THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 726 / 07

In the matter between:

ANTONIO CESAR ALVES DOS SANTOS **First Appellant**
SIKHOSIPHO DERICK MBATHA **Second Appellant**

and

THE STATE **Respondent**

Neutral citation: ***Dos Santos and another v The State*** **(726/07) [2010] ZASCA 73 (27 MAY 2010)**

BENCH: **CLOETE and PONNAN JJA and MAJIEDT AJA**

HEARD: **3 MAY 2010**

DELIVERED: **27 MAY 2010**

CORRECTED:

SUMMARY: Diamonds Act 56 of 1986 – convictions of dealing in unpolished diamonds. Prevention of Organised Crime Act 121 of 1998 (POCA) – pattern of racketeering – requires proof of a fact which a conviction of the Diamonds Act does not – no improper splitting of charges. Evidence – admissibility of seized items pursuant to an admittedly defective warrant – s 35(5) of the Constitution does not provide for an automatic exclusion of evidence obtained in violation of an accused's rights – fairness requires that a balance be struck – accomplices – exercise of caution must not be allowed to displace common sense – circumstantial evidence - not to be approached piece-meal. Sentence – grossly divergent sentences between the two appellants – disturbingly inappropriate – warranting appellate interference.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Le Grange AJ sitting as court of first instance):

(1)(a) The first appellant's convictions for contravening s 21 of the Diamonds Act 56 of 1986 are altered to convictions for contravening s 20 of that Act.

(b) Save as is set out in para 1(a), the first appellant's appeal is dismissed.

(2)(a) The second appellant's conviction for contravening s 21 of the Diamonds Act 56 of 1986 is altered to a conviction for contravening s 19 of that Act.

(b) Save as set out in para 2(a), the second appellant's appeal against his conviction is dismissed.

(c) The appeal of the second appellant against sentence succeeds to the extent that the sentence imposed on him is set aside and in its stead is substituted the following:

> 'Accused number 6 is sentenced to pay a fine of R 20 000 or in default of paying the fine to a term of imprisonment for a period of one year of which R 10 000 or six months' imprisonment is suspended for a period of five years on condition that he is not convicted of a contravention of sections 18, 19, 20 or 21 of the Diamonds Act 56 of 1986, committed during the period of suspension'.

JUDGMENT

PONNAN JA (JA and AJA concurring):

[1] Port Nolloth, notwithstanding its relatively small community of approximately

12 000 residents and some 220 businesses, has become, so the evidence suggests, a hotbed of illicit diamond dealing and related activity. The reason is not hard to find - it is its proximity to rich veins of alluvial diamonds, established diamond mines and mining houses. It and other towns close to the Namibian border have witnessed a proliferation of diamond dealing syndicates. Because of the corrupting and generally corrosive influence that with time becomes all too pervasive in such communities, a task team of the now disbanded Directorate of Special Operations commonly known as the Scorpions, under one of its special investigators, Koos Jooste, was established. It was not the only operation of its kind, nor was it the first. It followed the South African Police Service (SAPS) operations such as Steenbra and Solitaire in that general geographical area.

[2] For reasons that are not necessary to recount, the first appellant, Tony dos Santos, became the focus of this particular task team. On 17 January 2003, the task team sought and obtained from the judge designated in terms of s 31 of the Interception and Monitoring Prohibition Act[1] an order in terms of s 2(2) authorising a surveillance operation of Tony's Auto Spares, a business enterprise managed and operated by the first appellant in Port Nolloth. Given that the premises housing Tony's Auto Spares was secured by a high perimeter wall and monitored by CCTV cameras, Jooste secreted a pinhole camera in what came to be described in the evidence as the ‘buyer’s room’ of the building. From it, video images and audio feed was transmitted by radio link, in real time, to a house approximately one and a half kilometres away. There some members of the task team in addition to recording what was being transmitted onto video tapes, viewed the live feed on a monitor. Moreover, each of the monitoring crew maintained a log in which they made contemporaneous notes of what they witnessed and heard as it unfolded on the monitor in front of them.

[3] Unbeknown to the task team, the first appellant had also attracted the attention of a unit of the SAPS. On 22 February 2003 that unit, armed with a search warrant that had been issued by the Regional Court President of the Cape Regional Division the previous day, conducted a search of Tony's Auto Spares and an adjoining residential

1 Act 127 of 1992.

unit that was housed under the same roof. The SAPS seized 153 unpolished diamonds (including one partly polished diamond), cash to the value of R55 000.00 and diamond dealing paraphernalia such as a diamond scale, loupe, tweezers and pieces of paper with diagrammatic representations of diamonds and calculations on them. The first appellant was arrested, charged and released on bail. By that stage the task team had had the first appellant under close observation for approximately one month.

[4] On 25 June 2003, Jooste sought and obtained, in terms of s 29 of the National Prosecuting Authority Act,[2] a warrant authorising the search of Tony's Auto Spares and the first appellant's home at Karee Avenue, Port Nolloth and the seizure of items suspected of being connected to contraventions of inter alia the Diamonds Act[3] and the Prevention of Organised Crime Act (POCA).[4] By 4 July 2003 Jooste had resolved given the information that had been secured pursuant to the surveillance operation that the time was ripe for him to execute the warrants. He thus deployed three units at approximately 9pm to keep watch at Tony's Auto Spares, the first appellant's home, as well as the local cemetery that the first appellant had taken to frequenting. Shortly before midnight the first appellant was observed entering Tony's Auto Spares. All three units descended on those premises. The warrant was served on the first appellant and in his presence his business, the entire building housing Tony's Auto Spares and the adjoining residential unit were searched. A video cassette recorder was employed to record the search. The search proceeded into the early hours of the next morning. Various items were seized and the first appellant was arrested and taken into custody. The next afternoon the first appellant accompanied members of the investigating team to his home, which, in his presence, was also searched. Once again various items were seized. In total the second search yielded 24 unpolished diamonds and further diamond dealing paraphernalia.

[5] The first appellant was the first of nine accused indicted in the Cape High Court on a host of statutory contraventions. The broad hypothesis sought to be advanced by the State was that each of the accused to different degrees were parties to a pattern of

2 Act 32 of 1998.
3 Act 56 of 1986.
4 Act 121 of 1998.

racketeering activity. The alleged activity consisted in the planned, ongoing, continuous or repeated participation or involvement in contraventions of the Diamonds Act. In all, the first appellant was charged with 61 counts of contravening the Diamonds Act, six counts of contravening the Riotous Assemblies Act[5] (conspiracy to commit a crime) and two counts of contravening POCA (conducting or participating in racketeering activity or managing an enterprise used for racketeering).

