Case No 18/99

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of:

ABRAHAM SPIES
First Appellant

CHRISTOFFEL KRITZINGER Second Appellant

and

THE STATE
Respondent

CORAM: SMALBERGER, OLIVIER JJA and FARLAM AJA

DATE OF HEARING: 15 February 2000

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Criminal Procedure: Right to fair trial. Whether pre-trial conduct of police breached accused's right to fair trial

J U D G M E N T

/FARLAM AJA. . .

FARLAM AJA

[1] The appellants in this matter were convicted in the regional court sitting at Springbok on a charge of dealing in rough and uncut diamonds in contravention of section 20 of the Diamonds Act 56 of 1986.

[2] The first appellant was sentenced to a fine of R40 000 or three years imprisonment plus a further three years imprisonment. The second appellant was sentenced to a fine of R90 000 or three years imprisonment plus a further three years imprisonment suspended for five years on condition that he is not convicted of a contravention of sections 18, 19(1) or 20 of the Diamonds Act committed during the period of suspension.

[3] The first appellant appeals against both his conviction and the sentence imposed upon him. The second appellant only appeals against his conviction.

[4] At the commencement of the trial the appellants pleaded not guilty to the charge and made a written statement in terms of section 115 of the Criminal Procedure Act 51 of 1977 in which they placed the elements of the offence as alleged in the charge sheet in dispute and called upon the State to prove them.

In addition they made the following allegations:

(1) that the police investigation in the case was grossly irregular and unfair;

(2) that the evidence of the State was irreparably contaminated by the way in which the investigation was conducted by the police;

(3) that the State did not come to court with clean hands; and

(4) that a fair trial had been made impossible.

[5] After the appellants' counsel had read out their plea explanation and addressed the court shortly in elucidation thereof, he asked the court to order disclosure to the defence of the contents of a

departmental file which related to the appellants and which had been opened long before the day on which the appellants had been arrested. He explained that the first entries in the police docket, which had been disclosed to the defence, were made after the appellants were arrested but that, as what he called the "process" leading up to the appellants' arrest began a long time before the arrest, there had to be other notes which had to be disclosed to the appellants. He stated that the prosecution had informed him that there was another file on the case which contained witnesses' statements, at least one of which was not in the police docket, and a complete investigation diary which apparently contained far more information than appeared in the investigation diary in the police docket. This file, which the appellants' counsel called "the secret file", had been withheld from the prosecution until the morning when the trial was due to begin.

[6] In reply the prosecutor stated that he had been instructed by the senior public prosecutor not to make the departmental file available to the defence. He stated that he had only had a brief opportunity to peruse the contents of the file and asked for an adjournment to enable him to study the file properly. The adjournment asked for was granted and thereafter the prosecutor stated that he had given a copy of the file to the defence which had also been afforded the opportunity to look at the originals. The appellants' counsel then asked for a further adjournment to enable him to study the file and stated that it had been agreed between the prosecution and himself that the investigating officer would be called first and that he intended referring in the course of his cross-examination of the investigating officer to the contents of the file.

[7] After the appellants' counsel had been given the

opportunity he requested to study the file, the prosecutor called, as his first witness, the investigating officer Captain S W Lang, who was the second in command of the Diamond and Gold Branch of the S A Police Service in Springbok. He stated that after certain preliminary investigations, which had been done by Sergeant Groenewald and a police informer, had revealed that the first appellant and another person were interested in an illegal diamond transaction it was decided to launch a trapping operation in which State diamonds to the value of R446 363 were to be offered for sale to the first appellant and the other person.

On the 21st October 1995, 42 uncut diamonds were handed by his colleague Captain Van Niekerk to Detective-Sergeant Farmer while 38 uncut diamonds were handed over to Sergeant Groenewald. The witness, Captain Van Niekerk, Inspector Meeding, Detective-Sergeant Farmer and Sergeant Groenewald thereupon proceeded to the hotel at Nababeep where Farmer and Groenewald had reserved a room while the witness, Van Niekerk and Meeding reserved another . Some time later Groenewald and the second appellant came out of the room which had been reserved by Farmer and Groenewald.

