

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between:

Case No: CC 20/2011

THE STATE

And

PETER MICHAEL ROBERTS

Accused No 1

CAROLINA ROBERTS

Accused No 2

JONATHAN DANIEL NEL

Accused No 3

BRUCE ROBERT BURNSTEIN

Accused No 4

JOHN NELL

Accused No 5

Coram: **Chetty, J**

Date Heard: **14/11/2011 – 18/11/2011; 21/11/2011 – 25/11/2011;
17/01/2012; 27/08/2012 – 30/08/2012; 18/09/2012**

Date Delivered: **27/09/2012**

Summary: ***Criminal Law – Prevention of Organised Crime Act 121 of 1998 – Racketeering Activities – Illegal trading in abalone over period of time – Two or more offences – enterprise found proved – Interception of telephone communications – Judge’s directive in terms of Regulations Of Interception Of Communications And Provision of Communication-Related Information Act***

*70 of 2002 – Validity of directive – Accomplice evidence –
Cautionary rules - Search of premises validity thereof – Accused
guilty as charged*

JUDGMENT

Chetty, J

Introduction

[1] During the early afternoon of 8 January 2009, a truck bearing the registration letters and number BZH 945 EC pulled off the N4 about five (5) km from the Lebombo border post between the Republic of South Africa and Mozambique and was immediately swooped on by members of the then Directorate of Special Operations (the Scorpions). The two (2) occupants of the truck, *Marthinus Janse van Rensburg senior (Marthinus)* and his son, *Marthinus Janse van Rensburg junior (Boetman)* were ordered to alight and shortly thereafter Boetman voluntarily admitted that the truck was carrying a load of abalone hidden in a false compartment in the rear roof of the truck. In due course the roof was drilled open and found to contain six hundred and fifty eight (658) kilograms of abalone loosely packed in the concealed compartment. *Marthinus* and *Boetman* were duly arrested and detained in a nearby police station.

[2] Shortly after their apprehension, accused no.'s 3 and 4 were stopped at a roadblock on the N4 about twenty (20) kilometres from where the truck had

veered off the N4 but in the opposite direction. Shortly thereafter they too were arrested by the Scorpions and in due course came to share a cell with *Marthinus* and *Boetman*. The next day accused no. 1 was arrested at the Natures Gate Resort on the outskirts of Nelspruit in close proximity to the N4 leading to Mozambique and incarcerated with accused no.'s 3, 4, *Marthinus* and *Boetman* at the Matsulu Police station. On 12 January 2009 all five (5) of them appeared in the Barberton Magistrates Court.

[3] The arrest of the aforementioned quintet¹ was the culmination of a special project, codenamed, Operation May, initiated by the Scorpions, into a criminal syndicate suspected of involvement in abalone poaching. Accused no. 1 was one of the persons suspected of being a kingpin in the syndicate. During September 2008 the Scorpions, in an attempt to gain evidence of the syndicate's nefarious activities, sought a directive from a Judge pursuant to the provisions of section 18 (3)(a) read with sections 18(1), 16(1) and/or 17(1) and/or 19(1) of the **Regulations of Interception of Communications And Provision Of Communication-Related Information Act**².

[4] In his affidavit in support of the directive sought, Senior Special Investigator *Johan Jooste (Jooste)*, employed by the National Prosecuting Authority but assigned to the Scorpions, outlined the historical background to the project as follows –

¹ Accused no.'s 2 and 5 were arrested at a later stage.

² Act No. 70 of 2002

“A. HISTORICAL BACKGROUND”

14.

As background, investigation have proved that Chinese cartels operated under a blanket of quasi-legitimate businesses in which non-existent addresses, false identification documents, non-traceable partners etcetera, play a major role. Accommodation is always in areas where security is above average to exceptional and/or surveillance is almost impossible. During surveillance operations on Chinese individuals it was evident that the drivers of the abalone vehicles were well trained in counter-surveillance actions, eliminating surveillance teams vehicles within 10 minutes. The evasion tactics used were extremely efficient. Numerous disruptive actions were conducted against the identified suspects. The suspect's houses, storage facilities and businesses were searched to obtain evidence, but to no avail. Because of their close knit operations, informers are being recruited within the structures of the syndicates in order to assist with the investigation. Efforts are being made to introduce agents into the syndicates to build trust relationships for infiltration and penetration. It is however very difficult, because of time constraints and the Chinese close knit operations and culture.

15.

This is but a few examples of what law enforcement officers have to bear in mind when investigating and encountering Chinese Organised Crime. It is true that other syndicates make use of similar traditional methods, but with the sudden increase of Chinese controlled activities, the trans-national networks across the international arena, the need to address these criminal activities is very high.

16.

This affidavit relates to information received by an informant identifying the methodology to smuggle abalone from the coastal line of South Africa to the nine provinces of South Africa and across the borders to the Far East via road, railway and airplanes.

17.

On the 28th of May 2008 the informer was debriefed. The informer divulged information that has been followed up and corroborated by the intelligence report drawn up by SSI Heydenrych.

18.

The informer stated that there are local syndicates closely linked with Chinese syndicates that illegally dive for and collect abalone in the coastal areas. These Chinese syndicates dominate and control the illegal industry in South Africa. The informer identified several individuals that supply directly and indirectly to these Chinese syndicates. The informer also identified several Chinese individuals who control these markets. The modus operandi of the syndicates is to buy poached abalone from the coastal syndicates, transport it by means of road, rail or air transport to the storage facilities that are widely spread in the different provinces, process it and export it via the national border to the Far East. Part of their modus operandi is to make use of cell phone communication during transactions. The cell phone numbers are kept secret amongst the syndicate members as a method of protecting their criminal activities. This makes conventional investigation methods extremely difficult as mentioned above.

19.

The informer is personally involved in the criminal activities of these syndicates and has direct access to these cell phone numbers. The informer's role in the syndicate is the link between the suppliers of the abalone and the Chinese syndicate members. The informer collects the abalone which is

illegally poached and supplies it to the Chinese syndicate members on instruction via cell phone communication. The point of collections will differ on a daily basis as the Chinese syndicates are well aware of the law enforcement's actions. During these deliveries a close eye will be kept on the process for any unnatural reaction by the suppliers or anyone else in the area of the deliveries. The syndicate members will alert one another by cell phone. This makes observation and investigation actions extremely difficult."

I have deliberately reproduced this rather prolix historical exposition of the reasons which informed the decision to obtain the directive by virtue of the fact that it emphasizes the cloak and dagger nature of the poaching syndicates. The somewhat cryptic nature of the intercepted and monitored telephone conversations, which I will examine in detail hereinafter, must accordingly be evaluated against this background.

[5] Accused no.'s 2 and 5 were subsequently arrested and appeared with the quintet in Barberton until the matter was transferred to Port Elizabeth. During the various remands both in Barberton and thence Port Elizabeth, the seven (7) accused were represented by Mr *Gribenow*. During their first appearance in this Court on 3 May 2011, *Marthinus* and *Boetman* dispensed with Mr *Gribenow's* services and expressed a desire to plead guilty to the charges preferred against them and requested that they be afforded the services of a legal practitioner. Mr *Cilliers*, a member of the Port Elizabeth Justice Centre was duly appointed as their legal representative and entered a plea bargain with the state. Both pleaded

guilty to counts eight (8) and nine (9) and were duly convicted and sentenced, but not incarcerated. *Marthinus* and *Boetman*'s decision to plead guilty elicited a volley of derision from Mr *Price*. During their cross-examination and in the written heads it was suggested that they were threatened by the Scorpions not only to enter a plea bargain with the state but moreover to "unceremoniously and in very superstitious circumstances dump(ed)" their attorney, Mr *Griebenow*. The submission is based entirely on wild speculation and is directly contradicted by both *Marthinus* and *Boetman*.

[6] The five (5) accused now stand arraigned before me on multiple charges arising from contraventions of regulation 36 (1) (b) of the regulations promulgated under Government Notice R. 1111 and published in Government Gazette 19205 dated 2 September 1998 as amended, read with regulation 1 and 96 of the said regulations, as issued, in terms of section 77 of the **Marine Living Resources Act**³ (the Act) and further read with sections 1 and 58 (4) of the Act and section 250 of the **Criminal Procedure Act**⁴. The offences relate to unlawful engagement in the fishing, collecting, keeping, transportation, controlling of or being in possession of abalone⁵ without a permit. For ease of reference, I shall, at times, merely refer to the offences, simply, as poaching. At the inception of the trial, the spouses, accused no.'s 1 and 2, were represented by Mr *Price* whilst accused no.'s 3, 4 and 5 were represented by Mr *Griebenow*. At the commencement of the defence case however, Mr *Griebenow* sought and

³ Act No. 18 of 1998

⁴ Act No. 51 of 1977

⁵ In the coastal communities of South Africa abalone is colloquially referred to by its Afrikaans appellation as perlemoen.

obtained my leave to withdraw acting on behalf of accused no.'s 3, 4 and 5, their defence being entrusted to Mr *Price* on his instructions.

The pleas and plea explanation

[7] In his written plea explanation (exhibit "A") accused no. 1 not only denied complicity in the offences charged, but proceeded to cast aspersions not only on the integrity of the police investigation but on various witnesses whom he anticipated would be called on behalf of the state. The plea explanation is moreover replete with gratuitous comment and constitutes an aberration of the statement envisaged by section 115 of the **Criminal Procedure Act**. Accused no.'s 2, 3, 4 and 5 likewise denied all complicity in the offences charged.

The individual counts

[8] Counts one (1) and two (2) concern a contravention of sections 2 (1) (e) and (f) respectively read with sections 1, 2 (2), 2 (3), 2 (4) and 3 of the **Prevention of Organised Crime Act⁶ (POCA)** viz. conducting or participating in the conduct of an enterprise through a pattern of racketeering activities (s 2(1) (e)), and managing an enterprise conducted through a pattern of racketeering activities (s 2(1)(f)). The racketeering activities attributed to the accused, ten (10) in number, are reflected on Schedule A to the indictment and appear thus in chronological order commencing in 2005 and terminating during January 2009.

⁶ Act No. 121 of 1998

To aid the narrative of this judgment, it is reproduced hereinafter in the same format. The contents are self explanatory-

	Date	Accused persons involved	Place	Activity
1	On or about 10 October 2005	1 and 2	Port Elizabeth and or Graaf Reinet	Unlawfully and wrongfully engaged in the fishing and or collecting, keeping, controlling, transporting or possession of abalone, to wit by collecting, keeping, controlling, transporting possessing and dealing in 3147 units of abalone, without a permit as set out in count 3 and or its alternative count.
2	On or about 20 May 2006	1 and 2	Port Elizabeth	Unlawfully and wrongfully engaged in the fishing and or collecting, keeping, controlling, transporting or possession of abalone, to wit by collecting, keeping, controlling, transporting, possessing and dealing in 9947 units of abalone, without a permit.
3	On or about 7 July 2006	1, 2 and 3	Port Elizabeth	Unlawfully and wrongfully engaged in the fishing and or collecting, keeping, controlling, transporting or possession of abalone, to wit by collecting, keeping, controlling, transporting possessing and dealing in 11144

				units of abalone, without a permit.
4	On or about 3 December 2006	1, 2 and 3	Port Elizabeth	Unlawfully and wrongfully possessed 1676 units of abalone without a permit [Previous conviction, accused 1]
5	During or about the month of May 2007	1, 2, 3 and 5	Port Elizabeth	Unlawfully and wrongfully engaged in the fishing or collecting, keeping, controlling, transporting or possession of abalone, to wit by collecting, keeping, transporting, controlling, possessing and dealing in approximately 220 kilograms abalone, without a permit as set out in count 4 and or its alternative count.
6	During or about the period of May to September 2007	1, 2, 3 and 5	Port Elizabeth	Unlawfully and wrongfully engaged in the fishing or collecting, keeping, transporting controlling or possession of abalone, to wit by collecting, keeping, transporting, controlling, possessing and dealing in approximately 5400 kilograms abalone, without a permit as set out in count 5 and or its alternative count.
7	On or about 22 to 24 September 2007	1, 2, 3 and 5	Port Elizabeth and/or N1 Highway between Bloemfontein & Edenburg	Unlawfully and wrongfully engaged in the fishing or collecting, transporting, keeping, controlling or possession of abalone, to wit, by collecting, keeping, controlling, possessing and dealing in 7935 units abalone weighing 656.96

				kilograms, without a permit as set out in count 6 and or its alternative count. [accused 3 and 5: Previous conviction]
8	During or about the period 16 to 19 December 2008	1, 2, 3 and 4	Port Elizabeth and Komatipoort or	Unlawfully and wrongfully engaged in the fishing or collecting, keeping, transporting controlling or possession of abalone, to wit, by collecting, keeping, transporting, controlling, possessing and dealing in approximately 603 kilograms abalone, without a permit as set out in count 7 and or its alternative count.
9	During or about the period 21 to 24 December 2008	1, 2 and 3	Port Elizabeth and Komatipoort or	Unlawfully and wrongfully engaged in the fishing and or collecting, keeping, transporting, controlling or possession of abalone, to wit by collecting, keeping, transporting, controlling, possessing and dealing in approximately 593 kilograms of abalone, without a permit as set out in count 8 and or its alternative count.
10	During or about the period 7 to 8 January 2009	1, 2, 3 and 4	Port Elizabeth and Komatipoort or	Unlawfully and wrongfully engaged in the fishing and or collecting, transporting, keeping, controlling or possession of abalone, to wit by collecting, transporting, keeping, controlling, possessing and dealing in approximately 658 kilograms abalone, without a permit as set out in count 9 and

				or its alternative count.
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[9] Before I proceed to an analysis and appraisal of the evidence adduced, it is apposite, given the foregoing activities relied upon by the state, to consider the legislative framework governing counts one (1) and two (2). The **POCA** was promulgated to combat organised crime, money laundering and criminal gang activities, to prohibit racketeering and to provide for a range of related matters. Chapter 2 of the **POCA** delineates the offences relating to racketeering activities and prescribes the penalties for persons convicted of such offences. The essence of the offence postulated by section 2 (1) (e) of the **POCA** was succinctly stated by Cloete J.A in S v Eyssen⁷ viz, – “. . . **the accused must conduct (or participate in the conduct) of an enterprise’s affairs. Actual participation is required (although it may be direct or indirect) . . . ss (e) covers a person who was managing, or employed by, or associated with the enterprise] . . . “Manage” is not defined and therefore bears its ordinary meaning which in this context is “(1) to be in charge of; run, (2) to supervise (staff), (3) be the manager of.”**

Section 2 (1) (f) in turn provides as follows –

“(1) Any person who-

- (a) . . .
- (b) . . .
- (c) . . .
- (d) . . .
- (e) . . .

