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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter of:

ROBERT MICHAEL SCHOLTZ

First Appellant
(First Appellant a quo)
(Accused No. 1 a quo)

TREVOR MICHAEL HART-JONES

Second Appellant
(Second Appellant a quo)
(Accused No. 2 a quo)

and

THE STATE

Respondent

CORAM: TRENGOVE, CILLIÉ et HOEXTER, JJA

HEARD: 6 May 1985

DELIVERED: 24 May 1985

J U D G M E N T

Hoexter, JA

HOEXTER, JA

In the regional court for the district of Vanderbijlpark the appellant and one Hart-Jones, two males in their late thirties, were jointly charged with a contravention of sec 84(1)(a) of the Precious Stones Act, 73 of 1964. In what follows I shall refer to the appellant's fellow-accused at the trial as "Jones"; and to the appellant and Jones jointly as "the two accused". The State case was that on 25 May 1982 the two accused had bought 11 unwrought diamonds weighing 94,24 carats. The two accused pleaded not guilty. They were represented at their trial by an attorney and at the close of the State case each testified in his own defence. The trial court found the two accused guilty as charged and imposed on each a fine of R10 000 or two years imprisonment, and, in addition thereto, a further two years imprisonment whereof the operation of one year was conditionally suspended for five years. An order was also made for the forfeiture to the State of an amount of R27 990 given in exchange for the said diamonds. Against their convictions

convictions only, the two accused appealed to the Transvaal Provincial Division. HEYNS, AJ (in whose judgment VAN NIEKERK, AJ concurred) dismissed their appeals but granted the two accused leave to appeal to this Court. There is now before this Court an appeal by the appellant alone.

At the time of the events which formed the subject of the trial the appellant was a seller of semi-precious stones in Johannesburg where he worked as an agent for one Ackermann who was a licensed dealer in diamonds. The appellant used the offices of Ackermann. Jones lived in Durban but he was the owner of a company in Zimbabwe which exported gems.

In the immediate vicinity of the Holiday Inn at Vanderbijlpark, and on the banks of the Vaal River, there is a picnic spot. As a result of a telephone call made by one Jacobs to the appellant on 25 May 1982 the

two

two accused on that day travelled in the accused's car to Vanderbijlpark. Ackermann was in the car with the two accused. They dropped Ackermann in Vanderbijlpark and proceeded to the Holiday Inn where they met Jacobs who had also arrived there by car. Jacobs took the two accused to the picnic spot aforementioned where the appellant negotiated with one Zulu with a view to the purchase of 11 unwrought diamonds in the possession of Zulu. The value of these diamonds was then R97 223. The upshot of the negotiations was that Zulu handed over the diamonds to the appellant and the latter gave to Zulu a briefcase containing bank-notes to the value of approximately R28 000. Following this exchange the two accused and Jacobs got into the appellant's car. The appellant was behind the wheel and Jones sat in the passenger's seat next to him with the diamonds at his feet. Jacobs was in the back of the car. Unbeknown to the two accused both Jacobs and Zulu were

Detective-Sergeants

Detective-Sergeants in the SAP attached to the Diamond and Gold Branch. Moreover, the proceedings at the picnic spot had been observed by other members of the Diamond and Gold Branch, including a Captain du Preez. The departure of the appellant's car from the picnic spot was prevented by the sudden appearance upon the scene of a police car. Shortly thereafter Captain du Preez identified himself to the two accused and explained to them the true identities of Jacobs and Zulu. The police took possession of the diamonds and the money. In the boot of the appellant's car the police found two further briefcases and a battery-operated diamond scale. The one briefcase in the boot belonged to the appellant and contained notebooks and papers. The other briefcase in the boot was the property of Ackermann. Ackermann's briefcase contained documents and a quantity of money. In separate motor vehicles the two accused were removed to the Vereeniging Police Station.

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The exchange of diamonds and cash briefly described above was the culmination of a process of negotiation extending over a period of nearly three months. For an assessment of the probabilities in the case it is necessary to indicate, if only in broad outline, how protracted and elaborate the negotiations were. They were initiated by a business associate of Jones called David Adams. On 21 February 1982 Jones returned to South Africa after a business trip by air to London. Upon Jones's arrival at Jan Smuts Airport, he met Jacobs for the first time. Jacobs, under the assumed name of "Dave", was introduced to Jones by David Adams. At this meeting, and at later meetings with the one or other or both the two accused, Jacobs pretended to be an intermediary in illicit diamond trafficking. On this, and also on subsequent occasions, "Dave" was able to muster sundry other members of the Diamond and Gold Branch who posed as illicit diamond dealers and who outwardly created

the

the impression that they were fearful of apprehension by the police. The deception was successful. Jones was taken in and in due course the appellant was likewise duped.

