At that time Parity held

about .... /243

about 25% of the issued shares of Dundee Coal and the acquisition of the Hepburn shares would give appellant effective control of Dundee Coal, which he desired to obtain. A company known as Pearl Trust (Pty Ltd, was incorporated on 9th July, 1964, and it was the appellant's intention that that company would purchase the shares of the Hepburn family. Pearl Trust would be under the effective control of the appellant. Soon after its incorporation, Pearl Trust resolved, through it directors, to approve the purchase of 20,757 shares in Dundee Coal for R95,482 and to approve the borrowing of that amount from Helsa. Early in July, therefore, the stage was set for the acquisition of the Dundee Coal shares by Pearl Trust which, it should be mentioned, had issued only two shares of both of which the appellant was the beneficial owner. It appears that the purchase price of the Dundee Coal shares would have to be paid during July and according to Saevitzon, the only problem was to raise the required sum of R95,000. The problem was unquestionably solved, for it appears from the bank statement of Helsa that on 15th July,1964, that company paid by cheque the sum of R95,482-20.. It is not disputed that that

payment .... /244

payment was made for the acquisition of the Dundee Coal shares. It also appears from the bank statement that on 11th July a sum of R110,250 was paid into Helsa, which before that payment was made was overdrawn to the extent of R13,909-54. The payment in of R110,250 converted that debit balance to a credit of R96,290-63 which was reduced to R804-08 after the amount required for the purchase of the shares had been paid out. All this makes it perfectly clear that but for the deposit of R110,250, Helsa could not have met a cheque for R95,000 unless it enjoyed considerable overdraft facilities. It will be recalled from the extract of the judgment of Nicholas,J., reproduced earlier herein, that the deposit of R110,250 in Helsa included the bulk of the R30,375 stolen from Parity by means of the triangle scheme.

In essence the State's case against the appellant is that he realized that he could not achieve his aim of purchasing the Dundee Coal shares out of the cash resources available to him; that it became necessary to raise additional money if his aim were not to be frustrated; that the triangle scheme, of which

he .... /245

he was said to have been made aware by Saevitzon, afforded him the opportunity of raising additional money; that he seized that opportunity and knowingly associated himself with the scheme and employed ~~part~~ most of the proceeds of the theft to further his purposes.

Saevitzon's evidence was to the effect that ~~w~~ early in July he was aware of and discussed with the appellant the problem concerning the raising of money for the purchase of the shares. He worked out a budget for the appellant which revealed that the cash available from the usual sources (i.e. Waghan, Helsa and another of the appellant's companies) was only about R50,000 to R60,000. The appellant informed him that Goldberg would assist by purchasing from either Waghan or Helsa some shares in Parity Holdings, thereby making further cash available. Saevitzon approached Goldberg who thereupon purchased Parity Holding shares for R18,500. Saevitzon calculated that there was still a shortage of approximately

R15,000 .... /246

R15,000 to R18,000. He informed the appellant thereof and told him that "every avenue for the raising of money" had been exhausted. Saevitzon said that he thereafter discussed the problem with Hill who conceived the idea of the triangle scheme. Later in his evidence, however, Saevitzon said that it was the appellant who first suggested a scheme for getting money out of Parity by means of a false invoice for the manufacture of road safety triangles. The Court below did not find it possible to make a firm decision as to the originator of the scheme. But however the scheme originated, Saevitzon insisted that he mentioned it to the appellant on an occasion when they were discussing the shortage of available cash for the acquisition of the Dundee Coal shares and that the appellant fully approved of it. Indeed, according to Saevitzon, the appellant not only approved, but encouraged him to take from Parity more than was actually necessary for the purchase of the shares, saying, in effect, that they "might as well be hanged for a sheep as for a lamb." It was this semi-jocular remark by the appellant, said Saevitzon, that induced him and Hill to prepare the triangle invoice

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not merely for the amount which they thought represented the extent of the shortfall (i.e. R15,000-R18,000) but for over R30,000.

Both in the Court below and before us, the credibility of Saevitzon in regard to his alleged conversations with the appellant was strongly attacked. It is important to note that the learned trial Judge found that Saevitzon's evidence concerning the alleged conversations was "not only lacking in precision and clarity but it was also in some respects contradictory." This was a wholly justifiable comment; we would say that even stronger terms of denunciation of Saevitzon's evidence in that regard would have been justified. The same applies to Saevitzon's evidence concerning the events in Durban after the theft had been committed. The State's purpose in leading the evidence of what happened in Durban, was to show that in addition to having knowledge of the triangle scheme before it was carried out, the appellant had knowledge of it after it had been implemented and fully associated himself with it. It is not necessary to enter into detail concerning Saevitzon's evidence of the Durban happenings. It will be remembered that after Parity's

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cheque for R30,375 had been issued, Saevitzon departed from Johannesburg for Dundee, where he met the appellant. They proceeded from Dundee to Durban. Saevitzon said that he told the appellant what had thus far been achieved concerning the implementation of the triangle scheme and he testified to certain conversations over the telephone between Hill and the appellant and a telephone call which he personally put through from the Royal Hotel in Durban. It is sufficient to say that his testimony concerning the last named call was with almost complete certainty demonstrated to be false and that his version of the telephone conversations with Hill did not co-incide with Hill's. The appellant denied his evidence almost in toto. The Court a quo was clearly not impressed by Saevitzon's evidence on this aspect of the case and found itself unable to make any finding thereon. Again, we would observe that outright rejection of Saevitzon's evidence on certain aspects thereof would have been justified, for he emerged from cross-examination as a scathed and patently unreliable witness.

The problem, then, is whether despite the unreliability of Saevitzon's direct evidence calculated to implicate the

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appellant in the theft, there was ~~no~~ sufficient independent evidence to justify a finding that the appellant was, beyond reasonable doubt, a party to the theft?

In considering this problem, it is necessary to bear in mind that despite the rejection, or non-acceptance, of Saevitzon's evidence concerning what he said to the appellant at various times and what the appellant said to him, there can be no doubt that other parts of his evidence are substantially accurate and reliable. We refer to his evidence concerning the appellant's aim to acquire the Dundee Coal shares and his requirement of R95,000 to pay for them. That part of his evidence was not only not disputed, except in regard to minutiae, but was wholly corroborated by independent evidence of the collecting of money in Helsa's bank account and of what was done by the appellant. The appellant in fact floated the Pearl Trust Company, with the object of its acquiring the shares, he in fact financed the transaction out of Helsa's bank account, he actually purchased the Dundee Coal Shares; all as Saevitzon said. Moreover, the inescapable fact is that the bulk of the money stolen

by ..... /250

by means of the triangle scheme was paid into Helsa and formed an indispensable part of the total funds used to pay for the shares.

These facts, together with the inference to which they would ordinarily give rise, were fully appreciated by Mr. Hanson who sought to meet them by several submissions which require consideration The theme which was central to these submissions was that it had not been shown, particularly in the light of Saevitzon's mendacity, or, at the least, his unreliability, that the theft had not been committed by Saevitzon for his own sinister purposes, without the knowledge of the appellant. In support of that general submission, Counsel referred us to certain features of the case which, he contended, rendered it reasonably possible that despite the outward appearance which the payment of the money into Helsa bore, the theft was secretly committed without the appellant's knowledge. The main features relied upon were:

(a) that appellant was not shown to have been so desperately short of cash that a theft of this nature was necessary to enable him to achieve his aim. It was contended that on the evidence, Helsa enjoyed overdraft facilities up to a maximum

of .... /251

of R60,000 and that appellant could have made use thereof and not been driven to thieve from Parity, as Saevitzon said he was;

(b) that according to Saevitzon, R15,000-R18,000 was short; in truth, on a proper assessment of all available monies according to the evidence, only R6,000 was actually required, (this was also found by the Court a quo) yet Saevitzon stole R30,375, not all of which found its way into Helsa;

(c) that it was reasonably possible that Saevitzon paid part of the stolen money into Helsa with an eye to the future, having regard to his stake in Helsa (one share) or the promise of acquiring a substantial interest in that company in the future; or that he acted as he did "for some obscure reason of his own".

The last of these three submissions (i.e. (c)) need not detain us. A similar argument has already been considered and dealt with under count 15 and there are no special features

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in this count which could lead to a different conclusion on this point. Nor does it avail the appellant to rely upon unspecified and purely speculative "obscure reasons" which Saevitzon may have had for paying the money into Helsa. The appellant's argument in regard to Saevitzon's self-interest in depositing the money in Helsa is, in fact, weaker in regard to this count than in some of the others, for here, he did not credit his own loan account in Helsa's books with the proceeds of the theft but made an entry "on the deposit side of the cash book". He explained that he did not know precisely how to enter in the books this large cash deposit and intended to discuss the matter with the appellant. It may be added that it was not specifically contended, on this count, that the amount might have been paid in by Saevitzon to discharge his Stellaland debt to appellant; the amount involved obviously precluded such an argument. We proceed, then, to consider the points raised by (a) and (b) above.