⁷ 2009 (1) SACR 406 (SCA)

- (f) manages the operation or activities of an enterprise and any person who knows or ought reasonably have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;"

[10] Since its enactment the **POCA** has been subjected to ongoing judicial scrutiny and has invited learned discourse. Extrapolated from the case law the following principles emerge - in order to found a conviction thereanent, the state is required to establish the existence of an enterprise, a pattern of racketeering activity and a link between them and the accused. It must thereafter establish that the accused participated in the enterprise's affairs and that such participation was through a pattern of racketeering activity, which section 1 defines as – **“the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1.** As pointed out in Eyssen⁸ the participation or involvement must be **ongoing, continuous, or repeated**. As will appear more fully hereinafter, the existence of the enterprise has, on the totality of the evidence, been established beyond any doubt. It is however necessary, at this juncture, to immediately dispel any notion that the reference to **“two offences”** in the definition of **“pattern of racketeering activity”** means two (2) separate and

⁸ Paras [8] and [9]

disparate offences specified in schedule 1 to the Act. The submission made on behalf of the accused to that effect amounts to heresy. The definition of racketeering activities itself proves the fallacy of the submission. The evidence adduced furthermore proves beyond any doubt that accused no.'s 1 and 2 managed the operation of the enterprise and were aware of the fact that the various persons employed by it directly participated in its affairs through a pattern of racketeering activities.

[11] In order to acquit itself of the overall onus resting upon it to establish the guilt of the accused beyond a reasonable doubt Mr *Le Roux* adopted a multifaceted approach in the presentation of the state case. Firstly, he adduced the evidence of a number of persons who were directly involved in the listed activities under the aegis of accused no.'s 1 and 2. These witnesses, Mr *Russel Stevens* (*Stevens*), Mr *Marthinus Horn* (*Horn*), *Marthinus*, *Raymond Janse van Rensburg* (*Raymond*) and *Boetman*, whose evidence I shall consider in some detail hereinafter were all warned pursuant to the provisions of section 204 of the **Criminal Procedure Act**. Secondly, he adduced evidence of a plethora of documents found in accused no. 1's study at his residence following a search and seizure operation conducted by the Scorpions on 12 January 2009 and thirdly, he adduced evidence of intercepted telephonic conversations.

[12] In argument before me the section 204 witnesses were vilified and denounced as untruthful, and it was suggested that they had been coerced by

the Scorpions to falsely implicate the accused in the commission of the offences charged. The search of the house and seizure of documents found was lambasted as unlawful and an infringement of the accuseds' constitutionally entrenched rights and hence inadmissible and, as regards the intercepted telephone calls, accused no.'s 1, 2 and 3's common approach was to say that the calls after 18 December 2008 were inadmissible, that the transcripts were a morass of confusing details, contained no reference whatsoever to abalone and in general, of such poor quality that it be disregarded in *toto*.

The evidence of the witnesses directly involved in the poaching activities

Stevens

[13] It is convenient, given the passage of time over which the listed activities and individual offences were committed to commence with the evidence of *Stevens*. His evidence and that of the other section 204 witnesses must of course be critically analysed and evaluated by reason of the fact that they are accomplices. However, in this exercise caution should not be allowed to displace common sense⁹. In the evaluation and appraisal of their evidence, their status as accomplices must not be overlooked. Before I embark upon an analysis of his evidence, it is apposite to record the relationship between the various accused. Accused no.'s 1 and 2 are, as stated, spouses. Accused no. 5 is accused no. 1's brother-in-law whilst accused no. 3 is a long standing family friend of accused

⁹ See *S v Snyman* 1968 (2) SA 582 (A) at 585G

no.'s 1, 2 and 5. Accused no. 4's involvement in this matter arose out of his friendship with accused no. 3. It is not in dispute that prior to their arrest during 2009 accused no.'s 1, 3 and 5 had each been arrested and convicted¹⁰ for the illegal poaching of abalone, the circumstances under which, I shall in due course advert to. The previous conviction of accused no. 1 constitutes the fourth (4th) activity and that of accused no. 3 and accused no. 5 the seventh (7th) activity listed on schedule A respectively. *Stevens'* involvement in poaching commenced shortly after his arrival in Port Elizabeth from Bloemfontein during 2004 and terminated when he was arrested in November 2007 for abalone related offences. It is not in issue that *Stevens* was placed under witness protection for some time until interviewed by Colonel *Johannes Hendrik Smith (Smith)* whereafter he voluntarily made a statement in connection with this case. It is evident that *Stevens* has intimate knowledge of the methodology involved in the harvesting and preparation of saleable abalone. He narrated his rise through the ranks, from being the lowest, a "guardjie", i.e. the person carrying the abalone from the boats to land, to a sorter, storeman, renter of homes and ultimately an intermediary between the seller and buyer. Abalone, he recounted, differed in size, the nomenclature employed in its illicit trade to distinguish the various sizes, being small, medium and large. After being removed from the sea, the abalone would be transported to safe houses where it would be sorted according to size i.e. small, medium and large, preserved, generally by being dried by artificial

¹⁰ S 2(2) of the POCA provides that – "*The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render the trial unfair.*"

means and thereafter stored in deep freezers pending transportation to specific destinations *inter alia*, Cape Town, Bloemfontein and Johannesburg.

[14] *Stevens*' working knowledge of the manner in which the abalone was transported is also not in dispute. To avoid detection the vehicle in which the abalone was transported would follow an advance vehicle, the lead vehicle. Both drivers would be provided with cell phones, the sim card of which would contain only the respective drivers' numbers and nothing else. The lead vehicle would travel ahead, generally at a distance of between 20 – 25 kilometres, and, in the event of a roadblock or a police presence ahead, would telephone the other driver to appraise him thereof in which event an alternative route would be agreed upon or some other course adopted to evade the police.

[15] *Stevens* initially worked for two (2) well known abalone poachers in Port Elizabeth viz *Mario de Ridder* and *Jason Ross (Ross)* both of whom were heavily involved in the illegal trade. Logistical problems relating to the transportation of the abalone necessitated them acquiring a safe house in Johannesburg. To that end he, accompanied by *Ross*' brother, *Alan*, and the latter's cousin, one *Jonathan*¹¹ journeyed to Johannesburg where he rented a safe house in Norkem Park, a suburb of Johannesburg. The requisite deep freezers were soon acquired and abalone stored in the house. *Stevens* adverted to a system employed to avoid detection but it is unnecessary, for purpose of this judgment, to incorporate those herein. Suffice it to say it was akin to a cloak and dagger operation.

¹¹ Not accused no. 3.

Stevens regularly commuted to and from Johannesburg either by air or in the lead vehicle and recalled an incident during February 2007 whilst en route to Port Elizabeth where he was appraised that a shared load i.e. belonging to two different poachers was en route to Johannesburg.

[16] His testimony hereanent related to count four (4) and an amendment was sought to alter the date reflected on the indictment from May 2007, to February 2007. There being no objection, the amendment was granted. Paraphrased his evidence was as follows - the shared load, several bags of abalone, was differentiated by some being tied with cable ties and masking tape and the others not. All the bags were duly received by him and stored in the freezers in the house. In due course a Chinese buyer bought the unmarked bags which contained the larger abalone but declined to take the smaller abalone. When *Stevens* communicated this information to *Ross*, he advised him to keep the eleven (11) bags containing the small abalone in the freezer until further notice. *Stevens* flew back to Port Elizabeth and about a week later was informed by *Alan* that he would have to accompany him and his wife to Johannesburg by air. They were met at the airport by *Ross* who took *Alan* and his wife to a hotel before returning to the airport where *Ross* collected accused no. 1, introduced them and informed *Stevens* that he (i.e. accused no. 1) was the owner of the eleven (11) bags in the house. They left the airport and *Ross* dropped him and accused no. 1 at Emperor's Palace hotel in Johannesburg where, later the evening, accused no. 5 arrived and joined them. He, and accused no. 1

thereafter left the complex in a vehicle driven by accused no. 5 and he directed the latter to a shopping complex in Norkem Park. When their vehicle stopped at the McDonald's take out, he noticed accused no. 3 stopping next to them. *Stevens*, on the instructions of *Ross*, was to deliver the eleven (11) bags at the house to accused no. 1. Given the clandestine nature of the operation however, only *Stevens* and accused no. 3 repaired to the house and loaded the abalone into the vehicle. Accused no. 3 drove off with the load and *Stevens* walked a few blocks away before phoning accused no. 1 and giving him directions where to collect him which he duly did. He, accused no. 1 and accused no. 5 returned to the McDonalds car park where they met up with accused no. 3 before returning to Emperor's Palace hotel. In the early hours of the morning a Chinese man arrived at the hotel and he and accused no. 5 left the room before returning after some time. Early the next morning all four (4) of them flew back to Port Elizabeth.

[17] *Ross'* involvement in poaching eventually led to his arrest and this rendered *Stevens* down and out. During his impecunious state he fortuitously met accused no. 1 at a service station in Port Elizabeth where he lounged about and thereafter began working for him. Although *Stevens* admitted that he performed some work for accused no. 1's business, Lungile Industries, his real involvement was in his abalone activity as a storeman at the abalone drying and storage shed on a small holding in Seaview. *Stevens* became the link between the divers and accused no. 1. The abalone would either be picked up by him at the seaside or delivered to the small holding where it would be weighed. The

weight would be telephonically conveyed to accused no. 1 and the divers paid after he visited accused no.1's home and received the money from accused no. 2 who handled all the finances.

[18] The next chapter in *Stevens'* involvement in accused no. 1's poaching affairs concerned a load of abalone transported to Bloemfontein at the end of September 2007 (**count 6**)¹². He recalled the circumstances in which he and accused no. 3 loaded half the load at the store in Seaview and the other half at accused no. 3's home into a Nissan bakkie fitted with a rear, concertina type roller door. It is not in issue that the vehicle had been purchased at an auction in Johannesburg where accused no. 1 and accused no. 3 were together. In his evidence in chief accused no. 3 testified that he was unsure whether he or accused no. 1 bid for the two (2) vehicles purchased, i.e. the Nissan bakkie and the Colt bakkie. He stated that although he had sufficient money to pay for the Nissan, accused no. 1 did not. Consequently, accused no. 1 transferred money into his Absa banking account which he used to pay for the bakkie. *Stevens* had intimate knowledge hereof. He recounted how accused no. 1 telephoned from Johannesburg and instructed him to obtain money from accused no. 2 and deposit it into accused no. 3's banking account which he duly did. Accused no. 1 of course denied having purchased the bakkie and maintained that it was in fact purchased by accused no. 3. The latter's convoluted explanation why the money had to be transferred into his banking account is plainly nonsensical and designed to disguise the fact that it was in fact purchased by accused no. 1.

¹² The seventh (7th) activity for which accused no. 3 and accused no. 5 were duly convicted and sentenced.

[19] Accused no. 3's evidence concerning the bakkie is furthermore in direct conflict with what had been put to *Stevens* by Mr *Griebenow*. In evidence in chief he stated that he purchased the vehicle for himself and paid for it at the auction. That is in fact confirmed by exhibit "QQ", the statement by Mr *Darren Winterstein*, a director of the auction house, Aucor (Pty) Ltd. During cross-examination he confirmed that after repairs had been effected to the vehicle he kept it at his home and, after being cajoled by *Stevens* into agreeing to transport a load of abalone to Bloemfontein, he proceeded to the store in Seaview where the abalone was loaded onto the Nissan whereafter he dropped *Stevens* at the Walker Drive shopping centre and proceeded to Bloemfontein trailing the lead vehicle driven by accused no. 5. *Stevens* of course denied being dropped off at the centre and I accept his evidence that accused no. 3 dropped him off at a church where he was picked up by accused no. 1.

