46/78.
M.C.

JOSé FERREIRA PINTO DE CASTRO

a n d

THE STATE.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between -

JOSÉ FERREIRA PINTO DE CASTRO .... Appellant

a n d

THE STATE .... Respondent.

Coram: RUMPFF CJ., et VILJOEN, TRENGOVE AJJA.

Heard: 18 September 1978.

Delivered: 1 December 1978.

J U D G M E N T

VILJOEN, AJA. :-

With the leave of the Court a quo the appellant appeals against his conviction for contravening Regulation 3(1)(d) of the Exchange Control Regulations published

under / ....

under Government Notice No. R 1111 dated 1 December 1961 ~~and against his sentence of payment of a fine of R50-000~~ or 12 months imprisonment, plus twelve months imprisonment. Upon the application of the appellant the Court a quo further made, in terms of section 317 of Act 51 of 1977, a number of special entries relating to the admissibility of certain evidence.

The appellant (as accused no. 1) and two other persons, one Christos Fasouliotis (as accused no. 2) and Jacob Peter Swemmer (as accused no. 3), were jointly charged in the Supreme Court, Witwatersrand Local Division, on a number of counts, but when the matter finally came to trial, Christos Fasouliotis (hereinafter referred to as Christos) had fled the country and Swemmer had suffered a heart attack. The State withdrew the charges against him and the trial proceeded against the appellant on the charges as framed against the three appellants. They were charged with having :-

1. (main count) contravened Regulation 3(1)(d) read with Regulations 1 and 22 of the Exchange Control Regulations, (referred to above) and read with section 9 of Act No. 9 of 1933;

alternatively,

2. (first alternative count) contravened Regulation 3(1)(d) read with Section 18(2)(a) of Act 17 of 1956; alternatively,

3. (second alternative count) contravened Regulation 2(1) read with Section 18(2)(a) of Act 17 of 1956; alternatively,

4. (third alternative count) contravened Regulation 10(1)(c).

It was alleged that :-

"1. Accused No. 2 at all material times acted as an agent for Accused No. 1 and as an intermediary together with Accused No. 3 between Accused No. 1 and one VIVIAL JOSé RODRIGUES (hereinafter styled Rodrigues);

2. Accused No. 1 wanted an amount of R87 176,35 to be transferred out of the Republic of

South Africa;

3. Accused No. 3 introduced Rodrigues to Accused No. 2 as a person who could transfer money out of the Republic of South Africa;

4. Rodrigues informed Accused No. 2 that he could get money out of the Republic by telex through a corrupt Bank clerk;

5. It was agreed between Rodrigues and Accused nos. 2 and 3 that Accused No. 1 would hand a cheque in the amount of R87 176,35 to Rodrigues who would then arrange with the bank clerk to have the money telexed to Switzerland;

6. For this service Rodrigues was to have received a commission of R8 700 from Accused No. 1 and Accused No. 3 would have given the bank clerk R500,00 in addition to the R500 to be given to her by Rodrigues;

7. The above commissions would have been paid by Accused No. 1 at the office of Accused No. 1 after Accused No. 1 had established that the money had in fact been transferred to his bank account in Switzerland. Accused Nos. 2 and 3 would have accompanied Rodrigues to the office of Accused No. 1 for this purpose;

8. Accused No. 1 caused a bank cheque to be drawn, payable to himself, in the amount of R87 176,35 dated the 15th December, 1976;

9. On / ...

9. On or about the 15th day of December 1976, Accused No. 1, accompanied by Accused No. 2 met Rodrigues at the Leisk House branch of Barclays Bank and handed the said cheque to Rodrigues together with an Account number of a banking account in Switzerland;

10. Rodrigues proceeded to the counter of the said Bank purportedly to arrange for the telexing of the money to Switzerland, whereupon he and Accused Nos. 1 and 2 were arrested by detectives of the South African Police.

NOW THEREFORE:

MAIN COUNT:

Did the accused wrongfully and unlawfully contravene Regulation 3(1)(d) of the said regulations

IN THAT upon or about the 15th day of December 1976, and at or near Johannesburg, in the district of Johannesburg, the accused did wrongfully and unlawfully draw, or cause to be drawn, or negotiated a bill of exchange, so that a right on the part of Accused No. 1 or any other person to receive a payment in the Republic was created or transferred as consideration for the receiving by Accused No. 1 or any other person of a payment, or a right (whether actual or contingent) on the part of Accused No. 1 or any other person to receive a payment outside the Republic, to wit Switzerland;

FIRST / ...

FIRST ALTERNATIVE COUNT:

The accused wrongfully and unlawfully conspired to contravene Regulation 3(1)(d) of the regulations;

IN THAT during or before the period 1 September 1976, to 15 December 1976, and at or near Johannesburg, in the district of Johannesburg, the Accused wrongfully and unlawfully conspired with each other and Rodrigues to contravene Regulation 3(1)(d) of the said regulations by wrongfully and unlawfully arranging for the drawing or negotiation of a bill of exchange, so that a right on the part of Accused No. 1 or any other person to receive a payment in the Republic would be created or transferred as consideration for the receiving by Accused No. 1 or any other person of a payment or a right (whether actual or contingent) on the part of Accused No. 1 or any other person to receive a payment outside the Republic, to wit in Switzerland;

SECOND ALTERNATIVE COUNT:

The accused wrongfully and unlawfully conspired to contravene Regulation 2(1) of the regulations;

IN THAT during or before the period 1 September 1976, to 15 December 1976, and at or near Johannesburg, in the district of Johannesburg, the accused wrongfully and unlawfully conspired with each other and Rodrigues to contravene Regulation 2(1) of the regulations by wrongfully and unlawfully arranging for Rodrigues to buy on behalf of Accused No. 1,

foreign /...

foreign currency to the equivalent amount of R87 176,35 while neither the accused nor Rodrigues was an authorised dealer, and without permission granted by the Treasury, and/or not in accordance with conditions imposed by the Treasury;

THIRD ALTERNATIVE COUNT:

The accused wrongfully and unlawfully contravened Regulation 10(1)(c) of the regulations, or attempted to do so in contravention of section 18(1) of Act 17 of 1956;

IN THAT upon or about the 15th day of December 1976, and at or near Johannesburg, in the district of Johannesburg, the accused wrongfully and unlawfully entered into a transaction whereby capital, to wit R87 176,35, or any right to capital was to be exported from the Republic, the accused not being authorised dealers and without permission granted by the Treasury and/or not in accordance with conditions imposed by the Treasury."

This was a trap case. The trap, one Vivian José Rodrigues who, in spite of his Portuguese sounding name, is apparently Afrikaans speaking, was an important witness for the State. Another witness was mr. Johannes Henoch Neethling, a civil servant in the foreign exchange control

section of the S.A. Reserve Bank. Besides giving evidence that none of the accused was authorised by the Treasury to deal in foreign exchange, Neethling also testified to the prejudice suffered by the State as a result of the unauthorised outflow of capital from the country and a consequent reduction of the country's capital reserves. Other witnesses for the State were two police officers attached to the Commercial Branch of the South African Police at John Vorster Square, Lieutenant Bosman and Lieutenant Esterhuizen.

