CASE NO.: CA 08/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

AVITAL BEN BIROVSKY **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **HENNING AJ, *et* BOTES, AJ**

Heard on: October 4, 2010

Delivered on: October 19, 2010

JUDGEMENT:

Botes, AJ.:

[1] The appellant, an Israeli national who, at the time of the trial, was 43 years of age, was convicted in the Magistrate Court of Windhoek, on a charge of contravening Section 30(1) read with Section 30(2) of the Diamond Act, 1999 (Act 13 of 1999), unlawful

possession of rough and/or uncut diamonds, and a charge of contravening Section 37(1) of the Diamond Act, 1999 (Act 13 of 1999), unlawful import of rough and/or uncut diamonds.

[2] The quantity, value and weight of the diamonds involved in both counts were 272 rough or unpolished diamonds with a mass of 348.75 carats, valued at N$15,613.03.

[3] Appellant pleaded guilty and written statements in terms of Section 112(2) of the Criminal Procedure Act, Act 51 of 1977 were handed in during the proceedings in the court *a quo.* Appellant was convicted on both counts as pleaded.

[4] Appellant did not testify in mitigation nor did she call any witnesses to testify on her behalf. The State also did not call any witnesses.

[5] After hearing oral submissions on mitigation, aggravation and possible sentences to be imposed, appellant was sentenced to a fine of N$25,000.00 or three (3) years imprisonment on each of the counts. The magistrate gave an *ex tempore* judgment on sentencing, which *ex tempore* judgement's reasons the magistrate amplified after receipt of the notice of appeal.

[6] Appellant dissatisfied with the sentences, filed a notice of appeal against both sentences imposed. The grounds of appeal contained in the notice of appeal are quoted *verbatim* hereunder:-

"*Ad the sentence*

1. The Learned Magistrate failed to take into account or take into account adequately, that

1.1 The Appellant was a First Offender.
1.2 The value of diamonds was only N$15,613.03.
1.3 The diamonds were forfeited to the State.
1.4 The Appellant cooperated with the police investigation.

2. The Learned Magistrate overemphasised the seriousness of the offence and the interest of society.

3. The Learned Magistrate erred in taking into account the prejudice or potential prejudice of the Namibian Government, losing its International Trading Licence in Diamonds, as occasioned by Appellant's conduct in that:

3.1 No evidence led as to how Appellant's conduct would have exposed the Namibian Government to loss of trading licence/s, and <u>exparte</u> statements by the Prosecutor were taken into account.

4. *The sentence is so unreasonable, shocking and disproportioned, that no reasonable Court could have imposed it."*

[7] The appellant, in the court *a quo* and on appeal was represented by Mr Muluti. The State was represented in the court *a quo* by Mr Nsundano and on appeal by Ms Jacobs.

[8] Rule 67 of the Magistrate Court Rules, requires that a notice of appeal shall "*set out clearly and specifically the grounds whether of fact or law or both fact and law, on which the appeal is based.....*".

[9] In *S v Wellington*[1], *Frank J,* dealing with a notice of appeal, quoted Diemont J, is *S v Horn, 1971(1) SA 630(C) at 631 H*, where the following was said:-

"the rule provides in simple unambiguous language that the appellant must lodge his notice in writing, in which he must set out "clearly and specifically" the grounds on which the appeal is based. He must do this for good reason. The Magistrate must know what the issues are, which are to be challenged, so that he can deal therewith in his reasons for judgment. Counsel for the State must know what the issues are so that he can prepare and present argument which will assist the court in his deliberations and finally, the court itself will wish to be appraised of the grounds so that it can know what portions of the records to concentrate on and what preparation, if any, it should make an order to guide and stimulate a good argument in court."

