CASE NO. CC 58/93

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

REINHOLDT DANKE NANGOMBE

CORAM: STRYDOM,

J.P.

JUDGMENT

STRYDOM, J.P.: The accused is indicted on two charges of contravening Sec. 30(1) of Proclamation 17 of 1939. On the first main charge it is alleged that the accused stole an unspecified quantity of rough and uncut diamonds from his employer C.D.**M.** This occurred on the 20 December 1991.

In respect of the second main charge it was alleged that the accused stole 174 rough and uncut diamonds with a mass of 283,02 carats and with a value of R472 890-00 from C.D.**M.** his employer on the 31st January 1992.

In respect of both main charges the accused was also charged in the alternative with contravening Section 28(a) of Proclamation 17 of 1939 in that he was in possession of, in the one instance, an unspecified quantity of rough and uncut

diamonds, and in the other instance in possession of 174 rough and uncut diamonds with a mass and value as set out before.

The accused pleaded not guilty to all these charges and stated through his Counsel that he placed in issue each and every element of the charges alleged against him.

Mr du Toit, assisted by Mr Hinda, appeared for the accused and Mr van Wyk appeared for the State.

The main state witness was Mr Kotze a senior Security Officer in the employ of C.D.M. and who is in such employ for 12 years.

He testified that he struck up an acquaintance with the accused during October 1991. He stated that accused was going to Swakopmund for the holiday season and that he asked him to take along a parcel for his parents-in-law who were also at that stage residing at Swakopmund.

At a meeting at Kotze's house to discuss further details accused asked him whether the parcel contained diamonds to which he replied in the affirmative. Thereupon he was asked by accused whether he would also assist him in taking out diamonds from the mine. Kotze agreed but said that he could only do so once a month when security escorted the salary payments of workers into the mining area. It was arranged that they would meet at the fuel pumps at field plant no. 4 on the 20 December 1991.

From the start, and even before the taking out of diamonds was discussed, Kotze had reported his contact with accused to his superiors as well as to Inspector Ludike of the diamond branch of the police. From them he received instructions to continue to befriend the accused.

On the 20 December before Kotze entered the mining area he, as well as his vehicle, were searched by Sgt. Steyn of the Police.

The witness met the accused at the pre-arranged spot and a parcel, wrapped in masking tape and marked "Sir" on the one side and "Junior" on the other side, was placed on the right front seat of the vehicle by accused. This parcel was, according to the witness, as big as a Rl-00 coin.

Kotze took the parcel and returned to his office. Here he handed the parcel to Sgt. Steyn. The parcel was X-rayed and showed a picture similar to that of diamonds. On his return Steyn again searched him as well as the vehicle. After the parcel was X-rayed it was handed back to the witness to be put in his motor vehicle in his garage at his house at no. 2 Ostrich Avenue, Oranjemund, as arranged with accused. The parcel was not opened at any stage. The parcel was left on the floor in front of the front left seat. Kotze returned later that day to his garage and found that the parcel was gone.

It was further testified by this witness that the management of the mine decided to consent to this parcel being taken by

the accused and not to stop and arrest him.

Kotze again heard from accused during January 1992. Kotze arranged for accused to visit him and on this occasion accused informed him that the parcel had contained 4 smaller parcels of which only one was his. His parcel he had sold for R42 000-00. After using R2 000-00 the 50% share of the witness amounted to R20 000-00. No money was shown to Kotze but he decided not to take his share but rather to utilise it to buy more diamonds so that the next deal could be better. It was also decided the next taking out of diamonds would be on the 31 January, 1992 when the next payroll was scheduled.

Accused also asked Kotze to obtain a small diamond scale for him to assist him when buying diamonds. This was done and the scale was collected from Kotze's wife.

On 30 January accused again visited Kotze at his house to finalize arrangements. It was agreed to follow the same modus operandi as was followed the previous time.

On the morning of the 31 January at 9:30 Kotze as well as his vehicle was searched by warrant officer Prinsloo before he went into the mining area. There, according to Kotze, he met accused as before at the fuel pumps in no. 4 Plant. At this meeting with accused the latter handed to him a longish parcel, about 7cm long which fitted well into his hand and which was again wrapped in masking tape.

