REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No. **A 116/2004**

In the matter between:-

CAREL CHRISTIAAN VAN DER BERG First Appellant

EWALD KLEINHANS Second Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED THIS 6TH DAY OF JUNE 2008

ENGERS AJ :

INTRODUCTION

1. Appellants appeared in the Cape Town Regional Court on a charge of

contravening section 20 read with sections 1, 82(a) and 90 of Act No. 56 of 1986 (colloquially referred to as illicit diamond buying or IDB). They pleaded not guilty, but were found guilty and sentenced to a fine of R8 000,00 or 18 months imprisonment plus 2 years imprisonment suspended for 5 years on condition that the Appellants were not again found guilty of a similar offence during that period.

2. Appellants appeal against their conviction.

3. It is common cause that the Appellants were caught by means of a police trap or undercover operation.

4. The fundamental issue in this appeal is the application of section 252A of the Criminal Procedure Act, No. 56 of 1977 ("CPA"), which deals with traps and undercover operations. Section 252A was introduced into the CPA by way of an amendment and came into effect on 29 November 1996. The date of the offence was 18 April 2000.

5. At the hearing, the magistrate conducted a trial within a trial to decide whether the evidence relating to the police trap ought to be admitted or excluded. He held that the evidence was admissible.

6. The appellants contend that

a. the trapping operation did not accord with the guidelines applicable to such traps;

b. the police went further than permitted in terms of the statute;

c. the evidence arising from the trap ought to have been excluded;

d. without that evidence, the State case against them would fail, and that they should have been acquitted.

7. It appears to me that the last of these contentions is correct. Virtually the entire case against the appellants consists of evidence gleaned from the police trap. In the absence of that evidence, there would be nothing to sustain a conviction.

8. Accordingly, one must examine the first three contentions.

APPROACH TO THE EVIDENCE

9. Before doing so, there is a preliminary issue which bedevils this case. In his judgment as to the admissibility of the evidence of the police trap, the magistrate stated as follows:

> "*Die Hof gaan nie op hierdie stadium 'n gedetailleerde redes verskaf vir sy bevinding nie, aangesien dit sou vereis dat die*

Hof 'n oordeel sou moes vel oor sekere getuie, getuies se geloofwaardigheid. Gedetailleerde redes sal later gegee word indien nodig.

In die lig van al die getuienis, in die lig van al die submissies asook dié aspek in geskil, bevind die Hof dat die polisie tydens die optrede bona-fide opgetree het en die Hof bevind dat die polisiebeamptes se optrede nie verder gegaan het as die skep van 'n geleentheid om 'n misdryf te pleeg nie...."

10. However, nowhere in his main judgment did the magistrate either give reasons for his decision in the trial within the trial, or make findings regarding the credibility of the various witnesses.

11. In the trial within the trial, the State called:

a. Captain Brink, who had given the go-ahead for the trap;

b. Detective-inspector Theron, who was in charge of the trap;

c. Detective-sergeant Molefe, who participated in the trap;

d. Ms Vosloo, a typist at the SAP's Gold and Diamond branch in Bellville.

For the appellants, only the first appellant testified.

12. In addition to the above evidence, certain documents were also placed before the court. These included:

a. Guidelines for trapping operations promulgated in terms of section 252A(4); this document sets out mainly procedural requirements for traps.

b. Affidavits by Brink and Molefe;

c. An affidavit by the police informant in the case, identified only as “Bron Nr 13103". The informant did not testify.

13. There were certain issues on which the evidence of the State witnesses conflicted with that of the first appellant. Firstly, there was a marked difference in the evidence relating to the number of telephone conversations, who initiated them, and the content of such conversations, during the approximately two months before the trap was sprung. The first appellant testified that there had been many such conversations (he estimated 10), that all had been initiated by the police (not necessarily by the same person in each case, because the original contact had come from the informant, and Molefe had thereafter contacted him), and that in virtually all the conversations, he had been offered diamonds to buy and told of how much money he would be able to make. Although he professed lack of interest, the calls continued to come. Molefe, on the other hand, testified that there were far fewer phone conversations, that the first appellant had initiated these, and that the tenor of the conversations was first appellant asking when Molefe could get diamonds

for him.