Excluding the evidence given by Neethling, the case presented by the State, can be summarised as follows :-

Swemmer was a person who had on previous occasions been involved in the illegal smuggling of money out of the country. He and Rodrigues became acquaintances. Whether Rodrigues knew about his past activities is not clear but during or about August or September 1976, while Swemmer was out on bail subsequent either to his conviction for or his arraignment on a charge of contravening the exchange control regulations, he tried to involve Rodrigues in his

schemes. Rodrigues pretended to be prepared to assist him. It seems that Rodrigues brought Swemmer under the impression that he himself was a bank official and that he could smuggle money out of the country by using the services of a corrupt bank clerk. In due course Swemmer introduced Christos to Rodrigues. It turned out that it was Christos' money which had to be smuggled out of the country.

Rodrigues, who had in the meantime informed the police of this proposed scheme and had received certain instructions from the police aimed at setting a trap for Swemmer and Christos, had a number of meetings with these two. At a certain stage, however, Swemmer informed Rodrigues that Christos had left the country with his money, but Rodrigues soon ascertained that that was not the truth. A few days prior to the 15th December, 1976 Swemmer requested Rodrigues telephonically to call at his office. When he arrived there he found Christos with Swemmer. Rodrigues then learned that somebody else,

simply referred to as a Portuguese gentleman, wished to send money out of the country. Swemmer had introduced Rodrigues to Christos as a bank manager and it is to be inferred that Christos knew that the money would not be sent out of the country legally; he must have been under the impression that Rodrigues was a corrupt bank manager or official who was prepared to participate in this illegal scheme by using the facilities of his bank for this purpose.

During this discussion it was arranged that Christos and this third person whose money was to have been transferred would meet Rodrigues at the bank on the 15th December, 1976. They would bring along a cheque for the amount to be transferred as well as the other person's name and the number of the account at the foreign bank to which the money was to be transferred. The amount was discussed and Rodrigues understood that the cheque would reflect an amount in S.A. currency equivalent to 100 000 American dollars. This, converted into S.A. currency,

amounted to R87 176,35. Swemmer and Christos were under the impression that the cheque would be handed-over the counter to a corrupt bank clerk (" ..... omdat sy ook hand in die ding gehad het om die geld uit die land uit te kry") presumably by Rodrigues whom they regarded as a corrupt bank official. The clerk would then telex the money out of the country.

Commission for Rodrigues was discussed. An amount of R8 700, roughly 10% of the amount of the cheque, was agreed upon. Swemmer and Rodrigues gave Christos an undertaking that each of them would hand R500 to the clerk. It was arranged that after the conclusion of the transaction they (Rodrigues, Christos and the appellant) would go to Swemmer's office where they would wait for about half-an-hour, after which lapse of time they would telephone the bank and upon receiving confirmation that the money had been transferred, payment of the commission would be effected and they would disperse.

As arranged with the police officers, Rodrigues met Bosman and Esterhuizen at Barclays Bank, Leisk Street branch, just after 12h00 on the 15th December. According to the evidence of Rodrigues he met the two officers on street level and he and Bosman ascended, by means of the escalator, to the bank hall on the first floor. Esterhuizen might have ascended the steps. After speaking to Bosman he went down again to wait for Christos and the third person who would accompany him. Christos turned up first. When the appellant arrived the three of them took the escalator to the bank hall which they entered. This was a hall where provision was made for customers to sit down and complete documents like cheques and deposit slips and where general bank business was conducted.

Bosman's evidence in this context was that, as arranged, he went with Esterhuizen to the Leisk House branch of Barclays Bank where he met Rodrigues on the steps of the building and the two of them entered the bank together. It does not appear from his evidence in what manner Esterhuizen entered the bank.

Esterhuizen's evidence does not clear up this dispute. He merely said that he and Bosman met Rodrigues at the bank, that Bosman spoke to Rodrigues (who was wearing a brown leather jacket) at the foot of the escalator and that all three of them then entered the bank.

In the bank hall, according to the evidence of Rodrigues, the appellant was introduced to him by Christos as De Castro. Rodrigues could not remember clearly exactly how he was introduced to the appellant. What he clearly recollected was that his surname was not mentioned to the appellant. His evidence under cross-examination reads as follows :-

> "Maar in elk geval, toe u die beskuldigde ontmoet het, was dit in die saal? --- Korrek. Toe is julle aan mekaar voorgestel? --- Ja meneer. Dit is mnr. de Castro en hoe het mnr. Christos u aan hom voorgestel? Wat het hy in verband met u gesê? --- Ek kan nie onthou nie, maar ek dink

ek / ....

ek kan duidelik onthou dat hy nie my van aan hom genoem het nie.

'Dit is die bestuurder', of so iets? --- Ja, so iets. Die bank klerk of so iets, of iemand van die bank.

HOF: U sê n bank klerk? --- Ek is nie seker wat is die terme wat hy gebruik het nie Edelagbare, maar hy het nie gesê my naam is Rodrigues of so nie. Ek kan nie dit onthou nie.

Maar hy het verwys na n hoedanigheid? --- Ja hy het gesê hierdie man, dit is de Castro en dit is... ek weet nie wat hy gesê het nie.

ADV. MORRIS: Maar in elk geval was Christos onder die indruk dat u wel die bestuurder was? --- Nie die bestuurder nie, maar n amptenaar van die bank. Iemand wat daar werk."

After the introduction Christos handed to Rodrigues a piece of paper with a name and account number on it. This piece of paper was handed into court as Exhibit B. Christos explained to him that that was the account of the person to whom the money had to be telexed. From the appellant himself he received a cheque which was handed in as Exhibit A. The amount of R87 176,35 on the cheque was the amount to be telexed, he deduced. The appellant did not speak to him.

Rodrigues testified that with the two documents he and Christos went to a queue where they remained for a while but which they afterwards left to join another queue. There were no people in this queue. (I suppose he meant that they went to another counter where there was no queue). He beckoned to a lady clerk behind the counter. Christos and the appellant were with him. As soon as he started speaking to the lady Bosman grabbed him, arrested him and removed the two documents, Exhibits A and B, from his possession. Rodrigues did not tell the court what he said to the lady clerk. What does appear from his evidence is that he simulated a struggle when Bosman pretended to arrest him. Bosman told the court that inside the bank hall he and Esterhuizen pretended to write while Rodrigues stood some distance away from them. After a while Christos and the appellant entered the bank, went up to Rodrigues and spoke to him. Bosman saw Christos and the appellant each handing to Rodrigues something which looked to him like a white piece of paper. Rodrigues thereupon walked to the foreign

exchange /

exchange counter. The appellant followed Rodrigues and stood a distance of four to six paces away from him. Christos joined a queue at another counter. At the counter where Rodrigues went there was a lady assistant. He could not hear whether Rodrigues spoke to the lady behind the counter. At that stage he went up to Rodrigues and grabbed the two pieces of paper, Exhibits A and B from his hand and pretended to arrest Rodrigues who simulated resistance by struggling with Bosman. He also arrested the appellant who did not attempt to run away. Esterhuizen arrested Christos.

