Bib 149/92

6/91
/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE STATE ..... APPELLANT

and

S SELLEM ..... RESPONDENT

CORAM CORBETT CJ, SMALBERGER, KUMLEBEN, F H GROSSKOPF JJA et VAN COLLER AJA

HEARD : 12 MARCH 1992

DELIVERED : 30 MARCH 1992

J U D G M E N T

KUMLEBEN JA/...

The respondent stood trial in the regional court at Cape Town charged with the illicit purchase of 8 unpolished diamonds in contravention of s 20 of the Diamonds Act, No 56 of 1986 (the "Act"). The alternative charge alleged that he had unlawfully possessed the diamonds thus contravening s 18 of the Act. He pleaded not guilty on both counts. A conviction followed on the main one. He was sentenced to 15 months' imprisonment of which 9 were to run concurrently with a previously imposed suspended sentence, should it become operative. His appeal to the Cape Provincial Division of the Supreme Court was allowed: his conviction and sentence were set aside without the substitution of a conviction on the alternative count. The judgment on appeal is reported: 1990(1) SACR 30. In terms of s 311(1) of the Criminal Procedure Act, No 51 of 1977, the court a quo granted the appellant leave to appeal on the following two

questions of law: first, whether the respondent purchased the diamonds, having regard to the definition of "purchase" in s 1 of the Act; and second, whether he possessed them unlawfully.

Warrant Officer Swartbooi, a member of the then S W A police stationed at Windhoek, was the key witness for the State. The trial court found him to be both truthful and reliable. The conflicting testimony of the respondent was rejected. The accepted evidence on the questions to be considered was to the following effect. (The extracts to be quoted from the record are taken from the evidence of Swartbooi.)

The respondent and Swartbooi first made contact with each other when Swartbooi got in touch with him in December 1987. Details of that occasion are not stated in evidence. On 29 January 1988 the respondent received a telephone call from Swartbooi. He asked the respondent whether he was interested in an illicit diamond transaction. Swartbooi was operating as an agent provocateur. He arranged to meet the

respondent the following day at a flat in the Gardens Centre in Cape Town. The respondent kept the appointment and Swartbooi, incognito, received him and showed him 6 unpolished diamonds. Swartbooi quoted a price of R15 000 for them. The respondent asked whether he could take them away with him, sell them and return with the money: "dat hy graag die diamante wil saamvat en gaan verkoop en dan die geld vir my bring." This proposal fell through because the respondent was unable to leave the required deposit of R3 000. They parted company but not before they had arranged to meet again. Later that afternoon the respondent returned accompanied by another man. He introduced him as a prospective buyer: "sy koper". This person examined the diamonds. As they had brought no money with them, the respondent suggested that Swartbooi should go with them to some place where they could proceed with the transaction. He did not agree to this and so they left.

On 8 June 1988 Swartbooi again telephoned the respondent to say that he was in Cape Town at the flat and was still available to do "business". The respondent agreed to meet him there that afternoon. On his arrival Swartbooi introduced him to another person present. He was in fact Sergeant Barnabas, also a member of the then S W A police. Each policeman had a parcel of diamonds, 8 in all. They were shown to the respondent and he was told that they wished to sell them in one lot for R24 000. The respondent complained that the price was too high if he was to profit from the transaction: "dat hy ook 'n wins uit die besigheid wil maak en ... dat die prys baie hoog is." A reduced price of R22 000 was suggested and this the respondent found acceptable. He again asked to take the diamonds away with him, implicitly to show them to the buyer he had in mind. When this request was refused, the respondent left but it was arranged that he would be

telephoned that evening. This call was made and they agreed to meet the next day at the flat.

When the respondent arrived the following morning Barnabas was present. Some general conversation ensued before the respondent was handed the diamonds. Swartbooi asked whether he was satisfied with the proposed price of R22 000. He replied that it was still too high. It was further reduced, this time to R20 000. The respondent undertook to return with this sum after the diamonds had been sold: "Ons het die prys verlaag na R20 000,00 en beskuldigde het saamgestem dat hy wel die R20 000,00 nadat hy die diamante gaan verkoop het, vir ons die R20 000,00 sal terugbring." As the three of them left the flat the respondent objected to Barnabas accompanying them. He remained behind and the respondent and Swartbooi proceeded to a lower level of the building. At this point Swartbooi sprang the trap by giving a

prearranged signal to a colleague, Constable Williams, who thereupon appeared on the scene. The respondent reacted by taking the diamonds from his pocket and throwing them away. They were retrieved and he was arrested.

