Reportable/Not Reportable

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: CC 18/2017

Date Delivered: 01/03/2019

In the matter between:

THE STATE

And

JULIAN BROWN **ACCUSED 1**

EUGENE VICTOR **ACCUSED 2**

BRANDON CRAIG TURNER **ACCUSED 3**

SENTENCE

MAKAULA J:

[1] I convicted Accused 1 and Accused 2 for contravening the provisions of section 2(1)(f) of the Protection of Organised Crime Act 121 of 1998 (POCA). Section 3 of the POCA deals with the penal provisions. It provides that a person

convicted of contravening section 2(1)(f) is liable to pay a fine of R 1000 million rand or to imprisonment for a period up to life imprisonment.

[2] In mitigation of sentence Accused 1 called his sister, Ms Nicola Hattingh (Nicola). She stated as follows:

> ". . . I am here today to humbly plead with you and to ask mercy when you hand down the sentence to my brother today. I grew up with Julian in a close knit family with a mom and dad that have been married for 35 years. If there is someone who truly and genuinely knows my brother it is us. Therefore, I would love to tell you a bit about my brother and what he means to us, his extended family, friends and workers. Julian is an absolute heartfelt, gentle, compassionate human being".

[3] She went on to give a detailed account of how he looks after his employees and their families, his discipline and leadership skills, his accomplishments at such a young age, and how he taught them as a family that all human beings are equal. She stated that they were brought up by excellent parents who insisted on good values in them. She told of how Accused 1 single handedly saved an elderly gentleman from a crowd of people and a burning motor vehicle. This was confirmed by Accused 1 when he testified. The person was trapped inside that burning motor vehicle. She testified about how philanthropic Accused 1 was, citing that he built a hall for free at Walmer Park Township. She mentioned that Accused 1 is looking after a little girl who has special needs and does so as if she was his own. She mentioned an instance where Accused 1 assisted a Malawian to go to his country to

meet his family which he had not seen for five years. He has a love relationship with his life partner who is dependent on him for a living. His parents are still alive.

[4] Under cross-examination by Mr Le Roux, it turned out that Nicola did not know some of the personal circumstances of Accused 1. She did not know whether he passed standard 8 and whether he completed the chef course he underwent.

[5] Accused 1 testified his construction business employs 21 people. He stated that, if sentenced to direct term of imprisonment the construction company would have to close down. He confirmed the evidence of his sister in so far as it related to him and the role he plays to his workers, community and how he saved a person from a burning motor vehicle.

[6] He testified that he had previously worked with community leaders at Walmer Township and assisted them without charging a fee for work done. He is willing to build houses for the poor for free if given a non-custodial sentence and such a condition is imposed.

[7] Mr Price, on behalf of Accused 1, made further submissions in mitigation of sentence. He submitted that there is no evidence that Accused 1 benefited financially from the proceeds of the offences. There is no weight nor amount realised from the proceeds of the activities mentioned in the evidence, so he

submitted. These factors, so he argued, merit that Accused 1 should be treated differently from other sentences meted out in related cases[1].

[8] I have considered the judgments referred to above and for purpose of this judgment, I need not deal pertinently with the facts and the sentences meted out. In the *Miller* judgment the accused were convicted of the contravention of section 2(1)(e) of the Prevention of Organised Crime Act 121 of 1998 (POCA) which carries the same penalty as the contravention of section 2(1)(f) of POCA. Mr Price argued that there is a difference in the weight of abalone ceased and the amount benefited between this case and the *Miller* and the *Blignaut* (CC 20/2018) judgments which should act in favour of Accused 1 when it comes to sentencing.

[9] It is correct that there is no evidence that pertains to the amount Accused 1 made out of the abalone poaching. However, I cannot lose site of the evidence of Mr Mostert who was employed by the Department of Agriculture, Forestry and Fisheries (DAFF); about the total weight of each racketeering activity and the street value of abalone found on each activity.

[10] The evidence I have accepted reveals that Renier Ellerbeck, Edgar Clulow, Edgar Clulow Junior, and many others who were involved in the various activities, testified that they were employed by Accused 1. The ultimate person who was to benefit was him. The motor vehicle that Accused 2 was arrested whilst driving was linked to Accused 1 in one way or another. Clulow Junior testified that he was present at some stage when Accused 2 changed the licence disc and the registration

[1] *The State v Roberts and Others*, CC 20/2011 handed down on 1 March 2011; *State v Blignaut*, CC20/2018 handed down on 19 September 2018; *State v Miller and Another* 2018(2) SACR 75 and *State v Blignaut and Others* 2018(1) SACR 587 (ECP).

plates of that motor vehicle. He assisted in loading abalone which Accused 2 was transporting to Gauteng, in terms of his evidence.

