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

REPORTABLE

CASE NO: SS 13/2012

In the matter between:

THE STATE

and

PHILLIP JAMES MILLER	ACCUSED No. 1
WILLEM JACOBUS VAN RENSBURG	ACCUSED No. 2
ADRIAAN GEVAN WILDSCHUT	ACCUSED No. 3
TONY PETER DU TOIT	ACCUSED No. 4
JOHANNES EMIL LIEBENBERG	ACCUSED No. 5
RODNEY ONKRUID	ACCUSED No. 6
STANLEY SIFISO DLAMINI	ACCUSED No. 7
DESMOND DAVID PIENAAR	ACCUSED No. 8

GREGORY ABRAHAMS ACCUSED No. 9

SENTENCES HANDED DOWN ON MONDAY 19 MARCH 2018

GAMBLE, J:

INTRODUCTION

[1] On 4 September 2017 Accused no's 1 to 4 were convicted on several charges relating to the unlawful possession or control for commercial purposes of varying quantities of abalone at times during the period 2005 to 2006 in contravention of Reg 39(1)(a) of the Regulations published the Marine Living Resources Act, 18 of 1998 ("the MLRA"). The same accused were also convicted of contravening s2(1)(e) of the Prevention of Organised Crime Act, 121 of 1998 ("POCA") in that they conducted (or were associated with the running of) an unlawful enterprise through a pattern of racketeering activity. Accused no's 2,3 and 4 were also found guilty of contravening s 18(1) of the MLRA in that they operated a fish processing establishment without the necessary license.

[2] Accused no 5 was convicted of a single count of contravening the aforesaid Reg 39(1)(a) in that he was found in unlawful possession of a quantity of abalone on a single occasion in October 2006 but was acquitted under the POCA charge he faced. The charges against accused no. 7 were held in abeyance after he absconded just after the commencement of the trial in August 2014, while accused no's 6, 8 and 9 were acquitted on all charges.

[3] After conviction the case stood down for several months while pre-sentencing reports were procured. Upon resumption on 5 February 2018 after the summer recess the court heard evidence in mitigation of sentence on behalf of all the accused, the details whereof will appear later as each accused is dealt with invidually. The court also heard evidence in aggravation of sentence presented by the State and the Court asked that a social worker who had furnished a report in relation to accused no 3's domestic circumstances be called to give oral evidence in amplification of her report.

[4] Thereafter the court adjourned for argument on sentence which concluded on 7 March 2018. The court is once again indebted to counsel on both sides for their detailed written and oral submissions

made in regard to sentence, which have greatly assisted in this onerous task at the end of what has been a marathon trial lasting in excess of 165 court days.

THE GENERAL APPROACH IN RELATION TO SENTENCE IN CRIMINAL MATTERS

[5] It has been said on more than one occasion that the function of passing sentence is a task both most onerous and lonely, for it falls on the Presiding Judge alone to consider the multitude of relevant facts and circumstances and to achieve the necessary balance to ensure that the sentences imposed are fair, just and lawful. In this matter, the court has been fortunate to continue to enjoy the assistance of an experienced assessor who has been consulted in relation to the sentences which will be imposed and with which he is in agreement. But, at the end of it all it is the court's function to conclude these proceedings by imposing sentence on each of you, and so it must be.

[6] The approach to sentence in the constitutional setting was restated by Sachs J in S v M (Centre for Child Law as amicus curiae) 2007 (2) SACR 539 (CC) at [10]. In that matter the Constitutional Court

confirmed that the point of departure (or the *"north star"* as Sachs J called it) in considering sentence remains the decision of the erstwhile Appellate Division in S v Zinn 1969 (2) SA 537 (A) at 540G-H in which the so-called "*triad sentencing formula*" was defined. I quote in full from para 10 of the judgment in M.

> *"[10] Sentencing is innately controversial. However, all the parties to this matter agreed that the classic Zinn triad is the paradigm from which to proceed when embarking on 'the lonely and onerous task' of passing sentence. According to the triad the nature of the crime, the personal circumstances of the criminal and the interest of the community are the relevant factors determinative of an appropriate sentence. In S v Banda 1991(2) SA 352 (B) at 355A Friedman J explained that:*
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> > '*The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counter-balance between these elements in order to assure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial*

incantation, the mere stating whereof satisfies the requirements. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern.'

And, as Mthiyane JA pointed out in Director of Public Prosecutions, KwaZula-Natal v P 2006 (1) SACR 243 (SCA) at para 13, in the assessment of an appropriate sentence the court is also required to have regard to the main purposes of punishment, namely, its deterrent, preventative, reformative and retributive aspects. To this the quality of mercy, as distinct from mere sympathy for the offender, had to be added. Finally, he observed, it was necessary to take account of the fact that the traditional aims of punishment had been transformed by the Constitution."

[7] In footnote 3 to para 10 of his judgment Sachs J refers to a report by the South African Law Commission of November 2000 entitled "*Report on a New Sentencing Framework*" to give context to his reference to the controversial nature of sentencing.

> *"The report explains at para 1.2 that individual decisions are announced to a critical public who analyse them against a variety of expectations. They not only ask whether the sentences express public condemnation of the crime adequately and protect the public against future crimes by the reform and incapacitation of offenders and by the deterrence of both the individual offender and other potential offenders, but also whether the sentences are just in the sense of similar sentences being imposed for offences that are of equal seriousness or heinousness. In addition there is a growing expectation that the sentence must be restorative, in the sense both of compensating the individual who suffered as a result of a crime and of reparing the social fabric that criminal conduct damages. All these concerns are inevitably particularly prominent amongst victims of crime, who have a special interest in the offences that they themselves have suffered."*

[8] Nowadays the public interest in sentencing of offenders, which is the final destination in any criminal trial, is spurred on by both the

demand for societal recompense for the extraordinary levels of crime with which our communities are plagued on a daily basis and the media coverage of criminal proceedings which now convert the living room into a virtual court room. And so, one often has to endure the indiscriminate public clamour for heavy sentences when considering that leg of the triad. But at the end of the day, a balanced approach is what the Constitution demands of a court of law, always cogniscant of the fact, as Ackermann J pointed out in the Constitutional Court in S v Dodo 2001 (1) SA 594 (CC) at para 38, that one must not lose sight of the dignity of the offender involved given that *"(h)uman beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as a means to an end."*

[9] A further consideration which is important in the present matter is the fact that the court is dealing with multiple accused who have been convicted of a variety of offences. In such circumstances the court must have regard to the principle of consistency which demands, on the one hand, that similar sentences be imposed in circumstances where similarly placed offenders commit similar crimes and on the other hand

that the perpetrators of more serious crimes be sentenced more severely thereby ensuring that the most blameworthy offenders receive the severest sentences. See in this regard SS Terblanche, A Guide to Sentencing in South Africa, 3rd ed at p139 para3.2.

THE NATURE OF THE OFFENCES INVOLVED AND THE INTERESTS OF SOCIETY IN RELATION THERETO.

[10] These 2 legs of the Zinn triad will be addressed jointly given that they are closely aligned to each other. In so doing, I turn firstly to consider the crimes of which the accused have been convicted. On the one hand there are the contraventions of the MLRA, which involve the unlawful possession, control and/or keeping of large quantities of abalone for commercial purposes and the processing thereof in informal, illegal fish processing establishments ("FPE's). On the other hand, there are the contraventions of POCA which embrace the running of, and/or participation in, the affairs of an unlawful enterprise through a pattern of racketeering activity.

[11] The prescribed sentences for the various offences give one some idea of how seriously the Legislature considered the gravity of the

offences. As already pointed out in the main judgment, each act of illegal possession etc of abalone for commercial purposes carries with it the sanction of a fine up to a maximum of R800 000 or imprisonment of not more than 2 years. That sentence is stipulated without any regard for the amount or size of abalone involved in any particular act of such possession. The offence of running an unlicensed FPE attracts a fine not exceeding R2m or imprisonment up to a maximum of 5 years.

[12] Turning to the POCA contraventions, the Legislature has determined in s3(1) that a fine of R1000m (ie a billion Rand) or life imprisonment may be imposed for a contravention of s2(1)(e) of that act. I know of no heavier penal sanction for any statutory contravention in our law. In addition, Part 2 of Chapter 3 of POCA makes provision for a court convicting a person of a contravention of that act to conduct an enquiry into any benefit which such person may have derived from the proceeds of the crime which has been committed. In that event the court may make an order that such proceeds be forfeited to the State. Such an enquiry has been launched by the Asset Forfeiture Unit against accused no 2 and will be dealt with by this court in due course after sentencing has been concluded.

THE EFFECT OF ABALONE POACHING ON THE MARINE ENVIRONMENT

[13] It has been suggested by some that the illicit possession of abalone is really a victimless crime. It is said that unlike murder, rape or robbery there is no victim who suffers physical harm at the hands of the perpetrator. The perception is that offences such as the illegal possession of rare plants, reptiles, diamonds, gold, ivory, rhino horn or abalone are invariably driven by commercial interests and it is sometimes said that such persons should be convinced, often by the imposition of a hefty fine, *"that financially the game is not worth the candle."* See R v Mbele 1955 (4) SA 203 (N) at 207A.

[14] In this case the State adduced the evidence of a number of employees of the Branch: Marine and Coastal Management ("MCM") of the erstwhile Department of Environmental Affairs and Tourism. Pursuant to the rearrangement of government departments these witnesses later fell under the current Department of Agriculture, Forestry and Fisheries ("DAFF"). They are Messers Bernard Liedemann, Angus McKenzie and Keith Thompson to whom I shall refer through their former employment at MCM. I do not intend reciting their evidence in any detail: it is a matter of

record in the case and I shall focus thereon only to the extent that it impacts on the question of sentence.

[15] The evidence of the MCM officials gave the court some idea of the extent of the abalone industry (both legal and illegal) in South Africa, the current state of abalone stocks along our coastline, the impact of abalone poaching on the marine environment and the value of abalone in the trade, both locally and abroad. Mr McKenzie's evidence in the trial was illustrated by a useful Powerpoint presentation which included tables emanating from marine research and photographs of abalone poaching taken in situ.

[16] The evidence of Mr McKenzie, a qualified oceanographer with more than 30 years experience with MCM in the field of abalone research, explained in detail how in the 1950's and 1960's abalone was originally harvested by local artisanal fisherman living along the coastline from Hawston to Gansbaai and beyond in small craft using a surface supply of compressed air piped down to divers on the sea bed. It was an unsophisticated, community-based activity in which the locals took from the sea what they believed was their rightful due.

