

CASE NO.: CC 167/98

THE STATE versus GALIT KRAMASH

HANNAH, J

1998/10/27

JURISDICTION

Laws of Namibia apply to persons in transit area at Hosea Kutako International Airport.

CRIMINAL LAW

MENS REA

Offence of failing to make a declaration to a customs officer and offences of importing or possessing rough or uncut diamonds require *mens rea*. But onus is on accused to prove absence of *mens rea*.

CASE NO: CC 167/98

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

GALIT KRAMASH

CORAM: HANNAH, J.

Heard on: 1998/10/01,02

Delivered on: 1998/10/27

JUDGMENT:

HANNAH, J.: The accused has pleaded not guilty to an indictment which contains four counts. The first alleges failing to make a declaration to a customs officer in contravention of section 14(l)(a)(iii) of the Customs and Excise Act, 20 of 1998. The second alleges unlawful importation of 27 kilograms of rough or uncut diamonds valued at NS47 338 344.00 in contravention of section 28(d) of Proclamation 17 of 1939 as amended. The third alleges unlawful possession of such diamonds in contravention of section 28(a) of the Proclamation. And the fourth alleges bribery of a police officer. All these offences are alleged to have been

committed on or about 24th September, 1998 at or near Hosea Kutako International Airport in the District of Windhoek.

The facts of the case are largely common cause and it is convenient to summarise them by reference to the evidence of the accused. She was brought up in Israel and obtained a degree in the history of arts in that country. She is now 26 years of age and is married. In the latter part of 1997 her husband became resident financial director in a diamond business known as the Catoka Project based in Angola. The Catoka Project is a joint venture between an Israeli company called LLD, the Governments of Angola and Russia and a Brazilian company. Another company called Heart Diamonds is an associate company of LLD. Each month a consignment of diamonds was sent from the Catoka Project to Tel-Aviv by courier. As a form of perk the accused, who had joined her husband in Angola, was sometimes asked to act as courier. She is studying for an honours degree at the University of South Africa and if acting as courier took her to Johannesburg for the diamonds to be shipped onwards to Tel-Aviv she could spend time at the University campus in Pretoria. If she was asked to do the through trip to Tel-Aviv she could spend time at home. And so in late 1997 she flew with a consignment of diamonds from Luanda to Tel-Aviv via Paris. In February 1998 she made a similar trip via Brussels. In March, 1998 she flew from Luanda to Johannesburg where she delivered the diamonds to Ram International, a professional courier company, at the customs point for onward shipment to Tel-Aviv. And there was one other similar trip. On none of these occasions was any problem experienced. The accused had with her a certificate of origin showing LLD or its associate company, Heart Diamonds, as owner of the

diamonds which were placed in a sealed container. In Europe she stayed in transit and if a security X-Ray picked up the diamonds and she was questioned she would simply produce the certificate. The State has not suggested that the involvement of the accused in shipping rough or uncut diamonds from Luanda to Tel-Aviv was anything other than legitimate.

On 23rd September, 1998 the accused was to act as courier once again this time taking a container containing 27 kgs of rough or uncut diamonds worth N\$47 338 344,00 from Luanda direct to Johannesburg where it was intended that she should hand it over to a representative of Ram International as she had done previously. However, certain documentation was not ready and it was decided that she should travel the following day. On 24th September there was a flight to Windhoek and a further flight from Windhoek to Johannesburg and she was booked onto that route. And so it came about that on 24th September the accused arrived at Hosea Kutako International Airport, Windhoek with hand luggage in which was a container containing rough or uncut diamonds worth N\$47 338 344,00. It was her intention, and this is conceded by the State, simply to change aeroplanes and continue her journey to Johannesburg with the diamonds where she would hand them over in a perfectly legitimate way to a representative of Ram International. But that was not to be.

The facilities at Hosea Kutako International Airport are such that transit passengers have to pass through the immigration point in the arrival hall and the customs point in the baggage hall and from there exit into the main airport hall. They then find their way through an unrestricted area to the appropriate check-in counter, exchange their

tickets for a boarding pass and then make their way past the immigration point into the departure lounge. If they are changing aeroplanes they have the added burden of collecting their luggage from the carousel in the baggage hall, taking it through customs to the check-in counter in the main airport hall and checking it in.