The negotiations at Jan Smuts Airport on 21 February 1982 took place in a parked car. Jones inquired of Jacobs whether he had bought diamonds. Jacobs replied that he had not, but he went to call Det Sgt Pindi who had been waiting nearby. Pindi produced a number of diamonds which Jones examined with the aid of a magnifying glass. There was some haggling over price but no sale eventuated. On 11 March 1983 Jones and Jacobs met again at Jan Smuts airport. On this occasion Jones suggested that Jacobs should try to obtain a large parcel of diamonds worth R100 000. The next meeting between them was in Johannesburg during the morning of 15 March 1982; and they met again during the afternoon of the same day when, for the first time, Jones was accompanied by the appellant. The

appellant

appellant mentioned that he had money and he inquired of Jacobs whether the latter could get hold of diamonds. Jacobs replied in the affirmative and said that he had friends in South-West Africa.

Jacobs, and the two accused met again in Johannesburg during the morning of 7 May 1982. In the appellant's motor car they drove to and parked at Jan Smuts Airport. There Det Const Sotowe was held out to the two accused as one of Jacobs's friends from South-West Africa. Sotowe produced diamonds which the appellant examined and then returned to Sotowe. A further but abortive meeting between the two accused and Jacobs took place in the afternoon of the same day at the Millpark Holiday Inn, during the course of which it was agreed that they would meet again on the following day. During the morning of 8 May 1982, and at a parked car at Jan Smuts Airport, Jacobs introduced Det Sgt Zulu to the two accused under the name of "Joseph".

Zulu

Zulu produced a parcel of diamonds for their inspection and thereupon the appellant fetched a diamond scale from the boot of the car. The appellant weighed each diamond in turn; recorded its weight; wrapped it up separately; and marked the package so made by him with a coloured pencil. The diamonds were then returned to Zulu. Jacobs next presented Det Const Nkosi, in the guise of an illicit diamond seller, to the two accused. Nkosi likewise produced diamonds for the inspection of the two accused. The appellant observed the same procedure with each diamond before returning them to Nkosi. At that juncture, and at the request of the appellant, Sotowe was again summoned to produce the diamonds previously exhibited by him. Once again the appellant followed the same procedure of weighing, recording and wrapping up of individual stones before the diamonds were returned to Sotowe. Haggling over the price followed. The appellant offered to pay R17 000 for the diamonds. Jacobs said that his friends wanted R86 000.

No

No agreement was reached.

On 10 May 1982 the appellant met Jacobs in Johannesburg and was informed by the latter that his South-West African friends had gone back home. However, the appellant made an offer to buy for R28 000 the parcel of diamonds exhibited to him by Zulu on 8 May; and he gave Jacobs his telephone number. On 25 May 1982 Jacobs telephoned the appellant to inform him that his friends had returned from South-West Africa and that they were at the Vanderbijlpark Holiday Inn. The two accused met Jacobs at the Holiday Inn, and the events following thereon have already been described.

Immediately after the two accused had pleaded not guilty at the trial their attorney indicated the nature of their defence by making the following statement to the regional court:-

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"The accused will not deny that they were involved in negotiations with certain persons who subsequently, it transpired, were members of the South African Police and informers regarding the diamonds.....The defence of the accused will be that at no time did they intend entering into an illegal transaction with the sellers but at the time money and diamonds exchanged handsthe object of Accused No 1 and 2 at that stage was to have the persons with whom they were negotiating arrested by the policeThe intention was in fact to inform the police and have these people arrested and charged."

When they themselves came to testify at the trial the appellant and Jones each gave evidence in support of the defence earlier adumbrated by the attorney. Although there is now before us the appeal only of the appellant, a proper understanding of the case makes it necessary to examine the testimony of each of the two accused. I deal first with the appellant's own evidence.