[17] However, as the product became more sought after due to its popularity in the Far East particularly on festive occasions, it became necessary to control the fishing rights relating to abalone. For instance, in the 1985/6 fishing season, MCM, employing scientific measures, determined (as it did with other species of fish and rock lobster) what the annual TAC (total allowable catch) would be for abalone for that season. The season, I should point out, corresponds with the tax year – from 1 March in year 1 to 28 February in year 2. Each holder of the right to harvest abalone was allocated a portion of the TAC for individual commercial exploitation. The rights-holder (invariably a diver) was required to bring the abalone ashore at a designated place where a fisheries' inspector was available to inspect the catch, weigh it and endorse the diver's permit accordingly.

[18] MCM also ensured that the processing of abalone for the export market was strictly controlled through the licensing of FPE's to which export permits were granted. Most of these FPE's were said to be in the Hermanus/Overstrand area, close to the where the resource was harvested.

[19] In the result, a rights-holder for the harvesting of abalone was permitted to collect annually no more than the weight specified in the permit and was obliged to deliver the harvested animals (for that is what they really are) in their shells only to a registered FPE. The rights-holder could instruct the FPE how the harvested product was to be processed (eg tinned, dried or frozen) and might even nominate the end user (eg by designating a specific purchaser), or the holder could sell the product to the FPE which was then entitled to process and on-sell the abalone at its discretion. Where a rights-holder had not used up the entire allocation in a particular year, MCM permitted the balance of the allocation to be rolled over to a subsequent year.

[20] It can be seen therefore that the commercial harvesting, processing and exporting of abalone was strictly controlled and monitored by the authorities so that the sustainability of the resource could be maintained, on the one hand, and the revenue stream could be monitored on the other hand. It was important that commercial enterprises involved in the abalone market paid their dues to the fiscus, thereby ensuring revenue to the State derived from the commercial exploitation of its natural resources. Mr McKenzie testified that by far and away the bulk of

abalone harvested in South Africa was destined for the Far East and was usually shipped through the port of Hong Kong.

[21] In addition to the commercial exploitation of abalone, in the past recreational divers were permitted to harvest a daily bag limit for personal consumption. Initially this was set at 5 units per person per day and subsequently reduced to 3. From about 1994 onwards, MCM noticed an upsurge in the harvesting of abalone by recreational divers and thereafter a siginificant increase in poaching along the coast around Hawson near Hermanus. During the next 10 years poaching of abalone was said to have increased about 10 fold, so much so that in the 2003 season recreational diving for abalone was banned indefinitely, a situation which persists to this day.

[22] As the demand grew and law enforcement clamped down, poachers of abalone began using sophisticated equipment such as specialized air supply tanks (called “bombs”) which were silent (unlike the compressors of old) and enabled clandestine diving expeditions to take place. Through the use of night sights, radio scanners and cellphones the poachers were able to take out abalone around the clock, making use of

7m inflatable craft with powerful engines (so-called *"super- ducks*") so as to outpace the hapless fishing inspectors.

[23] Applying the maxim of "safety in mumbers" large groups of divers took to the sea to harvest abalone. In a photograph included in Mr McKenzie's presentation one can see as many as 14 crew members on one "super-duck" as it makes its way out to sea. These fishermen were supported on land by gangs of men and women armed with a variety of weapons including semi-automatic rifles. Understandably, the small numbers of under-resourced fisheries' officers were no match for these poachers who shamelessly made their way over the beaches of the Overstrand to relieve the small craft of their valuable cargos.

[24] As a consequence there was an unmitigated plunder of the country's natural resources and the areas under attack were soon fished out. Undeterred, the poachers expanded their horizons moving further east and west of Hawston. It would be fair to say that Gansbaai, directly across the picturesque Walker Bay from Hermanus but about 40kms by road to the east, became synonymous with the illegal abalone poaching industry in the first decade of this century. Indeed, accused no 3, Mr

Wildschut, a sometime resident of that village, confirmed as much in his evidence in mitigation of sentence.

[25] But the poachers did not only begin exploiting new marine areas (including the marine protected areas off Betty's Bay and Robben Island), they also started taking out smaller, undersized abalone. While the minimum shell diameter of a legally sized animal measured 114mm, Mr McKenzie testified that more than 60% of poached abalone seized by the authorities was found to be undersized. This meant that the reproductive cycle of the species was being compromised as immature adults were harvested.

IMPACT ON THE THE TOTAL ALLOWABLE CATCH

[26] The response of the authorities to this impending ecological disaster was to reduce the TAC annually and to reduce the areas ("zones") in which harvesting was permitted to take place. Mr Thompson, who was recalled by the State to give evidence in aggravation of sentence, testified that in the 2003/4 season the TAC for abalone was fixed at 282 tons, a figure which was down by nearly 30% in comparison to the previous season. That tonnage was allocated to 300 individual

rights holders who each received permission to harvest a quota of 940 kg per season at that time.

[27] There was a steady decline in the TAC. By 2005/6 it was down to 223 tons and the following season (2006/7) it almost halved to 125 tons. These are important figures to which I shall return later since the abalone involved in this matter was exported between January 2005 and September 2006. In the 2007/8 season the TAC was reduced further to 75 tons but the situation was so dire that no TAC was allocated in the 2008/9 season in an endeavour to protect the species.

[28] This environmentally proactive step understandably resulted in an outcry amongst the licensed fisherman who suffered a complete loss of income. The court was informed that litigation ensued and that as a consequence thereof, the authorities were ordered to reinstate a TAC in the 2009/10 season: for the next 4 seasons 150 tons were allocated. These were shared amongst the rights-holders who were then each allocated 500kg per season. In the 2013/14 season the TAC was dropped again to 96 tons rendering an annual quota of 320 kg for each rights-holder. As matters presently stand that is the TAC for the 2017/18 season.

[29] Mr Thompson explained to the court how the weight of the abalone is reduced through the processing phase. First of all, the animal must be delivered to the FPE in a live state ie “shell-on”. Once the shell is removed and the abalone is gutted of its entrails, its weight reduces by about 70%. So, for example, a live animal weighing 1kg on delivery to the FPE will render approxiamately 300g of raw meat for processing for human consumption. That 300g portion of abalone meat can be frozen and exported as such, or it can be canned.

[30] There is evidently also a good market in the Far East for dried abalone, which must also be processed by an FPE. In such event, said Mr Thompson, there is a further reduction in the mass of the cleaned, fresh meat by about 70% rendering around 90-100g of dried abalone meat from a live, “shell-on” animal of 1kg. For the purposes of this judgment I shall refer to the live, “shell-on” animal as “*live abalone”*.

[31] Mr Liedemann, now a Deputy Director in DAFF charged with MLRA compliance, told the court that he visited Hong Kong in October 2011 in the course of his work in a related abalone prosecution and encountered any number of retail stores selling a variety of marine products, from sharkfin, mussels and sea cucumbers to a large selection

of abalone products. He was able to sneak a few photographs of abalone on the shelves of a store he passed (he was apparently not permitted to go in and photograph) and produced these as Exhibit VV. On several of these photographs one can see dried abalone stored in large glass cannisters. According to Mr Liedemann, South African abalone is on sale "on almost every street in Hong Kong" and some of his photographs included South African abalone, which he was able to identify.

[32] The price reflected on the cannisters photographed by Mr Liedemann suggests a retail price of HK$ 3800 per catty. This, according to Wikipedia Online Encyclopaedia, is a traditional unit of mass used in the Far East for weighing food and groceries in shops and street markets. In Hong Kong it is the equivalent of 604 metric grams. I shall return later to the Rand equivalent per kilogram of dried abalone on sale in Hong Kong. Suffice it to say that there is a huge mark-up of this sought after product from the time that it leaves the kelp-clad reefs of Gansbaai and beyond until it reaches the shelves of stores in Hong Kong.

[33] Mr. McKenzie's presentation included a table recording the total number of units of abalone confiscated during the decade between 2001 and 2010. The lowest was in 2001 when 300 000 units were seized

and the highest in 2007 when this figure had trebled to 900 000 units. Understandably, the authorities were unable to produce accurate figures indicating the annual tonnage of abalone illegally harvested and exported from South Africa but Mr McKenzie was able to cast some light on the probable extent thereof.

[34] When he testified in 2014 Mr Mckenzie testified that the TAC was 150 tons which meant that a maximum of 150 tons of live abalone could be caught for commercial exploitation throughout South Africa. If that abalone was cleaned and frozen for export, said the witness, this would have rendered approxiamately 50 tons of fresh or frozen abalone available for legal export. If the total TAC was dried, on the other hand, this would have rendered only 15 tons of dried abalone available for export. Mr McKenzie said that he inspected the abalone seized in this matter when the containers exported through V&A Cold Storage were returned from Singapore and the contents taken to the MCM store in Paarden Eiland. There he found boxes of abalone concealed as pilchards, some containing frozen abalone and some containing dried abalone. This confirmed his earlier evidence that there is a market in Hong Kong for both forms of processed abalone.

[35] In reply to questions from the Bench, Mr McKenzie testified that the South African authorities were in regular contact with the authorities in Hong Kong responsible for the monitoring of the illegal trafficking of wild life and related products through that port. His knowledge thereof stemmed from a working group on which he served. Mr McKenzie testified that a member of the working group in Hong Kong monitored the quantities of abalone passing through that port and submitted an annual report to the group. At the time of giving evidence in 2014 Mr McKenzie testified that it was estimated that a total of between 1000 and 2000 tons of processed South African abalone passed through Hong Kong annually.

[36] Assuming for the moment the lower figure of 1000 tons, and assuming further that all of this abalone was frozen (and we know that it was not), the evidence shows that the TAC would have been exceeded 20 fold. Put differently, if 50 tons of frozen abalone could be lawfully exported in terms of the 2014 TAC of 150 tons, then 950 tons of the 1000 tons of abalone monitored by the Hong Kong authorities was illegal. This suggests, at the very least, that of the order of 95% of the South African abalone passing through Hong Kong in 2014 was illegally harvested and

exported. The assumptions I have made are conservative and the volume of illegal abalone will increase if account is taken of the possible movement of 2000 tons and, further, if it is assumed that some of the tonnage was dried.

[37] At the end of the day, I believe it can be stated with a fair degree of certainty that the evidence establishes that extraordinarily large amounts of South African abalone have left our shores for the Far East market and that only a very,very small percentage thereof was legally harvested and exported. I turn now to consider the consequences of this plunder of one of our country's prized, natural marine resources.

THE CURRENT STATE OF THE RESOURCE

[38] In the first place, consideration has to be given to the current state of the resource. As already indicated, Mr Mckenzie testified about the diminishing size of confiscated abalone. Whereas a legally sized live abalone in the shell was required to measure 114mm in diameter (a little larger than the width of the palm of an adult male hand) and to weigh about 700g, the authorities found increasingly that smaller and smaller animals were being harvested. In one of Mr McKenzie's slides from 2014

one sees a pair of outstretched male hands holding 10 small shucked abalone rather than the 2 (or perhaps a maximum of 3) which one would legitimately expect to find. Furthermore, upon his return to the witness box in 2018, Mr Thompson spoke of seeing confiscated, shucked abalone as small as a R5 coin. In the circumstances, the marine biologists are most concerned that the reproductive ability of the species is under serious threat.