[11] The seriousness of abalone poaching and the violations of the POCA is reflected in the sentences the legislature has ordained. Captain Swanepoel testified that abalone poaching reached alarming propositions in Port Elizabeth, which is regarded as the hub of the Eastern Cape. His Commander instructed him to form a team of investigators involving officials from DAFF. He complied. It took years for them to investigate abalone poachers because of the manner they operated. I dealt fully with how the operations were conducted in the judgment on the merits.

[12] DAFF, because of the depletion of abalone in the Port Elizabeth area due to it being unlawfully harvested, embarked on a project of replenishing the coastal area by planting abalone. Further, because of poaching, DAFF had to employ a company to look after the ranching area called Wold Coast Abalone which in turn employed the Technical Task Force to guard the coastal area in an effort to stop the syndicates which unlawfully poached abalone.

[13] Mr Mostert testified on the merits that the abalone poached, is destined for the Chinese market. It is unlawfully exported to China and Hong Kong where it is sold at exorbitant prices because some regard it as an expensive dish and others use it as an aid to prevent ageing. The evidence confirms the involvement of the Chinese in abalone poaching. In the judgments on merits, I referred to a message from a Chinese person which was found in Accused 1's phone. That message was talking of how abalone must be prepared and cooked. It stated that customers were

complaining that the prepared abalone is not well cooked inside. Accused 1 distanced himself from that message by saying that he receives a number of sms and whattsapp from sources he did not know. From this, I deduce that it is apparent that the abalone poached was destined for the international market.

[14] The government incurred exorbitant costs in replenishing the sea with abalone, and in taking measures to prevent abalone poaching which had reached alarming proportions in the coastal area. This on its own reflects on the seriousness of the offences with which the Accused have been convicted.

[15] Running the risk of repeating myself, Accused 1, was the employer of the other two Accused. I say so even though I convicted Accused 2 on count 1. Accused 1 did not show any signs of remorse. Throughout the trial he maintained that his only involvement in abalone poaching was that he was hiring out diving equipment, assisting the section 204 witnesses including Accused 2 financially. The Clulows were involved with him through his construction business. Accused 1 portrayed all of them as people who were useless gamblers and some drug addicts. He knew all their short comings and alleged that Renier Ellerbeck was a thief and a repeat offender. Such comments made of these people and police witnesses are unfortunate. Especially now that I found that all the section 204 witnesses were working for him.

[16] Accused 2 played a significant role in the running of the enterprise. The evidence reveals partially that he was involved in recruiting some of the 204 witnesses, to either transport abalone or provide them houses to store abalone.

Payment was filtered through him. He was involved in the day to day running of the enterprise and at the same time act as its employee. He was instrumental in carrying out the affairs of the enterprise, hence he was arrested transporting abalone at Jansenville. I mention at this stage that the role played by Accused 2 and 3, even though convicted of contravening section 2(1)(e) of POCA in respect of count 2, their sentences should be less than that of Accused 1. It is always desirable that there should be no differentiation in sentences especially those committed at the same time but in instances like this it is necessary.

[17] Accused 2 is 33 years old, unmarried and has two daughters aged 5 and 7 years. Mr Roelofse, on his behalf, advised me that Accused 2 was employed by Accused 1 as a site manager in his construction business earning a sum of R1500.00 per week. He left school in standard 6 because he had learning problems. He is forgetful and that impacted on his learning abilities.

[18] Accused 3 is 39 years old. He has been married for six years. His wife is unemployed. He has children he is looking after who are 12 and 16 years old. He is also looking after his step child. He is working for his brother. He is a qualified welder. He has recently been promoted to be a supervisor at his work and is earning a net salary of R10 000.00. He had been suffering from depression and anxiety. His brother has undertaken to pay a fine of up to R100 000.00.

[19] Accused 1 was convicted of the contravention of the MLRA regulations on 28 November 2005 and was sentenced to twelve month imprisonment which was wholly suspended conditionally for five years. He was further convicted of possession of an

unlicensed firearm on 24 May 2013 and was sentenced to pay R5000.00 or ten months imprisonment. The latter conviction is not relevant for purposes hereof. The former is more than ten years old.

[20] Accused 2 has no previous convictions. Accused 3 has two Road Traffic previous convictions which are not relevant hereof. He has a previous conviction of contravening the MLRA regulations and was on 20 September 2005 sentenced to six months imprisonment wholly suspended for five years conditionally.

