G.P.-S. BORG J 445 311/79

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

(APPELLATE DIVISION)
AFDELING)

SEE 213/79

APPEAL IN CRIMINAL CASE
APPÈL IN STRAFSAAK

I KATSIKARIS

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Symmington + Oll *Respondent's Attorney* DPP (Cape Town)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate H.C Nel, SC *Respondent's Advocate* A Baker
Advokaat van Appellant *Advokaat van Respondent*

7 MAR 1980

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

CPD 4 11 13

Adv Nel SC 10-33 — 11-05
11-20 — 12-55
14-00 — 14-10

Adv Baker 14-10 — 15-20

Adv Nel SC 15-20 — 15-35

11 TJPMAPE 8-5 80 HOF NR1 CR9-45 AN

Sien uitspraak — Hofrecord

leave granted by Trengove on 16/8/79

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

IOANNIS KATSIKARIS ..... Appellant

AND

THE STATE ..... Respondent.

Coram: TROLLIP, J.A., VAN WINSEN et BOTHA, A.JJ.A.

Heard: 7 March 1980.

Delivered: 8 May 1980.

J U D G M E N T

TROLLIP, J.A. :

This appeal concerns the appellant's alleged contraventions of Regulations 2(1) and 3(1)(a) of the Exchange Control Regulations promulgated in Government Notice R 1111, dated .... /2

dated 1 December 1961, under section 9 of the Currency and Exchanges Act, No. 9 of 1933. He was convicted of both contraventions by the Cape of Good Hope Provincial Division (VIVIER, J.). Both counts were taken together for the purpose of sentence. He was sentenced on them to a fine of R18 839,58 or one year's imprisonment and also to one year's imprisonment suspended for five years on appropriate conditions. He has duly appealed to this Court against those convictions.

He originally appeared in the magistrate's court where he was not represented. He there pleaded guilty to both charges. The magistrate, after questioning him about his plea, was satisfied that he had admitted the allegations in the charges and stopped the proceedings (see section 121(1) and (2)(a) of the Criminal Procedure Act, 1977). Thereafter he was arraigned

for .... /3

for sentence in the Court a quo. There he was represented by counsel. The latter sought to satisfy the Court a quo that, despite appellant's plea of guilty, he was not guilty of the alleged offences and that his plea should be altered to one of not guilty in terms of section 121(6) of the Act. The record of the proceedings in the magistrate's court was handed in. An agreed statement of facts was also handed in by consent. The State then adduced the evidence of two witnesses. After hearing argument the Court a quo, following section 121(5)(b), held that the appellant had no valid defence to the charges and that his plea of guilty should therefore stand. Hence it convicted him of both offences, and ultimately imposed the aforementioned sentence.

The background to the alleged offences appears from the agreed statement of facts. It reads -

"AGREED .... /4

"AGREED STATEMENT OF FACTS.

1. During the period March 1970 to August 1976 one RAYMOND ANDREW KETS, a shipping clerk, fraudulently misrepresented to AMERICAN EXPRESS INTERNATIONAL INCORP. (PTY.) LTD., Greenmarket Square, Cape Town, on 391 different occasions, that he was entitled to purchase American Express travellers cheques payable in foreign currency in order to meet expenses of certain foreign vessels, the owners of which he alleged were clients of his employers.

2. KETS, however, was not entitled to buy the travellers cheques on this basis, and was, in fact, commissioned by various persons (middlemen) to obtain the travellers cheques from Amexco for the sole purpose of resale thereof to would-be currency smugglers throughout the Republic.

3. During the above period over R8 million worth of foreign currency, 99% of it United States dollars, was illegally channelled out of South Africa through the machinations of KETS.

4. The accused was desirous of illegally taking or despatching foreign currency from the Republic; and with this purpose unlawfully received travellers cheques on seven different occasions during the period set out in the indictment from one PERICLES KAPSIAS as well as from one JOHN VLACHOSOTERGIOS, both of whom were operating as middlemen.

5. .... /5

5. The accused paid in rand the full exchange rate value then reigning vis-à-vis the American dollar, and, in addition, a 6% commission, to the middleman.

6. The travellers cheques were signed top and bottom on the face of the cheque by the accused in Caledon, and, on divers occasions during the period set out in the indictment, (he) despatched them from Caledon to Greece. All these cheques were presented by and/or on behalf of the accused to an Athens bank and duly honoured by the latter, who, in turn, were reimbursed by Amexco, New York, on clearance of the cheques.

