THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 19/2014

In the matter of:

HENRY EMOMOTIMI OKAH **APPELLANT**

and

THE STATE **FIRST RESPONDENT**

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **SECOND RESPONDENT**

THE MINISTER OF POLICE **THIRD RESPONDENT**

THE MINISTER OF INTERNATIONAL RELATIONS **FOURTH RESPONDENT**

THE MINISTER OF JUSTICE AND

CORRECTIONAL SERVICES **FIFTH RESPONDENT**

Neutral Citation: *Okah v S* (19/2014) [2016] ZASCA 155 (3 October 2016)

Coram: Navsa, Shongwe, Dambuza and van der Merwe JJA and Schoeman AJA

Heard: 24 August 2016

Delivered: 3 October 2016

Summary: Interpretation and application of s 15 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 : extra-territorial jurisdiction : extent of.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Claassen J sitting as court of first instance) judgment reported *sub nom S v Okah* 2015 (2) SACR 561 (GJ):

1. The appeal is upheld to the extent reflected in the substituted order of the court below, set out hereafter.
2. In respect of conviction, the order of the court below is set aside and substituted as follows:

'The appellant is convicted on counts 2, 4, 6, 8, 9, 10, 11 and 12.'

3. In respect of sentence, the order of the court below is set aside and substituted as follows:

'Counts 2, 4, 6, 8, 10 and 12 are taken together for purposes of sentence and the accused is sentenced to 12 years' imprisonment.

Counts 9 and 11 are taken together for purposes of sentence and the accused is sentenced to 8 years' imprisonment.

The effective sentence is thus 20 years' imprisonment.'

JUDGMENT

Navsa and Van der Merwe JJA (Shongwe & Dambuza JJA and Schoeman AJA concurring)

[1] This appeal concerns the prosecution on criminal charges, in the South Gauteng High Court, Johannesburg, of the appellant, a Nigerian citizen who has permanent residence status in South Africa. The prosecution followed on two separate bombings in Nigeria, as a result of which 12 people were killed, 64 severely injured and property was damaged. It was alleged by the State that the appellant, Mr Henry Okah, had been involved in the planning and execution of these bombings.

[2] During 2005, the appellant had made the Republic of South Africa his principal place of residence and was granted permanent residency status on 13 March 2007. He was arrested in South Africa on 2 October 2010 and was charged with 13 counts under the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (the Act). The first 12 counts were related to bombings that occurred in Nigeria: at Government House Annex, Warri, on 15 March 2010 and Eagle Square, Abuja on 1 October 2010. Count 13 alleged that the appellant had threatened certain South African entities that were commercially active in Nigeria with destabilising terrorist activities.

[3] The court below (Claassen J), in its judgment, at the outset, posed the following question: 'One may well ask: Why is the accused being tried in a South African Court?' It answered the question by reference to a number of international conventions adopted by the United Nations General Assembly[1] and the Organisation

[1] The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973; the International Convention Against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979; the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997; and the International Convention on the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.

of African Unity,[2] in respect of which South Africa was a signatory, and a resolution by the United Nations Security Council,[3] in response to international terrorism, and the resultant enactment by the legislature of the Act, which ostensibly enables extra-territorial prosecution of criminal offences comprising acts of terrorism and related activities. The counts in question, based on the provisions of the Act, range from engaging in terrorist activities to delivering, placing and or detonating explosives causing death and serious bodily injury, to attempts to cause harm to internationally protected persons and financing terrorist activities. The indictment contained a number of alternative counts. We shall, in due course, explore our law in relation to extra-territorial jurisdiction. We will also deal with the specific counts when we engage in determining whether the convictions set out below were well founded.

[4] Claassen J undertook an examination of the Act, and specifically considered s 15, dealing with 'jurisdiction', and was satisfied that the court was competent to try the appellant on all the counts in the indictment.

[5] The court below had regard to certain admissions by the appellant and to the common cause facts. It was not disputed that the bombings had occurred in Warri and Abuja in Nigeria on 15 March 2010 and 1 October 2010 respectively, and were caused on each occasion by two explosive-laden vehicles being detonated remotely. It is common cause, as described earlier, that as a result of the Warri and Abuja bombings, several people died, many suffered bodily injury, and property was damaged.

[6] It was uncontested that the appellant was a leader of the Movement for the Emancipation of the Niger Delta (MEND) during 2010 and that he had in the past supplied arms and ammunition to that organisation. It was accepted during the trial that MEND had claimed responsibility for the two bombings.

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[2] The OAU Convention on the Prevention and Combatting of Terrorism, adopted by the Organisation of African Unity at Algiers on 14 July 1999.

[3] United Nations Security Council Resolution 1373, adopted under Chapter VII of the Charter of the United Nations on 28 September 2001.

[7] MEND appears to have its origins in an uprising by people of the oil-rich region of the Niger Delta,[4] against what appears to have been regarded as the Nigerian government's lack of concern about the severe degradation of the environment and the lack of benefit to the local population from oil revenue. Antagonisms also appear to have arisen from dispossession of land due to commercial activity linked to exploitation of oil deposits. A number of militant groups had attacked oil pipelines that served foreign oil companies. Executives of those companies were kidnapped and held for ransom. Ultimately, the militant groups united under MEND's umbrella and waged an armed struggle against the Nigerian government.