The witness went into the room where he found the first appellant, Farmer and the police informer. Thereafter Van Niekerk, Groenewald, Meeding and the second appellant also came into the room. After Groenewald had made a report of what had happened from the time of the preliminary investigation to which I have referred until the transaction which preceded the departure of Groenewald and the second appellant from the room, Farmer, Groenewald and the appellants were searched. Farmer and the first appellant had nothing of interest in their possession. Groenewald had R150, which had been in his possession before he went to the hotel, and a piece of paper on which was written the first appellant's telephone number. The second appellant was in possession of an envelope containing the diamonds which had earlier been handed over to Groenewald and Farmer. Also in the room was a briefcase in which were found a pistol belonging to the first appellant, an electronic diamond testing device, a diamond scale, a jeweller's magnifying glass and a piece of paper on which calculations had been made. Farmer then took out of a cupboard in the room a plastic bag containing R145 000.

The witness stated that the appellants were arrested together with the informer, against whom the charge was

subsequently withdrawn.

[8] In his cross-examination of Captain Lang counsel for the appellants confined his questions in the main to the departmental file, the way the witnesses' statements had been drawn up and the fact that the witnesses had conferred together before the trial so as to eliminate discrepancies in the evidence they were to give.

[9] At no stage was the appellants' version as to the events of the 21st October 1995 put to the witness nor was it suggested that his evidence as to what happened on that day in the presence of the appellants was incorrect.

[10] What emerged during the cross-examination of the witness was that the statements of the State witnesses were all signed on or after the 11th October 1995 after the witnesses had conferred together in an attempt to ensure that they did not contradict each other in their evidence. (Whether two witnesses got together for this purpose and then two others or all five State witnesses had what can be described as a joint conference for this purpose is not clear - but nothing turns on the point.) Thereafter the witnesses' statements were given various dates from the 30th October to the 2nd November 1995, plainly to create a false impression that they were made separately and on different occasions.

[11] In addition to Captain Lang four other witnesses testified for the State, viz Captain van Niekerk, Sergeant Groenewald, Detective- Sergeant Farmer and Inspector Meeding.

[12] On the merits Van Niekerk's evidence covered the same ground as that of Lang which I have already summarised. Once again the appellants' counsel confined his cross-examination to topics similar to those covered during his cross-examination of Captain Lang and did not deal with the events which led up to the arrest of the appellants in the hotel room in Nababeep on the 21st October 1995.

[13] Sergeant Groenewald testified that on the 19th October 1995, that is to say two days before the arrest of the appellants at the hotel at Nababeep, he and the police informer went to Kuruman where they met
first appellant and another person and it was arranged that a further meeting would take place on the 21st October 1995.

On the 21st October, as Captain Lang had testified, 38 uncut diamonds were handed to him and 42 to Farmer. He and Farmer then proceeded to the Nababeep Hotel. At about 1.15 pm

the first appellant and the informer came to the hotel room where he and Farmer were. Later the second appellant joined them. He was carrying a briefcase. He asked where the diamonds were, whereupon the witness asked him where the money was. The first appellant opened the briefcase which was full of notes. The transaction was then discussed.

At the request of the second appellant the diamonds were produced. The second appellant weighed them and told the first appellant how many carats there were, which first appellant then wrote down on a piece of paper. The second appellant tested the diamonds with a diamond tester and said that they were of good quality. After all the diamonds had been weighed and tested the second appellant asked how much Groenewald and Farmer wanted for them. Groenewald replied that they were looking for an amount of R450 000. The second appellant said that this was too much and that he knew that the Portuguese were willing to pay R600 per carat and that he was willing to pay R800 per carat. After further discussion a price of R200 000 was agreed upon. The money in the briefcase was then counted by Farmer, who said it was R145 000, whereupon it was agreed that the second appellant would bring the remaining R65 000 to the witness the following week. (The difference between the amount paid over and the agreed price was actually R55 000, the amount of R65 000 being an adding mistake made by one of the parties.)

