IN THE HIGH COURT OF NAMIBIA

case no cc.84/92

In the matter between

THE STATE

versus

1. **WILLI NORBET MAASDORP**

2. **WILLIAM ALFRED ABRAHAM PHILLIPS**

CORAM: O'LINN, J.

Heard on: 1992.06.04 and 05

JUDGMENT

O'LINN, J.: Accused numbers 1, ***2*** and 3 appeared on charges of dealing in diamonds, alternatively on a charge of possession of diamonds. Accused numbers 1 and 2 pleaded guilty to the main charge and accused number 3 pleaded not guilty to both the main and alternative charge. Here I should have mentioned that accused numbers 1 and 2 also pleaded not guilty to the alternative charge.

In view of the plea of accused number 3 there will be a separation of trials and he was allowed to stand down until his case can be dealt with.

As far as accused numbers 1 and 2 are concerned they have not only pleaded guilty but submitted a written statement in terms of section 112(2) of Act 51 of 1977 setting out the basis of their plea of guilty.

I am satisfied that they not only admit all the essential allegations of the main charge but that they both intended to plead guilty to the main charge.

IN THE RESULT I find accused numbers 1 and 2 guilty of the main charge, i.e. in that on or about the 30th June 1991 and at or near Khomasdal in the district of Windhoek the accused unlawfully bought or received 43 rough or uncut diamonds with the mass of 72.42 carats and the value of R76 503.00.

O'LINN, JUDGE

IN THE HIGH COURT OF NAMIBIA case

In the matter between

THE STATE

versus

3. **WILLI NORBET MAASDORP**

4. **WILLIAM ALFRED ABRAHAM PHILLIPS**

CORAM: O'LINN, JUDGE

Heard on: 1992.06.04 and 05

Delivered on: 1992.06.05

SENTENCE

O'LINN, J.: It is trite law that the Court must consider the person and personal circumstances of the accused, the nature of the crime committed and the interest of society. These three basic considerations or factors are mostly interrelated.

As to the personal circumstances of the accused, Mr Maritz, counsel for accused number 1, set out all the personal circumstances pertaining to accused in a viva voce statement to the Court. Mr Januarie, counsel for the state, when asked by the Court whether the state accepts that statement and those facts and circumstances as put forward by counsel for accused number 1, stated that the state accepted the facts and circumstances so set out.

Accused number 1 was, however, not called to testify on any

aspect of mitigation whatsoever. After the state had called the assistant-sergeant Dawid to give evidence on the question of sentence, counsel for accused number 1 was again invited by the Court to reconsider the calling or not of the accused on the question of sentence in case anything stated by the police witness took him by surprise. However, counsel for accused number 1 informed the Court in response to this invitation that his instructions are that accused number 1 would not testify.

Accused number 2 was in fact called by his counsel, Mr Hinda, to place certain facts pertaining to his person and personal circumstances before the Court. That concluded the evidence as to sentence put before the Court at the stage when sentence had to be considered. Obviously all the facts which both accused admitted at the stage when they presented their explanation of their pleas of guilty are before Court and it is not necessary to refer to the facts admitted by both accused in the course of that explanation of their pleas. I must also draw attention to the fact that when accused number 2 was called by his counsel to testify at the sentence stage, counsel for accused number 1 asked him whether or not the explanation of plea by accused number 1 had been put to him in consultation and whether he agreed that that version given by accused number 1 was correct. He conceded that that version was correct. So it means then that there is also the testimony by accused number 2 which confirmed, as far as he is concerned, what accused number 1 had said in his written explanation of plea.

I have weighed all the evidence and all the submissions made by counsel very carefully. As far as the applicable law is concerned, particularly the law relating to cases where traps are involved, the Court has been referred to several cases and for the purposes of enlightening the accused and the public, I deem it useful to again shortly refer of some of those cases.