[8] It is necessary to record that the former President of Nigeria, Mr Goodluck Jonathan (who was the president of Nigeria when the Abuja bombing occurred) himself came from the southern regions of Nigeria where MEND operated. His predecessor, President Umaru Musa Yar'Adua,[5] who was the President of Nigeria during the Warri bombing, had initiated an amnesty programme in 2009 which, inter alia, involved the voluntary surrender of arms and ammunition by armed MEND militants and other rebel factions associated with the conflict in the Niger Delta. One of the conditions in negotiating the amnesty with the militants was that the appellant as leader of MEND, who was in custody at that time on charges of treason and gun-running, should be released.

[9] During July 2009 the appellant accepted an offer of amnesty extended to him by the Nigerian government. In so doing the appellant also offered to work with the Nigerian government towards the restoration of peace in the Niger Delta region. He was released as a result of the amnesty. It would appear that the appellant had subsequently become increasingly dissatisfied with post-amnesty conditions in the oil-rich regions of southern Nigeria. After his release, during August 2009, the appellant returned to South Africa. As stated earlier, the he was arrested in South Africa on 2 October 2010 on the counts he faced in the court below.

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[4] The Niger Delta is the delta of the Niger River, sitting directly on the Bight of Biafra side of the Gulf of Guinea on the Atlantic Ocean, in Nigeria.
[5] President Yar'Adua passed away on 5 May 2010.

[10] We return to the trial in the court below where Claassen J took the view that the evidence led to the following ineluctable conclusions:

(i) the appellant had acted as a spokesperson for MEND and used the pseudonym 'Jomo Gbomo' in e-mails to and correspondence with the media;

(ii) shortly before the Warri bombing he had entered Nigeria unlawfully from Benin, that is, not at an official point of entry;

(iii) the two bombings were caused by motor vehicles laden with explosives, and the make of at least three of the four motor vehicles had been identified;

(iv) MEND had accepted responsibility for the bombings which had caused death and destruction and which fell within the definition of 'terrorist activities' and the offence of terrorism in the Act;

(v) a number of people who had attended gatherings at Warri and Abuja fell within the definition of 'internationally protected person' in the Act; and

(vi) the buildings damaged during the bombing fell within the definition 'state or government facility' in the Act.

[11] Claassen J had regard to the evidence by key witnesses for the State in relation to the Warri bombing on 15 March 2010, from which it appeared that the appellant, who was in Nigeria at the time, had given instructions to a Nigerian national, Mr Obi Nwabueze, for the purchase of two vehicles to be used to detonate explosives. The appellant had arranged for hidden compartments to be constructed within those vehicles. The appellant had also provided money for the purchase of the explosives and detonators, and for the construction of the compartments. In addition, the appellant had supplied the timing devices for use in the explosives, being clocks and/or mobile phones. The appellant had also demonstrated how the detonators were to be attached to the explosives.

[12] At the instance of the appellant, the location at Government House Annex, Warri, was chosen because it was where the Vanguard Newspaper had scheduled a post-amnesty dialogue meeting. That meeting intended to explore such issues as skills acquisition and training programs for the former militants; strategies to reconstruct the communities devastated by militant activities and oil pollution; rehabilitation programs for such militants; disarmament and amnesty; bunkering and economic sabotage; resource control; demilitarisation of the Niger Delta; and the

security, economic development and peace in that area in general. The Minister of the Niger Delta, the Delta State Governor, the Imo State Governor, the Edo State Governor and other State officials were present. During the course of the morning, Jomo Gbomo, on behalf of MEND, sent a warning via the internet, that a bomb would be detonated in the vicinity of Government House Annex. The appellant had given instructions to operators to park the vehicles inside the venue, but due to there being a school directly adjacent to the venue and security being tight, they chose instead to park close to the entrance of the venue, and have the explosives detonated there. The appellant was, according to the evidence, still in Nigeria immediately after the explosion.

[13] In relation to the Abuja bombing on 1 October 2010, the following evidence was adduced. The planning and the instructions for the bombing took place in South Africa. The appellant telephonically planned the bombing, and chose Abuja as the location because of the celebration of Nigeria's 50th National Independence Day. The appellant was the driving force behind the bombing, and sent money to his accomplices for the purchase of equipment for the bombing. He had also sent timing devices from South Africa. Former Nigerian President Goodluck Jonathan and foreign dignitaries and Nigerian state officials were in attendance to celebrate the Independence Day anniversary.

[14] In respect of both the Warri and Abuja bombings, two sets of explosives had been utilised, and timing devices had been used to delay the detonation of the second explosion until some time after the first explosion. The intention was that a crowd would be attracted to the site of the first explosion, which would then be caught in the blast zone of the second explosion, resulting in maximum injury and death.

[15] In relation to count 13, the State relied on a communiqué – an e-mail – on 27 January 2012, from one Mr Peter Timi (Timi), proclaiming himself to be the European representative of MEND, threatening the commercial interests of South African companies operating in Nigeria. The court below also had regard to a similar threat uttered by the appellant on 30 January 2012 to the investigating officer.