14. Secondly, there were differences regarding the events on the day of the trap itself. First appellant testified that Molefe had telephoned him from Cape Town, and said that he should come to Cape Town because he, Molefe, had the diamonds. First appellant said he could not leave Worcester, whereupon Molefe phoned him an hour or two later from the Engen garage in Worcester. He eventually met Molefe who offered him the diamonds for R80000, then R60000, and finally for R20000 with the proviso that if the diamonds were sold for more than R45000, a further R25000 would be payable. Molefe did not testify about the call from Cape Town, but said that first appellant had called him the evening before to ascertain whether the diamonds were available.

15. The failure of the magistrate to give any reasons for his decision in the trial within the trial, or to make any findings relating to the credibility of the witnesses, places this appeal court at a distinct disadvantage. The magistrate had the opportunity of observing all the witnesses and their demeanour when giving evidence. Demeanour is an important factor in weighing up the credibility of a witness. In the present case, we do not know which witnesses the magistrate accepted as truthful, or why he did so. We also do not know on what facts he based his decision in the trial within a trial.

16. I have read and re-read the record of the evidence given by all the witnesses. I have also had regard to the various criticisms levelled against the main witnesses by counsel (counsel for the appellants criticising the State's witnesses, and counsel for the State criticising the first appellant's evidence). I have already referred to the conflict between aspects of the State's version and the appellants' version. These cannot be resolved solely by reference to the record. It is possible that the State could have led further evidence which might have enabled one to resolve the conflict. The State did not call the informant (I appreciate that there may be cogent policy reasons for this), nor did it lead any evidence of, for instance, telephone accounts which might have shed considerable light on the matter.

17. As far as the documentation is concerned, the various affidavits referred to above should not, in my view, carry any weight, even if admissible. A self-confirming affidavit by Brink and an affidavit by an unnamed informer are not documents on which one can place very much reliance.

18. The result is that I find myself unable to make any finding as regards which version of events should be accepted and, *a fortiori,* I cannot reject the evidence of the first appellant as not being reasonably possibly true. I therefore propose to approach this issue of the police trap on the basis of the evidence given by first appellant.

19. In doing so, I am mindful of what Flemming J said in S v Desai1997 (1) SA 845 (W) at p 848

> "*The trap gave evidence. The informer did not. This left the field wide open for the appellant to testify about what the informer had allegedly done. That it is often for various reasons undesirable or impossible for the police to produce an informer as a witness, is a state of affairs which, as the 'defence' raised in this case shows, creates an attractive prospect for an accused who is trapped, to be acquitted not because the facts do not prove guilt, but because the accused was 'enticed and lured'. Courts should be aware of the risk. Courts have a duty to society in general not to share in the spirit of unduly promoting everything which can possibly assist towards acquittal, irrespective of the established truth. Unless the court devotes itself adequately to the ascertainment of the truth and to acting in accordance therewith, society can be expected to make its own assessment of guilt and to compensate with its own reactions for such failure and for indecisiveness or spinelessness of the court.*
>
> *That consideration must be borne in mind when deciding to what extent the allegations of the appellant against the informer can or should be recognised as a 'defence'. Similarly so when asking whether the draftsman of the Constitution would have been so irresponsible as to strike a balance which demands that even those who are known to have committed*

an illegal deed should nevertheless be acquitted. (The said consideration also requires proper scrutiny of the uncontradicted evidence about the 'enticement'.)"

THE LAW RELATING TO POLICE TRAPS

20. Prior to 1996, our law countenanced the use of police traps in order to bring to justice persons who were suspected of committing an offence. It was generally recognised, however, that the danger existed of the traps going too far and persuading, or even enticing, someone to commit an offence which he would not otherwise have committed. On the other hand, our law did not recognise a defence of entrapment as such.