The appellant told the trial court that, with a view to a possible transaction involving diamonds, he had

been

been introduced by Jones to Jacobs and David Adams. After his first meeting with these two men he had concluded that they were "illegal dealers" and he had informed Jones of his view. Although he was not prepared to become involved in any illegal diamond transaction, so testified the appellant, he had nevertheless persisted in his negotiations with Jacobs and his confederates for the following reasons. Although their suspicions were groundless, the police suspected the appellant of involvement in trafficking in diamonds; and in his dealings with the dealers to whom Jones had introduced him he saw an opportunity of going through the motions of buying unwrought diamonds from the sellers and then forthwith betraying them to the police. By so doing, so the appellant explained, he would kill two birds with one stone : the unfounded suspicions about him which the police had harboured would be at once dispelled; and at the same time he would qualify for the payment of a police reward in an amount

equivalent

equivalent to one-third of the value of the diamonds that he had pretended to buy from the illegal sellers. The "illegal dealers" concerned were, so testified the appellant, "talking very large amounts". The appellant's cash resources, on the other hand, were limited; and in order to put his plan into execution the appellant borrowed an amount of R30 000. He further told Jones that the latter would get paid "if the thing was done successfully my way", but no specific amount was mentioned or agreed upon by the two accused.

The appellant said that before 25 May 1982

he had explored with Jacobs the possibility that the sellers might agree, against payment of a deposit, to allow the two accused to remove the diamonds offered by Zulu in order to have them valued by a third party. Pursuant hereto, and in the course of his telephone conversation with Jacobs on 25 May 1982, Jacobs informed the appellant (I quote from

the

the appellant's evidence in chief):-

"We've agreed that you would bring money and leave R28 000 with them as security and be able to take the diamonds to a gentleman, that you've arranged to have it valued with, in Vanderbijlpark and then come back and do a negotiation, a deal with them."

According to the appellant Jones happened to be with him in his office at the time of the telephone call by Jacobs.

Having concluded the telephone conversation with Jacobs the appellant explained to Jones what he proposed to do at the meeting with the "illegal sellers" at the Vaal River. He would show them R28 000 in a briefcase which he would thereafter hand over to Jones. The appellant would then go off in his car, taking the diamonds with him and accompanied by one of the "illegal sellers". He would be bound ostensibly for the valuer but in reality for the police. Meanwhile Jones would remain at the Vaal River with the R28 000 and the rest of the "illegal sellers", awaiting the return to

the

the scene of the crime of the appellant, duly reinforced by the police.

As the two accused were leaving the office, so testified the appellant, Ackermann asked them where they were going. Hearing that they proposed a brief visit to Vanderbijlpark, Ackermann requested them to give him a lift to that town. The appellant went on to say that he told Jones not to disclose their designs to Ackermann during the journey to Vanderbijlpark. Upon their arrival at Vanderbijlpark Ackermann was dropped off in town and the two accused drove on to the Holiday Inn where they met Jacobs. Driving ahead of the appellant's car Jacobs led them to the picnic spot in the vicinity of which the "illegal sellers", including Zulu, were waiting. Some discussion ensued, whereafter Zulu, who seemed disinclined to do business with the appellant, asked to be shown money. The appellant opened the boot of his car and showed Zulu his briefcase

containing

containing some R28 000 consisting of bank-notes tied in bundles. The appellant then suggested that Jones, with the R28 000 in his possession, should stay behind with Zulu and that Jacobs should accompany him (the appellant) by car to have the diamonds valued. According to the appellant Zulu did not wish Jones to remain. Zulu and the appellant exchanged the diamonds and the appellant's briefcase containing the money and the accused, Jones and Jacobs got into the appellant's car. Inside the car the appellant handed the diamonds to Jones. As the appellant tried to drive off a police car blocked their way and Captain du Preez explained to the two accused that they had been the victims of a "diamond trap". At the request of Captain du Preez, and in the presence of the two accused, Jacobs and Zulu respectively reported on what had taken place. Thereafter the appellant asked to speak aside to Captain du Preez. His request was granted and the appellant then explained to

Captain

Captain du Preez that it was "all a big mistake"; and that in fact he and Jones had been engaged in trapping the "illegal sellers". At the Vereeniging Police Station the appellant elected to make a statement. The body of that statement and certain questions by Captain du Preez and answers by the appellant in elucidation of it, are quoted hereunder:-

"Omrede ek alreeds verdink is van diamanthandel het ek gedink as ek gesmokkelde diamante met hulle verkopers aan die polisie oorhandig daar 'n beloning van omtrent 'n derde vir my sou wees en dat ek my posisie op die vorige agterdog sou opklaar, maar ongelukkig is my planne in die wiele gery voor ek daarmee kon slaag.