The first one is the case of S v Kramer and Others, 1991(1) SACR, at p.25 (Nm) . In that case the Court dealt with at least three categories of contraventions of the Diamond Proclamation and the manner in which the Courts in the past dealt with those cases. These three categories are set out briefly at page 33 from paragraph B-H and it is useful to repeat that part of the report of the said case:

> "When analyzing the sentences in the aforegoing, mostly unreported, cases of the Supreme Court of Namibia, a clear distinction is apparent between sentences in cases where traps have been involved in selling diamonds to the accused who were first offenders, and cases where the accused were convicted of the theft of diamonds from a licenced employer such as the Consolidated Diamond Mines Company or where employees were convicted of a contravention of s 2 8 of Proc 17 of 1939, but where the circumstances justified the inference that the diamonds were stolen by the employee from the licenced owner.
>
> In recent years almost all convicted offenders of the first category were sentenced to imprisonment with an alternative of a fine, plus a period of imprisonment, suspended as a whole.

> The second category of convicted offenders were sentenced to imprisonment also in the case of first offenders.
>
> A third category can also be distinguished, where the accused was convicted of possession of diamonds and where no trap played any role or where a trap was used, but the accused was already in illegal possession of diamonds and thus already committing a crime before the trap was sprung in order to obtain evidence of the offence or to recover the diamonds. In this third category even first offenders in possession of diamonds of very small value, very often were sentenced to imprisonment without the option of a fine and without suspension of the periods of imprisonment".

In the case of the State v Kramer, the appeal against sentence was upheld and an alternative of a fine was substituted for the sentence of imprisonment by the Court a quo.

However, the legislature increased the maximum penalty drastically subsequent to the date of the commission of the offence in the aforesaid case of S v Kramer and Others. The maximum penalty was increased to R2 00 000 or 15 years imprisonment or both by Proclamation AG 7 of 199 0, dated 13/3/1990, which underlined the gravity of the offence.

In S v Koekemoer and Others, 1991(1) SACR at p.427 (Nm) , the Court further dealt with the abuse of the use of traps and the paragraph in the headnote briefly summarising the circumstances and the approach of the Court should also be repeated for the purpose of this case:

"The accused, who were 28 and 29 years of age respectively, were convicted of purchasing uncut diamonds to the value of R220 000 in contravention of s 28(b) of the Diamond Proclamation 17 of 1939 (Nm). The accused had met one B in Johannesburg who had promised them that they could make a profit of about R15 000 each from buying diamonds in Namibia and reselling them. He (B) knew sellers and purchasers and could arrange a sale. The accused went along with B's plan and borrowed an amount of R90 000 for this purpose. They went to Namibia accompanied by B and eventually they met the police trap who was to sell them the diamonds. The deal was concluded in the presence of B and as soon as the money was handed over the accused were informed that it was a trap and they were arrested. The Court formed an impression of the accused that they were unintelligent and were not knowledgeable in matters of this sort. They were both first offenders. The Court held that it was clear that B was an informer and that his actions and those of the police deserved censure: when a trap was set for a person certain precautions ought to be taken to ensure that persons who were engaged in illicit diamond buying fell victim to the trap and not people who had no previous records, who were otherwise ignorant and had been enticed, encouraged or incited by people such as professional informers working with the police. The Court held that in a case such as the present the Court had to indicate to those who conducted trap systems that the Court would not allow abuse of the system to continue. The accused were accordingly each sentenced to a fine of R3 000 or nine months' imprisonment plus five years' imprisonment all of which was suspended fore a period of five years on certain conditions".