On arrival at the airport the accused followed the routine just described. She reported to an immigration officer at the immigration point and the officer, having checked her ticket and passport to ensure that she was travelling on to Johannesburg, returned her passport unstamped. So far as he was concerned she was a transit passenger not seeking to enter Namibia and so there was no need to stamp her passport or retain an immigration form. In addition to the hand baggage containing the diamonds the accused was also travelling with a suitcase and she was told to collect it from the luggage carousel. This she did and she then asked two policemen where a transit passenger should go and was told that she should go through the automatic door leading to the unrestricted area. This she did without declaring the fact that she was carrying rough or uncut diamonds. The accused said that because she was a transit passenger her mind was not focusing on customs or customs declarations or anything of that kind. In her experience passengers in transit simply do not declare their goods as they are not bringing goods into the country in which they are in transit.

Having passed through the automatic door at the customs point the accused went directly to the South African Airways counter where she checked in her suitcase and received a boarding pass. From there she went through the immigration point for departing passengers and then, with assistance, placed her hand luggage on the security

X-Ray machine. She was then asked to go to a nearby room where a police constable asked her to open her suitcase. This she did saying that the suitcase contained diamonds. She showed the police officer the certificate of origin, told her that everything was legal and refused to open the sealed container. The container, she said, had to remain sealed until arrival in Israel and she would only have permitted it to be opened before arrival if required to do so by a high ranking official. The police officer told her to wait and she then returned with one Warrant Officer Isaacs. They went to Isaacs' office where the suitcase was reopened and the accused informed Isaacs that the sealed container contained diamonds. She showed him the certificate but he said that it was not enough. The accused was then taken to Windhoek and placed in custody.

As stated earlier, the foregoing summary of facts is largely common cause. There were some minor differences such as whether the accused passed through the red or green channel at the customs point. Once she was shown photographs of the customs point the accused was adamant that she had passed through the green but the evidence of one of the customs officials on duty was that the group of transit passengers from the Luanda flight went through the red channel as was the normal practice with all passengers from Angola. However, there is no suggestion that the accused was questioned by any customs official and nothing of significance turns on whether she passed through the red or green channel. If she did indeed pass through the red channel then I accept that her evidence is the result of innocent mistaken recollection. Certainly I reject the submission of Mr Goba, who with Mr Small appeared for the State, that the evidence of the accused in this regard was a deliberate lie reflecting on

her general credibility.

The major conflict in the evidence lies in that of Maria Katoole and that of the accused. Katoole is the police constable who was stationed at the security X-Ray machine and who accompanied the accused to the search room. She said that she asked the accused to open her luggage but she refused to do so. Instead she produced a paper and said she had papers for "those items." Katoole said she read the document and said she would like to see the items in the bag but still the accused refused. Katoole said that she then told the accused that she would call the supervisor but the accused said that she should not. She would pay her. Katoole said that again she told the accused to open but she still refused. Katoole then called the supervisor and handed the document to him. When he read the document he instructed the accused to open the bag which she did. And inside was a box. The supervisor then called Warrant Officer Isaacs.

The evidence of Katoole contrasts sharply with that of the accused in certain respects. The accused denied refusing to open the suitcase. All she refused to open was the sealed container containing the diamonds. And the accused denied making any kind of offer to pay Katoole. With regard to the question of refusal to open the suitcase I prefer the evidence of the accused. Katoole accepted that the accused handed her the certificate of origin and whilst this document is by no means clear, being a mixture of different languages, one glance shows that it has to do with diamonds. Reference is made to "Heart Diamonds Ltd" and the word "Diamantes" appears twice. It is most unlikely that the accused would have handed this document over without explaining

that it had to do with diamonds and, having done that, there could have been no reason for her to have refused to open the suitcase although opening the container itself was another matter. Also, at the beginning of her cross-examination Katoole agreed that when she asked the accused to open the suitcase she did so but she later resiled from this piece of evidence. In my view, the constable has confused the accused's refusal to open the container with a refusal to open the suitcase.

