THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case no: 916/2013

In the matter between:

PETROS DUMISANE JWARA	**FIRST APPELLANT**
VICTOR MPHO JWILI	**SECOND APPELLANT**
RATSHEKI LAMPROS MOKGOSANI	**THIRD APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Jwara v S* (916/13) [2015] ZASCA 33 (25 March 2015)

Coram: Brand, Ponnan and Willis JJA and Dambuza and Gorven AJJA

Heard: **12 March 2015**

Delivered: **25 March 2015**

Summary: Criminal Law ─ various offences under Prevention of Organised Crime Act 121 of 1998 and other common law crimes ─ admissibility of evidence obtained pursuant to a direction made under Interception and Monitoring Prohibition Act 127 of 1992 ─ exercise of discretion to admit a

proper one ─ evidence of crimes sufficient ─ convictions good ─ no basis to interfere with sentences.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Coetzee J)

The appeals against the convictions and sentences of all three appellants are dismissed.

JUDGMENT

Gorven AJA (Brand, Ponnan and Willis JJA and Dambuza AJA concurring):

[1] *Quis custodiet ipsos custodes?*[1] Thus enquired the satirist Juvenal in his poem on his attempts to enforce moral behaviour. Since Plato, this phrase has been used to lament the corrosive effect of corrupt police and judicial officials. When Captain Sizane, the investigating officer in this matter, stumbled on a reference to the first appellant being involved with a suspected manufacturer of substances proscribed under the Drugs and Drug Trafficking Act[2] (the Drugs Act), he was confronted with what appeared to be just such corrupt behaviour. This came about after he had obtained an order under the Interception and Monitoring Prohibition Act[3] (the Interception Act) to monitor calls made to and from the cellphone of that suspected drugs manufacturer. The conversation said that the first appellant had undertaken to store the seized drug manufacturing

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[1] Juvenal *Satire* 6.346–348. The translation has been rendered as: 'Who will guard the guards themselves?'
'… I know the plan that my friends always advise me to adopt:
"Bolt her in, constrain her!"
But who can watch the watchmen?
They keep quiet about the girl's secrets and get her as their payment;
everyone hushes it up.'

[2] The Drugs and Drug Trafficking Act 140 of 1992.

[3] The Interception and Monitoring Prohibition Act 127 of 1992.

machinery and return it to the suspect after the matter had been resolved. The first appellant was also said to have told the arrested wife of the suspect what to mention in her warning statement to the police. The first appellant was, at the time, a Superintendent in the South African Police Service (SAPS) and the head of the West Rand Organised Crime Unit.

[2] This discovery led Captain Sizane to set about applying for a direction under the Interception Act from the designated judge, Seriti J, to monitor the cellphone calls made to and from the first appellant's cellphone. This direction was granted. An extension of that direction was afterwards obtained from the same judge relating to the cellphones of the second and third appellants and one Captain Shange (Shange). The three appellants and Shange were all members of the West Rand Organised Crime Unit at the time.

[3] In due course, the three appellants were arraigned, along with Shange, in the South Gauteng High Court, sitting at Johannesburg before Coetzee J. They confronted 13 charges; not all of which applied to all of the accused. Before the trial commenced, Shange died. This left the three appellants as the only accused persons in the trial. They were all acquitted on counts 2, 4, 5 and 8. The remaining charges confronting them, and on which they were convicted as charged, were as follows:

- Contravention of s 2(1)(*d*) of the Prevention of Organised Crime Act 121 of 1998 (the POCA), during the period 2005 to 2007 by acquiring or maintaining an interest in an enterprise – second and third appellants (Count 1);
- Contravention of s 2(1)(*f*) of the POCA, during the same period by managing the operation of an enterprise – first appellant (Count 3);

