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IN RE

13.01.1981

G.P.A.

A. 448

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

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE. APPEL IN STRAFSAK.

PIERRE FRANCOIS HOGG

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney C. & A. PRINCE Respondent's Attorney A.G. (CTR)
Prokureur van Appellant Prokureur van Respondent

Appellant's Advocate Botha Respondent's Advocate de
Advokaat van Appellant Advokaat van Respondent

Set down for hearing on _____
Op die rol geplaas vir verhoor op _____
(C.P.O.)

Coram: Wessels, Rabau A.R.R., et Miller ~~et~~ A.R.

Adv. Botha se betoeg 9.47-9.50 vm
Adv. Klein se betoeg 9.25-11.03 vm.
Adv. Klein se betoeg 11.17-11.20 vm.
Adv. Botha se betoeg 11.22-11.26 vm.

Verlof deur Regter P.J. VAN DER MERWE
150/75

C.A.V.

The Court is hereby informed that the Appellant has been notified of the date of the hearing.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

PIERRE FRANCOIS HUGO

Appellant

and

THE STATE

Respondent

Coram: WESSELS, RABIE et MILLER, JJ.A.

Heard: 19 August 1976.

Delivered: 26 August 1976.

J U D G M E N T

MILLER, J.A.:

The appellant was charged in the Cape Provincial Division (ROSE-INNES, A.J., and two assessors) on seven counts of fraud. To each of these counts were added three alternative charges, only one of which needs to be mentioned, viz., the

first alternative in each case in which it is alleged that appellant contravened section 80 bis of the Companies Act, No. 46 of 1926, as amended. The appellant pleaded not guilty to the main charge of fraud in respect of all seven counts, but guilty to the first alternative charge in respect of counts 1, 3, 4, 5, 6 and 7. He was acquitted on counts 2 and 5, found guilty in terms of his plea of the first alternative offence alleged under each of counts 1, 3 and 4 and was convicted of fraud under counts 6 and 7. In respect of the convictions for fraud, he was sentenced to 18 months imprisonment on each of the two counts. His application for leave to appeal against the convictions on counts 6 and 7 having been refused by the trial Judge, he petitioned the Chief Justice for leave, which was granted in respect of count 6 only. The question before us, then, is whether he was wrongly convicted of the fraud alleged in count 6.

Counts 3 to 7 are grouped together in the indictment, to which is attached a schedule reflecting details

applicable to each of the five counts. When there have been extracted, from the schedule, those details applicable to count 6 and the necessary formal adapt^{ta}ions made to the body of the charge, the main count of fraud under count 6 reads as follows:

"Whereas there was a duty upon the accused, in terms of Section 80 bis of the Companies Act, when offering shares for sale to the public, or when inviting offers from the public to purchase shares, to accompany such offer or invitation either by a prospectus complying with the provisions of the above-mentioned Act, or by a written statement containing the particulars required by the above-mentioned Section to be included therein,

And whereas, during 6 May to 1 July 1970 and at or near Cape Town, in the district of The Cape, the accused offered shares in the company Hugo Hold Wash Holdings (Pty.) Ltd., for sale to R.S. Hall, or invited offers from the said R.S. Hall to purchase the said shares,

And whereas:

- (i) the said offer or invitation was not accompanied by such prospectus or written statement as required by Section 80 bis of the Companies Act and/or,
- (ii) the accused when he so offered or invited, caused the said R.S. Hall to believe that the said Company was financially sound,

Now, therefore, by virtue of the failure to disclose and/or the representation, set out under (i) and (ii)

above, the accused did wrongfully, unlawfully, falsely and with the intent to defraud cause and induce the said R.S. Hall, to his loss and prejudice, to accept shares in the said company and/or to make loans to such company for the amount of R10 000, whereas in truth and in fact the accused, when he so failed to disclose and/or represented well knew that the said company was not financially sound, and that the said R.S. Hall would not have accepted the said shares and/or made the said loan if the true financial position of the said company was disclosed to him in terms of the said prospectus or said written statement.