Farmer then put the money in a plastic bag which he placed in a wardrobe in the hotel room. The second appellant put the three packets of diamonds in an envelope and pushed it into his underpants. The witness and the second appellant then left the room after which the witness gave the pre-arranged signal. Van Niekerk, Lang and Meeding then appeared. Shortly thereafter the appellants were arrested.

[14] Although the cross-examination of Groenewald was devoted in the main to the compilation of his statement in collaboration with Farmer, the discussions he had with Farmer in an attempt to ensure that there were no discrepancies in their evidence and the fact that he studied his statement carefully before giving the

evidence, he was also asked a few questions about what happened on the 21st October 1995. One of the questions related to whether liquor was consumed in the hotel room. He conceded that this was correct and that he thought that everyone in the room had drunk brandy, if he remembered correctly. He explained that he had drunk liquor, although he was on duty, because he was posing as a "smokkelaar". He was also asked about the computational error in terms of which there was an outstanding balance of R65 000 instead of R55 000 on the purchase price. He replied that he realised at the time of the transaction that the amount of R65 000 was incorrect but as he knew it would never be paid over he did not bother to put it right. He was also asked who handed the money over to Farmer. His answer was the first appellant did so by throwing it out from the briefcase onto the bed and telling Farmer, who was sitting on the other side of the bed, to count it.

The appellants' version in respect of the merits was not put to the witness.

[15] It is unnecessary to summarise the evidence of Detective-Sergeant Farmer because he added nothing to the version of events given by the previous State witnesses. Once again the appellants' counsel refrained in the main from questioning him on the merits of the matter and concentrated his attack on the manner in which the witness's statement was prepared together with that of Groenewald and the fact that he studied it carefully, in order, as he said, to refresh his memory before he testified to it but, as in the case of Groenewald, there was some limited cross-examination on the merits. Counsel asked Farmer whether liquor was consumed in the hotel room. The

witness stated that the appellants ordered a bottle of liquor and that he and Groenewald each drank about two tots of liquor. The appellants' counsel also put it to the witness that the money was not handed over to him by the appellants. The witness replied that first appellant threw the money out from the briefcase onto the bed and said that the money was there. The appellants' version on the merits was not put to him.

[16] The last witness for the State was Meeding, who added nothing to what had been covered in the evidence of the earlier witnesses. He also was not cross-examined on the merits.

[17] After he testified, the State case was closed whereupon the appellants' counsel closed the defence case without calling any evidence.

[18] The regional magistrate who tried the case came to the conclusion that the contention that the conduct of the police had entailed a denial of the appellants' fundamental right to a fair trial could not be sustained. He was satisfied that the version of events given by the police witnesses, which was uncontradicted, was corroborated by the fact that it appeared to be common cause that the money confiscated by the police belonged to the second appellant and also by the evidence of the other goods seized after the arrest of the appellants. He was accordingly of the view that "any danger which might have been said to be inherent in the approach of the police to the effect that the combined version was possibly untrue or so unreliable that there was no prospect of the accused's being guaranteed a fair trial can safely be dismissed."

[19] An appeal to the Cape Provincial Division of the High Court was dismissed. In the course of her judgment Traverso J, with whom Louw J concurred, said that the question as to whether an accused's fundamental right to a fair trial has been breached will depend on the facts of each case. In this regard reference was made to the statement made by Kriegler J in *Key v Attorney General, Cape Provincial Division and Another*, 1996 (4) SA 187 (CC) (at 195 G -

196 B, para [13]), in the context of the admissibility of unconstitutionally obtained evidence, which is in the following terms:

> "In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin,* fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtain unconstitutionally, nevertheless be admitted."