[6] The second appellant, Derek Mbatha, who had come to be identified in consequence of the surveillance of the first appellant as one of the alleged role players in the illicit diamond trafficking enterprise, was arrested approximately one year after the first appellant on 3 June 2004. He was charged with three counts – one of contravening the Diamonds Act (dealing in unpolished diamonds), one of contravening the Riotous Assemblies Act (conspiracy to commit a crime) and one of contravening POCA (conducting or participating in racketeering activity or managing an enterprise used for racketeering).

[7] A protracted trial ensued. In all some 27 witnesses testified for the State. At the close of the State case all of the accused bar the two appellants were found not guilty and discharged. Neither of the appellants testified in their defence. At the conclusion of the trial before Le Grange AJ (sitting with assessors) the first appellant was convicted on five charges of dealing in unpolished diamonds in contravention of s 21(b) of the Diamonds Act and one charge of conducting or participating in racketeering activity in contravention of s 2(1)(e) of POCA. The second appellant was convicted on one count of dealing in unpolished diamonds in contravention of s 21(a) of the Diamonds Act. On the convictions in terms of the Diamonds Act: before us it was common cause that the first appellant ought correctly to have been convicted under s 20 and the second appellant under s 19. Nothing, however, turns on this. On the racketeering conviction the first appellant was sentenced to a term of eight years' imprisonment and in respect of the five contraventions of the Diamonds Act he was sentenced to 12 months' imprisonment on each count. Those latter sentences were ordered to run concurrently with the first. The first appellant's effective sentence was thus eight years'

5 Act 17 of 1956.

imprisonment. The second appellant was sentenced to a fine of R20 000 or imprisonment for a term of four years, half of which was conditionally suspended. The appeal in each instance against the convictions and sentences is with the leave of the court below.

[8] The cornerstone of the State case was the evidence of the brothers Basson – Tim and Aubrey. Both were accomplices who were warned in terms of s 204 of the Criminal Procedure Act[6] (CPA). The former had been in the first appellant's employ for some nine years prior to his arrest. On 24 January 2003, Tim contacted the first appellant telephonically and informed him that his brothers Aubrey and Andre, who were then employed by Alexkor mine, sought a meeting with him. The purpose of that meeting, so Tim and Aubrey testified, was to enable them to dispose of certain unpolished diamonds that they had smuggled from their place of employment, to the first appellant. That meeting took place in the buyer's room of Tony's Auto Spares. In it, the diamonds changed hands for R1 000.00.

[9] Two days later on 26 January 2003, as was their wont, the three brothers visited the first appellant to view a rugby match on MNet. On that occasion, according to both Tim and Aubrey, all three of them were schooled by the first appellant in the purchase of unpolished diamonds. In the words of Aubrey: 'Dit was die Sondagnamiddag gewees. Ons het weer gegaan na die kantoor wat die winkelgedeelte van die huis skei en ons het weer stelling ingeneem by sy lessenaar. Wat daar gebeur het, mnr Dos Santos het aan ons 'n demonstrasie gedoen hoe om 'n loop te hanteer. Hoe om – hoe jy die loop in jou regterkantste hand vashou, 'n ongeslypte diamant aan jou linkerkantste hand en hoe jy die diamant dan bestudeer. Mnr Dos Santos het die demonstrasie gedoen en daarna het ons drie broers dit ook daarna gedoen.

En hoe was dit aan u verduidelik om die loop te gebruik? --- Kan u weer die vraag stel?

U sê u was gewys om die loop te gebruik? --- Dis korrek, ja.

Kan u vir ons verduidelik hoe dit aan u getoon is of hoe gebruik 'n mens 'n loop? --- Die loop hou jy aan jou regterkantste hand vas. Dan sit jy jou lang vinger sit jy deur die opening. Die vergrootglas van die loop hou jy in jou wysvinger en jou duim vas. Dan bring jy hom naby aan jou oog. In jou linkerkanste hand, jou wysvinger en jou duim het jy jou diamant. Dan bring jy jou diamant nader na die loop toe om 'n beter view te kan kry van hom, dan rol jy die diamant om te kyk vir enige krake, spots, die kleur van die diamant.

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6 Act 51 0f 1977.

U Edele, ek sal nie nou daardie beeld toon nie, maar ek sal dit môre toon. Dit gaan 'n bietjie tyd neem om dit te kry, want dis op dieselfde band. Wat het na die opleiding gebeur, mnr Basson? --- Mnr Dos Santos het die diamantskaal sowel as die loop sowel as kontant aan my oorhandig omdat ek nou nie oor die nodige finansies beskik om die diamante aan te koop nie, sowel as 'n tabel wat hy vir my geteken het, wat ek moes gebruik het om – in die tabel is dit opgestel die rand, die hoeveelheid geld wat jy moet betaal vir 'n diamant. Dan kyk jy vir die kleur van die diamante en die verskillende karate.

U sê mnr Dos Santos het geld aan u oorhandig? --- Dis korrek, ja.

Kan u onthou hoeveel aan u oorhandig was? --- Dit was 'n bedrag van R5 000.'

[10] A few days later, Aubrey used the scale and loupe and R1 000.00 of the first appellant's R5 000.00 to purchase unpolished diamonds from certain persons in Buffelsrivier, a few kilometres from his place of employment. On 29 January 2003, together with his brother Andre and possibly Tim (of the latter Aubrey was not sure) he called on the first appellant at Tony's Auto Spares. There he supplied the diamonds to the first appellant. Early in February 2003 Aubrey once again purchased unpolished diamonds from the same persons in Buffelsrivier. On 6 February 2003 he visited Tony's Auto Spares and handed those unpolished diamonds (12 in all) to the first appellant. Each of those three occasions testified to by Aubrey constituted a separate charge of contravening the Diamonds Act on which the first appellant was ultimately convicted.