Other evidence confirms the arrangement as regards the disposal of the diamonds. The respondent at no stage had any money on him or indicated that he was in a position to buy the diamonds. Swartbooi under cross-examination said that from their conversation he gathered that the respondent had a buyer in mind: "dat hy wel 'n koper het wat die diamante kan koop." Barnabas confirms this. He said: "Hy het toe gesê hy sal na die koper toe gaan."

On this evidence the regional magistrate concluded, incorrectly, that a sale between the police traps and the respondent had taken place inasmuch as the merx and pretium had been decided upon. In doing so he overlooked the fact that, although the

price was settled, this was not with a view to the respondent buying the diamonds. He was to be an agent. More precisely stated, the agreement reached between the police traps and the respondent was: either one of mandate, sometimes referred to as indirect agency, in that he undertook to sell the diamonds on his own behalf and account to the policemen for the proceeds of the sale up to the agreed amount; or one of agency in the true sense, in that he was to sell the diamonds on their behalf (no doubt as undisclosed principals) for at least R20 000. Whichever way their agreement is construed, his remuneration was to have been the difference between R20 000 and the purchase price for which he sold the diamonds.

In the light of these facts, the first question to be decided is whether the court a quo was correct in concluding that the respondent ought not to

have been convicted on the main charge, that is, of a contravention of s 20 of the Act. It reads as follows:

> "No person shall purchase any unpolished diamond unless -
> (a) he is a licensee; or
> (b) he is the holder of a permit referred to in section 40(1)(b)."

Section 1 of the Act includes the following definition:

> "'**purchase**', in relation to an unpolished diamond, means to purchase the unpolished diamond, to deal in it or to obtain it by way of barter, pledge or in any like manner;"

In deciding that there was no contravention of s 20, Rose-Innes J, with Van Schalkwyk AJ concurring, said in an ex tempore judgment:

> "There is no definition of the term 'to deal in' in the Act and it must bear its ordinary meaning. There is much authority in our law canvassing the ordinary meaning of the words 'to deal in' and perhaps I may, for sake of brevity, suggest that the words mean to negotiate and complete a commercial transaction as a course of business in which the person charged with the dealing is frequently involved. There are many cases in the

context of this Act and other Acts which show that fortuitous isolated transactions do not constitute a dealing in the ordinary meaning of the word. Section 19 of the Act which creates the crime of dealing in unpolished diamonds is to the same effect. It is directed at persons who without the necessary permits or licences act in the way in which a legitimate dealer in diamonds acts, that is to say runs a business in diamonds without the necessary authority to do so. There is no suggestion here on the evidence that appellant was dealing in diamonds or that the transaction that he discussed with the police constituted a dealing in diamonds. In any event he was not charged with dealing in diamonds, he was charged with purchasing them." (35 b - d)

The expression "deal in" may, on the one hand, connote - as the word "dealer" does - a course of business conduct or a trading operation; or, on the other hand, the phrase may also refer to a single transaction. Dictionary definitions bear this out. To quote but one: The Oxford English Dictionary (Second Edition) ascribes the following meanings inter alia to the phrase: "To carry on commercial transactions; to do business, trade, traffic (with a person, in an

article.) and "To take part in, have to do with, occupy oneself, do business, act." The intended meaning of the expression in a particular enactment is therefore to be determined by the context in which it appears.

For a number of reasons I consider that this question of law ought to be decided in favour of the appellant.

An isolated purchase of an unpolished diamond plainly constitutes a contravention of the section. The other specific contracts included in the definition - pledge and barter - likewise refer to a single transaction as opposed to a course of conduct. Thus, by association the phrase "deal in" in the definition must likewise be capable of applying to a solitary transaction. The cognoscitur a sociis aid to interpretation, though ordinarily invoked to restrict the import of a word or phrase in an enactment, in this

case serves to determine the intended meaning of the words "deal in". Moreover, if such meaning is not attributed to the phrase, it would seem to follow that it was redundantly included. It is difficult to envisage a course of dealing in diamonds which would not inevitably entail a purchase of a diamond or its procurement "by way of barter, pledge or in any like manner."

