

255/74

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between

PETROS LOUVERDISAPPELLANT.

and

THE STATERESPONDENT.

Coram: Holmes, Hofmeyr, J.J.A., et Galgut, A.J.A.

Heard: 18 November 1975.

Delivered: 24 November 1975.

J U D G M E N T.

GALGUT, A.J.A.

The appellant, to whom I will refer as

the accused, was found guilty in the Northern Cape

Division...../2

Division by a judge and two assessors on two counts. The first was a charge of illicit dealing in diamonds in contravention of section 84 (1) of Act 73 of 1964. The second was a charge of resisting and assaulting the police, in the execution of their duty, in contravention of section 27 (a) Act 7 of 1958. On count 1 he was sentenced to a fine of R1 000 (with an alternative of one years imprisonment) and in addition a sentence of two years imprisonment was imposed of which 1 year was suspended on certain conditions. The sentence on count 2 was a fine of R100 with an alternative of one months imprisonment. He appeals to this court, with leave granted under section 363 (6) of Act 56 of 1955, against the conviction and sentence on count 1. There is no appeal in respect of count 2.

The State's case in count 1 was that the accused on the 21st February 1974 unlawfully bought 2 rough and uncut diamonds from Detective Sergeant Simpson who was acting as a police ptrap.

The...../3

The accused is aged 46. He was at the time the ~~owner, or part owner, of businesses in Bloemfontein and Kimberley.~~ These businesses were cafes and restaurants. The business in Kimberley was conducted in two sections. The one section was called The Corner Lounge and above was the other section called The Steak House. A man whose true name was not disclosed and who did not give evidence but whom the accused believed to be Kobus Fourie, and to whom I will refer as Fourie, had for a considerable time prior to the 21st February been in the habit of visiting The Corner Lounge. The accused used to see him there and had begun to regard him as a regular customer. On the night in question the accused returned from Bloemfontein where he had been attending to the businesses there, and entered The Corner Lounge after 7 p.m. At about 9 p.m. Fourie and Simpson came into The Corner Lounge together. Fourie introduced him to Simpson.

The evidence disclosed that Simpson had come to

the...../4

the cafe with the set purpose of selling two diamonds to the accused. ~~These had been previously handed to him~~ by detectives of the diamond branch for that purpose. It is clear that Fourie was part of the scheme to try and sell diamonds to the accused. They, shortly after their arrival in The Corner Lounge, intimated to the accused that Simpson was in a position to sell diamonds to him. The State's case virtually rests on Simpson's evidence. He testified that a sale of the diamonds and payment therefor took place that night. The accused's version is that only a future sale of diamonds was discussed and that he was prepared to enter into these discussions because he wished (for reasons which will appear later) to have time to inform the police so that they could arrest Simpson when he came with the diamonds. The court a quo accepted Simpson's version and rejected that of the accused and convicted him.

In view of the submissions made by counsel the
evidence...../5

evidence of Simpson and that of the accused will have to be carefully examined and it is convenient to set out their respective versions at this stage.

Simpson testified that he had received two diamonds from detectives in the diamond branch; that a microphone (which measured 4" X 3" X 1") was concealed on his person under his underpants; that from this microphone wires (aerials) extended and these were sewn into and under his shirt; that this microphone and wires were to be used, not only for recording his conversations with the accused, but also to broadcast information to the detectives who were awaiting the outcome of the trap; that the purpose of going to the cafe was to sell the diamonds to the accused; that shortly after having been introduced to the accused by his companion (i.e. Fourie) he, during the conversation, intimated that he worked on the Finch Mines and had a quantity of diamonds for sale; that some conversation followed between him and the accused; that

the...../6

the accused asked him to accompany him and they rode round two blocks in the accused's van; that during this ride, in reply to a question by the accused, he told the latter he had two diamonds with him; that later in the ride he told the accused that if they were going to meet anyone else "I will not have any diamonds with me" and threatened that he would jump out of the vehicle; that they returned to the cafe; that while he and Fourie were seated at a table the accused sent two glasses and some whisky to them; that the accused closed The Corner Lounge and the three of them proceeded to The Steak House where there were still some people; that he told the accused that he did not wish to discuss diamonds if other people were in the vicinity; that the accused later brought a bottle of whisky and the three of them sat and had some liquor; that in reply to a question by the accused he told him that the two diamonds weighed approximately 18 carats and that the price was R2 000; that at the accused's

request...../7

request he accompanied the accused to a small room to the right of the kitchen; there the accused asked him, Simpson, to strip; that he pretended to be embarrassed and the accused told him that he was doing this to ensure that he did not have a microphone; that he, Simpson, lowered his trousers, took off his jacket and unbuttoned his shirt and pulled up the back thereof and the accused then intimated that he was satisfied that there was no concealed microphone; that while they were walking back to the "eating" section of The Steak House he, in reply to a question by the accused, again said that he had two diamonds which weighed about 18 carats; that the accused asked if ^{he} had weighed the diamonds; that he replied in the negative and said he did not want to be found in possession of a scale; that he told the accused that he could see the diamonds; that the accused then asked him to accompany him, which he did, and they went to a big room (which was later referred to as The Elephant's Ear