[39] Mr McKenzie told the court of the necessity to introduce designated zones where abalone could be harvested in an attempt to maintain the sustainability of the resource. These zones were surveyed over the years to measure the density of abalone found in an area of 50sq metres of ocean bed (that is an area of approxiamately 7x7m). He showed, for example, that around 2001 the density of abalone in the Gansbaai area was of the order of 0,75 units per 50 sq metres while in 2010 it had dropped significantly (about 5 fold) to around 0,15 units. Both Messers McKenzie and Thompson were extremely pessimistic about the survival of the species and the extinction of wild abalone appears to be a very real possibility.

[40] The area from Hermanus to Gansbaai has seen the growth of the mariculture industry and, in particular, the harvesting of farmed abalone which is grown in tanks close to the sea. Such farms might well ensure the continued existence of the species but it seems that even they are under threat from the poaching community. In a press report on the News 24 website on 9 August 2017 it was stated that more than 120 men had descended on an abalone farm at Danger Point near Gansbaai the previous day and indiscriminately helped themselves to farmed abalone. It was reported that the following day law enforcement officials came upon 37 bags (containing 3100 units of abalone) awaiting collection.

[41] According to Mr Thompson the abalone produced at these mariculture facilities is treated like gold. He described to the court how the live product is transported to the airport under armed guard in vehicles customarily associated with cash-in-transit deliveries and related an anectodal incident where an off-duty policeman, who was apparently moonlighting as a security escourt for such transport, was gunned down in an attack on such a vehicle.

[42] While the long term effect on the ecology due to the elimination of abalone remains a matter of speculation and will probably

only be fully appreciated in the decades to come, both Mr Mc Kenzie and Mr Thompson testified regarding a noticeable uptake of West Coast rock lobster in areas where they were formerly not found and where abalone stocks are now depleted. This was particularly noticeable in the area around Cape Hangklip and eastwards. Evidently the theory is that the lobster feed on small abalone, some as small as a thumb nail, and that the destruction of the larger abalone has left the smaller units vulnerable to predation by lobster.

[43] Furthermore, it is said that the stripping of abalone off the reefs and rocks on the ocean floor has led to an increased surface area for kelp to take root. Consequently, there has been an increase in the density of kelp forests and there are concerns that this will affect the proliferation of in-shore fish species which might struggle to survive in the more dense kelp forests. It seems fair to say then that the large scale destruction of abalone is likely to have significant ecological consequences beyond just the extinction of the species.

SOCIAL IMPLICATIONS FOR LOCAL COMMUNITIES

[44] The involvement of organized crime syndicates, in particular the so-called Chinese Triad gangs, in abalone is well documented. In a paper issued by the Institute for Security Studies in April 2005 (ISS Paper 105) the well known author Jonny Steinberg discusses the involvement and influence of these organizations in abalone smuggling at length in a paper entitled "*The Illicit Abalone Trade in South Africa".* So do Charles Goredema and Khalil Goga in a later paper issued by the same institute in August 2014 (ISS Paper 262) entitled *"Crime Networks and Governance in Cape Town*". Both papers link the high incidence of substance abuse in areas where abalone smuggling is rife to the emergence of drug smuggling syndicates who are said to exchange abalone for drugs.

[45] While there is no evidence in this case which links Richard Chao, the mastermind behind the criminal enterprise run under the names Rapitrade and Syroun, I believe that it is fair to say that abalone poaching generally has had a deleterious effect on society. This phenomenon is not only to be found in the writings of academics distant to the area. Accused no 3 himself shared with the court his personal

experience of substance abuse and anti-social behaviour amongst the youth in his neighbourhood at Gansbaai where jobs are few and poaching a ready source of income for the locals. This situation is also confirmed in a recent study commissioned by the Western Cape Department of Human Settlements in collaboration with the Overstrand Local Municipality, in which a social development agency known as SOREASCO was asked to report on the needs and demand for affordable housing in the area under the jurisdiction of the Overstrand Local municipality.

[46] In chapter 7 at p 128 of their report entitled "*Quality of Life*" the authors refer to their assessment of the concerns of local residents in the areas from Betty's Bay to Gansbaai as follows.

> *"Increasing social and deviant behaviour within communities was repeatedly mentioned as a primary factor negatively impacting on the quality of life of surveyed communities. This was described as a serious issue in all settlements, albeit in varying degree, with the least affected community reported to be Mooiuitsig in Betty's Bay and the worst Masakhane in Gansbaai. Participants from the latter mentioned community repeatedly mentioned their disquiet with the*

steady decline in the moral standing in this community, stating that Masakhane used to be a very safe community. The situation has, however, changed drastically. It has become, according to a leader, a community that has been… 'high-jacked by criminal elements directly linked to the poaching groups active in the area' and residing in Masakhane.

The decay in the social fibre in Masakhane is endemic according to the respondents. The youth, including the very young, are increasingly being affected and becoming involved in criminal behaviour, particularly relating to drugs and alcohol abuse and sexual promiscuity. Particular concern was expressed about young girls that are being corrupted by the display of affluence and conspicuous spending by poachers. Some of the local police were also implicated by the respondents claiming that they assist poachers in their criminal activities….

The exact same sentiment was expressed by a community leader… in Pearly Beach. Concern was raised about the increasing crime and abuse of substances in this settlement, claimed to be intimately associated with the practice of poaching. The impact of this illegal

activity on the community's mores and cohesion is negative and is exacerbated by the lack of concerted punitive action by what is described and alleged to be a corrupt local police service.

This sentiment was repeated by community leaders and members of Hawston, stating that children are increasingly getting involved in drugs and gang activities…..

It is evident from these narratives that a general deep concern pertaining to the decline in the social fabric exists among all low income settlements of the Overstrand. In all discussion spontaneously this was directly associated to the abalone poaching sub-culture evident in these communities…."

[47] There are no doubt a variety of socio-economic, socio-political and historical factors which contribute to the predicament of poor communities in our province. However, this court cannot ignore the anecdotal evidence before it of the negative impact that abalone poaching has had on the residents of the areas where the resource has been so actively poached.

[48] In the circumstances this court rejects the notion that the illegal exploitation of abalone for commercial purposes is a victimless crime. This court has little doubt that both the leaders and the residents of those communities look to the courts to take appropriate steps to improve the quality of life and safety of their communities when the perpetrators of this scourge are brought to book.

[49] Clearly none of the accused before court were directly involved in the removal of abalone from the sea. But each of them, in his own individual way, was a vital link in the chain of production which facilitated the illegal export of hundreds of tons of this prized delicacy to its end users. They are all intelligent people who were willing and knowing participants in the greater scheme to advance the commercial interests of people like Richard Chao, the prime mover behind this unlawful enterprise. They too like Chao were driven by greed and without their participation, the poachers would not have had a market for their bounty. In the circumstances, their moral blameworthiness is not far off that of the mastermind.

[50] Notwithstanding the current concerns about the extinction of the species (and I pause to mention that Steinberg in his 2005 paper

predicted that it was already imminent then), the poaching of abalone continues apace. In the main judgment I referred to news reports of regular police raids and roadblocks at which large quantities of illegal abalone were seized during 2017. There does not appear to have been any let-up in that situation.

ON-GOING POACHING

[51] At the very time that Mr Thompson was giving evidence in aggravation of sentence (8-13 February 2018), there was a news report of a gas explosion (with the loss of a life) at an illegal FPE in Maitland a mere 10km or so from the seat of this court. Mr Thompson confirmed, after checking records at the MCM store, that more than 11400 units of dried abalone weighing 669kg were seized during the raid at those Maitland premisies, together with 15355 units of fresh, shucked abalone weighing 1603kg. This is a total of 26735 units with the average weight of a unit of fresh abalone being 104g and dried 5 g.

[52] In addition, Mr Thompson informed the court of another on-going investigation in which he was involved at the time of testifying involving the seizure of a large quantity of abalone at a destination which

he preferred not to disclose for fear of prejudicing that investigation. And, indeed only last week we read in the local newspapers of a large raid in the Overstrand in which a number of fisheries inspectors were arrested along with more than a dozen poachers.

[53] In short it must be said that the alarming fact is that poaching of large quantities of undersized abalone continues unabated. The sentences handed down by the lower courts (often fines coupled with an alternative of imprisonment, as we see in the case in respect of accused no 3 in regard to his guilty plea after his arrest at Foxhole Farm in February 2006) seem to have been no more than an occupational hazard taken into account by the unlawful enterprises as part of their necessary running expenses.

[54] The poaching of abalone, like other forms of poaching, is an offence which at its core is based on dishonesty. As this case shows, the participants in such crime will go to extraordinary lengths to conceal their activity, knowing full well that what they are busy with is unlawful. In the result, the sentences handed down in a matter such as this must send a clear message to those who choose to become involved in abalone

poaching, wherever in the chain they may fit in, that heavy sentences are lkely to be handed down in the future.

THE ESTIMATED VALUE OF THE ABALONE INVOLVED

[55] I turn now to consider the value of the abalone involved in this matter. The State led evidence from Mr Thompson on his re-call in relation to the going price paid by legal FPE's for abalone in 2005-6. He testified that as part of his preparation for testifying in criminal prosecutions relating to abalone over the years he and his colleague Barend Smal (who also testified in realtion to the convictions) made regular enquiries from the handful of FPE's in the Hermanus to Gansbaai area regarding the price paid by those entities to rights-holders for the purchase of live abalone at the time of such enquiries. The purpose of the enquiry was to attempt to fix some sort of basic, reliable market price for abalone. Mr Thompson did say that it was not an easy task as competitors in the industry did not easily reveal their trade secrets.

[56] These figures were set out in a table annexed to Mr Thompson's statement prepared for submissions on sentence, Exh RSC6A, which reflects that the price paid in 2006 by the FPE's for live

abalone was R300/kg . Mr Thompson then purported to calculate the value of the abalone controlled commercially by each of the accused by multiplying that rate by the mass handled per accused. His calculation in relation to the mass so controlled is, however, fundamentally flawed and cannot be relied upon. Suffice it to say at this stage that the value was overstated due to errors which crept into the calculations resulting in the overstatement of the mass of abalone attributed to each accused.

[57] Mr Uijs SC, on behalf of accused no 2, took issue with this aspect of Mr Thompson's evidence and attempted to demonstrate that in 2006 the price paid for live abalone was only R150/kg. Counsel did not adduce any viva voce evidence in this regard but sought to rely on various documents which he handed in from the Bar and placed before the witness for comment. The documents in question are Exhs RSC 9 to RSC13.5. The State objected to the admissibility of these exhibits and in the result they were only provisionally admitted into evidence.

