IN THE SUPREME COURT OF NAMIBIA CASE NO.: SA 2/93

In the matter of

REINHOLDT DANKE NAKGOMBE APPELLANT

and

THE STATE RESPONDENT

Coram: Mahomed, CJ; Dumbutshena, AJA; Levy, AJA.

Heard on: 1994/04/07 Delivered on: 1994/10/07

JUDGMENT

DUMBUTSHENA, A.J.A:

The appellant was convicted of contravening section 30(1) of Proclamation 17 of 1939. It was alleged that on or about 31 January 1992 he stole from his employer CDM (Pty) Ltd (CDM) 174 rough and uncut diamonds with a mass of 283,02 carats valued at R472 890,00. Alternatively appellant was charged with contravening section 28(a) of Proclamation 17 of 1939 in that on 31 January 1992 at or- near Oranjemund he had unlawfully in his possession the above diamonds.

The appellant was also charged with contravening section 30(1) of Proclamation 17 in that on 20 December 1991 he did

steal an unspecified quantity of rough and uncut diamonds from his employer CDM. In the alternative he was charged with contravening section 28(a) of the Proclamation in that it was alleged that he had unlawful, possession of that unspecified quantity of diamonds. He was acquitted on both the main and the alternative charge.

Appellant was sentenced to a fine of R25 000,00 in default of payment two years imprisonment and to 8 years imprisonment. Two years of that sentence were suspended on appropriate conditions. He now appeals to this Court against both conviction and sentence.

The appeal was brought by leave of the Court a quo. I intend to derive benefit from the account of the facts made by the learned Judge-President in the court below. I, therefore set it out below in full:

> "The main state witness was Mr. Kotze a senior Security Officer in the employ of CDM and who is in such employ for 12 years.
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> He testified that he struck up an acquaintance with the accused during October 1991. He stated that accused was going to Swakopmund for the holiday season and that he asked him to take along a parcel for his parents-in-law who were also at that stage residing at Swakopmund.
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> At a meeting at Kotze's.house to discuss further details

accused asked him whether the parcel contained diamonds to which he replied in the affirmative. Thereupon he was asked by accused whether he would also assist him in taking out diamonds from the mine. Kotze agreed but said that he could only do so once a month when security escorted the salary payments of workers into the mining area. It was arranged that they would meet at the fuel pumps at field plant no. 4 on the 20 December 1991. From the start, and even before the taking out of diamonds was discussed, Kotze had reported his contact with accused to his superiors as well as to Inspector Ludike of the diamond branch of the police. From them he received instructions to continue to befriend the accused.

On the 20 December before Kotze entered the mining area he, as well as his vehicle, were searched by Sgt. Steyn of the Police.

The witness met the accused at the pre-arranged spot and a parcel, wrapped in masking tape and marked "Sir" on the one side and "Junior" on the other side, was placed on the right front seat of the vehicle by accused. This parcel was, according to the witness, as big as a Rl-00 coin.

Kotze took the parcel and returned to his office. Here he handed the parcel to Sgt. Steyn. The parcel was

X-rayed and showed a picture similar to that of diamonds. On his return Steyn again searched him as well as the vehicle. After the parcel was X-rayed it was handed back to the witness to be put in his motor vehicle in his garage at his house at no. 2 Ostrich Avenue, Oranjemund, as arranged with accused. The parcel was not opened at any stage. The parcel was left on the floor in front of the front left seat. Kotze returned later that day to his garage and found that the parcel was gone.

It was further testified by this witness that the management of the mine decided to consent to this parcel being taken by the accused and not to stop and arrest him.

Kotze again heard from accused during January 1992. Kotze arranged for accused to visit him and on this occasion accused informed him that the parcel had contained 4 smaller parcels of which only one was his. He had sold his parcel for R42 000,00. After using R2 000,00 the 50% share of the witness amounted to R20 000,00. No money was shown to Kotze but he decided to take his share but rather to utilise it to buy more diamonds so that the next deal could be better. It was also decided the next taking out of diamonds would be on the 31 January 1992 when the next payroll was scheduled.

Accused also asked Kotze to obtain a small diamond scale for him to assist him when buying diamonds. This was done and the scale was collected from Kotze's wife.

On 30 January accused again visited Kotze at his house to finalise arrangements. It was agreed to follow the same modus operandi as was followed the previous time.