[16] In the court below, the appellant's legal representative denied that he had been involved in the terrorist activities alleged by the State and suggested, when his legal representative cross-examined witnesses, that he had been the victim of a conspiracy between them and the Nigerian government to falsely implicate him. This was rejected by Claassen J who held that no basis had been laid for the alleged conspiracy and said the following (para 64):

'On the contrary, many of the State witnesses were the accused's former accomplices who were intimately involved with the actions of the accused in planning and executing the bombings in Warri and Abuja.'

The appellant chose not to testify.

[17] In the end, the court held that the material evidence, which it dealt with in some detail, proved the appellant's guilt on counts 1 to 12. Claassen J said the following (paras 142 – 143):

'The evidence of the two main accomplices is congruent and corroborates one another. There are no contradictions or discrepancies which may negatively affect their testimony. . . The evidence of these witnesses overwhelmingly established that the accused was the planner, funder, supplier, instructor, expert and leader in the execution of the bombings in Warri and Abuja. Although he was not present at the moment the car bombs exploded, it cannot be gainsaid that they exploded at his instance and direction. To my mind that makes him guilty beyond all reasonable doubt of the charges in counts 1 to 12 as the main perpetrator.'

[18] It is necessary, in relation to count 13, first, to have regard to the e-mail by Timi containing the threat to South African interests in Nigeria, the relevant parts of which read as follows:

'

27 January 2012

. . .

I am Mr Peter Timi the Europe representative of the Movement for the Emancipation of the Niger Delta (MEND). I have been mandated to communicate our displeasure over your country's involvement through the South African judiciary as it concerns our leader Mr Henry Okah.

It was a shock when we learnt that the trial of Mr Henry Okah was once again postponed till the 1st of October 2012 which to us is totally unacceptable.

We should remind you of the South African investments in Nigeria such as the few stated below and we will not hesitate to disrupt their business activities and take the South African nationals working for these companies hostage.

- Ethnix Designs
- Pepkoro Limited
- Standard Bank
- Nampak
- KPMG
- MTN
- Phillips Consulting
- Plessey
- Legacy Hotels
- Enterprise LG
- Dimension Data
- Johnnic Africa
- Pace Property
- Altech Namitech
- Sun International
- ABSA and Southern Sun

The South African Government through her judiciary is hereby advised to within the next two weeks release our leader or else the South African citizens and companies will be at risk. Don't forget that no amount of Nigerian Government's security guarantee can stop us.
We will carry out these 'PROMISES' to the letter, enough is enough.'

[19] In relation to this e-mail, the court below also had regard to the evidence of Mr Simon Kerry (Kerry), the group risk manager for Plessey (Pty) Ltd (Plessey), which installs and builds telecommunications infrastructure for the telecommunications industry in South Africa and other parts of the continent. Plessey employed four South African nationals in Lagos, Nigeria. After receiving the e-mail referred to above, a discussion ensued with company executives and it was accepted that there was cause for concern. There was communication with Dimension Data, another company whose interests were threatened in the e-mail. Whilst not evacuating their personnel, both companies put contingency plans in place for rapid evacuation should the need arise. There was no evidence that the

threats materialised. As must by now be apparent, the appellant was in custody in South Africa at the time that the e-mail threat was made.

[20] Finally, in relation to count 13, the court below took into account the evidence of Colonel Noel Zeeman (Zeeman), the investigating officer who had been called as a witness by the appellant. Zeeman testified about a conversation he had engaged in with the appellant, on 30 January 2012, in the reception area of the holding cells of the court below. According to Zeeman, the appellant had complained about his exorbitant legal fees and then went on to say the following:

'South Africa is going to pay as South Africa should not be involved in the matter and that was not their problem. He went on further to say that there was nothing stopping him from attacking South African interests in Nigeria as he is a warrior and will continue fighting . . . .'

Zeeman was subsequently made aware of the e-mail by Timi and saw a copy of it.

[21] In respect of count 13, Claassen J concluded as follows (para 300):

'I am satisfied that the State proved beyond a reasonable doubt that the accused is also guilty on count 13. The evidence of Kerry and Zeeman is uncontroverted and prove that the accused and/or one of his supporters, Timi, voiced threats of danger to South African companies and their employees operating in Nigeria.'

[22] Being cautious, Claassen J considered, in the event of his conclusions in relation to the main charges being wrong, the alternative charges of conspiracy to commit those offences. The court below had regard to case law on conspiracy and held that the evidence clearly disclosed that the appellant had conspired with some or all of the individuals mentioned in the indictment in counts 1 to 12.

[23] Having convicted the appellant, the court below proceeded to sentence the appellant as follows. In respect of the Warri bombing, the convictions on counts 1, 3, 5, 7, 9 and 11 were taken together for sentencing, and the appellant received a sentence of 12 years' imprisonment. In respect of the Abuja bombing, the convictions on counts 2, 4, 6, 8, 10 and 12 were taken together, and the appellant was sentenced to a further 12 years' imprisonment. In respect of the conviction on count 13, the court below imposed a sentence of 10 years' imprisonment. The latter sentence was ordered to run concurrently with the sentence imposed in respect of

counts 2, 4, 6, 8, 10 and 12 referred to above. Thus, the effective sentence was 24 years' imprisonment.