In argument on behalf of the appellant Mr Downer relied upon the decision of this court in S v Boshoff 1978(2) S.A. 457(A). The reported judgment omits details of the arrangement between the police trap and the appellant. However, a perusal of the original judgment reveals that the facts of that case closely resemble those with which we are concerned. A price was agreed upon between the trap and the appellant; the latter left to sell the diamonds; he returned with the purchase price; and received a

commission. Unlike the present case, the evidence did not unequivocally point to the appellant being a 'go-between' and not a purchaser. The court a quo held him to be a purchaser, but in any event concluded that as an agent he was nevertheless guilty of a contravention of s 84(1)(a) of the Precious Stones Act, No 73 of 1964, this being the section then in force prohibiting illicit diamond dealing. Its proscription was that "no person shall buy, deal in or receive by way of barter, pledge or otherwise, either as principal or agent, any rough or uncut diamonds". Though somewhat differently phrased, s 20 read with the definition of "purchase" is thus substantially the same as its predecessor, s 84(1)(a). On appeal this court was not satisfied that the trial court was wrong in concluding that a sale between the trap and the appellant had been proved

but, like the trial court, found that in any event the appellant had contravened the section by dealing in diamonds. In the judgment (per Rabie JA at 461 A - C) it was said that:

> "'Buy', 'deal in' and 'receive by way of barter, pledge or otherwise' is klaarblyklik aparte verbode handelinge en 'receive' kwalifiseer in geen opsig die woorde 'deal in' wat hom in die paragraaf voorafgaan nie. Die uitdrukking 'sake doen' word nie in die Wet omskrywe nie, maar dit is, in sy gewone betekenis, 'n wye begrip, en die bewoording van art 84(1)(a) toon dat die Wetgewer bedoel het dat dit 'n transaksie sou kon insluit wat nie as 'n koopkontrak beskou kan word nie. (Vgl R v Gibbons 1956(4) SA 494 (SR)). Indien 'n mens in die onderhawige geval sou aanneem dat die getuienis nie bewys dat appellant die diamante gekoop het nie, dan blyk dit nietemin duidelik dat appellant met Brink 'n ooreenkoms aangegaan het waarvolgens hy (i) die diamante in ontvangs geneem het met die doel om dit te gaan verkoop ('n handeling wat waarskynlik op sigself 'n oortreding van art 84(1)(a) is: kyk '... andersins ontvang'); (ii) R7 000 aan Brink sou betaal, en (iii) alles wat hy meer as R7 000 vir die diamante kry, vir homself sou kon behou. Hiermee het appellant m.i. ongetwyfeld sake gedoen in verband met die diamante, soos bedoel in art 84(1)(a), en

ek vind dit nie nodig om die aangeleentheid verder te bespreek nie."

Although it would appear that the question whether the expression is to be restricted to a course of business was not pertinently raised during argument in that appeal, the quoted passage certainly confirms the interpretation for which the appellant contends. (Apparently in the present case during argument in the court a quo its attention was not drawn to this decision.)

Mr Fagan, in advancing his argument to the contrary on behalf of the respondent, referred to the decision in Corona v Minister of Home Affairs 1982(2) S.A. 533 (ZHC). In that case the applicant had been prevented from applying for bail. The provision relied upon for this step was s 106(2) of the Criminal

Procedure and Evidence Act Chap 59 (Zimbabwe). The relevant portions of this enactment are thus set out at 534H - 535A of the judgment:

> "'(2) The Minister ... may, in an application for bail in terms of ss (1) -
> (a) ..... ;
> (b) in respect of any -
> (i) offence under any law relating to the illicit possession of or dealing in or the unlawful importation or exportation of any precious metal, precious stones, currency, bills of exchange, travellers' cheques, letters of credit, bank drafts or promissory notes;
>
> certify that the administration of justice would be prejudiced if the applicant were admitted to bail.
> (2a) .....
> (2b) Where a certificate is issued in terms of ss (2), the application for bail shall be refused.'"

Having stressed the need for the expression "dealing in" to be construed in its contextual setting, the court at 540 G - H said:

> "I am aware that the cases to which I have

> referred deal with the meaning of such expressions as 'dealing in' in statutes which may be different in form and substance from s 106 (2) (b) (i) of Chap 59. I am also aware of the dangers of making comparisons in such circumstances. In my view, however, when regard is had to the object of s 106 (2) (b) (i) of Chap 59, there is no discernible reason why the ordinary meaning of that expression should not be followed. In the ordinary way, 'dealing in' a commodity in my view means to traffic in or trade in that commodity."

