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G.P.A.

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

(APPELLATE) DIVISION.
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN STRAFSAAK.

RONALD LEVITT
Appellant.

versus/teen

THE STATE
Respondent.

Symington & de Kok
Appellant's Attorney P.G. (G. van)
Prokureur van Appellant Respondent's Attorney
Prokureur van Respondent

Appellant's Advocate E.K. Lichtenberg S.C.
Advokaat van Appellant Respondent's Advocate E.R. Erasmus S.C.
Advokaat van Respondent

Set down for hearing on 3.10.76
Op die rol geplaas vir verhoor op

(E.C.D.) 31012
Erasmus Wessels, de Villiers et Katze AJA
Lichtenberg - 9.45-11.00. 11.15-12.37. 3.37-4.00.
Erasmus - 12.37-12.45. 2.15-3.37.

C.A.U.

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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

RONALD LEVITT Appellant

and

THE STATE Respondent

Coram: Wessels, De Villiers, JJ.A., et Kotzé, A.J.A.

Heard: 13 May 1976

Delivered: 2 June 1976

J U D G M E N T

WESSELS, J.A.:

This matter originated in the regional court, Port Elizabeth. Appellant was charged on 10 counts, namely, two of theft, two of contravening provisions of the Insolvency Act (No. 24 of 1936), five of contravening provisions of the Companies Act (No. 46 of 1926) and one of contravening a provision of the Magistrates' Courts Act

(No. 32 of 1944).....2/

(No. 32 of 1944). He was acquitted on three counts, and convicted on the remaining counts. An appeal was noted to the Eastern Cape Division, but was only pursued in respect of the conviction on three counts (i.e., counts 2, 4 and 7). The appeal against the conviction and sentence on count 4 was allowed; that against counts 2 and 7 was dismissed. The Eastern Cape Division granted appellant's application for leave to appeal to this Court against its judgment dismissing the appeal against the conviction on counts 2 and 7.

In so far as count 2 is concerned, the charge sheet reads as follows:

"THAT the accused is guilty of contravening section 132(d) of Act 24 of 1936 as amended:
IN THAT

WHEREAS the estate of the accused was provisionally sequestrated by the PORT ELIZABETH Circuit Local Division of the Supreme Court of South Africa on the 1st day of MAY, 1973:

AND WHEREAS.....3/

AND WHEREAS the estate was finally sequestrated by the said Division of the Supreme Court of South Africa on the 5th of JUNE, 1973.

NOW THEN

On or about the 12th NOVEMBER, 1971 and prior to the sequestration of his estate, and at or near PORT ELIZABETH in the district of PORT ELIZABETH and in the Regional Division of EAST CAPE, the said accused, being an insolvent, did wrongfully and otherwise than in the ordinary course of business, remove or make a disposition of assets to wit, a 1971 PEUGEOT Motorcar to T.D. LEVITT or did wrongfully permit such removal or disposition, such removal or disposition having prejudiced or having been calculated to prejudice creditors of the accused.*

For the purpose of sentence, counts 2 and 3 were taken together. The sentence imposed by the regional magistrate was one of four months imprisonment, the whole period being conditionally suspended for three years.

In so far as count 7 is concerned, the charge sheet reads as follows:

*That the accused.....4/

"THAT the accused is guilty of contravening section 90 of Act 46 of 1926 as amended. IN THAT the accused being a director of TIVEL (PTY) ^{LTD.} (a company in terms of Act 46 of 1926 as amended and hereinafter referred to as the Company) during the period 15th AUGUST 1972 to 1st MAY, 1973 and in PORT ELIZABETH in the district of PORT ELIZABETH and in the REGIONAL DIVISION OF EAST CAPE the said accused did wrongfully and unlawfully fail to keep in one of the official languages of the Republic such books of account as are necessary to exhibit a true and fair view of the state of the Company's affairs, and explain the transactions and financial position of the trade or business of the Company, including books showing the assets and liabilities of the company and books containing entries from day to day in sufficient detail of all cash received and cash paid, statements of the annual stocktakings and of all goods sold and purchased, showing the goods and the buyers and sellers thereof in sufficient detail to enable the nature of those goods and those buyers and sellers to be identified."