[20] The learned judge in the court *a quo* dealt with the question as to whether in this case appellants' right to a fair trial had been breached as follows:

> "Die enigste vraag wat gevra moet word is of die optrede van die polisie met betrekking tot die wyse waarop die beëdigde verklarings saamgestel is tot gevolg het dat die beskuldigdes se reg tot `n billike verhoor

> dermate aangetas is dat die appellante sondermeer vrygespreek moet word of dat die getuienis nie toegelaat moet word nie. Gesien die feit dat die getuienis onaangeveg staan en die getuies deurgaans die waarheid van hulle getuienis bevestig het, kan daar by die opweging van die belange van die beskuldigde aan die een kant en die belange van die gemeenskap aan die ander kant nie gesê word dat die beskuldigde se reg tot `n regverdige verhoor dermate aangetas is dat die skuldigbevinding en vonnis ter syde gestel moet word nie. Mnr. Du Toit het aangevoer dat in die omstandighede die getuienis van die Staatsgetuies nie behoorlik getoets kan word nie. Ek kan nie saamstem dat dit so is nie. Waar `n getuie toegee dat hy en sy getuies weersprekings in hulle getuienis "uitgestryk" het, is dit tog manna uit die hemel vir enige kruisverhoorder. Maar in hierdie geval word daar nie eers gepoog om die Staatsgetuies te kruisverhoor oor die meriete nie."

[21] On appeal to this Court the appellants' counsel submitted that the convictions of both the appellants as well as the sentences imposed should be set aside. He contended that both the trial court and the court *a quo* underestimated the seriousness of the police conduct and the absence of pre-trial fairness in investigatory methods and that it should have been held that what was called the "orchestrated irregular method of police investigation" was so serious as to disenable the appellants from enjoying a fair trial and that both the appellants should have been found not guilty.

[22] In support of these submissions reliance was placed on the decision of this Court in *S v Ebrahim* 1991 (2) SA 553 (A), as well

as the decision of the Cape Provincial Division in *S v Nortje* 1997 (1) SA 90 (C) and a dictum by Edeling J, with whom Van Coppenhagen J concurred, in *S v Hayes en `n Ander* 1998 (1) SACR 625 (O) at 630 g.

[23] In *S v Ebrahim, supra*, the accused was abducted from a foreign state by agents of the South African State and handed over to the police in South Africa where he was detained and later charged with treason, convicted and sentenced. On appeal to this Court it was held that the court in which Ebrahim was convicted lacked jurisdiction to try him because his abduction was unlawful. The rule of the Roman Dutch law that a court before which a person who had been illegally arrested in another area of jurisdiction by agents of the state in which the prosecution was to take place had no jurisdiction to try him is still, so it was held, part of our law: see the reported judgment at 579 F - G and 582 B.

> At 582 D - E the following was said:
> "Wanneer die Staat self `n gedingsparty is, soos byvoorbeeld in strafsake, moet dit as `t ware 'met skoon hande' hof toe kom. Wanneer die Staat dan self betrokke is by `n ontvoering oor die landsgrense heen soos in die onderhawige geval, is sy hande nie skoon nie."

[24] I do not think that that passage can assist the appellants in the present matter. Ebrahim had been abducted, as the Court found, by agents of the South African State and his appearance before the trial court was a direct result of that abduction, which, in terms of the common law rule to which the Court referred, meant that the trial court lacked jurisdiction. The State as prosecutor was tainted by the illegal abduction with which the State itself was directly concerned.

[25] The facts of this case differ *toto caelo* from those in the *Ebrahim* case. The appellants were lawfully before the court. The

prosecution was in no way involved in, or to be held responsible for, the conduct of the police: to use the metaphor employed in the *Ebrahim* case, it cannot be said that the hands of the prosecution in this case were not "clean".

[26] The facts in the *Nortje* and *Hayes* cases were similar. In both cases persons who would not otherwise have participated in the purchase of uncut diamonds did so after improper pressure had been brought to bear upon them (see the *Nortje* case *supra* at 102 B and the *Hayes* case *supra,* at 632 c - g).

[27] In the *Hayes* case a similar *modus operandi* as in the present case was followed by the police in regard to the preparation of the witnesses' statements, particularly so as to eliminate discrepancies. After quoting the evidence on the point Edeling J said (at 630 g):

> "Hierdie getuienis is op sigself moontlik genoegsaam om te bevind dat die appellante se reg op `n regverdige verhoor daardeur verydel is."

This was not, however, the basis for the upholding of the appeal in that case. As in the *Nortje* case the conviction was set aside because the accused were induced to commit the crime of which they were convicted because of fundamentally unfair police procedures.