- Dealing in drugs by supplying cocaine, ecstacy and crystal methaqualone to Norman Kokoeng on 8 February 2007 – first and second appellants (Count 6);
- Defeating or obstructing the course of justice by releasing a suspect, Kenneth Bogopane and/or causing a false entry to be made in the SAPS occurrence book, resulting in his release on 10 February 2007 – first and second appellants (Count 7);
- Theft of 800kg of ephedrine, a scheduled substance, at OR Tambo airport on 3 October 2007 – all three appellants (Count 9);
- Supply of ephedrine, a scheduled substance, by selling it for R1 425 000 – all three appellants (Count 10);
- Fraud by giving out to MJ Pretorius on 3 October 2007 at OR Tambo airport that they were authorised to seize a consignment of ephedrine for the purposes of investigation – all three appellants (Count 11);
- Attempted theft of 5.7 kilograms of cocaine on 9 October 2007 at OR Tambo airport – all three appellants (Count 12);
- Fraud by giving out to JD Scott that they were authorised to apply for a certificate in terms of s 252A of the Criminal Procedure Act 51 of 1977 in respect of the ephedrine at OR Tambo airport on 3 October 2007 – all three appellants (Count 13).

[4] The first appellant was sentenced to an effective 25 years' imprisonment, the second appellant to an effective 22 years' imprisonment and the third appellant to an effective 20 years' imprisonment. The appellants were all denied leave to appeal by the court below but granted bail pending the outcome of a petition to this court. This court granted leave to appeal against the convictions and sentences on 28 February 2012.

[5] The appeal lapsed for failure to file the record timeously. Some six months thereafter the state applied to have the bail of the appellants revoked. Despite opposition, an order to that effect was granted by Satchwell J. This elicited an application for leave to appeal that order by the appellants, which was granted by Satchwell J. Although that appeal was before us, all concerned agreed that events had overtaken it. Nothing more need be said on the matter.

[6] An application for reinstatement of the appeal was brought and must be decided. The explanations given for allowing the appeal to lapse were, to put it mildly, somewhat unconvincing. However, consideration of such an application also involves weighing the prospects of success on appeal. Since it was necessary to fully consider the very substantial record for that purpose, it seemed appropriate to deal with the merits of the appeal. The appeal was therefore reinstated at the hearing without objection.

[7] I turn to summarise the offences. Count 1, relating to the second and third appellants, concerned acquiring an interest in an enterprise through a pattern of racketeering activity in contravention of s 2(1)(*d*) of the POCA. The word 'enterprise' is defined in the POCA as follows:

'"Enterprise" includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity.'

As was pointed out by this court in *S v Eyssen*:[4]

'It is difficult to envisage a wider definition. A single person is covered. So it seems is every other type of connection between persons known to the law or existing in fact; those which the legislature has not included specifically would be incorporated by the introductory word "includes". Taking a group of individuals associated in fact, which is the relevant part of the definition for the purposes of this appeal, it seems to me that the association would at least have to be conscious; that there would have to be a common factor or purpose identifiable in

[4] *S v Eyssen* 2009 (1) SACR 406 (SCA) para 6.

the association; that the association would have to be ongoing; and that the members would have to function as a continuing unit. There is no requirement that the enterprise be legal, or that it be illegal. It is the pattern of racketeering activity, through which the accused must participate in the affairs of the enterprise, that brings in the illegal element; and the concepts of "enterprise" and "pattern of racketeering activity" are discrete. Proof of the pattern may establish proof of the enterprise, but this will not inevitably be the case.'

[8] Pattern of racketeering activity is, in turn, defined as meaning:

'. . . 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'.

Schedule 1 includes contraventions of s 3, 4 and 5 of the Drugs Act which deal with the manufacture and supply of scheduled substances, the use and possession of proscribed dependence producing substances and dealing in such dependence producing substances. I shall refer to all of these by way of the general term 'drugs'. Schedule 1 also includes the common law crimes of theft and fraud. This, in effect, means that a group of people, associated in fact, which commits two offences under schedule 1 within a ten year period, maintains an interest in an enterprise through a pattern of racketeering activity.

[9] Count 3, relating to the first appellant, was that he contravened s 2(1)(f) of the POCA by managing an enterprise through a pattern of racketeering activity. Apart from the management aspect, the same criteria apply. All of the other counts fall under Schedule 1.