7. The cheques so obtained by the accused originally were received by KETS as follows:

5 January 1973	£ 1 300
27 March 1973	£ 1 200
16 May 1973	£ 3 020
18 July 1975	£ 2 760
3 December 1975	£ 5 680
13 January 1976	£ 6 810
22 April 1976	£ 2 270

These cheques are before the Court.

The equivalent rand value of the above totalled R18 839,58 (£ 23 040).

8. The accused did not have the lawful authority of the Treasury or a person authorised by the Treasury in terms of the regulations to purchase foreign currency as set out above or take or send it out of South Africa, as

set .... /6

set out supra.

9. KAPSIAS and VLACHOSTERGIOS were not authorised dealers in terms of the regulations.

10. The accused did not know KETS personally."

The American Express Company will also be referred to as "Amexco" hereinafter.

Regulation 2(1) says -

"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."

The gravamen of the offence alleged in count 1 was that appellant, without the required Treasury permission, did "buy .... foreign currency" amounting to the £ 23 040 from the two persons mentioned in paragraph 4 of the agreed statement ("the middlemen"), who were not authorised dealers.

For appellant it was contended that he merely bought travellers' cheques and not "foreign currency" and therefore did not breach Regulation 2(1). "Foreign currency" is defined in Regulation 1 as meaning "unless the context otherwise indicates .... any currency other than currency which is legal tender in the Republic." The contention was that the travellers' cheques in question did not themselves constitute "currency" at all. Sustenance for this argument was sought to be derived from Regulation 3. Subregulation (9) thereof provides -

> "For the purposes of this regulation, any bills of exchange or promissory notes payable otherwise than in the currency which is legal tender in the Republic shall be deemed to be foreign currency .... "

Hence, the argument proceeded, the conspicuous absence of any similar deeming provision applicable to Regulation 2 indicated

clearly .... /8

clearly that instruments like bills of exchange and promissory notes payable in a foreign currency were not intended to be foreign currency for the purpose of Regulation 2(1). That argument appealed to and was accepted by the Court in S. v. Pamensky 1978 (3) S.A. 932 (E) at pp. 934 H - 935 C.

For reasons given later when dealing with count 2 I do not think that the travellers' cheques did constitute or were proved to constitute "foreign currency" within the meaning of that expression as used in Regulation 2(1) or as defined in Regulation 1. But, as will now appear, that conclusion does not assist the appellant on count 1. What Regulation 2(1) forbids is that a person should, without the necessary permission etc., "buy" or "sell" any foreign currency. That presupposes the entering into of an agreement to buy or sell foreign currency. The

provision .... /9

provision hits at the entering into of such an agreement with someone who is not an authorised dealer without Treasury permission. Its purpose is to enable the Treasury to exercise proper control, directly or through authorised dealers, over all such transactions in order to protect the Republic's reserves of foreign currency. Consequently, as soon as such an agreement is entered into without its permission and with someone other than an authorised dealer, Regulation 2(1) is contravened, irrespective of where or when the foreign currency, as the merx of the agreement, is to be received or delivered in pursuance thereof. Thus, for example, if A without the necessary permission agrees to buy £ 10 000 from B, not being an authorised dealer, in terms of which agreement that foreign currency is to be received by or delivered to A somewhere abroad when he goes there, then Regulation 2(1) is, without more,

contravened .... /10

contravened. That in terms of the agreement some article (like a key to the safe where £ 10 000 is being kept abroad) or some document (like a letter or cheque) evidencing A's right to receive that foreign currency is simultaneously given by B to A in order to facilitate his getting the £ 10 000 when abroad, must not be allowed to obscure the true nature of the agreement. It still is ordinarily one of buying or selling, not the article or document, but the foreign currency. See S. v. Amojee 1971 (1) S.A. 795 (D) at pp. 796 G - 797 A. There the accused was alleged to have contravened Regulation 2(4)(a) by having used "foreign currency .... acquired from an authorised dealer" in the form of bank drafts, expressed in sterling, for a purpose other than the one mentioned in his application therefor. Counsel contended that the accused merely acquired the bank drafts and not foreign currency and therefore did not contravene the Regulation. The dicta of JAMES, J.P.

in rejecting that contention are very apposite to the present case.

