



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Not reportable**  
Case No: 663/2018

In the matter between:

**NICO VILJOEN**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Viljoen v S* (663/18) [2019] ZASCA 22 (27 March 2019)

**Coram:** Navsa AP, Van Der Merwe and Schippers JJA

**Heard:** 14 March 2019

**Delivered:** 27 March 2019

**Summary:** Criminal Law and Procedure – purchasing unpolished diamonds in contravention of s 20 of the Diamonds Act 56 of 1956 – admissibility of evidence – whether police trap went beyond providing an opportunity to commit offences – s 252A(1) of the Criminal Procedure Act 51 of 1977 – evidence admissible – appeal dismissed.

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## ORDER

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**On appeal from:** Northern Cape Division of the High Court, Kimberley (Lacock and Williams JJ sitting as court of appeal):

The appeal is dismissed.

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## JUDGMENT

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**Schippers JA (Navsa AP and Van Der Merwe JA concurring):**

[1] The appellant was convicted in the Port Nolloth Regional Court on three counts of purchasing unpolished diamonds, in contravention of s 20 of the Diamonds Act 56 of 1956. Counts 1 to 3 were taken together for the purpose of sentence and he was sentenced to three years' direct imprisonment; and a fine of R160 000 or three years' imprisonment, wholly suspended for a period of four years on condition that he was not found guilty of a contravention of s 20 of the Diamonds Act, committed during the period of suspension.

[2] An appeal to the Northern Cape Division, Kimberley, against the appellant's conviction was dismissed, but his appeal against sentence resulted in a reduction of the sentence of three years' direct imprisonment to 12 months' direct imprisonment. In June 2012, prior to the coming into force of the Superior Courts Act 10 of 2013, the court a quo granted the appellant leave to appeal to this court.

[3] The material facts can be shortly stated. In May 2004 the police launched a project known as Operation 2081 to stem the illicit trade in unpolished

diamonds in the Western Cape, Gauteng and the Northern Cape. To that end they made use of traps and undercover operations authorised by the Director of Public Prosecutions under s 252A of the Criminal Procedure Act 51 of 1977 (the CPA). When the operation was terminated in September 2006, 31 unpolished State diamonds with a value of some R600 000 had been sold to identified suspects and 17 persons had been arrested, including the appellant.

[4] The appellant bought unpolished diamonds from Inspector Leon Ferris (Ferris), a police trap, on three occasions at Scotia Inn, a hotel in Port Nolloth (the hotel), owned by the appellant. These sales were digitally recorded on audio-visual equipment. The recordings were viewed by the trial court. The defence did not dispute the contents of the recordings and agreed that they were a true version of what took place.

[5] The appellant's co-accused, Ms Esmeralda Losper (Losper), who introduced him to Ferris, was present only during the first sale on 21 July 2005. Before they went to the hotel, Ferris handed Losper an unpolished diamond (valued at R19 735, which Ferris was instructed to sell at a minimum price of R10 000) at her work. She examined it and asked what the price was. Ferris replied R20 000. She arranged to meet the appellant at the hotel where he paid Ferris R12 000 for the diamond, after he had told Ferris that it contained a flaw. Ferris paid Losper a 'commission' of R1000 for the introduction. As they left the hotel, the appellant told Ferris to contact him or Losper if he had more diamonds. On 18 August 2005 Ferris offered two unpolished diamonds to the appellant for R27 000. Ferris was instructed to sell them for not less than R13 000. They settled on a price of R20 000 after the appellant 'showed' Ferris that the diamonds were flawed. The third sale was concluded on 2 November 2005. Ferris offered an unpolished diamond for sale at R29 000 (he was instructed to sell it for not less

than R15 000). The appellant paid R25 000 for the diamond, after he pointed out what he said were certain defects in its colour and quality.

[6] Subsequently, the appellant was arrested and pleaded not guilty to the charges. He alleged that, contrary to the provisions of s 252A of the CPA, the conduct of Ferris went beyond providing an opportunity to commit the offences, on the following grounds. Ferris had an inappropriate love relationship with Losper in order to mislead her and get close to the appellant. The police trap's offer to sell the diamonds was an irresistible temptation. The sales were concluded rapidly and the appellant had no opportunity to reflect upon or withdraw from them.

[7] Ferris denied all this in the ensuing trial-within-a-trial to determine the admissibility of his evidence. He was subjected to detailed cross-examination. Neither the appellant nor Losper testified, nor presented any evidence to contradict Ferris' version. The magistrate found that the appellant's allegations were without foundation and ruled that Ferris' evidence was admissible. Subsequently, both the appellant and Losper closed their cases without adducing any evidence.

