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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ANDREAS SHANDUAMA APPELLANT

and

THE STATE RESPONDENT

CORAM : SMALBERGER, KUMLEBEN JJA et
NICHOLAS AJA

HEARD : 18 SEPTEMBER 1989

DELIVERED : 26 SEPTEMBER 1989

J U D G M E N T

KUMLEBEN, JA/....

KUMLEBEN, JA:

This is an appeal against sentence.

The appellant was one of twelve accused who appeared before Strydom J in the Supreme Court of South West Africa on a charge of theft and on certain alternative charges.

The facts giving rise to them were common cause. Each of the appellants, who were at the time employees of the CDM diamond mine at Oranjemund, illicitly came to possess rough and uncut diamonds, the property of the mine. These were given to one of their number, accused no 1, who had agreed to take them beyond the security limits of the mine. He was caught

in the act: hence the main count averring that all the accused were jointly, as principals or accessories, guilty of theft. The first alternative charge alleged a contravention of sec 30(1) of Proclamation No 17 of 1939 in that, with reference to the appellant (accused no 2), he unlawfully concealed or retained, with intent to convert to his own use, 299 diamonds with a mass of 350,9 carats and a value of R213 866,00 At the start of the trial the charge against accused no 5 was withdrawn. The remaining accused pleaded guilty: accused no 1 to the main charge, the rest to the first alternative charge. Each was found guilty in accordance with his plea. Sec 28, as amended, of the Proclamation provides for a maximum sentence of a fine of R20 000 or 15 years' imprisonment, or both, in the case of a contravention of sec 30(1). The sentence imposed on the appellant was a fine of R10 000

or 5 years' imprisonment plus a further 6 years imprisonment, of which 2 were conditionally suspended.

After conviction the appellant gave evidence in mitigation of sentence, and a security officer of the mine testified on behalf of the respondent. The material facts on the question of sentence, emerging from their evidence and from certain admitted facts, can be thus summarised.

The appellant, a 52-year-old member of the Ovambo tribe, was the father of no less than 20 children, 7 of whom were children of a previous and his present marriage. Sixteen of them were attending school and the remaining 4 had not yet reached school-going age. He was responsible for their maintenance

and that of his present wife. He had received no formal education and first earned his livelihood as a herdsman.

He was first employed with the CDM at Oranjemund in 1959, progressing from domestic servant, to office cleaner, to bus driver. From 1959 until the time of his arrest in 1986 he was employed as a contract labourer, or "migrant", as such was described in evidence. Over this period of 27 years he was intermittently thus employed on some 17 contracts for spells varying from 2 months to 12 months. His salary at the time of his arrest was R780,20 per month. The facts disclosed on the record relating to this form of employment were: that such an employee has no assurance of re-employment after a term of service; that the periods of employment, as I have indicated, vary; that

he receives no remuneration from the mine during the interim periods and in the nature of things cannot undertake any other form of permanent employment during such intervals and that he does not become entitled to pension benefits but on reaching sixty years of age may, if still an employee of the mine, receive an ex gratia payment, the amount of which is in the discretion of the mine management.

About six weeks before his arrest he found the parcel of diamonds lying in the road after a rain storm, the suggestion being that it had been washed out from some place where it had been buried or otherwise hidden. The parcel was secured with adhesive tape of some kind. He realised that it contained

diamonds. He decided to pick it up and retain it on account of the parlous situation at his home: his family did not have sufficient money to pay for food, clothing or school fees. He did not, however, at any stage open the parcel to examine the diamonds or count them. Thus he succumbed to temptation but, according to him, mastered his curiosity. In due course, as I have said, the parcel was handed over to accused no 1 with a view to its being taken from the mine.

A procedure for rewarding certain employees who handed in diamonds found by them was in operation at the time. This incentive did not, however, extend to contract workers. It was entirely at the discretion of the mine officials whether, and if so in what amount, such an employee would be rewarded for his honesty.

The appellant is a first offender and before this lapse had, one infers, an unblemished record as an employee at the mine.

Certain statistics, taken from a mine register, were admitted to show the prevalence of offences relating to the misappropriation of diamonds at the mine during the previous four years. The figures referred to the annual number of "cases", the number of arrests and the aggregate value and mass of the diamonds involved. However, as pointed out in the judgment, without evidence of the nature of the offences and the number of convictions, this information is of little or no value.

In considering the question of sentence, the trial court, having stressed that the offence is a

serious one which, if undetected or if the diamonds are not recovered, adversely affects State interests and the economy of the territory, took into account certain mitigatory features common to all the accused. They were first offenders with dependants but without sufficient means to support them properly. The accused showed remorse for what they had done as evidenced by statements made by each on the day of arrest before a magistrate admitting their guilt. As mentioned, they all pleaded guilty at the trial. The court also took into account, on the one hand, that they were contract employees but, on the other hand, attached significant weight to the value of the diamonds involved, two matters to which I shall return.