[10] Van *Heerden J in S v Khoza*[2], with reference to the matter of *S v Hlope*, quoted the learned judge's observations as follows*:*

"It should be made perfectly clear that a notice of appeal is not just an informal document which could be disregarded at will. It forms the very basis upon which an appeal must stand or fall. This Division is working under tremendous pressure, the Judges barely have time to read a record once and certainly no time to consider the merits of an appeal outside the grounds upon which a conviction or sentence is being attacked in the notice of appeal. When an accused is convicted the magistrate often does not give any reasons in support of the conviction and/or times may only give a short ex tempore judgment. After a notice of appeal is lodged the magistrate's statement of facts found proved and his written reasons for judgment are usually confined to the grounds taken therein..... A warning is accordingly issued, that in future this court will be very slow in allowing appellants to amend their grounds of appeal at such a late stage and will only consider doing so if there is a substantive application to that effect. Appeals will have to stand or fall on the grounds properly and timeously taken."[3]

[1] 1990 NR 20 (HC) at 22 H-I
[2] 1979(4) SA 757 NPD AT 758 B-E.
[3] In S v Baloyi, 1991(1) SACR 265 (B), Friedman J pointed out that the notice of appeal must have defined the subject matter of the appeal, that if no subject matter is defined by the notice there can be no valid appeal,

[11] Mr Muluti, on behalf of the appellant, in appellant's main heads of argument and/or during the hearing of the appeal, in addition to the grounds reflected in the notice of appeal submitted that:-

- "*By reason of the fact that the magistrate imposed similar sentences on both counts "it may be inferred that the magistrate concluded that there were no substantial and compelling circumstances"*[4]*"*

- *"The record does not indicate which personal circumstances, if any, were taken into consideration during sentencing"*[5]*"*

- *"The court a quo should have ordered that the two counts for purposes of sentence should have been taken together, since they are based on a single transaction with the same state of mind."*[6]*,*

- *"The court a quo misdirected itself in that it failed to consider the effect of articles 10 and 11 of the Namibian Constitution insofar as it is required that all persons be regarded as being equal before the law."*[7]

[12] None of the submissions referred to hereinbefore is founded, even by a stretch of imagination, on any ground of appeal as it appears in the notice of appeal. The submissions also, do not only entail points of law, but of law and fact. Any such submission that is not based on one or more of the appellant's grounds of appeal, cannot be entertained because the grounds of appeal have not been amended and have not been submitted to the magistrate for his consideration. As such, the additional submissions advanced by Mr Muluti find no application in the present appeal and are ignored.[8]

[13] Mr Muluti submitted that the court *a quo* failed to take into account or take into account adequately that the appellant is a first offender, the limited value of the diamonds, the forfeiture of the diamonds, and that the appellant co-operated with the police investigation.[9] There is in my opinion no merit in the submissions made by Mr Muluti as it is evident from the contents of the *ex tempore* judgment on sentence given by the magistrate as amplified by the reasons supplied by the magistrate that the court *a quo*

---

and that when a notice of appeal does define the subject matter for appeal, counsel's submissions, and the hearing of the appeal, must be confined to the subject matter so defined. See also: S v Gey van Pittius & Another, 1990 NR 35 (HC) at 368 where Strydom, AJP (as he then was) said: "the purposes of grounds of appeal as required by the rules is to appraise all interested parties as fully as possible of what is an issue and to bind the parties to those issues." S v Kakololo, 2004 NR 7 (HC) on p8

[4] Paragraph 2 and 3 of appellant's heads of argument
[5] Paragraph 6 of appellant's heads of argument
[6] Paragraph 9 of appellant's main heads of argument
[7] Submissions made in Court by Mr Muluti
[8] S v Lukume, 2000 NR 115 (HC) 117 F; Jacobus Adriaan Pienaar v The State, unreported judgment (HC) per Muller J, delivered on 5 October 2010 at p17.
[9] Paragraph 1 of appellant's main heads of argument and submissions made in Court.

was alive to the personal circumstances of the appellant, the value of the unpolished diamonds, as well as the fact that appellant cooperated with the police.[10] It also does not appear from the record, as well as the nature of the sentences imposed that the court underemphasised the personal circumstances of appellant.

