

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no.: HC-MD-CRI-APP-CAL-2023/00005

In the matter between:

**WILLEM JOHANNES ANDREAS BERGH**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Bergh v S* (HC-MD-CRI-APP-CAL-2023/00005) [2023] NAHCMD 469 (4 August 2023)

**Coram:** SHIVUTE J *et* CHRISTIAAN AJ

**Heard:** 3 July 2023

**Delivered:** 4 August 2023

**Flynote:** Criminal Law – Statutory offences – Mens rea – In what form – Appellant convicted of possession of unpolished diamonds in contravention of s 30(1)(a) of the Diamond Act 13 of 1999 – Requisite mens rea in form of culpa – State to prove that appellant committed the act constituting offence prescribed by the Act with guilty mind –

Appellant bearing evidential onus to explain and satisfy court on balance of probabilities that he did not commit prohibited act with mens rea – In present case, appellant failing to give honest and reasonable explanation – Appellant failing to exercise high degree of circumspection and care – Appellant failing to discharge onus on balance of probabilities – Appeal on conviction dismissed.

**Summary:** The appellant had been convicted on a contravention of s 30(1)(a) of the Diamond Act 13 of 1999, in that he had possessed unpolished diamonds. Counsel for the appellant contended that the court a quo misdirected itself when convicting the appellant with mens rea in a form of culpa instead of dolus.

*Held that:* Negligence may constitute sufficient proof of mens rea even in cases where negligence is not the gist of the offence charged if there was a duty on the part of the person charged to exercise a high degree of circumspection and care. Therefore, the mens rea required is in the form of culpa.

*Held that:* Proof by the respondent that the appellant committed the act prohibited by the statute an allegation that was not in any event disputed constitutes sufficient proof for the court a quo to infer that the appellant did so with a guilty mind and the appellant is required to satisfy the court on a balance of probabilities that he did not have the necessary mens rea when he committed the act alleged.

*Held that:* The appellant failed to exercise a high degree of circumspection and care to remove the diamonds from his bag before he departed for Namibia. He also failed to give an honest and reasonable explanation on a balance of probabilities to satisfy the court that he did not have the necessary mens rea. For the above reasons, the appeal against conviction is dismissed.

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## ORDER

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The appeal against the conviction is dismissed.

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## APPEAL JUDGMENT

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SHIVUTE J (CHRISTIAAN AJ concurring):

### Introduction

[1] The appellant was convicted in the Magistrate's Court sitting at Luderitz on a charge of possession of four unpolished diamonds weighing 2.2 carats and valued at N\$6708,51 in contravention of s30(1)(a) of the Diamond Act 13 of 1999. He was sentenced to N\$10 000 fine or in default of payment to 12 months' imprisonment. Obviously dissatisfied with the conviction, the appellant has since lodged this appeal against his conviction only.

### Grounds of appeal

[2] The appellant enumerated six grounds in his amended notice of appeal. The first ground, however appears to be a conclusion reached by the drafter of the notice and does not satisfy the requirement of being clear and specific as demanded by rule 67(1) of the Magistrates' Court Rules. It is also not borne out by the record. The court a quo specifically stated that the appellant did not produce a permit. (Compare *S v Wellington* 1990 NR 20 (HC) at 22F - J). The first ground need not to be considered further for the purpose of this appeal.

2.1 The learned magistrate erred in law and/or facts by making a finding that the State has proven its case beyond reasonable doubt that the appellant had the requisite mens rea despite accepting the appellant's explanation that he merely forgot to remove the diamonds from his bag before he travelled to Namibia.

2.2 The court a quo misdirected itself by concluding that the appellant's explanation raised suspicion (and seemingly making an adverse credibility finding against the appellant) simply on the basis of the conflicting evidence given in court by the appellant that the appellant at one stage testified that it was his son who placed the uncut diamonds in his bag and later testified that it was himself. The court a quo ignored the material issue, that irrespective of whether it was the appellant or the son who placed the diamonds in the bag, the question is whether the appellant was aware that he had the diamonds in his possession when he arrived at the border.

2.3 The court a quo misdirected itself by applying the principles applicable to negligence to convict the appellant of an offence that requires mens rea in the form of intention.

2.4 The court a quo misdirected itself when it accepted the first state witness' testimony that the appellant told the witness that he did not know that it was wrong to bring diamonds into Namibia as the truth. Despite the defence having demonstrated to the court during cross-examination, that the first witness informed the second state witness, Chief Inspector Motinga that the appellant had informed him that he unintentionally brought the diamonds into Namibia. The latter version being the version that both the appellant and the Chief Inspector confirmed.

2.5 The learned magistrate misdirected himself in law and fact when he convicted the appellant on the charge on the basis that the appellant had failed to discharge the onus to prove that he was not aware of the presence of the diamonds in the bag.