[11] Insofar as the second appellant is concerned, Tim testified that he (the second appellant) came to see the first appellant during the course of Friday 21 February 2003. Tim was told by the first appellant that the second appellant had to go and fetch something from the mine and that Tim must give him some money for petrol. That Tim did. After 10pm that evening, the first appellant called Tim on his cellular phone to tell him that the second appellant was at Tony's Auto Spares and that he (Tim) must go there to open the premises for the second appellant. Tim did as he was told and let the second appellant onto the premises. When the first appellant arrived, the two appellants made their way to the buyer's office, whence Tim heard the first appellant who was speaking loudly say 'Dit is 'n 100 carat. Ek is ryk. Al die probleme is verby'. Later that evening and after the second appellant had left, the first appellant invited Tim into his office. There the first appellant placed a large unpolished diamond on the table, which he informed Tim the second appellant had brought. Tim was asked to examine the

stone and to weigh it. The stone weighed 91 carats. That constituted the fourth charge of contravening the Diamonds Act on which both appellants were convicted.

[12] In respect of the first appellant's fifth conviction of contravening the Diamonds Act, Tim testified: 'Terwyl mnr Dos Santos in die selle was in Port Nolloth, het 'n ene John Legged [that should have been Legget] besoek by die winkel afgelê en aan my gesê hy will mnr Dos Santos sien. Ek het aan hom genoem ... (tussenbeide).

HOF: Jammer, kan u die persoon se naam net herhaal, asseblief. --- John Legget.

John Legget? --- Ja, Edelagbare. Ek het aan hom genoem dat Tony nie hier is nie. Die polisie was die naweek by ons en hulle het hom gearresteer en hy het vir my gesê hy wil my privaat sien. Ek het hom na die eerste kantoor gevat wat net naby die winkel is en daar binne met hom gepraat. Hy het aan my gesê dat hy iets wil kom afsit by mnr Dos Santos. Ek het aan hom gesê ek sal hom help omdat mnr Dos Santos in die selle is. My woorde aan hom was gewees, ons gaan nie loop lê terwyl mnr Dos Santos in die selle is nie. Ons sal wys ons gaan voort. Ek sal hom help met die transaksie om vir mnr Dos Santos te wys dat ons staan agter hom. Ek is na die binne kantoor en het van die toerusting daar gaan haal en dit na die eerste kantoor gebring om John Legget se steen te weeg op die skaaltjie. Ek het die diamant by hom gevat en dit op die diamantskaal geplaas en gesien dit weeg 2.77 karaat. Ek het aan hom genoem dat ek nie die volle bedrag kan betaal nie, omdat ek nie weet hoeveel ek hom moet gee nie en aan hom genoem ek gee hom 'n deposito van R400. Ek sal hom R400 gee totdat mnr Dos Santos uit is - op borg uit is en dan kan hy terugkom en sy verskil kom haal. Hy het verstaan en ek het die geld aan hom oorhandig.'

There can be little doubt that Tim acted as the first appellant's agent in respect of the 2.77 carat diamond purchased from Legget. That much emerges from the following excerpt of his evidence:

'Op daai stadium was die winkel onveilig gewees en ek het geglo dat ek Tony se goed by my huis moet bêre. Ek het ook John Legget se 2.77 karaat gevat en dit by my huis in die kluis toegesluit. Na Tony op borg uit is, het ek aan hom gevra of ek dit moet gaan haal by my huis om dit vir hom te bring. Hy het vir my gesê, nee, ek moet dit daar bêre. Dis veilig daar. Ons het nog altyd voortgegaan om kliënte te help na-ure en ek het weer aan mnr Dos Santos gevra, moet ek daai goed gaan haal en dit vir hom bring, want John Legget het nie sy geld gekry nie. Hy het gesê, nee, ons bêre dit daar. Die ander bly in sy ma se tuin.'

[13] The Legget transaction was not an isolated one. According to Tim: 'My diensplig te, soos ek sê, het later verbeter in die winkel, deurdat ek van die kliente moes help in die winkel na-ure as Tony nie daar was nie, met onwettighede en dan moes ek ook geld uitbetaal het of ek moes geld weggeneem het.

…

Watter onwettighede? --- Dit was die aankoop van ongeslypte diamante.

Ken u 'n ongeslypte diamante, mnr Basson? --- Dis reg, ja. Tony het my vertel of geleer wat is 'n geslypte diamante en wat is 'n ongeslypte diamante.'

Tim testified furthermore that there were other instances when he dealt, in the absence of the first appellant, with potential sellers of unpolished diamonds. He explained:

'Verduidelik my die prosedure, mnr Basson, wat u sal volg as iemand – of toe u nou ongeslypte diamant aankoop? --- Dit sou net gebeur as Tony nie in die plek is nie, wanneer die kliënte na my toe gaan kom, dan gaan ek hulle help. Ek sal hulle in die eerste kantoor van die winkel los. Dan sal ek alleen na Tony se kantoor beweeg en dan sal ek die diamante op die tafel plaas. Dan sal ek die papiertjie op die tafel plaas. Ek sou die diamantskaaltjie vat. Dan sou ek dit op die lessenaar plaas, dit oopmaak. Ek sou die diamant vat en dit op die skaaltjie plaas om te kyk hoeveel dit weeg. En dan sou ek die loop vat en dit daardeur besigtig deur te kyk of daar enige spots of krake of onsuiwerhede daarin is.'

[14] Immediately after the sentencing of the appellants, the court below granted an order in terms of s 35(1)(a) of the CPA declaring forfeit to the State the diamond dealing paraphernalia that had been seized during the search of the first appellant's premises. The State, moreover, gave notice of its intention to apply for a confiscation order against the first appellant in terms of s 18 of POCA in the sum of R2 099 218.75, being the value of the unpolished and polished diamonds seized from the appellant's premises, as also the cash to the value of R55 000.00.

[15] Paragraph 4 of the draft confiscation order read:

'The commissioner of the South African Police Services, at his discretion and written authority, as provided for in terms of section 3(*1*) of the Finance and Financial Adjustments Acts Consolidation Act 11 of 1977, is authorized to pay a reward of one third of the value of the unpolished diamonds seized by members of the South African Police Services on 22 February 2003, i.e. one third of R1 897 605.00.'

That immediately prompted counsel for the first appellant to apply for a special entry to be made in terms of s 317 of the CPA. Counsel motivated the application thus:

'I am caught at a disadvantage, M'Lord, because the defence was not informed that a reward to the tune of R600 000 will be paid in return for information which apparently led to the prosecution in this matter and we were not informed whether the person who provided this information would be a witness and we were not told what this information would entail. Under the circumstances I am obliged to request that Your Lordship authorizes that a special entry be made in the record with regard to this particular aspect.'