As to (a), the evidence was not very clear concerning the extent of the facilities which Helsa's bank was prepared

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to allow it. It was common cause that Helsa enjoyed overdraft facilities up to R20,000 and that was taken into account in the assessment of the extent of available cash. Saevitzon said that he was instrumental in arranging for facilities with the bank and knew that Helsa's limit was R20,000. The appellant relied upon a minute of a meeting of Helsa's board on 3rd June, 1964, in which was recorded a resolution that the bank "be requested ..... to allow .... Helsa to overdraw its current account from time to time to the maximum amount of R60,000, on the understanding that the facilities allowed will be in the discretion of the bank until the authority is cancelled in writing". When this minute was put to Saevitzon in cross-examination, he simply re-affirmed that the bank had not in fact exercised its discretion in favour of allowing more than R20,000. The Court a quo found as a fact that R20,000 was the limit of Helsa's overdraft facilities. Whether such a positive finding was justified on the evidence, based as it was mainly on the evidence of Saevitzon, appears to us to be open to some doubt. But whatever

the .... /254

the true position may be as to the extent of Helsa's overdraft privileges and on the assumption that the bank, if approached, would have allowed Helsa substantially to exceed R20,000, the failure of the appellant to take advantage of such assistance does not, in our view, serve to lend support to the contention that the appellant was not as anxious to put money into Helsa as Saevitzon said he was and that Saevitzon banked the stolen money in Helsa for purposes of his own. A financier might have many reasons for preferring not to use extensive overdraft facilities if there was an opportunity to raise the required money elsewhere. Quite apart from the consideration of the interest payable on a large overdraft, there he might be reluctant, for a variety of reasons, to approach the bank or to overdraw to an extent which might affect the bank's confidence in its depositer's stability. Or he might have future needs in mind. If such a financier were disposed not to create problems affecting his relationship with his bank, it would by no means be extra-ordinary for him to use every possible expedient to raise money elsewhere and if he were unscrupulous in regard to such matters,

he .... /255

he might not count at making use of unlawfully acquired funds. Not only, therefore, is it by no means clear that appellant could have obtained assistance from the bank beyond the R20,000 which he utilized, but even if he could, it is matter for speculation and conjecture what he would have done. All that can be said in favour of the contention advanced on behalf of appellant in this regard is that if Helsa enjoyed overdraft facilities in excess of R20,000, the crisis was not as acute as Saevitzon said it was; and that circumstance, in itself, would not afford a reasonable explanation why Saevitzon, if he were stealing for himself and not for the appellant, employed almost the entire proceeds of the theft for the benefit and use of the appellant.

Turning to feature (b) above, it is true that there is no clear explanation for Saevitzon and Hill stealing over R30,000 when, according to Saevitzon's own calculations and evidence, a maximum of R18,000 was required by Helsa. Normally, the inference to be drawn would be that he stole the excess for himself, but that inference cannot be drawn where his own subsequent dealing with the stolen money belies it. It may be, of course, that

his ..... /256

are [illegible]

not only, moreover, [illegible] that [illegible] have

obtained substance from [illegible] the $25,000 which he

utilized, [illegible]

objective [illegible]

favor of the [illegible] evidence [illegible]

the regard [illegible] expenditures in

excess of $25,000, [illegible] evidence [illegible] said

loan; [illegible] circumstances, in itself, would not afford a

reasonable [illegible] Levitzon, [illegible] were [illegible] for

himself [illegible] for the [illegible] employed [illegible] the entire

proceeds of the [illegible] for the [illegible] of the [illegible].

Turning to (3) above, it is [illegible] there is

no clear explanation for [illegible] over 150,000

when, according [illegible] evidence, a

maximum of [illegible] was [illegible] the inference

to be drawn [illegible] the [illegible], but

that inference cannot be drawn [illegible]

[illegible] the [illegible] of course, that

the .....

his evidence is true that the appellant suggested to him, by the superficially frivolous remark to which reference has already been made, that he should take more than was strictly necessary but for reasons already stated it is not safe to rely upon anything that Saevitzon said in relation to his alleged discussion with the appellant. The reason for stealing precisely R30,375 therefore remains unexplained and obscure. But once the possibility that Saevitzon placed the stolen money in Helsa for his own benefit is discarded as being fanciful, the reason for his stealing more than was necessary for the appellant's purposes does not assist the defence in any way that we can see.

There remains one issue which needs to be mentioned, albeit briefly. It relates to the minutes of a meeting of the Parity Board on 14th September, 1964, in which there is recorded the terms of a report made by Saevitzon concerning the question of giving away, gratis, road safety triangles to persons taking out third party insurance with Parity. That was a false report, for by that time the theft had already been committed and as Saevitzon himself said in evidence, the report was intended by

him .... /257

him merely to serve as "eye-wash" for the members of the Board. The appellant is not recorded as having been present at that meeting but there is evidence in addition to Saevitzon's that he was present and heard the report. The appellant was equivocal in his evidence on this point; he did not deny that he attended the meeting but suggested that he left the meeting before the question of his salary was discussed and was not present when the report concerning the triangles was made. He said that had he been present at that time he would have protested vigorously against the giving away of the triangles to all who took out third party insurance with Parity, as he had been against that idea all along. The significance of all this evidence is that it establishes that the appellant was aware and had for some time been aware of discussions concerning the acquisition of road safety triangles and that to that extent at least there exists a probability that he discussed the matter with Saevitzon. If his suggestion that he was not present when Saevitzon's report was made is false(and it must be remembered that he was at first disposed to deny that he was present but later said he could not remember whether he was present or not) then his silence or absence of

objection .... /258

objection in the face of Saevitzon's reports affords a strong indication that he knew what was afoot and understood that Saevitzon's report was not being made to be acted upon but merely for the purpose of deceiving the members of the Board. The learned Judge accepted the evidence that appellant was present when the false report was made at the meeting and relied upon the implications thereof as pointing strongly to the appellant's knowledge and understanding of the inward purpose and object of Saevitzon making that report. We are unable to find that the learned Judge was wrong in that respect.

In the result we are satisfied that the finding was fully justified that the appellant knew of the deposit of the stolen money in Helsa and of the source of such money, which was used for his own purposes, and that the conclusion of the Court below that he was a party to the theft must stand. Accordingly, the appeal against the conviction of this count fails.

Count 27.

For the proper understanding of the allegations in this count of theft, it is necessary to sketch some of the background as well as to set out the main features.

1. By about the middle of July 1964 the appellant had gained control of Dundee Coal Company Limited ("Dundee Coal") through a purchase of a parcel of its shares by Pearl Trust Company Limited. The shares in the latter company, specially registered to acquire the Dundee Coal shares, were beneficially owned by the appellant. The acquisition of those shares has been referred to in count 24. Dundee Coal was an old established company in Natal whose coal mining activities had long since ceased. It had become mainly an investment company with a good portfolio of shares worth nearly R1,000,000. It was a public company listed on the Johannesburg Stock Exchange. By 27 July 1964 the appellant had caused its board of directors to be reconstituted by the appointment of five persons nominated by him, including Charles, ~~as chairman, Alleson, and one~~ Fookes. Fookes, a financial consultant, had joined Parity in about September 1963 in order to handle its investments. It seems

clear ...../

clear that the appellant put him on the board of Dundee Coal to handle its investments, too.

2. Soon after gaining control, the appellant, after consultation with others, decided that Dundee Coal should turn to factoring, that is, discounting, confirming, and other types of financing transactions. Hence, on 27 July 1964 its board resolved formally to undertake such business through Dundee Factors (Pty) Ltd., the shares of which it would (and did) acquire, and, as Dundee Coal did not itself have the funds to finance such business, to borrow up to R500,000 by pledging its assets, including its shares. The obvious way to raise the required funds would have been to sell its shares. Indeed, the appellant said that that was the original idea. But, according to the minutes of the meeting of 27 July, the company's liability for income tax on the ensuing profits was obviously present to the minds of the directors, for they decided that Mr. Schwarz, its attorney, should take counsel's opinion on the question of avoiding such liability by amending its memorandum of association. Apparently nothing came of that.

3. ..... /

3. Thereafter, on 12 August 1964, Saevitzon on Parity's behalf signed an acknowledgment of pledge in which he acknowledged receipt of a number of share certificates in sugar companies which were to be lodged with Parity as security for a loan of up to R355,200 (i.e. 80% of the value of the shares) to be made by Parity to Dundee Coal. According to the minutes of the board meeting of Dundee Coal on 24 August 1964 it was noted that the loan was "in order to establish loan facilities to finance Dundee Factors (Pty.) Ltd. in terms of" "its resolution on 27 July 1964 (see paragraph 2 above). The minutes also recorded that Saevitzon, as chief administrator of Parity, had verbally agreed to charge Dundee Coal 5½% p.a. interest on the loan. Parity paid the R355,200 to Dundee Coal on 28 August 1964.

4. On 14 September 1964 the Parity board of directors approved the loan of R355,200 to Dundee Coal secured by the pledge of the sugar shares.

5. We pause here to observe that when the Registrar granted Parity its certificate on 23 July 1960 authorising it

to .... /

to carry on motor insurance business, he laid it down as a condition of registration that "no unsecured advances may be made out of insurance funds without the prior approval of this (the Registrar's) Office". (That restriction did not apply to the making of fixed deposits with approved institutions - see counts 20 and 21.) On the other hand the appellant said that insurance funds could be used to invest in the shares of public companies, and in the absence of any evidence to the contrary, that must be accepted as being correct. (The only restriction in that respect, according to the conditions of registration, is one against investing in the shares of subsidiary companies without the Registrar's approval.)

6. At about this time (i.e. mid-1964), the Registrar, as a result of an investigation into the affairs of National Savings, required that certain loans by it totalling R103,063, should be repaid. The appellant consequently devised and decided upon a scheme for repayment. It was that Waghan should get the money required from Parity Holdings, who would get it from Dundee Coal, who in turn would receive it from Parity.