After he had arrested the appellant he introduced himself and told them that he was arresting them for a contravention of the exchange control regulations. The appellant's immediate response, without Bosman demanding an explanation, was that the cheque belonged to him. The appellant was then warned by Bosman not to say anything further and he was told that he would get an opportunity later to provide an explanation. They spoke in English. When Christos was arrested by Esterhuizen

he heard Christos explaining that he was there only to get change.

Esterhuizen confirmed Bosman's evidence that they both pretended to write at the writing desks provided for that purpose but his evidence as to the events after Christos and appellant had entered the bank hall deviated in a number of respects from that of both Bosman and Rodrigues. When he noticed Christos and the appellant they were already talking to Rodrigues. He saw the appellant handing something to Rodrigues. All three thereupon moved to a certain counter where Rodrigues beckoned to a lady clerk. At this stage Christos was standing next to Rodrigues. The appellant was standing a short distance - about a metre - from them. Bosman jumped up, grabbed Rodrigues and dispossessed him of a cheque which he had in his hand. When Bosman pretended to arrest Rodrigues the appellant moved away from the little group. He was not questioned about the arrest by him of Christos.

It / ...

It is common cause that from the bank the arrested persons were taken to Bosman's office at John Vorster Square where, inter alios, the appellant was interrogated and where he was searched. Among the documents found on his person were certain correspondence between himself and the Union Bank of Switzerland including a notification dated 31st August 1976, that an account US $ 926,245.60 T had been opened in his name as well as a set of conditions regulating the relations between the bank and its customers.

On the same day the appellant made a statement which was taken down by Bosman in the English language. Bosman admitted that he experienced some difficulty in following the appellant who was Portuguese speaking, but in his view, save for some imperfections in the statement, the statement was substantially correct. According to an endorsement by Bosman on the statement it was taken down at John Vorster Square and concluded at 14h45. This statement reads as follows :-

"José /.....

"José Ferreira Pinto de Castro, residing at 22 Maiden Street, Robindale, Randburg states :-

I have been warned that I am in the presence of a Justice of the Peace, that I am suspected of attempting to contravene the currency control regulations in that I tried to have South African currency sent to a bank in Zurich, Switzerland without the approval of the S.A. Reserve Bank.

I have been warned that this is a serious offence and I must be careful what I say. I have been warned that I need not make a statement but should I elect to make a statement, it will be reduced to writing and may be used as evidence in court.

I am by my sound and sober senses.

After the above warning I elect to make the following statement :-

I am in South Africa now for a few months all in all. I am a Portuguese citizen residing in Mozambique. I have applied for permanent residence in South Africa.

I have a business in the Trust Bank Centre, Johannesburg, together with Dr. Soares de Milo. We have been in partnership since ± March 1976 in S.A. I have been residing in S.A. since February this year.

When I came to South Africa I brought about R700 with me.

I have / ...

I have an account at the Barclays Bank, 114 Market Street, Johannesburg. In this account I have money that I am keeping for Portuguese people that are staying in Mozambique and who are going to reside in Portugal. I do not know how they got it into S.A. They just asked me to keep the money for them.

On either the 3rd or 6th December 1976 I was approached in my office by Mr. Mannie Silva who informed me that he could have money transferred out of S.A. through a bank.

I believed that if the transfer was done through a bank it had to be legal and I thought it well to transfer the money I had for the other people to Europe.

I did not inform the owners of the money of my intentions because we had agreed that if it was possible I would send the money to them.

Mannie and I agreed that I would draw the money and meet him today and have the money transferred.

He told me that the cheque had to be a cash bank cheque but when I went to my bank I was advised to cross the cheque and make it payable to myself. This I agreed with and received a cheque from the bank. The money was drawn from my account to pay for the cheque.

I met Mannie at my office at 11h30 today as agreed and he introduced me to Mr. Christos

Fasouliotis in Eloff Street where he was waiting for Mannie.

Christos and I then went to the Barclays Bank, Bree Street, Leisk House, where we met Mr. Vivian José Rodrigues. Christos introduced me to him.

They spoke together and Vivian asked me the cheque which I handed to him together with a slip of paper which contained my name and Swedish bank account no. to enable him to transfer the money. It also contained the account no. of the people who gave me the money.

Vivian then went to a lady behind the counter and spoke to her.

He was suddenly grabbed by the police and arrested. I was about 3 yards away. When I saw what was happening I told the police that it was my cheque. I was also arrested and taken to J.V. Square together with Vivian and Christos.

I would not have paid anybody a commission on this transaction.

That is all I know."

From the offices at John Vorster Square the appellant and Christos were taken to the appellant's office where Bosman attached certain documents which were

handed / ...

handed in as exhibits. Exhibit C was lying openly on a table, he said. This was a document on which there were certain figures - both on the face (C) as well as on the reverse side (C1) thereof. Exhibit D was also found in the office.

A further document containing certain figures was handed in as Exhibit F. From the photostatic copy attached to the appeal record the condition of the original is not ascertainable but from the evidence it appears that this document was at one stage torn in two. Bosman's evidence relating to this document was that while he was busy searching the appellant's office he heard a noise behind him and when he looked round he noticed Esterhuizen picking up the two bits of this torn document. Esterhuizen reported to him that Christos had tried to destroy this document. Esterhuizen's evidence was that he removed Exhibit F from Christos' right hand pocket, that he placed this document and other things he found in Christos' possession on top of a steel cabinet and that

he / ...

he subsequently handed everything to Bosman. When he found this document on Christos' person it was still in one piece.

A "receipt" signed by Bosman and the appellant which was handed in as Exhibit J reflects that Exhibits C and D were "taken from offices of Mr. J.F.P. de Castro on 15.12.76 at 17h00 approx."

At the conclusion of the State's case application was made for the discharge of the accused. This was dismissed and the appellant was called to give evidence on his own behalf. His evidence was that he immigrated to the Republic from Mozambique in 1976 after he had completed the necessary formalities and had obtained a resident's permit in 1975. He had been practising as a solicitor in Mozambique and with his wife had conducted a reasonably lucrative travel agency business. When Frelimo took over the government in Mozambique he lost all his assets, including a house.

He started practising as a business consultant in

Johannesburg giving advice mostly to his compatriots who required advice in business and legal matters. He was fully acquainted with the currency control regulations obtaining in Mozambique but not with those of this country. He learned that money could legally be transferred to overseas banks through commercial banks in this country which were authorised for that purpose. Such authorised banks were accorded quotas. During July/August 1976 one De Almeida, a friend of his and a chartered accountant in Mozambique, telephoned him and advised him that a person of his confidence would deliver to him a parcel of approximately 100 kilo's. He understood De Almeida to be referring to money in the amount of approximately R100 000. Money could not be mentioned because the telephones in Mozambique were tapped by the Frelimo government. It was made clear to him that he was to invest the money but in such a way as to be readily redeemable whenever it would be required in a hurry.

A / ...

A few days later a person who said he was from De Almeida arrived at his office. This person handed him a smallish suitcase in which he found money (presumably bank notes in S.A. currency) which, when he checked the bundles of notes, amounted to R97 500. He telephoned De Almeida and advised him that the parcel had arrived. He was still considering ways and means to invest the money when De Almeida telephoned him and told him to hand the money to one Peters or Peterson. This person who had an office close to his office collected the money from him and handed him an informal receipt. Some time later, about the beginning of September, Peters returned the amount to him in the form of a cheque which he deposited in his current account at Barclays Bank, Market Street branch. He informed De Almeida of the return of the money to him. At a later stage he transferred the amount from his current account to a call account with the object of earning interest on the money.