Now therefore the accused is guilty of FRAUD."

The appellant, with complete justification, asked for further particulars to this charge. These are the particulars he sought:

- "(a) What precisely is it alleged did the accused fail to disclose?
- (b) What precisely is it alleged did the accused represent?
- (c) In what manner is it alleged did the accused so represent."

~~The answer to his request reads thus:~~

- "(a) Accused failed to disclose the particulars required by Section 80 bis (3) of the Companies Act.

(b) and (c) Accused told Mr. Hall

- (i) All the equipment and vehicles in use were paid for and/or
- (ii) The books of the companies were not available being with the auditors".

Neither at the trial, nor on appeal, was the failure to disclose the particulars required by section 80 bis (3) relied upon by the State in connection with the fraud charge. That aspect of the main charge in count 6 may therefore be disregarded for purposes of this appeal.

The evidence established and the trial Court found that Hall, in fact, paid R10 000 over to the appellant for investment in Hugo Hold Wash Holdings (Pty.) Ltd., a holding company under the effective control of the appellant and carrying on, through another company controlled by appellant, a laundry business at Woodstock. In consideration of such investment, Hall was to be employed by and become a director of

the holding company. The Court found that it was established that the appellant induced Hall to make the investment by falsely, and with intent so to induce him, representing to him

(i) that the books of the company were not available because they were at the auditors and (ii) that the holding company and the business were "doing well, barring teething troubles, and that the business was improving". It will be noticed that the Court a quo did not at all found its verdict that the appellant was guilty of fraud upon the first of the representations alleged in the further particulars to the charge, viz., that all the equipment and vehicles in use were paid for; it expressly found that that representation was not established by the evidence.

The second of the representations found by the Court a quo to have been established (namely, the representation that the company and business were doing well and improving, which, it would appear, the Court regarded as virtually synonymous with a representation that they were financially sound) was not alleged in the further particulars to the charge and the appellant's contention is that in relying upon such representation the trial Court travelled beyond the confines

of the charge which the appellant was called upon to meet.

The point was not raised for the first time on appeal.

7 Shortly after the commencement of Hall's evidence, it appears that Mr. Klem, who appeared for the State at the trial and on appeal, was about to question the witness in regard to what the appellant had told him concerning the financial soundness of the holding company. Appellant's counsel objected to such evidence on the ground that the indictment contained no allegation that appellant had represented that the company was financially sound. That objection was overruled by the trial Judge, who held that in the context of the charge as a whole, the allegation that "the accused caused the said Hall to believe that the company was financially sound" was "clearly" an allegation that the appellant actually represented to Hall that the company was financially sound.

I do not think that the charge as framed contains

an allegation that the appellant made such a representation to Hall. What paragraph (ii) of the third paragraph of the preamble to the charge (set out above) alleges, is simply

that the appellant caused Hall to believe that the company was financially sound. The questions which naturally arise therefrom are how, or by what means, did he cause Hall to hold such belief? These were, in effect, the questions which appellant, in his request for further particulars, required the State to answer. The State answered them by saying, very clearly, that the actual representations made by appellant were that

"(i) all the equipment and vehicles in use were paid for and/or

(ii) the books of the company were not available being with the auditors".

When those particulars are read with the charge, as they must be, the only reasonable meaning that can be given to the whole is that what the State alleged was that by making those two clearly specified representations of fact, the appellant caused Hall to believe that the company was financially sound and, therefore, to invest money in the company. Such an allegation differs materially from an allegation that an express representation of fact, viz., that the company was financially sound,

was made by appellant to Hall. Mr. Klem attempted to resist

such an interpretation of the charge by contending that what the State intended when formulating the further particulars, was to furnish representations additional to those which it had alleged in the body of the charge. If that was the State's intention it failed entirely to give expression to it; moreover, the appellant did not ask to be informed of what further representations the State relied upon, but asked simply, with reference to the charge, what precisely it was that the State alleged the appellant represented to Hall, to which inquiry the State made a direct answer, clearly specifying two distinct representations. It is worthy of note that when answering an identical question in relation to count 7, which shared the preamble with count 6, the State pointedly averred that the representation made by appellant to the ~~complainants named in count 7, was that the company concerned~~ in that count was so successful that it was in the course of opening another branch - a representation relating to the financial soundness of the company but which the State did not,

apparently, consider had already been alleged in the charge itself, which was in terms identical with those of count 6.