[14] Mr Muluti contented that the forfeiture of the unpolished diamonds must be regarded as a mitigating factor and that the learned magistrate erred in the law and/or on the facts in not doing so. Ms Jacobs, on behalf of the state, submitted that a forfeiture in circumstances like the present, cannot be regarded as mitigation as the magistrate was compelled to forfeit the diamonds to the State.[11] In my view the submission of Ms Jacobs is correct, as it is common cause that the possession and importation of the rough and uncut diamonds, by appellant were illegal. Appellant, could not import nor legally possess the rough and uncut diamonds in the Republic of Namibia. Appellant as such was not lawfully entitled to the value of the unpolished diamonds or any part thereof. The magistrate was compelled to declare the rough and/or unpolished diamonds forfeited to the State in terms of section 34 of the Criminal Procedure Act.[12]

[15] This situation is distinguishable from the situation where a presiding officer is clothed with a discretion to declare forfeited to the State an article which an accused may lawfully possess and the value of which is to an accused's financial benefit.[13] This is not the case in the appeal under consideration. I am therefore of the opinion that the Magistrate did not *err* in not taking into account, as a mitigating factor, the forfeiture order made, as appellant has no recognisable right or interest in our law in the articles or the value of the articles declared forfeited. Appellant, furthermore, did not place any facts before the court *a quo* from which it can be inferred that she, outside the borders of Namibia, would have had a lawfully recognised right and/or interest in the articles or the value of the articles declared forfeited.

[16] Mr Muluti strenuously argued that "*the learned magistrate over emphasised the seriousness of the offence and the interest of society."* No specific ground or reason

---

[10] Record pg 22, lines 10-20 "Mitigation falls under the Accussed person's circumstances. The fact that she is a first offender, place (sic) a big role in reaching a reasonable sentence, but it is not a major factor on which the Court should consider sentencing, since there are other issues to focus on. As the Defence Counsel stated, the Accused person pleaded guilty which is appreciated by the Court because it reduces the work lock (*sic)* and the time spent in Court, by pleading guilty. Furthermore that she cooperated with the police and the matter was resolved in a reasonable time."

[11] Section 34 of the Criminal Procedure Act, Act 51 of 1977, See also: Section 77 of the Diamond Act, 1999.

[12] Act 1951 of 1977 as amended. The Magistrate forfeited the unpolished diamonds to the State in terms of Section 77 of the Diamond Act, 1999. The said section however, does not in itself provide for the forfeiture of the unpolished diamonds. The forfeiture should have been made in terms of Section 34 of the Criminal Procedure Act, Act 51 of 1977. This aspect however is of no significance in this appeal, as the magistrate was compelled to declare the unpolished diamonds to be forfeited to the State.

[13] See section 35 of the Criminal Procedure Act, Act 51 of 1977 – in matters where the court has a discretion, the court is entitled to take any relevant factor into account, including *inter alia,* the question of whether the object played an important or assessory role in the commission of the offence. The court will also bear in mind to what extent the accused will be affected in his daily life. In S v Knutzen, 1972(2) SA 489 (EC) it was held that motor vehicle which was also the living quarters of the accused, should not be forfeited.

however found its way into appellant's heads of argument or Mr Muluti's address in court in an effort to substantiate the alleged misdirection. On perusal of the magistrate's judgment on sentence, I did not find any indication that the magistrate, on the recorded facts, overemphasised the seriousness of the offence and interest of society. There, is no merit in this argument advanced on behalf of appellant. Even if I am wrong, I am of the opinion that due to the aggravating circumstances referred to hereinbelow, the magistrate was entitled to place the seriousness of the offence and the interest of society on the foreground when sentencing was imposed.

- Appellant, at the time of sentencing was a 43 year old business woman, an Israeli national who was involved in the diamond industry for approximately 10 years. Appellant is of moderate education, and has three (3) children who live in Israel.[14]

- The offences committed by appellant, were premeditated. Appellant who earns a living from the diamond industry also breached the trust that the International Diamond Industry certainly has in its stakeholders, not being involved in the illegal transportation, possession and/or dealing with the commodities from which they attempt to earn a living from.

- Appellant was on her first trip to Namibia and as such showed a complete disregard for, not only the sovereignty of the Republic of Namibia, but also for the interest of all Namibians not to be subjected to illegal activities perpetrated by foreigners on Namibian soil. Namibia, with its fragile economy, of which the diamond industry is a very important source of income for its Government and its citizens, cannot internationally, be regarded to foster a climate of perceived acceptance of international trafficking of illegal substances and/or commodities across its borders.