in the evidence); that he there showed the accused the diamonds and the accused took possession of them; that having "studied" them he handed them back; that they returned to the "eating" room where the accused said he was satisfied with the price and that he had only R500 there but would have to get the balance from his house; that the accused handed him a packet (exhibit 4) and said it contained R500; that they finished the bottle of whisky and thereafter the accused closed The Steak House and he and Fourie then accompanied the accused to the latter's van; that they all three sat in front and he placed the packet, exhibit 4, on the dashboard; that they were taken to the accused's house and there they alighted and were taken to a table next to the swimming pool; that he ^{had} left exhibit 4 on the dashboard; that the accused then brought brandy and glasses and they partook of this liquor; that the accused and Fourie then went off in the van and returned after about 20 minutes; that the accused

then...../9

then asked him to accompany him to a room where the accused took a bundle of notes (exhibit 7) out of his pocket and told him that it amounted to R2 000; that this bundle was handed to him and he thereupon took out his handkerchief, in the corner of which the two diamonds were tied up, and handed it to the accused; that he, Simpson, returned to the table and the accused went off but joined him and Fourie at the table a minute or so later; that the accused then drove them back to where he, Simpson, had parked his own vehicle and there he and Fourie alighted; that he then proceeded to give the prearranged signal to the detectives who were still awaiting the outcome of the trap; that before the latter arrived the accused had driven off; that when the detectives, viz., Major Piek, Captain Mostert, Detective Warrant Officer Pool and Detective Sergeant Botha, arrived he reported to them and they all drove to the accused's house but the accused's car was not there; that he, Captain Mostert and Sergeant Botha drove off leaving Major Piek and Warrant Officer Pool at the house

to await the accused; that whilst driving and seeking the
accused he and Captain Mostert saw the accused's van and
went to the accused; that he, Simpson, then made a full
report to Captain Mostert in the presence of the accused;
that Captain Mostert arrested the accused and gave him the
usual warning; that the accused denied any knowledge of
the diamonds; that at a later stage whilst he was again
telling Captain Mostert about the incidents of the night
the accused, without warning, struck him on the mouth, there-
by dazing him and knocking out one of his teeth; that it
was after all these happenings that Major Piek, who by
now had come from the accused's house, searched him and
found the R2 000 on him but not the diamonds; that Major
Piek then went to the accused's van and there found ex-
hibit 4 on the dashboard. Shortly thereafter Colonel
Erasmus arrived and while he, Simpson, was making a report
to him the accused lunged and struck Colonel Erasmus; that
the next thing he realised was that the accused had been
knocked...../11

knocked down; that the accused was searched, as also his house and that of one Hattingh, but the diamonds were not

found. On several occasions during his evidence Simpson emphasized that in order to induce the accused to believe that he was a genuine seller of diamonds and not a trap he had pretended to be very nervous.

In cross-examination the accused's version was put to Simpson. This version will be set out shortly later. At this stage it is only necessary to say that Simpson agreed that in his conversation with the accused there was talk of future sales and that the accused had mentioned that for such sales he would need 48 hours notice and that there was also talk of him, Simpson, coming back on the following Monday for that purpose. He remained adamant, however, that the two diamonds had been shown to the accused that night and thereafter had ~~been bought by and handed over to the latter.~~

The instrument, viz., the microphone and wires

which...../12

which Simpson was carrying did not work properly. It did not broadcast as planned and it only recorded portions, virtually only snatches, of the conversation between the accused, Simpson and Fourie. These portions, many of which are not complete, have been transcribed (exhibit J (1)). It was suggested to Simpson that certain of these snatches of the conversation suggested that only future transactions were discussed by him and the accused and seemed to indicate that the accused was not shown any diamonds that night. Simpson, however, adhered to his version. The transcript of what was recorded on the microphone will be discussed later. It will be noticed that no mention of Fourie is made after they returned from the accused's home. This is because he disappeared from the scene at that time.

Before setting out the accused's version of the events it is convenient to say that the accused early on in his evidence stated that he, since his 17 th birthday, and his family over the years, had been continually approached...../13

approached by traps and others in connection with illicit diamond transactions and that on this occasion, when

Fourie and Simpson told him that they had a large quantity of diamonds, he decided to put an end to such approaches. To this end, so he said, he decided to make the necessary arrangements for a future transaction so that he could act as an informer and have Simpson and Fourie arrested. He would in this way not only obtain the usual reward paid in such cases, but everybody would then know he was an informer and he would then not again be worried by such persons. This was the reason why he pretended to be an interested purchaser and continued to emphasize that he needed 48 hours notice of any suggested deal.