[24] The appellant applied for leave to appeal against his convictions on counts 1 to 12, principally on the basis that the court had no jurisdiction to adjudicate on those counts because they were acts of terrorism committed beyond the borders of South Africa, namely in Nigeria. A secondary ground on which leave to appeal was sought was that there had been a duplication of charges. In respect of count 13, leave to appeal was sought on the basis that no link could be established between the appellant and the e-mail threatening South African interests in Nigeria. Claassen J made the following order:

'1. Leave is granted to the Supreme Court of Appeal against this court's finding that it had jurisdiction in terms of Act 33 of 2004 to hear and adjudicate counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

2. The application for leave to appeal the convictions on the merits of counts 3 to 8, based on an alleged duplication of charges, is dismissed.

3. Leave is granted to the Supreme Court of Appeal against the conviction only on count 13.'

[25] The appeal was first enrolled in this court for hearing on 26 November 2014. There had been no attack in the court below on the constitutionality of the provisions of the Act. For the first time, in this court, counsel for the appellant sought to launch an attack on the constitutionality of the Act insofar as it purported to grant a South African court extra-territorial jurisdiction. After an exchange between this court and counsel on behalf of the State and the appellant, it was agreed that the matter be postponed to enable the responsible Minister, namely the Minister of Safety and Security, to be given notice of the constitutional challenge. Subsequently, an order was obtained by the appellant in the high court in terms of which the National Director of Public Prosecutions, the Minister of Police, the Minister of International Relations and Cooperation and the Minister of Justice and Correctional Services were joined as parties to the appeal in this court.[6]

[6] For present purposes and for reasons provided in para 26 below, it will become apparent that it is not necessary to address the correctness of that procedure.

[26] Subsequently, the appellant filed an application to extend his grounds of appeal, to include a constitutional challenge against certain provisions of the Act. Before us, however, when the present appeal was heard, the attack against the constitutionality of the Act was abandoned. Counsel on behalf of the appellant also accepted the factual findings of the court below in relation to counts 1 to 12. Therefore, the only issues on appeal were (a), whether the court below had jurisdiction to entertain any or all of counts 1 to12, and, (b), whether the evidence in the court below justified a conviction on count 13. It is to those issues that we now turn.

[27] At the outset it is necessary to conduct a brief overview of our law relating to jurisdiction prior to the introduction of the Act. Jurisdiction is an important aspect of the sovereignty of the State. Sovereignty entitles a state to exercise its functions within a particular territory to the exclusion of other states. Jurisdiction encompasses the authority that a state has to exercise its functions by legislation, executive and enforcement action, and judicial decrees in relation to persons and property. In most circumstances the exercise of state power, as aforesaid, is limited to its own territory.[7] It is a fundamental principle that a state can assert its jurisdiction over all criminal acts that occur within its territory and over all persons present in its territory, who are responsible for such acts, whatever their nationality.

[28] In *Kaunda & others v President of the Republic of South Africa & others* 2005 (4) SA 235 (CC), para 38, Chaskalson CJ said the following:

'It is a general rule of international law that the laws of a State ordinarily apply only within its own territory.'

The European Court of Human Rights, in *Bankovic & others v Belgium & others* ECHR 2001-XII; [2001] ECHR 890 (para 59), said the following:

'[F]rom the standpoint of public international law, the jurisdictional competence of a State is primarily territorial.'

[29] In our law in relation to territorial jurisdiction, the principle that the State may assert its jurisdiction over all criminal acts that occur within its territory over all persons responsible for such criminal acts, whatever their nationality, when present

[7] John Dugard *International Law: A South African Perspective* 4 ed (2011) at 146.

in South Africa is well established.[8] However, in more recent years there has been a broadening of the basis of jurisdiction. There is now recognition that the basic principle referred to above is losing ground. For a start, there is a trend indicating that, where the constituent elements of a crime occurred in different countries, the offence may be tried in any jurisdiction where any of those elements or their harmful effect occurred.[9]

[30] In *S v Basson*,[10] the Constitutional Court in dealing with the presumption against extra-territorial jurisdiction and the exceptions to that rule said the following:

'[223] We accept that as a general proposition our courts have declined to exercise jurisdiction over persons who commit crimes in other countries. This, as Dugard points out, is an aspect of sovereignty which has given rise to a presumption against the extraterritorial operation of criminal law.

[224] There are, however, exceptions to the general rule. As Watermeyer CJ observed in R v Holm; R v Pienaar the basis of this rule is international comity:

"'An independent state does not claim a wider jurisdiction because it does not wish to encroach upon the corresponding rights of other independent states."

Watermeyer CJ goes on to refer to Wheaton International Law as saying that the judicial power of the State extends:

"'(1) To the punishment of all offences against municipal laws of the State, by whomsoever committed, within the territory.

(2) To the punishment of all such offences, by whomsoever committed, on board its public and private vessels on the high seas and on board its public vessels in foreign ports.