The question here, therefore, is simply whether the appellant, by agreement with the middlemen, did buy foreign currency, i.e., the $ 23 040, from them. The indictment alleged that he did. In the magistrate's court he pleaded guilty to the charge. In answer to the questioning by the magistrate he clearly admitted having bought such currency - he did not say that he had merely bought travellers' cheques or any other rights. True, the agreed statement of facts mentions his acquiring the travellers' cheques for the $ 23 040 from the middlemen and paying them therefor. And in ordinary parlance one often speaks of buying travellers' cheques. Moreover, it was also contended for appellant that in fact all he acquired by purchase and cession from the middlemen were their rights against Amexco as represented by the

travellers' .... /12

travellers' cheques. But having regard to his above admissions and the agreed statement of facts read as a whole, I think that in truth, substance, and effect he bought from them the foreign currency, as reflected in the travellers' cheques, and not merely their rights against Amexco. That the middlemen themselves might then have had no dominium, control, or disposal over that foreign currency is irrelevant, for their lack of any such rights would not have precluded them from effectively selling the foreign currency to appellant (cf. Frye's (Pty.) Ltd. v. Ries 1957 (3) S.A. 575 (A) at p. 581 A - E). Nor did appellant purchase the travellers' cheques from them. They were given to him under the agreement as evidencing his right or title to receive that foreign currency abroad and to facilitate his getting it. For it is clear from the agreed statement of facts that the entire object of his

agreement .... /13

agreement with the middlemen was to enable him to obtain and use the American dollars in Greece, which indeed subsequently happened.

The Court a quo adopted a similar approach to the problem. VIVIER, J., in his judgment said -

> "What is prohibited by Regulation 2(1) is, inter alia, an agreement of purchase of foreign currency without the necessary permission, and in my view such an agreement is precisely what the accused concluded in the present case. His sole intention was to purchase foreign currency, and for this purpose he concluded an agreement of purchase in terms whereof he obtained foreign currency. He was not interested in the travellers' cheques as such, nor did he buy them as such. His sole purpose was to buy foreign currency, and the means by which he achieved his purpose was to buy travellers' cheques. That he obtained foreign currency by way of the purchase of travellers' cheques was common cause."

I agree with those dicta. The aforegoing approach was not considered in Pamensky's case, supra, 1978 (3) S.A. 932 (E), possibly because of the particular form of the charge (see p. 936 A - D), so that, even if that case was correctly decided, it is

distinguishable 14

distinguishable. It follows that appellant's plea of guilty and his conviction on count 1 must stand.

I turn now to consider count 2.

Regulation 3(1)(a) provides that without the requisite authority no person shall "take or send out of the Republic any bank-notes, gold, securities or foreign currency". The State's case was that appellant had contravened the Regulation by sending the $ 23 040 out of the Republic. The Court a quo held that the State's case was well-founded, since the appellant had used the travellers' cheques as the means of sending that foreign currency out of the Republic.

The first inquiry is whether or not the travellers' cheques themselves constituted "foreign currency" within the meaning of that expression in Regulation 3(1)(a). The State's

main contention was that they did. The definition of "foreign currency" is repeated here for easy reference:

> "unless the context otherwise indicates .... 'foreign currency' means any currency other than currency which is legal tender in the Republic."

The two requisites of that definition are (1) that it must be "currency", and (2) that it must be currency other than that which is legal tender in the Republic, i.e., other than our rands and cents and our bank-notes of the S.A. Reserve Bank - see sections 9 and 12 of the S.A. Mint and Coinage Act, No. 78 of 1964. This latter requisite creates no difficulty in the present case. The initial problem concerns the first requisite. "Currency" is itself not defined in the Regulations. In relation to "foreign" its ordinary meaning (which counsel for the State invoked) is those coins, and the promissory documents representing them (i.e. paper money),

especially .... /16

especially government and bank-notes, which are in general circulation or use in a foreign country as media of exchange (see Concise Oxford English Dictionary, 5th and 6th editions, s.v. "currency", "current", and "money").

For the State it was contended that the lawgiver could not have intended to confine "foreign currency" to "hard cash" (as counsel called it), i.e., specie and bank-notes. The reasons advanced were that nowadays foreign financial transactions are seldom effected through hard cash but mostly through documents, like travellers' cheques, bank-drafts, letters of credit; that the latter embody or evidence the rights of the holder to be paid, are redeemable for or convertible into money or money's worth, and are currently used extensively as media of foreign exchange; that in this respect they do not differ in nature or

principle .... /17

principle from foreign bank-notes; that they too must therefore be regarded as being "promissory documents" or "paper money" as mentioned above; and that, in any event, the context of Regulation 3 requires that "foreign currency" must be interpreted so as to include all travellers' cheques so as to avoid absurd, unintended results.