[20] Accused no. 3's evidence concerning ownership of the Nissan is clearly false. It was put to *Stevens* by his then attorney, Mr *Griebenow*, that accused no. 3 bought the Nissan at the auction on the instructions of *Fabian Roberts (Fabian)* and fetched the vehicle from him immediately prior to loading the abalone at Seaview before departing to Bloemfontein. What was put is irreconcilable with both accused no. 3's and accused no. 1's evidence and vouchsafes *Stevens'* truthfulness. *Fabian* is, according to the accused, the real villain. His name

features prominently in the telephone transcripts and it is clear that he was heavily involved in poaching.

[21] Accused no. 1's direct involvement in the illicit trade in abalone during 2005 to March 2008 was similarly chronicled by **Horn**. *Horn* readily admitted his involvement in the poaching of abalone for several years until his arrest during November 2007. What follows is his narrative. After his arrest, he was questioned by Captain *Cronje* and divulged the names of persons listed as contacts on his cell phone address book. He transcribed those numbers onto a sheet of paper and supplied it to *Cronje*. The document was handed in as exhibit "AA" and it reflects the names and cell numbers of various poachers including that of accused no. 1. *Horn's* decision to resort to a life of poaching was occasioned by the failure of his business endeavours. Initially he dove for abalone which he sold on the black market and soon attracted the attention of known poachers, *Pierre Lourens (Lourens)* and *Ronnie Viviers*, whose names appear on exhibit "AA". The latter were employed by one *Deon de Villiers (Divvy)* and in due course *Lourens* introduced him to accused no. 1. In terms of their newly established business relationship he now began buying abalone from other divers and commenced storing it for accused no. 1 first in Despatch and thereafter at various other places in Port Elizabeth and its environs.

[22] This business relationship led to *Horn* visiting accused no. 1's home where he would receive money to pay the divers either from accused no. 1 or in

his absence, accused no. 2. *Horn's* evidence comprised the entire gamut of the illegal trade in abalone and was never seriously disputed. What was placed in issue was the involvement of accused no. 1 and accused no. 2. Thus, the opening salvo in Mr *Price's* cross-examination was the exclamatory declaration that accused no. 1 and accused no. 2 had never, prior to him (i.e. *Horn*) entering the courtroom, seen him. *Horn's* immediate riposte, framed as a question, was where would he then have obtained accused no. 1's cell phone number from. The retort, perhaps understandably, was not pursued. Instead, the focus of the cross-examination shifted to show that *Horn's* evidence was a complete and utter fabrication. *Horn* was asked to describe the house, its surrounds and its features. His answers were somewhat vague and ultimately led to a request made by Mr *Le Roux* in re-examination that *Horn* be conveyed in order for him to point out the house he alleged he visited on divers occasions.

[23] On my instruction and at the behest of the prosecutor and the defence, Captain *Els (Els)*, a member of the South African Police Services, was assigned the task of conveying *Horn* in order for the latter to point out the home of accused no.'s 1 and 2. The outcome¹³ of this endeavour was that *Horn*, albeit that his directions were initially somewhat wayward, directed *Els* to the former house of accused no.'s 1 and 2. In argument before me Mr *Price* submitted that *Horn's* success in finding the house was either pure coincidence or that *Horn* had been appraised of the exact location of accused no. 1's home. It is not in issue that at the time this pointing out occurred, accused no. 1 and his family had relocated to

¹³ *Els's* notes concerning the incident was handed in by agreement as exhibit "BB".

other premises and the home substantially refurbished. *Horn's* evidence is not open to attack and the pointing out, more than three (3) years after his relocation to Pretoria attests to his truthfulness. Accused no.'s 1 and 2's denial of any prior association with him is patently false and I accept that he worked for accused no. 1 and, on occasion, together with *Lourens*, repaired to the home where accused no. 2 handed money over to them. The inference is inescapable that she knew precisely that the money paid related to the illegal trade in abalone and constituted payment to the divers for the abalone. The foregoing evidence related to the fourth (4th), fifth (5th) and seventh (7th) activities, but were considered out of sequence purely to explain the *modus operandi* of the enterprise. I revert now to the first (1st) activity.

The first activity

[24] Further evidence of accused no. 1's involvement in and association with the illegal trade in abalone was inadvertently uncovered on 10 October 2005, when traffic officer *Morné Mulder*, on patrol duty along the road near Graaff Reinet, signalled to an oncoming motorist that he/she should stop for a routine check. The vehicle, a Golf, bearing the registration letters and numbers DKH 477 EC, was searched and a substantial quantity of abalone found. The driver, a Mr *Leetion*, was duly arrested and he and the vehicle removed to the South African Police Services in Graaff Reinet. Warrant officer *Pika*, attached to the Port Elizabeth organised crime unit, was contacted and hastened to Graaff Reinet and

seized two (2) cell phones from *Leetion*. Scrolling through the contacts on the phone he recorded the numbers on a piece of paper, handed in as exhibit “T”. Both accused no. 1 and accused no. 2’s numbers, 082 659 2820 and 083 320 2619 appear thereon. Both accused formally admitted in exhibit “S1” that those were the numbers of their respective cell phones. *Pika’s* evidence hereanent was never challenged. Although accused no. 1 was led concerning his relationship, if any, with *Leetion*, and maintained that *Leetion* worked for *Fabian*, no attempt was made to proffer any explanation for the inclusion of his cell phone number on *Leetion’s* phone. So too, in the case of accused no. 2.

[25] This activity, essentialized as count 3, represents the first in sequence of the activities relied upon by the state as constituting the pattern of racketeering activities. The accused formally admitted that as regards count 3 –

“Ad Count 3

- (i) That on the 10th of October 2005 at about 15h25 and near Graaff Reinet, AJ Leetion, whilst being the driver of a vehicle with registration DKH 477 EC, was stopped by two traffic officers.
- (ii) That 3147 units of shucked abalone was found in the said vehicle and that AJ Leetion did not have a permit or could not produce any authority to transport or be in possession of the abalone.
- (iii) That the abalone was the *Haliotis Midae* species.

- (iv) That on 17 January 2006 and in the Magistrate's court in Graaff Reinet AJ Leetion, under case number 2439/05, was convicted of the Contravention of Regulation 36(1)(a) of the Regulations as promulgated under Government Notice R.1111 and published in Government Gazette 19205 of 2 September 1998, as amended, read with Regulation 1 and 96 of the said Regulations as issued in terms of Section 77 of Act 18 of 1998, the Marine Living Resources Act and read with Section 1 and 58(4) of the said Act {The unlawful engagement in fishing, collecting, keeping, transportation, controlling and or being in possession of abalone without a permit.}
- (v) That on 10 March 2006 he was sentenced to 18 months imprisonment.
- (vi) That the value of the abalone at the time was approximately R350 000-00."

[26] I shall in due course deal fully with the evidence of both *Marthinus* and *Raymond*, but mention, as part of the apercu detailing the accuseds' involvement in the activities listed on annexure A to the indictment, that both *Marthinus* and *Raymond* testified that they knew *Leetion*. *Raymond* testified that one of the persons to whom he handed accused no. 1's abalone was *Leetion* whilst *Marthinus* narrated the circumstances in which he was appraised by accused no. 1 of *Leetion's* arrest and subsequent conviction. It is clear from his evidence that he and accused no. 1 were in the lead vehicle which escorted *Leetion* to Johannesburg and although *Marthinus's* recollection was sketchy it is clear that

the incident he testified to related to *Leetion's* arrest near Graaff Reinet. This was clearly an activity of the enterprise.

The second activity

[27] On 20 May 2006, Senior Fisheries Inspector Colonel *Rudolf Gerhard van der Berg (van der Berg)* was on patrol duties in Algoa Park with a member of the South African Police Services. Acting upon information relayed to them they stopped a white Toyota Quantum panel van bearing Gauteng registration plates. The vehicle was searched and found to contain abalone. The accused formally admitted, pursuant to the provisions of section 220 of the **Criminal Procedure Act** that, -

"Ad Activity 2, Schedule "A"

- (i) That on the 20th of May 2006 at about 13h30 and near Port Elizabeth, Nico Schultz, whilst being the driver of a vehicle with registration SLB 348 GP was stopped by Mr Gerhard van der Berg, an official from Marine and Coastal Management.
- (ii) That 9947 units of shucked abalone was found in the said vehicle and that Nico Schultz did not have a permit or could not produce any authority to transport or to be in possession of the abalone.

- (iii) That the abalone was of the *Haliotis Midae* species.
- (iv) That on 25 May 2006 and in the Magistrate's court in Port Elizabeth, under case number 27/2952/06, Nico Schultz was convicted of the Contravention of Regulation 36(1)(a) of the Regulations as promulgated under Government Notice R.1111 and published in Government Gazette 19205 of 2 September 1998, as amended, read with Regulation 1 and 96 of the said Regulations as issued in terms of Section 77 of Act 18 of 1998, the Marine Living Resources Act and read with Section 1 and 58(4) of the said Act {The unlawful engagement in fishing, collecting, keeping, transportation, controlling and or being in possession of abalone without a permit.}
- (v) That on the 3rd of August 2007 he was sentenced to 12 months correctional supervision in terms of section 276(1)(h) of Act 51 of 1977."

[28] The circumstances under which the Quantum was found to contain abalone was narrated by *Raymond*. Acting on the instructions of accused no. 1, he loaded the abalone onto the vehicle prior to handing it over to *Nico Schultz*, the driver depicted on exhibit "V14". The weight of the evidence clearly establishes that the abalone belonged to the enterprise and was destined for its buyers in the hinterland.

The third activity

[29] On 7 July 2006 warrant officer *Zola Yako* (*Yako*) was on patrol with a colleague, warrant officer *Piet Bester* (*Bester*). Acting on information they followed a Tata bakkie towing a trailer laden with bags of charcoal from Walker drive in Sherwood to the Metlife Plaza in Kabega Park. When the driver alighted in the car park *Bester* approached him and requested permission to search the trailer. The driver consented and, on inspection, bags of abalone were found concealed under the charcoal. *Yako* testified that the incident occurred at 09h20¹⁴. The bakkie and the load of abalone on the trailer was photographed (exhibit “U”). The accused formally admitted that –

“Ad Activity 3, Schedule “A”

- (i) That on the 7th of July 2006 at about 09h20 and near Makro, Kabega Park, Port Elizabeth, Stephanus Schultz, whilst being the driver of a vehicle with registration DNT 094 EC with a trailer, was stopped by members of the South African Police Services.
- (ii) That 11144 units of shucked abalone was found in the said vehicle and that Stephanus Schultz did not have a permit or could not produce any authority to transport or to be in possession of the abalone.
- (iii) That the abalone was of the *Haliotis Midiae* species.

¹⁴ The admissions relating to this activity was altered with the consent of the defence by the substitution of the time 09h20 for 13h40.

- (iv) That on the 7th of November 2007 and in the Magistrate's court in Port Elizabeth, under the case number 27/7175/06, Stephanus Schultz was convicted of the Contravention of Regulation 36(1)(a) of the Regulations as promulgated under Government Notice R.1111 and published in Government Gazette 19205 of 2 September 1998, as amended, read with Regulation 1 and 96 of the said Regulations as issued in terms of Section 77 of Act 18 of 1998, the Marine Living Resources Act and read with Section 1 and 58(4) of the said Act {The unlawful engagement in fishing, collecting, keeping, transportation, controlling and or being in possession of abalone without a permit.}
- (v) That on 13 December 2007 he was sentenced to a fine of R15 000-00 or 6 months imprisonment and a further 2 years correctional supervision in terms of section 276(1)(h) of Act 51 of 1977."

[30] The enterprise's and accused no. 1's direct involvement in this activity was adverted to by both *Raymond* and *Marthinus*. *Raymond* was instrumental in packing the abalone onto the trailer whilst *Marthinus* was to accompany accused no. 1 in the lead vehicle to Johannesburg. To that end he and accused no. 1, who had secured *Raymond's* BMW for the trip were at a garage near Makro where accused no. 1 received a telephone call that the police had seized the Tata. The trip to Johannesburg had to be aborted accordingly.