Arguments by counsel

[3] Counsel for the appellant argued that although the appellant was found in possession of uncut diamonds, the State had failed to prove beyond reasonable doubt, that the appellant had the requisite mens rea. The court a quo used a wrong formula by applying the law applicable to culpa in a form of negligence to arrive at a wrong conclusion. The learned magistrate convicted the appellant on the basis that the appellant did not discharge the onus to prove that he was not aware of the presence of the diamonds in the bag and did not act like a reasonable person would have done in the circumstances. Counsel contended that the offence which the appellant was charged with requires intent. Therefore, the court a quo cannot apply the principles applicable to a crime that requires negligence.

[4] Furthermore, implicit from the reasons for the conviction is that the court a quo accepted the appellant's version that he forgot to remove the diamonds from the bag, on which basis the learned magistrate ought to find that the appellant lacked intent and should have acquitted him. The appellant informed Warrant Officer Uugwanga, who searched the vehicle, that he did not intend to bring the diamonds with him to Namibia but he had simply forgotten to remove them from his bag before he came to Namibia. This was due to the fact that he left in a hurry when his son told him that he had arranged for him and his wife a vacation for Valentine's Day in Namibia. The version that the appellant said he forgot to remove the diamonds was confirmed by the Chief Inspector. It is worth mentioning that the Chief Inspector was not present when the appellant's motor vehicle was searched. He only came at a later stage when he was called by the first witness, Warrant Officer Uugwanga.

[5] Counsel further argued that the court could not have been satisfied beyond reasonable doubt that the appellant knew that he had the diamonds with him when he entered Namibia because, due to a mistake he lacked the intention to possess them. He could not be found to be culpably responsible. The requirement of culpability ensures that nobody is punished for harm which he commits accidentally or of which he could not have been aware. It is not apparent from the judgment of the court a quo whether it

rejected the appellant's version that he had forgotten the diamonds in the bag. The learned magistrate seemed to have accepted Warrant Officer Uugwanga's evidence in court that after the search, the appellant told him that he did not know that it was wrong to bring the diamonds into Namibia. Warrant Officer Uugwanga's version is inconsistent with what he told the Chief Inspector the same day that the appellant brought the diamonds to Namibia unintentionally.

[6] This was also what he said in his statement. The court should have found that Warrant Officer Uugwanga did not tell the truth in court. Warrant Officer Uugwanga prevaricated when questioned why his evidence in court regarding what the appellant told him following the discovery of the diamonds. His testimony in court differs from his written statement and what he told the Chief Inspector. Counsel argued that the Warrant Officer's version in court was an afterthought tailored and designed to create the impression that the accused was aware of the diamonds in his bag. Counsel again urged this court to interfere with the court a quo's judgment on the basis of the principle that no onus rests on the accused to convince the court of the truth of any explanation even if that explanation is improbable. The court is not entitled to convict, unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is false.

[7] On the other hand, counsel for the respondent grouped grounds 2.1, 2.3 and 2.5 together for purposes of argument as they overlap. It is his argument that the offence in the present matter has much more in common with the offences falling within the 'intermediate group'. As regards to the offences that are within the intermediate group, the onus is on the State to prove that the appellant committed the act constituting the offence. Thereafter, an evidential onus shifts to the appellant to disprove that he had the requisite mens rea when he committed the act. He must give an explanation on a balance of probabilities which satisfies the court that he had no mens rea when he committed the act alleged in the charge.

[8] Counsel argued that the evidence placed before the court a quo is that the diamonds were found in the appellant's bag which he regularly uses and wherein he keeps his personal belongings. The appellant was the one that placed the diamonds in the bag and not the son. He forgot to take out the diamonds before he came to Namibia. The appellant had also placed a pistol in the same bag but he only remembered to remove the pistol. The provisions of s30(1)(a) of the Act demands a high degree of circumspection and care on the part of the appellant and any failure to exercise that degree of circumspection or care constitutes the mens rea necessary for a culpable violation of the provision.

[9] Counsel further argued that the appellant's explanation that he did not know that he had the diamonds with him when he came to Namibia from South Africa, or that he forgot to remove the diamonds from the bag, thus lacking mens rea, cannot be considered to be reasonably possibly true. The appellant ought to have known of the diamonds in the bag and taken more care to ensure that before travelling he was not in possession of the said diamonds. The offence of which the appellant was charged with requires mens rea in the form of culpa or negligence.

[10] As regards to ground 2.2, the court a quo stated that it seemed as though the appellant wanted to shift the blame to his son that he is the one who placed the diamonds in his bag. The fact that the appellant conceded that he placed the diamonds in the bag is an indication that he was aware of the diamonds in the bag prior to travelling. Therefore, his explanation of forgetting to remove the diamonds is not justifiable.