For reasons now to be given that argument cannot prevail. Despite its breadth, I shall, in dealing with it, confine my attention mainly to the travellers' cheques in question here. True, the promissory documents or paper money in the above-mentioned ordinary meaning of "currency" embody or evidence, like travellers' cheques, the holders' entitlement to receive the money expressed therein or its value. But in order to constitute currency such promissory documents must also be in general circulation

or .... /18

or use in the foreign country concerned in the sense that they are, without more, freely transferable from hand to hand like the coins and bank-notes of that country. Despite the now extensive use of travellers' cheques, I do not think that they have as yet attained that high degree of facile trasferability. Certainly, there is no evidence to that effect before us. In any event it seems unlikely that a person to whom a travellers' cheque is presented for payment or exchange is obliged to accept it or will invariably accept it. Whether or not he will accept it depends upon the standing of the bank or concern issuing it and usually only if the countersignature corresponds with the signature thereon. Both of those elements detract from its free transferability which characterises coins and bank-notes. In these respects travellers' cheques do not differ from bills of exchange and promissory notes

expressed .... /19

expressed to be payable in foreign currency. They too are documents embodying or evidencing the holders' right to receive payment, but they are also not in general use or circulation in a foreign country like its coins and bank-notes. That the lawgiver accepted that such bills of exchange and promissory notes do not ordinarily constitute foreign currency is indicated by Regulation 3(9), already quoted above. For therein such instruments are deemed to be "foreign currency" for the purposes of Regulation 3 only. So, if the travellers' cheques in question here are not themselves "bills of exchange or promissory notes" within the meaning of that expression in the deeming provision (a question about to be considered), it can be safely inferred that they do not otherwise constitute "foreign currency" within the contemplation of the Regulations. The Court a quo and counsel for the

State relied on certain dicta in S. v. Bergman 1977 (3) S.A. 589 (A) at pp. 591 C - E, 592 F - H as supporting the contrary conclusion. I do not agree that they do, but, in any event, as the present point was not there raised and the dicta were obiter, they are not decisive of the present problem. The main contention for the State therefore fails.

Are these travellers' cheques bills of exchange or promissory notes? The State, in its alternative contention, maintained that they were. If correct, then they are deemed to be foreign currency under Regulation 3(9) for the purpose of Regulation 3(1)(a). The Court a quo did not deal with this point.

Some evidence was adduced from Mr van Akker, the manager of the travelllers' cheques division of Amexco's head office in Johannesburg, tending to show that the present travellers'

cheques .... /21

cheques are negotiable instruments when duly countersigned. Indeed, according to the useful article, "Travellers' Cheques and The Law", by E.P. Ellinger, Professor of Law, Victoria University of Wellington, in the Toronto University Law Journal (1969) 132, which was handed in to us -

> "Travellers' cheques are regarded by merchants and travellers all over the world as a special category of negotiable instruments" (p. 134).

See too Chitty on Contracts, 24th edition, vol. 2, p. 196, which is to the same effect. Whether or not they are true negotiable instruments may well depend upon acceptable evidence of mercantile usage or custom. However, even if they are negotiable instruments, that does not assist the State. The deeming provision in Regulation 3(9) does not refer to "negotiable instruments" but only to specified kinds thereof, i.e., "bills of exchange and promissory

notes" .... /22

notes"; and negotiable instruments are not all necessarily of the latter kind (see, for example, Cowen, The Law of Negotiable Instruments, 4th ed., at p. 28). That the instruments in question here are called and commonly known as "cheques" used by travellers does not per se render them in law cheques or bills of exchange. Whether or not they are such has to be determined by the relevant law applicable to the latter.

As Cowen rightly says (p. 30), there is a dearth of authority on the legal status of travellers' cheques. We were, however, referred by counsel for the parties to some useful articles, like the one referred to above, and extracts from textbooks dealing with the subject. Whether or not a traveller's cheque of the kind in question is a bill of exchange, cheque, or promissory note generally depends upon the correct interpretation

of .... /23

of its particular wording and form because it undoubtedly constitutes a written instrument. A sample form of the Amexco cheques involved here can be reproduced thus:-

"U.S. DOLLAR TRAVELERS CHEQUE.

When countersigned below with
this signature

_____ _____ 19

Before cashing write here city
and date

AMERICAN EXPRESS COMPANY

at 65 Broadway, New York, N.Y.