The wording, subject-matter and harsh potential of that enactment make it clearly distinguishable, as counsel readily conceded, from s 20. There is therefore no need to express an opinion on the correctness of that decision. We were, however, referred to the court's view of the "ordinary meaning" of the expression. In support of this interpretation the court relied to a large extent on what was said by De Beer J in Rex v Oberholzer & Others 1941 O P D 48. This decision is in more than one respect closer to home. The appellants were convicted in the magistrate's court of having

dealt in rough and uncut diamonds in contravention of s 1 of the 119th Chapter of the "Vrystaatse Wetboek." It reads as follows:

> "Het zal niet wettig zijn voor eenig persoon ... in zijn of haar bezit te hebben, of te koopen, te handelen in, in te voeren of uit te voeren, of te ontvangen bij wijze van ruil, pand of anderszins, ... of te verkoopen, aan te bieden, of ter verkoop, ruil of pand ten toon te stellen, of ... te beschikken over of te leveren eenige ruwe of ongeslepene diamanten,"

There was no question of trading or a course of dealing. The conviction in the magistrate's court was based on a single encounter between the appellants and a trap and on the facts it was open to serious doubt whether such could be described as dealing in diamonds. The matter was taken on appeal. De Beer J based his decision on the conclusion that "handelen in" was restricted to a business of trading in diamonds. This appears from page 60 of the judgment:

> "It is with considerable hesitation that I have come to the conclusion that 'deal in' here bears the meaning trade in and not the wider meaning being interested in. I must frankly concede that my decision may have been influenced by the Dutch version, for here I find no difficulty at all in deciding that 'te handelen in' bears the narrower meaning of 'to trade in' and can in the context bear that meaning alone."

The other two members of the court decided that, whichever meaning is given to the expression, the appellants had not dealt in diamonds. They, however, made it clear that they did not subscribe to the interpretation placed upon the phrase by De Beer J. Thus Fischer J.P. at page 51 concluded:

> "Ek meen dat daar dus wel 'n 'handelen in' kan wees met betrekking tot een transaksie in verband met diamante omdat die persoon hom besig hou met die koop en verkoop van diamante."

And Van den Heever J at page 55 remarked that:

> "Denkbaar kan ook 'n enkele transaksie van die aard wat 'n handelaar verrig as 'handelen in' beskryf

word."

For reasons already given, the view taken by Fischer J.P. is in my opinion the correct one and what the learned judge said in reference to the prohibition in the Vrystaatse Wetboek can as aptly be applied to its present counterpart.

The same expression - "deals in" - features in s 2(a) and (c) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, No 41 of 1971. These sub-sections lay down that any person who deals in any prohibited or dangerous dependence - producing drug shall be guilty of an offence. It is perhaps worthy of mention that in the numerous cases in which this phrase was considered it has never been suggested that a single transaction could not give rise to a contravention. (See, for instance, S v Solomon 1986 (3) S.A. 705(A) and the decisions cited by

counsel in the heads of argument, listed on pages 706 and 707.)

Reverting to the reasoning in the court a quo as set out in the passage quoted from the judgment, two further comments are necessary. First, I fail to see how s 19 of the Act assists one in this enquiry. It lays down that no person may sell any unpolished diamond. It is not - as is said in the quoted passage from the judgment of the court a quo - "directed at persons who without the necessary permits or licences act in the way in which a legitimate dealer in diamonds acts, that is to say runs a business in diamonds without the necessary authority to do so." A dealer, defined in s 1 as the holder of the requisite diamond dealer's licence, is in terms of s 19 one of the persons exempt from this prohibition. But this fact in no way relates to the use of the expression "deal in" included in the extended definition of purchase with

reference to s 20. Second, it is not clear from the reasoning of the court a quo whether the observation that "[i]n any event he was not charged with dealing in diamonds, he was charged with purchasing them" was intended as an independent ground for upholding the appeal. If this was the reason for its inclusion, it must be said that the contention is unsound and was not relied upon by Mr Fagan. The charge alleged that the respondent in purchasing the diamonds had contravened s 20 read with s 1.

In the cirucmstances, as I have indicated, one must hold that s 20 was contravened and answer the first point of law in favour of the appellant.

In the light of this conclusion it is unnecessary to decide the second question of law, namely, whether the respondent was in unlawful possession of the diamonds. It is moreover inappropriate to do so since in the result it is not a

question of law "on the correct decision of which the conviction or acquittal of the accused depends": Rex v Burwood 1941 AD 217 at p 226. (See too Attorney-General (Transvaal) v Raphaely 1958(1) SA 309(A).) However, lest the absence of comment in this judgment on the conclusion of the court a quo be construed as implied approval, I must say, with due respect, that I doubt the correctness of its decision and find the reasoning on which it is based questionable.