I turn now to set out the accused's evidence.

He said that he had been to Bloemfontein to attend^{to} the

businesses there; that he had returned with R2 450; that he went to The Corner Lounge at about 7 p.m.; that

Fourie...../14

Fourie and Simpson came into the cafe some time later
~~and that Fourie introduced Simpson to him; that they in-~~
timated that they had diamonds for sale; that Simpson
came behind the counter and said he was from Finch Mines
and wanted to talk about diamonds; that Simpson returned
to the table where Fourie was seated; that he later went
to them and told them he was not prepared to buy any dia-
monds unless he had 48 hours notice; that he later again
went to their table and asked which one wanted to come
with him; that Simpson came with him and they went to
his van and went for a drive; that during the drive
Simpson said they had a large quantity of diamonds, 151
carats in all; that Simpson said he had no diamonds with
him; that Simpson, who throughout had acted in a nervous
manner, said if he did not stop the van he would jump
out; that they returned to The Corner Lounge; that he
~~sent whisky to the table where Fourie and Simpson were~~
sitting; that after closing time they all left The Cor-
ner Lounge...../15

ner Lounge and went to The Steak House; that he there asked on what basis "can this hoard of diamonds be

bought?"; that Simpson said to him that he would only sell them one by one and he told Simpson that was not acceptable; that eventually Simpson said that the two biggest diamonds weighed 18 carats and the cost would be R2 000; that Simpson said that they(Simpson and Fourie) were prepared to do a deal in 48 hours time because they had decided they could trust him (the accused); that he replied that he was glad the question of trust had been brought up and he asked Simpson to come with him and they went to a room upstairs; that he there stripped to show Simpson he had no microphone concealed on him; that he asked Simpson to do the same; that Simpson opened his shirt and offered to be searched; that he was satisfied Simpson had no microphone on his person; that they returned to the table and they had further discussions during

which he again emphasized he needed 48 hours before doing a deal; that Simpson replied and said he would come

on...../16

on Monday but would not bring all the diamonds; that after further conversation and drinking he asked Simpson whether he had weighed his diamonds and the reply was that he, Simpson, did not own a scale and repeated that two of the diamonds weighed 18 carats and that when he, the accused, saw them he would be able to "judge them"; that Simpson and Fourie said they wanted proof that he could pay for the diamonds; that thereafter when he closed The Steak House he collected the money (bank notes and cheques) from the till; that despite the fact that he had no liquor at home he invited Simpson and Fourie to his home for a drink; that he had with him the money (R 2 450) which he had brought from Bloemfontein and the money (R425) which he had taken from the till in The Steak House; that the packet containing the R425 he left in the van; that he left Simpson and Fourie at a table near the swimming pool while he went inside the house and hid the R2 450 behind the

stove...../17

stove because he did not know what sort of people Simpson and Fourie were; that he came back to the table

and asked Fourie to accompany him and the two of them went off to the house of one Hattingh, who was a friend, to get a bottle of brandy; that en route Fourie told him that Simpson wanted to be satisfied that he, the accused, would be able to pay for the diamonds when they came on the Monday; that they returned to his home and partook of the liquor; that he then went into the house and, having taken R2 000 from the R2 450, he called Simpson aside and handed this money to him, whereupon Simpson gave him a handkerchief which had a knotted corner; that he was shocked and Simpson told him to undo the knot whereupon, because of his fear that the knot might contain diamonds, he threw the handkerchief back to Simpson; that Simpson then went back to the table and ~~sat down and proceeded to count the money; that he then~~ told Simpson that it was his, the accused's, money and Simpson then pushed the money over to his side of the table...../18

table and left it there; that, as he was anxious to get rid of them, he told Simpson and Fourie that he wanted to take them back to their car; that he in fact did so and then he suddenly remembered that the R2 000 had been left on the table near the swimming pool; that he hurried home to find, to his dismay, that the money was not there and so decided to go and seek the aid of his friend, Hattingh, before approaching Simpson and Fourie; that when he was near the latter's house he was stopped by a police car; that thereafter Simpson arrived and reported to Captain Mostert and Detective Sergeant Botha; that while doing so Simpson taunted him by saying he, the accused, had tried to play poker but had lost; that this angered him to such an extent that he struck Simpson on the mouth; that Captain Mostert immediately drew a revolver; that later Colonel Erasmus arrived on the scene and said to him that as he, the accused, had struck a member of the police he

would...../19

would be taught a lesson and that thereafter he was dealt a number of blows, and when he fell to the ground was kicked by the police.

The microphone recording, as already stated, was very poor. It was fitted with wires so as to be used also for transmitting purposes. Simpson testified that he tried, but without success, to transmit from the accused's home after the accused and Fourie had gone off to fetch the brandy. Those passages in the transcript which are relevant will be discussed when dealing with the submissions made by counsel in regard to the credibility of Simpson and the accused.