$ 10.00.

Pay this Cheque
to the Order of _____

In United States	In all other countries
TEN DOLLARS	Negotiable at current buying rate for bankers' cheques on New York

Countersign here in presence of (Signature illegible)
person cashing CHAIRMAN

_____ "

According to the form the person to whom the

instrument .... /24

instrument is issued ("the traveller") must sign it in the first, upper space on its issue. He must also countersign it in the second, lower space when he cashes or negotiates it. The name of the person to whom or to whose order the cheque is to be payable by Amexco can be inserted subsequently in the space provided. It was common cause that the question whether or not these instruments are bills of exchange, cheques, or promissory notes is determinable by the provisions of our Bills of Exchange Act, No. 34 of 1964 ("the Act"), since they were all issued in the Republic (cf. section 70(a) of the Act). Since the instrument embodies an order rather than a promise to pay, counsel for the State did not contend that it is a promissory note (see section 87(1)). Nor did he contend that it is a cheque, for, apart from any other consideration, there was no evidence that Amexco is a banker (see definition

of "cheque" in section 1). But he contended that it is a bill of exchange as defined in section 2(1), for it embodies "an unconditional order in writing", signed by the traveller as drawer and addressed by him to Amexco, requiring the latter to pay the £ 10 on demand to him or his order. For appellant it was submitted that any order to pay contained in the instrument is not unconditional, as the definition requires, since payment is made conditional upon the traveller countersigning it in the presence of the person cashing it and upon the countersignature corresponding with the signature. Since the instrument therefore does not comply with that requirement of section 2(1), counsel said, it is not a bill of exchange - see section 2(2).

Counsel for the State submitted that the traveller signs in the first space in the instrument only for the purpose

purpose of identification, but that he signs in the second space (his countersignature) as the drawer of the instrument addressed to Amexco. Hence, so the argument went, his having to countersign there in the presence of the person cashing the instrument merely serves to identify him as the true drawer of the order, which, on his countersignature, then becomes an unconditional order addressed to Amexco to pay the specified amount. That is not, in my view, the true interpretation of the instrument. The space for the first signature is preceded by the words, "When countersigned below with this signature", and is succeeded by the name of Amexco, and then by the imperative words "Pay this Cheque to the Order of .... ". It is those preceding and succeeding words that clearly constitute the order addressed to Amexco which the traveller, as the drawer, signs when he affixes his first signature in

that .... /27

that space. That signature, of course, also serves to identify him subsequently when he wishes to cash or negotiate the instrument by countersigning it, but that is purely an incidental, albeit important, purpose. That Amexco, as the drawee, has already accepted the order, through the signature of its chairman, by the time it is issued to and signed by the traveller, as the drawer, is of no significance for that is quite permissible under section 16(1)(a). For support of that interpretation see Chitty, supra, p. 195, regarding the second form of travellers' cheques there dealt with.

Is the abovementioned order of payment in the instrument conditional or unconditional? It is only conditional if the qualification is in the order directed at the drawee, as for example, where he is only to pay if a receipt form incorporated in

the .... /28

the instrument is duly signed by the payee (see Bavins, Jnr. and Sims v. London and S.W. Bank (1900) 1 QB 270, CA.). It is otherwise if the qualification is directed at the payee, as where for example, the payee is directed to sign the receipt form, for that leaves the order to pay addressed to the drawee unconditional (see Nathan v. Ogdens Ltd. (1905) 93 L.T. 553 at p. 555; Roberts & Co. v. Marsh (1915) 1 K.B. 42, CA.). Now clearly the requirement on the Amexco instrument, "Countersign here in the presence of person cashing", that precedes the space for the countersignature, is directed at the traveller to comply with when he wishes to cash or negotiate the instrument. It is not a condition or prerequisite of payment imposed by the traveller on the drawee, Amexco. That therefore does not render the order of payment conditional. But the effect of the words preceding and succeeding the traveller's

first .... /29

first signature is quite different. As already mentioned they are part of the order of payment addressed to Amexco. And they do contain a condition qualifying that order: payment is only to be made if the countersignature is made and corresponds with the traveller's signature. That renders the order of payment conditional and precludes the instrument from being a bill of exchange (see section 2(2)), a cheque (see section 71), or a promissory note (see section 87(1)). That the condition may subsequently be fulfilled by the countersignature being duly made and corresponding with the first signature does not cure that defect. For section 9(2) says -

> "An instrument expressed to be payable on, or after the occurrence of, a specified event which may or may not happen, is not a bill, and the happening of the event does not cure the defect."