The fourth activity

[31] Accused no. 1's involvement in the fourth (4th) activity listed in Schedule "A" was somewhat tentatively admitted in terms of section 220 of the **Criminal Procedure Act** as follows -

"Ad Activity 4, Schedule "A"

- (i) That on the 3rd of December 2006 at about 21h10 and on the N1 National road, Deal Party, Port Elizabeth, accused 1, whilst being the driver of a vehicle with registration CSR 989 EC was stopped by members of the South African Police Services.
- (ii) That 1676 units of shucked abalone was found in the said vehicle and that accused 1 did not have a permit or could not produce any authority to transport or to be in possession of the abalone.
- (iii) That the abalone was of the Haliotis Midiae species and the approximate value was R300-000-00.
- (iv) That on the 13th of June 2007 and in the Magistrate's court in Port Elizabeth, under the case number 27/7175/06 and attached as Annexure "A", accused 1 was convicted of the Contravention of Regulation 36(1) (a) of the Regulations as promulgated under Government Notice R.1111 and published in Government Gazette 19205 of 2 September 1998, as amended, read with Regulation 1 and 96 of the said Regulations as issued in terms of Section 77 of Act 18 of 1998, the Marine Living Resources Act and read with

Section 1 and 58(4) of the said Act {The unlawful engagement in fishing, collecting, keeping, transportation, controlling and or being in possession of abalone without a permit.} and sentenced to 18 months conditionally suspended for a period of 5 years.”

Included in the annexure referred to in paragraph (iv) thereof, to wit, the transcript of the proceedings in the magistrate’s court, is a plea explanation pursuant to the provisions of section 112 (2) of the **Criminal Procedure Act** wherein the circumstances in which accused no. 1 came into possession of the abalone was adverted to viz. –

- “1. . . .
2. . . .
3. . . .
4. I attended a braai whereafter I was asked to drop off one of the people who attended the braai at his home in Sidwell. When I dropped this person he asked me whether I would deliver something for him to a certain given address on my way home. I agreed. I waited until the man returned. On his return I saw that he was loading bags of abalone onto my bakkie. I objected but he assured me that there will be no problem. As a result of my alcohol intake at the braai I was easily convinced.”

This seemingly exculpatory explanation tendered for his possession of the abalone is patently false in the light of the totality of the evidence adduced before me that he was one of the illegal abalone industries’ big kahunas in Port

Elizabeth. The inference may legitimately be drawn that this activity was that of the enterprise.

The fifth activity

[32] The fifth (5th) activity involves the participation of *Stevens* and has been fully set out in paragraph [16] hereinbefore. Notwithstanding the concession made by Mr *Le Roux*, I am satisfied that accused no. 5, by his conduct, directly participated in the enterprise's affairs.

The sixth activity

[33] Counsel for the state conceded that this activity, essentialized as count five (5)¹⁵ has not been established and that accused no.'s 1, 2 and 3 are entitled to their acquittal hereanent.

The seventh activity

[34] This relates to count six (6) and has been dealt with in paragraphs [18] to [20] viz. the offences for which accused no. 3 and accused no. 5 were convicted.

¹⁵ Accused no. 5 discharged on this count.

The eighth, ninth and tenth activities

[35] These activities relate to counts seven (7), eight (8) and nine (9) viz. the transportation of abalone to Mozambique by *Raymond, Marthinus and Boetman*. Although their testimony was subjected to a barrage of criticism the attack upon their credibility and reliability is completely unwarranted. Although their evidence is not entirely without blemish, whatever contradictions or inconsistencies there were can properly be attributed to the passage of time which has elapsed since they first became involved in accused no.'s 1 and 2's nefarious activities. There is abundant corroboration for their testimony from other witnesses, documentary evidence and the telephone records, exhibit "Z", to which I now turn.

[36] These telephonic communications are strongly relied upon by the state as affording ample corroboration for the evidence of the *Janse van Rensburgs* relating to the eighth (8th), ninth (9th) and tenth (10th) activities which the state alleged were undertaken during the period 16 December 2008 to January 2009. Although the initial authorisation was valid only until 21 December 2008, it was extended by a further order of Swart J until 17 March 2009 (exhibit "Y"). Both written directions were admitted into evidence with the consent of the accuseds' legal representatives.

[37] Notwithstanding the defences' acquiescence in the admission of exhibits "X" and "Y" however, Mr *Price*, in his written heads of argument sought to impugn the admissibility not only of the intercepted telephone calls post 18 December

2008 but moreover the admissibility of the extension directive itself. This incongruity is perplexing to say the least. Be that as it may however, the submission that Swart J “did not apply his mind to the second directive” is spurious. It is apparent from *Jooste’s* affidavit in support of the extension that cogent reasons existed for seeking the extension. As will appear hereunder, the reasons for seeking to have these telephonic communications consigned to the dustbin, is not difficult to fathom. Their content, from the most unlikely source, the accused themselves, vouchsafes the *Janse van Rensburgs’* truthfulness.

[38] Special Investigator *Marko Strydom (Strydom)*, the official designated to monitor the communications to and from accused no. 1’s cellular phone testified that over the passage of time he developed a personality profile of the persons engaged in conversation from which he was able to identify the persons in communication with accused no. 1. That tittle of evidence was never challenged under cross-examination. In Mr *Price’s* written heads of argument however *Strydom’s* evidence identifying the interlocutors was assailed and it was submitted that in the absence of expert voice analysis testimony, no weight whatsoever be accorded to *Strydom’s* evidence hereanent. The fact of the matter is that *Strydom’s* evidence was never challenged. To now suggest that in as much as the accused did not admit their voices on the recording that *Strydom’s* evidence was of little or no probative value is disingenuous. As pointed out in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others**¹⁶ -

¹⁶ 2000 (1) SA 1 (CC) at para [61].

[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.

[62] The rule in *Browne v Dunn* is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses'. It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence *is* to be challenged but also *how* it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed."

Apart from the foregoing I unreservedly accept *Strydom's* evidence that during the prolonged period of monitoring accused no. 1's telephone calls, he succeeded in identifying the interlocutors.

[39] The telephonic communications relevant to these proceedings and relied upon by the state were handed in as exhibit "Z" and covered the period 1 December 2008 to 9 January 2009. During *Strydom's* initial cross-examination, objection was taken to specific telephonic communications where a telephone number other than of accused no. 1 was reflected on either the "**called address**" (destination) or "**calling address**" (received from). Counsel for the accused submitted that it was apparent herefrom that *Strydom* had listened to and monitored telephone numbers not authorised in terms of the directive. There is no substance in the objection. I accept *Strydom's* evidence that in those instances where a cellular number other than that of accused no. 1 appears in exhibit "Z" in either scenario, i.e. called address or calling address, that accused no. 1, notwithstanding his denial, diverted the call to that particular number. The telephone number monitored remained that of accused no. 1 and no other.

[40] During his cross-examination of *Strydom*, and in an attempt to impugn the reliability of the transcriptions in exhibit "Z", Mr *Price* handed up a random assemblage of transcribed conversations (exhibit "M") which he submitted were riddled with mistakes and reflective of the unreliability of exhibit "Z". *Strydom* was

cross-examined at length on obvious incorrect data reflected on exhibit “M”¹⁷ and readily conceded that mistakes did appear therefrom. The upshot of this exercise however was that counsel were directed to listen to the compact discs from which the transcriptions (forming part of exhibit “F”) emanated. During *Strydom’s* re-examination, whatever typographical errors appearing on exhibit “Z” were corrected and exhibit “Z” amended, without demur from the defence and it properly records the identity of the interlocutors and the communications between them albeit that some of the transcriptions are punctuated by words such as “indistinct” and the like. Notwithstanding such deficiencies however, objectively read, they reveal the direct involvement of the accused in the commission of the offences charged.

[41] The accused furthermore formally admitted that –

- “(i) That at all times relevant to the indictment a cell phone with the cell number of 0826592820 was the contract phone of Accused 1.
- (ii) That at all times relevant to the Indictment a cell phone with the cell number 0833202619 was the contract phone of Accused 2.
- (iii) That the cell phone with the number 0826592820 the subject was of an interception direction issue in terms of the Regulation of Interception of Communications and Provision of Communication-related Information Act, Act 70 of 2002.

¹⁷ These were sourced from the compact discs which contained the entire record of the monitored telephone calls. Copies of the discs had been provided to the defence and handed in as part of exhibit “F”.

- (iv) That the cell phone communications was intercepted and monitored pursuant to a judge's direction in terms of the Regulation of Interception of Communications and Provision of Communication-related Information Act, Act 70 of 2002.
- (v) That the cell phone communications so intercepted were digitally recorded and stored in audio files on a hard drive of a computer.
- (vi) That the telephonic communications [audio files] for the period 1 December 2008 to 21 January 2009 from and to the cell phone 0826592820 was transcribed.
- (vii) That the transcriptions are a true reflection of the content of the conversation so recorded."

[42] The accuseds' involvement in the offences charged can best be illustrated by analysing the intercepted calls following the arrest of accused no.'s 3 and 4 and *Marthinus* and *Boetman* and thereafter to retrace the events as they unfolded and which ultimately led to their arrest. At 07h23 on 9 January 2009, accused no. 3's wife, *Chanelle* telephoned accused no. 1 on his cell no. 082 659 2820. The call was answered by accused no. 2. After a brief exchange of pleasantries, she informed accused no. 2 that she had not spoken to accused no. 3 since midday the previous day. Accused no. 2 expressed her surprise and sought confirmation that the former had in fact last spoken to accused no. 3 at noon the previous day. Accused no. 1 interjected saying that she i.e. *Chanelle* should phone accused no. 3 and told accused no. 2 to convey what information they had. She notified her that accused no. 1 had spoken to accused no. 3 at

12h30 the previous day and said *“they might be at the edge”*. Accused no. 3 then immediately telephoned accused no. 1 and said *“oh S, they pulled them off”*¹⁸. He said something about *“I am going to get out of here, they have taken them out of the truck, they are opening the back or something”*. Chanelle then enquired whether this had occurred in Johannesburg whereupon accused no. 2 informed her that it was not in Johannesburg but *“almost on the other side”*. The remainder of the conversation proceeded as follows:-

FEMALE VOICE IN: And, ja, and was he, was he not with them or what?

FEMALE VOICE: No, no. What he did was, you see, they, they were going, they were going to cross over, so he was on the one station that [VOICES IN BACKGROUND] you cross over and they, the other vehicle came through and they were on the other side and then he said that he saw a car in front of it and a car behind it and they got out of the vehicle and they were opening the back.

FEMALE VOICE IN: Oh.

FEMALE VOICE: OKAY. NOW HE SAW THIS, SO HE SAID TO Pete ‘I am getting out of here’ and then a few minutes later Peter said no, Peter phoned him and he said, ‘no, no, I am getting out of here’ and he left, but we haven’t heard from him since and we tried to phone him again and his phones were off, so (indistinct), what he could have possibly done is, switched the phone off and F chopped it.

FEMALE VOICE IN: But what about the other one?

FEMALE VOICE: Well, now, we were flipping waiting, waiting, waiting. When you phoned now we thought okay, well, okay, obviously now the police have got him, because he phoned us and he spoke to you, but we’ve heard nothing and you say you have heard nothing.

FEMALE VOICE IN: Ja (indistinct - . . . intervenes)

¹⁸ I have omitted the vulgar language and replaced the word by its first letter.

FEMALE VOICE: Now we don't know what the F is going on . . . (intervenes)

FEMALE VOICE IN: (Indistinct) (indistinct) F in an accident and (indistinct)

FEMALE VOICE: No, (indistinct) (indistinct)

FEMALE VOICE IN: (Indistinct)

FEMALE VOICE: No, we don't know what the F is going on.

FEMALE VOICE IN: And he obviously hasn't book in any hotel?

FEMALE VOICE: No.

FEMALE VOICE IN: Because if he was in Jo' burg then he would have phoned.

FEMALE VOICE: exactly, that what Peter said. You know, what's, what's odd, he could have come, like coming to the closest town and go to a tiekie-box and phone your cell no or my cell no. . . (intervenes)

FEMALE VOICE IN: Ja.

FEMALE VOICE: Or Peter's contact cell number, any cell number, I mean he would remember somebody's cell number, so somebody would have heard something by now.

FEMALE VOICE IN: Ja.

FEMALE VOICE: But now, his driver said, I don't know, but (indistinct) he lives in the F bottom of a beer bottle, Peter says his driver apparently spoke to him at four o'clock yesterday. Peter says, no that is F impossible, because he's phone is off, his phone has been off since one o'clock.

FEMALE VOICE IN: Ja, no, I phoned him just after one o'clock and his phones were off (indistinct - speaks simultaneously)

FEMALE VOICE: Yes, peter said . . . (intervenes -)

FEMALE VOICE IN: (Indistinct) I (indistinct) those phones were off, (indistinct) (indistinct).

FEMALE VOICE: Dead right, dead right. Now that is what's confusing us, but you've heard nothing?

FEMALE VOICE IN: No, the last time was five past twelve when he phoned me.

FEMALE VOICE: No, I don't know, I don't know what the F (indistinct) (indistinct), like Peter said, its either a knock, or that's (indistinct), because he said to Peter there's a, there's a Volkswagen in front , he said they were unmarked vehicles again, you know mos, they always with unmarked vehicles, that's not police cars, you understand what I am saying.

FEMALE VOICE IN: Ja, (indistinct)

FEMALE VOICE: There was one in front and (indistinct) - speak simultaneously) (indistinct) like he (indistinct) (indistinct) where and they are (indistinct)

FEMALE VOICE IN: Now, what do, what do we do, what do we think? Do we phone the long one and ask him to query?

FEMALE VOICE IN: [Amused] Oh, Jirre.