Kotze thereupon returned to his offices where he and the vehicle were searched by warrant officer Prinsloo. He also handed to Prinsloo the parcel he had received from the accused. This was again X-rayed and showed a picture similar to that of diamonds. The parcel was not opened. It was unmarked and for fear that accused's suspicion may be aroused, the parcel was not marked in any way by the police. The parcel was then returned to Kotze who, as before, took the parcel to his house where he left it again inside his vehicle on the floor in front of the left front seat and returned to his office.

After 12 o'clock on that specific day, Sgt Krohne, Security Officer Nel, and Warrant Officer Spangenberg, arrived together with the accused and the witness was shown a parcel which to him looked similar to the one he had received earlier from the accused. The parcel was opened by Krohne. Inside was 7 smaller parcels of which 4 contained code marks. The smaller parcels were opened and they contained 174 objects which appeared to be diamonds. Kotze received a reward of R331 000-00 from C.D.M.

The State also presented the evidence of Sgt. Steyn, Sgt. Krohne, Warrant Officer Prinsloo, Security Officer Nel and Security Officer Rust. These witnesses held observation at one or other of the incidents related to by Kotze and which took place on the 20 December 1991 and the 31 January 1992.

The accused declined to give evidence under oath and closed his case without placing any explanation before the Court.

Mr du Toit severely criticised the evidence of Kotze and stated inter alia that he concealed the involvement of his wife from the police and the Court. That his version that the accused approached him was false and that it was in fact he and his wife who sat up a trap and initiated the whole transaction. He, Kotze, chose areas where it was impossible to observe him and he was allowed to handle the two parcels unobserved over long periods and over long distances. Furthermore he clearly did not mention in his police statement that the vehicle was searched, which raised the reasonable possibility that it was not searched at all.

Mr du Toit further submitted that Kotze was clearly a trap and an accomplice, and that the cautionary rules in that respect apply. He was also in certain material respects a single witness and that his evidence should only be accepted by the Court if satisfactory in all material respects, which, according to counsel, was not the case.

I agree with Mr du Toit that Kotze was clearly a trap who received a substantial reward, whether that, in the circumstances set out before, makes him also an accomplice I am not convinced, but will accept for purposes of this case that that is so. I also agree that in material respects Kotze is a single witness and that for the foregoing reasons his evidence must be approached with caution and circumspection.

It is further also correct that the trap that was set up left much to be desired and was clumsily done in a haphazard

fashion, and without always having regard to the rules laid down by the Courts over the years.

The system of trapping may, in the case of an unscrupulous trap, involve innocent people. The rules are designed to avoid such dangers as far as possible and compliance therewith must be insisted upon by the Courts. However noncompliance therewith will not always lead to an acquittal if there are other good grounds for believing the trap's evidence. (See S v Chesane 1975 (3) 172 (T) at 173 E-G).

However cases such as Myers and Meshum v R 1907 TS 760 at 761, S v Tsochlas 1974 (1) SA 565 (A) at 574, S v Mabaso 1978 (3) SA 5 at 7 and S v Ohlenschlager 1992 (1) SA Criminal Reports 695 (T) at 721-722a illustrate the dangers involved in such evidence.

This brings me to Kotze's evidence. It must first be remembered that Kotze was not a lay person picked up off the street (as it was stated in Chesane's case supra p 173 H) but he was a security officer of 12 years standing in the employ of C.D.M. Furthermore according to his evidence the accused was someone who was suspected of having illicit dealings in diamonds. From the start Kotze reported his contact with the accused to his superior officer as well as to the diamond branch of the Police. In various material respects the evidence of Kotze is supported by other witnesses, some of whom, such as the Police officers, did not have any financial interest in apprehending the accused.

1. The incident of the 20 December 1991:

   On this occasion the witness returned from the mining area and showed Sgt Steyn a parcel wrapped up in masking tape. Afterwards observation was held at the garage of the witness and Security Officer Rust took a video tape of what occurred there. This tape showed Kotze first of all entering his garage, and, after he had left, the accused entering the garage and leaving the garage. Thereafter Kotze reported that the parcel was gone.