On the morning of the 31 January at 9:30 Kotze as well as his vehicle was searched by warrant officer Prinsloo before he went into the mining area. There, according to Kotze, he met accused as before at the fuel pumps in no. 4 Plant. At this meeting with accused the latter handed to him a longish parcel, about 7cm long which fitted well into his hand and which was again wrapped in masking tape.

Kotze thereupon returned to his offices where he and the vehicle were searched by warrant officer Prinsloo. He also handed to Prinsloo the parcel he had received from the accused. This was again X-rayed and showed a picture similar to that of diamonds. The parcel was not opened. It was unmarked and for fear that accused's suspicion may be aroused, the parcel was not marked in any way by the police. The parcel was then returned to Kotze who, as before, took the parcel to his house where he left it again inside his vehicle on the floor in front of the left front seat and returned to his office.

After 12 o'clock on that specific day, Sgt Krohne, Security Officer Nel, and Warrant Officer Spangenberg, arrived together with the accused and the witness was shown a parcel which to him looked similar to the one he had received earlier from the accused. The parcel was opened by Krohne. Inside were 7 smaller parcels of which 4 contained code marks. The smaller parcels were opened and they contained 174 objects which appeared to be diamonds. Kotze received a reward of R331 000,00 from CDM.

The state also presented the evidence of Sgt. Steyn, Sgt. Krohne, Warrant Officer Prinsloo, Security Officer Nel and Security Officer Rust. These witnesses held observation at one or other of the incidents related to by Kotze and which took place on the 20 December 1991 and the 31 January 1992."

Mr. Du Toit, for appellant, argued the appeal against conviction on four main grounds. He submitted that it was wrong for the trial court to find that the state proved beyond reasonable doubt that the parcel handed to the witness Kotze by appellant on 31 January 1992 was the same parcel found by Krohne in an unknown street in Oranjemund. He said Kotze's car in which he testified leaving the parcel of diamonds was not searched.

He submitted that the trial court erred when it found that Kotze's evidence was acceptable, when in fact there were contradictions in his evidence. He argued that the discrepancy in the evidence of Nel and Krohne as to where the parcel was found should have raised a reasonable doubt as to where the parcel was found. The parcel was said in the same breath to have been seen falling from the hands of the appellant. Yet, argued Mr. Du Toit, parcels of diamonds were said to be left lying about in the vicinity where the said parcel was found.

Mr. Du Toit argued with some force that the Court a quo should have found that officials were involved in a search for the parcel and that Krohne eventually found it behind the Appellant's motor vehicle. The existence of some contradictions in the State case cannot be denied. Those contradictions were, however, overwhelmed by direct and circumstantial evidence led against appellant and which was left uncontradicted on account of appellant's failure to lead evidence in his own defence.

It was not denied that appellant approached Kotze and asked him to assist in the removal of diamonds from the mining area. On 31 January 1992 Kotze went to the mining area.. He was handed a parcel by appellant. On his way out of the mining area Kotze handed the parcel to Warrant Officer Prinsloo. The parcel was X-rayed. It was found to contain something that resembled diamonds. The parcel was handed

back to Kotze who placed it in his garage in a motor car as per an arrangement made with appellant. Security Officer Nel and Sgt. Krohne were observing Kotze*s house and garage. They observed Kotze arriving in a vehicle at his house and entering his garage. They saw him opening the left hand door of his car and closing it again. Then they observed appellant coming to the garage. He opened the garage door and entered. He went to Kotze's car, opened the door on the right side of the car. He leaned into the vehicle. He thereafter closed the door of the car and left the garage.

When Nel, Krohne and Spangenberg tried to approach appellant he ran away through Kotze's yard to a street on the other side of the house. Spangenberg called on him to stop. He stopped and returned to his car which had been left idling and with the right front door open.

The search for the parcel began. Although Mr. Du Toit argued vigorously against the manner in which it was found. It is clear from the evidence that it was found near appellant's car and appellant was at his car.

The Court a quo was alive to this evidence and correctly, in my view, accepted it. It was not contradicted because appellant chose to remain silent which he was entitled to do. But his failure to testify strengthens the State case against him. "On the other hand it is right to bear in mind that there is no obligation upon the accused to give

evidence in any sense except that if he does not do so he takes a risk. The extent of that risk cannot be analysed in terms of logic; it depends on the correlation and assessment of the factors by the trier of fact, that is, on his judgment." Per Schreiner JA. in Rex v Ismail, 1952(1) SA 204(G) at 210(A).