FEMALE VOICE: Do you understand what I am saying.

FEMALE VOCIE IN: Uhm-uhm.

FEMALE VOICE: No we are sitting patiently waiting and then you phoned, I though okay, thank God we know now where he is of what is going on.

FEMALE VOICE IN: If he is (indistinct) (indistinct) phone call (indistinct).

FEMALE VOICE: He has to, they have to. Because remember, there are four of them. Somebody has to phone somebody, you understand what I am saying?

FEMALE VOICE IN: Ja.

FEMALE VOICE: There's four people. Some of them got to get contact sooner or later.

FEMALE VOICE IN: Ja, but then (indistinct) (indistinct) in a strange place, I mean, do they work the same and (indistinct).

FEMALE VOICE: Of course, yes. They have to. No, no, no they haven't gone over.

FEMALE VOICE IN: Oh.

FEMALE VOICE: It is here . . . (intervenes)

FEMALE VOICE IN: Oh.

FEMALE VOICE: On this side. They had worked exactly the same, you know, the (indistinct) it is not illegal.

FEMALE VOICE IN: Jeeziz.

FEMALE VOICE: Do you understand?

- FEMALE VOICE IN: Ja. Uhm.
- FEMALE VOICE: They say if they wanted to catch them they had to catch them on this side, not on that side.
- FEMALE VOICE IN: Ja.
- FEMALE VOICE: You understand, that's why they stopped them, but now we are confused. We are not sure whether it was (indistinct).
- FEMALE VOICE IN: No, no.
- FEMALE VOICE: Now if you, if you hear anything . . . (intervenes)
- FEMALE VOICE IN: I mean you have to . . . (intervenes)
- FEMALE VOICE: But this sign is pretty dead, Peter's contact phone and my died already, and we couldn't bring chargers for our contract phones, because we were just going to buy a phone over there.
- FEMALE VOICE IN: Where? Where are you? (Indistinct - . . . intervenes)
- FEMALE VOICE: We are (indistinct) on holiday.
- FEMALE VOICE IN: Oh, really.
- FEMALE VOICE: Yes.
- FEMALE VOICE IN: Oh, F
- FEMALE VOICE: Yes.
- FEMALE VOICE IN: Okay, well, if I hear anything then I will . . . (intervenes)
- FEMALE VOICE: Please let us know and where (indistinct - speak simultaneously) and all the details so that Peter can go sort something out.
- FEMALE VOICE IN: Ja. And if he (indistinct) give me call.
- FEMALE VOICE: If I hear anything I obviously I will let you know, but obviously we are waiting for you to let us know, because obviously he need to phone you, not us.
- FEMALE VOICE IN: Ja, okay. Okay, thanks.
- FEMALE VOICE: But anyway, as soon as you hear anything, I am going to get, what's his name, Alwyn to maybe phone . . . (intervenes)
- FEMALE VOICE IN: Ja.

FEMALE VOICE: Phone around here, up there (indistinct) heard anything or seen anything, or (indistinct) is going on, you know what I mean . . . (intervenes)

FEMALE VOICE IN: I will.

FEMALE VOICE: Thanks, hey.

FEMALE VOICE IN: Thanks very much.

FEMALE VOICE: Bye.

FEMALE VOICE IN: Bye.

FEMALE VOICE: Bye.”

[43] Approximately four (4) hours later, *Chanelle* once more telephoned accused no. 1 and after an initial pause, accused no. 2 answered. *Chanelle* asked for the registration number of the vehicle driven by accused no. 3 and she responded by saying that she would attempt to do so and revert to her.

[44] Eight (8) minutes later accused no. 1 received a call from *Marinda, Marthinus’* wife. I interpolate to say that this conversation must be examined against the background of accused no.’s 1 and 2’s defence that they had nothing to do with *Mathinus* and *Boetman’s* trip to Mozambique and had heard it for the first time that morning when telephoned by *Fabian*. After an initial pause and when she said “Hello”, the call was ended. A few seconds later accused no. 2 called her on accused no. 1’s cell phone and when she gave her name, handed the phone to accused no. 1. *Marinda* asked him “*het als toe goed afgeloop?*” to which accused no. 1 responded saying “*Hu-uhm, nee. Nee.*” The conversation proceeded as follows¹⁹:-

¹⁹ Exhibit Z0 (b) pages 38 – 41

“VROUESTEM: Wel, ek kry, ek kry hulle glad nie in die hande nie en ek begin nou worry.

MANSSTEM IN: Ek worry ook, maar okay, kyk hierso, ja, okay, ek kan nie verstaan nie, okay, maar moenie worry nie, alles sal alright wees, maar okay, hulle was fine né? Die trok, alles het goed geloop en hulle was in Jo’burg, né . . . (tussenbei).

VROUESTEM: En toe gaan Johnno(?) en sy vriend voor en die ou man en die laaitie was saam. Hulle, en hulle was amper daar, uhm, waar hulle sou uitgeklim het waar die ander ou sou oor gevat het . . . (tussenbei).

VROUESTEM: Ja.

MANSSTEM IN: En toe het Johnno my gebel, okay?

VROUESTEM: Ja.

MANSSTEM IN: En John het vir my gesê ‘o god’, ek moet net sien of miskien hy sal my help moet nodig hê, want hulle, daar, daar’s ‘n kar voor en agter die trok, hy staan oor die pad by die een petrolstasie en die trok is by die ander petrolstasie en daar is een voor en een agter . . . (tussenbei).

VROUESTEM: Ja.

MANSSTEM IN: Hulle het ‘n wit ou en ‘n swart ou en hulle praat daar met, met die toppie en die laaitie.

VROUESTEM: And hy, maar ek kan nie verstaan wat aangaan nie, want toe sê hy vir my, ek bedoel ‘n ou kan nie so bad luck wees nie, man. Toe sê hy vir my nee, want daai ding is, toe sê hy nee, toe sê ek vir hom maar nou gaan vind uit wat die fout is en bel die ou man. Toe sê hy nee-nee, hy wil net wegkom hier, hy wil net wegkom hier, hy wil wegkom hier.

VROUESTEM: Ja.

MANSSTEM IN: Toe sê hy wil net wegkom, hy gaan hom later bel, hy wil net wegkom daar van die plek. Toe ry hy. Toe bel ek hom weer. Toe sê hy nee, hy wil net wegkom, hy gaan my nou bel. Ek sê bel vir die ou en see of alles alright is.

VROUESTEM: Ja.

MANSSTEM IN: En toe, toe ek hom try bel, so half-past-12, one o’clock, gister, one o’clock, né?

VROUESTEM: Ja.

MANSSTEM IN: Fone af.

VROUESTEM: Ah. Ah.

MANSSTEM IN: Fone af. En nou die twee voertuie, die vier mense net weg – poef, gone, weg.

VROUSTEM: Is als weg?

MANSSTEM IN: Ek weet nie.

VROUESTEM: So jy kry hulle glad nie in die hande nie?

MANSSTEM IN: Glad nie in die hande nie.

VROUESTEM: Nou wat dink jy wat het gebeur?

MANSSTEM IN: Marinda, ek weet nie. Ek is so . . . (tussenbei).

VROUESTEM: Hulle is nie opgesluit nie, né?

MANSSTEM IN: Ek weet nie, want kyk hierso . . . (tussenbei).

VROUESTEM: So jy weet nie of hulle opgesluit is nie?

MANSSTEM IN: Kyk hierso, as hulle, as hulle gevang was, dan obviously is hulle gepimp. Verstaan jy?

VROUESTEM: Ja.

MANSSTEM IN: Maar ek weet nie by wie, want daar kan nie baie mense wees nie, want dan was hulle gepimp. Maar dan as hulle opgesluit is, hulle moet ‘n oproep kry. Dan gaan hulle mos, Thinus gaan jou most bel. Verstaan jy?

VROUESTEM: (Onduidelik).

MANSSTEM IN: En dank an jy my bel. Verstaan jy?

VROUESTEM: Ja.

MANSSTEM IN: Dan kan ek reel, want kyk as (onduidelik) – dit is, dit is ‘n groot F, as dit die storie is, dan, maar dan, ek bedoel ek het klaar met Alwyn gepraat, ek het hom gebel. Toe sê hy nee, jy, ek kan nie nou, hy kan nie bel nie, ek kan niks doen nie, ek moet net wag. As hulle iets verkeerd gedoen het en die Boere het hulle gelaai, hulle sal ‘n oproep kry . . . (tussenbei)”.

[45] The conversation continued in much the same vein, accused no. 1 adding that he was beginning to panic and then sought to reassure her saying:-

“MANSSTEM IN: Of so half-past-12. Of iemand, man ek weet nie, maar die beste is, okay, alles sal alright wees, maak nie saak nie wat dit is. As hulle (onduidelik) is, al die goed is weg, hulle sal alright wees. As die Boere, hulle sal borg kry, hulle sal afkom met ‘n boete. Ek bedoel ek sal reel. Dit is nie ‘n problem nie. Ek het klaar met die prokureur gepraat. Hy sê, hy sê ek moenie worry nie, ek moet maar oorgaan, my ‘n international nommer kry, ek kan hom bel, as ek iets hoor, die nie ‘n problem nie, maar die beste is laat Raymond wees tons weet nie, daar kan miskien ‘n problem wees, ek weet nie wat dit is nie . . . (tussenbei).”

[46] The content of these conversations unequivocally establishes the falsity of accused no.'s 1 and 2's versions that they were not involved in the transportation of the abalone. The conversation between accused no. 1 and accused no. 3 on the evening of 7 January 2009 establishes not only the truth of the *Janse van Rensburgs'* version of events but gives the lie to their own contrived defence. At 20h51 on 7 January 2009, accused no. 1 telephoned accused no. 3. Notwithstanding the guarded and somewhat cryptic nature of the conversation it is evident that it concerns the *Janse van Rensburgs* and establishes that accused no. 3, as testified by them, had been in contact with them earlier. This is fortified by the content of the conversation reproduced in paragraph [44] where accused no. 1 informed *Marinda* that *Marthinus* and *Boetman* had been in Johannesburg. Their evidence that they would alight from the truck close to the

Mozambican border whereafter accused no. 3 would drive the truck is in fact confirmed by the conversation between accused no. 3 and accused no. 1 that they would meet at a restaurant across the border in Mozambique. The remainder of the conversation is concerned with abalone and their prospects for 2010.

[47] It follows from the foregoing that accused no. 1's evidence that he received a telephone call from *Fabian* on the morning of 8 January 2009 wherein the latter informed him that a truckload of his abalone was en route to Mozambique and requested that he keep a lookout for the truck is clearly false. Accused no. 3's evidence that accused no. 1 in turn telephoned him and conveyed *Fabian's* request to him is likewise contrived. The contention that the truckload of abalone belonged to *Fabian* surfaced for the first time in accused no. 1's evidence and was never put to either *Marthinus* or *Boetman*. What was put to *Marthinus* by Mr *Price* gives the lie to both accused no.'s 1 and 3's version. Mr *Price* made the following assertion –

“Wat ek vir jou wil sê is, meneer, dat as 'n mens kyk na die omringende feite van hierdie saak - ek praat nou spesifiek van daardie twee trips Komatipoort toe - daardie perle-moen was Raymond en (onduidelik) Janse van Vuuren se perlemoen. Dit is gery met die doel om geld te verdien sodat Peter Roberts terugbetaal kan word. Dit was julle perlemoen; julle het dit ge"source", ons weet nie van wie af nie en julle, al wat jy doen is jy sleep mnr Roberts in wanneer jy weet dis nie

hy nie, dis iemand anders. --- Edelagbare, as ek mag reghelp, waar moet ons geld gekry het om die perlemoen te koop as ek in finansiële moeilikheid was.

HOF U sê dit is onwaar? --- Ekskuus Edelagbare?

U sê dit is onwaar wat die stelling is? --- Dit is onwaar daai.

MNR PRICE Ek dink u verstaan my stelling verkeerd. Al wat ek vir jou probeer sê is julle het wel die perlemoen aangery maar vir iemand anders. Ek weet nie dit was nie. Ons weet nie wie dit was nie. Daar is verskeie grootbase tussen die perlemoen-mense in die Baai. --- Soos u nou sê ons het aangery vir iemand anderste maar hoe?

Ja. --- Mnr Peter Roberts het ons dan gevra om te ry.”

The incongruity of the two (2) diametrically opposing assertions made is, not only astounding but moreover clearly establishes the falsity of accused no.'s 1 and 3's evidence. Furthermore the absence of any telephonic record of this conversation accentuates the untruthfulness of accused no. 1. The suggestion made by Mr *Price* that this telephone call was expunged from the transcript (exhibit "Z") by the police is nonsensical and devoid of any substance – there was no such phone call from accused no. 1 to accused no. 3 nor from *Fabian* to accused no. 1.