2. As far as the incident on the 31 January 1992 is concerned:

   Again Kotze returned from the mining area and handed to Warrant Officer Prinsloo a parcel which was X-rayed and which according to the picture could have contained diamonds. Kotze was handed the parcel to be placed on the prearranged spot. Security Officer Nel as well as Sgt. Krohne, who was keeping observation on the house and garage of Kotze, from the yard of an empty house directly opposite from that of Kotze, saw the witness arriving in a vehicle, going into his garage where he opened the left hand door of his car and closed it again. Thereafter they also observed the accused coming out of the yard of Kotze's premises, opened the garage door and entered. Thereafter he went up to Kotze's car, opened the door on the right hand side, leaned into the vehicle and thereafter closed the door again and left the garage.

When thereafter the three of them, i.e. Nel, Krohne and Spangenberg, rushed at accused he ran away. He ran through Kotzes' s yard to a street on the other side of the house where Spangenberg called on him to stop. The accused stopped and return to his car, which was standing idling,

with the right front door open. At the time when accused was rushed by Nel, Spangenberg and Krohne he was ahead of them by some 30 yards. As a result whereof they lost sight of him and they only saw him again when they got the split-pole fence on the other side of the yard. In my opinion nothing much turns on this. Nel said that when Spangenberg shouted on accused he stopped and returned to the car. His right arm was at his side and Nel saw a parcel dropping off his hand. This was picked up by Krohne who had jumped over the fence and was coming from behind the car. Krohne saw accused, who was facing Nel and Spangenberg, dropping the parcel from his right hand. He saw it rolling a short distance, as was also testified to by Nel.

As to the place where the parcel came to a standstill there was a conflict between the evidence of Nel and Krohne and when this was brought to his attention Krohne clumsily tried to change his evidence. However I was impressed by Nel as a witness and I have no doubt that both he and Krohne saw the parcel falling from or off the right hand of the accused.

In cross-examination it was put to both witnesses that they did not see any parcel dropping from the hand of accused but that a parcel was only found after a search was launched, and found behind the car. This was also based on evidence given by Steyn namely that he stopped about 150-17 0m from the scene where he saw Nel, Spangenberg and Krohne and the accused. It was put to him in cross-examination that they were going through motions as if they were conducting a

search. He agreed. What these motions were and when he observed them is uncertain. Steyn was with Prinsloo in a caravan about 150m away on the side of Kotze's garage. When accused entered the yard after he came out of the garage, Prinsloo instructed Steyn to run through an alley to the street on the opposite side of Kotze's house to be able to cut off the accused if he should try to escape.

Nel and Krohne emphatically denied that they had to conduct a search for the parcel. It was suggested, at least in cross-examination, that no parcel was found on or at the accused and that the parcel which was eventually picked up had nothing to do with the accused. It must therefore have been a parcel of diamonds which was discarded there by somebody else. This seems to me to be improbable. However I am satisfied that the parcel was the same that Kotze said was handed to him by the accused, which he showed to Prinsloo and which he again placed in his car. Kotze conceded that he could not say that it was the same but said that it was similar. That is also the evidence of Prinsloo. I agree with Mr van Wyk that it is highly improbable that a parcel similar to that described by Kotze and Prinsloo will now all of a sudden appear in the street next to Kotze's house a few metres away from the accused. I believe the evidence of Nel and Krohne that they saw the parcel dropping off or from the hand of accused.

That seems to me to complete the chain, and to support in a material respect the evidence of Kotze that he received such parcel from the accused, that as arranged with the accused

he placed it in his car in his garage at no. 2 Ostrich Avenue. And that that is where it was picked up by accused and it was dropped by him in the street when he was confronted by Nel, Spangenberg and Krohne.

However, apart from such corroboration of Kotze's evidence there are also other factors which point to the cogency of this evidence. Except that it was put to Kotze that he and accused did not discuss on an occasion that he will help accused to bring out diamonds, none of what was testified to by Kotze was denied either in cross-examination or explained by accused under oath. The defence was content, as they were entitled to, to attack Kotze on various grounds and on credibility and to show him up as a poor witness. This, in my opinion, they did not succeed to do and Kotze's evidence, which was also shown by other evidence to be the truth, is accepted by the Court.