7. ...../

7. The Registrar also objected to the purchase by National Savings of the book debts from Trans-Africa. (That transaction had taken place about 11 March 1964; it has already been canvassed in count 20.) In consequence, Trans-Africa and National Savings agreed to reverse the transaction by the former re-purchasing the remaining book debts as at 30 September 1964 and paying National Savings for them by 15 October 1964. Goldberg advised the Registrar accordingly by letter on 11 August 1964. The appellant devised and decided upon a scheme to enable Trans-Africa to pay the re-purchase price, which was ultimately fixed at R80,000. It was that Parity would pay R100,000 to Dundee Coal, who would pass it on to Dundee Factors. The latter, as part of its factoring business, would finance Waghan to enable it to pay Trans-Africa the R80,000.

8. Thereafter, in pursuance of the two schemes, Saevitzon, who was fully aware of them, caused Parity to pay Dundee Coal R168,000 on 15 September 1964 in respect of the first scheme, and R100,000 on 22 September 1964 in respect of the second scheme. There was no resolution of Parity's

board .... /

board of directors authorising either of these payments. The appellant was charged in this count with the theft from Parity of those two amounts.

9. The total amount of moneys that Parity therefore paid to Dundee Coal was R605,200.

10. On 29 September 1964 the Dundee Coal board resolved that "the Company's portfolio be sold from time to time at the discretion of Mr. Fookes."

11. On 2 October 1964 Thompson, employed by Dundee Coal, wrote to Fookes as follows:

> "You can see from the attached statement we are now on overdraft. If you could let us have a further loan in the coming week, I should be much obliged. R50,000 would suffice. In the meantime, if you have more to spare we could take, say, R100,000.00, as Dundee Factors call on us periodically. I hear that Mr. Schwartz has ruled that Parity cannot buy our complete share portfolio, as this would constitute disposing the major portion of the company's assets and would

run .... /

run counter to the Companies Act.

Cannot this be overcome if it was proposed as a general resolution at a forthcoming extraordinary general meeting? If it was passed at that meeting with shareholders' approval I can see no objection to it. You would have to include it on the agenda and Notice to Shareholders. Just a thought."

12. On 12 October 1964 Fookes for Parity wrote to Alleson for Dundee Coal confirming the purchase by Parity of a parcel of certain shares from Dundee Coal for R301,712.60, saying that on receipt of the scrip that amount would be paid. According to the minutes of Dundee Coal's board meeting of 20 October 1964 Fookes tabled details of portion of the company's share portfolio that had been sold by him and these were approved. They must have included the abovementioned shares. Those shares were apparently paid for by and delivered to Parity.

13. On 10 November 1964 Thompson for Dundee Coal wrote a letter to Fookes, care of Premium Investments Co. (Pty.) Ltd. ..... /

Ltd. (This company managed Parity's investments under the guidance of Fookes who was a director of it at this time, together with Saevitzon and one Racki. One of the ten issued shares ~~one~~ was held by Saevitzon, ~~one by Premium Investments~~, and nine by appellant's three daughters. The company was wholly under the appellant's control. Fookes was apparently given a free hand with investing Parity's moneys, except that on 11 February 1964 Parity's board had resolved that in future Fookes should "liase" with Premium Investments "for discussions regarding purchases of shares".) The letter of 10 November 1964 was as follows:-

" PURCHASE OF SHARES.

We confirm our telephone conversation of today's date when it was agreed that Parity Insurance Co. Ltd. would purchase the undermentioned shares from us at the following prices ruling on the Stock Exchange.

~~No money will pass,~~ but a book entry will reduce the loan which Parity has made to us.

Tongaat .... /

Tongaat	19,617	@	320	=	R 62,774-40
Crookes	24,585	@	240	=	59,004-00
Reynolds	57,398	@	240	=	137,755-20
Gledhow	47,645	@	235	=	111,965-75
Consol. Sugar	2,100	@	265	=	5,565-00
					R377, 064-35

We also confirm your suggestion that the balance of our share investments be taken over by Parity Insurance Co.Ltd. at the ruling prices on 10th December,1964. The necessary transfer forms will be prepared in due course."

Those were mostly the sugar shares that had previously been pledged to Parity on 12 August 1964 - see paragraph 3 above.

14. Apparently on 13 November 1964 Parity bought another parcel of shares from Dundee Coal for R228,135.45. Presumably that transaction was also arranged between Fookes and Thomson. On that date Fookes, for Premium Investments,

wrote ..... /

wrote to Thomson, for Dundee Coal, as follows:

"Further to our telephone conversation of this morning I enclose two schedules which are I think self-explanatory.

The resulting position is, I think as follows:-

LOAN TO DUNDEE COAL FROM PARITY INSURANCE CO. R605,200-00

REDUCED AS FOLLOWS:-

Shares bought by Parity Insurance from Dundee Coal

on 10th November, 1964	R 377,064-35	
on 13th November, 1964	R 228,135-45	
		R605,199-80

Therefore: Balance due from Dundee Coal to Parity Insurance Company Limited in order to close this account amounts to ..... 20 cents

In the circumstances a cheque from you for 20 cents would satisfactorily close this position."

15. According to the minutes of the board meeting of Dundee Coal on 16 November 1964 Fookes fully reported the details of those transactions in paragraphs 12,13 & 14 above.

That concludes the summary of the main facts.

Unfortunately ..../

Unfortunately neither the State nor the defence canvassed the issues raised by this count in any detail with the State's witnesses. Several points were left untouched, and, mostly because of the unsatisfactory testimony of the appellant, have now become matters for inference. The Court a quo itself had to reconstruct a chronology of the events in its search for the truth. (That is not intended to be a criticism of counsel on either side in any way, for their difficulties in a case of this magnitude must have been legion).

The gist of the Court a quo's reasoning in convicting the appellant is contained in the following passage:-

> "Saevitzon knew that there was no board or any other competent authority for the payments; that they were made without security; and that they were made at the behest of the accused and made not in the interest of Parity, but for the accused's own purposes in connection with National Savings. And the fact that he thought that Parity would be repaid by Dundee Coal at some time in the future cannot affect the matter.

The .... /

The accused was a party to the making of these payments. He devized the scheme in terms of which they were to be made. He instructed Saevitzon to make them. He does say that he thought Saevitzon would obtain a board resolution, and he said that Goldberg was fully aware of the payments and the reason therefore, but I reject both these statements. He put forward a false justification for the payments and that is inconsistent with any belief that a board resolution would be obtained, or that Goldberg was aware of the payments and the reason therefor."

The nub of the problem in this appeal is whether it is reasonably possible (a) that by 15 September 1964 Parity and Dundee Coal had decided that Parity should acquire Dundee Coal's portfolio of shares, and (b) that the payments of R60,000 and R100,000 on 15 and 22 September 1964 were made on account of the purchase price of the shares in anticipation of their acquisition. That was the essence of the

appellant's ..... /

Parity in parcels. That was in fact subsequently done - see paragraphs 12,13 and 14 above. Fookes's evidence, which was accepted, established that a decision was taken by the appellant Goldberg, and others that Parity should acquire the Dundee Coal shares, and he acted in pursuance of it.

Now according to him the meeting he testified to took place in October 1964. Unfortunately, but inadvertently that evidence was obtained from him by ~~the State~~ in chief virtually ~~by~~ a leading question as to the time of the meeting. Neither counsel for the State nor the defence probably appreciated the true significance ~~of~~ of the date of the meeting at the time. The following extract from his evidence in chief shows how he came to give that evidence:

> "Would you look next at EXHIBIT 1041A. (This is the letter referred to in paragraph 12 above.) This is a letter dated the 12th October, 1964, addressed by Fookes, Investment Adviser of Parity, to Alleson, Dundee Coal Company Durban. Follow my reading of the letter, please : 'Dear Sir, This letter serves to confirm the purchase of the attached list of shares

by ..... /

by this company from your company. On receipt of the appropriate scrip with signed and marked transfers attached, we will pay you a cheque of R301,712.60. In the meantime we await your confirmation of the sale.' Do you remember this letter? --Yes my LORD.

Can you identify the signature thereon as yours? --- It is mine, my LORD.

Now attached to 1041A, is a schedule 1041B: 'Securities sold by Dundee Coal Company, Ltd. and purchased by Parity Insurance Company,Ltd.' Details of the shares are given, the agreed price, and the proceeds. Do you identify your signature on that? --- Yes my LORD.

What were the circumstances surrounding this letter of yours to Dundee Coal? -- My LORD I mentioned earlier in evidence that I used to meet Mr. Goldberg for informal meetings on Saturday mornings. These meetings used to take place in Mr. Heller's office. On one meeting in October ....

Is that October, 1964? --1964 - sorry my LORD - the question of the indebtedness of Dundee Coal -

to Parity came up."

It is most doubtful whether Fookes, independently of the exhibit, would have remembered after nearly four years that this particular customary meeting occurred in October 1964. It is true that he connects it with Dundee Coal's "considerable" indebtedness to Parity at the time which would be cancelled by Parity's purchasing the shares, but that might have referred to the secured loan of the R355,200 paid on 28 August 1964 - see paragraph 3 above. That possibility was not negatived by his evidence.

