IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

JACKSON SITHOLE — First Appellant

CLEMENT KUBEKA — Second Appellant

and

THE STATE — Respondent

Coram: MULLER, MILLER, JJ.A. et HOFMEYR, A.J.A.

Heard: 28 November 1978

Delivered: 30 November 1978

J U D G M E N T

MILLER, J.A. :-

The appellants were convicted in the Witwatersrand Local Division of contravening section 84 (1)(a)

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of Act 73 of 1964 by dealing in rough or uncut diamonds. Each of them was sentenced to a fine of R2 500 with the alternative of two years imprisonment and in addition to two years imprisonment conditionally suspended for three years. With leave of the Court a quo they come on appeal against the sentences imposed.

The appellants neither bought nor sold the diamonds involved (said to have a value of R13 546) but acted as "the go-betweens" for the alleged seller and a purchaser. I say "alleged seller" because the mooted seller was, unknown to the appellants, in truth a policeman masquerading as a pro= spective seller. The main object of the trap was, appa= rently, to bring home a charge under the Act against a person or persons whom the police believed or suspected to be engaged in illicit transactions of that kind and with whom they believed the appellants to have some contact. In the result, the trap failed in the sense that the purchaser contrived to get away with the diamonds, resulting in substan= tial loss to the State. The appellants were thereupon charged in respect of their part in the transaction, which was un= doubtedly an /important .....

important and unlawful part.

The first appellant is 55 years old and the second 56 years. They were at the time of commission of the offence employed by the same employer, the first appellant as a domestic help and the second as a chauffeur. They had both been so employed by the same employer for very many years; first appellant for some 34 years and the second appellant for 30 years. First appellant earned a salary of R60 per month and second appellant R100 per month. Neither of them had any previous conviction of any kind. When passing sentence, the learned Judge a quo made, inter alia, the following observations:

> "Consideration should be given to the fact that all those involved in this transaction should not look upon this transaction as a worthwhile commercial risk. If a comparatively moderate fine were to be imposed, nobody would feel hurt by the effects of the sentence. I must, however, not allow the fact that the police

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> plan probably miscarried weigh too much with me. I will endeavour to keep you out of jail because of your clean records and because of your age; but I am bound to impose a heavy fine, a fine which ordinarily neither of you would be able to pay out of your own resources. I will impose such fine to try to keep you out of jail; otherwise I would have sentenced you to jail without the option of a fine."

The evidence of the appellants' monthly earnings is the only evidence on record as to their financial position. It is manifest that if they have no assets or other source of income, the fine imposed on them is far beyond their means to pay. The opportunity of keeping out of gaol which the learned Judge decided to afford them because they were first offenders and of fairly advanced age, would then be wholly illusory. Furthermore, the learned Judge recognized that they would "ordinarily" not be able to pay the fine "out of their own resources". A possible explana= tion of this rather enigmatic situation appears to be that the learned Judge had a notion that the fine might be paid

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not out of the resources of the appellants themselves but by another or others. There are indications pointing in that direction and Mr Duke, who appeared for the appellants at the trial and on appeal explained that in the course of argument at the trial the possibility of payment being made by others was discussed. But be all that as it may, it is clear (and this was conceded by Mr Fourie, who appeared for the State) that the sentences imposed should not, in the circumstances of this case, be allowed to stand. When a Court has decided that a con= victed person ought to be afforded the opportunity of staying out of gaol by giving him the option of paying a fine, it should not impose a fine which to its knowledge or belief is utterly beyond the means of such person to pay. (See per Ramsbottom, J., in R v Nhlapo 1954 (4) SA 56 (T) at p 58 F - G; and see S v Kapweja and Others 1975 (2) SA 541 (AD) at p 548 F - G. In the last-named case the sentence was left undisturbed but the circumstances were substantially different.) When

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it has been decided to give a convicted person the option of a fine, there should be some purposeful inquiry into his means in order to enable the Court to make a proper assessment of what an appropriate fine, in the particular circumstances, would be. (Nhlapo's case, ibid.)

The problem as to what should now be done in this case was canvassed in argument before us. It appears to me that the indicated course would be to set aside the sentence and remit the case to the Court a quo for the purpose of ascertaining such further facts as to the appellants' financial resources as it may be able to and reconsidering the whole question of sentence thereafter. Mr Duke was not averse to that course being followed and Mr Fourie conceded that that was the procedure of choice and supported it.

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The appeal against sentence succeeds.

The sentences imposed by the Court a quo are set aside and the matter is remitted to that Court for the purpose of passing sentence afresh after hearing such further evidence and argument as may be presented to it relative to the financial resources of the appellants or relevant in any other respect to the question of sentence.

S. MILLER

JUDGE OF APPEAL

MULLER, J.A.)
HOFMEYR, A.J.A.) CONCUR