Case No 73/89
/wlb

SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the appeal between:

FAROUK GUMAN : Appellant

and

THE STATE Respondent

CORAM: VAN HEERDEN, MILNE et STEYN JJ?

Date of Hearing: 7 September 1990

Date of Judgment: 28 September 1990

J U D G M E N T

MILNE JA/.....

MILNE JA:

The appellant was convicted in the Regional Court on three charges, namely, on count one of buying two pieces of unwrought gold containing 130,2 and 116,4 gm of fine gold respectively, in contravention of section 143(1) of the Mining Rights Act, No 20 of 1967, on count two of having in his possession 7501,34 gm of unwrought gold in contravention of sub-section (3) of that section, and on count three of having in his possession an unpolished diamond with a mass of 0,8 carats in breach of section 18 of the Diamonds Act, No 56 of 1982.

On each of the first two counts he was sentenced to 3 years' imprisonment and on the third count to 9 months' imprisonment. It was ordered that the sentence on count three and 1 year of the sentence on count two were to run

concurrently with the sentence imposed on count one. The effective period of imprisonment was therefore 5 years.

The appellant's appeal to the Transvaal Provincial Division against his convictions and sentence was dismissed. He then sought leave to appeal against the convictions only and such leave was granted by the court a quo.

The version of the State appears from the evidence of Sgt Likhula and Constables Mokwena, Van Zyl and Sherman and the police informer, John Malgas. This may be summarized as follows:

Malgas, who owned a taxi had, so he said, on two previous occasions transported a black man called Paulus from Bloemfontein to the appellant's house in Benoni where Paulus had sold gold to the appellant. This information was conveyed to the police who arranged a police trap. On 11

August 1987 the two pieces of gold which were the subject of count one were handed by Sgt Van Dyk (who had died by the time of the trial) to Const Mokwena. I stress that the gold was not handed to Malgas. The importance of this fact will appear later. Malgas and Mokwena and a Sgt Mogape were driven by Likhula in what was referred to in the evidence as a "Combi" to the house of the appellant. They were followed in a saloon car by Sgt Van Dyk and Constables Van Zyl and Sherman. Mogape, Mokwena and Malgas were admitted to the house by the appellant's wife and young son, who said that the appellant was not at home and asked them to sit in the study while she telephoned him. After a short while the appellant arrived and Mokwena handed him the two pieces of gold. The appellant then went upstairs and returned with a scale and a calculator. The appellant weighed the gold on the scale and then did some calculations on the calculator. He then offered a price of R4 655 for the gold and this was

agreed. This sum was then handed over to Mokwena in a bundle of bank notes. Mogape then made an excuse to leave the room and gave a pre-arranged signal. Likhula then flashed his lights which was a signal to the other policemen in the saloon car. The appellant then noticed the Combi and apparently smelling a rat, whipped the bundle of money out of Mokwena's pocket and locked the front door shouting "skelms". Mokwena and Malgas then beat a hasty retreat leaving the house at the back via the kitchen door and leaving both the gold and the money behind. Outside the house were Van Dyk, Van Zyl, Sherman, Mogape and Likhula. All the policemen then went to the back door and found it locked. The police then surrounded the appellant's house and eventually, after some fifteen minutes, the front door was opened. The policemen then entered the appellant's house (Malgas did not enter with them but sat in the Combi). At Van Dyk's request and in the presence of the appellant,

Mokwena made a report to Van Dyk as to what had happened between the appellant, himself, Malgas and Mogape before they had left the appellant's house. Van Dyk then asked the appellant where the gold was and, as a result of a report by the appellant (although there was a conflict as to the nature of this report) the gold was found under the cushions of a chair or sofa in the study. The appellant refused to go upstairs with the police and all the policemen with the exception of Sherman then went upstairs with the appellant's wife. In a bedroom in the drawers of one of the beds they found a red briefcase containing the same scale, a similar calculator and a musical instrument. In the same drawer they found a cake tin. In this cake tin there were 39 pieces of gold. The weight of this gold was 7501,34 gm and the value was R234 844.45. In the drawer of the other bed there was a plastic bag and inside this were further plastic bags containing what was described as "gold dust" or

"grondstof". Eventually, some days later, the diamond which was the subject of count three was found hidden in amongst the "grondstof" when this was handed over for analysis by the police. All these objects (excluding the diamond which at that stage was still hidden) were shown to the appellant when the policemen came downstairs. Van Dyk then asked the appellant for the money which he had paid to Mokwena for the two pieces of gold. The appellant then went to a wardrobe and produced a plastic bag from which he counted out R4 655 in notes. (There was some dispute as to exactly how this money was produced and I shall return to this at a later stage). These notes were then sealed in the appellant's presence in a brown envelope. When the envelope was unsealed at the trial and the contents counted it was, eventually, after a number of miscounts found to be R200 short. I shall also refer to this aspect of the matter later.