The court a quo held two inspections in loco. These were mainly concerned with the place where Simpson said the "stripping" took place and the lighting conditions in The Elephants Ear, being the room in which Simpson said that he had shown the diamonds to the accused.

A comparison of the evidence of Simpson and

~~the accused shows that they conflict in several respects.~~

The conflicts which are material for the decision of the appeal are the following:

- (a) Whether Simpson caused the accused to believe that he did not have the diamonds in his possession.
- (b) Whether Simpson showed two diamonds to the accused.
- (c) Whether the deal was concluded that night or whether they were discussing a future transaction.
- (d) Whether the R2 000 was handed to Simpson as payment for the two diamonds or to show that the accused had sufficient funds to pay for the diamonds.
- (e) Whether the diamonds were handed to the accused in pursuance of a concluded deal.

In order to resolve the above conflicts it is necessary to examine the respective merits of Simpson and the accused as witnesses.

Of Simpson as a witness the court a quo said the following:

"Now Simpson is a detective who, on his own evidence, has considerable experience of trapping and the impression this Court gained by observing his attitude and demeanour in the witness-box was that he is a keen detective and also a keen witness. A perusal of his evidence will show that he is the type of witness who wanted to explain almost every reply given to him. The Court observed that these explanations were tendered, by Simpson, not in a way so many witnesses do only when they have difficulty in answering questions, but almost as a matter of course. That sometimes applied even to simple questions. Explaining his evidence is to him to some extent a way of giving evidence.

The Court is aware that attitude and demeanour in the witness-box may sometimes be a very fallacious guide. In judging Simpson as a witness the Court must also keep in mind that the questions put to him in cross-examination often tended to tax his memory to the utmost. Not only was he

expected to recall the actual events of the evening in question, but also to remember what he had said at the preparatory-examination, recollect what transpired from the transcript of the taperecording and, last but not least recall what he had said in his evidence-in-chief. Many a time questions were directed towards him which not so much applied to the occurrence of events but to their sequence. The witness often had to apply his mind not to what had really happened but to what he had said had happened.

The Court however never gained the impression that Simpson was trying to mislead it. He may sometimes have been over insistent and keen to impress the Court that he was telling the truth but in spite of thorough and searching cross-examination he never gave the impression of telling deliberate untruths."

These findings as to the credibility of Simpson were attacked. I proceed to deal with the various criticisms in the numbered paragraphs set out below.

- i. That Simpson's evidence was not entirely satisfactory on the question of whether he brought _____ accused under the impression that he had no diamonds on his person.

The accused said while driving round the block Simpson said he had no diamonds with him whereas Simpson said he had early on during the drive told the accused he had two diamonds with him and also that during the drive he said to accused that if he took him to someone else he would say (i.e. pretend) he had no diamonds. Simpson admitted that at the preparatory examination he had said

"Toe ons in die kar klim, toe sê ek vir die beskuldigde waar gaan ons toe was sy storie ons gaan ry. Toe sê ek: 'Kyk, ek het nie die diamante by my nie en as jy gaan verder ry, dan spring ek uit.' "

The court a quo accepted that Simpson had probably not expressed himself clearly at the preparatory examination and accepted his evidence given at the trial. I am unpersuaded that the court a quo was wrong in so doing.

ii. That Simpson's evidence as to whether present

or future deals were discussed was unacceptable.

It was urged that at the preparatory examination

and at the outset of his evidence-in-chief in the court a quo Simpson gave the impression that the whole conversation that night centred around an immediate present transaction and that it was only after the Attorney-General produced the transcript of the microphone recording that Simpson testified that future transactions in regard to the other diamonds were frequently discussed. In this regard the following appears on page 2 of the transcript:

"(A long conversation between the two men follows. It is barely audible, if so, as a result of a constant and loud noise. A few words or sentences can be recognised, but the conversation cannot be followed. This lasts approximately 20 minutes).

I'll come back.....I'm sorry I promise you I don't want.....to do anything find out.

Forty-eight.....
finalise this business now."

Approximately seven pages later in the transcript

the...../25

the following appears:

~~"And, if you bring somebody else, I will not~~
do business with you, I promise you. I
won't do it with you.

Fair enough.

I'll come to you alone. I don't want to see
anybody else.

Is that clear?

If we do it that way I'm coming back.

Fair.

(Noise)

(No conversation for a while) (Noise of car)

.....think that way?

(?) Approximately eleven-thirty-eh-call it
eighteen-eighteen carat.

Eighteen?

Eighteen carat.

If you're ready for Monday, I'll come Monday
again.....

(Sound of glasses or cups)

I think one gets to know one another quick
enough.

Look, as long as there's nobody else.....
your place."