One day, towards the end of November or beginning

of December, De Almeida telephoned and told him that he would be contacted by somebody who was able to export the parcel overseas and requested the appellant to control the export. Two or three days after this telephone call one Mena é Silva arrived at his office and told him he was the person authorised by De Almeida to organise the transfer of the parcel to Europe. The appellant knew é Silva. He had previously met him in the street when he was introduced to him by somebody he could not remember. The appellant asked é Silva how he was going to transfer the money and was told that é Silva would arrange everything through a bank. The appellant telephoned De Almeida who confirmed what é Silva had told him. De Almeida told him the parcel would be addressed to a certain Mr. Carson. Mena é Silva had the details of this person. After a few days Mena é Silva returned to his office and confirmed the notification about Carson. He informed the appellant that Carson had an account with a Swiss bank. Upon further inquiries Mena é Silva told him that a friend of his or

somebody / ...

somebody in his circle of friends was a friend of a bank manager and that that particular bank would be able to effect the transfer because it had a "quota" in foreign exchange. The appellant did not know the law in detail but what he did know was that money could legally be sent overseas through a bank. He did not suspect that the scheme proposed by é Silva was illegal because he insisted and repeatedly stressed that the money should be transferred through a bank. Mena é Silva assured him that would be the case.

He did not know what bank é Silva had in mind. The latter undertook to arrange for the appellant to be present during the transaction so that he could satisfy himself that the transfer was done legally. About three days prior to the 15th December Mena é Silva returned to him and reported that a meeting had provisionally been arranged for the 15th December. He told the appellant to get everything ready to effect transfer of the money on that date. He told é Silva he would draw a cheque.

He asked é Silva what the amount was which the Bank was prepared to transfer. He was told that he could transfer an amount of 100 000 dollars. He asked what the amount in rand would be whereupon é Silva took a piece of paper from his office pad, made certain calculations and told him. It was "eighty-seven thousand, something, something rand", his evidence was interpreted. He identified Exhibit C as the piece of paper on which é Silva did the calculations. On the same piece of paper é Silva made further calculations. He calculated what 20% of the amount of R87 176,65 (the equivalent of 100 000 dollars) would be. This 20% he added to the amount of R87 176,65 and arrived at a total of R104 611.62 which he wrote down. When the appellant asked é Silva what he was calculating, he said that the 20% was his commission. The appellant immediately objected and said he was not paying commission. He pointed out to é Silva that the latter had told him he was going to Portugal in December and that he would see De Almeida in Portugal. He suggested

that é Silva could talk to De Almeida about commission when they met in Portugal. Mena é Silva accepted this position. Cross-examined on this point as to why he did not telephone De Almeida after this discussion to inquire about the payment of commission he said he did not do so for two reasons: firstly, because if any commission was payable De Almeida would, one way or another, have informed him, and secondly, there could not have been any arrangements for the payment of a commission because the amount of money he was holding for De Almeida was not sufficient therefor.

During this discussion two or three days before the 15th December he asked é Silva at which bank the transfer was going to be transacted. Mena é Silva told him he could not tell him because it had not occurred to him to ask his friend which bank it was.

On the 14th December (at exactly what time is not clear) he was advised by Mena é Silva that the meeting at the bank was arranged for the 15th between 12h00 and 12h30 and that é Silva would meet him at his office

between 11h30 and 12h00 to accompany him to the bank.

After his discussion with Mena é Silva on the 14th December he went to the Market Street branch of Barclays Bank where he had his account and requested Mr. Rogers of the bank for a draft in the amount required. Rogers told him to come in on the 15th. When on the 15th he asked Rogers for a draft in cash Rogers warned him that a cash draft was dangerous and suggested that a cheque be issued which was made out in his name. Rogers asked him for what purpose he required the cheque. He told Rogers that he required it for a bank transaction. He did not deem it necessary to enlighten him further. Rogers then suggested that the cheque be crossed. To cover the cheque the amount of money reflected by the cheque had to be transferred from his call account to his current account. This arrangement he left to the bank.

As arranged Mena é Silva called for him at the office. He showed é Silva the cheque whereupon é Silva expressed the view that because the cheque was in his

name / ....

name he would have to transfer part of the money into his own name. He said he wasn't sure about this, however. Mena é Silva asked him whether he had an overseas account to which he replied in the affirmative. He then took with him the papers relating to the small account which he had in a Swiss bank. These were the papers which Bosman found on his person and which were handed in as Exhibit E. In case he had to prove his identity he also took with him his book of life. Another document he took was the piece of paper Exhibit B. At that stage only the typed words on the one side (Exhibit B1) were on it. On their way to the bank he wrote in pencil, on the other side (Exhibit B) his own name and the details of his own account with the Swiss bank.

At that stage he had not met Rodrigues at all. On their way to the bank he and Mena é Silva met Christos. He never knew Swemmer until the three of them appeared in court together for the first time.

When / ...

When he left his office with Mena é Silva all he knew was that he was going to the bank to be introduced to the bank manager who was going to effect the transfer of the money. After that he intended returning to his office to telephone De Almeida to tell him about the transaction. Nobody suggested that he should go to Swemmer's office after the transaction. Nobody suggested that he should pay 10% commission to anybody. He did not take his cheque book along and he had only a few rand in cash with him.

With Mena é Silva and Christos who had previously been introduced to him by é Silva, he proceeded to the bank. When they arrived at Leisk House Mena é Silva asked to be excused because he had business to attend to before leaving for Portugal. He told the appellant that Christos would take him into the bank. Mena é Silva thereupon left them and he and Christos went up the escalator and entered the bank. Inside the bank Christos directed him to Rodrigues whom he had not met previously.

Rodrigues / ...

Rodrigues was wearing a dark jacket and a dark pair of trousers. He could not be sure whether it was a suit. He was introduced to Rodrigues as "De Castro" and Rodrigues was introduced to him as the bank manager. Rodrigues turned to Christos and said in English :- "Tell him to give me the cheque and account number and the name of the person that the money has got to go to." It seems that what he meant to convey was that he deduced that this was said by Rodrigues to Christos because he proceeded to testify that there was a lot of noise but he understood the word cheque and he assumed that Rodrigues wanted the cheque and something else. Cross-examined on this point he said that he understood the word "cheque" and "paper" whereupon Christos turned to him and said "Give him the cheque and paper". He took out his wallet, produced the cheque and the paper containing the name of Carson and the other details. He also produced his book of life but Rodrigues waved this away, indicating that he did not require it.

After / ....

After having received Exhibit B and B1

Rodrigues moved to one of the counters. The appellant followed him. Rodrigues signalled to a girl behind the counter. She approached them, Rodrigues addressed a few words to her and as she returned to her desk Bosman came up, grabbed Rodrigues and tried to take possession of something which Rodrigues had in his hand. The appellant reacted immediately by uttering the words: "What's happening? That cheque is mine." Bosman then identified himself as a policeman and he, Rodrigues and Christos were taken to John Vorster Square. At a certain stage while they were at John Vorster Square Rodrigues disappeared and did not accompany them to his office. He then suspected that Rodrigues was a trap.