The "specified event" after whose occurrence payment is to be made,

is .... /30

is the affixing of a countersignature that must correspond with the signature, an event which may or may not happen. See too Professor Ellinger's article, supra, at p. 137:

> "It is true that once they are countersigned, these travellers' cheques become absolutely payable, but this does not overcome the difficulty that the order, when given, is conditional."

The State also relied on section 17 in terms of which a drawee, without detracting from the validity of the instrument as a bill, may qualify his acceptance by accepting the instrument conditionally, i.e., "if it makes payment by the acceptor dependent on the fulfilment of a condition therein stated" (see subsection (3)(b)(i) thereof). The contention was that the condition that the countersignature must be made and correspond with the signature is one imposed by Amexco in its acceptance of the instrument and assented to by the traveller when he signs it as drawer (see

section .... /31

section 42). But that submission is untenable on the form of the instrument. As has already been pointed out the condition is an integral part of the drawer's (traveller's) order to Amexco and not any part of the latter's acceptance.

It was also urged that the requirement of a countersignature was no different in nature or principle from the need for an indorsement of a bill of exchange or promissory note payable to order; that, as the need for the latter does not render the order or promise conditional, so the requirements of the former should not have that effect. Chitty on Contracts, 24th edition, vol. 2, p. 196, effectively disposes of this argument.

> "Treating the request for a countersignature as a demand for an indorsement does not render the instrument unconditional. While an indorsement is necessary for the negotiation of a bill or a note payable to order, it is not a prerequisite of payment .... /32

payment. In the case of travellers' cheques, however, a countersignature is needed before the drawee or maker may pay the instrument, even if it is presented by the original payee. A traveller's cheque cannot, therefore, be regarded as an unconditional order or promise to pay and does not constitute a bill or note."

There have been several American decisions on the nature of travellers' cheques. The only reported one available to me is Paulink v. American Express Company (1928) 62 ALR 506, a decision of the Massachusetts Supreme Court. The travellers' cheques there in question were held to be "foreign bills of exchange". But the form of each cheque seems to have been an unconditional order to the Russo-Asiatic Bank of Petrograd, Russia. It said "On presentation of this check, pay from our credit balance, to the order of Jacob Paulink" a stated number of roubles. Another case that is often referred to is Emerson v. American Express Company (Mun. Ct.

App. Dist. Columbia) 90 A 2d 236 (1952), the full report of which is unfortunately not available to me. There the plaintiff acquired Amexco travellers' cheques, countersigned them but not in the presence of any person cashing them, and then lost them. Amexco paid them out to some other person. It was held that the plaintiff could not recover on them from Amexco. The Court seems to have treated them as negotiable instruments, which, when countersigned, became payable to bearer. If so, the decision does not appear to be in point here.

Counsel for the State relied on two articles in the South African Law Journal as expressing views supporting his argument. Firstly, "The Legal Nature of Travellers' Cheques" by J.C. Stassen in (1978) 95 S.A.L.J. 180. The author's conclusion (p. 185) is that it would appear that the travellers' cheques

discussed .... /34

discussed in the article (which included Amexco's) can be brought "within the ambit of those negotiable instruments" regulated by the Bills of Exchange Act. In order to reach that conclusion the author had to overcome the objection that, because the affixing of the traveller's countersignature is a prerequisite for payment, the order or promise is conditional. He said (p. 182), "The validity of this objection depends on the function of the countersignature". With respect, I think that that approach is erroneous in the case of an Amexco cheque. The validity of the objection depends mainly, if not entirely, upon the correct interpretation of the words appertaining to the first signature, as I have already pointed out above, and not the countersignature. After saying that the countersignature does not serve as the first indorsement of inter alia an Amexco instrument, but as a method of identifica-

tion .... /35

ion, the author expresses this view (p. 182):

> "The countersignature can, however, be regarded as performing another bill-of-exchange function. The wording of these travellers' cheques justifies the conclusion that the traveller signs as co-drawer or co-maker when he puts his countersignature on the travellers' cheque."

Presumably that means "co-drawer" or "co-maker" with Amexco. With respect, the wording of the Amexco cheque does not justify any such conclusion, substantially for reasons that have already been canvassed above.