- Both counsel in the court *a quo*, correctly described the offences, as very serious. Although the value involved is not substantial, the parcel was made up of a substantial number of rough or unpolished diamonds, i.e. 272. Without the advantage of appellant's evidence as to whether appellant knew of the low value of the diamonds when the offences were committed, the magistrate in his reasoning for sentencing correctly also regarded the offences as serious.

[17] In respect of the submission by Mr Muluti, that the sentences imposed are unreasonable, shocking and disproportioned and that no reasonable court could have imposed it, I am unable to agree therewith. The authorities referred to by Mr Muluti, in his heads of argument, as well as during argument, are clearly distinguishable from the facts and circumstances of this matter.[15] There, in my opinion, exists no striking

[14] Record page 8, lines 1-15

[15] S v John Leon Beukes, CC 27/2007, unreported judgment by Parker, J; S v Gert Johannes Feris, CC 71/2000 and the authorities referred to therein; S v James Auala, SA 42/2008. None of these cases involved foreigners who with a pre-meditated intention, came to Namibia to commit criminal offences.

disparity between the sentences imposed by the learned magistrate and that which this court would have passed as a court of first instance.[16]

[18] For the above reasons the appeal is dismissed.

_____

BOTES, AJ

I concur.

_____

Henning, AJ

ON BEHALF OF THE APPELLANT: Mr Muluti

Muluti & Partners

ON BEHALF OF THE RESPONDENT: Adv H Jacobs

The office of the Prosecutor-General.

[16] S v Tjiho, 1991 NR 361 (HC) at 365 D-F – "It is in the interest of society that the accused receive an appropriate sentence. Furthermore, law and order must prevail in society and society expects the court's protection against lawlessness. The accused must be prevented from repeating his crime and, if possible, reformed and other persons must be deterred from doing what the accused did." S v Anderson, 1964(3) SA 494 (A) at 495 G-H- "The decisions clearly indicate that a court of appeal will not alter a determination arrived at by the exercise of the discretionary power, merely because it would have exercise that discretion differently. There must be more than that. The court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence, actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the court of appeal will alter the sentence. If there is not that degree of difference the sentence will not be interfered with." See also: S v Van Wyk, 1993 NR 426 (HC)

IN THE HIGH COURT OF NAMIBIA

In the matter between:

AVITAL BEN BIROVSKY **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **HENNING AJ, *et* BOTES, AJ**

Heard on: October 4, 2010

Delivered on: October 19, 2010

JUDGEMENT:

Botes, AJ.:

[1] The appellant, an Israeli national who, at the time of the trial, was 43 years of age, was convicted in the Magistrate Court of Windhoek, on a charge of contravening Section 30(1) read with Section 30(2) of the Diamond Act, 1999 (Act 13 of 1999), unlawful possession of rough and/or uncut diamonds, and a charge of contravening Section 37(1) of the Diamond Act, 1999 (Act 13 of 1999), unlawful import of rough and/or uncut diamonds.

[2] The quantity, value and weight of the diamonds involved in both counts were 272 rough or unpolished diamonds with a mass of 348.75 carats, valued at N$15,613.03.

[3] Appellant pleaded guilty and written statements in terms of Section 112(2) of the Criminal Procedure Act, Act 51 of 1977 were handed in during the proceedings in the court *a quo*. Appellant was convicted on both counts as pleaded.

[4] Appellant did not testify in mitigation nor did she call any witnesses to testify on her behalf. The State also did not call any witnesses.

[5] After hearing oral submissions on mitigation, aggravation and possible sentences to be imposed, appellant was sentenced to a fine of N$25,000.00 or three (3) years imprisonment on each of the counts. The magistrate gave an *ex tempore* judgment on sentencing, which *ex tempore* judgement's reasons the magistrate amplified after receipt of the notice of appeal.

[6] Appellant dissatisfied with the sentences, filed a notice of appeal against both sentences imposed. The grounds of appeal contained in the notice of appeal are quoted *verbatim* hereunder:-

"*Ad the sentence*

5. The Learned Magistrate failed to take into account or take into account adequately, that

5.1 The Appellant was a First Offender.
5.2 The value of diamonds was only N$15,613.03.
5.3 The diamonds were forfeited to the State.
5.4 The Appellant cooperated with the police investigation.