[21] These offences were committed after the year 2013. In fact they date back to the year 2015. This was after *Peter Michael Roberts,* who was an abalone poacher was sentenced on 1 March 2013. I have referred to his case above. In sentencing Mr Roberts, Chetty J made the following appropriate remarks:

> "[13] The seriousness of the offences appears not to have unduly troubled the accused. The fines imposed on accused no's 1 and 3 and their previous brushes with the law appears to have lulled them into a <u>false sense of belief that imprisonment for abalone poaching was the last resort of the sentencing court</u>.
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> [15] The perception appears moreover to be reinforced by the non-custodial sentences imposed on accused no's 1, 3 and 5 for their previous poaching violations. This perception needs to be laid to rest. The imposition of non-custodial sentences for transgression of the regulations has had no deterrent effect whatsoever. <u>Poaching continues unabated, with ever increasing frequency and the time has arrived for a complete re-assessment of the sentencing options</u>". (Emphasis added)

[22] As alluded to, the accused committed these offences in spite the conviction and sentence of eighteen (18) years imposed on *Mr Roberts*. He was not deferred but instead carried on. The *Robert* matter went on appeal to the full bench of this division. _ In the appeal judgment in the matter delivered on 25 August 2015, Beshe J reviewed a number of judgments in abalone poaching and reasoned as follows:

> "[11] Judging from the penalties ordained for a contravention of the provisions of ***Section 2 (1) of POCA***, it is clear that racketeering activities or organised crime is viewed in a very serious light. The seriousness of the offences in this matter is also evident from ***Ackermann J's*** remarks in ***National Director of Public Prosecutions v Mohamed N.O. 2002 (4) SA 843 CC.*** Although the learned justice was concerned mainly with provisions relating to preservation orders, he was also alluding to the purpose of the Act as a whole. This is what he had to say:
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> **"<u>The purpose of the Act and certain of its relevant provisions</u>**
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> **[14] The Act's overall purpose can be gathered from its long title and preamble and summarised as follows: The rapid growth of organised crime, money laundering, criminal gang activities and racketeering threatens the rights of all in the Republic, presents a danger to public order, safety and stability, and threatens economic stability. This is also a serious international problem and has been identified as an international security threat. South African common and statutory law fail to deal adequately with this problem, because of its rapid escalation and because it is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved. The law has also failed to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities. Hence the need for the measures embodied in the Act.**

[15] It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. The above problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs".

[12] The sentences imposed in the cases referred to by ***Ms Crouse*** also provide an illustration of the seriousness with which racketeering activities are viewed by our courts as opposed to, for example rhino poaching, abalone poaching or dealing in drugs which does not amount to racketeering. In an unreported decision of ***Jwara v S ([916]/13) [2015] ZACZA 33 (25 March 2015)*** the appellants who were convicted of numerous charges involving drugs and were also convicted of contravening ***Section 2 (1) (d) of POCA,*** were sentenced to 25, 22 and 20 years imprisonment respectively. They were unsuccessful in their bid to appeal against their sentences. In ***S v Packereysammy 2004 (2) SA 169 SCA*** on the other hand, the appellant was in unlawful possession of 6140 abalone. His appeal against a sentence of eighteen (18) months imprisonment was dismissed. In a matter referred to by ***Mr Le Roux, S v Ndebele 2012 (1) SACR 245 (GSJ)***, for a conviction in terms of ***Section 2 (1) (e) and (f) of POCA*** the accused were sentenced to terms of imprisonment ranging between eighteen (18) and fifteen (15) years imprisonment.

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

[23] I agree with the reasoning of the full bench in this regard. Having regard to the facts of this case, I am unable to hand down a sentence which is non-custodial. I find the following sentences to be appropriate:

[24] Accused 1:

Count 1: The accused is sentenced to undergo eighteen (18) years' imprisonment.

Count 4: Three (3) years' imprisonment.

Both sentences are ordered to run concurrently.

[25] Accused 2:

Count 1: Accused is sentenced to undergo fifteen (15) years' imprisonment.

Count 2: Fifteen (15) years' imprisonment

Count 7: Three (3) years' imprisonment.

Count 8: Two (2) years' imprisonment.

Count 9: Two (2) years' imprisonment.

Count 10: Two (2) months imprisonment.

Count 11: Three (3) years' imprisonment.

All the sentences are ordered to run concurrently.

[26] Accused 3:

Count 2: The accused is sentenced to undergo fifteen (15) years' imprisonment.

Count 6: Three (3) years' imprisonment.

All the sentences are ordered to run concurrent.

[27] All the accused are declared unfit to possess fire arms.

[28] Furthermore, all the other section 204 witnesses are indemnified from prosecution in respect of the current offences except Mr Martin Phillip Kriel who did not give satisfactory evidence in respect of count 12.

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M MAKAULA
Judge of the High Court

For the State:	*Adv M Le Roux* *National Director of Public Prosecutions* *Port Elizabeth*
For Accused 1:	*Adv T Price SC* *Port Elizabeth*
Instructed by:	*Griebenow Attorneys* *Port Elizabeth*
For Accused 2 and 3:	*Mr P Roelofse* *Port Elizabeth*
Instructed by:	*Roelofse Meyer Attorneys*

Date Delivered: *1 March 2019*