[10] It was correctly accepted by the appellants that, apart from counts 6 and 7, the outcome of the appeal hinged largely on the question whether the

acceptance into evidence of the intercepted phone conversations obtained under the Interception Act should be set aside on appeal.

[11] The court below recognised that the provisions of the Interception Act limit the right to privacy accorded in the Constitution.[5] There was no attack on the constitutionality of the Interception Act. Therefore, evidence obtained in accordance with it would thus have been obtained without violating this, or any other, right. Where a right under the Constitution is impinged on by legislation, the prescripts of that legislation must be strictly adhered to. The appellants correctly submitted that the principles governing the obtaining and carrying out of search and seizure warrants apply equally to a direction under the Interception Act. The position on search and seizure was explained by Langa DP in *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others; In re Hyndai Motor Distributors (Pty) Ltd & others v Smit NO & others*,[6] when he said:

'On the proper interpretation of the sections concerned, the Investigating Directorate is required to place before a judicial officer an adequate and objective basis to justify the infringement of the important right to privacy. The legislation sets up an objective standard that must be met prior to the violation of the right, thus ensuring that search and seizure powers will only be exercised where there are sufficient reasons for doing so. These provisions thus strike a balance between the need for search and seizure powers and the right to privacy of individuals.'[7]

[12] The relevant parts of s 2(2) of the Interception Act read as follows:

'Notwithstanding the provisions of subsection (1) or anything to the contrary in any other law contained, a judge may direct that-

(a) . . .

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[5] Section 14(*d*) of the Constitution of the Republic of South Africa, 1996.
[6] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 (2) SACR 349 (CC) para 55.
[7] References omitted.

(b) . . . all communications which have been or are being or are intended to be transmitted by telephone or in any other manner over a telecommunications line, to or from a person, body or organization be intercepted; or

(c) conversations by or with, or communications to or from, a person, body or organization, whether a telecommunications line is being used in conducting those conversations or transmitting those communications or not, be monitored in any manner by means of a monitoring device.'

Some relevant definitions are:

'"monitor" includes the recording of conversations or communications by means of a monitoring device'.

'"monitoring device" means any instrument, device or equipment which is used or can be used, whether by itself or in combination with any other instrument, device or equipment, to listen to or record any conversation or communication'.

'"telecommunications line" includes any apparatus, instrument, pole, mast, wire, pipe, pneumatic or other tube, thing or means which is or may be used for or in connection with the sending, conveying, transmitting or receiving of signs, signals, sounds, communications or other information'.

[13] In their heads of argument, the appellants attacked the admissibility of the evidence obtained under the Interception Act on three fronts. The first was the grant of the initial direction by Seriti J in respect of the first appellant. The gravamen of this was that the application did not comply in all respects with the elaborate procedure set out in the Act. In argument, they conceded that this matter was distinguishable from that of *S v Pillay & others*[8] where the direction was obtained on false information contained in the affidavit supporting the application. In the present matter, it was correctly conceded that, whilst there may have been minor shortcomings in the application, they were at most technical in nature and did not go to the foundation of the application.

[8] *S v Pillay & others* 2004 (2) SACR 410 (SCA).

[14] The second point of attack was that the Interception Act did not provide for the interception of cellphone communications. This was not addressed in argument but was also not expressly abandoned. The reasoning was that, because cellphones were not operative in South Africa when the Act was promulgated and because there has been a subsequent amendment to the Act which makes explicit mention of this form of communication, the Act did not provide for interception of that form of communication. As has been seen in the section and the relevant definitions, however, this submission does not bear scrutiny. It was dealt with in *S v Cwele & another*,[9] where Koen J rejected a similar submission. In the light of the diffidence in advancing this argument before us, I need only say that I do not disagree with the finding in *Cwele* that this form of communication is included in the Act.