It was submitted that these passages show that from the

~~very outset the accused was insisting on 48 hours no-~~

tice and further that they were discussing a meeting

on the Monday night. I am unable to agree. The

transcript shows that they had already been talking

about...../26

about diamonds for more than twenty minutes. It cannot, therefore, be said that because these words appear on

page two of the transcript it has been shown that from the outset future deals were discussed. The transcript is quite consistent with discussions relating to a present transaction and also later to future transactions in respect of the other diamonds. The fact that future transactions were not mentioned by Simpson at the preparatory examination or early on in his evidence-in-chief in the court a quo is, as was found by the court a quo, probably due to the fact that Simpson was concentrating on testifying about the charge brought against the accused, namely, the sale of the two diamonds and not on the fact that there had been talk of possible future deals in respect of the other diamonds (i.e. the so-called "hoard" of diamonds).

For the above reasons I am unpersuaded that the court a quo was wrong in finding that Simpson's evidence

on...../27

on this aspect was not unsatisfactory.

iii. That Simpson's evidence was unsatisfactory as

to the "stripping" incident.

It was submitted that in his evidence Simpson described a place which was near the kitchen and described it as well lighted whereas at the first inspection in loco he pointed out a place near the bar counter and which was not part of the kitchen. This is so, but as the court a quo pointed out, Simpson did not know the layout of The Steak House and the error in description was thus excusable. As to the lighting of the place pointed out at the inspection. Defence witnesses were called to say the lighting was poor there whereas Simpson said it was adequate and he further suggested that it had been changed in the interim. Even if one assumes that Simpson was wrong and the defence witnesses were right as to the lighting this does not mean that Simpson was trying in any way to mislead the court. The fact remains that

it...../28

it is common cause that the stripping incident did take place as mentioned by Simpson and it is further common

cause that Simpson had the concealed microphone on his person and it was not found. Simpson would therefore achieve nothing by being untruthful on this aspect.

iv. That Simpson's evidence that the two diamonds were shown to the accused at The Steak House, in The Elephants Ear, cannot be accepted.

The lighting in this room was admittedly dim. The lighting in the nearby toilets was far brighter. Furthermore, members of the public and the staff of The Steak House could, if they were there, see into this room and would have to pass through it to go to the toilet. Hence, so it was argued, it was most improbable that the accused would seek to inspect the diamonds in this room. These submissions must be given their full weight but should not be unduly elevated. Simpson could, had he wished to strengthen the case against the accused, dishonestly have said that the diamonds were shown to

him in the privacy of the better lighted toilets. On
this aspect reliance was also placed on the following
words which appear towards the end of the transcript
(the underlining is mine):

"Have you got a scale I haven't got a scale.
Have you weighed them?

Say about plus minus eighteen.

(?).....

I'm not - I'm not sure, you should be
able to - eh - judge them.

So you haven't weighed them?

No, look, I don't like carrying those
things with me. Put it that way. But,
they're plus minus eighteen. You can,
if you see them, you can see for your-
self more or less."

The words underlined, so it was submitted, suggest that
they were talking about diamonds which were not there but

which...../30

which the accused would be able to judge when he saw them in the future. I do not find that these words bear that meaning only. If read in the light of what went before Simpson's reply to the effect that he did not like carrying diamond scales with ^{him} they might well mean that at that time and place he did not have scales with him to weigh the two diamonds. The words underlined can equally be read to be referring to the present and not the future. The passage consists of short, sharp, sometimes uncompleted passages and it is not possible to draw any conclusion from them. For all the above reasons I am unpersuaded that the court a quo erred in not finding that this part of Simpson's evidence was improbable.

v. That it is unlikely that the diamonds would have been shown to the accused in the dim light of the Elephants Ear and that the accused would have been satisfied with his inspection of the

two diamonds in such light.

~~This submission loses its force when one remem-~~
bers that at the second inspection in loco the court a
quo found that two small stones and small pieces of glass
were easily visible in the hand of Simpson. It is impli-
cit that the stones and pieces of glass would have been
of the approximate size of the diamonds. If it were not
so the point would have been raised immediately by the
defence. It follows that if, at the inspection in loco,
the court a quo could see these objects in Simpson's
hand that the accused would also have done so and would
have been able to see the diamonds even more clearly
when in his own hands. Furthermore he would always
have another opportunity of seeing them when he took de-
livery of them.

vi. That the sequence of events as recorded on the
transcript did not support Simpson's evidence.

as to (a) when the accused agreed to buy the
diamonds and ^(b) as to when the scale and the weigh-

ing...../32

ing of the diamonds was discussed.

As to (a). Simpson testified that after the stripping

incident he asked the accused if he was satisfied and the
latter answered "MUST BE" and they shook hands. This,
Simpson testified, satisfied him that the deal was conclu-
ded. The transcript shows that this conversation took
place before the accused had been shown the diamonds.
Hence it was urged that Simpson's version of when the deal
was concluded was unacceptable. I have scrutinised the
relevant passages in Simpson's evidence and am satisfied
that the effect of Simpson's evidence is that as the ac-
cused was satisfied that Simpson was not a trap he had
agreed to buy the diamonds. That would, of course, be sub-
ject to his being satisfied when he saw them and had to
pay for them.