The second article relied on "A Note on Travellers' Cheques", is by H.J. Swart in (1974) 91 S.A.L.J. 241. This article is of no assistance to the State in the present case, since it does not deal specifically with the Amexco form of travellers' cheque. But dealing generally with the argument that "the stipulation" that the traveller has to countersign in the presence of

the .... /36

the person cashing the instrument renders the order to pay conditional, the author says (p. 243):

> "It is submitted that the stipulation does not make the obligation to pay conditional. It merely stipulates a mode of signature by the payee. Signature by the payee of a document made to order is in any event a prerequisite of negotiation. The requirement is, in other words, equivalent to the commonly experienced stipulation on cheques that the cheque 'has to be indorsed and receipted'. Support for that view is found in the case of Nathan v. Ogdens Ltd. (1905) 93 L.T. 553 .... ".

Whether or not the countersignature also serves as an indorsement, I leave open. Subject to that, the passage is correct to the extent that it says or implies that "the stipulation", directed at the traveller, of countersigning in the presence of the casher, does not render the order to pay conditional. That aspect has already been fully canvassed above. But the article does not deal with the situation where the traveller's cheque, like Amexco's,

stipulates .... /37

stipulates, as part of the traveller's (drawer's) signed order to the issuer of the instrument, not to pay it unless it is countersigned with a signature corresponding with the first signature. It is that stipulation which, for reasons already given, renders the order to pay conditional. The author adds at p. 243 that once the instrument has been duly countersigned it "becomes payable to bearer and is transferable by mere delivery". Possibly it does then become a negotiable instrument (I express no view thereon), but, for reasons already given, it does not then become negotiable as a bill of exchange, cheque, or promissory note.

Hence, I do not think that the above articles in the S.A.L.J. further the case for the State on this particular aspect.

For the above reasons I do not think that the

traveller's .... /38

traveller's cheques in question here were bills of exchange, cheques, or promissory notes. Support for that conclusion is to be found in Professor Ellinger's article, supra, at pp. 137, 138; Chorley, Law of Banking, 6th edition, p. 258, and Chitty, supra, at pp. 195/6. Each expresses the view that the above Amexco form of traveller's cheque does not constitute a bill of exchange (including therefore a cheque) or a promissory note, since the order or promise to pay is conditional upon the countersignature being affixed and corresponding to the first signature.

I should mention here that Professor Ellinger's interpretation of the Amexco instrument differs in one respect from mine. According to him (p. 136) the order therein is not directed by the traveller, but by Amexco's chairman, to that company. (The chairman's signature appears in the lower right-hand corner.)

Chorley .... /39

Chorley is to the same effect, p. 256. But I think that the chairman, in signing as such, does so merely "in a representative capacity", in terms of section 24(1) of the Act, on behalf of Amexco. Hence I prefer my construction that his signature operates merely as an acceptance by Amexco of the order from the traveller. But whichever is the correct construction, the order of payment is conditional in the abovementioned sense.

Counsel for the State, however, emphasized that appellant had signed and countersigned the travellers' cheques before sending them out of the Republic. But, for reasons already given, that did not cure that shortcoming and convert them into bills of exchange, cheques, or promissory notes. That they might then have become negotiable instruments payable to bearer is of no consequence, for they still did not become bills of exchange or

promissory .... /40

promissory notes in terms of the deeming provision in Regulation 3(9). Nor is there any justification for extending the meaning of "bills of exchange and promissory notes" to cover the wider concept of all negotiable instruments, or, for that matter, to extend the meaning of "foreign currency" as defined in Regulation 1, to include travellers' cheques, which counsel for the State earnestly requested us to do. The meanings of those expressions are reasonably clear and certain and can be given effect to without any resultant absurdity; and, in any event, if there is any doubt about their meanings, since Regulation 3 enacts penal provisions carrying potentially heavy penalties (Regulation 22), they should be restrictively interpreted in the manner set out above and not extensively, as the State would have us do. Possibly, it might have been a casus omissus not to have included all travellers'

cheques .... /41

cheques within the deeming provision of subregulation (9) for the purpose of Regulation 3, but that is a matter for the lawgiver, not us, to rectify, if that was in fact the original intention.

To sum up: the traveller's cheques in question here did not constitute "foreign currency" in Regulation 3(1)(a), either as defined or deemed.

It remains to deal with the reasoning of the Court a quo that appellant, by sending the travellers' cheques overseas, sent the foreign currency represented thereby out of the Republic in contravention of Regulation 3(1)(a). I emphasize that the offence under that Regulation is committed if a person should "take or send out of the Republic any bank-notes, gold, securities or foreign currency". That connotes clearly a physical taking or sending of foreign currency out of the Republic.