[48] It is not in issue that the truck referred to by the conversationalists in the preceding paragraphs had been purchased at an auction in East London on 13 November 2008, ostensibly by *Raymond*. Payment of the purchase price was however made electronically by accused no. 2 into the auctioneers', Rose Innes,

banking account on 13 November 2008. The case presented on behalf of accused no.'s 1 and 2 was that, save for accompanying *Raymond* to the auction and effecting payment of the purchase price on his behalf, as an act of beneficence, they had no direct interest in the truck. On their version, the payment of the purchase price was merely a loan to *Raymond* which had to be repaid. The perjurious nature of that testimony is demonstrated by the following – it is common cause that at the time the truck was impounded by the Scorpions on 9 January 2009, no repayments had as yet been effected by *Raymond*.

[49] *Raymond's* evidence that accused no. 1 was the prime instigator in the purchase of the truck was assailed on a number of bases. The criticism directed at his testimony is however, upon a holistic appraisal of the evidence, totally unwarranted. Although *Raymond* was in certain respects a single witness, there are sufficient safeguards to conclude that he was a truthful witness. The documentary evidence found in accused no. 1's home during the search operation, coupled to the content of the plethora of telephone conversations concerning the truck, establishes beyond any doubt, not only the true ownership of the truck, but its intended purpose. During *Raymond's* cross-examination it was put to him that accused no. 1 not only paid for the truck as an act of beneficence to enable *Raymond* to start a cartage business but that he was unaware that the roof had been converted to conceal a false compartment. All three (3) *Janse van Rensburgs* testified that accused no. 1 was at their home when they constructed the false roof and I have no doubt whatsoever that

accused no. 1 purchased the truck for the sole purpose to illegally transport abalone and oversaw the conversion of the roof. Exhibit "KK", a letter written by accused no. 1, corroborates *Raymond's* evidence that he was merely employed by accused no. 1 as the driver of the vehicle. During *Raymond's* cross-examination he was referred to exhibit "Z 25(b)" in an attempt to show that he was the true owner of the truck. An objective analysis of the conversation however establishes the truth of *Raymond's* evidence that his public pronouncement that he was the owner of the truck was merely a ruse perpetrated by himself and accused no. 1 to conceal the true ownership of the truck. The conversation furthermore proves the falsity of accused no. 1's evidence that he knew nothing about the alteration to the roof. In fact the documents seized at his home refute any suggestion that accused no. 1 was not instrumental in deciding upon the construction of the false roof. Notwithstanding objective corroboration for *Raymond, Marthinus* and *Boetman's* testimony, their cross-examination was directed at establishing that accused no. 1 was not aware that the truck was being used to transport the abalone to Mozambique. *Raymond* testified about three (3) trips whilst *Marthinus* and *Boetman* merely referred to two (2) trips. It is clear from *Raymond's* evidence that all three (3) trips were done on the express instructions of accused no. 1 and with the knowledge of accused no.'s 2 and 3. The telephone transcripts constitute irrefutable proof of the truthfulness of the *Janse van Rensburg* trio.

[50] It is not in dispute that *Raymond* obtained a passport from the Department of Home Affairs on 13 November 2008. He testified that he required the passport in order to travel to Mozambique to convey a load of abalone for accused no. 1. Accused no. 1 of course denied any knowledge of the trip but that denial is, given the objective facts, contrived. *Raymond's* evidence that he had been instructed to have the truck in pristine condition for the trip to Mozambique in fact finds corroboration from accused no. 1 himself. In the phone call to *Raymond* at 10:02:50 on 15 December 2008 accused no. 1 instructs *Raymond* to clean and polish the truck and to check if everything was in order. During the conversation *Raymond* appraised him that he had obtained his passport. The immediate question is why would *Raymond* have mentioned this to accused no. 1. The answer is obvious, as appears from the further conversation the next day.

[51] On the morning of 16 December 2008 (08:45:55), *Raymond* telephoned accused no. 1's cell phone which was answered by accused no. 2. After a short exchange between them *Raymond* asked to speak to accused no. 1 and a conversation about the truck ensues during which accused no. 1 instructs *Raymond* to overnight at his home that night in order to be well rested for his journey. At 09:54:24 *Raymond* once more telephoned accused no. 1 during which he appraised him that another truck was being loaded and his truck would then be loaded. *Raymond* testified that he took the truck to a farm in Greenbushes pointed out to him by accused no. 1 where the abalone was loaded into the truck. Early the next morning, at 02:25:58 accused no. 1 telephoned

accused no. 2 and informed her that he was at the farm with a certain “Uncle *Mike*”, that they were almost done and that he was bringing *Raymond* home to sleep.

[52] *Raymond’s* narrative continued as follows - after the truck was loaded at the farm he drove it to accused no. 3’s home in Westering where it was parked and accused no. 1 who had followed him, picked him up and they then drove to his home where he overnighted. The next morning, 18 December 2008, accused no. 3 fetched him from accused no. 1’s home and returned to his home where he handed him R5000.00 of the R10 000.00 he had received from accused no. 1 for their expenses. On arrival at accused no. 3’s home he encountered an elderly gentleman whom he was told would drive with him to Komatipoort. They left Port Elizabeth, the lead car being driven by accused no. 3 accompanied by an unidentified passenger. They overnighted at Kroonstad, left the following morning and, en route to Maputo, stopped at Nelspruit where the old man was booked into a Road Lodge as he did not have a passport to enter Mozambique.

[53] Accused no. 3 in the lead vehicle did not however accompany *Raymond* to Maputo but turned back at Komatipoort on the understanding that they would meet the next day at O’Hagan’s restaurant in Nelspruit. *Raymond* duly proceeded to Maputo where he met up with a certain *Dave* and his companion and the next day delivered the abalone to a house in Maputo together with *Dave*. *Raymond* adverted to the circumstances under which accused no. 3 went to

Johannesburg where he met the buyers and where payment of the abalone was effected before returning to Nelspruit where he met accused no. 3 at the O'Hagans. He further testified that he had to replace one (1) of the truck's tyres in Nelspruit and, short of money, received some from accused no. 3 to purchase the tyre at Maxiprest in Nelspruit. During the search of accused no. 1's premises on 12 January 2009 the receipt from Maxiprest exhibit "F18.6" was found in the study. *Raymond* testified that he handed the receipt to accused no. 1 at his home on 20 December 2008 after returning from Mozambique. The Maxiprest invoice was one of a substantial number of documents found in a brown envelope in accused no. 1's study during the search of their home and I accept his evidence that he handed all the documents to either accused no. 1 or accused no. 2. The corollary of this finding is that accused no. 1 and accused no. 2's evidence that *Raymond* inadvertently left the documents in their home because he resided there is false.

[54] The next chapter in *Raymond's* narrative relates to the second (2nd) trip to Maputo, summarised as follows – On 22 December 2008 accused no. 1 informed *Raymond* to take the truck to the farm in Greenbushes where, on arrival he met accused no. 3, his brother and a labourer. The abalone was weighed, packed into the concealed roof and the roof closed and once more sealed. *Raymond* drove the truck to accused no. 3's premises where it was parked and he slept at accused no. 1's home that night. The telephonic conversations between accused no. 1 and *Raymond* conclusively establish the truth of *Raymond's* narrative. At

13:06:14 on 22 December 2008 accused no. 1 telephoned Raymond. The conversation related to the roadworthiness of the truck at the Post Office. One (1) of the documents found in the truck during the search near the border is a receipt for a special roadworthy permit issued by the Post Office on 22 December 2008.

[55] At 15:28:24 the same day accused no. 1 again telephoned *Raymond*. The import of the conversation once more pertained to the truck and concludes with accused no. 1 telling *Raymond* to take the truck because the goods would be ready at 8 or 9 p.m. and he was to park the vehicle as before and sleep over at his place. On enquiry whether *Marthinus* and *Boetman* should also sleep over, accused no. 1's response was that they would discuss it later.

[56] At 16:20:32 accused no. 1 again telephoned *Raymond* and discussed the licence for the truck. The conversation concluded by *Raymond* telling accused no. 1 that he was en route to his home. *Raymond's* evidence dovetails with the content of the telephonic conversations. He drove the truck to Greenbushes where it was loaded and he then drove it to accused no. 3's home where it was parked before proceeding to accused no. 1's home where he overnighted. At 07:39:20 on 24 December 2008 *Marthinus* telephoned accused no. 1 and enquired whether *Raymond* was asleep. Accused no. 1 responded in the affirmative telling *Marthinus* that they had worked late into the night. Accused no. 1 then enquired whether they were ready and emphasized that *Raymond* had not had much sleep. At 14:02:41 that afternoon accused no. 1 received a call from

Deon de Villiers (Divvy). The import of the conversation plainly and objectively construed clearly has reference to abalone, and not fish, as contended for by accused no. 1.

[57] The evidence establishes that on the morning of 24 December 2008 accused no. 3 fetched *Raymond* from accused no. 1's home and proceeded to *Raymond's* grandmother's home in Kensington where *Marthinus* and *Boetman* were picked up. They then proceeded to accused no. 3's home where the truck was collected which *Raymond* drove with *Boetman* as his passenger. Accused no. 3 and *Marthinus* were in the lead car and they drove in convoy straight through to Nelspruit and thence to Komatipoort where they stopped at the Sasol garage at the intersection. Accused no. 3 left them and went with *Marthinus* to make a reservation at the Border Country Inn Hotel and returned alone. On his return *Raymond* handed the keys of the truck to *Dave* whom they had encountered as they entered the garage and accused no. 3 dropped him and *Boetman* at the hotel. Later that evening, *Dave* telephoned *Raymond* saying that he was outside the hotel with the truck. *Raymond* went outside, collected the keys from *Dave* and parked it in the hotel's parking area. It is evident from exhibit "HH" the hotel's vehicle register that the security guard recorded that the truck entered the parking area at 21h20 on 24 December 2008. This confirms *Raymond's* evidence.

[58] Early the next morning, *Raymond*, *Marthinus* and *Boetman* drove from the hotel to Johannesburg. They met accused no. 3 at one of the Southern Sun hotels and he instructed them to book into a Formula One Hotel and meet him at an Engen garage which he identified to *Raymond*. At the appointed hour the next day, the *Janse van Rensburgs* met up with accused no. 3 who handed *Raymond* the sum of R40 000.00 with instructions that they utilise R2 500.00 to cover their expenses to Port Elizabeth and hand deliver the balance to accused no. 2 on their arrival.

[59] Exhibit "Z12(a)" reveals that at 17:30:19 on 25 December 2008, accused no. 1 telephoned *Marthinus* and brusquely demanded answers. The conversation clearly has reference to abalone. *Marthinus* informed accused no. 1 that accused no. 3 had intimated that he would have to remain in Johannesburg for three (3) or four (4) days. Accused no. 1 acquiesced and instructed *Marthinus* that they should return to Port Elizabeth. It is apparent from the conversation that the buyers had expressed reservations about the quality of the abalone and demanded that it be collected. Accused no. 1 then suggested that *Marthinus* and *Boetman* should return to Port Elizabeth in a motor vehicle.

[60] Notwithstanding the foregoing instruction, *Raymond*, *Marthinus* and *Boetman* however returned to Port Elizabeth during the afternoon of 26 December 2008. *Raymond* testified that he went to accused no. 1's home on 27 December 2008 and handed her various receipts and the money he received

from accused no. 3. The telephone records corroborate *Raymond's* evidence that he went to accused no. 2's home. At 12:32:35 on 27 December 2008 *Raymond* telephoned accused no. 1. During the conversation accused no. 1 expressed a desire to replace the truck's existing engine with a turbo diesel engine and a large part of the discussion related to improving the performance of the truck. *Raymond* intimated that he had just returned from his i.e. accused no. 1's home where he had left what he referred to as the "expense money". Accused no. 1 then informed *Raymond* that accused no. 3 was still in Johannesburg awaiting payment and only when the abalone was properly prepared on the other side (oorkant) would accused no. 3 receive payment.

[61] At 16:01:21 on 28 December 2008 accused no. 3 telephoned accused no. 1 and the two (2) of them conversed about the problems encountered with the abalone, the drop in prices and concluded with accused no. 3 informing accused no. 1 that the total weight was 548.75 kilogram. In their testimony both accused no. 1 and accused no. 3 suggested that their recorded conversation was confusing but merely related to fish. Their untruthfulness knows no bounds.

[62] Accused no. 3 telephoned accused no. 1 at 18:17:31 on 29 December 2008 and *inter alia* informed him that he had his money, *Fabian's* money and the old man's money. The further conversation clearly has reference to a further load of abalone to be transported across the border. Accused no. 3 then asked accused no. 1 whether he should take a friend or the old man. This is a clear

reference to accused no. 4 and *Marthinus* as subsequent events prove. A discussion then ensued concerning the condition of the abalone and accused no. 3 tentatively suggested that it would be blow dried and would be ready for transportation in two (2) days' time. Accused no. 1 then advised accused no. 3 that the abalone should be loosely packed in the truck (a fact confirmed when the truck was searched by the police and the abalone found loosely packed in the concealed compartment). Accused no. 1 then instructed accused no. 3 on the *modus operandi* to cross the border, to return and go to Johannesburg whilst *Marthinus* and *Boetman* were to drive to Port Elizabeth.