In respect of this count, appellant was sentenced to a fine of R40 or twenty days imprisonment.

In passing.....5/

In passing, it is to be noted that section 90(1) imposes an obligation on a company to keep books of account. Failure to comply with this provision renders the company liable to prosecution in terms of section 90(3). In terms of sub-section (3) a director commits an offence only if he "is aware of such failure" or if he "has failed to take all reasonable steps to secure" compliance by the company with the provisions of sub-section (1). In prosecuting a director, regard should be had to the provisions of sub-section (3) in formulating the charge. No objection was, however, taken at any stage to the formulation of the charge in question, and I make no further mention of it.

I propose dealing, firstly, with the appeal relating to count 2. It is to be inferred from the judgment of the regional magistrate that the asset removed or disposed of was the motor vehicle referred to in the charge

sheet, i.e.,6/

was payable in monthly instalments over a period of

24 months, the first instalment being payable on 1

December 1971. Clause 3 of the agreement reads as fol-

lows:

" Ownership in the said Goods shall remain vested in the Owner until the purchase price mentioned in the said schedule has been paid together with any interest or other amounts which may become payable by the Purchaser hereunder, but provided the Purchaser shall observe and perform all the terms and conditions hereof and upon payment to the Owner of all amounts and any interest payable under this Agreement the Purchaser shall then become the owner of the said vehicle; and until the Purchaser becomes the owner the registration certificate in respect of the vehicle issued to him by the registering authority shall be lodged with and retained by the Owner."

(In the agreement in question the seller is referred to as "owner")

Clause 11(a).....8/

Clause 11(a) of the agreement reads as follows:

"The Purchaser undertakes that he will:

(a) Keep the Goods in his own possession and control, and free of any lien, and charge, and will not without the previous consent in writing of the Owner, attempt or purport to sell, let, loan, pledge transfer, or part with the possession of the Goods or the benefit of or interest in this Agreement."

Clause 12 provides, inter alia, that if the purchaser fails to make punctual payment of instalments or commits an act of insolvency, the seller may terminate the agreement and retake possession of the motor vehicle.

In terms of clause 13 the agreement "is personal to the Purchaser and is not assignable by him".

The Peugeot was registered in the name of appellant's wife. It is by no means certain on what date registration was effected. The necessary documents were, however, signed by the seller and appellant's wife on 12 November, 1971. The documents are those referred to in section 42

of.....9/

of the Road Traffic Ordinance, No. 21 of 1966 (Cape).

Appellant's wife signed as the "New Owner".

Mr. W.D. Austin, credit manager of Malcomess Motors (Pty) Ltd., gave evidence on behalf of the State at the trial. He was asked how it came about that the Peugeot was registered in the name of Mrs. Levitt. He stated that a salesman, Mr. T. Abernethy, was "responsible" for the form the registration took. Under cross-examination, Mr. Austin testified as follows:

" And the position is really this, that it makes no difference to your company whatsoever, in whose name this vehicle is registered for the purposes of the Road Traffic Ordinance, is that so? -- That is right.

Your rights are covered by your hire-purchase Agreement and you are only concerned with the hire-purchase agreement, is that right? -- That is right.

And whether it is registered in Mrs. Levitt's name or Mr. Levitt's name, or anybody else's name, it is totally irrelevant for the purposes of your contract with Mr. Levitt. Is that right? -- Right.

You can always.....10/

You can always attach the vehicle and execute your right in terms of that agreement? Your ownership remains, and in fact, after insolvency, your ownership still remains, is it not? -- That is right."

Mr. Abernethy was not called to explain in what circumstances the Peugeot came to be registered in Mrs. Levitt's name.

Mr. K.N. Patterson, the trustee in the appellant's insolvent estate, gave evidence at the trial. In the course of his evidence he stated that after appellant's sequestration he visited him at his place of business. He asked him about the Peugeot motorcar, whereupon appellant stated that it was "his wife's car". He also stated that after appellant's sequestration Malcomess Motors repossessed the Peugeot and sold it. Out of the proceeds of the sale they discharged the amount owing to the company under the hire-purchase agreement and

gave him.....11/

gave him (the witness) a cheque for the balance (approximately R500), which he paid into the insolvent estate's banking account. Under cross-examination he conceded that what appellant had said was that the Peugeot was registered in his wife's name.