[11] Concerning ground 2.4, counsel argued that the differences in the two State witnesses' testimonies, considered against the totality of the evidence adduced are not material. Therefore, there is no prospect for this ground to succeed.

[12] Both counsel referred us to several authorities in support of their respective propositions to which we have had regard during the consideration of the appeal and

the preparation of this judgment. We now proceed to consider whether the court a quo misdirected itself in convicting the appellant.

#### The court a quo's reasoning in the conviction of the appellant in brief

[13] In convicting the appellant, the court a quo considered, among other things, that the appellant was charged with a statutory offence that falls under the 'intermediate group' where the onus is on the State to prove that the appellant committed the act constituting the offence, but, thereafter, an evidential onus is thrust on the appellant to disprove the inference that he had the requisite mens rea when he committed the act in question. The court further concluded that the requisite mens rea is in the form of culpa or negligence.

#### Legal principles relevant to the appeal

[14] The applicable legal principles concerning the court of appeal's approach to an appeal before it were set out by the Appellate Division of South African in *R v Dhlumayo & another* 1948 (2) SA 677 (A). These principles have been aptly and succinctly summarised in Hiemstra's Criminal Procedure (2008) at 30 – 45 as follows:

'The court of appeal must bear in mind that the trial court saw the witness in person and could assess their demeanour. If there was no misdirection of facts by the trial court, the point of departure is that its conclusion is correct. The court of appeal will only reject the trial court's assessment of evidence if it is convinced that the assessment is wrong. If the court is in doubt, the trial court's judgment must remain in place (*S v Robinson* 1968 (1) SA 666 (A) at 675 H). The court of appeal does not zealously look for points upon which to contradict the trial court's conclusions...'

[15] This approach was followed in this jurisdiction in *S v Van Wyk* 2015 (4) NR 1085 (SC) para 66. This court is therefore guided by these legal principles and we did not find any misdirection on the part of the court a quo in this regard.



[16] The issue to be decided by this court is whether there was a misdirection on the part of the court a quo for this court to intervene. The court a quo was criticised heavily that it convicted the appellant of mens rea in the form of culpa instead of dolus. The appellant was charged with contravening section 30(1)(a) of the Diamond Act 13 of 1999, which reads as follows:

'30 Prohibition relating to possession of unpolished diamonds

(1) Save as is otherwise provided in this Act, no person shall have any unpolished diamond in his or her possession unless such person is-

(a) a producer, contractor or sub-contractor as the case may be'

[17] It is trite law that statutory offences may be classified into three categories which may be stated as (1) strict liability, (2) mens rea in the form of culpa (negligence), and mens rea in the form of dolus (intention). The court a quo found that the form of mens rea required in this matter is culpa.

[18] In *S v Maritz* 2004 NR 22 (HC) at 26H–27B this court stated as follows:

'It is noteworthy that negligence may constitute sufficient proof of mens rea even in cases where negligence is not the gist of the offence charged, if there was a duty on the part of the person charged to exercise a high degree of circumspection and care. In *S v Arenstein* 1964 (1) SA 361 (A) Botha JA said (reiterating with approval what (Centlivres JA had stated in *R v H* 1944 AD 121 at 130 and 366) (sic):

"It is clear that negligence may constitute sufficient proof of mens rea even in cases where negligence is not the gist of the offence charged, if there was a duty on the part of the person charged to be circumspect. The degree of blameworthiness required for a culpable violation of a statutory prohibition or injunction must in the first place be sought in the language used by the law giver ... and in the absence of any words expressly indicating the particular mental state required, the degree of mens rea must depend on that foresight or care which the statute in the circumstance demands."

[19] Applying the above principles to the facts of the appeal before us, we are persuaded that the learned magistrate correctly found that the form of intention required

in this matter is culpa. Therefore, the contention by the appellant that the court a quo convicted the appellant on the wrong form of mens rea, which is culpa instead of dolus cannot be correct.

[20] The next issue to determine is whether the court a quo misdirected itself in holding that the State had proved that the appellant committed the act constituting the offence and that an evidential onus was thrust on the appellant to disprove the inference that he had the requisite mens rea when he committed the act in question. Furthermore, the court a quo made a finding that it was not disputed that the appellant was indeed found in physical possession of the said diamonds. Therefore, the State had proved that the appellant committed the act that constituted the offence as required by the Act.

[21] It is common cause that the appellant was found in possession of four unpolished diamonds. The appellant is the one who placed those diamonds, wrapped in a piece of toilet paper, and placed in a small container that was kept in a bag where the appellant normally carries his important documents. Since the appellant was charged with a statutory offence that falls within the intermediate group, it cannot be said that the court a quo misdirected itself by holding that an evidential onus shifted to the appellant. In the absence of words expressly indicating the particular mental state required, it is evident from the language used in s 30(1)(a) of the Act that the degree of mens rea required is in the form of negligence.