Dit is al wat ek op hierdie stadium wil sê. Ek is bereid om enige vrae te beantwoord.

Vraag: Die rapporte wat S/Sers Jacobs en Zulu in u teenwoordigheid aan my gemaak het, was dit korrek? ---- Antwoord: Ja.

Vraag: Wat was die plan waarvan u in u verklaring praat? --- Antwoord: Ek wou die persone en die diamante by die polisie gaan oorhandig.

Vraag: Het u al met die polisie oor hierdie aangeleentheid gepraat of dit onder hul aandag gebring? ----- Antwoord: Nee".

The

The version given to the trial court by Jones may be summarised as follows. He had been in "semi-partnership" with David Adams in a business which exported religious ornaments to Jeddah, and a fairly close friendship developed between them. Adams told Jones that he was looking for an outlet, beyond South Africa, for uncut diamonds, and while he was on a business trip to England Jones discussed the matter with his agent in that country. The meeting at Jan Smuts Airport on 21 February 1982 took place as a result of telephone calls to Adams from Jones in England. In subsequent meetings with Jacobs and Adams the latter, so testified Jones:-

".....kept pressurising me that there were masses of parcels, big parcels, and please couldn't we do anything about it"

The solicitations of Adams induced Jones to approach the appellant. The accused reacted to this approach by saying that he was already suspected of having been involved in an

illicit

illicit diamond transaction and that he was not interested in I.D.B.. The appellant nevertheless displayed interest in the possibility of "any deal being done above board."

Thereafter Jones introduced the appellant to Jacobs and Adams. After the appellant's first meeting with these two men he told Jones that the business proposed by Jacobs and Adams "was not kosher"; and that the appellant "would like to handle it his way." Exactly what the appellant had in mind, however, was revealed to Jones for the first time on the morning of 25 May 1982 in the office of the appellant. In his evidence in chief Jones gave the following account of the appellant's explanation to him:-

"For the first time he said that he was going to trap. He informed me that there was R28 000 involved. His idea was that he would leave me with the R28 000 whilst he took diamonds and one of the three, either Zulu or Mr Jacobs, or the third party that I don't know his name. Specifically I was to hold that R28 000 whilst he left the scene.

What

What was he going to do after leaving the scene? ----- To the police station, he was going to take one of the three to the police station."

However, as events actually unfolded at the meeting on the banks of the Vaal River, Zulu made it clear that there was no reason for Jones to remain with the "illegal sellers" while the appellant went off with the diamonds; and therefore Jones got into the car with the appellant. The appearance of the police shortly afterwards left Jones highly confused. At the Charge Office in Vereeniging his state of confusion was such that he elected at first not to make a statement. A short while later, however, he sought and obtained from Captain du Preez permission to ask the appellant a question. He then asked the appellant -

"whether he was going to do as planned"

to which the appellant replied in the affirmative. Thereupon

Jones

Jones sat down and himself wrote out a fairly lengthy

statement, the relevant portion whereof reads as follows:-

"It was at a breakdown stage in legal dealings that Mr Scholtz informed me that he was most anxious to clear his name with his previous suspicion that he was going to play the game his way. (I was not to worry as he would pay me). This arrangement was very loose). To my best knowledge he met with the parties on many occasions in order that they fulfil their promises of a big (very big) parcel coming to Cape Town. I was not present at most meetings.

I flew up from Durban yesterday (24.5.82) for business totally void from this account.

I have not had any contact with Mr Scholtz for a couple of weeks, in which time he had met with the parties and meetings were made.

This morning I was made fully aware of the full impact of what Mr Scholtz was going to do. (Would express myself better verbally at this point.)

I would like to state that:-

- (1) At the best of times my thinking has been confused (confined?) to within the law of South Africa.
- (2) At the time of my arrest I honestly state that Mr Scholtz given time would have proved this arrest in reverse.

(3) I

(3) I believe that Mr Scholtz was at all times working within the law and the clearance of his previous suspicion."