Van Akker testified that the normal procedure is that, when travellers' cheques are acquired from Amexco in the Republic, the foreign currency represented thereby is, usually within 24 hours, "transferred overseas through normal banking channels" to the foreign country concerned (here, the U.S.A.), in order to be available for Amexco to honour the cheques when they are ultimately presented to it for payment there. Dr Hamblin, head of the Inspection Division of the Exchange Control Department of the Reserve Bank, explained how the "transfer overseas" is effected. In answer to the question as to where such foreign currency emanated from, he said (my italics for emphasis):

> "Our foreign currency reserves as such consist of all of the credit bank balances which are held by the South African Reserve Bank and authorised dealers with correspondent banks around .... /43

around the world, together with our gold reserves held physically and any bank notes of foreign nations held by authorised dealers, so that the funds that are transferred to, for example, American Express, to cover payment of travellers' cheques is simply a transfer from one bank balance overseas to another ... The moment the account of the authorised dealer is debited in a foreign nation there has been a decrease in the amount of foreign currency reserves of South Africa."

From all that evidence it appears that no physical sending out of the Republic of the foreign currency concerned occurred here in consequence of the acquisition and despatch of the travellers' cheques; it was transferred merely by book entry out of our foreign currency reserves already held abroad. The reasoning of the Court a quo on this aspect was therefore erroneous.

Lastly, counsel for the State submitted that appellant, at the very least, was guilty of an attempt to commit a contravention of Regulation 3(1)(a). But the appellant completed and achieved everything he intended and set out to do;

for .... /44

for reasons already given, that did not amount to the commission of the offence of contravening the provision; hence, it is difficult to see how in the circumstances it can amount to the lesser offence of attempting to commit that contravention. I suppose his conduct could possibly have constituted such an attempt in these circumstances: if (i) he knew or thought that the foreign currency required for the travellers' cheques was available within the Republic, (ii) he intended it to be sent out of the Republic when he despatched the travellers' cheques overseas, but (iii) his intention was frustrated by reason of the authorities using foreign currency already held abroad for the purpose. But there was no evidence substantiating those circumstances; indeed, it is unlikely that he knew or ever applied his mind to the mechanics of rendering foreign currency available to meet travellers' cheques

sent .... /45

sent abroad.

In the result the Court a quo ought to have been satisfied that appellant was not guilty of the offence in count 2 to which he had pleaded guilty, should have altered the plea to one of not guilty, and found him not guilty. The appeal on this count therefore succeeds and his conviction is set aside.

It will be recalled that the sentence was imposed upon both offences taken together. We are now at large on the question of an appropriate sentence on count 1. Some reduction in the composite sentence is warranted since the alleged offence under count 2 was obviously and rightly regarded as serious by the Court a quo. The offence under count 1, of which he was rightly convicted, is equally serious, especially as he was fully aware of the illegality of his entering into the agreements with

the .... /46

the middlemen (see paragraph 4 of the agreed statement of facts). His unlawful conduct, moreover, extended over a period of more than 3 years (see paragraph 7). All his personal circumstances were fully canvassed in, and taken into account by, the Court a quo. They need not be repeated here. In regard to the imposition of a fine the learned trial Judge said:

> "Furthermore, and this is a feature which distinguishes the present case from most, if not all the other cases, the accused is not a wealthy man. The money which he sent to his parents did not come out of his own abundance, but was money which, I accept, he needed for himself and his own family. A substantial fine will hit him hard and will undo the results of many years of hard work. For him it will certainly serve as a sufficient deterrent."

In all the circumstances I think that justice will be done by our imposing the sentence on count 1 set out hereunder.

The following orders are made -

1. The appeal against the appellant's conviction on count 1

is dismissed;

2. The appeal against the appellant's conviction on count 2 is upheld and his conviction is set aside;

3. The sentence of the Court a quo imposed on counts 1 and 2, taken together for that purpose, is set aside, and the following sentence is substituted on count 1:

"On count 1 the accused is sentenced to a fine of R9 000 or 6 months' imprisonment and to a further 6 months' imprisonment suspended for 5 years on condition that he is not convicted of any contravention of the Exchange Control Regulations committed during the period of suspension."

W.G. TROLLIP, J.A.

VAN WINSEN, A.J.A.)
BOTHA, A.J.A.) concur