[8] Before us the appellant's attorney submitted that the State had failed to prove that Ferris went no further than creating an opportunity to commit the offences. It was submitted that the evidence against the appellant was obtained improperly and unfairly, which rendered the trial unfair. A further ground of appeal, namely that the State had not proved that the items which the appellant purchased were indeed unpolished diamonds, was abandoned, and rightly so.

[9] Section 252A(1) of the CPA reads:

'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).<sup>2</sup>

[10] In *Kotzè*,<sup>1</sup> this court said:

‘The section lays down two approaches to the admissibility of evidence obtained as a result of the use of a trap. Evidence is automatically admissible if the conduct of the person concerned goes no further than providing an opportunity to commit the offence. If the conduct goes beyond that the court must enquire into the methods by which the evidence was obtained and the impact that its admission would have on the fairness of the trial and the administration of justice in order to determine whether it should be admitted.’

[11] A court is obliged to consider the factors listed in s 252A(2)<sup>2</sup> in considering whether conduct goes beyond providing an opportunity to commit an offence,

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<sup>1</sup> *S v Kotzè* 2010 (1) SACR 100 para 23.

<sup>2</sup> Section 252A(2) of the Criminal Procedure Act 51 of 1977 reads:

‘(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/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;

(i) 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;

which is a factual inquiry.<sup>3</sup> These factors must be considered holistically and weighed cumulatively.<sup>4</sup>

[12] When the applicable factors are considered in the light of the evidence, it cannot be said that Ferris' conduct went beyond providing an opportunity to commit the offences. Ferris did not contact the appellant to do the first deal. In March 2005 Losper told Ferris that she knew that he was a diamond smuggler, asked him to bring her unpolished diamonds and said that her buyers were the Viljoen's of the hotel. She arranged the first transaction that led Ferris to the appellant. For these reasons, the allegation that Ferris had an inappropriate relationship with Losper which he exploited in order to entrap the appellant, has no merit. In any event, it is insupportable on the evidence.

[13] After the first sale, the appellant himself invited Ferris to do more deals, and the second and third sales took place pursuant to that invitation. The recordings of the transactions showed that both the appellant and Losper did not hesitate to participate in the offences; on the contrary they did so eagerly. The undisputed evidence was that the appellant was greedy ('uitgevreet') for diamonds. During each sale, which was concluded in an apparently calm and relaxed environment, the appellant left the room to examine the diamonds, returned and pointed out flaws in the diamonds to Ferris. Then the price was negotiated. There was time for conversation – the appellant asked Ferris where he lived and worked and even whether he was a police officer.

[14] The contention that the transactions were concluded rapidly, that the appellant had no time for reflection or to withdraw from them and that this translated into the transactions falling foul of the relevant provisions of the CPA,

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(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.'

<sup>3</sup> *Kotzè* fn 1 para 25.

<sup>4</sup> *Kotzè* fn 1 para 27.

has no foundation. Ferris testified that when the appellant left the room to examine the diamonds, he could have telephoned the police. He could also have withdrawn from the second sale when he met Ferris at a bank before they went to the hotel. That evidence was not contradicted. And the appellant concluded the second and third sales despite his suspicion that Ferris was a police officer.

[15] The evidence shows that the appellant was well-informed concerning sales of unpolished diamonds, particularly as regards colour, flaws, quality and price. The submission that Ferris induced the appellant to buy the diamonds because they were sold below their market value, has no merit. This was not a case where the trap fixed a low price to induce a sale. Instead, in each sale the asking price was close to the market value of the diamond. In the first sale the asking price was R20 000 and the market value of the diamond, R19 735. In the second sale the asking price was R27 000 and the diamonds were sold for R20 000. In the third sale the asking price was R29 000 and the appellant paid R25 000. And in the second and third sales the appellant paid prices way above the minimum that Ferris was allowed to accept for the diamonds.

[16] For these reasons, the appeal against conviction must fail. Regarding sentence, it is trite that the inquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the court in imposing it exercised its discretion properly and judicially.<sup>5</sup> Based on the evidence, the court a quo concluded that direct imprisonment was the only appropriate sentence as illicit diamond transactions remained serious offences in the Northern Cape, and it was extremely difficult to apprehend offenders. That conclusion and the resultant sentence cannot be faulted.

[17] In the result the appeal is dismissed.

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<sup>5</sup> *S v Pillay* 1977 (4) SA 531 (A) at 535E-F, affirmed in *Mpofu v Minister for Justice and Constitutional Development* 2013 (2) SACR 407 (CC) para 42.

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A Schippers  
Judge of Appeal



## APPEARANCES

For Appellant:           W Booth  
                                  William Booth Attorneys-at-Law, Claremont  
                                  Hanno Bekker Attorneys, Bloemfontein

For Respondent:         J J Cloete  
                                  Director of Public Prosecutions, Kimberley  
                                  Director of Public Prosecutions, Bloemfontein