In this case there was direct and circumstantial evidence, implicating appellant in the commission of the crime. The risk was therefore greater than in cases were guilt is sought to be proved by inference. While the appellant has a constitutional right to silence the direct evidence against him could not be ignored. "But the situation is different where there is direct evidence of the commission of the offence. In such a case the failure to testify or the giving of a false alibi, whatever the reason therefore -ipso facto tends to strengthen the direct evidence, since there is no testimony to gainsay it and therefore less occasion or material for doubting it." Per Holmes JA. in S v Nkombeni and Another, 1963(4) SA 877(A) at 893(G). This is indeed the position in this case. Kotze adduced evidence implicating appellant. That evidence was begging for an answer and none was given.

The judgment of Strydom, JP, on the merits, in the Court below cannot be criticised. The learned Judge-President analysed the evidence and found that Nel and Krohne denied ever conducting a search for the parcel. The learned Judge-President believed their evidence that they saw the

parcel drop off from the hand of appellant. There being no evidence that the vicinity where the parcel was found was strewn with parcels containing diamonds, the identity of the parcel cannot be doubted. And the evidence before the Court remained uncontradicted.

The evidence of Kotze received corroboration from the evidence of Nel, Krohne, Steyn and Spangenberg. However, Mr. Du Toit submitted that Kotze was a trap. A trap is defined in Gardiner and Lansdown South African Criminal Law and Procedure. 6th edition volume 1 at 659 - 660 as summarised and accepted in S. v Malinaa and Others, 1963(1) S.A. 692 (A) at 693 F - G and S v Tsochlas. 1974(1) SA 565A at 574B that "a trap is a person who, with a view to securing the conviction of another, proposes certain criminal conduct to him, and himself ostensibly takes part therein. In other words he creates the occasion for someone else to commit the offence". See S. v Ohlenschlacter. 1992(1) SAC LR 695(T) at 703b. (English headnote).

In this case there is evidence from Kotze that he suspected that appellant was stealing diamonds and that the appellant approached Kotze to assist him in taking out diamonds. It seems to me that Kotze is a trap whether or not he did not propose the commission of the offence. He did take part in the commission of the crime. There is however, evidence that he broached the subject when he and his wife discussed with appellant their desire to give him a parcel to take to

Kotze's in-laws.

He had an interest of his own to serve. He knew that upon the arrest of the appellant and the retrieval of the diamonds he would stand to gain 70% of the value of the diamonds retrieved by way of his reward. He received a reward of R331 000,00 form CDM. In the instant case it does not matter whether it was Kotze or appellant who first proposed the removal of diamonds from the mining area, Kotze would stand to gain either way. It cannot be said that Kotze's mind or motive was completely innocent.

It is with this in mind that the Court a quo assessed Kotze's evidence with caution. The cautionary rule must, in cases of this nature be applied more than in any other case in which a trap is involved. The reason for the cautionary rule, as I understand it, is that persons used as traps may have a motive in giving evidence which may outweigh their regard for the truth. Such motives may include the earning (as in this case) of a monetary reward (cf. R v Volk and Volk. 1954(1) SA 203 (SWA), per Classen, J, at p. 206H) or the desire to please their employers by securing a conviction (cf. R v Ah China. 1930 TPD 628, per De Waal, JP, at p. 413 H). Per McEwan, J in S v Chesane, 1975 (3) SA 172 At 173H.

The learned Judge-President considered all the aspects of the dangers of accepting a trap's evidence. He stated in his judgment:

"I agree with Mr. Du Toit that Kotze was clearly a trap who received a substantial reward, whether that, in the circumstances set out before, makes him also an accomplice I am not convinced, but will accept for purposes of this case that that is so. I also agree that in material respects Kotze is a single witness and that for the foregoing reasons his evidence must be approached with caution and circumspection."

After stating that the trap set up left much to be desired, the learned Judge-President went on to say:

"The system of trapping may, in the case of an unscrupulous trap, involve innocent people. The rules are designed to avoid such dangers as far as possible and compliance therewith must be insisted upon by the Courts. However, non-compliance therewith will not always lead to an acquittal if there are other good grounds for believing the trap's evidence. (See *S*_. y Chesane. 1975 (3) SA 172 (T) at 173 EG).