[16] Without immediately settling the terms of the special entry, Le Grange AJ acceded to counsel's request. After certain skirmishes between the parties as to the terms of the special entry the learned Judge eventually granted leave to the State as also the appellants to adduce evidence to enable him to determine and state the facts underpinning the special entry. Jooste testified for the State. None of the appellants did, nor were any other witnesses called on their behalf. In essence the court held that despite the evidence of Jooste which was not gainsaid by the appellants, it could not find that the application for a special entry was frivolous or absurd or that granting it would constitute an abuse of the process of the Court. It accordingly made a special entry in these terms:

'i). Jacobus Hermanus van Wyk ("Van Wyk") and Willem ("Tim") Basson testified on behalf of the State against the Accused prior to the conviction of Accused 1 and 6.

ii). On 23 October 2004, Van Wyk, and Tim had a telephonic conversation during which Tim told Van Wyk that he had been informed that a sum of R600 000 was available for information that would lead to the conviction of the Accused.

iii). As far as the Directorate of Special Operations ("DSO") is concerned, no reward will be paid to a State witness in this matter.

iv). The DSO and the Commissioner of the South African Police ("the Commissioner") agreed that the Commissioner has a discretion to pay a reward of approximately R600 000 to State witnesses in this matter.

v). Prior to the conviction of Accused 1 and 6, Tim consulted with members of the South African Police in the absence of members of the DSO.

vi). The information referred to in paragraphs (ii) - (v) was only obtained by the accused and their legal representatives after the conviction and sentence of accused 1 and 6.

vii). The Accused were deprived of an opportunity to cross-examine the State witnesses in the aforesaid regard.'

[17] Before us counsel conceded that the irregularity referred to in the special entry was not of such a nature that it amounted without more to a failure of justice. Rather, so the submission went, the possibility that Tim Basson may have been motivated by the payment of a reward justified his evidence being approached with extreme caution. That being so it is unnecessary for me to express any view on the correctness of the procedure adopted in the court below in respect of the invocation of s 317 of the CPA by counsel and the consideration given it by the court below. In my view, counsel was amply justified in his submission that the evidence of the Bassons was deserving of

heightened scrutiny, for, as the following extract from the recorded transcript of Aubrey's evidence makes plain, both were particularly dangerous witnesses.

'Daar was een keer 'n geval gewees wat ek 'n video-opname gemaak het in mnr Dos Santos se kantoor met my persoonlike videokamera waar ek ongeslypte diamante afgeneem het.

Hoekom? --- Die rede hoekom ek dit gedoen het, daar is 'n ander Portugees in Port Nolloth omdat my broer altyd na hom toe gegaan het as mnr Dos Santos daar was nie, het hy met die ongeslypte diamante na die persoon toe gegaan en ons op 'n dag gaan geld leen ook by die persoon en hy het vir ons gesê, soos hy vir my broer toe die vorige keer gesê het, onthou een ding, julle speel met vuur. Is 'n gevaarlike game waarmee julle besig is. . . .

U sê u het 'n opname gemaak van ongeslypte diamante, waar het u die opname gemaak? --- Die opname het ek gemaak in die kantoor wat op die video nou gewys was, die kamertjie van mnr Dos Santos.

En die ongeslypte diamante wat u op band vasgelê het, waar het u dit gekry? --- Die ongeslypte diamante was in die laai, my broer wat daar werk, het die diamante daar uitgehaal, dit was in 'n klein swart potjie gewees en hy het dit uitgegooi en ek het dit opgeneem. . . .

Kan u vir ons sê wat dit is? --- Dit is een van die ongeslypte diamante wat ek met my persoonlike videokamera afgeneem het.

Mnr Basson, terwyl ons kyk sien ons daar is sekere getalle of syfers op die TV of op die beeld, kan jy dit vir ons verduidelik wat dit is? --- Dit is die datum wanneer die opname gemaak is en die tyd.

Wat sien ons nou, mnr Basson? --- Dit is die karaat hoeveel daardie diamant weeg wat op die skaal is. Dit is nog van die diamante wat uit die swart potjie uitgekom het.

Wat gebeur nou, mnr Basson? --- Dit is nog diamante daardie en hulle was ook in daardie swart houertjie gewees.

Behalwe om die diamante op te neem. M'Lord, that's just the footage. Daar is net een vraag, mnr Basson, behalwe om die videoband op te neem, watter ander handelinge het u met die diamante gedoen tydens daardie opneming van die videoband? --- As u net die vraag anders kan stel, ek verstaan hom nou nie so mooi nie.

Julle het die diamante uit die pot geneem, julle het dit opgeneem op die videoband. --- Dit is korrek.

Wat het toe met die diamante gebeur wanneer julle klaar was met die opneming? --- O, die diamante is teruggesit in die pot en dit is my broer se werk, hy het gewerk met die diamante. Hy het dit teruggesit in die pot en in die laai gebêre.'

[18] It follows that the cautionary rule relating to accomplices is applicable to the evidence of the Bassons. That rule has been stated as follows by Holmes JA in *S v Hlapezula*:[7]

7 1965 (4) SA 439 (A) at 440D-H.

'It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit. Accordingly, even where sec. 257 of the Code has been satisfied, there has grown up a cautionary rule of practice requiring (*a*) recognition by the trial Court of the foregoing dangers, and (*b*) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him; see in particular *R v Ncanana*, 1948 (4) SA 399 (AD) at pp 405-6; *R v Gumede*, 1949 (3) SA 749 (AD) at p 758, *R v Nqamtweni* 1959 (1) SA 894 (AD) at pp 897G-898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned.'

[19] It must be emphasised that by corroboration is meant other evidence which supports the evidence of the state witness and which renders the evidence of the accused less probable on the issues in dispute (*S v Gentle*).[8] And whilst I am inclined to heed Counsel's note of caution that the evidence of the Bassons be treated with extreme caution, it bears noting that corroboration is not the only safeguard that can properly be employed to reduce the danger of convicting an innocent person. For, ultimately what is required is proof beyond a reasonable doubt and whether or not that threshold has been passed by the State depends upon an appraisal of all of the evidence.

[20] To the evidence of the Bassons, may be added the various items seized during each search. On behalf of the appellants it has been submitted that the evidence secured pursuant to the search falls to be excluded in terms of s 35(5) of the Constitution. Section 35(5) provides:

'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

The learned trial judge concluded after an admissibility trial that the admission of the evidence would not render the trial unfair or otherwise be detrimental to the

8 2005 (1) SACR 420 (SCA) at 430j-431a.

administration of justice.

