IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO.: CA10/2015

In the matter between:

PETER MICHAEL ROBERTS	**First Appellant**
JONATHAN DANIEL NEL	**Second Appellant**
BRUCE ROBERT BURNSTEIN	**Third Appellant**

And

THE STATE	**Respondent**

JUDGMENT

BESHE, J:

[1] This appeal, with leave of the court *a quo*, is directed at sentences imposed upon the appellants following their conviction by ***Chetty J*** on charges relating to racketeering activities involving unlawful trade in abalone. The appellants were accused numbers one, three and four in the trial. However, the third appellant did not pursue the appeal. This resulted in his appeal being struck off the roll.

[2] The appellants were convicted and sentenced as follows:

First appellant:

Count 1: Conducting or participating in the conduct of an enterprise through a pattern of racketeering activities in contravention of ***Section 2 (1) (e) of the Prevention of Organised Crime Act 121 of 1998*** **(POCA)**.

Count 2: Managing an enterprise conducted through a pattern of racketeering activities in contravening of ***Section 2 (1) (f) of POCA***.

Counts 1 and 2 were treated as one for sentence and the first appellant was sentenced to eighteen (18) years imprisonment in respect of the two charges.

Counts 3, 4, 6, 7, 8, and 9: The unlawful engagement in fishing, collecting, keeping, transporting, controlling of and or being in possession of abalone without a permit in contravention of ***Regulation 36 (1) (b) of the Regulations*** promulgated under ***Government Notice R. 111*** and published in ***GG 19205*** of 2 September 1998.

He was sentenced to two (2) years imprisonment in respect of each of the abovementioned counts. Each of these sentences was ordered to run concurrently with the sentence imposed in respect of counts one and two.

[3] Effectively first appellant was sentenced to eighteen (18) years imprisonment.

[4] **Second appellant**:

Count 1: Conducting or participating in the conduct of an enterprise through a pattern of racketeering activities in contravention of ***Section 2 (1) (e) of POCA***. He was sentenced to eight (8) years imprisonment in respect of count one.

Counts 4, 7, 8 and 9: He was convicted of the unlawful engagement in fishing, collecting, keeping, transporting, controlling of and or being in possession of abalone without a permit. He was sentenced to two (2) years imprisonment in respect of each of the four counts. It was ordered that sentences in respect of counts 4, 7, 8 and 9 should run concurrently with the sentence imposed in respect of count one.

[5] Second appellant was therefore sentenced to an effective sentence of eight (8) years imprisonment.

[6] The basis upon which the sentences are impugned is that they are shockingly inappropriate and out of kilter with other cases.

[7] It is trite that an appeal court may only interfere with a sentence if such a sentence is vitiated by:
(i) irregularity;
(ii) misdirection or
(iii) is one where there is a striking disparity between the sentence imposed and that which the appeal court would have considered appropriate had it been the trial court.[1]

[8] The penalty provided in ***Section 3 of POCA*** in the case of a conviction for offences referred to in ***Section 2 (1)*** is a fine of not exceeding R1 000 million or imprisonment for a period of up to imprisonment for life. As indicated earlier in this judgment, both appellants were convicted of offences referred to in ***Section 2 (1) of POCA***. To this end there was an acknowledgement by ***Ms Crouse*** who appeared on behalf of the appellants that the sentences imposed by court *a quo* are competent sentences in terms of applicable legislation. ***Ms Crouse*** also conceded that the circumstances of the case called for a direct term of imprisonment but submitted that eighteen (18) years in respect of first appellant and eight (8) years in respect of second appellant was excessive and suggested that fifteen (15) years imprisonment would have been appropriate in respect of first appellant. In support of this

[1] See Petkar 1988 (3) SA 571 (A), Director of Public Prosecutions, KwaZulu Natal v P 2006 (1) SA CR 243 SCA at 250 para [10]

submission ***Ms Crouse*** referred to a number of cases where lesser sentences were imposed or where the sentences were reduced on appeal.

[9] A comparison between the cases referred to by ***Ms Crouse*** and the present matter, will only be appropriate if the circumstances or facts of these cases are similar to the case under consideration. As far as the crimes under consideration in this matter are concerned, the trial judge pointed out that **"Quintessentially, the crimes of which the accused have been convicted relate to illegal trade in abalone and in particular accused number one's ongoing direct participation, in poaching, until his arrest in 2009. The evidence adduced, established a direct link with Chinese crime syndicates, of a protracted period of time, involving thousands of kilograms of abalone".**

[10] It has to be borne in mind however, that this matter is not only concerned with abalone poaching. Put differently, the appellants were not convicted of abalone poaching but rather of being involved in racketeering activities, involving unlawful trade in abalone, thereby falling foul of the provisions of the ***POCA***. As pointed out by ***Mr Le Roux*** for the respondent, the abalone related activities only constitute the predicate offences that constitute the pattern of racketeering activities under consideration.