The appellant testified in his own defence. His doctor, Dr Carim, and his wife also gave evidence. The defence version may be summarized as follows:

The appellant's wife thought that Mogape, Mokwena and Malgas were plumbers and having been warned by the appellant several days before to expect plumbers she telephoned him at his shop to say that the plumbers had arrived. The appellant drove himself from his shop in his car and found these three persons in the study. They wanted to sell him gold. He, however, showed them the door and said that he no longer dealt in gold. (He had two previous convictions of dealing in unwrought gold, one in 1976 for which he received a suspended sentence and one in May 1985, for which he was sentenced to a fine of R4 000, 2 years' imprisonment plus a further 2 years' imprisonment suspended for 5 years conditionally). He then went and lay down in a bedroom downstairs. He heard banging on the door and when he opened the front door the police asked him where the gold was; he

said he did not know what gold they were talking about whereupon they went straight to the study, lifted up the cushions of a sofa, and found two pieces of gold there. The police then asked him for the bundle of money that he had "paid these people with"; he disclaimed any knowledge of such money and he then said to them "if you want money let me show you where my money is", he then showed them money which represented takings from his drapery shop which he intended to bank. They said they wanted "the bundle".- He refused to go upstairs with the police because he had a neck injury as a result of a motor accident and his wife then went upstairs with the police. They came back but had nothing with them and said nothing about having found anything upstairs. One of the policemen then asked him for R4 600. He started to count out money from his takings and the policeman then said he wanted it all in R20 notes. There were not enough R20 notes to make up the full amount

so he counted out R3 600 in R20 notes, R400 in R10 notes and R600 in R50 notes (making a total of R4 600). The appellant later testified that one of the policeman said he must count out R650 in R50 notes so that the total was R4 650 not R4 600.

The appellant conceded in cross-examination that the briefcase which was produced as an exhibit was used by his children and that the electronic scale was his. This scale was, so he said, lying on a wardrobe upstairs. He had last used it a long time previously. He knew nothing about the cake tin or the gold found in the cake tin or the "grondstof" or the diamond and they were not shown to him on the day in question. He knew nothing of the calculator. He denied that he had ever met Malgas.

The magistrate analysed the evidence of the

appellant, his wife and his doctor and found them to be unsatisfactory witnesses. Mr Mahomed who argued the appeal both vigorously and comprehensively did not attempt to suggest that the magistrate had erred in this regard. He exercised a wise discretion in not attempting what would, in my view, have been an impossible task. He did however launch a serious attack on the State witnesses. I shall not attempt to canvass all the points which he raised but the main thrust of the argument on count one may be summarized as follows:

(a) The evidence of police traps must in general be treated with caution particularly when, as here, the accused is not offering gold for sale which he has in his possession, but is being tempted to buy gold which the police have in their possession.

(b) In this case after the transaction in which the accused allegedly bought and paid for the gold, no

money was found in the possession of the person to whom it was allegedly paid and the gold was not found in the actual physical possession of the appellant; although it was admittedly found hidden in his study.

(c) There are therefore no objective facts which point to the guilt of the appellant and the State is obliged to rely solely on the evidence of Mokwena and Malgas (Mogape not having been called) to establish such guilt.

(d) There are a number of suspicious and unsatisfactory aspects in the evidence of Mokwena and Malgas and the evidence of Mokwena is, in any event, contradicted on material points by the evidence of Van Zyl and Sherman.

Propositions (a) and (b) are correct. Proposition

(c) is not. It was accepted that the 39 pieces of gold, the scale and the calculator were found in the upstairs bedroom by the police. For reasons which will become apparent later, the finding of these articles together does in the circumstances point to the guilt of the appellant on count one as well as count two. There are, however, on the face of it, indeed some suspicious aspects of the State case and the argument merits careful consideration. The main points of criticism of the State witnesses were these:

(1) The appellant had suffered hairline factures of his neck vertebrae in a motor accident some months before the incident and he was still wearing a neck brace. It is therefore improbable that Mokwena who had Malgas there with him, would have allowed himself to be dispossessed of the vital trap money by the appellant.

(2) It is improbable that Mokwena and Malgas would simply have fled leaving the appellant in possession of the money and in a position to "re-arrange" the evidence and conceal the gold.