As to (b). In his evidence-in-chief Simpson testified

~~as to the stripping incident and went on to say that later~~
the accused asked him if he had weighed the diamonds and
if he had a scale; that he had answered in the negative

and...../32(a)

and said "look you can see the diamonds"; that the accused then asked him to go with him and they went to the room where he showed the diamonds to the accused. The transcript, on the other hand, reflects that the discussion about the scales and weighing took place towards the end of the talks in The Steak House (see the extract from the transcript in iv. above). It was urged that Simpson was giving a false picture. It does seem that Simpson's sequence is not correct but that does not, in my view, justify a finding that he was being untruthful. He conceded that his evidence of the sequence of events was not always consistent. This is not surprising when one remembers that he was describing events which took place over a period of approximately three hours. His evidence takes up 56 pages of the record in chief and 141 pages in cross-examination. Moreover, he makes no attempt to "tailor" his evidence to fit in with the transcript.

vii. A further criticism levelled at the credibility of Simpson related to the nature and degree of the blows dealt the accused after his assault on Colonel Erasmus.

I do not find it necessary to lengthen an al-

ready long judgment by going into detail on this aspect.

It is sufficient to say that Simpson said he did not

see any of the police trying to kick the accused after he had been knocked down pursuant to his attack on Colonel Erasmus. Major Piek testified that he prevented certain of the policemen who wanted to kick the accused, from doing so. Major Piek also said that the accused rushed at Colonel Erasmus and that a scuffle ensued resulting in the accused being knocked down. Major Piek also said that there was possible justification for the accused's belief that Colonel Erasmus would attack him and that if he, the accused, reacted by attacking Colonel Erasmus, he might well have been acting in self defence. A comparison of Simpson's evidence on this aspect does not justify a conclusion that he was untruthful. It may well be that he did not see anyone trying to kick the accused. He was himself badly injured and bleeding and attending to his own hurts. Major Piek's

suggestion...../34

suggestion that the accused may well have been acting in self defence is not shared by the other police witnesses

and moreover is difficult to understand in the light of his own evidence that the accused was in an aggressive mood. I am unpersuaded that it has been shown that the court a quo was wrong in finding that Simpson was not untruthful on this aspect.

I turn now to consider the evidence of the accused. It is, in my view, studded with improbabilities. I list the main ones below.

(aa) The stripping incident.

The accused's explanation, that because he had frequently been approached by police traps he did not want to waste time if Simpson turned out to be one and hence he wanted to satisfy himself that Simpson was not a trap carrying a microphone, is highly improbable. The probabilities are that this was a precautionary measure taken to ensure that he would not be trapped.

(bb)...../35

(bb) The production of the R2 000 at his home.

~~His explanation that he did this to satisfy~~

Simpson that he could pay for diamonds which were to be offered in the future is, in my view, quite improbable. If proof of his ability to pay (which in itself is improbable if one remembers he was known to be the owner of the businesses in Kimberley) was required, it could have been given in the cafe when this question was, according to him, previously raised in the cafe. Moreover, if it was handed to Simpson merely to prove ability to pay and if Simpson was seeking to fabricate a sale, by tossing the diamonds to the accused, he would hardly have proceeded to count the money.

(cc) His story that he forgot to take the money when he decided to take Simpson and Fourie back to the marketplace.

~~If one remembers that he did not trust these two men and took the precaution, so he said, of putting~~

the...../36

the R2 450 behind the stove, it is quite out of character for him to leave the money on the table. This becomes more improbable if one remembers that, when Simpson was counting the money, he told the latter that it was his money and not Simpson's. Had Simpson pushed it over to the side of the table the accused would have picked it up.

(dd) His story that he put exhibit 4 on the dashboard of the van and forgot all about it and hence it was left there until Major Piek found it there.

If in fact he only remembered that he left the R2 000 on the table when returning home, after having dropped Simpson and Fourie, he would obviously then have given thought to the money in exhibit 4. I say this because if he believed that the R2 000 had been stolen his thoughts must immediately have turned to the contents (R425) of exhibit 4 and the possible theft thereof. Hence his explanation that he put

it...../37

it there and forgot about it is most improbable. Simpson's version in this respect is far more probable. It is consistent with a payment of R2 000 to Simpson for the two diamonds and hence Simpson would not have had any right to the contents of exhibit 4.

(ee) His reason for taking Simpson in his van and riding round the block.

If future sales only had been discussed there would be no need to do this. It could serve no purpose. This operation is consistent with having been told that Simpson had diamonds. Simpson's threat (which is admitted by the accused) that he would jump out of the car, would sound strange to the accused if he believed Simpson had no diamonds. It is only consistent with a belief, by the accused and Simpson, that the latter in fact had diamonds on his person and did not want to be taken to another person.

(ff) His reason for inviting Simpson and Fourie to his house.