(3) To the punishment of all such offences by its subjects wheresoever committed.

(4) To the punishment of piracy and other offences against the law of nations by whomsoever and wheresoever committed."

Watermeyer CJ points out that this proposition is not accepted by all sovereign states and that England makes the smallest claim to punish its own subjects or others for extraterritorial offences. Other countries go so far as to exercise jurisdiction over nationals who commit crimes in any country.

[225] It seems generally to be recognised, even by those countries which limit their jurisdiction to crimes committed within their territories, that there are exceptions to the

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[8] See *R v Holm; R v Pienaar* 1948 (1) SA 925 (A) at 929-930; and *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC) paras 223-225.

[9] Alfred V Lansdown and Jean Campbell, *South African Criminal Law and Procedure*, vol 5 (1982), at 3 and 9.

[10] See *S v Basson* above.

territorial rule. Treason is such an exception, for it is considered that the State that is threatened has a greater interest than any other state in punishing the offender. Exceptions are also made in respect of transnational crimes where more than one state may have an interest in holding the offender liable for the crime.' (Footnotes omitted.)

[31] Further, with the increase in international terrorist activity, states have largely co-operated in order to combat that scourge. This has resulted in international instruments in that regard, which include the Conventions and the United Nations Resolutions mentioned above that are binding on signatories and/or member states. In order for the effective combatting of the terrorist activities, participating or member states are required to adopt the legislation that confers jurisdiction on domestic courts to adjudicate crimes committed extra-territorially.

[32] The long title[11] and the preamble[12] of the Act set out the purposes it seeks to achieve, which include that set out at the end of the preceding paragraph.

[33] We now turn to examine the relevant provisions of the Act. It must be understood that central to the Act is the creation of the offence of terrorism and related crimes. Section 2 of the Act provides as follows:

'Any person who engages in a terrorist activity is guilty of the offence of terrorism.'

The definition of 'terrorist activity' in s 1 is extensive. For present purposes, it is not necessary to set out the definition in full, save to state that it is couched in wide terms and applies to acts committed both inside and outside the Republic.

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[11] The long title of the Act provides:
'To provide for measures to prevent and combat terrorist and related activities; to provide for an offence of terrorism and other offences associated or connected with terrorist activities; to provide for Convention offences; to give effect to international instruments dealing with terrorist and related activities; to provide for a mechanism to comply with United Nations Security Council Resolutions, which are binding on member States, in respect of terrorist and related activities; to provide for measures to prevent and combat the financing of terrorist and related activities; to provide for investigative measures in respect of terrorist and related activities; and to provide for matter connected therewith.'

[12] The preamble includes the following:
'AND REALISING the importance to enact appropriate domestic legislation necessary to implement the provisions of relevant international instruments dealing with terrorist and related activities, to ensure that the jurisdiction of the courts of the Republic of South Africa enables them to bring to trial the perpetrators of terrorist and related activities; and to co-operate with and provide support and assistance to other States and relevant international and regional organisations to that end; . . . .'

[34] The sections that follow on s 2 create offences that are subsidiary to or associated with the main offence of terrorism. So, for example, s 3 provides for 'Offences associated or connected with terrorist activities', s 4 provides for 'Offences associated or connected with financing of specified offences' and s 5 creates an offence in relation to the delivery, placing, discharging and/or detonation of explosives or other lethal devices.

[35] The primary question in this case is to what extent extra-territorial jurisdiction is conferred by the Act in relation to offences created thereby. For that the starting point is s 15 of the Act, which is entitled 'Jurisdiction in respect of offences'. It is necessary to consider the provisions of subsecs 15(1) to (4), which read as follows:

'(1) A court of the Republic has jurisdiction *in respect of any specified offence* as defined in paragraph *(a)* of the definition of "specified offence", if –

(a) the accused was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic; or

(b) the offence was committed –

(i) in the territory of the Republic;

(ii) on board a vessel, a ship, an off-shore installation, or a fixed platform, or an aircraft registered or required to be registered in the Republic at the time the offence was committed;

(iii) by a citizen of the Republic or a person ordinarily resident in the Republic;

(iv) against the Republic, a citizen of the Republic or a person ordinarily resident in the Republic;

(v) on board an aircraft in respect of which the operator is licensed in terms of the Air Services Licensing Act, 1990 (Act 115 of 1990), or the International Air Services Act, 1993 (Act 60 of 1993);

(vi) against a government facility of the Republic abroad, including an embassy or other diplomatic or consular premises, or any other property of the Republic;

(vii) when during its commission, a national of the Republic is seized, threatened, injured or killed;

(viii) in an attempt to compel the Republic to do or to abstain or to refrain from doing any act; or

(c) the evidence reveals any other basis recognised by law.

(2) Any act alleged to constitute an offence under this Act and which is committed outside the Republic by a person *other than a person contemplated in subsection (1)*, shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to have been committed also in the Republic if that –

(a) act affects or is intended to affect a public body, any person or business in the Republic;

(b) person is found to be in the Republic; and

(c) person is for one or other reason not extradited by the Republic or if there is no application to extradite that person.