He made the statement, previously referred to, at John Vorster Square. He spoke in his English which was very weak. Bosman put certain questions to him which he answered to the best of his ability but they had some difficulties - he to make himself understood and Bosman

to / ...

to understand him. Basically what he said in the statement is correct but there are a few mistakes.

Cross-examined on Exhibit D which was found in his office he said it was not his handwriting. He could not explain how that document came to be found in his office. Apart from himself and Mena é Silva nobody else was interested in the transaction in his office at any stage. He suggested that Mena é Silva left Exhibit D there. Cross-examined as to how Christos came to be found with Exhibit F which contained figures reflecting calculations similar to those on Exhibit C, his answer was that he had not seen anything of that sort and that he never discussed anything like that. As far as he knew Christos had no interest in the matter. Christos never spoke to him about commission. Nobody ever spoke to him about commission except Mena é Silva.

Before proceeding with this judgment I deem it desirable to describe, as fully as it is necessary, the various exhibits which are relevant for the purposes of drawing / ...

drawing inferences therefrom.

Exhibit A is a cheque dated 15.12.76 drawn by Barclays Bank, 114 Market Street, upon itself in favour of J.F.P. de Castro for an amount of R87 176,35. Immediately above the signature of the representative of the bank as drawer the words "Bank Cheque Acc." appear. The cheque is crossed simply without the words "and Co", or "not negotiable" between the two transverse lines.

Exhibit B contains the full name and surname of the appellant in print-hand, repeated in ordinary manuscript and also in manuscript the following:-

"Account US ₰ 926 245.60 T."

with lastly, in bold capital print-hand the following :-

"ZURICH - BLEICHER WEG."

Whether these words were written in ink or pencil does not appear from the photostatic copy attached to the appeal record but the evidence was that these words were written in pencil.

On / ...

On Exhibit B1, the other side of Exhibit B, the following typed words appear :-

"ATTENTION MR. PREMCXAND
GUYERZELLER SUMONT BANK
8 GENSER STRASSE
8027 ZURICH.
ACC. NO. 17027."

The appellant's evidence that this Exhibit contained the name, details and account number of [redacted] Carson cannot be completely correct because the name Carson does not appear on this document.

Exhibit C is a document which, according to the evidence of the appellant, contains certain calculations done by Mena é Silva. On the face side it contains other writing as well but his evidence, which was not questioned, was that these other notes had nothing to do with the present case. The only relevant figures on the face side are, therefore, the following :-

"100 000 ÷ 1.1471 = R87 176-35.
87 176,35 X 20% = R104 611-62
$1 = R1.04."

(The sign in front of the figure 1 in the last line is rather illegible but I deduce it to be the dollar sign).

On the reverse side of Exhibit C1 the following figures appear/...

appear :-

"R100.000 / ——————→ 114.710

20 000
100 ——————— 85 000
100 ———————115 000.
20 000
STANDARD BANK."

According to the appellant's evidence these figures were written by Mena é Silva. However, on the right hand side of Exhibit C1 the following calculations were made in a completely different handwriting :-

" 104
14
416
104
1456
15000
4
19000 "

On Exhibit D, another document found in the office of the appellant, the following calculations appear :-

" R 104 000 ——————— 100.000 - 3000.000 /?
87 176.35 ——— 100 000
104 611.62
17 435.27 "

The handwriting on this document is very different from the handwriting said by the appellant to be that of Mena é Silva on Exhibits C and C1.

On Exhibit F the document which, according to the evidence of Esterhuizen, was found in the possession of Christos, the following figures appear :-

" 104.611.62
— 87 176.35
17 435 27 "

Further down the page there is a figure 100 000 with something illegible in front of it.

In his judgment the learned Judge a quo, having dealt to a certain extent with the evidence given by the State witnesses and having remarked that the facts are largely common cause, came to the conclusion that the accused committed acts which were prohibited by Regulation 3(1)(d) referred to in the first count. The learned Judge proceeded to remark that, in the light of the aforegoing, the crucial question for determination was whether

the / ...

the inference could be drawn as being the only reasonable inference from the proved facts, that the accused committed the prohibited act with the knowledge of the unlawfulness thereof. Having eventually answered this question in the affirmative, the learned Judge a quo convicted the appellant on the first count. Counsel for the appellant now contend, as their first attack upon the judgment a quo, that the learned Judge erred in doing so because, even on the assumption that the factual findings are correct, Regulation 3(1)(d) cannot have any application to the facts.

The relevant Regulation provides :-

"3. (1) Subject to any exemption which may be granted by the Treasury or a person authorised by the Treasury, no person shall, without permission granted by the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury or such authorised person may impose -

.....

(d) draw or negotiate any bill of exchange or promissory note, transfer any security or acknowledge any debt, so that a right (whether actual or contingent) on the part of such person or

any /...

any other person to receive a payment in the Republic is created or transferred as consideration -

(i) for the receiving by such person or any other person of a payment or the acquisition by such person or any other person of property, outside the Republic; or

(ii) for a right (whether actual or contingent) on the part of such person or any other person to receive a payment or acquire property outside the Republic;"

The words "did cause to be drawn" appear in the charge sheet, but the Regulation does not contain these words. The appellant did not draw Exhibit A. The bank drew the cheque upon itself. It was virtually a promissory note (see section 3(2) of the Bills of Exchange Act, No. 34 of 1964). The bank was, therefore, obliged to pay this cheque upon proper presentation. The words "Bank Cheque Account" suggest that the amount reflected ex facie the cheque was transferred from the appellant's account to the bank's account; in other words, the appellant's account (whether it was his call account or current account does not matter) was debited with the

amount / ...

amount and the bank's account credited.

Whether the fact that the appellant did not himself draw or negotiate the cheque is fatal to the State's case on the main count, I need not decide because, in my view, there are more material grounds for holding that the conviction under Regulation 3(1)(d) was wrong. The Regulation concerned requires a right (whether actual or contingent) to be created or transferred by the drawing or negotiation of the bill of exchange or promissory note as consideration for something. No right was created or transferred by the drawing of the cheque. The appellant had the right to receive payment at any stage, whether by issuing his own cheque or using a bank cheque. There was no need for a right to be created. Nor did he by drawing the cheque or causing it to be drawn transfer any right. He might have transferred a right to receive payment by negotiating the cheque but he would then transfer the right to somebody else and there is no suggestion that this was going to be done, save negotiating it to the bank for collection purposes. I do not think this was ever

contemplated because no substantial right to the money would thereby be transferred. Another requirement is that the right to receive payment in the Republic must be a consideration for the receiving of a payment or the acquisition of property outside the Republic or a right (whether actual or contingent) to receive a payment or acquire property outside the Republic. Consideration must in my view be understood to mean a quid pro quo. The words "on the part of such person" are confusing. They are capable of being construed as involving the same person both in the Republic and outside the Republic, but the words "as consideration for" clearly imply mutuality and reciprocity. It is conceivable that one party may be involved but then in different capacities.