The learned trial Judge himself held that Fookes must be wrong in placing this meeting in October. By inference from certain facts he found that it must have taken place towards the end of September. Those facts were, firstly, the minutes of the Dundee Coal board meeting of 29 September 1964 - see paragraph 10 above. One Abro, employed at the time by the company rendering managerial and secretarial services to Dundee Coal, handed in another minute purporting to relate to that meeting. Regarding Dundee Coal's shares the

relevant ..... /

relevant part read: "It was agreed that the Company's share portfolio would be sold to Parity Insurance Company Limited at a date to be decided at the market value or the middle market value on the chosen date". The learned trial Judge inferred that this must have been the first draft of the minutes of this meeting, that Mr. Schwarz must have been consulted after this meeting, that he then advised that the shares could only be sold in parcels, and that in consequence the resolution was subsequently altered to read "the Company's portfolio be sold from time to time at the discretion of Mr. Fookes." According to Abro, however, that minute was one of those that had been reconstructed by Alleson some considerable time later, after September 1965, when Dundee Coal's books and records had been seized by the police. Consequently, in the absence of other evidence supporting it, the above inference was not justified. It is far safer to rely on the official minute which Abro thought he had prepared himself. As Parity must have been the obvious prospective purchaser of the shares at the time, that minute means in reality that Fookes could sell the shares in

parcels ..... /

parcels to Parity from time to time. That indicates that the sale of the shares to Parity in parcels had been discussed, and decided on, advised upon by Mr. Schwarz, as Fookes testified, prior to 29 September 1964, and that decision was merely confirmed by the board at that meeting. The previous board meeting of Dundee Coal was on 12 September 1964. Hence that decision could possibly have been made about or after that date, i.e. too late to have been dealt with at that meeting. As Goldberg left for Europe on 12 September on a fortnight's visit, it could possibly have been made just before he left. Secondly, the learned trial Judge relied upon Thomson's letter of 2 October 1964 in which the latter said he had heard about Mr. Schwarz's ruling - see paragraph 11 above. But that piece of evidence is inconclusive as to when the ruling was actually given and hence when the decision to sell in parcels was taken. Consequently, we are constrained to differ from the learned trial Judge's inference that the Fookes meeting must have occured towards the end of September 1964.

Saevitzon's evidence in chief reads as follows:

"Now .... /

"Now prior to this date, the 12th August,1964, had you been a party to discussions affecting the possible sale of the whole or a portion of the Dundee Coal portfolio? --- Yes.

With whom did you have such discussions?-- The accused and with Mr. Harry Schwarz.

And without going into details, can you remember what the upshot of these discussions was? -- Yes, that at that stage Dundee Coal should not dispose of its shares on the open market, as if it made a profit it might be liable to tax. Thus it was decided not to sell this portfolio, but to raise money on these shares." ~~The accused's evidence~~

That is supported by the resolution of the board of Dundee Coal on 27 July 1964 - see paragraph 2 above. But it does corroborate the appellant 's testimony that the ~~idea of selling Dundee Coal's shares existed from the time it~~ turned to factoring.

Furthermore in chief he said:

"Was ..... /

"Was this scheme - to cut a long story short - was this scheme carried out as far as you know? -- Yes, it was carried out. But I did not see, I must say, when Parity lent this R150,000.00 and subsequently another amount to Dundee Coal, I understood it at all times to be that this was money that Parity was advancing to Dundee Coal, and when Dundee Coal had the right, it would sell its portfolio of shares and repay Parity, or sell its portfolio of shares to Parity to square off this loan.

So, in relation to those two payments, do I understand you correctly, you were not unduly concerned? --- Not at all concerned."

And under cross-examination:

" And that Company in its turn obtained the money from Parity by way of a loan? -- Yes.

Against the security of Dundee Coal's portfolio? --- No.

No? -- No. The portfolio had not been pledged then, that came some time later, but it was

the intention, you are correct.

It was the intention, all right, that will suit me for my present purposes. --- There was no guarantee at that stage." .....

"I thought you said it didn't worry you? -- It didn't, no it did not worry me, because I knew, I personally knew that in due course when it be competent for Parity to purchase the portfolio from Dundee, that is indeed what would happen.

I can't - I didn't follow you? --- Sorry, that when it would be competent for Parity to purchase a portfolio of shares that Dundee Coal had, that Parity would purchase it and the monies advanced by way of a loan under this hundred - R150,000 would be set-off against the value of that portfolio.

And that was the intention at the time? — As far as I was concerned, yes. As far as the accused was concerned, yes."

That .... /

That intention on Saevitzon's and the appellants part could possibly have arisen out of the decision, testified to by Fookes, that Parity should acquire Dundee Coal's shares in parcels from time to time. Hence Saevitzon's confidence that the payments were in order and safely made. His evidence therefore supports the reasonable possibility that that decision was taken sometime prior to 15 September when the first payment was made.

The only evidence Fookes gave about the two payments totalling R250,000 was that he knew at the time that they had been made. Goldberg said that he was unaware of them; but then he was overseas when they were made. Alleson, Charles, and Thomson were not asked about them.

The appellant's version was most unsatisfactory. The learned trial Judge described it as "a welter of confusion and contradiction", and generally be rejected as false. But the appellant did say that from the time Dundee Coal turned to factoring the idea was to sell its portfolio to raise capital for that line of business. That is supported by the other

evidence .... /

evidence mentioned above - see paragraph 2 above. He also said that it was decided to sell it in parcels of shares, because of the legal difficulty of a block sale, on the advice of Mr. Schwarz. It is not clear from his evidence when that advice was obtained, but apparently according to him it was about the time Dundee Coal turned to factoring. Other, more acceptable, evidence canvassed above, points to a later date. He also testified that after discussing it with Goldberg, Fookes, de Wet, and Frootko, it was decided that Parity should purchase the portfolio, and, after Fookes had confirmed the legal position with Mr. Schwarz, that Dundee Coal should sell it to Parity in parcels. He said that occurred in September, but he could not fix a date. It was that decision, he said, that led to the passing of the resolution by the Dundee Coal board on 29 September. The subsequent sales of shares mentioned in paragraphs 12,13 and 14 above were, he said, in pursuance of that decision. Despite his non-credibility as a witness, the substance of his evidence about such a discussion and decision is supported by Fookes's, Saevitzon's,

and ..... /

and certain of the other evidence canvassed above.

As against that the minutes of the Parity board meeting of 14 September 1964, which confirmed the loan of the R355,200 and pledge of Dundee Coal sugar shares- see paragraph 4 above, do not mention the decision to purchase the shares. Moreover, the meeting was the day before the payment of 15 September was made. It was put to the appellant in cross-examination thus:

> "And one notices too in the minutes, Exhibit 1028, that when approval is given to this investment there is no mention made of the idea which you say was in the forefront of everybody's mind, that there was being contemplated a purchase of the whole of Dundee Coal's share portfolio? —— Well, it wasn't mentioned, but it was an idea. The idea was there."

That is a factor to be taken into account, but it is not conclusive. ~~It might not have been mentioned because Goldberg~~ was not present, or it was too late for ~~including~~ inclusion in the agenda, or because those present already knew about it, or it might have been mentioned for information only and not recorded.

The ..../

The onus was on the State to prove that the decision that Parity would buy and Dundee Coal would sell its portfolio was not taken before 15 September 1964. On balancing up all the above facts we do not think that it discharged that onus; on all the above evidence we think that it was reasonably possible that it was taken before that date.

We turn to the next inquiry relating to the payments of R150,000 and R100,000 by Parity to Dundee Coal on 15 and 22 September 1964.

The effect of the appellant's testimony was that he directed those payments to be made as advances on the purchase price of the Dundee Coal shares in anticipation of their being sold in pursuance of the above decision. In chief he said: "I regarded those advances as an advance against the sale of the portfolio.... The ultimate sale of the portfolio." Under cross-examination: "and whatever monies were advanced by Parity to Dundee Coal, was in anticipation of being repaid by the Dundee Coal portfolio." The above quoted passages from Saevitzon's evidence tends to corroborate him on that aspect. .... /

aspect. And eventually that is actually how those payments were dealt with by Parity and Dundee Coal.

As against that there is certain other evidence to be weighed. Firstly, those payments were termed and treated as "loans" by Fookes, Thomson, Dundee Coal, and Saevitzon. Prima facie that would show that they were not regarded as advance payments. The term, however, might have been used in the circumstances as merely a convenient label and without any intention of indicating the true nature of the payments. In the context of the abovementioned transactions the term is somewhat equivocal. Secondly, the State referred to certain evidence of Alleson:

"Was the security, the matter of security for Dundee Coal's loan to Parity Holdings, discussed at this meeting in the office of the accused on the 11th September, 1964? Yes, it was, M'Lord.

Well tell us who said what? -- The accused assured me that the loan from Parity Insurance Company to Dundee Coal would be an unsecured loan, and

that .... /

that it would not affect the secured facilities which Dundee Coal had with Parity Insurance Company." Fookes gave similar evidence. But both were referring to another transaction and not to these particular payments.