6. The Learned Magistrate overemphasised the seriousness of the offence and the interest of society.

7. The Learned Magistrate erred in taking into account the prejudice or potential prejudice of the Namibian Government, losing its International Trading Licence in Diamonds, as occasioned by Appellant's conduct in that:

7.1 No evidence led as to how Appellant's conduct would have exposed the Namibian Government to loss of trading licence/s, and <u>exparte</u> statements by the Prosecutor were taken into account.

8. The sentence is so unreasonable, shocking and disproportioned, that no reasonable Court could have imposed it."

[7] The appellant, in the court *a quo* and on appeal was represented by Mr Muluti. The State was represented in the court *a quo* by Mr Nsundano and on appeal by Ms Jacobs.

[8] Rule 67 of the Magistrate Court Rules, requires that a notice of appeal shall "*set out clearly and specifically the grounds whether of fact or law or both fact and law, on which the appeal is based.....*".

[9] In *S v Wellington*[17], *Frank J,* dealing with a notice of appeal, quoted Diemont J, is *S v Horn, 1971(1) SA 630(C) at 631 H*, where the following was said:-

"the rule provides in simple unambiguous language that the appellant must lodge his notice in writing, in which he must set out "clearly and specifically" the grounds on which the appeal is based. He must do this for good reason. The Magistrate must know what the issues are, which are to be challenged, so that he can deal therewith in his reasons for judgment. Counsel for the State must know what the issues are so that he can prepare and present argument which will assist the court in his deliberations and finally, the court itself will wish to be appraised of the grounds so that it can know what portions of the records to concentrate on and what preparation, if any, it should make an order to guide and stimulate a good argument in court."

[10] Van *Heerden J in S v Khoza*[18], with reference to the matter of *S v Hlope*, quoted the learned judge's observations as follows*:*

"It should be made perfectly clear that a notice of appeal is not just an informal document which could be disregarded at will. It forms the very basis upon which an appeal must stand or fall. This Division is working under tremendous pressure, the Judges barely have time to read a record once and certainly no time to consider the merits of an appeal outside the grounds upon which a conviction or sentence is being attacked in the notice of appeal. When an accused is convicted the magistrate often does not give any reasons in support of the conviction and/or times may only give a short ex tempore judgment. After a notice of appeal is lodged the magistrate's statement of facts found proved and his written reasons for judgment are usually confined to the grounds taken therein..... A warning is accordingly issued, that in future this court will be very slow in allowing appellants to amend their grounds of appeal at such a late stage and will only consider doing so if there is a substantive application to that effect. Appeals will have to stand or fall on the grounds properly and timeously taken."[19]

[17] 1990 NR 20 (HC) at 22 H-I

[18] 1979(4) SA 757 NPD AT 758 B-E.

[19] In S v Baloyi, 1991(1) SACR 265 (B), Friedman J pointed out that the notice of appeal must have defined the subject matter of the appeal, that if no subject matter is defined by the notice there can be no valid appeal, and that when a notice of appeal does define the subject matter for appeal, counsel's submissions, and the hearing of the appeal, must be confined to the subject matter so defined. See also: S v Gey van Pittius & Another, 1990 NR 35 (HC) at 368 where Strydom, AJP (as he then was) said: "the purposes of grounds of appeal as required by the rules is to appraise all interested parties as fully as possible of what is an issue and to bind the parties to those issues." S v Kakololo, 2004 NR 7 (HC) on p8

[11] Mr Muluti, on behalf of the appellant, in appellant's main heads of argument and/or during the hearing of the appeal, in addition to the grounds reflected in the notice of appeal submitted that:-

- "*By reason of the fact that the magistrate imposed similar sentences on both counts "it may be inferred that the magistrate concluded that there were no substantial and compelling circumstances"*[20]"

- *"The record does not indicate which personal circumstances, if any, were taken into consideration during sentencing"*[21]"

- *"The court a quo should have ordered that the two counts for purposes of sentence should have been taken together, since they are based on a single transaction with the same state of mind."*[22]'

- *"The court a quo misdirected itself in that it failed to consider the effect of articles 10 and 11 of the Namibian Constitution insofar as it is required that all persons be regarded as being equal before the law."*[23]