As for Katoole's evidence that the accused said "Don't call the supervisor, I will pay you", Mr Cassim, for the accused, made three criticisms of the reliability of her evidence. Firstly, he contrasted Katoole's evidence in the witness box with what is contained in a written statement made by her on 25th September. In that statement she is recorded as having said "She asked me not to tell anyone and she will pay me for that." Katoole's explanation for the difference was that her fellow constable who took down the statement could have taken it down incorrectly but Mr Cassim says that that is not good enough. Katoole read through the statement and must have realised the importance of correctly recording words which, if said, amounted to a bribe. The difference between the witness' testimony and her written statement plants the seed of a doubt over her testimony. And then Mr Cassim referred to the admitted fact that Katoole did not inform her senior officer, Warrant Officer Isaacs, of the alleged bribe until 25th September. Katoole said she informed the other members of her unit on 24th but gave no explanation why she did not inform her senior officer until the following day. Speaking for myself, I would expect the report to have been made to Isaacs contemporaneously with the report regarding the diamonds and, in my judgment, the seed of doubt surrounding Katoole's testimony grows. Perhaps it was

suggested to her that an allegation of bribery would assist in undermining the position of the accused that she was not aware of any wrongdoing. Mr Cassim's third point was that the accused had no reason to offer to pay money. So far as she was concerned her actions were legal. There may be something in this point but not much. As Mr Small pointed out she would have been anxious to avoid any delay and that might have been reason enough for her to offer a payment.

I have considered the evidence of Katoole and that of the accused together with counsels' argument with regard to count 4. I also bear in mind the practice that section 208 of the Criminal Procedure Act should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect: *R v Mokoena* 1932 OPD 79 at 80. At the end of the day I am not satisfied beyond reasonable doubt that the accused did offer to pay Constable Katoole and accordingly she is entitled to be acquitted on count 4.

When dealing with count 1 both counsel for the State and counsel for the defence referred to *Tieber v Commissioner for Customs and Excise* 1992 (4) SA 844 (A). That case dealt, in part, with the effect of section 15(1) of the South African Customs and Excise Act, 91 of 1964 which provided that:

"(1) Any person entering or leaving the Republic shall, in such manner as the Commissioner may determine, unreservedly declare all goods in his possession which he brought with him into the Republic or proposes taking with him beyond the borders of the Republic, and shall furnish

an officer with full particulars thereof, answer fully and truthfully all questions put to him by such officer and, if required by such officer to do so, produce and open such goods for inspection by the said officer, and shall pay the duty assessed by such officer to the Controller."

That section is similar to section 14(1) of the Customs and Excise Act, 20 of 1998 which provides:

Persons entering or leaving Namibia, and smugglers

14. (1) Any person entering or leaving Namibia shall, to such officer and in such form and in accordance with the procedures prescribed by the Permanent Secretary, unreservedly declare -
- (a) at the time of such entering, all goods (including goods of or belonging to any other person) upon his or her person or in his or her possession and which he or she brought with him or her into Namibia, and which -
- (i) were purchased or otherwise acquired outside Namibia or on any ship or vehicle, or in any shop selling goods on which duty has not been paid;

(ii) were remodelled, processed or repaired outside
Namibia; or

(iii) are prohibited, restricted or controlled under any
law; and

(b) before so leaving, all goods which he or she proposes
taking with him or her beyond the borders of Namibia,

and shall furnish such officer with full particulars of such goods, answer fully
and truthfully all questions put to him or her by such officer and, if required
by such officer to do so, produce and open the container or package containing
such goods for inspection by such officer, and shall pay the Controller the
duty, if any, assessed by such officer."

When dealing with section 15(1) of the South African Act Goldstone JA said at 850H:

"The only purposes of declaring goods are:

(a) to enable the customs officer to determine whether duty is
payable; and

(b) to prevent prohibited or restricted goods being brought into the

country.

Goods in transit do not fall into either of those two categories. No purpose would be served in declaring goods in the hold of an aircraft or ship which are not brought into the Republic. An indication that section 15(1) does not apply to such goods is also to be found in the provision there for a customs officer to require the person declaring the goods to produce and open them for inspection. In the usual situation such a requirement would be impossible to fulfil in respect of goods in transit and not in the physical possession of the traveller. It follows that the provisions of section 15(1) do not apply to goods which remain in a transit area."