Then in the case S v De Beer, 1991(2) SACR at page 25 (Nm) a trap was also involved to bring the accused to justice. The sentence imposed by the judge in the Court a quo was imprisonment of 4 years, 2 years of which were suspended on certain conditions, notwithstanding the fact that the accused had bought the diamonds in the course of a police trap. The state referred to this case to show that that sentence was an appropriate sentence because on appeal the Full Bench did not set aside this sentence. But as Mr Maritz, for accused number 1, correctly pointed out, the reason why the appeal did not succeed was not because the judges on appeal held that the sentence was a sentence with which they agreed, but because it could not be said on the record in that case that the sentence of the Court a quo was startlingly inappropriate or that the Judge a quo had misdirected himself. This is so because the Court a quo has a wide discretion and on appeal the Court of Appeal does not easily interfere with such a sentence unless it is shocking or startlingly inappropriate or unless there are certain misdirections and/or irregularities committed by the Judge a quo or the Court a quo. That case is not really authority for imposing a sentence of imprisonment only, without the option of a fine.

In the case of S v Dennis De Bruyn, the presiding judge of the High Court, my brother Hannah, in the case of a trap, also imposed a sentence which allowed the accused to pay a fine as an alternative to imprisonment. The sentence in that case where the accused had bought diamonds from a police trap, was a fine of R25 000 or 3 years imprisonment

in default of payment and in addition 5 years imprisonment which was totally suspended on certain conditions. However, in the present case the trap conformed to essentially every rule and guideline laid down in the cases aforesaid and there is no real suggestion, at least not a suggestion supported by the evidence, that in this case the trap was not absolutely fair and justified. The only aspect of the trap which therefore may be of some benefit to the accused in this case is the fact that it could be argued that but for the trap, and even though the accused were keen to enter into the transaction, they may not have entered into any transaction, if the opportunity was not presented to them by the trap.

In the case of S v De Beer, supra, at p.29, par.c-h, I explained this consideration as follows:

> "This can be further illustrated by drawing a distinction between the role by police in non-trapping cases where the police investigate a crime or offence already committed or in the process of being committed, and attempt to obtain evidence of such a crime or offence, whereas in the first category of a trapping case the police or a police agent or informer usually takes the initiative to approach a person, who is not known to them to be a buyer of rough and uncut diamonds and suggest that he or they have diamonds available for sale, and once such person indicates his interest in such a deal, a police trap is set for him. At that stage such person, being a first offender, has demonstrated his willingness to buy and as such, a potential buyer and a potential offender, but he is not a buyer and not an

offender. By setting the trap the police is then not attempting to obtain evidence of any already perpetrated crime or offence, but provides, by means of false pretences, an easy opportunity for the interested person to become a buyer and so to become an offender. In such circumstances the transaction itself is in essence a simulated one and the offence committed a simulated or artificial one, artificially created with police participation; an offence which, but for the trap, may in real life never have been committed and an accused first offender who, but for the trap, may never have become an offender or criminal with disastrous and tragic consequences for him and his family.

This characteristic of this category of a diamond case has not been analysed and spelt out in so many words in the authorities before S v Kramer and Others, (supra) and also not in the line of cases referred to in Kramer's case (supra). But in my view this was the underlying reason for treating this category of case on a different footing than the other categories.

In the aforesaid category of case, first offenders were usually not sentenced to imprisonment without the option of a fine or imprisonment which was not wholly suspended. This was the case, whether or not a high degree of incitement or undue influence was proved or not. Of course, if a high degree of incitement or undue influence is proved in a particular case, this will be an additional reason for treating the accused more leniently. See S v Koekemoer and Another, High Court of Namibia, 13 September 1990, still unreported, a judgment of O'Linn, J."

In the present case, both accused were brought under the impression that the sellers were from C.D.M. They were

therefore quite happy to act as receivers of stolen property. There are several aggravating factors in this case which outweigh the consideration that the accused were caught in a police trap.

None of the accused have explained to this Court why they actually committed this offence, what their motivation was and why their moral guilt should be less or should be regarded as less than what appears on the face of it.

None of them testified to the effect that they regretted their actions and there is no other indication of genuine remorse, even though the fact that they both pleaded guilty and provided the Court with an explanation of their plea and with certain admissions which assisted the state and the Court and curtailed the proceedings. Such contribution, however, does not justify an inference on the balance of probabilities that they have genuine remorse, other than remorse which many accused people have when they are caught out and when they have to face punishment.