[21] The warrant, so it was conceded by the State, suffered the technical defect that the regional magistrate who issued it was not a magistrate as defined for the purposes of s 21 of the CPA.[9] The Constitution's specific exclusionary provision does not provide for the automatic exclusion of evidence obtained in violation of an accused's constitutional rights. Evidence falls to be excluded only if its admission would (a) render the trial unfair or (b) be otherwise detrimental to the administration of justice. As to (a): That provision resonates with Section 35(3) of the Constitution which guarantees every accused person the right to a fair trial. That constitutional principle is underscored by the philosophy that before persons are to be punished their guilt must first be established in a fair trial.[10] But as it was put in *S v Jaipal*[11] 'The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'

As to (b): This involves essentially a value judgment. In *S v Mphala,*[12] Cloete J formulated the approach to be adopted as follows:

'So far as the administration of justice is concerned, there must be a balance between, on the one hand, respect (particularly by law enforcement agencies) for the Bill of Rights and, on the other, respect (particularly by the man in the street) for the judicial process. Overemphasis of the former would lead to acquittals on what would be perceived by the public as technicalities, whilst overemphasis of the latter would lead at best to a dilution of the Bill of Rights and at worst to its provisions being negated.'

[22] The approach to an enquiry such as this is appositely captured in *Key v Attorney-General, Cape Provinicial Di*vision,[13] where Kriegler J held:

'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

9 According to s 1 'magistrate includes an additional magistrate and an assistant magistrate but not a regional magistrate'.
10 *Sanderson v A G Eastern C*ape 1998 (2) SA 38 (CC) para 23.
11 2005 (4) SA 581 (CC) para 29.
12 1998 (1) SACR 654 (W) at 657G-H. Cited with approval by Scott JA in his minority judgment in *S v Pillay* 2004 (2) SACR 419 (SCA) para 10.
13 1996 (4) SA 187 (CC) para 13.

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* [1996 (1) SA 984 (CC], 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 obtained unconstitutionally, nevertheless be admitted.'

[23] Here the investigating team did not act in flagrant disregard of the first appellant's constitutional rights. On the contrary, they sought judicial authority for their conduct. That judicial *imprimatur* was an attempt to uphold the law in spirit and letter. None of those executing the warrant knew that it suffered a defect. Eschewing the local Magistrates' Court in favour of one located in Cape Town was designed to protect the integrity of the investigation and to preserve the element of surprise, for, during operation Solitaire an approach to the Port Nolloth Magistrates' Court had resulted in the leaking of information. Significantly, Superintendent Bruwer testified:

'Nou sup Bruwer, u het getuig dat deel van u magte is dat u ook visenteringslasbriewe mag uitreik. Verduidelik vir ons hoekom het u nie self hierdie visenteringslasbrief uitgereik nie en dit deurgestuur na die Kaap toe? --- U Edele, ek het gevoel dat daar is genoeg tyd en dat 'n onafhanklike persoon buite die polisie, dat 'n landdros die inligting voorgelê word en dat die landdros die visenteringslasbrief uitreik.'

[24] In those circumstances it is plain that the task team was not attempting to garner any unfair advantage for themselves. Rather it plainly was an endeavour to protect the interests of the first appellant. For that they should be commended, not penalised by having the evidence that has been secured pursuant to that warrant excluded. To exclude the evidence in those circumstances would not conduce to a fair trial. Nor for that matter would it serve to advance the administration of justice. To exclude the evidence simply because the wrong magistrate had been inadvertently approached would run counter to the spirit and purport of the Constitution. In my view, on the facts of this case s 35(5) could hardly countenance the exclusion of the impugned evidence. Accordingly the conclusion reached by the trial court on this score cannot be faulted.

[25] Reverting to the evidence of the Bassons: Notwithstanding their relationship of employer and employee, Tim often accompanied the first appellant on his long personal

and business trips. The level of trust that the first appellant reposed in Tim is illustrated by the fact that Tim often opened and closed the business premises and supervised the conduct of the business in the first appellant's absence. To facilitate that arrangement, the first appellant had leased premises for Tim to occupy across the street from Tony's Auto Spares. The first appellant also paid for Tim's cellular phone. The location of the leased premises was significant according to Tim, for it enabled him quick access to Tony's Auto Spares whenever needed, which all too frequently was late in the evening and way after the spare's shop had closed for business at 6pm. Moreover, both of the Bassons, upon being arrested, intimated their desire to plead guilty to the charges and a willingness to co-operate with the State. Each was convicted pursuant to this plea and was sentenced to imprisonment for a term of two years which was conditionally suspended for five years.

[26] The brothers corroborated each other in material respects (see *S v Avon Bottle Store (Pty) Ltd;*[14] *S v Hlapezula*[15]). Moreover each was supported by the surveillance tapes, the incident register as confirmed by the evidence of the relevant member of the task team who made the entries in question and the record from MTN confirming the cellular telephone calls between Tim and the first appellant as testified to by the former. The surveillance tapes were admittedly of a very poor quality. Notwithstanding its grainy quality however, it afforded confirmation of the Bassons' presence in the buyer's room on each occasion that they allegedly participated in an illicit diamond dealing transaction as testified to by them. Importantly their account found support in the dates and times on the surveillance tapes and the corresponding entries in the log.

[27] The trial court, I should perhaps add, was alive to the dangers of accepting the evidence of the Bassons absent corroborating evidence implicating the appellants (see *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) paras 7 and 8). It is so that the evidence of the Bassons taken individually and cumulatively was not without blemish. But when taken together with the other evidence to which I have alluded it has an unquestionable ring of truth. I thus do not believe that those blemishes are such as to warrant either a rejection of the evidence of either or to undermine reliance upon them. For, as Holmes

14 1963 (2) SA 389 (A) at 393H.
15 1965 (4) SA 439 (A) at 440H.

JA made plain (*S v Artman*[16]): 'courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense'.