(3)(i) There was a serious contradiction between the evidence of Mokwena and Van Zyl as to the circumstances in which the gold was found.

(ii) There were serious contradictions between the evidence of Mokwena and Van Zyl on the one hand and Sherman on the other, as to whether the money, when it was produced by the appellant, was in one packet.

(4) There was no evidence that Mokwena or Malgas told the group of policemen outside the house and before the scale, calculator etc were found that these had been used in the transaction, or indeed, that any report had been made to the police

outside the house when Mokwena and Malgas emerged.

(5) An inference unfavourable to the State could be drawn from its failure to call Sgt Mogape.

As to (1) and (2):

The appellant was well enough to drive himself to and from the shop and even his own doctor agreed that it would be possible for the appellant to have mounted the stairs although he said it would be a slow and painful process. In any event, there is no question here of the appellant having overpowered Mokwena. The money was in one packet and it could have been the work of a moment for a deft-fingered man to remove it from Mokwena's pocket particularly as the latter was not expecting the appellant to do anything of the sort. While it is indeed surprising that Mokwena and Malgas left the appellant, as it were, in possession of the field, there is independent corroboration of the evidence that they did indeed leave the house by the back door. The appellant

said that they left by the front door. His evidence was rightly disbelieved and Sgt Likhula said that Mokwena and Malgas left by the back door. What reason would Mokwena and Malgas have had to leave via the back door unless the front door had, as they said, been locked by the appellant?

As to (3):

There are, on the face of it, contradictions between the evidence of Mokwena and Van Zyl as to the circumstances in which the gold was found. Mokwena said that when Sgt Van Dyk asked the appellant where the gold was he said it was in the study, that they then entered the study and that the appellant said it was under the sofa. The cushions of the sofa were then removed and the gold found. Van Zyl, on the other hand, says that Van Dyk asked the appellant where the gold was and the appellant then pointed to a chair that was in the room and said that that was the chair on which the man with the gold had sat. Van Dyk then lifted the cushions

of the chair and found the gold. A possible explanation is that these are the sort of discrepancies that may be found in the evidence of honest witnesses testifying some seven months after the event. Mr Mahomed submitted however, that this could not be the explanation. He pointed to the fact that Mokwena had denied that he had sat on the sofa where the gold was found. This, so he submitted, was sinister because it showed that Mokwena was trying to distance himself from the place where the gold had been "planted" by him. There is, however, a much simpler explanation which, in the light of what I shall call the "overall picture" and which I shall refer to later, seems to me the true explanation. This emerges from the evidence of the appellant himself. The appellant said that there were two two-seater sofas and one one-seater chair in the study and that the gold was found under the cushions of one of the two two-seater sofas, this being the one Mokwena had sat on. These he said were on the right-hand side as one entered the

study. He said that the single seater chair was also on the right-hand side but then corrected himself and said it was on the lefthand side. Be that as it may, it is quite possible that Mokwena simply did not remember which of the two two-seater sofas he had sat on.

I think it is relevant also to mention in this regard that the appellant's evidence as to the finding of the gold was inconsistent with the version that had been put by his counsel to the State witnesses. That version was unmistakably to the effect that on entering the house the police went straight to the sofa where the gold was hidden, thereby carrying the clear implication that Mokwena had told Van Dyk, before entering the house, where the gold was. In his evidence on the other hand the appellant described Van Zyl as having lifted all the cushions and later in his evidence said quite clearly that Van Zyl had conducted a search and had not simply gone straight to the sofa where

the gold was found. There is a clear inconsistency here and, furthermore, the appellant contradicted himself as to whether Mokwena could have had any opportunity to conceal the gold when leaving the house. He said quite unequivocally at one stage that he had "got the police out of the house with the gold" and that he had "made sure" that they took the gold out of the house because he did not want the gold there. In answer to the question "So they took the gold out of your house?" the answer was an unequivocal "Yes". When confronted with this problem in cross-examination the appellant however came out with the story that when he asked them to leave he walked out to go and open the door and that the police were then behind him and could therefore have concealed the gold without his knowledge.