[63] *Raymond's* sudden and unexpected departure to Durban to see his wife and child infuriated accused no. 1. In a conversation with accused no. 3 at 09:06:04 on 31 December 2008 he expressed his disgust at *Raymond's* decision to visit his wife. I interpolate to say that *Raymond's* immediate departure created a myriad of problems for accused no. 1, the primary one being who would drive the truck to Mozambique. Accused no. 1 thus solicited *Marthinus* and *Boetman's* assistance to solve his problem. They would drive to Mozambique. *Marthinus* testified that accused no. 1 telephoned him and asked him to tell *Boetman* to drive the truck to be loaded. The telephone conversations between *Marthinus*, *Boetman* and accused no.1 and accused no. 2 thereafter fully corroborates both *Marthinus* and *Boetman's* evidence that the load of abalone being transported to Mozambique belonged to accused no. 1.

[64] *Marthinus* and *Boetman* testified to events spanning several years. Both of them were unsophisticated witnesses and their evidence was not without blemish. Both however impressed me as honest witnesses and I have no reason to doubt their veracity. In an attempt to impugn *Marthinus'* integrity Mr *Price* attempted to cross-examine him on a statement made by him which he handed to his attorney at the time, Mr *Griebenow*. I disallowed cross-examination on the statement on the basis that the statement was a privileged communication between *Marthinus* and Mr *Griebenow* relating, as it did, to the criminal prosecution of the accused and *Marthinus* and *Boetman*. In argument however, Mr *Price* stated that **“it was his (*Marthinus'*) decision to find Mr *Griebenow*, not the other way around”**.

[65] The telephonic conversation between accused no. 1 and *Marthinus'* wife *Marinda* at 11:30:16 on 9 January 2009 exemplifies, not only the accuseds' untruthfulness but negates the submission made by Mr *Price* that Mr *Griebenow's* services were elicited by *Marthinus*. The conversation records that even prior to his own arrest accused no. 1 had contacted Mr *Griebenow* and enlisted his services to secure the release on bail of *Marthinus*, *Boetman*, accused no.'s 3 and 4. The submission made by counsel is therefore not only misleading, but fatuous.

[66] I have no hesitation in accepting *Marthinus* and *Boetman's* evidence that they conveyed the load of abalone on the instructions of accused no. 1 and that

accused no.'s 2, 3 and 4 were not only privy to the machinations of accused no. 1 but intimately involved in the transportation of the load of abalone to Mozambique.

[67] The fateful next load of abalone was in fact only transported from Port Elizabeth on the 7th of January 2009. The vehicle was stopped close to the Mozambican border post by the police on 8 January 2009. In the cabin the police found a cordless drill which *Boetman* in due course used to open the concealed compartment in the roof. The circumstances in which the drill came to be in the truck formed the subject matter of a conversation between accused no's 1, 2 and *Boetman* on 30 December 2008. During the early evening *Boetman* telephoned accused no. 1, the call being answered by accused no. 2 who informed him that accused no. 1 had gone to her sister's home. *Boetman* then requested her to ask accused no. 1 to charge accused no. 3's drill. Shortly thereafter accused no. 2 asked accused no. 3 where the charger was and asked him to bring it to accused no. 1 because he would need to charge it. Accused no. 3 then indicated that he would charge the drill and bring it the next day.

[68] The scheduled departure of the abalone was however forestalled because of *Raymond's* decision to go to Durban to visit his estranged wife. On the morning of 31 December 2008 accused no. 3 called accused no. 1 bemoaning *Raymond's* decision. *Raymond's* one redeeming feature was of course acknowledged because *Raymond* had, as he himself testified, had the planks cut

to size to facilitate the packing of the loose abalone into the roof of the truck. This became the subject matter of the conversation between accused no. 1 and *Marthinus* during that early evening. *Marthinus*' evidence is confirmed by the transcript. The trip had been scheduled for Friday, the 2nd of January and *Marthinus* confirmed that the truck's roof had been properly sealed, painted and the planks installed.

[69] On the evening of 1 January 2009, accused no. 1 telephoned *Divvy* and after confirming that the goods would be ready the following day, once more complained that *Raymond (die laaitie)* was away but that arrangements had been made for one *Bruce* to accompany accused no. 3. This reference to "*Bruce*" can only refer to accused no. 4. Accused no. 1 further informed him that *Raymond's* brother, i.e. *Boetman*, would be accompanying his father, i.e. *Marthinus*. The lead vehicle would be driven by accused no. 3 accompanied by accused no. 4. He was further informed that *Bruce* had a passport and that accused no. 4 would drive his motor vehicle over the border and accused no. 3 the truck. *Marthinus* and *Boetman* would stay at the hotel the night. After a further conversation about the weight and quality of the abalone accused no. 1 confirmed, as testified to by the *Janse van Rensburg* trio, that the false compartment in the roof of the truck had been converted to resemble a scoop and could hold about seven hundred (700) kilograms. The further significance of this telephone call is the admission by accused no. 1 that accused no. 2 had intimate knowledge about his financial affairs.

[70] The preparations for the trip continued and during the morning of 2 January accused no. 1 telephoned accused no. 3 and informed him that *Marthinus* and *Boetman* were in Kensington and that he had to obtain the temporary licence for the truck. The latter licence was in fact found in the truck and the circumstance in which it was obtained was adverted to by both *Marthinus* and *Boetman*. Accused no. 1 furthermore informed accused no. 3 that as *Marthinus*' telephone had his number on it, it could be problematic; he had to leave the phone at home and buy a new phone. Later that morning accused no. 1 telephoned *Marthinus* and enquired whether they were ready and when he affirmed told him to wait for accused no. 3 and follow him to the post office to have the licence sorted out. *Marthinus*' evidence mirrors the telephone call. The temporary licence for the truck was in fact obtained from the post office, valid for the period 6 January 2009 until 26 January 2009. *Boetman* was instructed to go to the place where the goods were to be loaded and this was in fact confirmed by him in his testimony.

[71] The rest of the day's conversations concerned the trip. Accused no. 1 instructed *Marthinus* to remove the squid (tjokka) bags from the truck to avoid any problems, and to tell *Boetman* to load the truck later that night. Nothing of any moment appears to have occurred on the 3rd of January 2009. Problems arose with the abalone and the anticipated departure date passed. The reasons were adverted to in the telephonic conversations between accused no. 1 and

Boetman on 5 January 2009. *Boetman* informed accused no. 1 that the truck was encountering problems. Accused no. 1 instructed him to take the truck to a certain *Bezuidenhout* in Green Street to sort out the problem. Both *Marthinus* and *Boetman* in fact confirmed that the truck was taken to *Bezuidenhout* for repairs.

[72] Shortly thereafter accused no. 3 telephoned accused no. 1 and enquired whether *Marthinus* had telephoned him. He replied in the affirmative. A few hours later *Boetman* called accused no. 1 to report that the problem with the truck had been resolved, that he was on his way to obtain the engine clearance and that *Marthinus*, wanted to speak to him. *Marthinus* informed him that he could not get the engine clearance certificate because of a system failure. He was informed to go and see their contact and if he still could not obtain the licence to contact accused no. 3 to sort out the problem. *Marthinus* was furthermore reminded to purchase a tin of paint to conceal whatever needed to be concealed.

[73] At 16:16:58 accused no. 1 received a call from Uncle *Mike*. From the cryptic nature of the conversation it is obvious that it relates to abalone. The conversation concerned the dry abalone which had been crated and weighed and the rest was in the process of drying. Two hundred and twenty eight (228) kilograms were available immediately and the rest would be ready in twenty-four (24) hours time. A minute later accused no. 1 telephoned Uncle *Mike* and after a complaint about money, told him that he would be leaving the next day. The rest of the conversation clearly concerns a further consignment of abalone for which

Mike was to arrange a storage place for. The conversation then shifts to the packing of the truck, the fact that the problems had been resolved and that accused no. 3 and *Marthinus* would be ready. They were to rest the next day and leave the following day. The evidence adduced regarding the documentation found in the truck establishes that the truck in fact left Port Elizabeth on 7 January 2009, as per the arrangements foreshadowed in the conversation between accused no. 1 and *Mike*.

[74] On the morning of 7 January 2009, accused no. 1 telephoned *Marthinus* and told him that the consignment was on schedule and that he should speak to accused no. 3 to get the clearance for the truck. *Marthinus* responded by saying that he had telephoned but was informed that the computers were still offline. In response accused no. 1 asked him to see whether he could not obtain a clearance or a temporary permit. If that was not possible, the officials must supply accused no. 3 with a letter to the effect that the system was offline. The conversation then shifted to a prospective storeroom between Addo and Coega for future use. About half an hour later accused no. 1 once more telephoned *Marthinus* during the course of which he informed him that even if the abalone was not properly prepared he should nonetheless load it and he would sort out whatever problem would arise later on. A further discussion then ensued concerning a certain Mr *Dobson's* abalone, and future dealings in abalone.

The case against Accused no. 3 and Accused no. 4

[75] Both accused no.'s 3 and 4 testified that they intended to spend a holiday in Mozambique together with accused no. 1 and his family. By prior arrangement accused no. 3 and accused no. 4 left in a Mercedes Benz owned by accused no. 1 on the 6th of January 2009 and overnighted in Johannesburg with the intention to meet accused no. 1 and his family at the airport on the 7th of January 2009 and ferry them to the rental company where accused no. 1 was to collect a recreational vehicle (RV). He testified that he left accused no. 4 at the hotel and duly proceeded to the airport to meet accused no. 1 and his family and took them to the RV hire company where he left them and returned to the hotel.

[76] The accuseds' evidence that they left Port Elizabeth on the 6th of January 2009 is patently untrue. It is clear from *Marthinus* and *Boetman's* evidence that they proceeded in convoy from Port Elizabeth during the early hours of 7 January 2009. Accused no. 3 and accused no. 4 both tailored their evidence to correspond with accused no.'s 1 and 2's evidence that he collected them at the airport on 7 January 2009. The telephone conversation between accused no.'s 1 and 3 during the evening of 7 January 2009 establishes the falsity of their testimony.

[77] Accused no. 3's evidence that he received a telephone call from accused no. 1 during the morning of 8 January 2009 is likewise contrived. During his

examination in chief he was pointedly asked whether he had heard from accused no. 1 the next day. The questioning proceeded as follows –

“Did you hear from accused no. 1 at all that day? That is now the morning of 8 January 2009. --- Well I received a call from him during the course of the morning, probably about I would say ten/half-past-ten, and then he asked me to have a lookout for Raymond’s truck.

Did he say Raymond’s truck? --- He said Raymond’s truck, because he apparently got a call from Fabian stating that they were up there doing some business and riding abalone obviously, and then I still told him no I will keep a lookout, but I mean I do not want to get too much involved with that.

That was a conversation between you and accused no. 1? --- Accused no. 1.

What phone did you phone him on? --- My contract phone.

Not yours. His. What phone did you phone him on? Or rather what number did you phone of his? --- It would have been a contract phone.

You are well known to the family? --- That is correct.

Do you have Shelby’s number? --- Yes, I did.

Now can you recall, I know it is a long time ago, can you recall more or less where you were when you got this call? --- We were en route from Johannesburg towards Komatipoort.

That is that N12 Witbank/Middelburg (intervention) --- That is the petrol station where you go and you get your insurance to go across the border.

Ja, but that is in Komatipoort. --- That is correct.

But the road is the N12 Witbank/Middelburg/Nelspruit, that way? --- That is the road yes.”

[78] That line of questioning was followed by a further leading question relating to other telephonic conversations between himself and accused no. 1 after he and accused no. 4 left the Sasol petrol station at the intersection. The underlying strategy is not difficult to discern. The anticipated answers from accused no. 3 that he in fact spoke to accused no. 1 on two (2) occasions on 8 January 2009 served not only to corroborate accused no. 1's evidence that he used his contract cell phone on each such occasion but moreover to cast doubt on the reliability of the intercepted phone call records, exhibit "Z" and the evidence of *Strydom*. The latter's evidence is, as I have emphasized hereinbefore, above reproach. The defence had access to the compact discs from which the telephone calls were transcribed and there can be no doubt that the evidence of both accused no. 1 and accused no. 3 that they spoke to each other on accused no. 1's contract cell phone during the course of 8 January 2009 is contrived.

[79] There was no suggestion made by either Mr *Price* or Mr *Griebenow* during their cross-examination of *Strydom* that such calls were in fact made. On the contrary, during the state case, the impression was sought to be created that accused no. 1 and accused no. 3, save for the telephonic contact evidenced by exhibit "Z" on the evening of 7 January 2009, had had no contact whatsoever. Mr *Griebenow* in fact pertinently put to *Smith* that accused no. 3 would deny having mentioned that he was going on holiday to Mozambique with a certain *Peter*. That denial could obviously not gel with the version put up by accused no. 1 during his testimony and it is no doubt for this reason that Mr *Price* led accused

no. 3 to say that what was put by Mr *Griebenow* was contrary to the instructions which he, i.e. accused no. 3 gave to Mr *Griebenow*.