[22] The court a quo was therefore correct in its finding that an evidential onus had shifted onto the appellant to disprove mens rea. Furthermore, the State had adduced sufficient evidence proving that the appellant committed the act constituting the offence. In the absence of an explanation from the appellant negating the inference that he had the required mens rea, the court a quo did not err to have found that he had a guilty mind to commit the offence.

[23] Another point of criticism levelled against the magistrate is that the court relied on the version of Warrant Officer Uugwanga, who told the court that the appellant told him

that he did not know that it was wrong to bring the diamonds to Namibia. Contrary to what the witness said in his statement that the appellant told him that he forgot to remove the diamonds from the bag and what he told the Chief Inspector that the appellant said he brought the diamonds to Namibia unintentionally. I pose to observe that Warrant Officer Uugwanga did not state in his police statement that the appellant told him that he did not know that it was wrong to bring the diamonds to Namibia, neither did he mention in his statement that the appellant told him that he forgot to remove the diamonds from the bag or that he unintentionally brought them to Namibia. However, there is evidence from the Chief Inspector that Warrant Officer Uugwanga told him that the appellant said he brought the diamonds unintentionally. This was not disputed by Warrant Officer Uugwanga and it is also the appellant's defence.

[24] It is trite that a statement to the police is intended to obtain the details of the alleged offence for purposes of possible prosecution and not to anticipate the witness evidence in court. (*S v BM* 2013 [4] NR 967 (NLD) para 186.) A witness can therefore, not be limited during his testimony to the statement he gave to the police.

[25] The next issue to be inquired into is whether the appellant had discharged the onus placed on him to show, on a balance of probabilities, that he did not have a guilty mind when he brought the diamonds into Namibia. The appellant testified that he did not see the container with diamonds in his bag, otherwise he could have removed it. The court considered that the appellant carried the same bag wherever he travelled. He kept his important items in that bag, including his pistol. Logic dictates that it is the same bag that he often opened and closed. The court a quo had also considered that when the second State witness told the appellant that the border crossing where the witness was working was small and there was no customs officials to whom a traveller could declare goods, the appellant said he did not know it was wrong to come with diamonds to Namibia.

[26] The court a quo further considered the explanation given by the appellant that the reason he forgot to remove the diamonds from the bag was because he had hastily

packed his items since they were in a hurry to ensure that he and his companion did not find the borders closed. The court a quo again considered that, during his defence case, the appellant shifted the blame onto his son, saying that it was the son who put the diamonds in the bag. However, in cross-examination, he testified that he had lied when he testified to that effect. He reaffirmed that it was him who placed those diamonds in his bag. It is highly improbable that the appellant had only remembered to take the pistol out of the bag but forgot to remove the diamonds which he placed in the same bag.

[27] The appellant in this matter is a businessman, who is involved in mining activities in his country. He held the position of director in a mining company, at the time of the trial. The appellant's defence is that he had forgotten to remove the diamonds from the bag. However, he was able to remember to remove the pistol that was also in the same bag before he departed for Namibia. The defence that the appellant had forgotten to remove the diamonds from the bag before he left his country is so easy to articulate.

[28] In *S v Zemura* 1974 (1) SA 585 (RA) at 591 where the court, with reference to *R v Stainer* 1956 (3) SA 498 (F.C.) at 501, held that to discharge the onus of showing that he had no mens rea, the accused had to show that his mistake was both honest and reasonable. For the appellant to succeed, he is required to show that he had exercised a high degree of circumspection and care. The provisions of s30(1)(a) demand a high degree of circumspection on the appellant's part. Mere inadvertence or thoughtlessness cannot be any justification for a failure to exercise that degree of circumspection. (See *S v Arenstein* supra). Again, by attempting to shift the blame to his son or by lying that it was his son who put the diamonds in the bag is a clear indication that his explanation is not honest and cannot be reasonably possibly true. Therefore, his defence cannot be relied upon.

[29] This court is satisfied that the court a quo correctly convicted the appellant as charged. There is no misdirection on its part to justify this court to interfere with its findings. The appellant failed to exercise a high degree of circumspection and care by failing to remove the diamonds from his bag before he departed to Namibia and to

discharge on the balance of probabilities that he had no mens rea in the form of culpa and the appeal against his conviction stands to be dismissed.

[30] In the premise, the following order is made:

The appeal against conviction is dismissed.

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N N SHIVUTE  
Judge

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P CHRISTIAAN  
Acting Judge

## APPEARANCES:

## APPELLANT:

V Alexander  
Of Veiko Alexander & Company Incorporated,  
Windhoek

## RESPONDENT:

A Amukugo  
Of Office of the Prosecutor-General, Windhoek