
SOUTH AFRICA / JUDGMENT

Groenewald and Others v S (A668/2010) [2019] ZAWCHC 170 (10 December 2019)

[2019] ZAWCHC 170

COURT

Western Cape High Court, Cape Town

BEFORE

Francis, Henney

CASE / FILE NUMBER

A668/2010

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IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A668/2010

In the matter between:

CHRISTO ANDREWS GROENEWALD

First Appellant

CHRISTO PETRUS GROENEWALD

Second Appellant

HENDRIK JEREMIA KRIEL

Third Appellant

WILLEM JACOBUS KRIEL

Fourth Appellant

BERNARD GELDENHUYS

Fifth Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED ON 10TH DECEMBER 2019

FRANCIS, AJ

INTRODUCTION

1. This appeal, with leave of the court a quo, is directed at sentences imposed upon the appellants following their conviction on one count of contravening section 2(1)(e) of the Prevention of Organised Crime Act 121 of 1998 (“POCA”) relating to racketeering activities involving the unlawful trade in abalone.
2. All the appellants were found guilty of participating in the illegal harvesting of abalone for and at the behest of Ms Elzette Jacoba Marx (“Marx”), the “kingpin” of the abalone racketeering enterprise. Marx and a number of individuals, including the appellants, were engaged at some level or another in the unlawful poaching, collection, transport, and distribution of abalone at a country-wide level. Marx entered into a plea agreement in terms of section 105A of the Criminal Procedure Act and was, subsequently, a key witness against all the appellants.
3. The level of participation in the abalone racketeering business varied amongst the appellants. The First Appellant was mainly involved in arranging the dives, keeping guard and acting as a go between the Second Appellant and Marx. He received the money from Marx for the abalone and actively promoted the illegal activities of Marx’s abalone racketeering enterprise. The Second Appellant dived on his own and from the Third Appellant’s boat. The Third and Fourth Appellants acted as divers and, once they acquired their own boats, they took between 12 and 17 divers at a time to dive for abalone. These divers took out between 25 kg to 60 kg of abalone per diver at a time. Depending on the weather, they went out diving for up to 3 times a week. On one occasion, they delivered 600 kg of abalone to Marx. The Third and Fourth Appellants, apart from diving themselves, acted as diving team leaders. The Fifth Appellant dived for abalone from different boats in his own time, and sometimes with a friend. The abalone poached were sold to Marx.
4. The appellants were sentenced as follows:
 - 4.1. First Appellant: three (3) years direct imprisonment;
 - 4.2. Second Appellant: four (4) years direct imprisonment;
 - 4.3. Third Appellant: six (6) years direct imprisonment;
 - 4.4. Fourth Appellant: six (6) years direct imprisonment; and
 - 4.5. Fifth Appellant: four (4) years direct imprisonment;
 - 4.6. All five Appellants were also sentenced to an additional two (2) years imprisonment suspended on condition that they are not convicted of a contravention of section 2(1)(e) or (f) of POCA or a contravention of Section 58(1)(a), (18)(1) of the Marine Living

Resources Act 18 of 1998 (“the Marine Living Resources Act” or Regulation 39(1) promulgated in terms of the Marine Living Resources Act, during the period of suspension.

5. The First, Second and Fifth Appellants were represented by Ms Kuun, the Third and Fourth Appellants by Mr Booth, and BL Lazarus represented the Respondent.
6. The grounds of appeal lodged on behalf of the First, Second, and Fifth Appellants overlap to a large extent with the grounds of appeal advanced on behalf of the Third and Fourth Appellants. In essence, the common grounds of appeal of the appellants may be summarised as follows: the court did not sufficiently consider the personal circumstances of each appellant;

the court over-emphasised the seriousness of the offence and the interests of the communities; that the offences took place between

the period 2000 and 2002 and there was a considerable period of time between the commencement of the trial and sentence being handed down in 2010 and the appeal finally being heard in December 2019; the sentences induced “a sense of shock” and other sentencing options, particularly correctional supervision, were not properly considered; and the state witnesses, including Marx, received lesser, non-custodial sentences consisting of fines, suspended sentences, and correctional supervision.