[58] The documents include invoices and payment advices purportedly issued by a company known as Legitprops 3016 CC, which traded as S&W Fishing. It appears now to be common cause that this was an FPE operating out of the industrial area in Hermanus of which

accused no 2 was a member together with a certain Mr Shaun Smith. These documents suggest that in April and September 2004, S&W Fishing paid rights-holders R150/kg for live, “shell-on” abalone delivered to its factory.

[59] There is also a “*Purchasing Agreement*” between S&W Fishing and one D.Bannister in terms whereof the latter’s entire allocation of 600 kg of live abalone for the 2004/5 season was purchased by S&W for R78 000. This equates to R130/kg.

[60] Given that the documents were intended to be used only for purposes of mitigation of sentence, and that the accuracy thereof was not critical to the guilt of the accused, I am prepared to allow some latitude in relation to the issue of admissibility, much like one would allow in a letter of commendation or a testimonial regarding an accused person. The admission of these documents does however leave one with a problem: how does one square the rate referred to therein with the evidence of Mr Thompson, based on his annual survey, regarding a “*going rate*”?

[61] Obviously, if the S&W Documents had been proved through a witness one would have been in a position to establish the accuracy of

the rate, and, importantly, the circumstances under which it was paid. One notes, for instance, that the purchase agreement with Bannister makes provision for an upfront payment by S&W and it is possible therefore that the price was discounted to make provision for this indulgence by the purchaser in favour of the seller.

[62] The evidence of Mr Thompson is not without problems either to the extent that it relies on the say-so of others. But there is some consistency (and hence reliability) in the fact that what he presented is really a survey of rates paid by a number of FPE's. When challenged in the witness box with the accuracy of his figures, Mr Thompson approached one of the FPE's, Walker Bay Canners Ltd, and asked the accountant (a Mr van der Berg) to verify the rates in his (Thompson's) table. A reply dated 7 February 2018 (Exh RSC 12.1-2) on the letterhead of Walker Bay Canners (which it appears is a subsidiary of I&J Ltd, a well-known, listed company in the fishing industry) stated that their records only went back as far as 2011. Nevertheless, the price paid per kg to rights-holders for live abalone during the period 2011 to 2017 refelected in that letter adequately corroborates Mr Thompson's table for

those years. There is no reason to think that the rates for earlier years would not have been reliably obtained.

[63] In the matter of S v Roberts and others to which further reference will be made later, the rate payable to divers for live abalone in the Eastern Cape in 2006 was said to be US$ 40 – 60/kg. Assuming an exchange rate of R6,70/ US$ at that time (the figure put forward by Ms van der Merwe in argument), this equates to a price of around R270 to R400/kg, rates which sit comfortably with those mentioned by Mr Thompson.

[64] In the result, one is left with a range of suggested rates for the payment of live abalone from 2004 to 2006 of between R130/kg and R300/kg. I suppose this might be termed the local "*commercial value*" of the product for that is what legitimate rights-holders might have received for the sale of the abalone if they had been permitted to harvest it and lawfully dispose thereof to an FPE. It therefore reflects the cost of the lost opportunities for those rights-holders. For the purposes of later calculations as to the value of abalone involved in this matter, and in an endeavor to be fair to all concerned I shall assume that the price for live abalone in the years 2005 – 2006 was R250/kg.

[65] However, this is not the only comparator in relation to the measurement of the financial implications of the crimes of which the accused have been convicted. We know from the evidence that the FPE's are responsible for the export of processed abalone since they are the entities that are licensed to do so. To the extent that accused 2, 3 and 4 have been convicted as a result of their involvement in the running of unlawful FPE's, one may ask what the value was to them of the abalone which Rapitrade on the one hand, and Syroun on the other, delivered to V&A for export by Richard Chao.

[66] Save in respect of accused no 4, that figure is unknown to the court, as is the value to Chao of the hundreds of tons of frozen and dried abalone which he unlawfully exported to Hong Kong. In regard to Mr du Toit, Mr Uijs SC pointed out in final argument that in his evidence he said that he was paid R30/kg by Chao for his work in cleaning, packing and freezing the abalone. This evidence was not challenged, said counsel. Mr Uijs SC also referred the court to an invoice included in the bundle of documents handed up during argument on sentence which suggested a rate chargeable by a legitimate FPE. In the absence of evidence to the

contrary, I am prepared to work with the rate referred to by Mr du Toit in evidence.

[67] What we do know, for instance, is that the mass of frozen abalone delivered by accused no 4 to Sea Freeze in 2005 was 44 tons, to V&A in 2005 was 1,8 tons and to V&A in 2006 was 24,46 tons. This amounts to 70,26 tons of frozen abalone over the 2 seasons. This figure excludes the abalone seized at Kendal Road and Brackenfell and which had not yet been delivered to Chao. Applying the accepted formula referred to by Mr Thompson of a 70% loss of weight between live and processed abalone, we can estimate what the mass of the live abalone delivered to Mr Du Toit for processing was, and we can also calculate the value thereof at the rate of R250/kg.

[68] In the result, we see that the weight of the total mass of 70,26 tons of frozen product actually delivered by or on behalf of Mr du Toit for storage by Rapitrade would have been of the order of 234 tons in the shell. At the alleged rate of R250/kg the cost of buying in that live abalone from a rights-holder would have been R58,5m. I shall deal with the Kendal Road and Brackenfell abalone separately as that had not yet been delivered when seized.

[69] In his cross examination of Mr Thompson, Mr Uijs SC referred the witness to RSC 13.1 which was said to be an invoice for the export of live wild abalone by a registered FPE to a purchaser in Hong Kong. The document reflected the value thereof in March 2006 as being US$ 49/kg. According to the website of the South African Reserve Bank (www.resbank.co.za) the exchange rate for 1 US$ on that day was R6,25 meaning that the export value to the FPE would have been R306,25/kg. If this document is a valid and reliable invoice, it suggests that live abalone that had been purchase for R150/kg (as contended for on behalf of accused no.2) was being on-sold live for just over R300/kg which reflects a mark up of 100%. If the live rate is increased to R250/kg, the mark-up is lower.

[70] Certain of the other documents handed up by Mr Uijs, refer to abalone transactions in October 2013 with an entity called Sea Point Sidewalk CC. In her evidence in mitigation on behalf of accused no 2, Ms van Rensberg suggested that at some stage or other her husband had an interest in this corporation. The documents refer to the export of some 40 kg of frozen abalone at the rate of US$ 100/kg, while the exchange rate as reflected on that invoice was R9,80/US$. The "*product weight*"

recorded on the invoice was 120kg, which Mr Uijs suggested was the weight of the live abalone before it was shucked and gutted. The conclusion counsel sought to draw then was that a delivery of 120 kg of live abalone rendered 40 kg of frozen abalone which was exported for R980/kg before deduction of freight and admin expenses. So, after paying R420/kg for live abalone (the 2013 figure suggested by Mr Thompson in his table), the legal FPE effected a mark-up in excess of 130%.

[71] I referred earlier to the evience of Mr Liedemann regarding dried abalone which he saw on sale in legitimate retail outlets in Hong Kong in 2011 for HKD 3800/catty. That would equate to around HKD 6333/kg in 2011 terms. According to the website of the SA Reserve Bank the average exchange rate in 2011 was HKD 1 = ZAR0,95, giving an equivalent of just over R6000/kg for dried abalone on sale in Hong Kong in 2011. That is also the figure that Mr Liedemann put up.

[72] The court does not know what the price per catty for dried abalone was in 2006, but, in light of inflationary increases in commodities generally it is fair to infer that it was lower 5 years earlier than HKD 3800.

According to the tables on the Reserve Bank website the average exchange rate in 2006 was HKD1 = ZAR1,10.

[73] In the absence of any reliable evidence, it is not for the court to speculate what the 2006 price was in Hong Kong for dried abalone per catty. But what the court can do is to look at Mr Thompson's table which reflects the price allegedly paid by FPE's for fresh abalone in 2011 as being R400/kg. Taking this as a baseline figure, and comparing it to the 2011 price in Hong Kong for dried abalone (R 6000/kg), one can assume that the value of 1kg of live abalone in South Africa increased around 15 fold (ie 1500%) before it attained its dried selling price in Hong Kong. And assuming that the same increase in value applied in 2006, live abalone with a value then of R250/kg might have sold for around HKD 3750/kg for dried abalone.

[74] Mr Thompson testified that there was a difference between the prices paid for live abalone by legitimate FPE's to rights-holders and those paid to poachers by illegal FPE's. He suggested that in the latter case the poacher might only receive half of the going commercial rate. If that is so, the profits to be made through the illegal exportation of the product would be even higher than those suggested above.

[75] These figures all necessarily involve a degree of speculation given that there are so many variables in the calculations which might influence the figures one way or the other. For the purposes of sentence in this matter it is not necessary (nor practically possible) for the court to arrive at an accurate figure: this is not a case where there is a direct correlation between the quantity of contraband involved and the extent of the sentence such as one finds, for example, in drug legislation. But what the court can find is that there was (and no doubt still is) a massive difference between what the South African diver (or rights-holder) earns for a kilogram of live abalone and what the Hong Kong consumer pays for a kilogram of the product in its dried form. Simply put, the figures demonstrate persuasively that there are very good profits to be made along the value chain through the illegal poaching, processing and exporting of South African abalone.

THE MASS OF ABALONE INVOLVED

[76] A further consideration in relation to the gravity of the offence and its impact on society relates to the loss of revenue which the fiscus suffers through illegal poaching of abalone. I dealt earlier with the inter-relationship between the TAC and the high percentage of abalone

entering Hong Kong illegally. It is now apposite to consider the numbers involved in this matter. Mr Thompson testified that the combined TAC for the years covering this case totaled 348 tons of live abalone – 223 tons for the 2005/6 season and 125 tons for the 2006/7 season. That is the equivalent of 104,4 tons of shucked, fresh/frozen abalone. For purposes of these calculations it will be assumed that a frozen unit of cleaned abalone is the same weight as a fresh cleaned unit and I shall henceforth therefore only refer to frozen abalone for purposes of mass comparison.

[77] The mass of frozen abalone exported on behalf of Rapitrade in this case totals at least 74,3 tons. This comprises

77.1 44 tons exported via Sea Freeze in Hout Bay during 2005;

77.2 1,8 tons delivered by accused no 4 to V&A on 25 February 2005 (count 14);

77.3 A total of 21,5 tons exported via V&A Cold Storage from 24 February 2006 to 23 August 2006;

77.4 In addition to this tonnage, there were some 12,1 tons of frozen abalone which were retrieved after the containers

seized in Singapore ("the Singapore containers") were returned to Cape Town. According to Exhibit ZZZZ, these containers were shipped from V&A on 12–13 September 2006. Rapitrade's share of this tonnage was 2,96 tons;

77.5 There were 1706 frozen units seized at Kendal Road, which at 110g/unit weighed 1876 kg or 1,876 tons, and

77.6 Lastly, there are the 1969 frozen units seized at Brackenfell on 6 October 2006, which at 110g/unit weighed 2165 kg or 2,165 tons.