What is more, the regulation deals with the creation or transfer of rights by the drawing and negotiation of bills of exchange and it is reasonable to assume that it was the intention of the legislature to use terminology which is peculiar to the law of negotiable instruments. In my view the learned Judge a quo clearly erred in holding

that / ...

that the word "consideration" ("teenprestasie") can not be given the meaning ascribed to it in section 81 of the Bills of Exchange Act, 34 of 1964 and that the decision of Fonds Adviseurs Beperk v. Trust Bank van Afrika Beperk, 1974 (4) SA 883 (A.D.) has no bearing on the present matter.

I have, therefore, come to the conclusion that the learned Judge wrongly convicted the appellant on the main count. It follows that he could not have been convicted on the first alternative count which alleges a conspiracy with others to contravene Regulation 3(1)(d).

The further inquiry is whether he should have been convicted on any of the other counts. It will be recalled that the second alternative count alleges a conspiracy to contravene Regulation 2(1). Adapting the specific allegations to the altered circumstances - altered by reason of the fact that the other two accused did not appear with the appellant at the trial - the charge was

that the appellant, Christos and Swemmer wrongfully and unlawfully conspired with each other and with Rodrigues to buy, on behalf of the appellant, foreign currency to the equivalent amount of R87 176.35 while neither the appellant nor Christos, Swemmer or Rodrigues was an authorised dealer, and without permission granted by the Treasury and/or not in accordance with the conditions imposed by the Treasury. The third alternative count does not allege a conspiracy. As appears from the charge sheet quoted above, it alleges that the appellant wrongfully and unlawfully contravened Regulation 10(1)(c) in that he wrongfully and unlawfully entered into a transaction whereby capital or any right to capital was, without authorisation, to be exported from the Republic, or that he attempted to do so in contravention of section 18(1) of Act 17 of 1956.

Section 2(1) of the Regulations (referred to in the second alternative count) provides :-

"Except with permission granted by the Treasury, and in accordance with such conditions as the

Treasury may impose no person other than an authorised dealer shall buy or borrow any foreign currency or any gold from, or sell or lend any foreign currency or any gold to any person not being an authorised dealer."

In my view the appellant cannot be found guilty under this section. There is no evidence that the intention was to buy currency before transferring it overseas.

Regulation 10(1)(c) referred to in the second alternative charge provides :-

"No person shall, except with the permission granted by the Treasury or by an authorised dealer and in accordance with such conditions as the Treasury or the authorised dealer may impose - enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic."

Act 17 of 1956 which contains section 18(1) referred to in this second alternative count is, strangely enough, the Riotous Assemblies Act. The section is,

however / ...

however, of general application, and provides :-

> "Any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

The learned Judge a quo raised the point whether the State could not, without alleging an attempt to commit the offence, rely on section 256 of the Criminal Procedure Act, 51 of 1977, which provides :-

> "If the evidence in criminal proceedings does not prove the commission of the offence charged but proves an attempt to commit that offence or an attempt to commit any other offence of which an accused may be convicted on the offence charged, the accused may be found guilty of an attempt to commit that offence or, as the case may be, such other offence."

The Court a quo did not decide the point, and it is not necessary for this Court to consider it. The

State made it perfectly clear that it intended the charge to include an attempt to contravene Regulation 10(1)(c), which is in my view, regard being had to the facts, the proper section to invoke.

Argument was addressed to us on the question of *mens rea* in the present case. Both *culpa* and *dolus* were canvassed at some length and it was generally contended on behalf of the appellant that the learned Judge *a quo* erred in holding that the appellant had the necessary *mens rea*. That was, of course, held in relation to the main count but the inquiry is equally relevant to the other counts because the appellant's defence is that, should the act which he committed be prohibited by whatever regulation may be applicable, he laboured under the impression that it was lawful because he thought that Rodrigues, the "bank manager" to whom he was introduced by Christos, had the necessary authority to send his money out of the country.

My approach in the present matter is the following:-

The first inquiry is whether his defence should be rejected. If it cannot be rejected, the Court would have to inquire further whether the appellant should not on some ground or another, as for instance, on the ground that he has not shown the necessary circumspection, be held to be precluded from relying on the defence. I have come to the conclusion, for reasons which follow, that his defence is untenable. It is, therefore, unnecessary to embark upon the second inquiry.

It was submitted on behalf of the appellant that his version that he was bona fide under the impression that Rodrigues was a bank manager who could legally send the money out of the country, may reasonably be true and that the Court, in considering whether that is the case, must be mindful of the principles laid down in the matter of R. v. Blom, 1939 A.D. 188 at p. 202/3, that the inferences sought to be drawn from the circumstances proved

must/...

must not only be consistent with all the proved facts but that the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.

The State's case is, broadly put, that, with guilty knowledge, the appellant entered into a transaction with others to send money out of the country illegally. There were certain discrepancies in the evidence of the State witnesses, some of which appear from the summary of the evidence above. Although these discrepancies were pointed out to us, counsel for the appellants wisely conceded that they did not materially affect the State's case because the facts on which the State relied were largely common cause. There was no direct evidence that the appellant knew that this transaction in which his erstwhile co-accused and Rodrigues were involved was an illegal transaction and what has to be determined is whether the circumstantial evidence was such that the only / ...

only reasonable inference to be drawn therefrom is that the accused was a participant in this what was, on the face of it, an illegal transaction. It is clear from the evidence that Rodrigues had no dealings with the bank but he pretended to be a bank manager who could use the facilities of his bank to send money illegally out of the country at a certain commission.

He / ...

He further pretended to be able to make use of the services of a clerk to give effect to the illegal arrangement and that such clerk would also have to be paid a commission. The stipulation by Rodrigues for a commission and the acceptance thereof by Christos and Swemmer are more consistent with dishonesty than with honesty. Although possible, it is unlikely that a bank manager, who sends money overseas for a customer in the ordinary course of the business of the bank, would charge commission. Of course, that he pretended to be prepared to give effect to this illegal transaction only if he was paid a commission, is the evidence of Rodrigues only. No other witness was called to support him and it is common cause that he never directly associated with the appellant but the learned Judge a quo, having warned himself that he had to treat Rodrigues' evidence with caution because he was a trap, accepted his evidence. It accords, moreover, with the probabilities. He masqueraded as a corrupt bank official and he

undoubtedly realised that the success of the trap operation depended upon his playing his role convincingly. It would be highly suspicious if he, who in the eyes of Swemmer and Christos was a corrupt bank official, was prepared to run the risk of detection and loss of his position without any reward whatsoever.

It is, therefore, a fair inference that Christos and Swemmer told the appellant that he would have to pay commission - unless, of course, Swemmer and Christos decided to cheat the "bank manager" by deciding not to pay him the commission after he had done them the service. Even if they harboured such intentions, it is improbable that they would not to tell the appellant that he would be required to pay commission. It is unlikely that they would cheat the "bank manager" simply to do the appellant a favour because there is nothing to suggest that they were doing him this favour for the sake of mere friendship and that they were not hard business men each of whom would,

first and foremost, look after his own interests. Whatever their motive might have been, it is to be inferred that they told him he would have to pay commission.

