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

(APPELLANT DIVISION
AFDELING)

APPEAL IN CRIMINAL CASE.
APPEL IN STRAFSAAK.

ALFRED EDWARD BARNARD

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Israel & Sackstein
Prokureur van Appellant

Respondent's Attorney A.G. (Att. Gen.)
Prokureur van Respondent

Appellant's Advocate E.M. Wentzel
Advokaat van Appellant

Respondent's Advocate D.W. Rothwell S.C.
Advokaat van Respondent T. Ue-schoor

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

(T.P.D.)

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Veram Van Blerk, Botha, Hofmeyr,
Wentzel - 9.45 - 10.45, 11.55 - 12.05;

Rothwell - 10.46 - 11.00, 11.15 - 11.55
C.A.V.

The Court dismisses
the said appeal.
Judgment per
Van Blerk ACJ.
19/9/75

Allen
Registrar

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PATRICK LEONARD LAURENCE

Appellant

versus

THE STATE

Respondent

Coram: VAN BLERK, A.C.J., BOTHA et HOFMEYR JJ.A.

Heard:

Delivered: 19:9:75

5th September 1975

J U D G M E N T

VAN BLERK A.C.J.:

This is an appeal from a judgment by the Transvaal Provincial Division dismissing the appellant's appeal against his conviction by a magistrate's court of an attempt to contravene section 11(g)bis of the Suppression of Communism Act No. 44 of 1950 as amended. The

contravention.....2/

contravention concerns the unlawful publication by the appellant of statements or utterances made by one Sobukwe, a person prohibited in terms of Section 9(1) of the Act.

The unchallenged evidence adduced on behalf of the State shows that the appellant compiled an article based on an interview he had with Sobukwe. The article contains utterances or statements or extracts from such utterances or statements made by Sobukwe.

On 3 January 1973 the appellant (a journalist attached to a Johannesburg newspaper, he was at the time resident in Johannesburg) wrote a letter to John Cundill whose address was 85 Fleet Street, London, requesting Cundill to do him a favour and put the envelope and an enclosed covering letter addressed to Colin Legum into an envelope and send them to Legum care of the address of The Observer, a London newspaper, Queen Victoria Street, London. In the covering letter to Legum the appellant offered the article for publication in The Observer, with the request

that.....3/

that should The Observer use the article his name should not be mentioned as he thought he would be liable under the "gagging clause" of the Suppression of Communism Act if he were by-lined. About three weeks later on 20 January the South African Police received by post an envelope addressed to the Commissioner of Police Johannesburg. According to the stamp on the envelope it was posted at London. This envelope contained the envelope addressed to John Cundill containing the letter to Cundill, the article and the covering letter to Legum. The identity of the person who posted the envelope with it's contents to the South African Police was not disclosed. But nothing turns on this. The appellant closed his case without calling evidence. There is, however, no evidence that Cundill ever received the envelope with it's enclosures addressed to him by the appellant.

The evidence is that copies of The Observer in which the article was to be published would in the ordinary

course.....4/

course of events be circulated among it's readers in South Africa and that the appellant a journalist of standing realised that in this way the article would be published in this country.

It was argued on appellant's behalf that the appellant could not achieve his purpose of publishing the article as a number of further acts had to be completed over which the appellant had no control, namely

- (a) The letter had to reach Cundill,
- (b) Cundill had to agree to pass on the article and covering letter to Legum and
- (c) Legum had to decide that the article was worthy of publication in the Observer, and if published The Observer had to reach it's readers in South Africa.

These further steps necessary for the completion of the

crime.....5/

crime, would, so the argument continued, never materialise (the letter had been intercepted) and therefore the appellant's purpose was frustrated in embryo; his conduct remained in the realm of preparation and did not become sufficiently closely connected with the ultimate commission of the offence so as to constitute an attempt.