[12] None of the submissions referred to hereinbefore is founded, even by a stretch of imagination, on any ground of appeal as it appears in the notice of appeal. The submissions also, do not only entail points of law, but of law and fact. Any such submission that is not based on one or more of the appellant's grounds of appeal, cannot be entertained because the grounds of appeal have not been amended and have not been submitted to the magistrate for his consideration. As such, the additional submissions advanced by Mr Muluti find no application in the present appeal and are ignored.[24]

[13] Mr Muluti submitted that the court *a quo* failed to take into account or take into account adequately that the appellant is a first offender, the limited value of the diamonds, the forfeiture of the diamonds, and that the appellant co-operated with the police investigation.[25] There is in my opinion no merit in the submissions made by Mr Muluti as it is evident from the contents of the *ex tempore* judgment on sentence given by the magistrate as amplified by the reasons supplied by the magistrate that the court *a quo* was alive to the personal circumstances of the appellant, the value of the unpolished diamonds, as well as the fact that appellant cooperated with the police.[26] It also does

[20] Paragraph 2 and 3 of appellant's heads of argument
[21] Paragraph 6 of appellant's heads of argument
[22] Paragraph 9 of appellant's main heads of argument
[23] Submissions made in Court by Mr Muluti
[24] S v Lukume, 2000 NR 115 (HC) 117 F; Jacobus Adriaan Pienaar v The State, unreported judgment (HC) per Muller J, delivered on 5 October 2010 at p17.
[25] Paragraph 1 of appellant's main heads of argument and submissions made in Court.
[26] Record pg 22, lines 10-20 "Mitigation falls under the Accussed person's circumstances. The fact that she is a first offender, place (sic) a big role in reaching a reasonable sentence, but it is not a major factor on which the Court should consider sentencing, since there are other issues to focus on. As the Defence Counsel

not appear from the record, as well as the nature of the sentences imposed that the court underemphasised the personal circumstances of appellant.

[14] Mr Muluti contented that the forfeiture of the unpolished diamonds must be regarded as a mitigating factor and that the learned magistrate erred in the law and/or on the facts in not doing so. Ms Jacobs, on behalf of the state, submitted that a forfeiture in circumstances like the present, cannot be regarded as mitigation as the magistrate was compelled to forfeit the diamonds to the State.[27] In my view the submission of Ms Jacobs is correct, as it is common cause that the possession and importation of the rough and uncut diamonds, by appellant were illegal. Appellant, could not import nor legally possess the rough and uncut diamonds in the Republic of Namibia. Appellant as such was not lawfully entitled to the value of the unpolished diamonds or any part thereof. The magistrate was compelled to declare the rough and/or unpolished diamonds forfeited to the State in terms of section 34 of the Criminal Procedure Act.[28]

[15] This situation is distinguishable from the situation where a presiding officer is clothed with a discretion to declare forfeited to the State an article which an accused may lawfully possess and the value of which is to an accused's financial benefit.[29] This is not the case in the appeal under consideration. I am therefore of the opinion that the Magistrate did not *err* in not taking into account, as a mitigating factor, the forfeiture order made, as appellant has no recognisable right or interest in our law in the articles or the value of the articles declared forfeited. Appellant, furthermore, did not place any facts before the court *a quo* from which it can be inferred that she, outside the borders of Namibia, would have had a lawfully recognised right and/or interest in the articles or the value of the articles declared forfeited.

[16] Mr Muluti strenuously argued that "*the learned magistrate over emphasised the seriousness of the offence and the interest of society."* No specific ground or reason however found its way into appellant's heads of argument or Mr Muluti's address in court in an effort to substantiate the alleged misdirection. On perusal of the magistrate's judgment on sentence, I did not find any indication that the magistrate, on the recorded facts, overemphasised the seriousness of the offence and interest of

---

stated, the Accused person pleaded guilty which is appreciated by the Court because it reduces the work lock (*sic)* and the time spent in Court, by pleading guilty. Furthermore that she cooperated with the police and the matter was resolved in a reasonable time."

[27] Section 34 of the Criminal Procedure Act, Act 51 of 1977, See also: Section 77 of the Diamond Act, 1999.