[15] The third point of attack was directed at the finding of the court below that, even if the application did not strictly comply with the Act, the evidence obtained as a result of the direction was nevertheless admissible. A failure to obtain evidence within the strict confines of the Act means that it falls outside the protective umbrella provided by the Act and results in a violation of the right to privacy. Such evidence may be rendered inadmissible under s 35(5) of the Constitution which provides:

'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

A number of factors meriting consideration in this enquiry were mentioned in *Pillay*, without these being regarded as exhaustive. These were:

'. . . the kind of evidence that was obtained, what constitutional right was infringed, was such infringement serious or merely of a technical nature and would the evidence have been obtained in any event.'[10]

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[9] *S v Cwele & another* 2011 (1) SACR 409 (KZP).
[10] Paragraph 93.

[16] On the facts of that matter, there were three primary considerations. The direction had been obtained by way of false information in the affidavit supporting the application, the evidence obtained under the Interception Act was supplemented by additionally tainted evidence by way of a statement obtained by undue influence and there were other means of investigation available. The concern was therefore expressed that:

'In our view, to allow the impugned evidence derived as a result of a serious breach of accused 10's constitutional right to privacy might create an incentive for law enforcement agents to disregard accused persons' constitutional rights since, even in the case of an infringement of constitutional rights, the end result might be the admission of evidence that, ordinarily, the State would not have been able to locate.'[11]

[17] The court below was alive to the relevant principles and set out clearly several features which weighed in the scale in favour of the admissibility of that evidence. When the appellants were asked whether they could make any submissions to the effect that the discretion was wrongly exercised, they candidly conceded that they could not do so. The deficiencies were of a purely technical nature. There was nothing misleading said in the application. The procedure in the Interception Act was followed as closely as possible. The monitoring of the conversations was the only means to investigate. In this regard, Captain Sizane testified that, since the suspects were all members of the SAPS and because of the endemic corruption therein, he could not use any other investigative tools without jeopardising the investigation. Not only was the exercise of the discretion a proper one but, in my view, it was correct and, in the circumstances of the matter, to have excluded that evidence would have led to a failure of justice. The provisions of s 35(5) therefore did not serve as a basis to exclude the evidence obtained pursuant to the directions and the admission of the evidence by the court below cannot be impugned.

[11]Paragraph 94.

[18] The court below dealt in extensive detail with the evidence on each count. This included setting out the intercepted communications which specifically bore on the counts in question. The picture that emerged was a clear one. The first appellant was managing the operations of the other two appellants, informers, drug dealers and Shange in seizing and onselling drugs.

[19] In brief, the evidence on counts 6 and 7 was as follows. One Kokoeng had been an informer for the first appellant when he was stationed at Vereeniging. When the first appellant was transferred to become the head of the West Rand Organised Crime Unit, he arranged for Kokoeng to be transferred there. He introduced Kokoeng to the second appellant and Shange as being the two loyal juniors who would be running around with him. After a successful raid for drugs, the second appellant misled Kokoeng, saying that it had been unsuccessful. When Kokoeng discovered this, he phoned the second appellant who undertook to straighten it out. The second appellant arranged to meet him in Randfontein with his friend Bogopane. They met the second appellant at a church there and he handed to them some cash and a stash of drugs for which they were to find a buyer. When Bogopane went to meet a prospective buyer, he was arrested. As a result he phoned the first appellant who promised to solve the problem. Whilst he was in the holding cells at Randburg, the second appellant visited him and told him that Shange had told him the arrest was unlawful. The arrest of Bogopane in possession of drugs was confirmed by a reserve police officer who was mystified as to why he was never called to testify in the case against Bogopane. The substances found in his possession were sent for analysis and found to be cocaine, ecstacy and crystal methaqualone, all prohibited substances under the Drugs Act. Despite this, the charges against Bogopane were withdrawn. The police occurrence book recorded that Bogopane was released by the second appellant and Shange on the basis that there was no

evidence which connected him to the offence. The second appellant was the investigating officer and the docket subsequently went missing. The court below correctly convicted the first and second appellants on these counts.