7. In so far as the Third and Fourth Appellants are concerned, additional grounds of appeal were advanced. These included the assertion that the court did not sufficiently consider that the Fourth Appellant was a primary caregiver, that the court misdirected

itself by assuming that because the appellants were living in the Gansbaai area there was a good chance that there would be a repetition of the same offences, that the court had misdirected itself by treating the appellants’ plea of not guilty as an

aggravating factor, that the court did not properly consider that the appellants were not the main perpetrators of the offences, and that the court had misdirected itself by finding that the families of the appellants were able to sufficiently fend for themselves.

8. The central thrust of the appellants’ case on appeal is that direct imprisonment is not an appropriate sentence for the offences for which they had been convicted and that a non-custodial sentence will be more appropriate.
9. Before considering the grounds of appeal, it is perhaps necessary to summarise an appellate court’s approach to sentencing:

9.1 It is trite that sentence is pre-eminently within the discretion of the trial court and an appeal court will not lightly interfere with the exercise of such discretion (see, *S v Romer* 2011 (2) SACR 153 (SCA) at [22]), and *S v Motloun* 2016 (2) SACR 243 (SCA)).

9.2 In *S v Bogaards* 2013 (1) SACR 1 (CC) at para [41], the Constitutional Court crisply summarised an appellate court’s power to interfere with sentencing imposed by courts below as follows:

“It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it”.

9.3 There have been different formulations of when a sentence is considered to be “disproportionate” or “shocking” but all these formulations are aimed at determining whether the court could reasonably have imposed the sentence that it did (see, *S v Sadler* 2000 (1) SACR 331 (SCA) at para [8]).

9.4 The essential inquiry in an appeal against sentence is not whether the sentence was right or wrong but whether the court, when imposing the sentence, exercised its discretion properly and judicially. In *S v Pillay* 1977 (4) SA 531 (A) at 535E - F, Trollip JA stated that,

“a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably”.

11. Turning to the grounds of appeal, the gravamen of the appellants’ case is that the trial court over emphasised the seriousness of the offence and the interests of the community with the result that the court arrived at a sentence of direct imprisonment which was both inappropriate and underplayed the personal circumstances of the appellants. I do not agree that the court misdirected itself by over emphasising the seriousness of the offences committed by the appellants.
12. It appears to me that the court’s finding on the gravity of the offence is completely justified in light of the serious threat to South Africa’s marine resources posed by the poaching of, and the racketeering in, abalone. The court had the benefit of expert evidence which demonstrated the depletion of abalone stock due to poaching and the indiscriminate harvesting thereof, both in and out of season. Evidence was also led before the court a quo on the devastating social and economic impact of this illegal activity on local fishing communities who depend on this marine resource for their livelihood, as well as on the legitimate abalone rights-holders who have experienced a drastic reduction in their quota share. Similar sentiments on the impact of racketeering in abalone were expressed by the courts in cases such as *S v Blignaut and Others* 2018 (1) SACR 587 (ECP), *Roberts and Others v S*

[2017] JOL 38653 (ECG), *S v Miller and Others*

[2018] 2 All SA 508 (WCC), and *S v Brown and Others* [2019] JOL 41511 (ECP).

13. In arriving at the sentences that it did, the court a quo took into account the fact that the appellants were all charged with, and convicted of, offences under POCA. The appellants were not simply convicted of abalone poaching but were convicted of being involved in racketeering activities which contributed to the growth and development of Marx’s unlawful abalone business enterprise. Convictions for offences under POCA attracts a maximum sentence of R1 billion or life imprisonment. That is the starting point of any sentence to be

imposed for a conviction under the said Act.

14. POCA was promulgated precisely in response to the ineffectiveness of the common law and statutory provisions in addressing organised crime, money laundering, and criminal gang activities. This is evident from the preamble of POCA which, in part, expressly states that the “South African common law and statutory law failed to deal effectively with organised crime, money laundering and criminal gang activities” and that it is “necessary to criminalise the management of, and related conduct in connection with enterprises which are involved in a pattern of racketeering activity”. In order to achieve these objectives, POCA mandates severe sentences in appropriate circumstances and, as Gamble J points out in *S v Miller and Others*, supra:

“[99]...in addition to granting orders which are intended to inhibit the rewards for the kingpin of the network of criminality, it aims to dissuade such persons and the foot soldiers from indulging in such crime through the deterrence of heavy jail sentences. To that end POCA is intended to be a serious response to a pernicious evil which undermines the very core of our constitutional order. We are still a relatively young democracy trying to address the injustices, both social and economic, of the past and our public purse needs every cent it can lawfully lay its hands on.