Mr. D.J. Sharp, a deputy-sheriff, stated that when he spoke to appellant about the Peugeot, the latter told him that it belonged to his wife. He (appellant) made no reference to the hire-purchase agreement.

The appellant was interrogated by the trustee at a meeting of creditors in terms of the provisions of section 65 of the Insolvency Act (No. 24 of 1936). A copy of the evidence given thereat was handed in at the trial. Appellant testified as follows in regard to the ownership of the Peugeot:

*You have got.....12/

" You have got a motor-car under Hire Purchase to Malcomess Motors. Is that correct? -- Yes.

What kind of motorcar is it? -- A 1971 Peugeot, 404.

Now, is that the motorcar that was standing outside your business premises when I first made your acquaintance? -- That is the car.

It is a blue one? -- It is a blue one.

And do you recall me asking you who owns the motorcar? -- Yes.

And what answer did you give me? -- That the car was registered in the name of my wife.

Was that a truthful statement? -- Yes, Mr. Patterson, it is registered in the name of my wife. I subsequently ascertained that the H.P. agreement was made out in my name.

So actually it is your asset? -- Actually it is my asset. I have shown you the registration papers.

Yes, I know. But the information you gave me first of all, I think you told me that the motor car belonged to Tevil? -- No, Mr. Patterson.

Did you tell me it belonged to your wife? -- I said Tevil paid the instalments of the car.

But this is in fact, although the car is registered in your wife's name, you actually bought it? -- Yes.

The Hire Purchase is in your name? -- The H.P. Agreement is in my name.

So, therefore, this car must be recovered into your insolvent estate? -- Yes.

Appellant was not questioned in regard to the reason

~~why the Peugeot was registered in his wife's name.~~

It was common cause that appellant was provisionally sequestered on 1 May 1973 and finally on 5 June 1973.

After the State had closed its case, the appellant's case was closed without any evidence being led on his behalf.

Before considering counsel's submissions on appeal before this Court, it is necessary to refer to certain further particulars furnished by the State in respect of count 2. From these further particulars it appears that it was the State's case that the "removal" or "disposition" was effected by the registration of the Peugeot in the name of appellant's wife. It was, further, stated that the "reason" for such registration was not known to the State, i.e., that it was not known whether the registration was pursuant to an agreement of sale, loan, lease or donation between appellant and his wife.

Although.....14/

Although the charge, as formulated, does not in terms
make such an averment, it is clear from the provisions
of section 132(d) of the Insolvency Act that the offence
is committed by an accused when the removal or disposi-
tion relates to an asset "in his estate".

In terms of section 2 of the Insolvency Act, "dis-
position" means "any transfer or abandonment of rights
to property and includes a sale, lease, mortgage, pledge,
delivery, payment, release, compromise donation or any
contract therefor....." The word "property"
means "movable or immovable property.....and includes
contingent interests in property....."

The word "removal" is not defined in the Act. In
the context in which the word is used in section 132(d),
I am of the opinion that it means the act of taking away
entirely or of conveying or shifting an asset to another
place (see Shorter Oxford English Dictionary, s.v. "re-
moval"). It appears to be notionally impossible to remove

an incorporeal.....15/

an incorporeal asset, except possibly in the sense of removing the written instrument evidencing the rights constituting the asset in the estate.

The reliance placed by the State on the fact that the Peugeot was registered in the name of appellant's wife, makes it necessary to refer briefly to certain provisions of the Road Traffic Ordinance, No. 21 of 1966 (Cape). In so far as it is material hereto, the word "owner" is defined as follows in section 1 (unless the context otherwise indicates):

- "'owner', in relation to a vehicle, includes -
- (a) a joint or part owner of that vehicle, or,
 - (b) a person having possession of that vehicle by virtue of a hire-purchase or suspensive sale agreement..... but does not include the seller or lessor under any such agreement....."

It will be noted that in paragraph (a) the reference is to ordinary common law ownership.