[78] Accused no 2 has been linked to 27,5 tons of Rapitrade's frozen abalone, Accused no 4 has been linked to the full amount of 74,3 tons and Accused no 5 to 2,1 tons thereof.

[79] Syroun, on the other hand, handled at least 67,43 tons of abalone, some of it frozen and some dried, made up by

79.1 31,33 tons of abalone (both frozen and dried) exported via V&A from February to 4 September 2006;

79.2 10788 freshly shucked units seized at Hercules Street. At 110g/unit this equates to 11866kg or 11,86 tons;

79.3 11030 freshly shucked and frozen units found at Faraday Street which equates to 12133 kg or 12,13 tons; and

79.4 Syroun's share of the Singapore containers, which consisted of both frozen and dried abalone exported between 12 and 13 September 2006. We are unable to state with any degree of certainty how many of the frozen units belonged to Syroun. What we do know, however, is that there were 45602 dried units in two of the Singapore containers. This must have belonged to Syroun and at 30g/unit this quantity of dried abalone equates to 13680 kg or 13,68 tons.

[80] In addition to the tonnages referred to in para 79, Syroun handled other dried abalone. It is reasonable to assume (and I did not understand counsel to argue to the contrary) that the dried abalone found at Faraday Street and Volmoed Farm, Rawsonville was part of Syroun's

intended export product. The total of the dried abalone seized at those localities amounts to 24713 units made up as to –

80.1 41 units found at Faraday Street; and

80.2 24672 units found at Volmoed.

[81] The weight of these units at 30g/unit equates to 1683 kg or 1,683 tons of dried abalone. For purposes of comparison and the calculation of values generally in this case it is preferable to calculate the weight of the fresh, shucked abalone before it was dried. And then it is necessary to calculate the live weight thereof to arrive at the local commercial value of the product. In the result, it is reasonable to conclude that 1683 kg of dried abalone was derived from 18700kg (18,7 tons) of live abalone, which, when shucked, cleaned and then frozen would have been reduced to 5610kg or 5,6 tons.

[82] In addition to the amounts already dealt with there is the evidence regarding the raid at V&A Cold Storage on 19 September 2006 when, according to the revised indictment 72749 units of abalone were found. These units comprised both frozen and dried abalone and were stored on 12 pallets. One of these pallets, it is common cause, belonged

to an entity called “Aqualina” and played no part in this case. That leaves 11 pallets which contained abalone stored on behalf of both Rapitrade and Syroun. As I have said, that stored on behalf of Syroun contained dried product but may well have included frozen abalone as well.

[83] On the available evidence,the court is unable to conclude how many of these units were stored on behalf of Rapitrade, and how many on behalf of Syroun. Nor are we able to assess what quantity of the said units were frozen and how many were dried. All that can be said is that the tonnages calculated on behalf of both Rapitrade and Syroun are significantly understated, and further that there are of the order of 5 tons or more which cannot be reliably linked to either company. When considered in the greater scheme of things, however, 5 tons of abalone, although worth a lot of money, will not have a significant impact in relation to sentence in this matter. In the circumstances, the accused must receive the benfit of any doubt occasioned by the lack of conclusive evidence on this score.

[84] The effect of these calculations is that it can be concluded with a reasonable degree of certainty that the combined mass of frozen abalone handled by Rapitrade during the period 2005 to 2006 amounts to

74,3 tons. The live weight thereof would have been of the order of 247 tons which at R250/kg was worth R61,9m.

[85] Valuing Syroun's exports is more difficult because of the combination of frozen and dried abalone. In fairness to accused no 3 the court will assume that all of Syroun's product was frozen and can therefore be valued at R250/kg. The total tonnage of 69,8 tons processed and stored by Syroun in the 8 month period from February to August 2006 equates to 232,6 tons of live abalone. At R250/kg this equates to R58,16m. It is important to stress that the monetary values expressed are in 2006 terms and do not take account of the effects of inflation and the devaluation of money. The present day value of that money would certainly be higher.

[86] In summary then, while the TAC for the 2 seasons (2005/6 and 2006/7) amounted to 348 tons of live abalone, the unlawful enterprise in this matter controlled by Richard Chao processed almost 480 tons of live abalone (Rapitrade's 247 tons + Syroun's 232,6 tons). This is nearly 132 tons more than the permissible TAC in a shorter period than that covered by the TAC and amounts to almost 140% of the TAC.

[87] These are startling figures when they are considered in the context of the TAC and what MCM considered to be the appropriate mass of this resource to be exploited commercially. And, I would hasten to add, as accused no 3's evidence suggests, this was not the only unlawful enterprise involved in abalone poaching at that time. While this matter has been running, another lengthy POCA trial involving the poaching and export of abalone (The State v Frank Barends and others, case no SS 47/2012) has been running in this Division before Mr Justice Erasmus. Judgment in that matter has not been delivered yet.

[88] In considering the agreed rates and volumes for purposes of sentence, it is apparent that certain of the assumptions made in paragraphs 321, 347 and 353 of the judgment on conviction in relation to the weight of individual units of abalone were incorrect. Those assumptions have been ignored for purposes of sentence and only the calculations in this judgment on sentence have been considered.

IMPLICATIONS FOR THE FISCUS OF THE POACHING IN THIS CASE

[89] Mr Ebenhaeser Beukes returned to the witness box to testify in relation to sentence. He is a tax investigator with the SA Revenue

Service and was asked to estimate the lost revenue to the fiscus as a consequence of these offences. Mr Beukes testified that he sat down with Mr Salvin Africa after the latter's arrest and considered the contents of exhibit GG to determine the amount of abalone (exclusive of pilchards) which was exported through the two cold storage companies involved in this matter. As a consequence of an extensive consultation with Mr Africa, the sole shareholder and director of both companies, the witness was able to provide figures for revised tax estimates in relation to Rapitrade and Syroun for the periods relevant to this case.

[90] Mr Beukes stated that as far as Rapitrade was concerned, the company had declared a loss of R18 313 for the tax year ending 28 February 2005 (i.e. calendar year 2004). Having consulted with Mr Africa the tax position of the company was revised so as to reflect an under declaration of income for that tax year and a revised taxable income in the amount of R2 262 407. The tax payable on this amount (exclusive of penalties and interest) amounted to R656 222. For the 2006 tax year, Rapitrade rendered no tax return and on the strength of the documentation made available to it SARS issued a revised assessment reflecting a taxable income of R27 486 030. The tax payable on that

figure amounted to R7 919 948. Finally, for the 2007 tax year, there was once again no return filed on behalf of Rapitrade, an assessment by SARS was fixed in the amount of R29 833 830 with tax in the amount of R8 590 810 payable.

[91] Turning to Syroun, Mr Beukes testified that that company's tax return for the 2005 tax year reflected a loss of R59 505. This figure was revised so that the assessment reflected a taxable income of R11 870 65 with tax in the amount of R333 619 payable. For the 2006 tax year the company filed no tax return. A revised assessment drawn up by SARS for that year reflected taxable income of R4 494 360 with tax payable in the amount of R1 252 364. Lastly, in respect of the 2007 tax year, Syroun similarly filed no tax return and pursuant to a revised assessment prepared by SARS was found to have a taxable income of R13 896 740. The tax payable on this was R3 969 054.

[92] In the result, SARS has calculated that the two companies owe it a total of R22 722 017 in arrear taxes for the three tax years in question. These amounts were not paid and would ordinarily attract penalty interest and fines of up to 200% of the assessed taxes.The composite figure after the addition of interest and penalties for the liability

of Rapitrade for the 3 tax years in question is R51 636 688 while in respect of Syroun it is said to be R12 731 798. The sum of these amounts for the 3 years under review is R69 368 486.

[93] The asumptions made by Mr Beukes are conservative in relation to the calculations made in this judgment. Furthermore, it must be said that the estimates referred to by Mr Beukes could have been subject to challenge by the taxpayers if they were considerd to be inaccurate. And, if the companies had been tax compliant and their assessed taxes had been paid timeously, or an arrangement arrived at for the payment thereof in instalments, it is possible that there might have been a reduction in the interest and/or the penalty components. But, at the end of the day, the loss to the national fiscus as a consequence of the abalone involved in this matter having been exported illegally, is still significant and runs into tens of millions of Rands.

LOSS SUFFERED BY FISHING COMMUNITIES

[94] In my view, a further important consequence of the abalone in this matter having been poached, as opposed to lawfully harvested and exported, is that the livelihoods of the traditional artisanal fishing

communities and/or rights-holders have been negatively affected. Mention has already been made of the fact that in the 2009 season the harvesting of abalone was effectively stopped when no TAC was declared. Furthermore, the steady decline in the TAC over the years (eg. from 282 tons in 2003 to 96 tons presently) has had a direct effect on the earning capacities of those communities who were usually the beneficiaries of lawful rights allocations.

[95] Put differently, the increase in abalone poaching has led to a smaller quantity of the resource being made available for lawful harvesting, with the result that there is then less abalone available for commercial exploitation to enable families to earn a decent living. And, it would not be unreasonable to infer that persons who would otherwise have earned a living lawfully as rights-holders, might be driven (out of necessity) to poaching to enable their families to survive – a real case of a dog chasing its own tail.

[96] As I have already demonstrated, the facts here show that abalone worth more than R128m was harvested and supplied to Rapitrade and Syroun for processing and export in the 2005/6 and 2006/7 financial years. This does not mean that the local fishing communities

suffered a loss in that amount, because the authorities would certainly not have permitted such an indiscriminate stripping of the marine resources. Rather, there would have been more abalone available for allocation to rights-holders with an increased TAC. Put simply, the poachers have taken the resource away from those who would otherwise be entitled to harvest abalone lawfully with all the beneficiation that that attracts.

THE IMPORT OF THE POCA LEGISLATION

[97] I turn next to consider the import of the POCA convctions for purposes of sentence in respect of accused 1, 2, 3 and 4. The point of departure is an understanding of the purpose of the act and its penal provisions. In National Director of Public Prosecutions and another v Mohamed NO and others 2002 (4) SA 843 (CC) at 850D, the Constitutional Court, more than 15 years ago, considered the constitutionality of s38 - a provision of POCA dealing with the preservation of seized propertry pending a forfeiture order. In delivering the unanimous judgment of the court, Ackermann J gave some context to the main purpose of POCA.

"[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 activities 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."