The criticism levelled at his evidence, that is Kotze's evidence, was not always justified. The fact that he willingly in cross-examination revealed his wife's involvement rejected the criticism that he wanted to conceal it. In fact he stated that the police was aware of the fact.

There is one aspect where Kotze's evidence can be criticized and that is that according to him he and his wife befriended accused by chance and that initially they only wanted to send a parcel with him to their parents at Swakopmund. The probabilities, I find, are that all this was part and parcel

of the trap to catch the accused. The criticism concerning the search of the vehicle was based on the fact that no mention thereof was made in the State's summary of facts and Kotze conceded that it is possible that he did not mention it in his statement to the police. If by this an inference can be drawn that the vehicle was not searched, that, as well as the fact that he was not always under observation, does not detract from the cogency of the evidence in total and the fact that by such evidence the accused, although he was directly implicated in the commission, of at least the offence charged in the main count number two, refrained from going into the witness box. Taking into consideration all the facts and the fact that accused did not give evidence under oath I am satisfied that in regard to main count 2 the State has proved beyond reasonable doubt that the accused is guilty. As far as Count 1 and its alternative is concerned, Mr van Wyk relied heavily on the reverse onus proviso that is created by Section 35A of Ordinance 17 of 1939 and the report which was made by the accused after the parcel was allowed to go through. On behalf of the accused it was argued that because the owner consented to let the accused take this parcel, that no theft was proved. (See R v Jona 1661 (2) SA 301, S v Mqube. 1970 (4) SA 586.

In the alternative it was argued that Article 35A does not assist the State and, if it does, that the accused have satisfied the onus placed on him.

Because of the conclusion to which I have come it is not necessary to decide whether in these circumstances theft was

committed or not. I agree with Mr du Toit that the nature of the objects is unknown to the State itself and that it is unable to argue that the substance forming the subject of the charge can be said to be rough and uncut diamonds. I also agree that the State can only make use of the reverse onus proviso in the section where the State can specifically allege that a specific substance forming the subject of a charge is a rough and uncut diamond and that the accused did such unlawful physical action with a particular object as he is charged with.

The State's evidence does not go further than to allege that there was some substance in the first parcel. The section does not presume such substance to be rough and uncut diamonds but places the onus on an accused to prove that it was not. Where the State evidence itself does not allege that the object or substance are rough and uncut diamonds the mere allegation in the charge will in my opinion not bring the matter within the ambit of the article. If I am wrong I am satisfied that the accused discharged such onus. On the evidence by the State various possibilities were conceded by them. The possibility that the parcel was valueless cannot be excluded. The possibility that the accused himself was testing Kotze by handing him a parcel which did not contain rough and uncut diamonds in order to see if it would go through is a reasonable one.

There are two aspects on which I wish to comment on. I have already said that the trap was clumsily and haphazardly conducted. As far as the identification of the parcel on

the second count was concerned, much more could have been done to facilitate and to make such prove easier. There is no reason why the parcel could not have been photographed before and after it was retrieved. That would have put the Court also in a position to judge for itself. In addition thereto the parcel could have been weighed and measured.

Secondly I was invited by counsel for the defence to comment on the fact that security officers are being paid a reward, as in this case, up to 70% of the value of the diamonds recovered and where an arrest was made. I have not heard any representations on behalf of the company but the reason is obviously to serve as an incentive to stem the tide of thefts of the property of the mine which are continuing unabatedly judging from the cases that are coming before us. I can't prescribe for the company but I must warn that such incentive may lead to fabrication of evidence in order to reap the benefits of such system. This is a factor which the Courts will and must take into consideration and which can, depending on the evidence, be a crucial factor in certain instances and lead to an acquittal.

In the result the Court finds as follows:

1. Count 1 and the alternative charge - the accused is found not guilty and discharged.

2. Count 2 - The accused is found guilty on the main count as charged.

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