(3) Any offence committed in a country outside the Republic as contemplated in subsection (1) or (2), is, for the purpose of determining the jurisdiction of a court to try the offence, deemed to have been committed –

(a) at the place where the accused is ordinarily resident; or

(b) at the accused person's principal place of business.

(4) Where a person is charged with conspiracy or incitement to commit an offence or as an accessory after that offence, the offence is deemed to have been committed not only at the place where the act was committed, but also at every place where the conspirator, inciter or accessory acted or, in case of an omission, should have acted.'

(Our emphasis.)

[36] As can be seen from the introductory wording of s 15(1), the definition of 'specified offence' assumes importance. That expression is defined in s 1 as follows:

'**"specified offence"**, with reference to section 4, 14 (in so far as it relates to section 4), and 23, means –

(a) the offence of terrorism referred to in section 2, an offence associated or connected with terrorist activities referred to in section 3, a Convention offence, or an offence referred to in section 13 or 14 (in so far as it relates to the aforementioned sections); or

(b) any activity outside the Republic which constitutes an offence under the law of another state and which would have constituted an offence referred to in paragraph (a), had that activity taken place in the Republic.'

[37] Para (b) of the definition refers to an activity outside the Republic, whereas para (a) thereof makes no reference to territory. In supplementary heads of argument, counsel for the appellant submitted that para (a) of the definition requires that the offences in terms of the Act listed therein, must be committed in the

Republic. We are unable to agree. The offences in para (a) consist of terrorist and related activities which, in terms of the definition of 'terrorist activity' in the Act, may take place anywhere in the world. Para (a) of the definition of 'specified offence' does not contain any limitation in respect of territory. It must be borne in mind that s 15 was inserted for the very purpose of empowering a domestic court to try offences in relation to terrorist activity committed elsewhere. There is no conceivable other reason for including such a provision relating to jurisdiction.

[38] Both paras (a) and (b) of the definition of 'specified offence' are qualified by the introductory reference to ss 4, 14 and 23. Section 4 deals with the financing of specified offences. Section 14, on the other hand, provides for criminal liability in relation to threats, attempts, conspiracies and assistance, inducements, etc to commit an offence. However, s 14, is in turn, qualified by the reference to s 4. Section 23 deals with prohibition and freezing orders in respect of property believed to be owned or controlled by an entity which has committed a specified offence and need not detain us further. It follows that the definition of 'specified offence' provides for two categories of offences, namely, (i) the financing of an offence listed in para (a) of the definition, ie an offence in terms of the Act wherever committed and (ii) the financing of an activity outside the Republic described in para (b) of the definition ie, one which constitutes an offence under the law of another state that would have constituted an offence in terms of the Act had that activity taken place in the Republic. Section 15(1) caters only for extra-territorial jurisdiction in relation to (i) above. It does so when the accused person was arrested in South Africa or any of the requirements set out in s 15(1)*(b)*(i) to (viii) were met or the evidence reveals any other basis for jurisdiction recognised by law. It was not suggested by counsel for any of the parties that subparagraph *(b)* of the definition of 'specified offence' found application in this case. It is thus not necessary to determine the circumstances under which it will find application.

[39] Counsel on behalf of the State was constrained to concede that the Act was not a model of clarity and in parts badly drafted. He also accepted that, read literally, s 15(1) read with paragraph *(a)* of the definition of 'specified offence', cannot have a meaning other than that set out above. However, it was contended by counsel on behalf of the State, that to interpret it in that manner would emasculate the Act and

that one should assume that the intention of the legislature was to broaden the application of the legislation rather than to have it restricted. It was submitted further, that to follow the literal wording would lead to absurd results and could not have been what the legislature had intended. As we understood the argument, it was suggested that it would be absurd for the legislation to provide for extra-territorial jurisdiction in respect of the more circumscribed offence of financing of terrorist activities, rather than what is covered by the wide definition of 'terrorist activity' — which the Act was intended to regulate.

[40] The argument must be rejected. First, as we will show, extra-territorial jurisdiction in respect of offences in terms of the Act other than financing thereof, are provided for in s 15(2). Secondly, counsel on behalf of the State was constrained to accept that in order to reach the interpretation he contended for, it would be necessary not only to strain the language of the legislation, but also either to exclude certain words, or read in others, or both. Thirdly, it is the legislature's prerogative to decide to what degree it would extend the jurisdiction of domestic courts in respect of all terrorist and related activities. It chose to do so in the terms set out above. It chose, in its wisdom, to restrict the category to those of financing or assisting in the financing of terrorist activities and those mentioned in s 15(2). It is not within our province to question the legitimate policy choices made by the legislature.[13]

[41] We turn to deal with the wording of s 15(2), set out in para 35 above. Its introductory words are couched widely. It provides for extra-territorial jurisdiction in relation to a person other than one catered for in 15(1), if the conditions in s 15(2)*(a)*, *(b)* and *(c)* are met. A person contemplated in s 15(1), as demonstrated above, is one who has committed an offence referred to therein and to whom the provisions of s 15(1)*(a)*, *(b)* or *(c)* apply. Section 15(2), on the other hand, involves jurisdiction in relation to any person who has committed an offence in terms of the Act *other* than a person contemplated in s 15(1), provided sections 15(1)*(a)*, *(b)* or *(c)* apply. Those subsections must be read conjunctively. This means that the act must affect or be intended to affect a public body, person or business in the Republic, the accused must be found to be in the Republic, and there is no application for the accused's

[13] See *Weare & another v Ndebele NO & others* [2008] ZACC 20; 2009 (1) SA 600 (CC) para 58.

extradition or the accused has, for one or other reason, not been extradited. As none of the offences in counts 1 to 12 affected South African interests, s 15(2) does not provide for extra-territorial jurisdiction in this case.