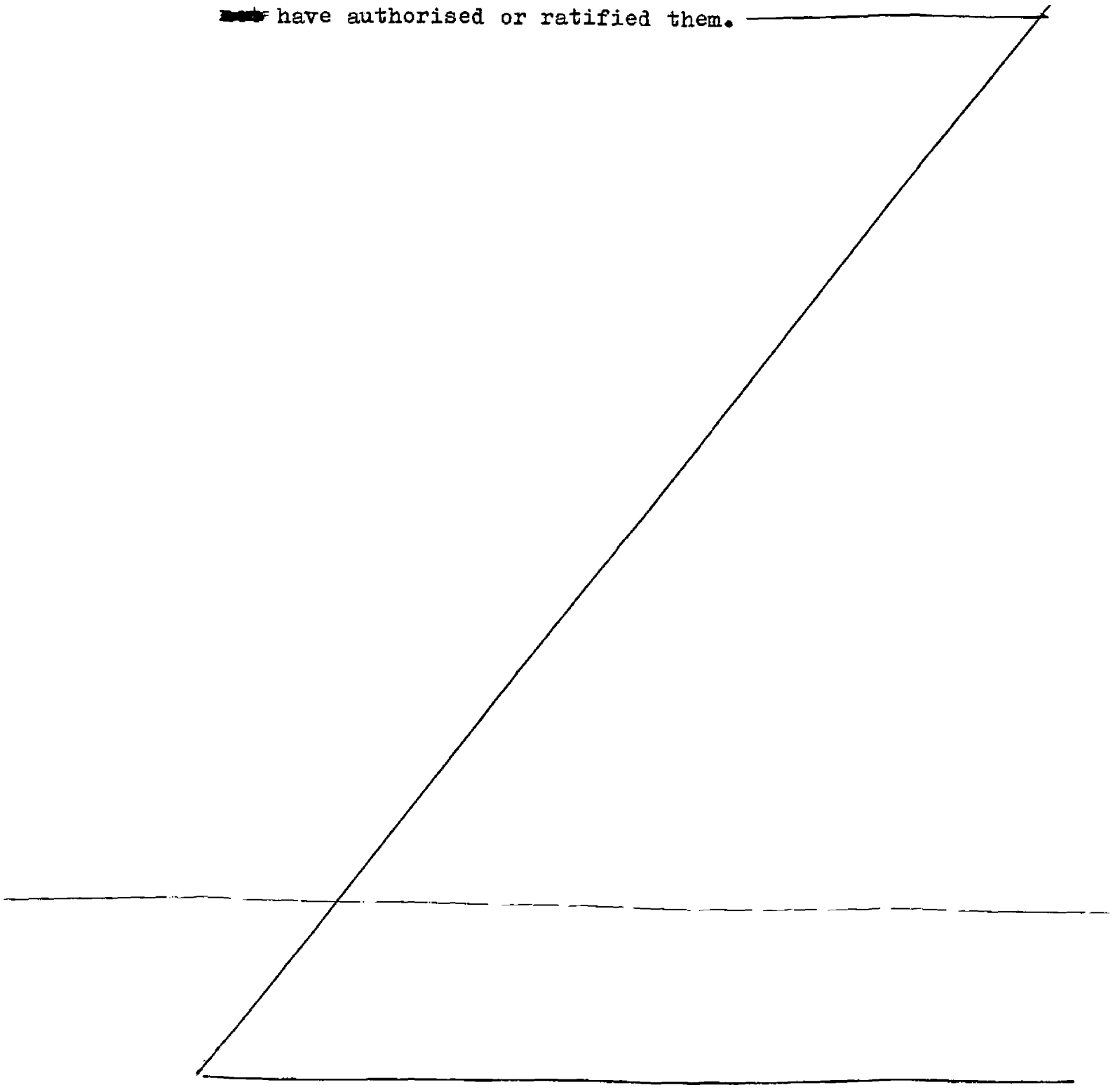
On the other hand there is this probability in favour of the appellant's version. He must have known that unsecured loans by Parity were forbidden by the conditions of its registration - see paragraph 5 above. It is somewhat unlikely that he would have blatantly flouted that restriction of the Registrar's to the tune of R250,000.

Hence, on balance we do not think that the State proved that those payments were not made by Parity in advance and on account of the purchase price of acquiring Dundee Coal's portfolio.

We shall assume in favour of the State that the payments constituted ~~on~~ an unauthorised contrectatio by ~~Parity's agents of the money in its banking account made with~~ intent to deprive it of the benefit of its possession of that money (see the discussion in count 20).

The .... /

The only remaining question is whether the State proved that the appellant did not honestly believe that Parity's board of directors, fully informed and acting honestly, would have authorised or ratified them.



On the basis of our finding that it has not been shown that the R250,000 was not paid as an advance on the purchase price of the shares, this question must necessarily be considered on the footing that, had the appellant submitted the matter to the Parity board for approval, he would have done so in a manner which conveyed that the proposed payment represented such an advance. In view of the undisputed evidence that the value of the shares by far exceeded R250,000, it must also be postulated that the appellant would have informed the board accordingly. It is fair to assume that having been provided with that information, an honest board, concerned to act in the best interests of the company, would have inquired as to the stability and integrity of Dundee Coal and as to the risk of its not fulfilling its obligation to give transfer of the shares. To such a question, the appellant could truthfully have given reassuring answers, for there is nothing in the evidence to suggest that Dundee Coal was anything but financially stable or that it was not in a position to transfer

the .... /289

the shares to Parity. In addition to these factors, it must be kept in mind (a) that the appellant, having already acquired the Hepburn family's shares in Dundee Coal, (see Count 24) was in effective control of that company; (b) that Fookes, who was in effect subject to the directions of the appellant (the trial Court found that he was "a tool of the accused") was on the board of directors of Dundee Coal; and (c) that Alleson, an accountant, also served on that board as a nominee of Parity. A properly informed board of Parity would have had all this knowledge and would no doubt have taken it into account when considering any proposal that an advance on the purchase price of the shares be made to Dundee Coal.

Against that background, it is difficult to find satisfactory reasons for a conclusion that the board of Parity would certainly, or very probably, have turned down such a proposal as is now being considered. And unless it can be said that such a proposal would in all probability have

been .... /

been vetoed, it would not, in ordinary circumstances, be safe to conclude that the appellant could not reasonably and bona fide have believed that the board would have approved the payment of R250,000 as an advance on the purchase price. It was contended on behalf of the State that the appellant had not really directed his mind to that question and that his defence really was that the board or members of the board had knowledge of the proposed transaction and in fact approved it. It is true that that suggestion was made by the appellant, but it emerges from his evidence that he believed that the transaction was in the interests of Parity. He said, for example, that the portfolio was "first class" and that "it was in the interests of Parity to take it and it was in the interests of Dundee Coal to sell it". Later in his evidence he expressed the belief that as the money was being paid out "in anticipation of getting the shares ... you can invest with public companies without security". Parity had previously invested in shares

of ..../

of public companies and the board was not averse to such investments. It is relevant to observe, too, that in answer to a question relating to the risk of making such an advance without full protection, the appellant said that these payments were made to a public company and added:

> "here .... you have got directors of Parity who are connected. After all, it is the same group. You don't think that the directors of Dundee Coal are going to steal your money".

This piece of evidence clearly has reference to his own control of Dundee Coal and to the circumstance that Fookes, Alleson and others were on the Dundee Coal board and would be hardly likely to allow Dundee Coal to keep Parity's money and not transfer the shares. That these considerations were not simply afterthoughts but were present to the mind of the appellant at the relevant time is a very real possibility. The appellant was paying out a very large sum of money on

behalf ..../

behalf of Parity and he had nothing to gain by risking it. That he was satisfied in his own mind in September 1964 that there was no risk of the shares not being transferred, may be safely accepted. It was virtually in his power to ensure that they were delivered to Parity and no possible reason has been suggested why he would not have exercised his power accordingly. And, as we know, the shares were in fact transferred. It is but a short step from his own knowledge that the shares would be transferred and that the money could be advanced without risk to Parity, to a belief that in those circumstances the board of Parity would offer no objection to the pre-payment of R250,000 on account of the purchase price. We have given due consideration to the circumstance that here, as in other counts which have been discussed earlier, the appellant had a degree of self-interest in placing Dundee Coal in funds at that time. But that is not a conclusive answer to the question whether an honest board, fully informed,

would ..../

would nevertheless have agreed to the transaction or whether the appellant could bona fide have believed that it would agree, where essentially the transaction held out substantial benefit for the company.