[28] In respect of the first appellant there are as well the items seized during each search. To recapitulate, those items included the unpolished and polished diamonds, substantial sums of cash, the diamond dealing paraphernalia such as magnifying glasses, diamond scales, diamond loupes and two other seemingly insignificant items being recently torn pieces of paper with diagrammatic representations that were recovered from the toilet system and other pieces of paper with diagrammatic representations, and partially used 49% strength hydrofluoric acid. In so far as the pieces of paper are concerned, whilst Superintendent Hamman, the handwriting expert, could not say with any degree of certainty that the pieces of paper bore the first appellant's handwriting he was willing to opine that it strongly resembled his handwriting. The significance of those pieces of paper emerges from the following evidence in cross examination of the expert gemmologist, Arthur Thomas: 'Now my question to you, Mr Thomas, having analyzed what now transpires to be uncut diamonds that were presented to you, would you be able to identify what purports to be a description of those two stones in conjunction with the little sketch appended there? --- What I see here, is something that we frequently use in the trade, that I use myself. In other words, I take it that this stone was an octahegen. This little sketch is typical of what we use.'

....

'Let's move on to the other stone? --- Here we see an octahegen with an intrusion indicated in the stone. This appears to conform to stone B11, which to three decimal places weighed 1.736 carats.

And there's a possibility that this may be ... (intervention). --- I would put it as a strong possibility, not on oath, but a strong possibility that this is the stone.'

And the evidence was that whilst hydrofluoric acid in that strength has other heavy industrial uses, it is commonly used to clean unpolished diamonds.

[29] In respect of the second appellant and the transaction involving the 91 carat diamond, it was put by counsel to one of the state witnesses on behalf of the first appellant:

'Nou mnr Dos Santos sal met betrekking tot hierdie spesifieke transaksie kom getuig as hy moet en daar

16 1968 (3) SA 339 (A) at 341C.

sal ook eksterne bewys wees daarvan indien nodig, dat by hierdie spesifieke geleentheid mnr Mbatha by hom kom geld leen het met die oog op 'n begrafnis wat moes plaasvind.'

Likewise the following was put on behalf of the second appellant:

'Mnr Jooste, beskuldigde nommer 6 [the second appellant] sal erken indien dit nodig is, dat hy wel daar op die 21ste was, maar die doel was om geld te leen en nie diamant te verkoop nie? --- U Edele, dis die eerste keer in my lewe wat ek sien iemand omhels iemand as hy geld geleen het, van blydskap.'

'Sal u sê dat daar is niks verkeerd om iemand te omhels as daai persoon aan my meegedeel het dat hy net nou een van sy geliefdes verloor en dat môre is daar 'n begrafnisdiens? --- U Edele, dan gaan jy dit met deernis doen. Jy gaan nie bly wees nie.

En dit is wat beskuldigde 6 kom sê indien nodig dat 'n stamlid, 'n vrou, is oorlede en die Saterdag ... (tussenbeide)

. . .

Dis 'n vrou wat 'n lid van die Zoeloe-stam is, wat oorlede is en die Saterdag is die begrafnisdiens. En hy was eers Tony's Auto Spares toe na middag om geld te gaan leen, want hy wou skape gaan koop en later Tony het hom gebel om te sê, het jy reg gekom met die skape. Toe sê hy, nee. En Tony het gesê, hoekom nie. En hy het gesê, ek benodig geld. En toe het hy geld gaan leen.'

[30] It thus came to be undisputed that the second appellant was indeed at the first appellant's premises at the time in question. The trial court concluded as presaged in Jooste's evidence: 'Despite this poor quality, the video footage of the evening of 21 February 2003 when Accused no 6 [the second appellant] visited Accused no 1 [the first appellant] does not however support the contention that this was an occasion where a bereavement was discussed since it was clear to this Court that both accused were in a mood of ecstasy. Both of them could hardly control their joy and laughter and recorded them hugging each other. It is therefore highly improbable that Accused No 6 was asking for financial assistance as a result of a bereavement.'

[31] The trial court has been criticised for what it is submitted is a contradictory approach inasmuch as it refused to place any reliance on the tapes when it acquitted the remaining accused at the conclusion of the state case in terms of s 174 of the CPA. In my view the approach of the trial court is beyond reproach. Given the quality of the tapes it was understandably reluctant, on the strength of them, to place the other accused on their defence. It was thus unwilling to rely upon them as a source of incriminating evidence. At the close of the defence case not only was the test different but also the nature of the enquiry. At that stage the trial court was confronted with two hypothetical postulates – one, advanced by the state, that the second appellant was

there to sell a 91 carat diamond and the other, advanced by the appellants, that he was there to borrow money on account of a family bereavement. The trial court concluded, against the backdrop of the surveillance tapes, that the one advanced by the appellants (in support of which neither appellant testified it must be added) was implausible and therefore untenable. In that, the trial court, in my view, cannot be faulted.

[32] Tellingly, the one search yielded a 91 carat diamond. That in itself lends material corroboration to Tim Basson's version. So do the surveillance tapes, incident register and MTN records. But even if Tim were not to be relied on, there remains the evidence of the gemmologist Thomas. Under cross examination by counsel for the second appellant, he testified with reference to what he could see of the 91 carat diamond on the surveillance tapes:

'That is real evidence. Now what I want to know is can you say with certainty that one of those objects on the scale there, was the same size as that …? --- The object that was being handled was approximately this size, yes.

The object that was being handled? --- The object that we saw being handled was approximately this size.

Now can you just tell me when did you see an object being handled? --- I saw the scale brought out. I saw the 50 carat correcting weight put into place, in order to calibrate the balance. Then the person picked up an object and put it on the balance. That object, looking at his hands as he picked it up and put it on the balance, was approximately this size. If I can explain that a little further, this is approximately the size of the 50 carat metal calibrating weight that was used. He picked up the calibrating weight, put it onto the balance, set the balance ... (intervention).'

...

'Now when you say that you saw him pick up something, are you referring to what you could see on the scale or what you could see before that? --- He had it on a pad in front of him. They shook hands (indistinct) a couple of times. The stone that had come out of the stone paper, was sitting on the pad in front of him. He calibrated the scale. He picked up something off the pad that was approximately this size and put it on the scale to weigh it.'

[33] In assessing circumstantial evidence one needs to be careful, as our courts have repeatedly warned, not to approach such evidence upon a piecemeal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility of an innocent explanation (*S v Reddy).*[17] For as Davis AJA,

17 1996 (2) SACR 1 (A).

quoting with approval from Best on *Evidence,* reminded us in *R v De Villiers:*[18]

'Not to speak of greater numbers; even two articles of circumstantial evidence – though each taken by itself weigh but as a feather – join them together, you will find them pressing on the delinquent with the weight of a millstone. . . . It is of the utmost importance to bear in mind that, where a number of *independent* circumstances point to the same conclusion the probability of the justness of that conclusion is not the *sum* of the simple probabilities of those circumstances, but is the compound result of them.'