In dealing specifically with the appellant, the learned Judge said:

"Wat beskuldigde 2 betref, is veral sy persoonlike omstandighede, met 20 kinders om te versorg, van groot belang. Ek het ernstige oorweging aan sy omstandighede gegee, maar ek sal my plig versuim indien ek die beskuldigde nie na die gevangenis stuur nie. In sy geval bedra die waarde van die diamante R213 866. Bykomend tot al die omstandighede ten opsigte van die beskuldigde, submitteer meneer Maritz dat sy geval, en gesien die wyse waarop hy in besit van die diamante gekom het, onderskei kan word van die gevalle waar 'n beskuldigde self diamante versamel en terughou. Dit is so dat ten gunste van die beskuldigde aanvaar moet word dat hy die diamante toevallig opgetel het, en hy dus nie oor 'n tydperk diamante versamel het nie.

Die saak sou egter nie onderskei kan word bloot omdat die beskuldigde besluit het om nie te kyk hoeveel diamante daar in sy pakkie was nie. Hyself getuig dat hy die pakkie vir 1 1/2 tot 2 maande in sy besit gehad het; geleentheid om ondersoek in te stel, was daar dus. Die feit dat hy dit nie gedoen het nie sou hom, na my mening, nie in 'n beter posisie plaas as die persoon wat wel ondersoek instel nie. Beskuldigde self getuig dat hy kon voel dat dit 'n hele klompie stene was, en hy moes beseft het dat hy hom aan 'n risiko blootstel. Nietemin het hy, toe die geleentheid hom voordoem om die stene deur die bemiddeling van beskuldigde nommer 1 deur te stuur, dit benut.

Ek neem in ag, soos ook by die ander beskuldigdes,

dat hierdie beskuldigde nie die presiese waarde van die stene besef het nie, of selfs presies geweet het hoeveel stene daar was nie, maar in die lig van die bevinding hierbo sou 'n Hof, na my mening, kwalik kan bevind dat 'n beskuldigde vir hom 'n voordeel behaal het deur nie vas te stel wat die omvang van sy daad is nie."

It emerged from the evidence of the appellant that bail in the sum of R20 000 had been paid with money collected by relatives and friends. This is naturally no guarantee that he would receive outside assistance for the payment of a fine and he was in no position to do so from his own resources. One, however, infers from what was said in the judgment on sentence that the court was told that in the case of each accused, should a fine be imposed, it could be paid. Mr Botes, who appeared on behalf of the appellant before us, confirmed this. He consequently restricted his argument to the additional prison sentence imposed. He did not contend that it ought to

have been entirely suspended but submitted that the unsuspended period of 4 years was in the circumstances unduly severe.

It was no part of the appellant's case when the matter was argued before us that the court had misdirected itself in any special respect. Counsel's submission was that the court had attached undue weight to the aggravating features of the offence whilst not according the extenuating facts their true worth.

In advancing this argument counsel laid special emphasis on the court's approach to the value of the diamonds misappropriated by him. The trial court, so counsel submitted, whilst accepting and appreciating that the appellant did not know their value and that the appellant was surprised when this

was revealed to him, nevertheless attached undue importance to the value of the diamonds in determining the sentence.

It is implicit in the quoted passage from the judgment that the court accepted - somewhat charitably some might say - that the appellant at no stage opened the parcel to look at or count the diamonds. Be that as it may, he must have realised that they were of value, and that they might be of considerable value, even though he did not know what they were actually worth. In carefully considering the importance to be attached to the value of the diamonds, the court cited with approval what was said on this subject by Beadle ACJ in S v Nkomo and Others 1976(4) S A 800 (R.,A.D.) at 801 F - 802 F:

"The first criticism which was made of the

magistrates' judgments in all these cases was that the magistrates paid too much regard to the uncut value of the emeralds with which the appellants dealt. In some cases the uncut value of the emeralds was considerable. It was argued that the appellants were all Africans who had no expert knowledge of the real value of the emeralds and in fact in all the cases, or the majority of the cases, the prices which they received for selling the emeralds were very much less than their real value. It was argued, therefore, that the moral guilt of all the appellants should not be assessed on the basis of the uncut value of the stones with which they dealt, but on the basis of what they thought the emeralds were worth. This, in my view, is an argument without substance.