In the course of the judgment dealing with this second question, the learned judge had this to say:

> "The whole transaction, as in the case of most trapping cases, was a pure fiction and a simulated transaction from beginning to end. The last thing that the police wished to do was for the diamonds to be sold to anybody. The diamonds had to be returned to the State coffers from where they came. There was no intention of selling to anybody whatsoever; this is stating the obvious. When one is dealing with trapping cases one is dealing with an artificial simulated situation which is a pretence from beginning to end and had no factual verity in it whatsoever. There is no

legal transaction at all." (36i - 37a)

What is stated in this passage, taken at face value, means that any purchase from an agent provocateur and, a fortiori any other act or transaction prohibited by s 20 in which such a person is involved, does not constitute an offence. It follows that this contention, if sound, would answer the first question of law in favour of the respondent. It is for this reason that I address it briefly. The proposition that, for instance, when a trap is involved in selling a diamond no sale takes place, and that hence no offence results, is to my mind both novel and bad in law. The fact that the trap does not plan to implement the terms of the sale fully or at all (and certainly wishes to retrieve the diamonds, if delivered) cannot set at naught the sale itself: voluntas in animo nihil operatur. This reasoning applies equally to the

agreement of mandate or agency with which the present case is concerned.

It remains to consider the question of sentence. Counsel were agreed that, if the sentence of the magistrate is not to be confirmed and reinstated, it is for this court to substitute an appropriate one.

At the trial one previous conviction was proved. On 23 October 1987 the respondent was convicted of a contravention of s 20 of the Act. For this earlier offence he was sentenced to pay a fine of R5 000 or serve 18 months' imprisonment; and a further wholly suspended sentence of 18 months' imprisonment was imposed. From his evidence in mitigation it appeared that he was allowed to pay the fine in instalments; that at the time the second offence was committed he was financially hard pressed and in arrear with the payment of his instalments; and that there was a balance of R500 still to be paid by him.

The regional magistrate, in the course of his consideration of the factors bearing upon sentence, said the following about the use of a police trap:

> "You were not subjected to sudden temptation. The negotiations that led to the eventual transaction were rather protracted. A distinction between this case and PETKAR 1988 (3) SA 571 (A) can be drawn. In this instance the police had no real need, as was the case in Petkar's, to verbally influence and/or persuade you. Although you were contacted by them, at all times you were a willing party well knowing that if it succeeds then you would benefit from it." (I emphasise.)

The decision cited in the above passage, Petkar's case, quoted with approval the following passage from the judgment of the present Chief Justice in S v Van Pittius and Another 1973(3) S.A. 814(C) 819A - C:

> "The artificial propagation of crime by means of police traps has 'many distasteful features' (see R. v. Clever, 1967 (4) S.A. 256 (R, A.D.) and the authorities cited therein) and its justification is based partly upon the belief on the part of the authorities that the accused has been engaged in criminal conduct of a similar nature in the past

> and is likely to continue to do so unless checked. The fact that an accused has to be importuned several times before agreeing to the criminal conduct proposed by the trap hardly indicates a general predisposition upon his part to commit this type of crime and this is, generally speaking, not an appropriate case for an artificially generated offence. Moreover, this kind of approach offends against the belief that the trap should be a fair one and that in general verbal persuasions should be avoided (see R. v. Clever, supra at p.258)." (I again emphasise.)

Referring firstly to the second italisized remark in the quoted passage, the fact that an offender was induced to commit the crime, and, if so, the extent of any such persuasion, is obviously significant when it comes to sentencing him.

The evidence before us in this regard is anything but explicit. According to Swartbooi, he did approach the respondent on three occasions, and a number of telephone calls were necessary to arrange for them to meet. But this evidence is neutral on the question of inducement. One cannot infer, as the court a quo did,

at 31h that Swartbooi "systematically sought repeatedly to entice appellant to repeat the offence of which he had recently been convicted." The respondent, when giving evidence in mitigation, said that Swartbooi had telephoned him at his home and invited him to become involved in an illicit diamond deal. He did not immediately agree. His evidence-in-chief continues:

> "Did they then approach you again? --- Yes.
>
> And that evidence we lead - it was agreed upon by the police that they approached you and in the initial stage you refused to deal with them and then they approached you at a later stage again. --- That's right.
>
> Now you at no stage approached them out of your own accord? --- No.
>
> Now did you have any money yourself to purchase diamonds? --- No sir.
>
> I think it was agreed by the police as well as under cross-examination that you yourself would not buy the diamonds. --- No.
>
> You were merely acting as a middleman. --- Yes on his insistence that I should find a buyer for him.