However cases such as Myers and Meshum v R, 1907 TS 760 at 761, S. v Tsochlas, 1974(1) SA 565(A) at 574, S v Mabaso, 1978(3) SA 5(0) at 7 and S. v Ohlenschlaqer, 1992(1) SA Criminal (Law) Report 596 (T) at 721 - 722a, illustrate the dangers involved in such evidence."

I have no doubt in my mind that the conviction of appellant

on the evidence presented to the Court by the State was proper. The Court, as already mentioned, did not have before it appellant's story. Appellant took refuge in silence. Mr. Du Toit mentioned now and again that appellant was an innocent man who had not committed the offence before and who had not shown any interest in. diamonds. However, the evidence adduced by Kotze showed that appellant was interested in diamonds. On 20 December 1991 he handed a parcel to Kotze. He was charged with the contravention of section 30(1) and 28(a) of the Proclamation. He was acquitted for reasons that were clear to the Court. He discussed with Kotze and his wife the parcel he was asked to take to Kotze's in-laws. He broached the subject of diamonds. He asked whether the parcel would contain diamonds.

In Namibia entrapment is not a defence. I cannot say whether the provisions of articles 12 and 25 of the Constitution of Namibia are contravened by entrapping suspects to crimes. It has still to be shown that these articles are contravened each time a suspect to a crime is entrapped. Does a fair trial begin with the arrest of a suspect? Is a fair trial not confined to the actual trial before a presiding magistrate or Judge? . These questions have to be answered before it can be said articles 12 and 25 provide a defence to trapping.

I would like to believe that a trial begins when the

determination of an issue between parties commences before a competent court and not at the arrest stage because the arrest of an accused person may be one of the issues to be determined by the court.

It has not been argued before us whether "fair trial" encompasses investigations before arrest, arrest and the determination of the case before a competent tribunal. Perhaps assistance can be derived from definitions of the word "trial" or "at a trial" given by learned judges. A few such definitions gathered in Poli v Minister of Finance, (1988) LRC (Const) 503 at 507f to 508a will be of assistance:

> "In Wozniak v Wozniak (1953) 1 All ER 1192 at p. 1193A Denning, LJ, defined the phrase "at the trial or hearing" as meaning the final determination. He said:
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> > 'I see no point whatever in the words "at the trial or hearing" unless they mean the final determination of the matter. They do not include preliminary applications.'
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> Eloff, J. said in S v Press Corporation of South Africa Ltd, 1979(4) SA 476 (TPD) at p. 478 that:
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> > '...the general meaning of the word "trial" in the context of criminal proceedings is reasonably well established in respect of the commencing stage thereof; that is when the judicial investigation by the court commences.'

Trial would mean the stage from the commencement up to the conclusion of the judicial enquiry.

In Catherwood v Thompson (1958) QR 326, a Canadian case, Schroeder, J., said at p. 331:

> 'In a general sense, the term "trial" denotes the investigation and determination of a matter in issue between parties before a competent tribunal, advancing through progressive stages from its submission to the court or jury to the pronouncement of judgment. When a trial may be said actually to have commenced is often a difficult question but, generally speaking, this stage is reached when all preliminary questions have been determined and the jury, or a judge in a non-jury trial, enter upon the hearing and examination of the facts for the purpose of determining the questions of controversy in the litigation.'

Before a Court of Appeal can decide whether entrapment falls within the ambit of the phrase "fair trial" in article 12 of the Constitution full argument will have to be submitted to the Court by Counsel and the meaning of fair trial argued before a decision is made on the full import of the phrase "fair trial" in article 12. I am therefore content to leave the meaning of a "fair trial" and whether police

investigations and arrests fall within its ambit for future determination. I decline, without hearing argument, to determine the effect of article 12 on the defence or otherwise of entrapment. This is a serious matter in view of what O'Linn, J. said in S v Kramer, 1991 (1) SACR 25 Nm at 30 c - g:

> "It is trite law that the trap system is regarded as a necessary evil in our law - ie that although it is tainted by immorality, it is justified particularly to bring a known criminal or offender to justice. Our Courts have traditionally held the view that the trapping system is legal, particularly because it is also legalised by statutory law in that, for example, moneys paid to traps can be forfeited to the State, and in some cases must be forfeited to the State in terms of express statutory provisions to this effect (see s 108(2) of the Precious Stones Act 73 of 1964, and s. 6 of Proc AG 70 of 1990, ...)."