.....
 The object of the Mines and Minerals Act, when it deals with precious stones, is obviously to see that the State is not prejudiced by the illegal dealing in such stones. It is to prevent such dealings that very severe penalties are provided in the Act. The prejudice to the State, when illegal dealing in precious emeralds takes place, is much greater when the value of the stones is great than it is when the value of the stones is low, so the crime committed by an accused person who deals in emeralds whose uncut value is very great is a much more serious offence than the crime committed by an accused who deals in emeralds whose uncut value is negligible. The knowledge of the accused, therefore, of the uncut value of the stones is by no means an overriding consideration. I would not go so far as to say

that it is a matter which must not be taken into account at all. For example, if someone is an expert in emeralds and knows precisely the actual value of the stones with which he is dealing and those stones are of very considerable value indeed, his case would probably be regarded as a more serious one than the case of an unsophisticated African who only had a vague idea of the value of the stones. But in every one of the cases that are now before the Court - and this applies to the vast majority of cases of illegal dealing in emeralds - all these appellants knew that they were dealing in precious stones, they all lived in an area where emeralds were mined, they all were, in one way or another, associated with each other in what may be called a ring or conspiracy to dispose of stolen emeralds, and they all knew that there was a fairly ready market for the selling of emeralds. They must have appreciated, therefore, that they were dealing in a commodity which could be of considerable value. The mere fact that they may not have realised the precise value of the stones in which they were dealing, does not seem to me to be a matter that must be carried too far. If, unbeknown to them, they were dealing in a stone whose value was much greater than they thought it was, then they ran that risk because they knew perfectly well that they had no right to be dealing in emeralds at all. There is no justification whatsoever for any such dealing in emeralds. So this argument that the uncut value of the stones is not a feature that must be taken into account, is an argument which, I think, can be to a large extent

disregarded, although not entirely, because, as I say, one must take into account to some extent the background of the particular accused who is dealing in the emeralds. Per contra, it by no means follows that, because the stones were worthless, the appellant should not receive a fairly severe sentence."

The observations of the learned judge in this extract from the judgment, in my respectful view, comprehensively and accurately place this consideration - the value of the diamonds and the accused's ignorance of their precise worth - in its correct perspective. There is no reason to conclude that the approach reflected in it was not followed by the trial court and applied to the facts of this case. On the contrary, the judgment indicates that it was.

Having said this, it does appear that the value of the diamonds involved in the appellant's case was the critical factor which moved the court to impose

the sentence it did. The 11 accused all received heavy fines; 7 were in addition given wholly suspended sentences (accused nos 3, 4, 6, 8, 10, 11 and 12); and the other 4 partially suspended sentences. (Accused nos 1, 2, 7 and 9). Accused no 1 was more severely sentenced for the obvious reason that he played the leading role in attempting to take the diamonds from the mine premises. In the case of the other 3 accused, whose sentences were only partially suspended, the admitted value of the diamonds involved was respectively R213 866,00 (the appellant), R30 556,00 (no 7) and R69 742,00 (no 9) whereas the highest value in respect of those whose sentences were totally suspended was R10 400,00 (no 4). Thus, one may safely infer, that the value of the diamonds involved in those four instances resulted in their receiving partially, and not totally, suspended sentences.

One also notes, by way of comparison, that the appellant admitted having misappropriated 299 diamonds whereas the next largest number admitted to (by accused no 9) was 107 diamonds. Thus the court properly had regard to the number and value of the diamonds involved in the case of the appellant in imposing a more severe sentence on him.

Counsel also referred particularly to the fact that the appellant was a contract worker, with all the disadvantages attaching to this form of employment, and submitted, firstly, that this fact made it more difficult for the appellant to withstand the temptation to misappropriate the diamonds and, secondly, that the complainant by adopting this form of employment was in a measure to blame for what occurred. In passing sentence

the court acknowledged that the fact that the appellant was a contract worker contributed to his economic plight and took this into account in his favour. As regards the further submission (that the complainant was in a sense the author of its own (potential) loss), where theft or a similar offence on the part of an employee can be, wholly or partially, attributed to exploitation on the part of the employer by way of inadequate remuneration or in some other way, this is a relevant consideration. In such a case the need to satisfy the retributive element of punishment is pro tanto reduced: the employee's misconduct is plainly less deserving of condemnation and the need to requite the complainant by way of punishment of the offender is likewise diminished. There must, however, be proof of such exploitation. The disadvantages attaching to contract employment, or certain of them,

have been referred to. But certain other facts necessary before such a conclusion can be reached, are not disclosed. The full terms of this form of employment are not set out and the reasons for such, as opposed to employment on a permanent basis, are not disclosed. One also does not know how the salary of the appellant compared with what he would have been able to earn with his skills in the open market elsewhere in that territory. These are all relevant facts on which the record is silent. Without such information it would be wrong to attribute fault on this score to the complainant. This was in effect the conclusion of the trial court and in my view it cannot be faulted.

For the rest, counsel for the appellant stressed the other mitigating factors whilst counsel

for the respondent, as thoroughly, drew attention to countervailing considerations calling for a severe sentence. All were carefully considered by the court a quo. In my view it cannot be said that the trial court in passing sentence failed to exercise a proper discretion.

The appeal is dismissed.

M E KUMLEBEN
JUDGE OF APPEAL

SMALBERGER JA)
NICHOLAS AJA) - Concur