The following four witnesses were called for the prosecution: Det Sgt Jacobs; Det Sgt Zulu; Captain du Preez; and Ackermann. Affecting the main features of the negotiations between the two accused and the "illegal sellers" up to the stage of the events at the picnic spot when the two accused and Jacobs got into the appellant's car, the State and defence versions differ no more than in regard to points of immaterial detail. As to the subsequent events on 25 May 1982, following the intervention of Captain du Preez, a number of more significant differences between the State and defence versions are to be noticed. These differences relate more particularly to the issues (1) whether or not the appellant, on becoming aware of the police, urged Jones to get rid of the containers holding the diamonds, and (2) whether or not the appellant during his private conversation

with

with Captain du Preez at the picnic spot claimed that he was working in league with the head of the Diamond and Gold Branch of the South African Police. It is necessary in the above connection to make brief reference to certain passages in the evidence of Det Sgt Jacobs and Captain du Preez. It is common cause that after the appellant had made his written statement (quoted earlier in this judgment) to Captain du Preez at the Vereeniging Police Station, the appellant also made certain oral statements to Captain du Preez in which he made reference both to the head of the Diamond and Gold Branch and to Ackermann. In order to weigh the probabilities in the case it is further necessary to examine the content of the appellant's said oral statements to Captain du Preez; and to consider the nature and extent of the cross-examination of Ackermann undertaken by the appellant's attorney.

Det

Det Sgt Jacobs told the trial court that as the appellant's car began to move off from the picnic spot and when the appellant became aware of the approach of the police car, the appellant said the following to Jones in respect of the two diamond containers:-

"There is that car, throw it outside, that thing, throw it outside."

Both the appellant and Jones denied in their evidence that the appellant had said any such thing to Jones. It has been mentioned that before the two accused were removed from the picnic site the appellant spoke aside to Captain du Preez. In his evidence in chief Captain du Preez gave the following account of what the appellant said to him on this occasion:-

"Daar het beskuldigde 1 aan my verduidelik dat hy eintlik saam met brigadier Erasmus werk.

Brigadier Erasmus? ---- Ja, Edelaagbare, dit is die hoof van die diamantafdeling, werk

en

en dat hy besig was om die Swartes met die diamante te vang. Ek het hom verwittig dat ek sal ingaan daarop."

Captain du Preez's description, during his evidence in chief, of the appellant's oral statement subsequent to his written statement, was the following:-

" Dat hy" (the appellant) "nie eintlik self vir Erasmus ken nie, dat hy van mnr Ackermann verneem het dat brig Erasmus blykbaar vir Ackermann sou gesê het dat as hulle Swartes of persone met ongeslypte diamante vang en na die polisiestasie toe bring, hulle n derde beloning kon kry. Dat mnr Ackermann op daardie stadium naby Vanderbijlpark-polisiestasie gewag het, en alles sal kan staaf."

When Captain du Preez was cross-examined it was put to him that during the appellant's private conversation with him at the picnic spot the appellant had made no mention of Brigadier Erasmus; and that the appellant had referred to the Brigadier for the first time at the Vereeniging Police Station after he had made his written statement. Captain

du Preez

du Preez was adamant that at the picnic spot the appellant had made specific reference to Brigadier Erasmus. It should be noticed further that in regard to the appellant's later oral statement the cross-examiner suggested to Captain du Preez that the appellant had said to him:-

"Ja luister hierso, eintlik het Wimpie (dit is nou Ackermann) gesê ja ons moet dinge so doen en so doen."

Captain du Preez conceded that the appellant had made a report to him in these terms. Indeed, he said that on the strength thereof he went to Vanderbijlpark in search of Ackermann. I should mention that it is common cause that Captain du Preez and the appellant travelled to Vanderbijlpark by car and found Ackermann. Ackermann was then also taken to the Vereeniging Police Station; and during the journey the appellant and Ackermann were asked not to discuss the case.

As

As to whether or not he had mentioned the name of Brigadier Erasmus in his private conversation with Captain du Preez at the picnic spot, the appellant vacillated considerably in giving his own evidence. Despite his attorney's challenge of Captain du Preez's evidence on this point, the appellant started off in his evidence in chief by saying that he did not know whether he had mentioned Brigadier Erasmus to Captain du Preez at that stage, but that he might have done so. When the matter was pursued with him by the presiding magistrate, the appellant gave the following evidence:-

"BY THE COURT: Are you denying that you mentioned Brigadier Erasmus at the riverside?
----- Your Honour, if I must say it on oath, 'yes' or 'no', I'd rather say 'no', because I can't remember mentioning it."