As to (2):

Sherman said that the money which the appellant handed over

to the police was not an "isolated" amount of R4 655 but part of a larger sum in the possession of the appellant, the balance of which he retained. If this is true, it does not help the appellant. It is common cause that after Mokwena and Malgas left some 15 minutes elapsed before the appellant unlocked the house and during this time the appellant could have mixed the R4 655 with other money. It was submitted, however, that Sherman's evidence was inconsistent with the evidence of Van Zyl and Mokwena because Van Zyl and Mokwena had said that the R4 655 was in one packet. Mokwena's evidence was throughout that he was not paying attention to exactly what was going on. True, he did say that it was in one bundle but in the same breath "As far as I know it was only one bundle". When asked whether there was any other money in the wardrobe he said that he did not take notice. He could not remember what was tied round the bundle. Van Zyl was more definite because he said "Beskuldigde het die hangkas se deur oopgemaak en hy het 'n laai oopgetrek binne

in die hangkas. Uit die laai het hy 'n plastiese banksakkie met geld uitgehaal. Hy het die geld uit die plastiese sakkie uitgehaal en dit op die bed uitgetel en konstabel Sherman het dit toe getel." Sherman, on the other hand, clearly says that there were about three identical plastic bags in which the money was contained. He was not certain of the exact number but there were more than one. In this regard it must be borne in mind that on the evidence Sherman was the one responsible for the counting out of the money and this inconsistency is reasonably explicable on the basis that Mokwena was, as he says, not paying attention and is simply mistaken. The same applies to Van Zyl: there is no strikingly memorable difference between three plastic bags and one plastic bag. Had the police conspired to say that there was one plastic bag so as to incriminate the appellant then, at the very least, one would have expected them all to say the same on this point whereas it was clear from Sherman's evidence in chief that his evidence was (a) that

there was more than one plastic bag and (b) that some money remained over after extracting the sum of R4 655.

No point can be made of the fact that when the sealed brown official envelope was opened and the money was counted out in court it was R200 short, since even on the appellant's version R4 650 was put into the brown envelope and it was then sealed in his presence. It simply remains a mystery.

As to (4):

It is correct that there was no evidence that Mokwena or Malgas made any report to Van Dyk, Van Zyl and Likhula when the former two emerged from the back door of the appellant's house. There is, however, no evidence that they did not make a report and Mr Mahomed was obliged to concede that, on the probabilities, Van Dyk would immediately have asked

those who had been sent into the house what had happened, and that Mokwena may have mentioned that the gold was inside the house. On the version of the appellant which was put to the State witnesses to which I have already referred, Van Zyl went straight to where the gold was hidden and in any event for what purpose would the police have surrounded the appellant's house and insisted on being admitted unless they had been told that the gold was there? Once one accepts, as one must, that this occurred, then there is every reason to believe that Mokwena mentioned the scale and the calculator outside the house and before these items had been found. The finding of these items therefore affords substantial support for the State case.

I now wish to deal with what I previously called the "overall factor". This is relevant to <u>all</u> the points I have been discussing. It is this. Mokwena and Malgas could

only have given the evidence they did if they had conspired together to give a false version to the effect that they had sold the gold to the appellant for R4 655, that he had used a scale and a calculator to work out the price, and that he had seized the money from them and that the gold must be in the house (knowing that Mokwena had actually "planted" it inside underneath the sofa cushions in the study). I wish to make two observations at this stage. Firstly the plan would have to have been conceived by Mokwena at the time when he hid the gold under the cushions and before leaving the house; and secondly, Mokwena would have to have said to Malgas "We must say that he kept the gold and that he paid the sum of R4 655 but that he smelled a rat and took the money back" or words to that effect. In my view this scenario is not reasonably possible. In the first place, Mokwena had no opportunity before meeting Likhula and the others outside to alert Malgas to the plan. Secondly, for

Mokwena and Malgas to concur in such a plan they would have to have been certain that there was R4 655 in the house. This sum would, on the scenario painted by the appellant, have been thought up on the spur of the moment. If this had happened, it seems more probable that a round figure like R4 000 would have been invented. Be that as it may, how could they have known that anything like this sum of money would be in the house? On the appellant's version the police would have had no reason to believe that there would be any money in the house. Even if they had learnt through some or other source that the appellant kept money in the house and only banked it every so often, how could they possibly have known how much he would have there on a particular day or indeed that he had not banked it all on the very day on which the incident occurred?

There is a further factor that must be taken into

account. The "trap" was Malgas and he was the one who was paid for his services by the police. It may be that he might have been prepared to "plant" the gold but he was at no stage in possession of the gold. It is common cause that Mokwena was the person who had possession of the gold and he had nothing to gain by "planting" it.

Finally, in my judgment no inference can be drawn from the failure to call Mogape. It appears from the magistrate's judgment that at the close of the State case the prosecutor stated that he did not deem it necessary to call Mogape as a witness. It does not necessarily follow from this that he was available and there is no other information on the record indicating that he was. (I do not, however, suggest that an adverse inference should have been drawn had it appeared that Mogape was in fact available.)