In my opinion, the registration of the Peugeot in the name of appellant's wife was in conflict with the provisions of section 42(2) of the Ordinance. On the evidence placed before.....16/

placed before the regional magistrate, the Peugeot ought

to have been registered in appellant's name. He had

"possession" of the vehicle "by virtue of a hire-purchase

agreement" and was, therefore, the owner thereof for the

purposes of section 42(2). In any event the registration

of the vehicle in the name of appellant's wife was a

transaction devoid of any legal consequences whatsoever

both in so far as the ownership of the Peugeot was con-

cerned and also in respect of the transfer of appellant's

contingent rights in terms of the hire-purchase agreement.

Except for the purposes of registration of the Peugeot,

appellant was not the owner thereof. He was, therefore,

not in a position to make any disposition in the sense of

transferring ownership from him to his wife. At all mate-

rial times the ownership of the Peugeot remained vested

in the seller, Malcomess Motors. Furthermore, appellant

required the written consent of Malcomess Motors to the

cession of.....17/

cession of his contingent rights under the hire-purchase agreement to his wife. There is no evidence that such a

cession was ever effected. In my opinion, therefore, it was not proved that appellant had made any disposition of his contingent rights under the hire-purchase agreement to his wife. It follows that it was not proved beyond any reasonable doubt that appellant was guilty of contravening the provisions of section 132(d) of the Insolvency Act.

In my opinion, there is no real substance in the appeal against appellant's conviction on count 7. Despite the somewhat inept formulation of the charge, to which I have referred to above, the appellant was not, in my opinion, prejudiced in any manner by the failure to make specific reference in the charge to the relevant provisions of section 90(3) of the Companies Act. The company in question, Tivel (Pty) Ltd., was incorporated on 8 April

1972. A week later, appellant and his wife were appointed as directors. On 16 May 1973, i.e., shortly after the

provisional sequestration of his estate, appellant resigned as a director. He was thereafter employed as manager of the company. Max Finn and Partners, a firm of chartered accountants, were appointed as auditors. A partner in the firm, Mr. S. Isaacson, gave evidence at the trial. In his evidence-in-chief he testified as follows:

"PROSECUTOR: Your Worship, this will be Count 7.

(TO WITNESS): According to the Minute book, and books in your possession, or any other information you may have obtained as an auditor of the company, do you know whether this company traded at all? Tivel (Proprietary Limited? -- I believe it has traded because as I mentioned, I subsequently did a set of books.

From when? -- The books had been written up from the beginning of 1973.

The beginning of 1973? -- If I say the beginning, it might have been January, or February, or March, I am not quite sure."

Isaacson was cross-examined as follows:

"CROSS-EXAMINATION BY DEFENCE: Mr. Isaacson, the books have in fact now been written up, is that right? -- Yes.

They are all.....19/

They are all with you and they are all in order, is that correct? -- Well, I ~~have not completed my audit, so I would~~ not know whether they are in order but they have been written up.

But they appear to be in order? -- They do appear to be in order."

It is clear from appellant's evidence given during his interrogation at a meeting of creditors that he was at all material times aware of the fact that books of account were not being kept. Isaacson's evidence, which was not challenged in cross-examination, proves that the company had commenced trading at a time when appellant was a director. In my opinion, therefore, appellant was rightly convicted on count 7.

Having regard to this Court's approach to the appeal relating to count 2, it is not necessary to deal with a point taken in limine by counsel appearing for the State, namely, that on appeal before this Court appellant should be restricted to the grounds of appeal relied upon by him

in the application.....20/

in the application to the Court a quo for leave to appeal to this Court.

As I have already pointed out, counts 2 and 3 were taken together for purposes of sentence. The appeal succeeds in so far as count 2 is concerned. There is no appeal before this Court in regard to count 3. It is necessary to effect a consequential amendment to the sentence of four months imprisonment imposed in respect of counts 2 and 3. The reference in the sentence to count 2 is to be deleted. In so far as count 3 is concerned, it is to be recorded that the sentence is to be one of imprisonment for a period of one month. The condition of suspension is to be altered by deleting the reference to section 132(d) of Act 24 of 1936.

In the result, the appeal succeeds in so far as count 2 is concerned, and the conviction and sentence on that count are set aside. In respect of count 7, the appeal is dismissed.

De Villiers, J.A.)
Kotzé, A.J.A.) concur.

P. B. O. - C