When further pressed the appellant said that he was not certain and "that there might have been the slightest possibility" that he did mention it.

Before

Before examining the tenor of the cross-examination of Ackermann it is necessary to see what account the appellant himself gave, during his evidence in chief, affecting his oral statement to Captain du Preez about the role of Ackermann; and what his reasons for the statement were. The appellant testified thus:-

"Now could you explain what discussion took place, if any, between you and du Preez, prior to going to fetch Mr Ackermann? --- I had told Captain du Preez that I was trying to catch these people with diamonds. I had also told him that Mr Ackermann whom we were now going to fetch, would be able to enlighten him more, for my benefit.

In what respect was this? --- Well that I was hoping he would remember or recollect and tell Captain du Preez when he realised what happened, that it was actually he who told me that it was my duty to report or arrest anybody that deals in illegal diamonds because it was not good for business and that I had heard it from him that he knew or had been informed that we were entitled to about a third of the value of the diamonds when an arrest was successfully made."

Against

Against this background the cross-examination of Ackermann by the appellant's attorney assumes particular significance. Ackermann's evidence in chief was very brief. The witness said that the appellant had worked for him as an agent and that on 25 May 1982 the two accused had given him a lift to Vanderbijlpark and dropped him off at a restaurant where they would pick him up again at about 3 pm. He made plain that he went to Vanderbijlpark entirely about his own business and that he had no interest in what the two accused were about. Concerning Brigadier Erasmus and what the witness might have said to the appellant in this regard, the relevant portion of Ackermann's cross-examination is set forth in full hereunder:-

"In die verlede het u al met beskuldigde nr 1 bespreek die probleme wat die diamantbedryf beleef as gevolg van onwettige handel met diamante, en dit is nou dwars oor die hele wêreld? Met ander woorde hoe die onwettige diamantbedryf die prys van diamante byvoorbeeld beïnvloed?-----

Ek

Ek sou sê ja ek was redelik uitgesproke daaromtrent.

Hy sal sê dit is inderdaad so, jy is taamlik uitgesproke in hierdie verband? En dat u met geleenthede genoem het, gesprekke wat u byvoorbeeld met brigadier Erasmus gehad het in verband met onwettige diamanthandel hoe dit toeneem en die stappe wat gedoen word om dit te bekamp? ---- Ek kan nie spesifieke geleenthede onthou nie, maar dit is moontlik."

So much for the main features of the evidence in the case. In its reasons for judgment the trial Court recorded its impression that on all material aspects the police witnesses had given their evidence in a clear and satisfactory manner. Dealing with the quality of the two accused as witnesses, the regional magistrate observed:-

"As to the crux of the matter, namely whether or not they had the required mens rea, they were both unsatisfactory and untruthful witnesses."

The trial court formed the impression that Ackermann was

"obviously

"obviously uneasy in the witness box". The regional magistrate rejected as "palpably false" Ackermann's evidence that on the day in question there had been no common interest between him and the two accused, and that he had travelled with them to Vanderbijlpark purely on his own private business. Of Ackermann the regional magistrate remarked in his reasons:-

"Ackermann is a businessman in the diamond trade in Johannesburg. He accompanied the accused to Vanderbijlpark for his own reasons as he puts it. He is then dropped in town and leaves his brief case containing R7 000 in the accused's car. When questioned by the Court he pretends not to remember how much was in the briefcase. Asked why R7 000 would have been in the briefcase he answers that he usually carries a considerable amount of cash at home, in his office and on his person. It is not insignificant that the first two state witnesses mention a price of R35 000 and that Captain du Preez says that the agreed price would have been in the vicinity of R35 000. Accused No 1 says that if the diamonds were valued in excess of R28 000 the difference would be paid. R7 000 happens to be the difference between R35 000 and R28 000."