[34] Before us counsel sought to suggest that the evidence seized during the search may have been planted by the investigating team. That as a possibility was not explored before the trial court. In fact it was not even suggested to any of the state witnesses that that may have occurred. A court, particularly one such as this on appeal, need hardly concern itself with what at best for the first appellant would qualify as a remote possibility. To do so would oblige the State during the trial to eliminate every conceivable possibility that may depend upon "pure speculation" (*S v Glegg*).[19] The fact that a number of inferences can be drawn from a certain fact, taken in isolation, does not mean that in every case the State, in order to discharge the onus which rests upon it, is obliged, according to Diemont JA (*S v Sauls):*[20] 'to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it is incriminating.'

[35] There was thus an entire body of evidence that operated against both appellants to different degrees. All of that evidence certainly called for an answer, for in respect of each a prima facie case had been established. Yet the appellants countered it with nothing, preferring instead to shun the witness stand. That was the right that each had, but its exercise is not without certain consequences. The choice of each to remain silent in the face of evidence implicating them in criminal conduct is suggestive of the fact that each had no answer to it. For if the evidence implicating the appellants was capable of being neutralised by an honest rebuttal, it ought to have been.[21] Weighing carefully the cumulative effect of all of the circumstantial evidence together with the direct evidence, the guilt of each appellant was so strong, that the learned Judge in the court below must

18 1944 (AD) 493 at 508.
19 1973 (1) SA 34 (A) at 38H.
20 1981 (3) SA 172 (A) at 182G-H.
21 *S v Mavinini* 2009 (1) SACR 523 (SCA) para 23; *S v Thandwa* 2008 (1) SACR 613 (SCA) para 53; *S v Chabalala* (2003) (1) SACR 134 (SCA) para 21.

inevitably have convicted. It follows that save for correcting the five convictions in the case of the first appellant to read s 20 instead of s 21, and in the case of the second appellant the one conviction to read s 19 instead of s 21, each of the appellants was correctly convicted on charges in terms of the Diamonds Act.

[36] There remains the conviction of the first appellant in terms of POCA. Section 2(1)(e) of POCA to the extent here relevant provides:

'Any person who –

. . .

(e) whilst managing or employed by or associated with any "enterprise", conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a "pattern of racketeering activity".'

In *S v Eyssen,*[22] Cloete JA stated: 'The essence of the offence in subsec (e) is that the accused must conduct (or participate in the conduct) of an enterprise's affairs. Actual participation is required (although it may be direct or indirect). [The subsection] covers a person who was managing, or employed by, or associated with the enterprise. "Manage" is not defined and therefore bears its ordinary meaning, which in this context is: "1 be in charge of; run. 2 supervise (staff). 3 be the manager of (a sports team or a performer)." Thus for a conviction the state had to establish the existence of an enterprise, a pattern of racketeering activity and a link between them and the first appellant.

[37] It is a requirement of the subsection that the accused must participate in the enterprise's affairs. The word 'enterprise' is widely defined. As pointed out in *Eyssen* (para 6) 'it is difficult to envisage a wider definition'. It is a further requirement that the participation must be through a pattern of racketeering activity. 'Pattern of racketeering activity' is defined to mean 'the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1.' Once again the term is widely defined. The participation must be by way

22 2009 (1) SACR 406 (SCA) para 5.

of ongoing, continuous or repeated participation or involvement (see *Eyssen* para 8 and 9).

[38] In the present case the evidence adduced by the state established that the first appellant conducted an illegal diamond dealing enterprise. The affairs of the enterprise entailed him purchasing unpolished diamonds from people who were not entitled to possess them. All five of the offences of dealing in unpolished diamonds in contravention of the Diamonds Act of which the first appellant was convicted, constituted participation in such affairs. And all occurred after the commencement of POCA. None of them was an unrelated instance of proscribed behaviour nor an accidental coincidence with any of the others (see *Eyssen* para 8). On the contrary, each of the five transactions was concluded in the same room, namely the buyer's room of Tony's Auto Spares. Tony's Auto Spares, which at the very least was managed by the first appellant, plainly had a legitimate as well as an illegitimate face. There were repeated instances of participation by the first appellant, which save for the one conviction involved personal participation on the part of the first appellant. In respect of that one his employee Tim Basson acting as his agent procured the diamonds for him. Moreover, according to Tim Basson, on diverse occasions he transported prospective sellers on behalf of the first appellant, from the nearby Sizamele Township to Tony's Auto Spares and back. Significantly, it was never even put to either of the Bassons that they had not received training at the hands of the first appellant nor been supplied with money or diamond dealing paraphernalia by him.

[39] For a pattern of racketeering activity, POCA requires at least two offences committed during the prescribed period. In this court, as indeed the one below, counsel argued that the word 'offence' in that context meant a prior conviction. Absent two prior convictions, so the submission went, POCA could not be invoked. Underpinning that submission is the contention that an accused person must first be tried and convicted of the predicate offences (here the charges in terms of the Diamonds Act) before he/she could be indicted on the racketeering charge in terms of POCA. Allied to that submission is the argument that in this instance there has been an improper splitting of charges resulting in an improper duplication of convictions.

[40] In my view, whether to prosecute and what charge to file or bring before a court are decisions that generally rest in the prosecutor's discretion. Nor would it be necessary, it seems to me, for the court to return a verdict of guilty in respect of the predicate offences for the POCA racketeering charge to be sustained. It may well suffice for the court to hold that the predicate charge has been proved without in fact returning a guilty verdict. But that need not be decided here.

[41] In respect of a similarly worded provision in the American Racketeer Influenced and Corrupt Organizations Act (RICO),[23] United States courts have held that a criminal defendant could properly be convicted of the predicate acts that form the pattern of racketeering activity basic to the RICO charge, and later be prosecuted under RICO.[24] On the other hand in *United States v Brooklier*,[25] the appellants had pleaded guilty to a RICO conspiracy charge, and were then indicted a few years later for a RICO violation. One activity instrumental in the prior conspiracy charge supplied a basis for the substantive RICO charge. The appellants moved to dismiss the alleged activity from the indictment on double jeopardy grounds. In denying the motion the Ninth Circuit stated that if the appellants had not been indicted and convicted previously, the government could have charged them with both the RICO conspiracy and the substantive RICO offence, each based partly on the same extortion activity, in the same indictment. Thus, since the offences were separate, the prior conviction did not bar a subsequent prosecution for the substantive RICO violations based in part on the same activity.