[42] Section 15(3) requires only brief attention. It was inserted purely in order to determine which domestic court within the Republic will hear a matter once jurisdiction had been established in terms of s 15(1) or s 15(2).

[43] It is now necessary to examine the facts and relate them to the counts in the indictment. Counts 1, 3, 5 and 7 are all related to the Warri bombing. It is clear that the appellant had departed from South Africa almost a month before it occurred. There was evidence that the appellant had travelled to Nigeria and crossed the border other than at an official crossing point. Every act committed by the appellant which constituted those offences as set out in the indictment, was committed by him outside of the Republic of South Africa. None of the counts set out at the beginning of this paragraph involve the financing of offences. As discussed above, our courts have extra-territorial jurisdiction in terms of s 15(1) of the Act only in relation to the crimes of the financing of the offences set out in para (a) of the definition of 'specified offence'.

[44] The provisions of s 15(4), which deal with conspiracy and incitement, set out above, are not applicable to the counts dealt with in the preceding paragraph because none of the offences envisaged in that section occurred within South Africa. There is no compelling evidence of a conspiracy or incitement here to commit the offences in question.[14]

[45] Claassen J did not engage in the interpretative exercise as set out above. The court below thus erred in assuming jurisdiction in relation to counts 1, 3, 5 and 7. In respect of those convictions, the appeal is thus bound to succeed.

[14] In para 96 of the judgment the court a quo referred to evidence of a witness who at the instruction of the appellant had conducted a reconnaissance of the venue where the post-amnesty dialogue would initially have taken place. This is far removed from the indictment and in any event it is unclear whether the appellant gave the instruction whilst in South Africa.

[46] We now turn to deal with count 9, which does implicate the financing of terrorist activities. It concerns a contravention of s 4(1)*(f)* of the Act, read with the necessary associated sections. In the present case, the appellant was charged with providing more than 2 million Nigerian naira to three individuals for the purposes of acquiring and adapting vehicles and to purchase explosives for use in the Warri bombing. This constituted financing of offences within the meaning of para (a) of the definition of 'specified offence'. The appellant was arrested in the Republic of South Africa and the bombing was essentially perpetrated by him, being a person ordinarily resident within the Republic. It follows that in respect to count 9, the court a quo was clothed with extra-territorial jurisdiction in terms of s 15(1). That conviction can thus not be faulted on the basis of lack of jurisdiction.

[47] In respect of count 11, it is necessary to have regard to the particulars set out in the indictment. The appellant was charged with contravening the provisions of s 3(1)*(a)* of the Act. That subsection reads as follows:

'(1) Any person who –

(a) does anything which will, or is likely to, enhance the ability of any entity to engage in a terrorist activity, including to provide or offering to provide a skill or an expertise; . . .

for the benefit of, at the direction of, or in association with any entity engaging in a terrorist activity, and who knows or ought reasonably to have known or suspected, that such act was done for the purpose of enhancing the ability of such entity to engage in a terrorist activity, is guilty of the offence associated with a terrorist activity.'

The factual averments in the indictment are that the appellant provided two clock timer devices that were fitted into the two vehicle-borne improvised explosive devices that were used in the Warri bombing. The court below found that the two timing devices used in the Warri bombing were acquired by the appellant in South Africa or were in his possession and that he had then transported them to Nigeria for the purposes of the bombing. The appellant thus contravened the provisions of s 3(1)*(a)* of the Act while still in South Africa, and the conviction on this count did not involve an assumption of extra-territorial jurisdiction. That conviction, too, cannot be faulted.

[48] We now turn our attention to the counts related to the bombing in Abuja, namely, counts 2, 4, 6, 8, 10 and 12.[15] The appellant conspired, planned and instructed people in relation to the execution of the bombing in Abuja whilst in South Africa. Simply put, there is no need in relation to these counts to examine the ambit of the extra-territorial application of the Act because he orchestrated the Abuja bombing from within the Republic of South Africa. It is as elementary as follows. The appellant was arrested here and charged locally for acts he committed within the country and a domestic court would therefore obviously have jurisdiction. In respect of these counts, the convictions by the court below must therefore also remain in stead.

[49] It now remains for us to deal with count 13. It will be recalled that Claassen J relied in this regard on the evidence of Kerry and Zeeman.[16] The essential problem for the State is that there was no acceptable evidence connecting the appellant with the e-mail referred to in para 18 above. The evidence of Kerry, that he had been made aware of the threat contained therein and that it was a cause for concern, is therefore of no assistance to the State. The expert evidence adduced by the State in relation to information technology did not cure the defect. What remains to be dealt with is the evidence of Zeeman. It is clear from the indictment that it is inextricably reliant on the Timi e-mail. The evidence of Zeeman would only be of assistance if it would link the email to the appellant, which it does not. For these reasons the court below erred in convicting the appellant on this count.