[98] The measures in the act to which the Learned Justice refers are two fold. On the one hand POCA recognizes that often the hidden hand (or the so-called "*kingpin"*) behind the criminal enterprise is far removed from the persons who commit, and are ultimately apprehended

and charged with, the predicate offences – the so-called "*footsoldiers*". To dissuade the kingpins from embarking upon acts of racketeering POCA authorizes the seizure and forfeiture of assets believed to be the proceeds of organized crime. As Justice Cameron put it in National Director of Public Prosecutions v Elran 2013 91) SACR 429 (CC) at [68], the legislation is intended to enable the law enforcement authorities to

> *".. Follow the money. Seize the profits. Target the spoils of criminality. This is what POCA does… It targets the proceeds of unlawful activities by enabling confiscation of their proceeds upon a criminal conviction…"*

As I said earlier, that is what the State has asked the court to do later in respect of the property of accused no 2.

[99] But in addition to the confiscation of assets, POCA mandates severe sentences in appropriate cases. It does so because, in addition to granting orders which are intended to inhibit the rewards for the kingpins 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. Prosecution of the masterminds is no easy task for there are many foot soldiers who will take the knock instead. But when cases eventually come before our courts involving the controllers of such criminal syndicates the courts must not hesitate to consider invoking the penal measures at thier disposal, firstly, to seek retribution for the theft of natural resources and secondly, to deter others who think they can do the same. As Justice Cameron suggested at para 70 of Elran

> *"We should embrace POCA as a friend of democracy, the rule of law and constitutionalism – and as indispensable in a world where the institutions of state are fragile, and the instruments of law*

sometimes struggle for their very survival against criminals who subvert them"

[101] It is true that in this case, the mastermind behind the criminal enterprise responsible for the export of these huge quantities of abalone to the East and the undoubtedly ultimate beneficiary of the scheme has escaped the clutches of the law by breaching the trust reposed in him by the court and skipping his bail. There is no doubt in the court's mind that Richard Chao's moral blameworthiness in respect of these offences is high and at the end of it all the ultimate beneficiary of this enterprise has avoided the law for now.

[102] Nevertheless, those who were willing to assist in the advancement of such interests for their own personal financial gain also attract a high degree of moral blameworthiness. Without the planning, financing, processing, packaging, storage and transportation of these vast quantities of abalone to the preferred destinations, the illegal poachers and divers responsible for the harvesting of the abalone would have no market for their bounty. Furthermore, it is not often that the members of what one might call the "*middle management*" of such an enterprise are apprehended. More often than not it is the foot soldiers –

the divers, the guards, the couriers and the FPE hands who are caught in possession of the abalone and for whom bail is posted, legal representation provided gratuitously and ultimately a fine paid by someone higher up the chain of command. That is exactly what this case has revealed.

[103] It is appropriate therefore that when those members of "*middle management*" of the criminal enterprise are eventually found out, they too be dealt with in the manner that POCA contemplates, for that is what the law-abiding public in general and the particular communities whose lives have been affected by this sort of criminality, expect of the courts. Serious criminal contraventions warrant serious sentences subject of course to the consideration of the personal circumstances of each accused and it is to that pillar of the Zinn triad that I now turn.

THE PERSONAL CIRCUMSTANCES OF THE ACCUSED.

Accused No 1

[104] Phillip Millller, who grew up and was schooled in Cape Town, is 57 years old and has 2 adult children. He is in engaged to a woman from Heidelberg in the Southern Cape who farms cattle. Mr Miller has

extensive experience in the local fishing industry where he has worked most of his life. Currently, he consults to a fish processing factory in the Strand where he earns between R20 000 and R30 000/mth. Mr Miller spends extended weekends with his fiancé in Heidelberg where he assists with farming chores and during the week lives in the Strand close to his place of employment.

[105] Mr Miller has had various complicating orthopaedic conditions, resulting in many operations, throughout his adult life as a consequence of a parachuting injury sustained while performing military service nearly 40 years ago. He also suffers from high blood pressure and other age related ailments but he is a big, strong man who has had a lifelong interest in diving and the sea. He has no criminal record.

[106] With the consent of the State, Ms Joubert handed up a pre-sentence report prepared by an employee of the Dept of Correctional Services. From that report, and indeed from hearing him in the witness box, it is apparent that Mr Miller has always been a person imbued with a sense of public service and spiritedness. He has had a long involvement with the Navel Cadet Corps in Cape Town which is a voluntary organization that endeavours to come to the aid of young people whose

lives have become troubled by engendering in them discipline and a love of the sea.

[107] Mr Miller returned to the witness stand to give evidence in mitigation of sentence and gave further evidence regarding his personal circumstances. He described the debilitating effect this case has had on him alluding to his state of mind as that of "*a dead man walking*". I have little doubt that the same can be said for his fellow accused who have had to wait for many years for this matter to be brought to conclusion while a plethora of collateral legal challenges have been made in relation to the legislation, the indictment and the admissibility of evidence in the case. That regrettably is the way in which these long trials with multiple accused run.

[108] Mr Miller is possessed of no assets of any meaningful value and is not in a position to pay a fine of any substance. In a thorough pre-sentence report Ms Ncediswa Sentile comes to the conclusion that Mr Miller is a suitable candidate for a sentence of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act, 51 of 1977 ('the CPA") should the court consider this an appropriate sentencing option. She observes that as Mr Miller is in full time employment, has a monitorable

address and he could be subjected to house arrest and community service in Heidelberg.

[109] Ms Sentile observes that Mr Miller does not acknowledge his guilt and takes no responsibility for the commission of the offences of which he has been convicted. It is therefore to be inferred that he shows no remorse for these offences. The court observed that when Mr Miller testified in regard to mitigation his evidence was carefully worded. When cross-examined by Ms van der Merwe about his apparent lack of remorse, Mr Miller said the following –

> *"I definitely supplied sardines to Rapitrade, there is no question about that. I had nothing to do with the exporting of abalone."*

Although the statement may be construed to be ambiguous, what Mr Miller did not say is that he did not know that Rapitrade was exporting abalone through Sea Freeze when he supplied pilchards to it through Pesca Atalantico.

[110] In my view Mr Miller spurned the opportunity to take the court into his confidence, to reflect on the matter and exhibit genuine remorse.

That having been said, the court accepts that Mr Miller's involvement in the activities of the enterprise was less serious than that of Accused no 2, 3 and 4. Although, he supplied pilchards to help mask the illegal export of 44 tons of frozen abalone worth around R11m, his own interest (according to his counsel) was the commission he earned on the supply of pilchards which amounted to about R600 000 for the year in question. It is true also that Mr Miller was struggling financially at the time after the collapse of his company, FTE, and the he was driven also by need rather than just greed. In light of these factors, I am of the view that a lighter sentence is warranted in the case of accused no 1.

Accused No 2.

[111] Other than tendering pleas of not guilty on the charges he faces, Mr Willie van Rensburg has not uttered a single word in these proceeedings. He has refused to take the court into his confidence on any aspects of the case, preferring rather to call his wife to give evidence in mitigation on his behalf. In addition, Mr Uijs SC also handed up a report by Ms Sentile confirming Mr van Rensburg's suitability as a candidate for a sentence of correctional supervision under s276(1)(h) of the CPA.

[112] From the limited evidence placed before the court I am able to conclude that Mr van Rensburg is 45 years of age, is married and has 2 young daughters aged 11 and 9 years respectively who are being educated at a private school in the city. It would appear that the mother is the primary caregiver to the children.

[113] Mr van Rensburg grew up in Hermanus and attended Stellenbosch University where he met his wife, Ms Kim Sabbe. He did not finish his B.Com degree there and dropped out after 2 years. Ms van Rensburg told the court that she went on to complete an undergraduate degree and then an honours degree in the field of property valuation at Stellenbosch. She is clearly a successful businesswoman in her own right and owns a substantial investment portfolio. She describes her husband as an innovative entrepeneurial person with an eye for an opportunity.

[114] In her report Ms Sentile refers to Mr van Rensburg's current business activity which is said to involve the manufacture of fiberglass tanks for use in the mariculture industry, in particular the farming of abalone. It is said that the company employs 27 permanent staff in Hermanus and that Mr van Rensburg *"draws R20 000 per month from his….business for his monthly living expenses excluding rent, transport*

and children's school fees." Ms Sentile reports that Mr van Rensburg travels through to Hermanus every Monday for work purposes and returns to Cape Town on weekends. During the week he evidently stays with his mother in Hermanus. Ms Sentile reports that Ms van Rensburg informed her that she earns around R25 000 per monthm from her business.

[115] Ms van Rensburg confirmed the allegation in the report that the family lives in Head Road in Fresnaye. She confirmed too that this a prestigious address in one of Cape Town's exclusive suburbs overlooking the Atlantic Ocean and said that she thought that the family home was worth around R18 million. Ms van Rensburg told the court that their home is rented and that the monthly rental was of the order of R45 000. Rather surprisingly she did not know the name of the owner of the property (in which she said they have lived for the past 10 years) but suggested that the rental was paid through a well-known national estate agency.

[116] Ms van Rensburg told the court that the school fees for their daughters, with whom she says accused no 2 has a close relationship, ran to around R40 000 per term. When the court asked how the family was able to afford an obviously opulant lifestyle, Ms van Rensburg said

that she and her husband funded certain of their shared domestic expenses through their respective businesses and drew therefrom what they needed to live on on an ad hoc basis. She said that accused no 2 contributed about R25 000 to the family's expenses but that he has no assets of any substance.

[117] There are certain problems with the evidence presented on behalf of accused no 2. In the first place, his wife did not refer in any great detail to the business venture dealt with by Ms Sentile. We heard little about the fiberglass tank business from Ms van Rensburg, but a lot about a company called CKW Steel (Pty) Ltd. Ms van Rensburg acknowledged that the name was an acronym for "Clive, Kim and Willie" and said that the "Clive" was a reference to Mr Clive Coetzee, an acquaintance of Mr van Rensburg, who has been present in the public gallery for much of this trial lending moral support to his long-standing friend. Ms van Rensburg has no interest in the business of CKW Steel, which according to company registration documents handed up by Mr Uijs SC, was registered in 2016 with accused no 2 as the sole shareholder and director.

[118] Ms van Rensburg explained that CKW was a company that her husband had set up with Mr Coetzee which imported steel products (for example wire and spikes) from China for use mainly in the agricultural sector. To this end it was said that Mr van Rensburg regularly visited China on business. The business was evidently run earlier through a Close Corporation known as Sea Point Sidewalk CC but later the name was changed to CKW. It is apparent to us from the evidence of Ms van Rensburg that CKW is currently Mr van Rensburg's primary source of income yet we know very little of the financial viability of the company. We have no details of its turnover, the staff compliment and the salaries of its employees or of its profitability.

[119] In the result I must come to the conclusion that accused no 2 has not been frank with the court regarding his current financial position. On the available evidence, this family enjoys an affluent lifestyle where just accommodation expenses and school fees amount to around R60 000/mth yet where their joint income is said to be of the order of only R45 000/mth. These figures do not make provision for food, clothing, medical expenses, motor vehicle and travel costs or entertainment, and at the end of the day the numbers simply do not add up.