21. A useful summary of the position is to be found in S v Petkar 1988 (3) SA 571 (A), where Smalberger JA said at 576

"*Much has been said in the past about the use of traps and the many undesirable features of the system. I do not propose to review the authorities on the point, and what has been stated in them. It will suffice for the purposes of the present matter to refer to extracts from two authorities. In R v Clever; R v Iso 1967 (4) SA 256 (RA) at 257H Quenet JP 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. In any case, such persons might not have offended again but for the fact that a trap was used.'

And later he added (at 258E):

'In cases where there is general recognition of the propriety of employing the system the greatest care should be taken to see that the trap is a fair one. Verbal persuasion should not be used.'

In S v Van Pittius and Another 1973 (3) SA 814 (C) it appeared that one of the appellants had been importuned three times by the traps before he agreed to sell them wine illegally. With regard thereto Corbett J said the following (at 819A - C):

'The artificial propagation of crime by means of police traps has "many distasteful features" (see R v Clever 1967 (4) SA 256 (RA) 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 258)).'

I am in full agreement with the sentiments expressed in the above-quoted passages. In the present instance the trap was not a fair one. Verbal persuasion - or at least something akin to it - was used. An apparent weakness was exploited. A friendship and situation of trust was abused. True, the appellant was not an entirely unwilling participant in the offence. He believed that he would ultimately 'get away with it' - a belief no doubt shared by most people who embark on criminal conduct of this kind. But the fact remains that the appellant did initially offer resistance, and this resistance was largely broken down by unfair methods. These considerations in my view substantially reduce the appellant's moral culpability."

22. Section 252A reads as follows:-

252A Authority to make use of traps and undercover operations and admissibility of evidence so obtained

(1) Any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in

order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3).

(2) In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court shall have regard to the following factors:

(a) Whether, prior to the setting of a trap or the use of an undercover operation, approval, if it was required, was obtained from the attorney-general to engage such investigation methods and the extent to which the instructions or guidelines issued by the attorney-general were adhered to;

(b) the nature of the offence under investigation, including-

(I) whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;

(ii) the prevalence of the offence in the

area concerned; and

(iii) the seriousness of such offence;

(c) the availability of other techniques for the detection, investigation or uncovering of the commission of the offence or the prevention thereof in the particular circumstances of the case and in the area concerned;

(d) whether an average person who was in the position of the accused, would have been induced into the commission of an offence by the kind of conduct employed by the official or his or her agent concerned;

(e) the degree of persistence and number of attempts made by the official or his or her agent before the accused succumbed and committed the offence;

(f) the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;

(g) the timing of the conduct, in particular whether the official or his or her agent instigated the commission of the offence or became involved in an existing unlawful activity;

(h) whether the conduct involved an exploitation of

human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances in order to increase the probability of the commission of the offence;

(l) whether the official or his or her agent has exploited a particular vulnerability of the accused such as a mental handicap or a substance addiction;

(j) the proportionality between the involvement of the official or his or her agent as compared to that of the accused, including an assessment of the extent of the harm caused or risked by the official or his or her agent as compared to that of the accused, and the commission of any illegal acts by the official or his or her agent;

(k) any threats, implied or expressed, by the official or his or her agent against the accused;

(l) whether, before the trap was set or the undercover operation was used, there existed any suspicion, entertained upon reasonable grounds, that the accused had committed an offence similar to that to which the charge relates;

(m) whether the official or his or her agent acted in good or bad faith; or

(n) any other factor which in the opinion of the court has a bearing on the question.

(3) (a) If a court in any criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

(b) When considering the admissibility of the evidence the court shall weigh up the public interest against the personal interest of the accused, having regard to the following factors, if applicable:

(I) The nature and seriousness of the offence, including-

(aa) whether it is of such a nature and of such an extent that the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;

(bb) whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate,

uncover or prevent its commission;

(cc) whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; or

(dd) whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;

(ii) the extent of the effect of the trap or undercover operation upon the interests of the accused, if regard is had to-

(aa) the deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;

(bb) the facility, or otherwise, with which such requirements could have been complied with, having regard to the circumstances in which the offence was committed; or

(cc) the prejudice to the accused resulting from any improper or unfair conduct;

(iii) the nature and seriousness of any infringement of any fundamental right contained in the Constitution;

(iv) whether in the setting of a trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence; and

(v) any other factor which in the opinion of the court ought to be taken into account.