[50] The result of the abovementioned convictions being set aside is that the sentences imposed have to be looked at afresh. Counsel for the parties were agreed

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[15] Count 2 is a contravention of s 2 of the Act, which involves engaging in terrorist activities and the alternative charges related thereto. Count 4 is a contravention of s 5*(a)* of the Act which involves the delivery, placing, discharge or detonation of an explosive device causing death and/or serious bodily injury and the alternatives relating thereto. Count 6 is a contravention of s 5*(b)* of the Act which involves the delivery, placing, discharge or detonation of an explosive device with the purpose of causing extensive damage to and/or destruction of inter alia a place of public use and/or public transport facility and/or government facilities, and the alternatives relating thereto. Count 8 is a contravention of s 8*(a)* read with s 14*(b)* of the Act, which deals with attempts to cause harm to internationally protected persons, and relates to the figures referred to earlier in the judgment who were in the vicinity of where the Abuja bombing occurred. Count 10 is a contravention of s 4(1)*(f)* of the Act involving financing of terrorist activities, and the alternatives relating thereto. Count 12 is a contravention of s 3(1)*(a)* of the Act involving enhancing the ability of an entity engage in a terrorist activity.

[16] See para 20 above.

that it would be in the interest of justice for this court to finalise that question without the need for it to be remitted for consideration afresh by the trial court. It will be recalled that the sentence in relation to count 13, which was that of 10 years' imprisonment, was ordered to run concurrently with the sentence in relation to the Abuja bombing. The effective sentence was one of 24 years' imprisonment.

[51] In relation to the Warri bombing the only convictions that were not displaced were in relation to counts 9 and 11. In respect of an appropriate sentence, it is necessary to bear in mind that that these counts involved the appellant providing finance and equipment without which the bombing would not have been executed. It is also necessary to take into account that there was an amnesty in place, which appears to have been accepted by all the major actors involved in the past struggles in the Niger Delta, including the appellant and his cohorts. The subsequent bombings took place despite the acceptance of the amnesty and in contravention thereof. The Warri event at which the bombing occurred, appears to have been one arranged by a newspaper to air, discuss and address the grievances of persons living in the Niger Delta affected by the prior lack of concern on the part of the government of Nigeria. The bombing disrupted that event and prevented those discussions from taking their course. Furthermore, it is significant that a school was located within the immediate vicinity of the bombing and the appellant was aware of that fact. Fortunately, it was decided to close the school for the day because of the event.

[52] It is also necessary to take into account that the two bombs were set up so that they did not explode simultaneously, with the second bomb only exploding ten minutes after the first. As explained above, the intention was that the first explosion would create chaos and confusion and draw a crowd to the scene of the disruption, ensuring that the second explosion would wreak even more havoc. It is also necessary to record that the appellant was upset that the bombs had not been placed closer to the buildings at which the event took place, despite being warned that this would result in more deaths, as he desired the bombings to have a greater devastating effect.

[53] Having regard to what is set out above, limited interference with the sentence imposed in relation to the Warri bombings is called for.

[54] In our view, the following sentences ought to be imposed:

(i) In respect of the convictions on counts 9 and 11 (relating to the Warri bombing), taken together, 8 years' imprisonment is appropriate.

(ii) The sentence in relation to the Abuja bombing, namely, 12 years' imprisonment, remains in place.

(iii) The two sentences are not to run concurrently.

(iv) The effective sentence is thus one of 20 years' imprisonment.

[55] The following order is made:

1. The appeal is upheld to the extent reflected in the substituted order of the court below, set out hereafter.

2. In respect of conviction, the order of the court below is set aside and substituted as follows:

'The appellant is convicted on counts 2, 4, 6, 8, 9, 10, 11 and 12.'

3. In respect of sentence, the order of the court below is set aside and substituted as follows:

'Counts 2, 4, 6, 8, 10 and 12 are taken together for purposes of sentence and the accused is sentenced to 12 years' imprisonment.

Counts 9 and 11 are taken together for purposes of sentence and the accused is sentenced to 8 years' imprisonment.

The effective sentence is thus 20 years' imprisonment.'

M S Navsa

Judge of Appeal

C H G van der Merwe

Judge of Appeal

Appearances:

Counsel for Appellant:	J P Marais (and P I Uriesi) (Supplementary heads of argument prepared by G C Muller SC) Instructed by: MVB Incorporated, Pretoria Botha & De Jager Attorneys, Bloemfontein
Counsel for First Respondent:	J P Pretorius SC (and J J du Toit) (Heads of argument prepared by S K Abrahams) Instructed by: Director of Public Prosecutions, Johannesburg Director of Public Prosecutions, Bloemfontein
Counsel for Third and Fifth Respondent:	M T K Moerane SC (and E B Ndebele) Instructed by: State Attorney, Pretoria State Attorney, Bloemfontein