In the instant case there was evidence that the appellant was involved in this type of activity and the place where he worked contained diamonds. These were factors to be considered. In addition Kotze led evidence incriminating appellant in this regard. The evidence was not contradicted. That evidence was damaging to the defence. It is not denied that appellant decided to seek assistance from Kotze. He decided on the date, place and procedure concerning the removal of the parcel. In spite of

the fact that the trap was clumsily handled and the fact that Kotze received a substantial reward, the evidence against appellant's participation in the trap, admittedly without knowledge of the trap, remained uncontradicted. The overall impression state evidence left was that appellant contributed to the moves that led to his entrapment. He was not persuaded to and he was not incited to remove diamonds from the mining area. It was the appellant who asked for assistance from Kotze. The learned Judge-President was aware of all these factors and came, in my view, to the right decision.

The Court a quo stated that "none of what was testified to by Kotze was denied either in cross-examination or explained by accused under oath. The defence was content, as they were entitled to, to attack Kotze on various grounds and on credibility and to show him up as a poor witness. This, in my opinion, they did not succeed to do and Kotze's evidence, which was also shown by other evidence to be the truth, is accepted by the Court".

A careful reading of the record leaves one with the view that what the learned Judge-President expressed in the above passage was correct. It was up to the appellant to challenge the truth of the assertions made by Kotze on oath. He did not do it. What the Court was left with at the end of the trial was the unchallenged and corroborated evidence of Kotze. The appeal against conviction has, in my view, no merit.

The appeal against sentence presents some difficulties. It is common cause that appellant is a member of a well known Namibian family. He is an educated man. And from the record of his promotions at his work place, it was clear that he was a capable and trusted worker. Had events not taken their present turn he would have received more rewarding promotions. He was at the time of his arrest earning approximately Rl 600,00 per month. He has had to delay his marriage to the mother of his child. He supports his child and his mother.

What is more he is a first offender. The Court a quo was impressed by appellant although he did not give evidence. His personal circumstances are compelling. They must be weighed against the seriousness of the offence he was convicted of. Mr. Du Toit contended that the trial court erred in imposing an effective sentence of imprisonment under these circumstances. He submitted that a fine of R60 000,00 would fit the offence and appellant's personal circumstances. He argued that the trap was unfair and irregular and this should have been considered a strong mitigatory circumstance.

Mr. Du Toit contended further that appellant's unlawful conduct was induced by Kotze, a trap, who brought appellant to stealing the diamonds. He would not have committed the offence had he not been entrapped by Kotze. To some extent this is true. This submission would have given more forceful mitigatory factors had appellant given evidence.

The learned Judge-President considered all the favourable factors of mitigation including the part played by Kotze. He came to the conclusion that appellant by "his own endeavours, obtained and stole diamonds. He looked for a safe conduit. The safe conduit was Kotze. Appellant sought to use him. It did not work. Kotze had his own interest."

Mr. Van Wyk, for respondent, submitted that this case was different from that of S. v Kramer and Others, 1991(1) SACR 25 (Nm) because the appellant in the instant case did not take the initiative. Although Kotze might have suspected him of dealing in diamonds there was no prior history of his dealing in diamonds. Appellant asked Kotze to assist him in taking diamonds out of the mining area. This was after the discussion between Kotze and his wife and appellant when Kotze asked him to take a parcel to his in-laws in Swakopmund. They then discussed whether the parcel contained diamonds. (During argument we were informed that in that area the word "parcel" has a secondary meaning -diamonds). Kotze's suggestion must have given an indication to appellant of the likelihood of carrying or dealing in diamonds. Kotze was a senior security officer. Appellant must have thought that it was safe to use him as a conduit. And indeed the indication became a reality when the first parcel handed to Kotze, the subject of the first count, did not lead to an arrest.

Mr. Van Wyk conceded that Kotze's behaviour and his inducing

appellant to take out diamonds corroded appellant's resistance to stealing diamonds. Because of this, argued Mr. Van Wyk, appellant was entitled to a lesser term of imprisonment than that imposed by the Court a quo.

I would like to comment on the reward system, the policy of CDM. The diamond industry every where in the world is threatened by losses incurred through thefts. One can say without hesitation that thefts of diamonds amount to economic sabotage. There is, therefore, every justification for mining companies to introduce all manner of measures in order to minimise losses of money through thefts. CDM introduced, understandably a reward of 70 per cent of the value of stolen diamonds that are retrieved. It is a big incentive to security officers and other workers whose duty it is to prevent thefts.