[120] Ms van Rensburg was asked in her evidence-in-chief to deal with the domestic circumstances which prevailed in November 2006 at the time accused no 2 was arrested when they would both have been aged about 34. She explained that her husband owned a townhouse in a complex in Westcliff in Hermanus and that they also rented an apartment in Clifton. The arrangement with the landlord in Clifton was that they had to vacate the apartment over the summer holidays when it was rented out at a higher rate and during that period the van Rensburg couple (then still childless) would take up residence in their Hermanus home.

[121] Ms van Rensburg, who knows the property market well, confirmed that Clifton is the city's most expensive suburb on the Atlantic Seaboard and it is apparent that this young couple lived very comfortably at that time. We know, too, from the evidence in the main trial that Mr van Rensburg drove a Mercedes Benz luxury vehicle. One is therefore inclined to ask where the money came from?

[122] In his cross examination of Mr Thompson, Mr Uijs SC handed up the unsigned financial staements for the calendar year of 2006 of a company called Ligitprops 3016 CC. This was a close corporation which traded in Hermanus as S&W Fishing and the documents describe the

nature of its business as the export of abalone, although Ms van Rensburg said that they exported crayfish as well. Its members were Willie van Rensburg and a certain Shaun M.Smith.

[123] The financial statements of this CC for the year ended 28 February 2007 reflect a healthy business with a gross income derived from the sale of abalone and crayfish of R11,7m. That figure was up by nearly R3,7m over the previous year – an increase in turnover of 46%, at a time when the abalone TAC had basically halved. While the list of expenses reflect a general deduction for salary and wages of R54754, the salary for members is recorded as nil. However, the members declared a dividend totalling R1,036m in that financial year. Assuming that each member drew the same amount via that dividend, this would have rendered a monthly income of just over R43 000 per member – not an insubstantial amount today let alone 12 years ago.

[124] In her evidence in mitigation on behalf of her husband, Ms van Rensburg let the cat out of the bag somewhat. She said that when she married her husband in 2004 he and Shaun Smith were running the biggest privately owned abalone exporting company in the country. They were evidently very successful – “huge” was the word Ms van Rensburg

proudly used. When asked what the turnover of S&W Fishing was “at that time” (and counsel was referring to the time around the arrest of no 2 in 2006), the witness repeatedly mentioned a figure of R30m. She knew about this because her husband and Mr Smith had told her of the figures.

[125] This figure, of course, does not tally with the turnover mentioned in the company’s financial statements but it does give us some idea of the extent of accused no 2’s probable benefits from his involvement with Rapitrade. The evidence fits neatly into the role described by Jaco Botha – that accused no 2 was the financial backer of accused no 4’s illegal FPE which supplied huge amounts of abalone to Rapitrade for export.

[126] Finally, it should be mentioned that accused no 2 has 4 previous convictions – 1 for common assault in 1996 when he paid an admission of guilt fine, and 3 contraventions under the erstwhile Sea Fisherires Act. These relate to a single incident in September 1988 when the accused was found in illegal possession of shucked abalone. He was just 16 at the time and the magistrate imposed a sentence of a fine of R300 suspended for 4 years and an order that he write an essay of at least 500 words on the topic of why it was his duty to conserve marine

life. While these convictions are old and must be ignored for present purposes in terms of s271A of the CPA, one wonders whether that essay was written and whether its purpose was ever truly taken to heart.

[127] The total amount of abalone involved in respect of the counts on which Mr van Rensburg was convicted is 28,5 tons of frozen abalone. This accords, in the main, with the volume handled by Mr du Toit in 2006, save that Mr van Rensburg was not convicted on count 14 (which Accused no 4 was) which involved 1,8 tons of abalone. The live weight of that frozen mass is 95 tons and the value thereof at R250/kg amounts to R23,7m.

[128] This figure sits fairly comfortably with Ms van Rensburg's evidence about the turnover of S&W. Of course, we do not know exactly what Mr van Rensburg's benefit was as a consequence of his involvement in the affairs of Rapitrade. Perhaps it was half the difference between the turnover in the financials and the figure mentioned by his wife? Maybe it was more and maybe it was less? But whatever it was, it can be stated with a measure of confidence that Mr van Rensburg's interest was driven by greed, given that he had a successful business offering a reasonable income. In light of the fact that he has only been

convicted for his involvement with accused number 4 during 2006, and has been associated with a lower amount of abalone, his sentence will be ameliorated accordingly.

Accused No. 3

[129] Gavin Wildschutt did not testify in the main trial but was called to give evidence in mitigation of sentence. He told the court that he is 42 years old and married with 4 children – a daughter aged 21 and 3 sons aged 18, 16 and 6 years. He grew up with an absent father who was a truck driver and was schooled in the Cape Town suburb of Elsies River where he left school in grade 11 to help provide for the family. Mr Wildschutt's early work life was as a guard on a taxi and later as a factory worker in Woodstock.

[130] The family lived in a house at 58 Naomi Street in Elsies River which they owned. As I understand it, Mr Wildschutt is now the rightful owner of the property in which his mother presently lives alone. He told the court that he feels morally obliged to his late father not to sell the house while his mother still needs a roof over her head. In 2013 Mr Wildschutt moved his family to Gansbaai to live in an RDP house which

he had bought there. The family still stays in Gansbaai where the 2 youngest children are in school. The 2 older children also currently reside in the Gansbaai house. Mr Wildschutt is currently employed on a casual basis with a local building contractor, Mr Isak Fourie, for whom he does tiling, painting and the like. Much of his time over the last 4 years has been taken up with this case but when he is able to work he earns up to R300/day.

[131] Ms Marilyn Wildschutt is 43 years of age and is chronically ill. In 2010 she was diagnosed with stage 3 cancer of the spine which has since spread to the liver and has progressed to stage 4. Notwithstanding advanced stem-cell treatment she has not recovered. Her mobility is severly compromised and Ms Wildschutt is now mostly confined to bed. She is cared for by her husband, the neighbours and the 2 older children. It seems as if Ms Wildschutt's prognosis is very poor.

[132] The family survives off Mr Wildschutt's earnings, a disability grant for Ms Wildschutt and social grants for the 2 younger children. Their daughter does part-time voluntary work as a teaching-assistant at a local school while she is studying through a correspondence degree to

become a teacher, while the oldest son is destined for university where he intends studying engineering.

[133] Mr Wildschutt himself is not healthy and suffers from a congenital illness which causes clotting of the blood and for which he is permanently on medication. While it is evident that Mr Wildschutt grew up in difficult circumstances, he has an engaging personality and is one who expresses himself in forthright terms. He impresses as a firm disciplinarian who has instilled good values in his children, for whom he obviously has high expectations.

[134] Mr Mellor handed up a report relating to the family's circumstances drawn up by Ms T. Klaas-Jolimvaba, a social worker with the Provincial Dept of Social Services in Hermanus, as well as a pre-sentencing report by Ms. J Engelbrecht of the Department of Correctional Services. The court requested that Ms Klaas-Jolimvaba be called to give oral evidence in relation to the family's domestic circumstances in light of the presence of the minor children and the directions of the Constitutional Court in S v M , the case referred to at the beginning of this judgment.

[135] Ms Engelbrecht found that Mr Wildschutt was a suitable candidate for a sentence of correctional supervision while Ms Klaas-Jolimvaba, particularly in her oral evidence, assisted the court in assessing the impact that a sentence of imprisonment in respect of accused no 3 might have on the interests of the children. I shall revert to that aspect shortly but I first need to address Mr Wildschutt's criminal record and the issue of remorse.

[136] Mr Wildschutt has 2 previous convictions, both of which arise from the raid at Foxhole Farm on 8 February 2006. As stated in the main judgment he tendered a plead of guilty in terms of s105A of the CPA to a charge of possession of 5050 units of abalone for commercial purposes in contravention of Reg 39(1)(a), and guilty to a charge of participating in the running of an illegal FPE in contravention fo s18 of the MLRA. On 3 May 2006 accused no 3 was sentenced to a fine of R40 000 or 18mths imprisonment in the erstwhile Regional (Environmental) Court in Hermanus, the charges having been taken together for purposes of sentence.

[137] In his s105A plea explanation, which was concluded jointly with 5 other persons charged in relation to Foxhole, Mr Wildschutt

expressly admitted that he was responsible for the transport of abalone to and from the premises. In the plea agreement, in which he said he was employed at the time as a wood-cutter earning R2000/mth, Mr Wildschutt associated himself with the following statements which were recorded in English for the benefit of accused no 4 in that case. An Afrikaans translation thereof was signed by Mr Wildschutt, as the 5th accused in that case:

> "*5. The seriousness of the crime is recognized by all parties, specifically the ecological and economic importance of protecting the abalone resource.*
>
> *6. The following extenuating circumstances apply:*
>
> *The more lenient sentences in regard to accused 4, 5 and 6 is (sic) the result of possible merit problems the State might have experienced in proving the case against the accused. Notwithstanding, accused 4, 5 and 6 indicated that they are willing to plea (sic) guilty to all counts and accordingly more lenient sentences are seen as appropriate."*

[138] These convictions have already been taken into account as predicate offences for purposes of convicting accused no 3 under the POCA charge. But they are also relevant for purposes of aggravation in this matter. The documents before this court show that at the very time that Mr Wildschutt was dealing with the consequences of his arrest at Foxhole, he was busy with the establishment of the abalone drying facility at Volmoed. Of particular significance in this regard is, firstly, the fact that the rent for the cottage at Volmoed was paid into Ms Mouton's bank account in cash by accused no 3's wife in March and May 2006, and secondly, that he was identified by the witness David le Roux as one of the roleplayers involved in the establishment of the FPE there.

[139] There is further aggravation to be found in the fact that accused no 3 was involved, not only at Volmoed at that time, but also in the establishment of the FPE's at Hercules and Faraday Streets. He was evidently undeterred by the substantial fine which was payable in respect of Foxhole, but forged ahead with the processing of many, many tons of abalone notwithstanding his frank acknowledgement in his s105A plea regarding the ecological and financial harm associated with this activity. Clearly, the fine was no more an occupational hazard for the accused.

[140] Indeed, in later explaining his plea in that matter to this court Mr Wildschutt candidly said that initially the State had offered a fine coupled with a suspended sentence in relation to the Foxhole prosecution but that he had refused this option. Clearly, he realized that at that stage he could not run the risk of having a suspended sentence hanging over his head if he was going to deal in poached abalone further. In my view, therefore, the moral blameworthiness of Mr Wildschutt's conduct in 2006 is very high.

[141] In her report to the court in consideration of Mr Wildschutt's suitability as a candidate for correctional supervision Ms Engelbrect noted the following.