[80] Accused no. 3 and accused no. 4 were integral to the transportation of the abalone to Mozambique. Much was made in cross-examination of the apparent conflict between the recorded conversation of accused no. 1 and *Divvy* during the course of which accused no. 1 told him that accused no. 3 would be driving in front together with one *Bruce*. That tittle of evidence was relied upon to show that the reference therein to “*Jono* and *Bruce*” could not have been a reference to accused no. 3 and accused no. 4 given the common cause fact that they were apprehended at the roadblock in the white Mercedes Benz.

[81] The truth of the matter is that the transcript records a conversation concerning the Mercedes. The cross-examination proceeded as follows –

“Kom ek help u. Ons gaan kyk na *Z6*. Ja *Z6A*.
Bladsy 3. Die 1ste Januarie 2009, heel onder. Para.
4 reël 24: mansstem “En *Jono* gaan voor ry in sy
bakkie saam met ‘n ander ou, *Bruce*”. --- Ja wel
daarna in ‘n gesprek waar hulle melding maak
(tussenbei)

Praat oor die huur van ‘n Mercedes. --- Die
Mercedes wat gebruik word en dan die vroumens
moet R12.000,00 betaal word vir die huur van die
Mercedes.

Vir die huur van die Mercedes. Maar daar word
nêrens in enige gesprek gesê dat die Mercedes ‘n
voorkar sou wees nie. --- Daar word nie direk gesê

ons gaan perlemoen vat en ons gaan dit met dit doen nie. Soos ek sê dit hang baie af van interpretasie van wat gesê word.”

[82] Reference to a Mercedes Benz appears from a conversation between accused no. 1 and *Marthinus* at 11:26:36 on 6 January 2009. It is apparent from these recordings and *Strydom's* evidence that he correctly deduced that the front car would be a Mercedes Benz driven by accused no. 3, accompanied by one *Bruce*. It is clear from *Smith's* evidence that the source of his information was *Strydom*. The latter had appraised him that a truck load of abalone destined for Mozambique would pass through Gauteng and Mpumalanga. The registration number of the truck was given as BZH 945 EC and it would be accompanied by another vehicle driven by two (2) white males bearing EC number plates and a motor home driven by a white man accompanied by his wife and children.

[83] Armed with this information a task force was assembled at the Nkomazi tollgate at Kaapmuiden where members of the South African Police Services had of their own accord set up a roadblock. The team was divided into shifts and commenced observations at 18h00 on 7 January 2009. The next morning *Smith* was informed that the truck had left Johannesburg at 6 a.m. and deduced that it would arrive at the tollgate between 12 noon to 1 p.m. The information relayed to *Smith* that the truck would leave Johannesburg at 6 a.m. appears clearly from the conversations between accused no. 1 and accused no. 3 on the evening of 7 January 2009. Although both accused no. 1 and accused no. 3 not only

denounced the conversation recorded in exhibit “Z (1) (a)” as unreliable and its context somewhat perplexing, their attitude is understandable given the incriminating features of their conversation. Firstly, it is in direct conflict with both accused no. 1 and accused no. 3’s evidence that accused no. 3 picked him and his family up at the airport. The gist of the conversation leaves no room for any suggestion that accused no. 3 picked up accused no. 1 at the airport and ferried him to the place where the RV was collected. Secondly, it shows direct knowledge of *Marthinus* and *Boetman*’s whereabouts and that of the truck.

[84] *Smith* of course was not privy to all the aforementioned conversations. His information was limited to those facts set in the beginning of the preceding paragraph. Acting on that information he left the roadblock at approximately 12 noon and proceeded in the direction of Nelspruit. En route he passed an oncoming white Mercedes Benz bearing Eastern Cape (EC) registration plates. Approximately five (5) or six (6) minutes later he encountered the truck, passed it, and at an opportune moment, made a u-turn and followed the truck whilst his companion, *Kurt Heydenryck* (*Heydenryck*) photographed it (exhibit “F1-5”). Whilst trailing the truck *Smith* contacted his fellow team members at the roadblock and instructed them to allow the truck to pass unhindered, and thereafter contacted *Pieter Willem van Heerden* (*van Heerden*) at Komatipoort and instructed him to be on the look-out for the Mercedes Benz.

[85] Mr *Luvuyo Mfaku* (*Mfaku*) and a Mr *Pillay* were instructed to look out for the Mercedes Benz and proceeded to the Sasol petrol station where they observed the vehicle parked. Two (2) white males were in close proximity to the vehicle, one (1) of whom was seated and eating a mango and the other standing a few paces from him. *Mfaku* observed the truck passing the garage and saw one (1) of the two (2) men who was standing near the vehicle gesturing to the driver of the truck to pass. The latter stopped at the intersection but proceeded onwards whilst the bald headed person moved closer to the road in the direction of the truck and turned back to the vehicle whereafter he and his companion drove off in the direction of Malelane. *Mfaku* identified the occupants of the vehicle as accused no. 3 and accused no. 4.

[86] Whilst accused no.'s. 3 and 4 admitted being at the Sasol garage, accused no. 4 denied walking up the embankment or making a gesture to the driver of the truck. *Mfaku's* evidence hereanent finds corroboration from disparate sources, from *Marthinus* and the content of certain telephone calls. I have hereinbefore adverted that in the conversation between accused no. 1 and *Divvy* the *modus operandi* to transport the abalone across the border had been revealed. – It clearly established that accused no. 3 would drive the truck and accused no. 4 the Mercedes across the border whilst the *Janse van Rensburgs* would remain at the hotel in Komatipoort and await the arrival of accused no. 3 with the truck.

[87] *Marthinus* corroborated *Mfaku's* evidence that as he passed the garage he noticed accused no. 4 gesturing to him. He testified that he inadvertently drove past the garage and intended to make a u-turn and return to the garage where the preordained meeting between himself and accused no's 3 and 4 was scheduled to take place. The truthfulness of *Marthinus'* evidence is underscored by the fact that *Smith* in fact saw the truck moving off the road in close proximity to the garage. This manoeuvre was necessary to effect the u-turn and return to the garage. *Mfaku* and *Marthinus'* evidence establishes that accused no. 4 was an integral part of the transportation of the abalone to Mozambique.

[88] Accused no. 3's evidence that he decided to return along the road whence they had travelled in order to locate an ATM at the nearest town, is in keeping with the rest of his evidence, false. It is clear that he took fright when he observed the police intercepting the truck and was in the process of fleeing the scene until he was apprehended at the roadblock.

[89] The telephone conversation between accused no. 2 and accused no. 3's wife during the morning of 9 January 2009 likewise conclusively establishes the falsity of accused no's 3 and 4's evidence. It was suggested to both accused no. 2 and accused no. 3 during their examination in chief that the absence of any record in exhibit "Z" confirming the existence a telephone call between accused no. 3 and accused no. 1 during the morning of 9 January 2009 established that the police suppressed such evidence. Both the suggestion and the accused's

adoption thereof is not only fanciful but nonsensical. It is obvious that accused no. 1 and accused no. 3 had a telephonic conversation immediately after the police surrounded the truck. The probabilities are that the conversation was one via the cell phone destroyed by accused no. 3 in the cell and a cell phone to which accused no. 1 had access to, viz his children's. I accept *Marthinus'* evidence that accused no. 3 smashed a cell phone in the cell – there was nothing to gain from manufacturing that tittle of evidence.

[90] It is obvious that the search of the Mercedes at the police station was not a thorough one and that accused no. 3 returned to the vehicle where he retrieved the cell phone which he destroyed in the cell. The discovery of the drill bit (exhibit "F17(5)") in the Mercedes Benz following the arrest of accused no.'s 3 and 4 was refuted by them. On their version the police must have obtained it elsewhere and perjured themselves by testifying that it was found in the Mercedes. The accuseds' denial, though patently false, is of course readily understandable. The rivets in the concealed compartment in the truck could only be removed with the aid of a drill as in fact occurred following the purchase of a drill bit in Komatipoort following the accuseds' arrest. The telephone conversations identified accused no.'s 3 and 4 as the persons who would have crossed the border into Mozambique and the drill bit would have had to be used to removed the rivets from the concealed compartment.

[91] The alleged confusion which the conversation between accused no. 2 and accused no. 3's wife appears to have engendered in accused no.'s 1, 2 and 3 is nothing more than a subterfuge. There is nothing perplexing about the conversation. It is a factual account of an abortive operation to transport abalone to Mozambique. The information conveyed to her by accused no. 2 was to the following effect – Accused no.'s 3 and 4 were virtually at the border when they saw the truck being stopped and the occupants ordered to alight. Accused no. 3 was at the service station as per the arrangement made to meet there and took flight. The arrangement that accused no. 3 would drive the truck across the border formed part of the subject matter during the conversation between accused no. 1 and *Marthinus'* wife at 11:30:16 on the morning of 9 January 2009, a few hours after the conversation between accused no. 3's wife and accused no. 2. Therein accused no. 1 advised the former that they were almost at the border where the truck was stopped and he wanted to get away as fast as possible. The content of these conversations refutes any suggestion that accused no.'s 3 and 4 were merely en route to holiday in Mozambique. In fact, as the phone records indicate, accused no. 3 was integral to the entire operation and both he and accused no. 4's protestations of innocence are completely false. They were, as I have previously stated, integral to the operation.

[92] The eighth (8th) and tenth (10th) racketeering activity is attributed to accused no.'s 1, 2, 3 and 4 whilst the ninth (9th) merely to accused no.'s 1, 2 and 3. Each of these activities relate to the transportation of the abalone to

Mozambique by the *Janse van Rensburgs*. As adumbrated hereinbefore, not only were they honest and reliable witnesses but their evidence was corroborated by the contents of exhibit “Z”, the telephone records.

[93] Although Mr *Le Roux* conceded that accused no. 5 would be entitled to his acquittal on count four (4), Stevens’ evidence details his involvement and I am satisfied that it was not merely peripheral but that he was directly involved in this activity. His conviction on the seventh (7th) listed activity thus establishes his involvement in two (2) or more offences as envisaged by the **POCA**.

[94] The evidence adduced, and which I have hitherto analyzed, establishes that – (i) accused no.’s 1 and 2 were directly involved in all but the sixth (6th) listed activity, (ii) accused no. 3 was directly involved in the fifth (5th), seventh (7th), eighth (8th), ninth (9th) and tenth (10th) activities, and (iii) accused no. 5 was directly involved in the fifth (5th) and seventh (7th) activities. Each of the foregoing activities, over a period of several years, unequivocally establishes a pattern of racketeering activity as defined in section 1 of **POCA**. The evidence furthermore proves that accused no.’s 1 and 2 managed the enterprise as envisaged by section 2 (1) (f) of the **POCA**.

The Search of accused no. 1's home on 12 January 2009

[95] The attack on the legality of the search is of course directed at suppressing the documentation found in the study at accused no. 1's home, exhibit "F18" (1-26). It is common cause that *Smith* and *Strydom*, alerted to the fact that accused no. 2 was en route to her home in Port Elizabeth from Johannesburg hastened there to conduct a search. It is common cause that the search was one conducted without a warrant and I accept *Smith's* evidence that the delay in obtaining a warrant would have frustrated the very purpose of the search. Notwithstanding the foregoing authority, *Smith*, in addition, requested accused no. 2's permission to search the premises. Accused no. 2 of course denied having consented to the search. Her denial is, in conformity with the rest of her evidence, clearly false and I accept *Smith's* evidence that she consented thereto.

[96] It is furthermore common cause that her attorney (Mr *Ryno Scholtz* (*Scholtz*)) came to her home shortly after the arrival of *Smith* and his coterie of policemen. In her testimony, accused no. 2 stated that *Scholtz* left prior to the search being concluded but that tittle of evidence too seems highly improbable. She signed the inventory of documentation seized from the premises (exhibit "G") from which it is apparent that she consented to the search. The submissions made concerning the legality of the search are entirely spurious. It was moreover pertinently put that *Scholtz* would testify that he requested *Smith* to cease the

search but that evidence was never tendered. The inference may thus legitimately be drawn that *Scholtz* declined to be party to accused no. 2's deceitfulness.

Conclusion

[97] The evidence to which I have adverted to hereinbefore conclusively establishes beyond any doubt the falsity of the versions proffered by the various accused and I reject their evidence in its totality. The weight of the evidence proves their direct involvement in the offences charged. Before I conclude this judgment however it is necessary to state the following. In argument and during cross-examination of various of the police witnesses, the integrity, not only of the entire police investigation but moreover of several of the witnesses involved in Operation May was impugned. There is no merit whatsoever in any of these imputations. The evidence shows that the investigations were conducted in a scrupulously fair manner and is beyond reproach. The investigators are to be commended for their sterling efforts in combating the scourge of abalone poaching in the Eastern Cape.

The verdict

[98] Accused no. 1 is convicted on counts 1, 2, 3, 4, 6, 7, 8 and 9.

Accused no. 2 is convicted on counts 1, 2 and 9.

Accused no. 3 is convicted on counts 1, 4, 7, 8 and 9.

Accused no. 4 is convicted on count 9.

Accused no. 5 is convicted on count 1.

Accused no.'s 1, 2 and 3 are acquitted on count 5.

DAYALIN CHETTY

JUDGE OF THE HIGH COURT

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