(4) An attorney-general may issue general or specific guidelines regarding the supervision and control of traps and undercover operations, and may require any official or his or her agent to obtain his or her written approval in order to set a trap or to engage in an undercover operation at any place within his or her area of jurisdiction, and in connection therewith to comply with his or her instructions, written or otherwise.

(5) [not relevant to this judgment]

(6) If at any stage of the proceedings the question is raised whether evidence should be excluded in terms of subsection (3) the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution:

Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the accused is not represented the court shall raise the question of the admissibility of the evidence.

(7) The question whether evidence should be excluded in terms of subsection (3) may, on application by the accused or the prosecution, or by order of the court of its own accord be adjudicated as a separate issue in dispute."

23. Section 252A must be viewed against the provisions of section 35 of the Constitution of the Republic of South Africa. The relevant sub-sections are (3) which states that every accused person has a right to a fair trial, and (5) which reads:

"Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

24. The interplay of the two statutes was discussed in S v Reeding and Another 2005 (2) SACR 631 (C), where Bozalek J said at 639/640

"*The approach to be adopted in considering the admissibility of trap evidence, and which marries the terms of s 252A(2)*

and s 35(5), advocated by Du Toit et al (at 24-134), is to consider, using the criteria listed in ss (2), whether admission of the evidence has without doubt not rendered the trial unfair or is otherwise not detrimental to the administration of justice. In my view, however, this standard of proof is inappropriate in the context of determining the admissibility as opposed to the weight of the evidence and, moreover, sets the bar too high. Section 252A(6) provides instead that an onus rests on the State to prove the admissibility of evidence on a balance of probabilities. This, in my view, is the correct standard of proof if Du Toit's general approach is to be followed."

25. In order to give effect to and implement the provisions of the Constitution and section 252, the Director of Public Prosecutions ("DPP") has laid down a set of procedural guidelines. These were placed before the magistrate as exhibit D and were elaborated on by the witness Brink who testified for the State in the trial within a trial.

26. As appears from the above, subsection 252A(1) sets out the basic principle, namely that evidence of a trap or undercover operation is admissible unless the trap goes further than providing an opportunity to commit an offence (which is tested by the factors set out in subsection (2)), and if it does, then the court has a discretion to admit such evidence (which discretion is exercised in accordance with the factors set out in subsection (3)).

27. On the evidence, it appears to me that the undercover operation showed a number of features which qualify as factors in terms of section 252A(2) tending to show that the operation went further than merely providing an opportunity to commit the offence:

a. There is certainly some doubt as to whether the formal guidelines regarding approval or authorisation of this operation were strictly adhered to. The onus was on the State to prove the admissibility of the trap evidence. It was common cause that this was a type of operation requiring prior written approval. The evidence is not conclusive that such written approval was received prior to the operation commencing.

b. The offence in question does not threaten the security of the State, the safety of the public or the maintenance of public order; whether the national economy is seriously threatened by IDB is debatable. It does not appear that IDB is particularly prevalent in the Worcester area.

c. On the first appellant's version, I am inclined to believe that many

people might have been induced to buy the diamonds on the strength of what he was told, and the number of times he was told it. Then too, the offering of the diamonds at almost half their value, and offering them effectively for a down payment of a quarter of their value, might well also have induced many people into buying them.

d. Again, on the first appellant's version, he resisted the temptation to commit the crime 8 or 9 times when telephoned. Only on about the tenth approach, and only when Molefe actually came to Worcester, did first appellant yield to temptation. And if one has regard to the extremely amateurish way in which he went about buying the diamonds, it lends credence to his version. He had no knowledge of diamonds, and no way of establishing the value of the diamonds. He had no money available, not even R20000, and for this reason had to involve second appellant, who borrowed the money from his father.