106/11-

On his insistence? --- Yes."

This assertion - that he was reluctant to participate - was probed to a very limited extent by cross-examination. The respondent was simply asked why he did not discourage the approach to which he replied:

> "When he phoned me, when he called me on the previous night, Wednesday night, I refused to sort of - I said I haven't got a buyer. Due to his insistence that I should look around or find somebody who will buy, that's how I sort of went to go and help him, taking whatever he would give me then I would be able to pay the last fine of which R500,00 I was supposed to pay."

Swartbooi was not recalled to give evidence at this stage after judgment with a view to refuting these admittedly rather vague allegations of the respondent. There are, one knows, degrees of persuasion, ranging from a repeated request to persistent pressure. On this evidence one cannot assess the degree of "insistence". This statement, since it was not

amplified by the defence, ought to have been further investigated by cross-examination on the part of the prosecutor or by further enquiry conducted by the court. On the evidence as it stands, one is bound to conclude, in favour of the respondent - though not with any degree of assurance - that an element of inducement was present.

It follows that the regional magistrate, in concluding that the respondent was a willing participant, misdirected himself. In the circumstances it is for this court to decide upon an appropriate sentence.

As pointed out, the respondent was approached and propositioned at a time when he was paying off the fine imposed and his suspended sentence was still in operation. The evidence does not disclose whether Swartbooi, or those who instructed him to set the trap, were aware of this previous conviction. Be that as it

may, the appropriateness of doing so in such circumstances has given rise to judicial comment. In R v Clever. R v Iso. 1967(4) S.A. 256 (RAD) Quènet JP at 257 H stated:

> "In the case of persons who have previously been convicted, trapping has the undesirable feature that it puts temptation in the way of those least able to resist it. In any case, such persons might not have offended again but for the fact that a trap was used."

The respondent's previous conviction for illicit diamond dealing shows that he was vulnerable in this regard. The purpose of a suspended sentence was to keep him, if possible, from serving a prison sentence by restraining him from repeating the offence. Entrapment was calculated to defeat this objective.

As appears from the passage in S v Van Pittius and Another (supra) already quoted, an important consideration justifying the use of a trap is the conviction, belief or at least suspicion that the

intended victim was or had been engaged in such criminal conduct. (See too S v Kramer and Others 1991 (1) SACR 25 (Nm) 30c.)

In this case the respondent was first approached by Swartbooi with a view to trapping him apparently within two months, and certainly within three and a half months, of his conviction. He was at the time paying off his fine, and this must have served as a constant reminder to him of the danger and consequences of repeating this offence. In the circumstances it is possible, but highly improbable, that when first propositioned by the trap he had resumed his criminal practices and that this had aroused the suspicion of the authorities. Thus, had suspicion prompted the decision to set a trap, evidence to that effect ought to have been placed before the court at the time when the question of sentence was being considered. (Cf. R v Motehen 1949(2) SA 547 (A) 550.)

In deciding on the sentence he imposed, the regional magistrate took all the personal circumstances of the respondent into account and paid due regard to the other determinants governing sentence. However, as I trust appears from what has been said, there are three important considerations peculiar to this case which ought to have been taken into account: The fact that to some extent the respondent must be taken to have been an unwilling participant; that he was propositioned at a time when he was still in a sense serving his sentence for the earlier conviction; and that there was no evidence to indicate that he was suspected of having resumed this sort of criminal conduct at the time he was first approached by the police trap. These features in my view justify a substantially lighter sentence, despite the fact that the respondent has twice committed this offence. They ought also to be given careful consideration before any

decision is taken to apply to court in terms of s 297(9) of the Criminal Procedure Act, No 51 of 1977, to put the suspended sentence for the first offence into operation.

The appeal succeeds. The conviction of the respondent in the regional court of a contravention of s 20 of the Diamonds Act, No 56 of 1986, is confirmed and reinstated. The following lighter sentence is substituted for the one originally imposed by the regional court:

> "15 months' imprisonment of which 9 are suspended for five years on condition that the accused is not convicted of a contravention of s 19 or s 20 of the Diamonds Act, No 56 of 1986, committed during the period of suspension."

M E KUMLEBEN
JUDGE OF APPEAL

CORBETT CJ)
SMALBERGER JA)
F H GROSSKOPF JA) - Concur
VAN COLLER AJA)