It appears to me, therefore, that there was considerable substance in the objection raised by counsel at the trial to the reception of evidence of the representation not charged and that such objection ought to have been upheld, leaving it to the State, if it were so advised, to apply for amendment of the charge subject to such conditions as to adjournment or postponement as might have been suitable. The appellant's complaint was by no means technical or trivial. An accused person is entitled to require that he be informed by the charge with precision, or at least with a reasonable degree of clarity, what the case is that he has to meet and this is especially true of an indictment in which fraud by misrepresentation is alleged. (Cf. R. v. Alexander and Others, 1936 A.D. 445 at p. 457; S. v. Heller and Another, 1964 (1) S.A. 524 (T) at p. 535 H). It is of vital importance to such an accused to know what he is alleged fraudulently to have said or done and he ought not to be left to speculate as to the

true nature of the misrepresentations laid to his charge,
nor to spell out of the charge possible misrepresentations
upon which the State might have intended to rely but which it
did not reasonably clearly describe. And when the State
clearly specifies the misrepresentations upon which it relies,
the accused is entitled to regard them as exhaustive and to
prepare his defence in respect of those representations and no
other.

However, the trial Judge having ruled that the
charge, properly construed, contained an allegation of the
representation in question and evidence relating thereto
having been led, Mr. Klem contended that even if this Court
came to the conclusion that the charge did not contain any
such allegation, it should, nevertheless, find that evidence
calculated to show that it was represented that the business
was financially sound, was properly received and considered
in reaching a verdict. He advanced two grounds for this
contention : the first, that on the analogy of the decision
in R. v. De Beer, 1949 (3) S.A. 740 (A.D.) at p. 745, evidence
relating.../12

relating to the financial soundness of the company was receivable as part of the appellant's general conduct in regard to the negotiations with Hall; and the second, that the terms of section 180 (1), read with section 180 (4), of the Criminal Procedure Act, 1955, operated to validate the proceedings.

As to the first of these grounds, there is not a true analogy between De Beer's case and this. In De Beer's case, in which the accused was charged with having committed an assault with intent to do grievous bodily harm by striking the complainant with the fists and hitting him on the head with a piece of iron, the Court held that evidence that he also stabbed the complainant, was correctly received, for it served to show the circumstances in which the offence charged was committed and was an inseparable part of the evidence led to establish that the accused hit the complainant on the head with a piece of iron, as charged. Evidence proving that the accused hit the complainant on the head with a piece of iron would apparently have brought the charge home to him without the

additional evidence of stabbing. In the case now before us, proof of the allegation that the appellant wilfully misrepresented that the books of the company were not available, would hardly of itself justify a conclusion that Hall was thereby induced to invest R10 000 in the company, nor did Hall say in evidence that he was so induced by that representation. This was conceded by Mr. Klem, who admitted that without proof that the appellant represented that the business was financially sound, the State could not ask for a conviction on the charge of fraud. Evidence that Hall was induced to make the investment by a representation that the business was financially sound, would not merely be an incidental part of the evidence by which the representations actually alleged in the charge were to be proved, but would constitute the very kernel of the State's case that the appellant was guilty of fraud and would be at substantial variance with the charge.

Nor do the provisions of section 180 of the Criminal Code avail the State in this case. In S. v. Kearney,

1964 (2) S.A. 495 at p. 503, HOLMES, J.A., observed that

section 180 (4)

"cannot be invoked where the variance is important
or the accused may be prejudiced".