That there was a discussion about commission the appellant had to admit because he had to explain the addition of 20% on the written calculations on Exhibit C. His version that Mena é Silva who did the calculations and demanded 20% commission immediately accepted the position when he made it clear to him that he refused to pay commission, is unlikely in view of what I have said above. Moreover, apart from the figures reflecting the simple conversion of American currency into South African currency, there are a considerable number of other figures which, inferentially, relate to the question of commission. The figure 104 is very prominent and seems to have been the basis of further calculations. These calculations appear in two handwritings on Exhibit C1. Whoever was responsible for the bulk of the relevant calculations on Exhibits C and C1 (whether it was Mena é Silva, as the appellant testified, or Swemmer or somebody else), there

are the further calculations on the right hand side of Exhibit C1 which also involve the figure 104. This handwriting very suspiciously resembles that on Exhibit D which was also found in the appellant's office as well as that on Exhibit F which was found in the possession of Christos when he was searched in the appellant's office on the day of their arrest. On both Exhibits D and F the figures 87 176.35 (the equivalent in rand of 100 000 American dollars) and 104 611.62, (which is the amount after adding 20%) appear. The appellant could not explain why Christos should have Exhibit F in his possession on the day of the arrest nor how Exhibit D came to be found in his office. From these notes on F and D the inference is to be drawn that Christos alone (if both are in his handwriting) or Christos, in whose possession F was found (which warrants the inference that he wrote it) and somebody else, whoever it was who wrote Exhibit D, must have added 20% to the amount to be sent overseas. As far as Exhibit C1 is concerned the right hand figures also lead one to the inference that either

Christos or somebody else, in any event some person other than the person who wrote the bulk of the figures, did those calculations. All this is inconsistent with the evidence of the appellant that only he and é Silva were involved as far as the 20% commission was concerned. The 10% commission (or close thereto) of Rodrigues could have been, and probably was, intended to come out of this 20%.

Moreover, the substantial number of calculations appearing on Exhibits C and D, is inconsistent with the appellant's version that there was a brief conversation about 20% - a simple demand by é Silva that he wanted 20% commission, and a refusal by the appellant. Had that been the case it is unlikely that any calculations would be made at all. It would have been a simple matter to calculate the 20% after the appellant had agreed to pay it. This inconsistency is enhanced by the considerable number of figures which suggests that there was some discussion

about / ...

about commission.

Some point was made of the fact that, as appears from the further particulars supplied by the State, the commission was to have been paid at the appellant's office whereas Rodrigues said in evidence it would be paid at Swemmer's office. I do not think that this factor should be accorded much weight. The State might, for the purposes of draughting the particulars, have relied on information from a source other than the statement of Rodrigues. The discrepancy is, of course, a feature to be taken into account but it does not weigh heavily with me. A further point made was that the appellant took no money with him to the bank for the purpose of payment of commission, nor did he have his cheque book with him. This is in my view a neutral factor. One would not expect the appellant to walk in the street with so much cash on him and even if they had arranged to go to Swemmer's office, it would have been an easy matter to send for his cheque book. He

could either have fetched it or sent for it while they waited to get confirmation from the bank that the transaction had gone through.

There are numerous other features which militate against the version of the appellant. According to his evidence De Almeida gave him instructions which he agreed to carry out strictly. He received the instruction that Mena é Silva would provide the details of Carson and his account. Yet there is no evidence that he received these details from é Silva. An account number alleged by him to be the account number of Carson, was typed in his office by his typist without Carson's name. Mena é Silva, who was to have been the person to manage this whole transaction, absents himself at the crucial stage. Because Mena é Silva had told him that, in view of the fact that his own name appears on the cheque, he would have to deposit some of the money in his own overseas account (which is unacceptable in itself) he wrote his own name and account number on the other side of the piece of paper on which the details of Carson's

account appear but, strangely, his name does not appear. He does this on the way to the bank but é Silva had already expressed this view at his office which caused him to take along Exhibit E and the annexures thereto which related to his own overseas account. Why it was necessary to write his own name and details on Exhibit B (and this on the way to the bank) while the bank could have obtained all the necessary information from Exhibit E, he does not explain.

His peculiar reticence towards Rogers of his own bank is another feature which is not consistent with a bona fide and open transaction. His evidence concerning his relation with De Almeida is full of inconsistencies. In spite of his receiving fairly detailed instructions from time to time and his resolve to carry out those instructions unswervingly and docilely, he, at a vague suggestion from é Silva, immediately decides without consulting De Almeida, to deviate from those instructions and to exercise his own discretion in transferring a certain amount of the money to his own bank account.

By all these features one is driven to one conclusion only and that is that the appellant never believed this to be a legal transaction. His version cannot possibly be true. The inference that he never bona fide believed that the transaction with the "bank manager" was a legal transaction, is the only reasonable inference to be drawn. The State has, in my view, proved beyond a reasonable doubt that he entered into the transaction (although it was a simulated transaction on the part of Rodrigues) well knowing, as far as he was concerned, that it was illegal. The learned trial Judge's rejection of the appellant's assertion that he was unaware of the illegality of the transfer as false, cannot be disturbed.

The further inquiry is whether, on the facts proved by the State, the appellant should be convicted of a contravention of Regulation 10(1)(c). It was pointed out on behalf of the appellant that the regulation only prohibits a person, except with the permission granted by the Treasury or by an authorised dealer, from entering

into / ...

into a transaction whereby capital or any right to capital is exported from the Republic. It was contended that the money (capital) was never exported from the Republic because before this could be done, Bosman and Esterhuizen clamped down on the little group in the bank. It was submitted that what was done were mere acts of preparation and that the appellant cannot be convicted of even an attempt. There was no attempt until the appellant in fact made or was a party to the making of a request that funds be transferred, counsel contended.

It can reasonably be assumed that the state of mind of the appellant was that although it was an illegal transaction, he expected to be required to complete and sign certain documents and possibly to endorse the cheque for collection. All the parties concerned had, however, finally agreed (ostensibly, as far as Rodrigues was concerned) that the money would, by using the administrative machinery of the bank, be sent overseas by Rodrigues and his minion, the corrupt clerk. All that remained to

be /...

be done, as far as the appellant was concerned, was for effect to be given to the agreement by completing the necessary formalities to give it the semblance of a regular bank transaction. The word "transaction" has various meanings. One meaning is "an arrangement, agreement, covenant". See The Oxford Dictionary s.v. "transaction". "Whereby" may, according to The Oxford Dictionary mean "in consequence of, as a result of". The words "transaction whereby" may, therefore, mean "an arrangement or agreement in consequence whereof". That this is the meaning which the legislator intended appears from the Afrikaans wording of the regulation which reads ".... enige transaksie aangaan wat tot gevolg sal hê dat kapitaal ..... vanuit die Republiek uitgevoer word" (my underlining).

In my view, therefore, the State has proved a contravention of Regulation 10(1)(c).

I have not dealt with the special entries because I do not deem it necessary to do so. The evidence said to have been inadmissible was either admissible or, if

inadmissible, did not prejudice the appellant at all.

The appeal against the conviction succeeds, therefore, but only to the extent of one conviction being substituted for another.

ON SENTENCE.

From the appellant's evidence in mitigation it appears that he is a married man with five children. He, his wife and three children of 8, 11 and 24 years live in a flat in Randburg, Johannesburg. His two other children aged 26 and 28 years have their own homes. The two youngest children go to school in Robindale, Randburg. He is 55 years of age.