- [100] And so, when our natural resources and wildlife are indiscriminately preyed upon and exploited by criminals whose only interest is financial gain, the Courts are enjoined, through the punitive measures contemplated in POCA, to protect those resources for the benefit of the people to whom they ultimately belong – the people of South Africa.”
15. The sentences imposed by the courts in cases dealing with racketeering activities involving abalone poaching illustrates the seriousness with which such activities are viewed by the courts as opposed to the sentences handed down by the courts in relation to the poaching of marine resources under the Marine Living Resources Act and the regulations thereto.
 16. A rough comparison of some of the sentences handed down under the Marine Living Resources Act and POCA illustrates the point.

Cases decided in terms of the Marine Living Resources Act –

- *S v Packereysammy* 2004 (2) SACR 169 (SCA) – unlawful possession of 6140 units of abalone, 18 months direct imprisonment,
- *S v Van Dyk* 2005 (1) SA 35 (SCA) - unlawful possession of 378 abalone, 18 months direct imprisonment,
- *Alcock v S* [2002] JOL 9786 (E) – unlawful possession of 348,76 kilograms of abalone, fine of R12000 or 12 months direct imprisonment of which R4000 and 4 months was suspended for five years,
- *S v Naumann and Another* [2013] JOL 29936 (FB) - unlawful possession and transportation of 2540 units of abalone, 8 months direct imprisonment.

Cases decided under POCA involving racketeering in abalone –

- S v Blignaut and Others 2018 (1) SACR 587 (ECP) – 20 years direct imprisonment;
- S v Miller, supra - sentences ranging from 4 years to 15 years direct imprisonment;
- Roberts and Others v S [2017] JOL 38653 (ECG) – sentences of 8 years and 18 years direct imprisonment; and
- S v Brown and Others [2019] JOL 41511 (ECP) - sentences ranging from 3 to 15 years direct imprisonment.

17. Of course, sentences imposed in other courts in similar cases are merely guidelines and not blue prints and one has to bear in mind the peculiar circumstances of each case (see, S v D 1995 (1) SACR 259 (A), and S v Velebhayi and Others 2015 (1) SACR 7 (ECG)). However, the cases cited above illustrates the increasing willingness of the courts to impose heavier sentences for racketeering offences involving abalone where the transgressors were charged and convicted for offences under POCA. These sentences are consistent with the courts recognition that drastic steps are required to address the rapid depletion of South Africa's marine resources. In this regard, the comments of Chetty J in S v Blignaut and Others 2018 (1) SACR 587 (ECP) are apposite:

"[10] The sentence on Roberts[1] and his coterie were imposed six years ago and the judgment attracted wide publicity. In it I emphasized that past sentencing patterns had to be revisited and that the time had arrived for a complete reassessment of the sentencing options. It is apparent from this and other matters of similar ilk presently before this division that my admonishments have attracted utter disdain rather than obeisance. The plunder continues unabated and the stage has been reached for appropriate sentences to stem the unrelenting poaching tide."

18. In my view, the sentences imposed on the appellants are not disturbing or shocking. Even if the sentences imposed are considered

to be severe, it is not necessarily inappropriate in the circumstances of this case. In any event, the severity of a sentence in itself is not a sufficient ground to interfere in the absence of any irregularity or misdirection and the court will only interfere if there is a striking disparity between the sentence passed and that which the court would have imposed (see, S v Berliner 1967 (2) SA 193 (A) 200F-G). Certainly, the sentence imposed by the court a quo is not out of kilter with the sentences handed down by the courts with regard to convictions under POCA.

19. The appellants have opined that they should be treated similarly to the state witnesses who had received non-custodial sentences and the "kingpin", Marx, who received an effective sentence of 4½ years direct imprisonment. Whilst one would expect uniformity in the sentences imposed on perpetrators and co-perpetrators, disparity between sentences imposed does not in itself warrant interference on appeal (S v Ginnoulis 1975 (4) SA (867) (A) at 873F). An appeal on this basis will only succeed where the sentence appealed against is disturbingly inappropriate. Even if there is a disproportionate difference in the sentences, if