Looking at the evidence as a whole, I am not persuaded that the magistrate erred in convicting the appellant on count one.

I deal now with count two. It was accepted in the appellant's heads of argument that the unwrought gold and the diamond which were the subject of counts two and three respectively were found by the police in the appellant's house on the day in question. It was submitted that in order to succeed on this count the State bore the onus of proving not only that the appellant had physical control of the gold, but also that he had the intention to control it for his own purpose or benefit. Assuming, without deciding, that this is correct, I have no doubt that the State discharged the onus. In my judgment it was established beyond reasonable doubt:

(a) that the appellant did weigh the gold which was

the subject of count one with the scales and thereafter calculated the price which he offered with the calculator;

(b) this very scale and a similar calculator were found together with the gold which was the subject of count two in the attaché case in the drawer of a bed in the upstairs bedroom of the appellant's house.

In all the circumstances the inference is irresistible that the appellant kept the gold there for his own purposes.

I deal now with count three. The magistrate found as a fact that the appellant was aware of the unpolished diamond that was hidden in the "grondstof" that was in the plastic bag in the drawer of the other bed. Nothing that

has been said persuades me that the magistrate erred in this regard. Section 89 of Act No 56 of 1986 placed the burden of proving that it was not an unpolished diamond on the appellant. This onus was not discharged. It was, however, argued that even if it was correctly found that the appellant was in possession of an unpolished diamond the conviction could not stand because it was not proved that the appellant knew it was an unpolished diamond. I have some doubt as to whether it was open to the appellant to raise this argument. His defence was not that he did not know that it was unpolished but that he did not know of its existence. Assuming, however, that it was open to him to raise the point in argument, the evidence clearly established that the diamond was hidden in the "grondstof" and that, in all the circumstances, it must have been the appellant who hid it there. If his state of mind was that he was lawfully in possession of the diamond it is

inexplicable that he would have hidden it where he did. In the absence of any explanation by the appellant the evidence establishes that he was conscious of the fact that he was not lawfully entitled to possess it.

It follows that the appeal fails in respect of all three counts.

I have already referred to the fact that leave was granted to appeal against the convictions only. Mr Mahomed submitted, however, that on the authority of S v Shenker 1976(3) SA 57 (A) at 61C-D, this court was entitled to consider the question of sentence. The court was there considering the provisions of section 369 of Act No 56 of 1955 which is the equivalent of section 322 of the 1977 Act. Galgut JA relied upon the provisions of sub-section 1(b) in concluding that the court had such power. This provided

that the court of appeal may "give such judgment as ought to have been given at the trial or impose such punishment as ought to have been ordered at the trial". With respect, I doubt whether that reasoning is sound. It appears to me that these provisions were intended to give the court power to alter the sentence consequent upon an alteration in the verdict and in no other circumstances. Thus if an accused person were to be found guilty of assault with intent to commit grievous bodily harm and sentenced to 5 years' imprisonment and on appeal the conviction were to be reduced to one of common assault these provisions would give the court power to alter the sentence accordingly. It is, however, unnecessary to decide the point since I am, in any event, not persuaded that the magistrate erred in imposing the sentences which he did impose. Mr Mahomed pointed out that the magistrate had punished the appellant on the basis that it was necessary "to protect the State economy" and

that dealing in gold or diamonds was "tantamount to sabotage of the State economy". He submitted that this was a serious exaggeration of the position. I agree but, on the other hand, the appellant had two previous convictions of the same offence and still had a suspended sentence hanging over his head when he committed this, the third, offence. Mr Mahomed also submitted that the magistrate while purporting to treat the appellant as a first offender on counts two and three had nevertheless given him the same sentence on count two as he had on count one and that the sentence imposed on count two was the maximum permitted by the Statute. This is, prima facie, anomalous but there are, in my judgment, two answers. In the first place the quantity of gold which the appellant possessed was substantial and was worth close on a quarter of a million rand. Secondly, although the appellant's previous convictions were of dealing in unwrought gold and not possession, it is usually not

possible to deal in gold without being in possession of it and the offences are related. The magistrate duly took into account the combined effect of the sentences and ordered part of the sentence imposed on count two and the whole of the sentence imposed on count three to run concurrently with the sentence on count one. No good reasons for disturbing the sentence have been shown.

The appeal is accordingly dismissed.

A J MILNE
Judge of Appeal

VAN HEERDEN JA]
STEYN JA] CONCUR