[28] I do not think that it can be said that the appellants in this case were induced to purchase the diamonds in question because of fundamentally unfair conduct on the part of the police. The appellants' counsel submitted that the trap was unfair because diamonds worth over R450 000 were sold for R200 000 and were in

fact handed over when only R145 000 had been paid. But this submission overlooks the evidence that the diamonds were offered for sale at a price of R450 000 and it was the appellants who had brought the price down by offering R800 per carat and referring to other buyers who only paid R600 per carat. There was no inordinate or unfair pressure or enticement and it was clear from the equipment brought by the appellants before they knew what price was to be agreed on that they had come to Nababeep with the intention of buying uncut diamonds.

[29] I now turn to the contention advanced on behalf of the appellants to the effect that their constitutional right to a fair trial was breached and that this breach was so fundamental that their conviction should be set aside without reference to the merits of the case.

[30] In this case the fact that the statements of the State witnesses were identical and obviously the product of a collaborative effort was known to the defence before any evidence was led. Copies of both police docket and the departmental file were in the possession of the defence at that stage and the appellants' counsel had been given an opportunity to study them. The fact that the witnesses had conferred together so as to eliminate discrepancies was brought out at the trial as well as the fact that the dates of the statements in the docket were incorrect. As Traverso J correctly said in her judgment in the court below the concession made by the witnesses that they ironed out discrepancies in their evidence really amounted to manna from heaven for any cross-examiner.

[31] In the present case, as indicated above, the appellants included in their plea explanation in terms of section 115 of Act 51 of 1977 the allegation that a fair trial had been made impossible. Notwithstanding this they pleaded to the charge and the trial proceeded. At the end of the trial the magistrate was satisfied that the appellants had not been deprived of their right to a fair trial because of the pre-trial conduct of the police.

[32] The question that arises for consideration at this stage is

whether the appellants had a fair trial.

[33] The factors relied on by the appellants in support of their contention that their right to a fair trial was breached were brought to the attention of the magistrate during the trial. If anything, they might well have served to make it more difficult for the State to prove its case because, if there had been conflicts of fact between the State and the defence which the magistrate had had to resolve, he might well have been unable to find that the State version was to be accepted beyond reasonable doubt. This would have been because of the necessity to make allowance for the fact that the actions of the police witnesses when their statements were recorded and the preparations they had made thereafter to ensure that their evidence did not contain discrepancies and contradictions might have hampered the defence in the presentation of the appellants' case. I do not think that the conduct of the police in this matter, however undesirable or open to criticism it might have been , rendered it impossible for the appellants to have a fair trial. On the contrary, I am satisfied that their trial was fair and that the magistrate was obliged on the evidence, in the absence of any contrary version put forward by the defence which gave rise to a reasonable possibility that the appellants were not guilty, to find them guilty as charged.

[34] In my view the appellants' appeals against their convictions must fail.

[35] It remains to deal with the first appellant's appeal against the sentence of three years imprisonment imposed upon him in addition to the fine of R40 000 (or three years imprisonment).

[36] Unlike the second appellant, who was a first offender, the first appellant had a previous conviction for contravening section 20 of the Diamonds Act in respect of which he was sentenced on the 26th June 1992 to a fine of R4000 or 18 months imprisonment, plus 18 months imprisonment suspended for five years on condition that he was not again convicted of an offence of, *inter alia*, contravening section 20 of the said Act.

[37] The appellants' counsel was not able to point to any

misdirection on the part of the magistrate which vitiated the sentence imposed in respect of the first appellant. It follows that the test to be applied on appeal against the sentence is that set out in *S v Pieters* 1987 (3) SA 717 (A) at 734 E, *viz* whether the trial court could reasonably have imposed the sentence it did. I cannot find that the trial court could not reasonably have imposed a sentence of imprisonment in respect of the first appellant nor can I find that the period imposed was unreasonable in the circumstances.

[38] The following order is made:
The appeals of both appellants are dismissed.

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I G Farlam
Acting Judge of Appeal

SMALBERGER JA)
OLIVIER JA) CONCUR