the heavier sentence is in all the circumstances an appropriate one, interference will not be proper (see, *S v Marx* 1989 (1) SA 222 (A) 225H-226B and the comments of Rogers J in *S v Smith* 2017 (1) SACR 520 (WCC) at [109]). In any event, the trial procedure of the state witnesses were somewhat different. The state witnesses, or co-perpetrators, entered into plea and sentence agreements in terms of section 105A of the Criminal Procedure Act in connection with offences committed under the Marine Living Resources Act and not POCA. The court a quo correctly pointed out that these state witnesses were involved in a plea bargaining exercise characterised by “give and take”

where the state obtained its plea of guilty and the accused received a lesser sentence than might otherwise have been imposed. Two very different fact-finding processes were involved in the trials of the appellants on the one hand and the state witnesses on the other hand: accordingly, the respective courts imposed a sentence on the basis of the facts before it (cf. *S v Engelbrecht* 2011 (2) SACR 540 (SCA)).

20. The assertions that the trial court did not sufficiently consider the personal circumstances of each appellant and that some of the appellants were primary caregivers, or that the court did not seriously consider non-custodial sentencing options such as correctional supervision, are sweeping conclusions which are not borne out by the record. Indeed, the magistrate meticulously went through the personal circumstances of each appellant, their individual roles in the unlawful racketeering enterprise of Marx, the family circumstances of each appellant and the possible impact on family members of the direct imprisonment of appellants, and why alternative sentences such as fines or correctional supervision would not be appropriate to the circumstances of each appellant.
21. The trial court also had the benefit of a Correctional Services Report for each of the appellants and made reference to them even though the court did not follow the recommendations therein. The fact that the court did not expressly comment on, or follow, the recommendations of the Correctional Officer does not necessarily mean that the magistrate did not apply his mind to the report. The portion of the record dealing with sentence comprises some 858 pages. It would have been a herculean task indeed for the court to comment on each and every factor which it did, or should have, taken into account when determining the sentence. This was expressly recognised by the court when it stated as follows:

“HOF: Alhoewel die Hof nie elke doelstelling van vonnis spesifiek behandel het nie, en ook nie spesifiek verwys het aspekte soos Zin (sic) se belissing – die sogenaamde Triad nie het die Hof al die gemelde faktore oorweeg.” (Record, p 1998 lines 10 – 15).

In this regard, it is worth noting the comments of Trollip JA in *S v Pillay*, supra, at 535 A-C:

“....merely because a relevant factor has not been mentioned in the judgement on sentence, it does not necessarily mean that it has been overlooked, for no judgement can ever be perfect and all embracing ... moreover, the value to attach each factor taken into account is also for the trial court to assess”.

22. It is indeed so that there was an inordinate lapse of time between the commission of the offences, the trial, the sentencing of the appellants, and the hearing of this appeal. The Supreme Court of Appeal has in a number of judgements expressed its displeasure with what it characterised as “a lackadaisical approach in promptly dealing with trials and appeals” (per Mathopo JA in *Carneiro v S* [2019] ZASCA 45 at para [11]. See also, *Hendricks v S* [2010] ZASCA 55). Nonetheless, inordinate delays before an appeal is heard would not automatically lead to a reduction in sentence, and the weight given to delays of this nature in considering an appropriate sentence will depend on the circumstances of each case (see, *S v Malgas & Others* 2013 (2) SACR 243 (SCA) at paras [21] - [23], and *Steyn v S* [2014] ZASCA 20). In this case, the passage of time must have taken its toll on the appellants albeit that they were, and still are, out on bail. However, there is no suggestion that this time lapse caused the appellants to suffer actual prejudice, or was such as to vitiate the fairness of the trial, or materially impacted on the sentencing process. Certainly, the appellants did not complain of any delay during the trial and the explanation proffered by Ms Kuun for the delay in this appeal finally being heard appears to be largely related to obtaining a proper record. The appellants were out on bail whilst the appeal was being prosecuted and no doubt experienced a great deal of unease in getting on with their lives whilst knowing that the appeal was still pending. However, whatever difficulty they may have experienced in their personal circumstances is far outweighed by the gravity of the offence and ought not to affect the appropriateness of their sentences.
23. In my view, the sentences imposed by the court a quo fit the crimes, the offenders, and takes the interests of society into account. Accordingly, there is no basis to interfere with the sentences imposed by the court a quo.
24. In the circumstances, the appeal against sentence is dismissed.

I agree and it is so ordered

HENNEY, J

[1] *S v Roberts and Others* 2013 (1) SACR 369 (ECP).

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