[20] I turn to consider counts 9, 10, 11 and 13. The evidence of Mr Pretorius, an employee of Swissport Cargo, was that on 3 October 2007 he was approached by three police officials. They introduced themselves as Mokgosane, Shange and Jwili – the first and last also being the names of the third and second appellants respectively - from the West Rand Organised Crime Unit and told him that they were looking for a parcel. They showed him an airways waybill which corresponded with the parcel they were looking for and told him the parcel contained cocaine. He was requested to contact them when the person came to fetch the parcel. They took the parcel with them for safekeeping. The parcel weighed 189 kilograms and they loaded it onto a pickup truck with a forklift. He contacted them when the person came to collect the parcel and all three returned and took the person with them.

[21] Captain Scott was approached telephonically on 2 October by Shange to obtain authorisation to do a controlled delivery of the consignment. He received a written request the following morning but heard nothing more. The substance taken was tested and found to be ephedrine, a scheduled substance under s 3 of the Drugs Act. Only 30 000 grams of this was submitted for analysis and subsequent destruction. According to the transcripts of the intercepted communications, the controlled delivery was arranged by the appellants. On 3 October, the third appellant told the first appellant during a conversation which was intercepted that he had taken possession of the ephedrine and that a buyer had already taken two bags and that more would be supplied the following day. The third appellant told the first appellant that he would let him have R1 million that evening. This arrangement was confirmed by Shange in a conversation with the first appellant where they congratulated each other on a

successful job. There were further communications concerning payment where it was indicated that R425 000 had been received and that another R1 million was expected.

[22] Count 12 related to an incident where an employee of the South African Revenue Service, stationed at OR Tambo airport discovered 5.7 kilograms of cocaine in a container with the assistance of a dog. The second and third appellants and Shange arrived in the search area and informed her that they were waiting for that shipment and were to take it by way of a controlled delivery. They were not authorised to be in the search area and were also not accompanied by an authorised person as was required. They were also unable to produce documents to show that they were entitled to do a controlled delivery with the shipment. After they had been asked for those documents, they disappeared. This attempt at theft of the consignment was also referred to in the transcripts of the phone calls intercepted under the Interception Act.

[23] In addition, it was clearly shown by a forensic audit of the financial affairs of the appellants that, in 2007, all three appellants received moneys in excess of their salaries and for which they could not account. The first appellant received R1 044 169.61, the second appellant R69 679.61 and the third appellant R56 430.56. Many of the intercepted communications revolved around the amounts which had been negotiated with purchasers and how payments were being made to the appellants. No point would be served in repeating the analysis of the court below. In argument before us the findings and reasoning of the court below were not seriously challenged.

[24] Counts 1 and 2 related to the first appellant managing an enterprise as defined in the POCA and the other two participating in it. Taking into account the other offences, all of which took place during 2007, it is clear that the state proved that the appellants were associated with each other in fact in a pattern of

racketeering activity managed by the first appellant and participated in by the second and third appellants.

[25] All of this compelling evidence required an explanation. The failure of any of the appellants to call countervailing evidence placed them at risk.[12] This, too, was conceded in argument. In my view, considering the evidence in its totality, the court below correctly found that the state had proved its case beyond reasonable doubt. There is therefore no basis on which to set aside the convictions.

[26] As regards the sentences, despite an invitation to do so, none of the appellants was able to point to any misdirection by the court below. Neither were they able to submit that the sentences were so startlingly inappropriate as to induce a sense of shock. As a result, this court is not entitled to interfere.

[27] In the result, the appeals against the convictions and sentences of all three appellants are dismissed.

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T R Gorven

Acting Judge of Appeal

[12] *Osman & another v Attorney-General, Transvaal* 1998 (2) SACR 493 (CC) para 22; *S v Boesak* 2001 (1) SACR 1 (CC) para 24.

Appearances

For First Appellant:	C Meiring Instructed by: Dolf Jonker Attorneys, Bryanston Symington & De Kock, Bloemfontein
For Second & Third Appellants:	WB Ndlovu
For Respondent:	I Bayat Instructed by Director of Public Prosecutions