As I have already said, the variance, here, between evidence of a representation concerning the financial soundness of the business and the representations set forth in the charge read with the further particulars thereto, is fundamental. Moreover, although some evidence was led of what the appellant told the complainant concerning the financial state of the business, the issue does not appear to have been fully canvassed. It is noteworthy that while Hall was questioned at length, and very directly, concerning the alleged representations regarding payment of the cost of vehicles and equipment and the unavailability of the company's books, comparatively few questions were put to him concerning what appellant actually told him about the financial stability of the company or the Woodstock business. The high-water mark of what Hall said in evidence

in that regard is the statement which I have already quoted
and upon which the trial Court relied, namely, that the business
was doing well, save for teething troubles, and was improving.
Appellant's counsel directed his main cross-examination of
Hall in that regard to the extent to which such a statement,
if it was made to him, induced or influenced him to invest
money in the business, having regard to the fact that it
appeared from Hall's own evidence that he visited the business,
before deciding to invest the money, and personally examined
the slips reflecting daily takings and other documents touching
upon the extent of the business being done at Woodstock. What
he saw impressed him and in answer to the question,

"And that is the factor that induced you to invest
your money?"

he answered "Yes", adding that the daily takings indicated to
him that the business was doing "a greater turnover each month".

True, in other passages in his evidence he indicated that other
factors induced him to invest in the company. It is not

necessary to analyse his evidence in detail. It is sufficient

to say that the probabilities are that had the allegation been clearly made in the charge that it was represented to him by appellant that the company or the business was financially sound, and that this induced him to invest money therein, the issue would have been more thoroughly investigated than it was. Indeed, the appellant might well have elected to give evidence if that allegation had been clearly made in the charge. It must be remembered that the appellant, who neither testified himself nor led any evidence at all, pleaded guilty in respect of the first alternative charge under some of the counts and might well have considered that the case against him in respect of counts 2 and 5, of which he was acquitted, were so weak that he need not enter the witness box. This left only counts 6 and 7 and the real possibility cannot safely be excluded that had the representation upon

which the State now so strongly relies been made in the

charge,.../17

charge, his counsel might have advised him of the need to answer such allegation from the witness box. The potentiality of serious prejudice to the appellant if evidence were to be considered in respect of the allegation not made in the charge is, in the circumstances of this case, manifest.

I would add, finally, that this is by no means a case in which the evidence led so clearly demonstrates the appellant's guilt that it is inconceivable that any other verdict could be returned, whatever opportunities he were afforded to meet the allegation not made in the charge. To the contrary, the brief references I have made to Hall's evidence indicate that not only the precise terms of what appellant said to him concerning the financial state of the company appear to be in some measure of doubt, but also whether what appellant told him in that regard was what actually induced him to invest money in the business.

The conviction of the appellant on the main charge under count 6 cannot stand. Since he pleaded guilty

to the first alternative charge under that count and ought to have been found guilty in terms of his plea, it is proper to substitute such a verdict for the one returned by the Court a quo. Concerning the sentence in respect of the verdict thus to be substituted, it appears to me to be proper to treat this contravention in the way in which the Court a quo treated similar verdicts under counts 1, 3 and 4, which were all taken together for purposes of sentence, which was one of a fine of R300 with the alternative of 100 days imprisonment. The result would be that that sentence would stand in respect of counts 1, 3, 4 and 6.

The appeal is allowed. The conviction and sentence on count 6 are set aside and there is substituted for such conviction a verdict of guilty of contravening section 80 bis of the Companies Act. The sentence imposed on counts 1, 3 and 4 will stand also in respect

of the substituted verdict under count 6, with the result

that such sentence will be in respect of counts 1, 3, 4
and 6, all taken together for the purpose of sentence.



S. MILLER.
JUDGE OF APPEAL.

WESSELS, J.A. }
RABIE, J.A. } Concur.