These then were the trial court's impressions

of

of the various witnesses. Before considering whether the evidence as a whole sustains the conviction of the appellant it is necessary to comment briefly on two or three aspects of the regional magistrate's findings of fact and his reasons for judgment. On all the evidence it is not clear whether at the picnic spot there was any definite agreement as to the total purchase price to be paid by the appellant for the 11 unwrought diamonds in the possession of Zulu. Zulu testified that the appellant agreed to pay him R35 000; and that the arrangement was that the appellant would leave the picnic spot simply in order to procure the outstanding balance of R7 000. According to the appellant (and for this part of the appellant's story there is corroboration in the evidence of Jacobs) the arrangement was that R28 000 was paid to Zulu as a "deposit" and that the amount of the purchase price would be finally negotiated upon the appellant's return to the picnic spot after valuation of the diamonds by a third party. The trial court did not

resolve

resolve this particular disputed issue but in my view nothing turns on it. The prohibition contained in sec 84(1)(a) of Act 73 of 1964 is cast in wide terms. Save as otherwise provided in the Act no person shall -

"..... buy, deal in or receive by barter, pledge or otherwise, either as principal or agent, any rough or uncut diamonds."

Unless in his negotiations with Zulu the appellant entertained the mental reservation which is the basis of his defence, then on either version of the arrangements agreed upon at the picnic spot the exchange of the money for the uncut diamonds was hit by the provisions of the subsection.

Reference has been made to the conflict of evidence in regard to the question whether or not at the picnic spot, and upon the approach of the police car, the appellant urged Jones to throw away the diamonds. A clear finding that on this issue Jacobs is to be believed, and

that

that the denial of the two accused is to be rejected as false, would serve as a strong pointer to a guilty state of mind on the part of the appellant; and it would be almost wholly destructive of the appellant's version. But likewise in regard to this conflict of evidence the regional magistrate has not made any specific finding of fact either way. It is true, of course, that in general the trial court was favourably impressed with the calibre of the police witnesses whereas it found the two accused to be unsatisfactory witnesses. However, Jacobs was a police trap and the events at the picnic spot represented the critical stage in a very sustained operation by members of the Diamond and Gold Branch in a bid to ensnare the two accused. And in relation to this cardinal issue Jacobs was alone in the car with the two accused and therefore a single witness. In delivering the judgment of the Court a quo, HEYNS, AJ, expressed the view that on this point the testimony of Jacobs had -

"very

"... very little if any evidential value".

In all the circumstances of the case, and in the absence of any crisp finding thereon by the trial court, the proper course seems to me to place no reliance whatsoever on this particular statement in the evidence of Jacobs.

The trial court disbelieved the story told by the two accused. Part of their version was that Ackermann accompanied them to Vanderbijlpark as a casual fellow-traveller who was ignorant of the mission upon which the two accused were to embark at the Holiday Inn. On this part of the defence version the two accused were corroborated by the evidence of Ackermann. Ackermann's evidence to this effect was rejected by the trial court as manifestly untrue. On this point the truth or falsity of Ackermann's testimony is not, I consider, of decisive importance in weighing the evidence of the appellant. Ackermann's ignorance of the nature

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nature of their mission would not necessarily point to the conclusion that the two accused were bent on exposing illicit dealing in diamonds; and if Ackermann had knowledge of the nature of their mission, such knowledge, by itself, would hardly provide proof that the two accused were about the illegal purchase of uncut diamonds. But whether or not Ackermann had knowledge of their mission no doubt bears on an assessment of the credibility of the appellant; and it may be relevant also to an assessment of the probabilities, because the evidence suggests that Ackermann was better equipped than either the appellant or Jones accurately to determine the value of uncut diamonds.

Here it must be borne in mind, I think, that the trial court's criticism of Ackermann's version that his business in Vanderbijlpark was unconnected with that of the two accused postulates that the money in Ackermann's briefcase left in the boot of the appellant's car amounted to R7 000. However, no evidence was led at the trial to establish that the money in Ackermann's briefcase was counted by anybody. Although

Ackermann's

Although Ackermann's evidence shows that he was a somewhat reluctant and evasive witness, this part of his story is not, I think, open to criticism in the particular respect relied upon by the trial court.

The conviction of the appellant depended upon proof beyond reasonable doubt that at the time when the diamonds and the money exchanged hands at the picnic spot the appellant had the requisite mens rea. No onus rested on the appellant to convince the trial court of the truth of his version that in fact he was trying to trap Zulu and expose him to the police. In order to acquit the appellant the trial court did not have to believe the appellant's version. The trial court was entitled to convict the appellant only if satisfied, not only that his version was improbable, but in addition that there was no reasonable possibility that it was not substantially true.