One difference between section 14(1) of our Act and section 15(1) of the South African Act is that a distinction is apparently drawn between goods upon the person of a person entering the country and goods in that person's possession and it may be that that would lead to a conclusion different from that expressed by Goldstone J.A. However, in the circumstances of the present case it is unnecessary to express an opinion on the matter. On the facts of the present case the accused together with her luggage did not remain in the transit area at Hosea Kutako International Airport. Due to the peculiar arrangements for transit passengers she passed into the unrestricted area of the airport albeit for a very short period of time. She should have declared the diamonds in her possession to a customs officer.

Another case to which reference was made is *S v Kanyamula* 1984 (2) SA 121 (ZSC).

In that case the appellant, whilst in transit, was found to be in possession of prepared Indian hemp, a prohibited substance. He was convicted of contravening the Dangerous Drugs Act. On appeal he contended that as a transit passenger he was not subject to the laws of Zimbabwe in relation to the possession of dangerous drugs. On appeal the Supreme Court held that the transit lounge at Harare International Airport is as much part of Zimbabwe as any other part of the country and that the laws of Zimbabwe are as much applicable there as they are in any other part of Zimbabwe. I respectfully agree that the same holds true of the transit area at Hosea Kutako International Airport. But in any event on the facts of the present case the accused left the transit area and passed into the unrestricted area of the airport.

The real issue in the instant case is one of *mens rea*. The State conceded that *mens rea* is an element of each of the offences with which the accused is charged in the first three counts and, in my view, that concession was correctly made. And I am also of the opinion that the concession made by Mr Cassim that the onus is upon the accused to prove, upon a preponderance of probabilities, the absence of *mens rea* was correctly made. See *R v Britz* 1949 (3) SA 293 (A.D.) at 301. I therefore turn to consider whether the accused has established, on a balance of probabilities, that her mind was innocent at all material times.

The best evidence of the state of mind of the accused is her own evidence and her evidence was that throughout her passage through Hosea Kutako Airport she was unaware that she was doing anything wrongful. However, it is all too easy for an accused to make such a claim and where it is made the circumstances and facts of the

case must be carefully examined and considered. What stands out in the present case is the fact that the accused had made previous journeys, all legitimate, carrying rough or uncut diamonds from Luanda to Tel-Aviv or Johannesburg. She had experienced no problems on those occasions and had no reason to expect any when she undertook the journey via Windhoek on 24th September, 1998. When she arrived at Hosea Kutako International Airport she knew that all that was required of her was to collect her luggage and check in for the onward journey to Johannesburg. That her mind, in these circumstances, did not focus on the question of a customs declaration is, in my view, perfectly reasonable and understandable. The State adduced evidence of a large sign above the luggage carousel informing passengers that they must make a customs declaration but I can well understand if a transit passenger should show no interest in such a sign. Why should she when she is not intending to bring any goods into Namibia? And furthermore why should she be aware that possession of rough or uncut diamonds in Namibia without a licence or authority is unlawful? Mr Goba made the extravagant submission that everyone should be aware of the fact that Namibia is a diamond producing country and, as such, is likely to have laws regulating possession of rough or uncut diamonds but, in my view, there is no substance in that.

In my view, the account given by the accused was plausible and credible and to avoid the conclusion that her mind was, in all probability, innocent the State must point to factors which indicate that it was not. That, in my judgment, the State has failed to do. All it has done is speculate. And as for the suggestion that the accused was negligent in not ascertaining the laws of Namibia prior to commencing her journey why should she when she expected to be in transit? The only previous occasions she

had passed through Hosea Kutako Airport were on two return flights from Johannesburg to Luanda on Air Namibia when, according to her unchallenged evidence, she went directly from the aeroplane to the departure lounge.

In my judgment, the accused has satisfied the onus placed upon her of establishing that at all material times her mind was innocent. Accordingly, she is acquitted and discharged on all four counts.

As for the suitcase and the diamonds, Exhibit 1, it is ordered that they be delivered to her as passenger hand baggage on an aircraft of the accused's choosing at Hosea Kutako International Airport and on which she is travelling to a destination outside Namibia.


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HANNAH; J.

ON BEHALF OF THE STATE

ADV D F SMALL

ADV R GOBA

ON BEHALF OF THE DEFENCE

ADV N CASSIM AND

WITH HIM ADV P J MILLER

Instructed by:

Conradie & Damaseb

(Mr Damaseb)