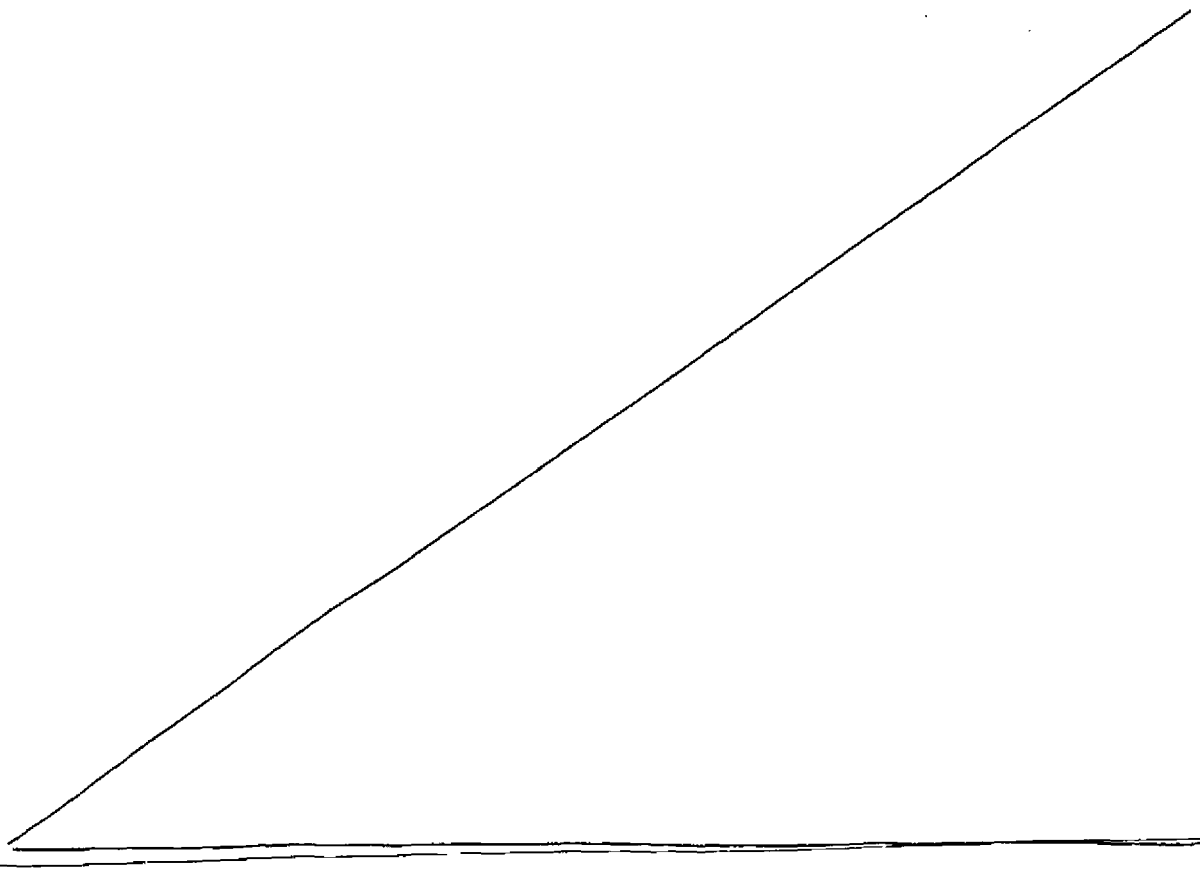
Finally, it is necessary to consider an argument presented on behalf of the State with reference to the meeting of the Parity board held on 14th September, 1964, which as pointed out above, was the very day before the first payment of R105,000 was made. It was contended that the omission from those minutes of any reference to the advance of R250,000 gives rise to the inference that the appellant feared or believed that the board would not approve. But for the reasons mentioned above in connection with a similar argument on the question whether there had in truth been a decision to purchase the shares, the omission from the minutes is not conclusive. On this aspect of the case, too, it is a factor to be taken into account, but it does not appear to us to be sufficiently cogent to negative the other considerations which, as we have mentioned above indicate a very real possibility that the appellant bona fide and reasonably believed

that .... /294

that the board would approve the advance payments in respect of the purchase price of the shares.

In the result, we consider that the State failed to discharge the onus of proving that the appellant did not entertain that belief and that it therefore failed to prove that he acted animo furandi.

The appeal on this count succeeds.



Count 29 ...../295

COUNT 29 (FRAUD).

The gist of the charge in this count is aptly summarised by the learned trial Judge as follows -

> "After the sanction by the Court of the compromise in Trans-Africa, the continued holding by Trans-Africa of more than 2% of the shares in National Savings constituted a contravention of the articles of association of National Savings.
>
> The Registrar pressed Trans-Africa to 'spread' its 100% shareholding in National Savings in order to comply with that company's articles. After many months, a large number of National Savings shares were transferred to various persons. The State case is that most of the transfers were not genuine, but were effected in terms of a scheme to deceive the Registrar into believing that there had been compliance with his demands. The State alleges that the crime of fraud was committed by Saevitzon when he advised the board of Trans-Africa on the 27th October 1964 that 'the articles of National Savings &

> Finance Corporation have now been complied with ...' It is alleged that the accused is also guilty of fraud because Saevitzon was acting with common purpose and in concert with the accused."

Trans-Africa was incorporated in 1955, and in 1959 it was registered as a deposit-receiving institution in terms of section 4 of the Banking Act, No. 38 of 1942. It had a wholly-owned subsidiary, National Savings, also a registered deposit-receiving institution. The appellant was chairman of Trans-Africa until September 1960, and remained a director until the collapse of Standard Finance in 1961. On 1 April 1963 Trans-Africa was placed under provisional liquidation, and it was de-registered as a deposit-receiving institution on the grounds that it did not carry on satisfactorily the business of a banking institution; see Registrar of Banks v. Trans-Africa Bank Ltd., 1963 (2) S.A. 687 at 692 D. It never regained such registration. On 11 June 1963 it was placed in final liquidation. On 18 December the Court sanctioned an offer of compromise between Trans-Africa and its creditors, and

297/... discharged

discharged it from liquidation. Its only remaining assets were its shareholding in National Savings, and some book debts. The appellant controlled Trans-Africa (a) through its directors, who were his nominees (Saevitzon was chairman); and (b) through Tacshare, the shares of which he owned beneficially, Tacshare holding the majority shareholding in Trans-Africa. He also controlled National Savings, through Trans-Africa's shareholding therein.

The articles of National Savings provided in article 5 that no member should hold more than 2% of the issued share capital of the company; but this was expressed to be inapplicable to shares held by a registered banking institution. The article, as amended in September 1963, also provided, in sub-paragraph (f), that no shares should be held in the name of a nominee. To safeguard this latter provision, article 40 was also amended. The words italicised, infra, indicate the latter amendment -

> "40. Every instrument of transfer shall be left at the Transfer Office of the Company, at which it is presented for registration, accompanied by the certificate of the shares to be transferred and/ or such other evidence as the Company may

298/... require

require, to prove the title of the transfer or his right to transfer the shares, and an affidavit sworn to by both the transferor and the transferee to the effect that to the best of their knowledge the transfer is not in conflict with paragraph (f) of Article 5."

These amendments were effected at the instance of the Registrar, who wished to avoid control of National Savings being exercised through nominee shareholders.

As already mentioned, Trans-Africa held virtually all the shares in National Savings. This was in order as long as Trans-Africa was a registered banking institution. But when it was de-registered, the Registrar took the view that the articles of National Savings precluded Trans-Africa from holding more than 2% of the shares of National Savings. He therefore insisted, on 3 October 1963, that Trans-Africa dispose of 98% of its shares in National Savings to independent persons, in such a way that the shareholding in National Savings would be widespread and diversified in accordance with its articles. The Registrar was adamant in his attitude; and at all material times Trans-Africa intimated its agreement with his attitude,

299/... and

and its acquiescence in his demands. Correspondence ensued between the Registrar and Trans-Africa over a period of several months; and we do not think that there can be any doubt but that the appellant and Saevitzon, who was his nominee chairman of Trans-Africa, were playing for time. The reason for this was that the appellant wanted to sell National Savings to the best advantage to a deposit-receiving institution; and he obviously could not do this if, in compliance with the Registrar's demand, Trans-Africa disposed widespread of 98% of its shares in National Savings to independent persons. Furthermore, the appellant thought that the latter course would not be financially advantageous, and that it would be difficult to place the shares, as they were not quoted on the Stock Exchange, and no dividends were being paid, and buyers would be reluctant to take a minority shareholding of 2% in a company.

But the Registrar was adamant and pressing, and time was running out. In this dilemma, Saevitzon says, the appellant and he bethought themselves of a ruse to throw dust in the eyes of the Registrar. Pending the sale of National Savings to a deposit receiving institution, Trans-Africa would go through

300... the

the motions of selling and diversifying its shares in National Savings, in apparent compliance with the Registrar's demands; but the sales would be mere shams, to selected persons who could be relied upon to be co-operative. The "buyers" were to furnish promissory notes expressed to be payable in January 1966 and were to be informed that they would never be called upon to pay them. These notes (they are variously referred to in the record as notes or bills) were to be pledged with Dundee Factors as part of the security for a loan of R100,000 to Trans-Africa, payable on 3 January 1966. Once the appellant had sold National Savings to a Banking institution (negotiations for which were continuing at this time) he would have to redeem this loan in order to gain possession of the National Savings share certificates, at the same time releasing the promissory notes.

In March 1965 the appellant reached agreement with Trans-Drakensberg for the acquisition by it of the National Savings shares.

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In pursuance of the foregoing SCHEME, a meeting of Trans-Africa shareholders was held on 23 July 1964. All were associated with the appellant. The minutes of the meeting record that the acting secretary reported that only one application for three shares had been received. In view of that, the following resolution was passed -

> "That the Directors of the Company be and are hereby empowered in terms of Section 70 Dec. of the Companies Act, as amended, to dispose of ninety-eight per cent of the 19,250 fully paid up shares of R2-00 each, held by the Company in THE NATIONAL SAVINGS AND FINANCE CORPORATION LIMITED, at a price of R12-95 per share, by offering them in the first instance to the shareholders of your Company pro rata, as near as may be, to their respective shareholdings, with the proviso that no individual shareholder may acquire, either in his own name or through a nominee or nominees, more than 385 shares, and in the event of shareholders not taking up the whole of the shares offered the Directors be authorised to dispose of them to such other persons as the Directors may determine.
>
> Provided, however, that should the Directors of the Company be able to dispose of the total share capital of the NATIONAL SAVINGS AND FINANCE CORPORATION LIMITED to a Banking Institution registered in terms of the Banking Act No. 38 of 1942 as amended, they are hereby empowered in terms of Section 70 Dec. of the Companies Act, as amended, so to do on such terms and conditions as they in their discretion may decide without first offering the said shares as aforesaid to the shareholders of this Company."

Saevitzon, in his evidence, bluntly described that resolution as "a piece of eyewash". Eight days later, on 31 July

1964 Trans-Africa wrote to the Registrar -

> "We have received applications for shares in National Savings & Finance Corporation Limited from the persons mentioned in the attached schedule.
>
> The applications received are in excess of the number of shares available for disposal and it is proposed to allocate shares in such a manner that no person will hold more than the maximum of two per cent of the total shareholding in National Savings & Finance Corporation Limited.
>
> In this connection we may mention that negotiations are taking place between Pearl Corporation (i.e. Trans-Africa) and Trans-Drakensberg Bank with the view to the latter taking over National Savings & Finance Corporation Limited. In view of this may we suggest that the allotment of shares be held over until after this meeting."