He knew that he had no liquor at home. Hence ~~it is most unlikely that he would invite them to come to~~ his home to have a drink, well knowing that he would have to go for liquor to a friend, Hattingh, which would entail being away for 20 minutes. It is more probable that the reason for the trip to his house was ~~because~~ ^{that} the deal had been clinched at the cafe, that the money in exhibit 4 was given to Simpson as an earnest; that he went off to Hattingh's house for some purpose other than merely to get liquor.

(gg) His story that he wanted to become a police informer in order to stop traps or illicit diamond sellers from pestering him.

Having regard to the fact that he stated that he had been approached on very many occasions since he was 17 years old and that his family had also been approached, ~~it is more than strange that he should suddenly at this~~ age decide to turn informer. Moreover there would be

no reason for him to take the precautionary measures mentioned earlier. ~~From his own evidence it appeared~~ that he knew Detective Sergeant Botha and Colonel Erasmus (whom he addressed as Rassie) fairly well. Had it been his intention to turn informer he could easily have adopted other means to have informed the police. His excuses, viz., that the police would not take any notice of any such complaint, cannot, in his circumstances, be accepted.

The compound result of all these improbabilities cannot be overlooked. It appears from the judgment of the learned judge that the court a quo was fully aware of the fact that on the main issue the State's case virtually rested on the single evidence of Simpson and further, that he was a police trap. Having considered the legal principles set out in the relevant cases the learned judge went on to say:

"Because of the similarity in the nature of the evidence and the inherent danger

in...../40

in convicting on the evidence of an accomplice and the danger in convicting on the evidence of a trap, it follows that the same factors which may be relied upon in reducing the risk of false incrimination, may safely be relied upon in dealing with the evidence of a trap.

These factors are firstly that the Court should warn itself of the special danger of convicting on such evidence and secondly that the danger or risk of convicting wrongly on such evidence will be reduced if there is corroboration implicating the accused. It will also be reduced if the accused shows himself to be a lying witness. See Rex v. Ncanana, 1948 (4) S.A. 399 at p. 405 (A.D.).

This Court is therefore in duty bound to approach the evidence of Detective Sergeant Simpson with caution keeping in mind the above principles."

In this Court counsel for the accused did not suggest that the court a quo had erred in any way in its approach to the evidence. He did, however, submit that it had erred in its findings of fact and probabilities and that it had further erred "in its endeavours to excuse and explain errors" in Simpson's evidence. In view of what has been set out in paragraphs i. to vii.

above as to Simpson's credibility and in paragraphs

~~(aa) to (gg) in regard to the improbabilities in the~~

accused's version, I find no merit in this submission.

The court a quo said of the accused that it had "not the slightest hesitation in finding that the accused's defence was ingenious but false. It is rejected as not being reasonably true" and went on to say:

"The Court is unanimous in its finding that the accused was an untruthful witness, that Simpson was a reliable and truthful witness and in addition, after consideration of all the evidence, finds that the compound result of the probabilities and the cumulative effect of the evidence are overwhelming against the accused."

The following dicta of Davis, A.J.A., in R.v. Dhlumayo and Another 1948 (2) S.A. 677 (A.D.) at pages 705 are apposite:

"3. The trial Judge has advantages - which ~~the appellate court cannot have - in~~ seeing and hearing witnesses and in being steeped in the atmosphere of the trial. Not only had he had the opportunity of observing their demeanour,

but...../42

but also their appearance and whole personality. This should never be overlooked.

4. Consequently the appellate court is very reluctant to upset the findings of the trial Judge.
5. The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he was.
6. Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial."

The trial court in this case, a judge and two assessors, had the advantages mentioned by Davis, A.J.A., and this Court is not persuaded that its judgment is wrong.

Earlier in this judgment the material conflicts between the evidence of the accused and Simpson were set out in paragraphs lettered (a) to (e). In regard to those conflicts it follows from what has been said above that the State proved that Simpson did not cause the

accused to believe that he did not have diamonds on him;
~~that Simpson did show the two diamonds to the accused in~~

The Steak House; that the deal was concluded that night
and that the accused and Simpson were not discussing on-
ly future transactions; that the R2 000 was handed to
Simpson as payment for the two diamonds; that the dia-
monds were handed to the accused pursuant to a concluded
contract.

In the result the appeal against the convic-
tion on count 1 fails.

After the accused was convicted and pursuant
to an application made by the Attorney-General the lear-
ned Judge a quo acting in terms of section 108 (2) of
Act 73 of 1964, declared the R2 000 to be forfeited to
the State and in terms of section 357(1) of Act 56 of
1955 ordered the accused to pay to the State an amount
of R3 797, being the value of the diamonds handed by
Simpson to the accused.

I turn...../44

I turn to consider the appeal against the sentence.