But the system has telling disadvantages. It interferes with the smooth running of our system of justice. The reward system, because it is very lucrative, may induce security officers and others to tempt people to steal diamonds in order for them to get rewards.

In S v Fillemon Shitungeni, Case no. CC 25/93, as yet unreported, Levy J, described the reward system as immoral. He went on to say at 13:

> "The underlying danger that the reward system has, is that it may make liars and perjurers out of innocent and

> good security officers and positive criminals, out of weak security officers by offering them more money than they could earn in a life-time. And all they had to do to get this money, is to use the power which they have by virtue of their employment to trap someone, whether such person is a suspected illicit diamond dealer or whether he is innocent."

In this case it is easy to assume that Kotze is a good person and a good employee of CDM. The Court does not know how much his employer pays him per month. In this entrapment he earned 70 per cent of R472 890,00, a reward of R331 000,00 from his employers, CDM. Whatever his salary is this is a great deal of money.

The danger is that innocent men and women may be induced, I put it no higher than that, to steal diamonds because security officers want to earn the 70 per cent reward. Innocent people may find themselves convicted by the Courts on evidence led by people with interests of their own to serve, the lucrative rewards.

Courts of law must guard against the abuse of the legal system because justice begins at the time a suspect is questioned by the police. If at that stage falsehoods are brought to Court by over-enthusiastic police or state witnesses, courts may unknowingly accept false evidence and convict innocent men and women. The interests of society

are safeguarded by a system of justice that excludes the false entrapping of innocent people because such entrapment may bring to court people who had no interest in stealing and dealing in diamonds. When security men, the very people who are employed to prevent theft of diamonds, entice people to steal diamonds in order for them to earn a reward, no fair system of justice can justly be enforced.

The interest of the diamond industry, which must by all means be protected by our justice system, must not be used to corrupt the very system that gives the industry protection. I say so because those who want to earn the high rewards open to them upon the apprehension of diamond thieves and the retrieval of diamonds are open to abuse the innocent and high rewards meant to curb the incidents of thefts.

In the instant case it is common cause that the discussion between appellant and Kotze on diamonds was started by Kotze and his wife when they broached the subject of a parcel they wished appellant to take to Swakopmund.

Appellant wanted to find out whether the parcel contained diamonds, from that point onward the link in the chain was established. In the end appellant eventually brought the subject of Kotze assisting in the removal of diamonds from the mining area.

There are, in this case, many pieces of the evidence of Kotze that required rebuttal and contradiction. They were left unchallenged and unexplained because, as I said before, appellant sought refuge in silence.

However, this is a very serious offence. The courts of this country impose, on those convicted of contravening sections 30(1) and 28 of Proclamation 17 of 1939, long terms of imprisonment.

However, in this case factors of mitigation outweigh those of aggravation. It is not usual for an appellate court to ignore submissions on sentence made by State counsel in serious cases such as this one. Mr. Van Wyk drew the Court's attention to two factors of mitigation. He submitted that Kotze was a senior security officer who induced appellant or enticed him to steal diamonds. He lowered appellant's resistance to theft of diamonds by agreeing to be a conduit for the removal of diamonds stolen by appellant. He corroded appellant's resistance. These are weighty factors of mitigation, justifying a reduction in the sentence of imprisonment imposed by the Court a quo. These factors were not, in our view, given due weight by the Court a quo.

In the result the appeal against conviction is dismissed but the appeal against sentence succeeds to this extent:

The fine of R25 000,00 or in default of payment 2 years imprisonment, is confirmed. The sentence of 8 years imprisonment with 2 years suspended for 4 years is set aside and substituted by the following:

> Appellant is sentenced to 8 years imprisonment. Four years of that sentence are suspended for five years on condition that appellant does not commit during that period an offence contravening section 30(1) or section 28 of Proclamation 17 of 1939 for which he is convicted and sentenced to a term of imprisonment without a fine.

E. DUMBUTSHENA, A.J.A

I concur.

I. MAHOMED, C.J

I concur.

H. W. LEVY, A.J.A.

ADV. FOR THE APPELLANT: E. DU TOIT, S.C.
: G.S. COETZEE

(KARUAIHE & CONRADIE)

ADV. FOR THE RESPONDENT: F.P. VAN WYK