[11] Judging from the penalties ordained for a contravention of the provisions of ***Section 2 (1) of POCA***, it is clear that racketeering activities or organised crime is viewed in a very serious light. The seriousness of the offences in this matter is also evident from ***Ackermann J's*** remarks in ***National Director of Public Prosecutions v Mohamed N.O. 2002 (4) SA 843 CC***. Although the learned justice was concerned

mainly with provisions relating to preservation orders, he was also alluding to the purpose of the Act as a whole. This is what he had to say:

> **"<u>The purpose of the Act and certain of its relevant provisions</u>**
>
> **[14] The Act's overall purpose can be gathered from its long title and preamble and summarised as follows: The rapid growth of organised crime, money laundering, criminal gang activities and racketeering threatens the rights of all in the Republic, presents a danger to public order, safety and stability, and threatens economic stability. This is also a serious international problem and has been identified as an international security threat. South African common and statutory law fail to deal adequately with this problem, because of its rapid escalation and because it is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved. The law has also failed to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities. Hence the need for the measures embodied in the Act.**
>
> **[15] It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. The above problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs."**

[12] The sentences imposed in the cases referred to by ***Ms Crouse*** also provide an illustration of the seriousness with which racketeering activities are viewed by our courts as opposed to, for example rhino poaching, abalone poaching or dealing in drugs which does not amount to racketeering. In an unreported decision of ***Jwara v S [916]/13 [2015] ZACSA 33*** (**25 March 2015**) the appellants who were convicted of numerous charges involving drugs and were also convicted of

contravening ***Section 2 (1) (d) of POCA***, were sentenced to 25, 22 and 20 years imprisonment respectively. They were unsuccessful in their bid to appeal against their sentences. In ***S v Packereysammy 2004 (2) SA 169 SCA*** on the other hand, the appellant was in unlawful possession of 6140 abalone. His appeal against a sentence of eighteen (18) months imprisonment was dismissed. In a matter referred to by ***Mr Le Roux***, ***S v Ndebele 2012 (1) SACR 245 (GSJ)***, for a conviction in terms of ***Section 2 (1) (e) and (f) of POCA*** the accused were sentenced to terms of imprisonment ranging between eighteen (18) and fifteen (15) years imprisonment.

[13] There can be no merit in the submission that the court *a quo* did not give sufficient consideration to sentences previously imposed for similar offences. It is clear from the abovementioned cases that where racketeering was involved, severe sentences were imposed. (See ***S v Ndebele, S v Jwara*** *supra*).

[14] It was also contended on behalf of the appellants that the court *a quo* did not give sufficient consideration to the personal circumstances of the appellants, including the fact that portions of their sentences in respect of previous convictions of the appellants were suspended and could still be brought into operation. In my view the fact that the court *a quo* saw fit to sentence appellants' former co-accused in the trial, accused number two, to a non-custodial sentence and gave reasons for doing so, is a clear indication that he paid due regard to appellants and their former co-accused's personal circumstances. The fact that the appellants had suspended sentences hanging over them did not escape the trial judge's mind either. As the learned judge pointed out **"There can be little doubt that accused 1 co-opted the other accused into participating in his criminal escapades.**

Thereafter they became integral to the enterprise's success and must have been aware, not only of the unlawfulness of abalone poaching, but the attendant risks. Its lucrativeness however, outweighed the pitfalls, and this is evidenced by accused 3's continued involvement. He and accused number 5 were both convicted of contravening Section 36(1)(a) of the Regulations on 7 March 2008 and sentenced to a fine of R30 000, or 18 months' imprisonment, half of which was suspended for five years, on the usual conditions. Accused 3 however carried on regardless. The seriousness of the offence appears not to have unduly troubled the accused. The fines imposed on accused 1 and 3 for previous brushes with the law, appears to have lulled them into a false sense of belief that imprisonment for abalone poaching was the last resort of the sentencing Court".

[15] In my view the sentences imposed by the court *a quo* fit the crimes, the offenders and take the interests of the society into account. In my judgment there is no basis for us to interfere with the sentences imposed by the court *a quo*. The sentences do not appear to be startlingly inappropriate.

[16] The appeal is dismissed.

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N G BESHE
JUDGE OF THE HIGH COURT

LOWE J

I agree.

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MJ LOWE
JUDGE OF THE HIGH COURT

BROOKS AJ

I agree.

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RWN BROOKS
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Appellants	:	ADV: L Crouse
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For the Respondent	:	ADV: ML Le Roux
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Date Heard	:	17 August 2015
Date Reserved	:	17 August 2015
Date Delivered	:	25 August 2015