[42] RICO has come to be described as a formidable tool in the US Government's arsenal to wage war against crime. It has been pointed out that the relationship between the RICO substantive and predicate offences is crucial to the application of the statute. Because Congress expressed its intent that the two offences be treated separately when it enacted RICO, the Federal Circuit Courts of Appeal have rejected double

23 18 USC §1961 (5): 'A "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity'.
24 *United States v Harley* 678 F.2d 961 (1982); *United States v Martino* 648 F.2d 367 (1981); United *States v Peacock* 654 F.2d 339 (1981).
25 685 F.2d 1208 (1982).

jeopardy attacks on RICO prosecutions. The reasoning appears to be that Congress manifested its intention that RICO and its predicates be separate offences.[26]

[43] Prosecutions under POCA as also the predicate offences would usually involve considerable overlap in the evidence, especially where the enterprise exists as a consequence of persons associating and committing acts making up a pattern of racketeering activity. Such overlap does not in and of itself occasion an automatic invocation of an improper splitting of charges or duplication of convictions. As should be evident from a simple reading of the statute, a POCA conviction requires proof of a fact which a conviction in terms of the Diamonds Act does not. I can conceive of no reason in principle or logic why our approach should be any different to that adopted by our American counterparts, for as Justice Frankfurter remarked in United *States v Dotterweich:*[27] '[T]he good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted. Our system of criminal justice necessarily depends on "conscience and circumspection in prosecuting offenses". '

[44] In a similar vein Navsa and Van Heerden JJA, writing for the majority in *S v Whitehead*[28] stated: 'There is no infallible formula to determine whether or not, in any particular case, there has been a duplication of convictions. The various tests that have been formulated by our courts . . . are not rules of law, nor are they exhaustive. They are simply useful practical guides and in the ultimate instance, if these tests fail to provide a satisfactory answer, the matter is correctly left to the common sense, wisdom, experience and sense of fairness of the court.'

[45] *Whitehead* recognised that a single act may have numerous criminally relevant consequences and may give rise to numerous offences. Our legislature has chosen to make the commission of two or more crimes within a specified period of time and within the course of a particular type of enterprise independent criminal offences. Here the two statutory offences are distinctly different. Since POCA substantive offences are not the same as the predicate offences, the State is at liberty to prosecute them in separate trials or in the same trial. It follows as well that there could be no bar to consecutive sentences being imposed for the two different and distinct crimes as the one requires

26 Karen J Ciupak 'RICO and the Predicate Offenses: An Analysis of Double Jeopardy and Verdict Consistency Problems' (1982) 58 *Notre Dame Law Review* 382.
27 320 U.S. 277 (1943).
28 2008 (1) SACR 431 (SCA) para 35.

proof of a fact which the other does not. Although a court in the exercise of its general sentencing discretion may, with a view to ameliorating any undue harshness, order the sentences to run concurrently. Thus, by providing sufficient evidence of the five predicate acts, the State has succeeded in proving the existence of the 'racketeering activity' as defined in POCA.

[46] Lastly, as to sentence: Section 87(a) of the Diamonds Act provides:

'Any person who is convicted of an offence under this Act shall be liable–

a) in the case of an offence referred to in section 82(*a*) or (*b*), to a fine not exceeding R250 000, or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment'.

Section 82(a) refers inter alia to any person who contravenes sections 19(1), 20 and 21. Thus notwithstanding the learned trial judge having misdirected himself by convicting each appellant in terms of the wrong section of the Act, that misdirection does not vitiate the sentence, for as the section makes plain the legislature intended a contravention of each of those sections to be visited with the same maximum penalty.

[47] The question is thus whether it can be said that the trial court did not exercise its judicial discretion properly. As to that, the sentence of the first appellant does not appear to me to be startlingly inappropriate. The same, however, does not hold true of the second appellant. It is so that the stone in question weighed 91 carats, which, according to the state, he sold to the first appellant for R 14 000. Neither that in itself, nor anything else on the record that I can find, can justify the grossly divergent sentences between that imposed on the second appellant, a first offender, and that imposed on the first (being 12 months imprisonment) in respect of the same transaction in contravention of the Diamonds Act. Both appellants were associated to more or less the same degree in the commission of the offence. If anything the first appellant's conduct ought to have attracted greater opprobrium because he was the financier and kingpin of this murky business. In those circumstances it has to be said that the sentence of four years' imprisonment (albeit that it was coupled with a fine of R 20 000 and half of which was conditionally suspended) imposed on the second appellant is

disturbingly inappropriate and warrants appellate interference (*S v Giannoulis*).[29] At the very least it seems to me that the sentence imposed on the second appellant should be equated to that imposed on the first. It follows that the sentence imposed by the trial court on the second appellant falls to be set aside and in its stead I would substitute the following:

'Accused number 6 is sentenced to pay a fine of R 20 000 or in default of paying the fine to a term of imprisonment for a period of one year of which R 10 000 or six months imprisonment is suspended for a period of five years on condition that he is not again convicted of a contravention of sections 18, 19, 20 or 21 of the Diamonds Act 56 of 1986, committed during the period of suspension'.

[48] In the result:

(1)(a) The first appellant's convictions for contravening s 21 of the Diamonds Act 56 of 1986 are altered to convictions for contravening s 20 of that Act.

(b) Save as is set out in para 1(a), the first appellant's appeal is dismissed.

(2)(a) The second appellant's conviction for contravening s 21 of the Diamonds Act 56 of 1986 is altered to a conviction for contravening s 19 of that Act.

(b) Save as set out in para 2(a), the second appellant's appeal against his conviction is dismissed.

(c) The appeal of the second appellant against sentence succeeds to the extent that the sentence imposed on him is set aside and in its stead is substituted the following:

> 'Accused number 6 is sentenced to pay a fine of R 20 000 or in default of paying the fine to a term of imprisonment for a period of one year of which R 10 000 or six months' imprisonment is suspended for a period of five years on condition that he is not convicted of a contravention of sections 18, 19, 20 or 21 of the Diamonds Act 56 of 1986, committed during the period of suspension'.

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29 1975 (4) SA 867 (A).

V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

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