e. Although no evidence was led about first appellant's financial position, it is common knowledge that policeman are not paid particularly well. Accordingly, the repeated suggestion that by buying the diamonds first appellant would make a lot of money

would have been a significant inducement to him.

f. There is also some doubt in my mind whether, before the trap was conceived, there was a reasonable suspicion that the first appellant had committed or was committing any offence of IDB or similar to IDB. The evidence of the State was hardly convincing, and the fact that the informant was not called leaves a large gap between the suspected policeman “Carl” in Paarl, and the first appellant in Worcester.

28. Having regard to all the above, I am constrained to differ from the magistrate. In my view, the police undercover operation went considerably further than merely providing an opportunity for the first appellant to commit the offence. It induced him into buying diamonds illicitly whereas but for the repeated importuning, the persistent reminders of the large profits to be made, and the discounting of the purchase price to bargain basement levels, he would probably not have done so.

29. The enquiry does not end there. Section 252A(3) provides that if a court finds that the setting of a trap goes further than merely providing an

opportunity to commit the offence, it may refuse to allow such evidence to stand,

30. The issue of a trap used in relation to IDB was discussed in S v Spies and Another 2000 (1) SACR 312 (SCA). Although there are similarities between that case and the present one, I am of the view that it is distinguishable on the facts. The SCA came to the conclusion that it could not be said that the accused had been induced to purchase the diamonds because of fundamentally unfair conduct on the part of the police. The main contention was that the diamonds had been sold at far less than their real value. But the Court pointed out that they had initially been offered at their true value, and that the accused had bargained down the price. It was clear also, from the fact that the accused had brought with them equipment for weighing the diamonds when they went to meet with the trap, that they already then intended to buy the diamonds.

31. In the present case, the conduct of the police, on first appellant's version, went considerable further than that in the Spies case. And, but for such conduct, i.e. the numerous importuning phone calls, the fact that the police came to Worcester to deal with the appellant, and the reduction of the purchase price, there is a real likelihood that the appellant would not have

committed the crime.

32. Turning to the factors in subsection 252A(3), many of them are not relevant to the present case. In weighing up the public interest against the appellants' interests, I bear in mind that it is necessary and desirable to bring to justice those who are guilty of IDB, although little evidence was led regarding the seriousness and prevalence of the crime. Equally, if not more important, however, is the necessity to protect innocent members of the public from being induced into committing crimes by overzealous undercover operatives. The literature is full of warnings against the potential pitfalls of police traps going too far. See, for instance "Eating the forbidden fruit: the morality of police trapping practice", by N Bohler which appeared in Codicillus, vol XXXX No 2 (Oct 1999).

33. I am of the view that the right of appellants to a fair trial may indeed have been infringed, and also that to admit the evidence relating to the police trap would be detrimental to the administration and interests of justice. It can hardly be conducive to the administration of justice for innocent persons to be induced into committing offences which they would otherwise have not committed. The present case may be close to the borderline but in my view it falls on the exclusion side of the borderline.

34. It follows from the above that the undercover operation which trapped the appellants, would not pass the test of section 35 of the Constitution. I am thus of the view that the evidence relating to the police trap should have been excluded.

35. As far as the position of second appellant is concerned, he was clearly at the wrong place at the wrong time. Or, more correctly, first appellant happened to be at second appellant's butchery at the wrong time. Caught up in the events, he was clearly dazzled by the inducement of untold wealth, so much so that he went and borrowed the necessary funds from his father.

36. If one excludes the evidence of the undercover operation, this would apply to second appellant as well. Without such evidence, his conviction, too, cannot be sustained.

37. I would accordingly uphold the appeals, and set aside the convictions and sentences of both appellants.

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ENGERS AJ

I agree. The appeal is upheld. The convictions and sentences are set aside.

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NC ERASMUS J

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N ERASMUS J