Accused number 1 did not even testify. On the available evidence both appeared to have been greedy and in a hurry to do a deal. Accused number 1 even told the policeman, assistent Sergeant Dawid, that he had previously lost money because the diamonds bought were not genuine diamonds and that he now wanted to buy genuine diamonds to recoup his losses.

entered into the transaction. He brought the equipment of a diamond dealer such as a diamond-tester and a magnifying glass and used both instruments apparently to satisfy himself as to the genuineness of the diamonds and the mass and value of the diamonds. Accused number 2 also used the magnifying glass.

Accused number 1 apparently did not have the ready cash available to buy the diamonds himself, but accused number 2 had R40 000 available which he paid over as a deposit on the purchase price. Accused number 1 appears to be a healthy man in the prime of his life, he has a dependant wife and a son of 18 who is a student employed part-time and partially dependent on him for maintenance.

Accused number 2 did not make any strong points about dependants but has a wife and a daughter to maintain. Accused number 2 will have to forfeit the R39 000 paid over as a deposit and this is an important factor which I must consider in his favour because, as I pointed out in S v Kramer and Others, this forfeiture of R39 000 is a punishment in itself. Accused number 2, according to his evidence, is not a very healthy person in that he had a bypass operation of an artery in his leg in recent years and has sometimes, according to him, difficulty in walking. It must, however, be pointed out that he had no problem in moving quickly to the place where the diamonds were available for sale.

Accused number 1 has several previous convictions but none

related to diamond dealing and in so far as diamond dealing is concerned, he can be regarded as a first offender. The fact that he has these previous convictions must count against him although this Court will not give it much weight because the crimes or offences committed were not very-serious .

Accused number 2 has no previous convictions.

Both accused are prominent in public life and in the case of accused number 1 he was still active in party politics and up to the date of his offence played a prominent part in a political party in this country. Accused number 2 was a minister in the transitional government up to the date of the implementation of the so-called Peace Plan, Resolution 435, which led to the independence of this country. Both of the accused are men who cannot plead ignorance in any sense. They have held leadership positions in the public life of this country in the past and in the case of accused number 1, he was still active as a public figure in this country at the time of his arrest.

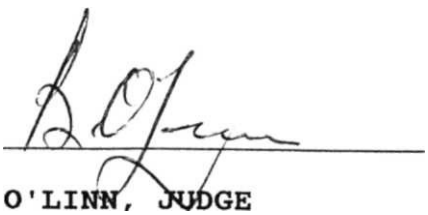
This Court is not here dealing with ignorant people who did not have the opportunity to go to school. Perhaps they did not have all the opportunities which some sections of the community had, but they were privileged compared to so many other people who often appear before this Court for contraventions of the Diamond Proclamation and who are sentenced to periods of imprisonment, without the option of a fine.

Both accused betrayed the trust of their organisations and of the public.

The Court was informed that both are able to pay a substantial fine. In the case of accused number 2, as I have indicated, he must forfeit R40 000 to the state and it must be regarded as a loss to him and part of his punishment. Although in the particular transaction on which they were convicted the person who actually purchased was accused number 2, the other factors that I have indicated have led me to conclude that there is no reason to differentiate between the two accused in the sentence to be imposed on them.

I have come to the conclusion that a balanced and appropriate sentence to be imposed on each of the accused, is the following:

> Payment of a fine of R20 000 (Twenty Thousand Rand) or 2 (two) years imprisonment if the fine is not paid and in addition a period of 5 (five years) of imprisonment, 33$ (three and a half) years of which is suspended for 5 (five) years on condition that the accused is not convicted of contravening section 28 of Proclamation 17 of 1939, committed during the period of suspension.



O'LINN, JUDGE

Counsel for Accused 1 and 3:	Adv. G. Maritz
Instructed by:	Stern & Barnard
Counsel for Accused 2:	Adv. G.Hinda
Instructed by:	Karuaihe & Conradie