When he left Mozambique for the Republic in 1975 he lost his house valued at approximately R45 000 on which he still owed about R6 000. He lost his practice as a solicitor and also a travel agency business in which he and his wife were directors. The Frelimo government just took everything without compensating him at all.

In Johannesburg he established himself as a business consultant. Apart from the R10 000 deposited as bail he has about R2 000. He drives a motor car which he purchased new for R3 000 about 3 years and 3 months prior to the trial. His wife drives a small car. His car is paid for, his wife's not. He received no benefit from the transaction.

In regard to the question of sentence the learned Judge said that it was necessary for the Court to have regard to the three basic elements: the crime itself, the interests of the community and the appellant's personal circumstances. He did not find it necessary to repeat the facts relating to the crime. He took into account, however, that a trap was employed and also the fact that the money did not leave the Republic of South Africa. In relation to the interests of the community the Court felt that it could not lose sight of the fact that the offence of which the appellant had been found guilty related to the economy of the Republic as a whole.

It can, generally speaking, be described as a form of economic sabotage, he said. The economic interest of the State and the general body of its citizens are prejudiced by an offence of this nature. In the circumstances the Courts rightly treat such contraventions as being very serious offences, he said. The learned Judge thereupon quoted the following excerpt from the headnote in the judgment in the matter of S. v. Pillay, 1977 (4) SA 531 (A.D.) :-

> ".... the Courts rightly treat such contraventions, particularly in the present economic climate, as being very serious offences. Hence, in the assessment of the appropriate punishment to impose, the retributive and especially the deterrent elements must inevitably be the predominant considerations. This is particularly so since offenders and would-be offenders are generally persons of means, to whom the payment of a fine, even the maximum fine, would not present great difficulty and serve as sufficient retribution or deterrence."

It may well be, said the learned Judge, that the facts in Pillay's case are entirely different from the facts in the present case. He also bears in mind,

he said, that the evidence the appellant has given in mitigation did not indicate that he was a man of means. Those aspects, said the learned Judge, would not be lost sight of in having regard to the headnote which he quoted.

In regard to the element of the personal circumstances, the learned Judge took into account, as an important factor, that the appellant was a first offender, He also took into account, he said, all the other personal circumstances which he mentioned in his evidence in mitigation and said :-

> "The Court will, in the light of this evidence, have regard to the fact that you have practically lost everything, and that you may be liable for deportation, and whatever fine the Court might impose, that you would also lose that.
>
> Reference has been made to the case of S. v. Scheepers, 1977(2) SA 154 (A.D.) in regard to whether this is a case which calls for imprisonment. I have given due consideration to this decision. The Court must, notwithstanding the principles enunciated therein, have regard to the particular circumstances and the particular offence which has been committed by the accused.

> Apart from the crime and your personal circumstances, there are the interest of of community which must be considered, and to which reference has been made above.
>
> I consider, having regard to all the factors, that an appropriate sentence in this matter is R50 000 or 12 months imprisonment, plus 12 months imprisonment."

In my view a fine was properly imposed in the present case because by committing the offence the appellant sought to further his own material interests. The learned judge did, however, not specifically say why he imposed, in addition to the fine, a sentence of imprisonment. It is deduced that he did so in view of "the particular circumstances and the particular offence which has been committed by the accused". But did the particular circumstances and the particular offence justify a sentence consisting in a fine of a not inconsiderable amount plus an unsuspended sentence of 12 months imprisonment?

Contraventions of the currency control regulations are at present, regard being had to the present economic circumstances and the frequency with which they, for whatever reason, occur, regarded as serious offences by the courts of this country, but circumstances may differ from case to case. The passage quoted from the headnote in the judgment in the Pillay case, supra, appears in the judgment itself at p. 538 D - F. This passage is immediately followed by the following sentence :-

> "Although each case must, of course, be adjudged in the light of its own particular circumstances, I think that the present is a case in which those two considerations should predominate."

In this case too, I take it, the learned judge was of the view that the retributive and deterrent elements predominated. But that by itself is not sufficient reason for imposing in addition to a heavy fine a prison sentence. In Pillay's case the fact

that / ...

that the appellant was a man of means and that he had previously been convicted of fraud, strongly influenced the Court a quo in that case in imposing, and this Court in not interfering with, the sentence of imprisonment.

In my view the fine of R50 000, even though it is an arbitrary figure, is, standing alone, not too high nor too low. It is not too high because it bears a realistic relation to the amount of money which the accused attempted to send out of the country. It is, perhaps, slightly on the low side, but having regard to the other features of the case, not too low. One feature about which there is an absolute dearth of evidence, is the ability of the appellant to pay the fine. The ability to pay may, depending upon the objectives the sentencing officer has in mind, be a very important consideration. From a point of view of retribution and deterrence it becomes, possibly, less important.

The / ...

The appellant was probably advised that he could, under the Regulations, be fined to the extent of the amount involved in the offence and for that reason I shall assume, in spite of the learned Judge's remark that the evidence the appellant has given in mitigation did not indicate that he was a man of means, that, although it may be a considerable hardship, it is within his ability to pay the fine.

The other features I have in mind are, in the first instance, the fact that it was not the appellant's own money that he wanted to send overseas and that he would receive no personal benefit from the export of the money; secondly, that the Republic was the country of transit only. Had the venture succeeded, the economics of this country would not have been affected in the sense of the reserves suddenly being depleted to the extent of more than R87 000. The money came into the country, surreptitiously and illegally/....

illegally, it would appear, and was destined to leave the country in the same way.

These features are hardly reconcilable with the agreement on the part of the appellant to pay commission and with his avowed intention to pay some (at least) of the money into his own foreign banking account, but the State has not joined issue with him on these matters and, in fact, the attitude of miss. Borchers appearing for the State is that she accepts the position as such. These are factors which substantially affect the question of sentence and should have been taken into account by the learned Judge.

I am mindful of the fact that the sentence imposed by a lower court is not easily interfered with on appeal. In Pillay's case, supra, at p. 535, E - G, TROLLIP JA., expresses the test to be applied as follows :-

> "As the essential inquiry is an appeal against sentence, however, is not whether the sentence

was / ....

> was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

The learned judge did not say that he did not take these features into account, but had he done so he could not have come to the conclusion that this case fell in the normal category of "economic sabotage" cases, as he referred to them. For these reasons I am disposed to interfere with the sentence imposed. I am of the view that while the fine should be allowed to stand the additional sentence of 12 months imprisonment should be suspended.

In the / ...

In the result the appeal succeeds to the following extent.

(a) The conviction on the main count is set aside and is substituted by a conviction on the third alternative count.

(b) The sentence of a fine of R50 000 or 12 months imprisonment plus a further 12 months imprisonment stands save that the 12 months imprisonment is suspended for a period of five years on condition that the appellant is not convicted of any contravention of the Currency Control Regulations published in Government Notice No. R 1111, dated 1 December 1961 or any amendment or substitution thereof, committed during the period of suspension.

G. VILJOEN,
Acting Judge of Appeal.

RUMPFF, CJ.)
TRENGOVE, AJA.) Concur.