Attached to the letter was a list of the names and addresses of applicants for shares in National Savings. The persons selected were, Saevitzon said, "persons who had been subservient to the accused or (Saevitzon), companies which we owned, persons

303/... which

which we could exercise control over". The actual "placing" of most of the shares was done by Saevitzon and Van Lingen. According to Saevitzon, the arrangement, to which the appellant was a party, was that they would approach the persons on the list, and invite them to apply for shares, telling them that they did not have to pay for the shares, but that they could furnish a promissory note. This note they would never be called upon to pay. The purchasers would be asked to sign an application form for shares, and at the same time a blank transfer form relating to those shares, and a document pledging the shares to Trans-Africa. Thus the share certificates would remain in the possession of Trans-Africa.

Saevitzon said that he placed some shares in accordance with this arrangement. The applicants signed application forms, blank transfer forms and forms of pledge, and gave notes for the purchase price which were expressed to be payable in January 1966. So far as he knew, none of the applicants (which included himself, his wife and his brother) were ever called upon to pay the notes. The share certificates were retained

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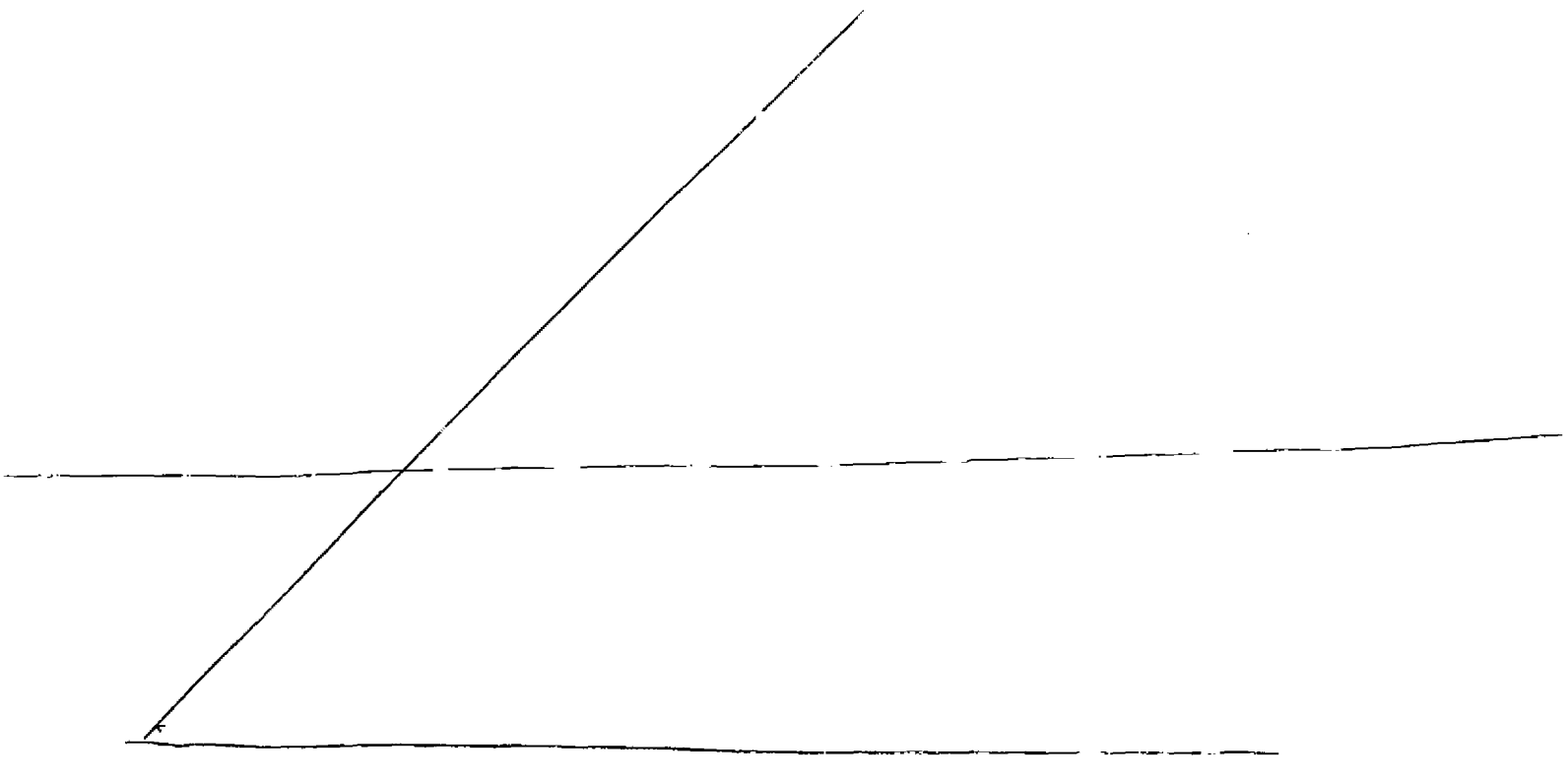
by Trans-Africa. The whole operation was, he said, "just a ruse". Its object was to deceive the Registrar into believing that his demands had been fully complied with by Trans-Africa.

As the final step in this course of deceit, on 27 October 1964 Saevitzon inserted the following document in the Minute Book of Trans-Africa. (By this time its name was Pearl Corporation Ltd.) The document was signed by Saevitzon and Benater as directors, and confirmed by Saevitzon as chairman. Loydell refused to sign it. Those three were the only directors at that time.



"MINUTES OF A MEETING OF DIRECTORS OF PEARL CORPORATION LIMITED HELD IN JOHANNESBURG ON THE 27TH DAY OF OCTOBER 1964 AT 2.15 P.M.

Present: Mr. A.M. Saevitzon (Chairman).
Mr. R. Benater.

In terms of Article 99 the quorum for this Meeting was fixed at two Directors.

The Chairman advised the Meeting that in terms of the Articles of National Savings & Finance Corporation Limited that the Pearl Corporation Limited have been obliged to dispose of excess shareholdings to one hundred and thirty one shareholders at a price of Twelve Rand ninety cents per share. The Chairman further stated that the Articles of National Savings & Finance Corporation Limited have now been complied with in that no individual or Company has been allotted more than two per cent of the total issued share capital of National Savings & Finance Corporation and that the Pearl Corporation Limited have retained the maximum percentage allowed in terms of the Articles, i.e. three hundred and eighty five shares.

The Chairman stated that in terms of a previous Minute, the Directors were authorised to give extended terms where necessary. This has in fact been done on a Promissory Note basis payable on the 3rd January, 1966 and as security the relative shares accompanied by blank transfer deeds will be held by the Pearl Corporation Limited until such time as the relative Promissory Notes concerned have been honoured.

In view of the above, and to afford working capital for the Corporation, arrangements have been concluded whereby Dundee Factors (Pty) Limited will advance to the Pearl Corporation Limited ninety per cent of the value of bills pledged to them together with the relative share certificates and blank transfer deeds where applicable.

It was therefore resolved that Promissory Notes as per schedule laid before the Board be pledged to Dundee Factors (Pty) Limited and that the shares accompanied by blank transfer forms as per schedule laid before the Board be pledged to Dundee Factors (Pty) Limited, against which the latter Company will advance the Pearl Corporation Limited the sum of R103,496.40c. less stamp duty, Bank charges, etc. and that the rate of interest payable to Dundee Factors (Pty) Limited will be ten per cent per annum, payable every six months in arrear as from 28th October, 1964.

It was further resolved that the Corporation's General Manager, Mr. B. van Lingen, be authorised to sign all documents to give the necessary effect to any cession or pledge required by Dundee Factors (Pty) Limited.

Seconded by Mr. R. Benater.

CONFIRMED.

.....
Chairman

.....
A.M. Saevitzon.

.....
R. Benater.

.....
E.G. Loydell (post Meeting)."

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The foregoing document was the basis of the charge of fraud on this Count. We draw attention to the words, in the first main paragraph, "The Chairman (i.e. Saevitzon) further stated that the Articles of National Savings & Finance Corporation Limited have now been complied with ...." This was plainly intended to convey that the Registrar's demands had been met.

We turn now to the question whether there are circumstances rendering it safe to rely on Saevitzon's evidence implicating the appellant. As to that -

1. The appellant controlled both Trans-Africa and National Savings.

2. Saevitzon was the chairman of National Savings, as the appellant's nominee and trusted lieutenant; and there was a very close relationship between the two men at that time.

3. The appellant was vitally affected by the Registrar's demands, since he owned, through Tacshare, approximately 56% of the issued share capital of Trans-Africa; and National

307/... Savings

Savings was a wholly-owned subsidiary.

4. It is clear that the appellant had full knowledge of the Registrar's demands and of the correspondence on that subject between Trans-Africa and the Registrar. The trial Court so found, and the finding was not challenged on appeal.

5. The appellant admitted that he did not wish to dispose of the National Savings shares disadvantageously in small parcels; and that he thought that it would be difficult to place such parcels.

6. The appellant was aware of the dishonest nature of the protracted correspondence from Trans-Africa to the Registrar, for those letters pretended that Trans-Africa was willing to take and was taking steps to comply with the Registrar's demands, whereas in fact nothing was being done in this regard. The reason for this inertia was that the appellant was trying to sell National Savings to the best advantage to a banking institution.