It is clear from the proved facts that the appellant himself could not publish the article as for publication he had to rely on third parties over whom he had no control. However, the facts show that he made the article available and offered it for publication; he therefore took the necessary steps for the publication thereof. He set out to do the following: To visit Sobukwe, to interview the latter, to compile for publication an article based on the interview, to write the letters to Cundill and Legum requesting them to assist him in securing publication and to ~~post the two letters and the article to Cundill.~~ Thus he did everything which he set out to do; he could do no more and

dropped.....6/

dropped out of the picture after he had completed his self-imposed task. On a realistic, common sense view the role played by the appellant clearly constituted a completed attempt, which left no room for consideration of the distinction between acts of preparation and acts of consummation, an attempt of the kind envisaged by Watermeyer CJ in Rex v. Schoombie 1945 AD 541 and formulated as class (a) - as distinct from class (b) - at pages 545 and 546 of his judgment as follows:

"Attempts seem to fall naturally into two classes: (a) Those in which the wrongdoer, intending to commit a crime, has done everything which he set out to do but has failed in his purpose either through lack of skill, or of foresight, or through the existence of some unexpected obstacle, or otherwise, (b) those in which the wrongdoer has not completed

all.....7/

all that he set out to do, because the completion of his unlawful acts has been prevented by the intervention of some outside agency."

The appeal is dismissed.

P. B. van Blerk
Van Blerk
A.C.J.

Hofmeyr J.A.) Concur

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

PATRICK LEONARD LAURENCE

Appellant

and

THE STATE

Respondent

Coram: VAN BLERK, A.C.J., BOTHA et HOFMEYR, JJ.A.

Heard: 5 September 1975.

Delivered: 19 September 1975.

J U D G M E N T

BOTHA, J.A.:

I agree with the Acting Chief Justice that,

for the reasons advanced by him, the appeal should be

dismissed.

The.../2

The charge against the appellant is that he did wrongfully and unlawfully, in contravention of section 11 (g) bis of Act 44 of 1950, as amended, print publish or disseminate certain utterances or statements or extracts from such utterances or statements made by a person prohibited from attending any gathering. In further particulars furnished at the request of the appellant it was alleged that he had prepared an article containing extracts from utterances or statements made by or purporting to have been made by a person prohibited from attending any gathering, and that thereafter the appellant had forwarded the said article to one John Cundill in London "with the request or suggestion that it be published in a newspaper known as 'The Observer' , being a newspaper which is imported into the Republic of South Africa", and which is distributed to members of the public in South Africa.

It is, of course, obvious that the appellant

could.../3


could not himself have printed or published in "The Observer" the offending article prepared by him. For that he required the co-operation of Cundill, Legum and the other persons in control of that newspaper, over whom the appellant himself had no control. But, having regard to the ordinary meaning of the word "publish", viz. "to make publicly or generally known" (Oxford Dictionary), the prohibition contained in section 11 (g) bis includes a prohibition against taking such steps as may be necessary to procure the publication by someone else of the statements or utterances therein contemplated. A somewhat analogous case is that of R. vs. Pickering, 1911 T.P.D. 1054. In that case a regulation made it an offence for an employer not to register a native as required by another regulation. Under that regulation, however, an employer could not register a native, but could only take certain steps to obtain registration by the responsible official. It was held that the regulation should be

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construed so that it would be an offence for an employer not to take the steps necessary for registration by the official.

With the posting of the article and the covering letter to Cundill in London, the appellant had taken all the steps which were necessary and which he could possibly have taken to procure the publication in "The Observer" of the offending article, and which the law prohibited him from doing. Had publication taken place, the appellant would have been guilty of a contravention of section 11 (g) bis without the performance of any further act or acts by him. Because he had failed in his purpose in that publication in "The Observer" was not achieved, albeit through no fault of his own, he could not have been convicted of a contravention of that section. The steps taken by the appellant up to the posting of the letter and article to Cundill, constituted, however, what is known as a completed attempt (Burchell and Hunt : S.A. Criminal Law, Vol. 1 at p. 380) to contravene that section, such

as is referred to in the passage cited by the Acting
Chief Justice from the judgment in Rex vs. Schoombie,
1954 A D 541. That being so, I agree that the
question whether the appellant was still engaged in
acts of preparation or in acts constituting consummation
of the offence does not arise for consideration.


D.H. BOTHA, J.A.