Case No 734/92

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

MALIZO NGOXANE Appellant

and

THE STATE Respondent

CORAM: VAN HEERDEN, KUMLEBEN et HOWIE JJA

HEARD: 15 February 1994

ORDER MADE: 15 February 1994

REASONS DELIVERED: 17 February 1994

REASONS FOR JUDGMENT

HOWIE, JA .....

HOWIE JA,

Appellant and another man (accused no 1) were convicted in a regional court of fraud and sentenced to three years' imprisonment, of which two years were conditionally suspended. Appellant's appeal to the Cape of Good Hope Provincial Division against his conviction and sentence was unsuccessful but that Court granted him leave to pursue the present appeal. At the conclusion of the hearing in this Court the appeal was dismissed, the reasons to be handed in later. The reasons follow.

It was common cause or not in dispute that on 24 September 1990 a meeting took place at Kuilsriver between Detective Warrant Officer Visagie of the Police Gold and Diamond Squad, accused no 1 and appellant, who was then a constable in the Police force stationed in Guguletu. Neither policeman knew at that stage that the other was a member of the force. Visagie had received information

that accused no 1 was in possession of one and a half bars of unwrought gold which he wanted to sell. Visagie made contact with accused no 1 who told him that the gold had been brought to Cape Town by a friend who worked on a gold mine at Welkom. Visagie accordingly arranged with accused no 1 for the meeting to take place.

In the interim the sale of the bars had also been discussed between accused no 1 and appellant. To their knowledge the metal concerned was not gold at all. Pursuant to their discussion appellant accompanied accused no 1 to the meeting and was introduced by the latter as the friend from Welkom. They did not take the bars with them, intimating that they first wished to talk to Visagie. In the ensuing conversation appellant named a price of R150 000. Visagie said he wanted to see the gold before he would buy. The upshot was that they agreed to meet in Sea Point the next day to take the matter further.

By this stage it was Visagie's intention to trap accused no 1 and appellant and he enlisted the aid of two colleagues to help him put this plan into effect.

On 25 September Visagie drove alone to the appointed place and waited in his car. His colleagues travelled separately and parked close by. Accused no 1 appeared and got into Visagie's car, carrying a bag. Appellant arrived later and also entered Visagie's car. He had meanwhile spotted the men in the nearby car and asked if they were Visagie's friends. Visagie denied it. Accused no 1 then produced one metal bar from the bag, explaining that the other one had been taken from where they had hidden it. Visagie asked if it was gold and received an affirmative answer. Having thereafter agreed on the price, Visagie alighted on the pretext that he wanted to take a closer look at the gold. He signalled to his colleagues and on their arrival he announced that it

was a police operation. Appellant's immediate response was that there was nothing to worry about as the metal was not genuine gold. He and accused no 1 were than arrested. A short while afterwards appellant disclosed to his arrestors that he was a policeman but this did not divert them from their course.

Later scientific investigation established that the subject of the sale was indeed not gold and appellant and accused no 1 were duly prosecuted for fraud in having represented that it was. When pleading not guilty at the trial - where he was represented by counsel - appellant claimed for the first time that his purpose in selling the "gold" was to arrest Visagie for illicit gold dealing and to this end he employed accused no 1 as a trap.

Visagie was the sole State witness. The essential features of his evidence are contained in the outline just given. Appellant's evidence was an

elaboration upon his plea explanation.

The regional magistrate concluded, by reason of various improbabilities and contradictions in appellant's evidence, that it had to be rejected as beyond reasonable doubt false. A study of the record demonstrates that despite the contentions of appellant's counsel in this Court (he was not counsel who appeared at the trial) the regional magistrate's conclusion was wholly justified.

First and foremost there is appellant's omission to disclose upon arrest, or at any subsequent time preceding his trial, that he was himself engaged upon a trapping operation. He was a man with eleven years' service in the Police force and he professed to have conducted such operations before. It is unthinkable that he would have refrained from revealing his true role, especially given the extraordinary coincidence that Visagie was similarly engaged. Questioned about this omission,

appellant alleged that he had hardly been confronted by Visagie and his colleagues when they vigorously prevented his tendering any explanation at all. This allegation was first made by appellant when testifying under cross-examination. It was not put by his counsel to Visagie. Later in his evidence appellant did admit having had the opportunity to say his piece while he was being charged at the police station but he advanced the excuse that he had by then resolved, by reason of the denial to let him say anything initially, to say nothing at all. That is not only grossly improbable, it is patently incredible.

Another unlikely feature of appellant's story is his statement in evidence-in-chief that when he saw the two men in the nearby car he saw that they were policemen and immediately suspected that what he was involved in was a police trap. Had that really been the case there would obviously have been no point in pursuing his own plans and

he would have revealed his hand to Visagie. At the latest he would have done so when Visagie himself turned out to be a fellow policeman. Perhaps because appellant came to realise later in his evidence how lame this aspect of his account was, he changed it by saying that he suspected, not knew, that the other two men were policemen but that in any event, he did not think that they were connected with Visagie or the "gold" sale.

Visagie testified that Police procedure confined trapping in gold and diamond matters to the Gold Squad and then only after its commanding officer had given approval. Appellant said that he was aware of the existence of the Squad but thought that he was free to arrange a trap on his own initiative, even without informing his own commanding officer. This is inherently improbable given appellant's lowly rank and the specialist nature of the offences and investigations falling within the sphere of operations of

the Gold Squad.

It remains to say that apellant's evidence was inconsistent and far-fetched regarding the circumstances in which he came to be involved with accused no 1 and how the latter came to possess the metal bars in question.

It follows from the warranted rejection of appellant's evidence that his conviction was in order.

As regards the matter of sentence, the mitigating circumstances are that appellant has no previous convictions; that he had, before dismissal resulting from this offence, served in the Police force for eleven years; and that no real loss was sustained. On the other hand there is undoubted aggravation in the fact that appellant, as a guardian of the law, resorted to serious criminal conduct; that such conduct was premeditated; and that it was manifestly prompted by the prospect of monetary gain, without any suggestion that appellant was in straitened

financial circumstances.

It has not been shown that the trial Court misdirected itself in relation to the facts relevant to sentence and consequently no ground for interference exists.

For these reasons the appeal was dismissed.

C T HOWIE, JA

Van Heerden) Kumleben) Concurred