7. Saevitzon said that from February 1964 the appellant and he began preparing a list of

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possible shareholders in National Savings who would be symphathetic towards the appellant; and it became the list which was ultimately sent to the Registrar. The appellant under cross-examination denied this. The trial Court rejected his denial, because Saevitzon's evidence as to their preparation of the list was not challenged. All that was put to Saevitzon in this regard was that the aim was to get "friendly shareholders" and not "friendly nominee shareholders".

8. It is common cause that the great majority of the applicants did sign promissory notes, expressed to be payable in January 1966, and also signed blank transfer forms, and delivered the shares in pledge to Trans-Africa. The appellant conceded, under cross-examination, that the applicants were to be told that Trans-Africa was reserving the right to sell these same shares to a banking institution at a profit. The appellant denied that the buyers were to be nominees, but it is plain that, even on his version of genuine sales, the rights of the buyers were so whittled down as to render them mere caretakers for Trans-Africa

309/... and

and the appellant, who retained for themselves the practical rights of ownership.

9. A number of witnesses testified to their "purchase" of National Savings shares. Their evidence is not all one way, possibly because different approaches were used to different buyers. Some, indeed, regarded themselves as genuine buyers. But it is clear from the testimony of others of them that they regarded themselves as mere nominee purchasers, with no beneficial interest in the shares. Thus, Botha, a Parity employee, was approached to buy shares by Van Lingen (a former director of Trans-Africa and now a de facto manager). He says he signed the documents without reading them. (Saevitzon said of Botha, in regard to Count 10, that he would do as he was told.) Swart, also a Parity employee, says he was not buying in his own name. Hill, the marketing manager, says that he was approached by Van Lingen, who said -

> "It is simply a pro forma application. We want shares to be in the hands of people we know. In

310/... actual

actual fact you'll never be called upon to take them up or pay for them."

At a later stage Hill said he was told:

"In actual fact you are acting as a nominee for Wolf (i.e. the appellant) in this matter. He wants you to sign bills. You need not fear. Other arrangements will be made to pay for shares."

"Two days later I demanded the return of my bill and got it back."

Benater, (a director of Trans-Africa from January to November 1964) said that he did not regard himself as the beneficial owner of the shares. In addition several companies, which the appellant controlled, applied for some of the shares.

10. (i) In regard to the bills given by Saevitzon and his family it is common cause that on the 24th December 1965 a letter was written by a firm of attorneys to Trans-Africa on behalf of Saevitzon and his family, demanding the return of these bills. In this letter it was stated, inter alia:

311/... "We

"We are instructed that, in fact, the shares were never the property of our client, or his wife, or Mr. B.H. Saevitzon ..... the reason for the purported purchase of the shares was to enable you to comply with requirements of the Registrar of Financial Institutions. For this reason the Saevitzons, together with various other people, acted as fictitious shareholders and were, in fact, not the beneficial holders of the shares, nor was it ever contemplated that the bills, which fell due for payment in January 1966, would ever be presentend for payment. We are further instructed that at the request of various other persons similarly involved, their bills have been returned to them."

(ii) Despite reminders no answer was received to this letter.

(iii) While admitting having had personal sight of the letter referred to above, and having discussed it with his attorney, the appellant could not give an acceptable explanation why, on his version, the serious allegations

312/... contained

contained in the said letter were not refuted.

11. Although the entry in the Minute Book of 27 October 1964 states that the promissory notes were to be pledged to Dundee Factors for a loan to provide "working capital" for Trans-Africa, in fact the loan (R100,000) was needed in order to put Waghan in funds to enable it to pay a debt to Parity Agencies (Cape), whence it was to go to Parity. It was common cause, on the facts relating to Count 30, that the appellant planned these payments. He was thus fully in the picture, in regard to the promissory notes furnished by the "buyers" of National Savings shares.

12. Each purchaser of the shares was asked to sign a letter, paragraph 6 of which reads -

> "Upon a failure by the Purchaser to pay the purchase price and interest in full on due date, the Seller is hereby irrevocably authorised to dispose of the said shares purchased to any person or Company, whether by private treaty or otherwise, for such consideration as it sees fit, provided, that in the event of such purchase consideration being less than the capital amount and interest owing, then and

313/... in

> in such event, prior written notice of the intention so to dispose of the shares, shall be given to me and I shall then have the further right to purchase the said shares at the amount of capital and interest then outstanding, which right shall annure for a period of seven (7) days after the posting of a letter to me containing the aforesaid notice."

Counsel for the appellant submitted that the foregoing provision was inconsistent with sham sales. In our view the provision is inconclusive. It is consistent with (a) the sales being genuine, or (b) the sales not being genuine, in which event the letter, signed by selected "friendly" buyers, was intended to give an air of outward propriety to the transaction. That technique was employed in other Counts in this case, e.g. Counts 4 and 10.

In our view the cumulative effect of all the foregoing factors is such as to render it unsafe to rely on Saevitzon's evidence implicating the appellant. In the result, it was established that the appellant and Saevitzon (who was chairman of Trans-Africa) were acting as socii with a common purpose in a plot involving sham sales, with the intention of deceiving the Registrar into

314/... believing

believing that his demands had been complied with. We also consider that there can be no doubt but that the appellant realised that, after the sham sales of National Savings shares had been concluded, his socius Saevitzon as chairman of Trans-Africa would, in the performance of their common purpose, make some entry in Trans-Africa's Minute Book to record the "fact" that the Trans-Africa's shareholding in National Savings had now been spread, thus indicating a compliance with the Registrar's demand. The appellant is therefore as guilty as Saevitzon in that regard.

The indictment alleged a misrepresentation "through Trans-Africa's Board of Directors, to Trans-Africa, its directors, its auditors, and to the Registrar." It does not matter whether the false entry (i.e. the misrepresentation) actually reached the mind of the Registrar. It is sufficient that it was made to Trans-Africa; (see Kritzinger's case, referred in the judgment on Count 10).

It was calculated to prejudice the standing of Trans-Africa. For that matter it was also calculated to prejudice the Registrar and the auditors, for it was likely that they would be informed or come to know of it; and it is not necessary that the element of prejudice should relate to the person to whom the misrepresentation is made. See R. v. Heyne and Others, 1956(3) S.A. 604 (A.D.) at 622 E.

S U M M A R Y

To sum up so far -

1. The appeal is allowed in respect of counts 8, 9, 12, 20, 21, 23 and 27.

2. The appeal is dismissed in respect of counts 4, 10, 15, 16, 19, 24 and 29.

S E N T E N C E

There remains to be considered the effect of the foregoing on sentence.

The trial Court -

(a) convicted the appellant on 14 counts;

(b) sentenced him to a period of imprisonment in respect of each of those counts, the aggregate being 42 years;

(c) ordered a concurrence of sentences to the extent that the effective sentence was imprisonment for 7 years. This was in accordance with the

316/... accepted

> accepted principle that the onerous nature of the cumulative effect of periods of imprisonment must be borne in mind.

There was no appeal against sentence, either against the period of imprisonment imposed on each count, or against the degree of concurrence, with its effective sentence of 7 years.

As the result of the appeal, the appellant stands convicted on 7 counts, in respect of which he was sentenced by the trial Court to periods of imprisonment aggregating 19 years. On that footing, this Court must now decide the effective sentence which the appellant must be ordered to serve.

The appellant was 62 years of age when he was convicted, a circumstance which evokes a note of compassion in considering the bleak recompense of imprisonment in the afternoon of his years. We also take into account his anguish, as well as very heavy expense, over a long period in connection with a trial lasting nearly 20 months in which he was acquitted on 17 out of 31 counts. And some abatement of his effective sentence must be accorded him in respect of the counts on which the appeal has succeeded, balanced of course against the fact that he still

317/...remains

remains convicted on seven serious counts.

These seven counts on which he stands convicted were grave and cynical crimes, conceived in the main in the spirit of pillage, and committed deliberately over a period of some two years, in blatant disregard of the mercantile tenet that a company is an entity in its own rights, which those who control it must safeguard. That principle is the foundation of the right of limited liability enjoyed by shareholders in respect of company debts. The appellant, however, wanted to have it both ways - blandly treating the company assets as if they were his own, while enjoying the advantage of his limited liability for company debts. In such circumstances the deterrent aspect of sentence calls for a measure of emphasis.

Weighing all these considerations, we are unanimously of the opinion that the periods of imprisonment totalling 19 years imposed by the trial Court on these 7 counts, should be ordered to run concurrently to an extent that the effective sentence is imprisonment for six years.

This means that, as the result of the appeal having been allowed on some counts, the appellant's effective sentence

318/... is

is reduced from seven years to six years. That the apparently modest extent of this reduction is not directly proportionate to the appellant's success on appeal, is a consequence which flows from the serious view which we take of the seven offences of which he still stands convicted.

In the result, the unanimous order which this Court makes is as follows:

1. The appeal is allowed in respect of counts 8, 9, 12, 20, 21, 23 and 27.
2. The convictions and sentences on those counts are set aside.
3. The appeal is dismissed in respect of counts 4, 10, 15, 16, 19, 24 and 29.
4. The sentences imposed by the trial Court in respect of the latter seven counts are to run concurrently to an extent that the appellant's effective sentence is imprisonment for six years.

G.N. HOLMES
JUDGE OF APPEAL.

W.G. TROLLIP
JUDGE OF APPEAL.

S. MILLER
ACTING JUDGE OF APPEAL