~~The following were the facts^{rs} placed before the court a~~

quo:

1. The accused is aged 46 and is a first offender. He is a married man. His children are, however, all grown up.
2. He owns the business mentioned earlier in this judgment and his financial commitments are such that if he has to go to gaol he will suffer much financial harm.
3. The loss of the R2 000 is in itself a severe penalty.
4. The order to pay R3 797 to the State is a hardship.
5. This is a trap case and the evidence shows that he did not initiate the events.
6. The accused (this was stated during the trial and again when the accused gave evidence in mitigation of sentence) had been approached frequently since he was seventeen years old by traps and other persons

who...../45

who wished to sell diamonds illicitly and members of
~~his family had, also on several occasions over the~~

years, been approached to buy diamonds and despite the
fact that his wife had telephoned the police when his
daughters were approached to buy diamonds, nothing
came of it.

Counsel urged that the facts set out in paragraph 6
had not been given due weight by the learned Judge a quo.
These facts were stressed in the court a quo before sen-
tence was passed and the learned Judge a quo has stated
that he gave full consideration to everything urged by
counsel. There is no reason to believe that they were
overlooked. It was not suggested by the accused that
because of the frequent attempts to trap him he had even-
tually succumbed. In fact his whole conduct and the
precautions he took show that he was taking a calculated
~~risk.~~ The fact that his wife and children have in the
past been approached to buy diamonds and that the police

did...../46

did not react to reports in this regard does not seem

~~to me to have any bearing upon his guilt. It follows~~

that the factors in paragraph 6 do not assist the accused in regard to sentence.

In this Court no irregularity in the proceedings was contended for. The only misdirection suggested was that the learned judge a quo had lost sight of the factors set out in paragraph 6. That submission as we have seen must fail. It was then urged that having regard to the size of the fine, the loss of the R2 000, and the order to pay the R3 797 and the fact that he is a first offender that the sentence of two years, even though one year was suspended, is so severe as to be disturbingly inappropriate.

In a judgment delivered in this Court on the 23rd September 1975, in the case of S.v.Rabie not yet reported, Holmes, J.A., set out in paragraphs lettered (a) to (h) the guidelines which are of general application when considering

an

appropriate...../47

appropriate sentence. It would be a work of supererogation to repeat them. I proceed to apply the approach set out in Rabie's case.

First the crime. It is a crime which ^{the} legislature regards as very serious as is evidenced by the fact that an accused, who contravenes section 81(a) of Act 73 of 1964, is liable (see section 84(3)) on conviction to a fine not exceeding R10 000 or imprisonment for a period not exceeding fifteen years or to both such fine and imprisonment. The crime is closely akin to that of receiving stolen property knowing it to have been stolen. It is normally made possible only by the dishonesty of mine employees whose thefts from their employers are naturally stimulated by the existence of persons willing to buy diamonds; cf. the remarks of Schreiner, J.A., in R.v. Viviers and Another 1966 (4) S.A. 132 (A.D.) at page 135.

Secondly, the criminal. The accused took a

calculated...../48

calculated risk. He knew full well what he was doing.

~~This is evidenced by the precautions he took to avoid~~

being trapped. Moreover, after Simpson and Fourie had told him they were from Finch Mine and had a hoard of diamonds, he was prepared to buy diamonds. It follows that he was prepared to receive stolen property. He was a man well versed in business and his whole conduct shows that this was not a case in which he acted impulsively or without thought. The negotiations and events took place over a period of from two to three hours.

Thirdly, society. In this regard the following ^{remarks} addressed, by the learned Judge a quo, to the accused are appropriate:

"In a number of recent cases, however, in this Division warnings have been issued that first offenders may be sentenced to imprisonment without the option of a fine. I have very seriously considered Mr Zietsman's submissions because to send a first offender to prison is something which is not easily done.

You must, however, have been well aware that in this area, which is a diamond producing area, illicit transactions

are considered in a very serious light by the Court. The precautions taken by you not to be trapped in this case show that you knew that the matter was serious, and that you were playing with the proverbial fire.

This is also not a case where you have taken the Court into your confidence.

The Judge President of this Division as far back as 1966 pointed out that first offenders are being sentenced to serve terms of imprisonment. I refer to the S.v.Duvenhage reported at page 512, 1970 (2) S.A. In that case the learned Judge in 1966 already said to the accused:

'Ek dink jy weet ook baie goed dat die diamantbedryf in werklikheid die lewensaar van hierdie gebied is en dat optrede soos joune daardie lewensaar skaad.'

Now, the same applies to you: you are well aware of the importance of the diamond industry in Kimberley, which may be considered the focal point of the diamond industry in this country."

The trial judge had full regard to all the factors urged on behalf of the accused. The discretion was pre-eminently his. Having regard to what has been set out above and following the approach set out in

Rabie's case I cannot say that the trial judge erred

in imposing the sentence which he did.

In the result the appeal fails and is dismissed.

J. Galgut
GALGUT, A.J.A.

HOLMES, J.A.)
HOFMEYR, J.A.) Concur.