[28] Act 1951 of 1977 as amended. The Magistrate forfeited the unpolished diamonds to the State in terms of Section 77 of the Diamond Act, 1999. The said section however, does not in itself provide for the forfeiture of the unpolished diamonds. The forfeiture should have been made in terms of Section 34 of the Criminal Procedure Act, Act 51 of 1977. This aspect however is of no significance in this appeal, as the magistrate was compelled to declare the unpolished diamonds to be forfeited to the State.

[29] See section 35 of the Criminal Procedure Act, Act 51 of 1977 – in matters where the court has a discretion, the court is entitled to take any relevant factor into account, including *inter alia,* the question of whether the object played an important or assessory role in the commission of the offence. The court will also bear in mind to what extent the accused will be affected in his daily life. In S v Knutzen, 1972(2) SA 489 (EC) it was held that motor vehicle which was also the living quarters of the accused, should not be forfeited.

society. There, is no merit in this argument advanced on behalf of appellant. Even if I am wrong, I am of the opinion that due to the aggravating circumstances referred to hereinbelow, the magistrate was entitled to place the seriousness of the offence and the interest of society on the foreground when sentencing was imposed.

- Appellant, at the time of sentencing was a 43 year old business woman, an Israeli national who was involved in the diamond industry for approximately 10 years. Appellant is of moderate education, and has three (3) children who live in Israel.[30]

- The offences committed by appellant, were premeditated. Appellant who earns a living from the diamond industry also breached the trust that the International Diamond Industry certainly has in its stakeholders, not being involved in the illegal transportation, possession and/or dealing with the commodities from which they attempt to earn a living from.

- Appellant was on her first trip to Namibia and as such showed a complete disregard for, not only the sovereignty of the Republic of Namibia, but also for the interest of all Namibians not to be subjected to illegal activities perpetrated by foreigners on Namibian soil. Namibia, with its fragile economy, of which the diamond industry is a very important source of income for its Government and its citizens, cannot internationally, be regarded to foster a climate of perceived acceptance of international trafficking of illegal substances and/or commodities across its borders.

- Both counsel in the court *a quo*, correctly described the offences, as very serious. Although the value involved is not substantial, the parcel was made up of a substantial number of rough or unpolished diamonds, i.e. 272. Without the advantage of appellant's evidence as to whether appellant knew of the low value of the diamonds when the offences were committed, the magistrate in his reasoning for sentencing correctly also regarded the offences as serious.

[17] In respect of the submission by Mr Muluti, that the sentences imposed are unreasonable, shocking and disproportioned and that no reasonable court could have imposed it, I am unable to agree therewith. The authorities referred to by Mr Muluti, in his heads of argument, as well as during argument, are clearly distinguishable from the facts and circumstances of this matter.[31] There, in my opinion, exists no striking disparity between the sentences imposed by the learned magistrate and that which this court would have passed as a court of first instance.[32]

---

[30] Record page 8, lines 1-15

[31] S v John Leon Beukes, CC 27/2007, unreported judgment by Parker, J; S v Gert Johannes Feris, CC 71/2000 and the authorities referred to therein; S v James Auala, SA 42/2008. None of these cases involved foreigners who with a pre-meditated intention, came to Namibia to commit criminal offences.

[32] S v Tjiho, 1991 NR 361 (HC) at 365 D-F – "It is in the interest of society that the accused receive an appropriate sentence. Furthermore, law and order must prevail in society and society expects the court's

[18] For the above reasons the appeal is dismissed.

BOTES, AJ

I concur.

Henning, AJ

ON BEHALF OF THE APPELLANT: Mr Muluti

Muluti & Partners

ON BEHALF OF THE RESPONDENT: Adv H Jacobs

The office of the Prosecutor-General.

protection against lawlessness. The accused must be prevented from repeating his crime and, if possible, reformed and other persons must be deterred from doing what the accused did." S v Anderson, 1964(3) SA 494 (A) at 495 G-H- "The decisions clearly indicate that a court of appeal will not alter a determination arrived at by the exercise of the discretionary power, merely because it would have exercise that discretion differently. There must be more than that. The court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence, actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the court of appeal will alter the sentence. If there is not that degree of difference the sentence will not be interfered with." See also: S v Van Wyk, 1993 NR 426 (HC)