In

In the estimation of the regional magistrate the appellant was an unsatisfactory witness. That this impression was well-founded is borne out, in my view, by an examination of the appellant's evidence. More particularly in regard to the issue as to when, for the first time, and in what fashion, the appellant in his explanations to Captain du Preez sought to invoke the name of Brigadier Erasmus, the appellant was an evasive and unconvincing witness.

A feature in the case which in my view militates strongly against the defence raised by the appellant is the nature and extent of the cross-examination of the State witness Ackermann undertaken by the appellant's attorney. Having regard to what was suggested to Captain du Preez during his cross-examination, and bearing in mind the tenor of the appellant's own evidence, it is reasonable to expect that during the cross-examination of Ackermann the whole issue of what Ackermann (on the defence version)

was

was alleged to have told the appellant about Brigadier Erasmus would have been explored with the witness at some length, in detail, and with the same tenacity displayed by the appellant's attorney in his cross-examination of the police witnesses who testified for the prosecution. But in fact - as the appellant's counsel in argument properly conceded - the cross-examination of Ackermann is remarkable for its tentative and perfunctory nature in regard to this important element in the defence version.

Having regard to the sustained and protracted dealings which the appellant admittedly undertook with the police trap, the regional magistrate disbelieved the appellant's story that his conduct was actuated by a desire to assist the police in the detection of illicit diamond deals and in the hope of some financial benefit in the form of a police reward. In my opinion the appellant's explanation is unworthy of credence. A perusal of the

appellant's

appellant's evidence shows, I think, that he is an intelligent individual. In cross-examination the appellant was constrained to admit that without giving the police prior notice of his alleged intention so to do, his attempt to usurp the functions of the Diamond and Gold Branch exposed him to grave risk. The danger with which his alleged plan was fraught was not limited to the possibility that in the course of such dealings he might have been discovered by the police in a compromising situation resulting in his criminal prosecution. The appellant's alleged plan also involved the hazard of considerable financial prejudice to himself. Objectively viewed the appellant's conduct points in my view rather to an intention on his part to reap illicit gain directly from the purchase of uncut diamonds than to a hope of indirect financial advantage in the shape of a police reward. At the picnic spot the appellant paid Zulu a deposit of some R28 000. It is true that on either the State or the defence version the

appellant

appellant was prepared to take leave of Zulu and the money with no certainty that upon his return to the picnic spot either Zulu or the money would still be there. But on the defence version the risk of financial loss to the appellant was appreciably larger than on the State version. Should Zulu disappear with the money before the appellant's return to the picnic spot then, on the State version, the appellant would have the benefit of the uncut diamonds in his undisturbed possession. On the defence version, however, the uncut diamonds would be surrendered by the appellant to the police, and against an abortive capital outlay of some R28 000 (for which the appellant had raised a loan) the appellant would have been left with the meagre consolation of the hope of a police reward (to half of which Jones would presumably have been entitled) representing but one-third of the value of the diamonds.

There are other unsatisfactory features in

defence

defence case. Although there is before this Court only the appeal of the appellant, it is clear, on either the State or the defence version of the facts, that from the middle of March 1982 the two accused were acting in concert. In weighing the strength of the prosecution's case against the appellant it is both necessary and proper to test the probabilities by reference not only to the reaction of the appellant to the intervention by the police at the picnic spot, but to consider also the response thereto of Jones. If the two accused were in truth engaged in trapping Jacobs and his associates then there was no reason for the arrival of Captain du Preez to have thrown Jones into a state of complete confusion. That Jones was nonplussed by the police intervention; that he needed time for reflection; and that he found it necessary to put a precautionary question to the appellant before committing himself to a statement all tend to show, in my opinion, that the story told by the two accused to the police was part of a dishonest stratagem

strategem discussed between the two accused previously, but somewhat imperfectly, which was to be employed in the possible eventuality of detection by the police.

In a careful argument to this Court Mr Ludorf has said everything that might fairly be urged in support of the appellant's appeal. Having given due consideration to counsel's submissions I remain unpersuaded that the trial Court was wrong in concluding, not only that the appellant's story was improbable, but further that on all the evidence any reasonable possibility that the appellant's version might be true could be safely excluded.

The appeal is dismissed.

G G HOEXTER, JA

TRENGOVE, JA)
 CILLIÉ, JA) Concur