> *"He takes responsibility for his actions, understands and comprehends the seriousness of his wrongdoings, verbalizes his remorse and is willing to be engaging (sic) in therapy in order to improve his social functioning as well as life skills programs as (sic) to assist him to cope and deal with life (sic) situation…."*

[142] Ms Klaas-Jolimvaba, in her separate report had the following to say.

"6.3 BEHAVIOUR

The accused made bad choices in the past as he has a previous offense (sic) where abalone was involved. According to him he learnt from his past mistakes and decided to change his behaviour by doing business in wood cutting….

7.1 PREVIOUS CONVICTIONS

The SAP 69 was not available when we compile (sic) this report, as it was requested from Gansbaai police station but unfortunately we did not received (sic). The accused was involved in case (sic) of abalone with his friends and was found guilty. He was fine (sic) for the conviction. According to him he learnt from his mistakes. He bought a truck to do business with wood after his release from prison.

7.2 CURRENT OFFENCE

The accused alleged the abalone does not belong to him. He do (sic) not accept responsibility for the offence…"

[143] When testifying in mitigation of sentence, Mr Wildschutt was cross examined by the prosecution in relation to the allegations suggesting remorse on his part. His contradictory response thereto demonstrates anything but contrition. He firstly turned his back on the plea bargain concluded in response to the Foxhole arrest, saying he was most definitely not guilty but had been advised by his attorney, Mr du Plessis, that a guilty plea was one way of avoiding the stresses, strains and delays of a criminal trial. He initially persisted in this court in maintaining his innocence in that matter.

[144] But then Mr Wildschutt unexpectedly demonstrated an apparent frankess to discuss his past misdemeanours. He told the court that in about 2002 he was a driver for an abalone syndicate headed by the same Frank Barends referred to earlier who is currently standing trial in this Division before Mr Justice Erasmus also on abalone related charges. Mr Wildschut said that in the course of his association with Barends he had been involved in a motor car accident near Bonnievale, had been arrested but was later acquitted as no abalone was found in his

vehicle. He claims that he was in fact driving a decoy vehicle as part of the Barends operation.

[145] After initially suggesting to the court that this was the incident in which he learnt from his mistakes, and regretted what he had done, accused no 3 changed tack and on further questioning by Ms van der Merwe said that he was actually referring Ms Klaas-Jolimvaba to the Foxhole arrest. The mere fact of his arrest there was, he suggested, sufficient to teach him a lesson and deter him from any further involvement with abalone.

[146] The court asked Mr Wildschutt to clarify the matter. He then said that he relied on both incidents as demonstrating that he had learned from his past mistakes. The first lesson he said he learned was when he became involved with Mr Barends' activities. This the court understood to be an acknowledgment that Mr Wildschutt had been part of an abalone poaching ring at that time.

[147] Then, said Mr Wildschutt, the Foxhole arrest was a further warning and that the mistake that he made there was that he had associated with the wrong people. And then in a most opaque way the

accused said that whatever he may have got up to in 2006, he had led an exemplary life since then. Although the temptation to become embroiled in abalone poaching again was literally on his doorstep in Gansbaai, Mr Wildschutt suggested that he had avoided the temptation to do so and invited the court to make enquiries from the investigating officer, W/O Potgieter in that regard.

[148] I regret to say that I am unable to come to the conclusion that Mr Wildschutt has shown true remorse in this matter. Implicit in his evidence is an acknowledgment that he was involved in abalone smuggling over the period 2002-2006, and the persistence of his involvement suggests that at the time he was prepared to continue with such activities despite being a family man. Indeed, as I have said, Ms Wildschutt, too, seems to have been involved to an extent at least as regards Volmoed. And, it seems to me that now the accused is understandably desparate to avoid incarceration so as to be able to care for his ailing wife and children.

[149] That then takes us back to M's case, which requires a court to have regard to the provisions of s28 of the Constitution and consider the impact of the childrens' rights protected therein when imposing sentence

in a criminal matter. There the Constitutional Court suggested the following guidelines at para [36].

> *"(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.*
>
> *(b) A probation officer's report is not needed to determine this in each case. The convicted person can be asked for information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.*
>
> *(c) If on the Zinn – triad approach the appropriate sentence is clearly custodial and the convicted person is a*

primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

(d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.

(e) Finally, if there is a range of appropriate sentences on the Zinn approach, the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose."

[150] The Constitutional Court went on to point out that these guidelines are entirely consistent with the constitutional duty of the State to protect its citizens by diligently prosecuting crime and that the sentence in such a matter, which must be approached and a case-by-case basis, involves questions of context and proportionality. In that regard there are two important competing considerations which arise, the first being the importance of maintaining the integrity of family care wherever possible.

[151] In addition, said the court, a further consideration is

"[39]….. (t)he duty of the State to punish criminal misconduct. The approach recommended in para [36] makes plain that a court must sentence an offender, albeit a primary caregiver, to prison if on the ordinary approach adopted in Zinn a custodial sentence is the proper punishment. The children will weigh as an independent factor to be placed on the sentencing scale only if there could be more than one appropriate sentence on the Zinn approach, one of which is a non-custodial sentence. For the rest, the approach merely requires a sentencing court to consider the situation of children when a custodial sentence is imposed and not to ignore them.

[40] The tension lies between maintaining family care wherever possible, on one hand, and the duty on the State to deal firmly with criminal misconduct, on the other. As the Zinn triad recognises, the community has a great interest in seeing that its laws are obeyed and that criminal conduct is appropriately prosecuted, denounced and penalised. Indeed,

it is profoundly in the interests of children that they grow up in a world of moral accountability where self-centred and antisocial criminality is appropriately and publicly repudiated. In practical terms, then, the difficulty is how appropriately and on a case-by-case basis to balance the three interests as required by Zinn, without disregarding the directory provisions of s 28. This requires a nuanced weighing of all the interlinked factors in each sentencing process. The normative setting for the balancing will be the intricate interrelationship between ss28(1)(b) and 28(2) of the Constitution, on the one hand, and s276 (1) of the CPA, on the other."

[152] In the case of the Wildschutt household I accordingly have regard to the following factors when considering an appropriate sentence for accused no 3.

152.1 In light of Ms Wildschutt's chronic (and potentially terminal) medical condition, the accused shares the role of caregiver in the Gansbaai home. There is evidence that the neighbours help out from time to time and there are also 2 major children

in the home, both of whom were described by the accused as responsible and law-abiding young adults.

152.2 The family is in receipt of various State grants through which its domestic expenditure is augmented.

152.3 In the event that accused no 3 is incarcerated, a further grant will accrue to the family.

152.4 There are two major children in the home, both of whom are capable of earning an income so as to contribute to the family's domestic expenses.

152.5 Both of those major children reside in the home and will be able to attend to the care of their ailing mother and younger siblings.

152.6 The family is well known to the local welfare authorities, one of whom in particular (Badisa) has a satellite office in the town.

152.7 Both Mr and Mrs Wildschutt have extended families who reside in the Western Cape, and are families to whom the

children can turn in times of need. Similarly, it is not unreasonable to infer that members of the extended family might step in of their own accord to address any welfare concerns which they might have in regard to the Gansbaai home.

152.8 Mr Wildschutt owns a house close to the Tygerberg Hospital. This was formerly their family home when they resided in Cape Town and was seadrched during the investigation in this matter. That house could, no doubt, be utilised by Mrs Wildschutt and the children, in particular should the need arise for her to attend hospital for treatment.

[153] Although Mr Wildschutt has only been convicted in relation to his activities on behalf of Syroun during the first 9 months of 2006, he was nonetheless involved with a substantial amount of live abalone – 232,6 tons with a commercial value of R58,16m as I have already indicated. In his case it is an aggravating factor that he has 2 previous convictions arising out of his arrest at Foxhole Farm and that, notwithstanding that arrest, he continued with business as usual. In fact, even after his arrest in relation to the activities at Bellville South, Belhar

and Volmoed, he continued to deliver abalone to V&A on behalf of Syroun.

[154] Mr Wildschutt was clearly driven by greed since he indicated that he and his wife were running a remunerative fish and fresh produce business from their home in Elsies River which produced sufficient income to enable him he to allegedly buy a truck to transport wood, pay the fine arising out of Foxhole and pay his bail in this matter - initially around R100 000. I am of the view that Mr Wildschutt's moral blameworthiness is high and that he is deserving of a heavy sentence.

Accused No.4

[155] Tony du Toit is 62 years of age and is divorced with 3 adult children and 4 grandchildren. He lives at Port Edward in kwaZulu-Natal with his life partner where he is currently unemployed. He previously held a sales position at a local furniture store, and his erstwhile employer confirmed in writing that such employment is still available to him should he not be incarcerated.

[156] Mr du Toit did not give further evidence in this matter but Mr Uijs SC handed up a pre-sentence report completed by one S.D.Dladla of

the Department of Correctional Services in KZN. The report confirms that Mr du Toit has a monitorable address and is a suitable candidate for correctional supervision in the event that the court considers that to be an appropriate form of sentence. Mr du Toit does not appear to be possessed with any assets with which to pay a fine.

[157] Mr du Toit has a string of previous convictions for dishonesty dating back to the 1980's and one for assault in December 1998. These convictions, too, are to be ignored in terms of s271A of the CPA.

[158] As far as the offences of which he has now been convicted are concerned, we have found that Mr du Toit was responsible for processing, on behalf of Rapitrade, more than 74 tons of frozen abalone during the period Jan 2005 to Sep 2006. This equates to about 247 tons of live product valued at around R61,9m. In the circumstances Mr du Toit on his own was responsible for handling about 70 % of the TAC for those years. Mr du Toit's moral blameworthiness is high in the circumstances and although he did not testify in that regard, the correctional supervision report suggests that Mr du Toit has expressed remorse for what he did and that he says that he ahs learnt from his wrongs.

[159] I am prepared to accept that he is now contrite. Mr du Toit did not hide his involvement in abalone processing from the court, yet I suppose it might be said that he could hardly do so in light of the evidence which was stacked up against him after the Durbanville and Brackenfell raids. In any event, he sought to justify his conduct on the tenuous basis of a belief that he acted within the law. I have to add that, having listened to the explanation offered by Mr du Toit on the merits, I am left with the abiding impression that he has taken the fall for his friend and sometime business associate, Willie van Rensburg. The manner in which he attempted to distance Mr van Rensburg from any knowledge of his abalone facility in circumstances where the latter was a major participant in the local abalone and crayfish export market did not sit comfortably with the court.

[160] It is no pleasant task to pass sentence on a man in his senior years but the amount of abalone processed by Mr du Toit's FPE is massive. It seems that when he arrived in the Western Cape from Gauteng in around 2004 he was in a financial predicament and that he took to abalone for a livelihood. But when he did so, he took to it in a big way. At the rate which he alleged of R30/kg paid by Richard Chao for his

services, the almost 80 tons which he processed would have brought in an income of around R2,4m over about a 20 month period. That equates to about R120 00 a month. In today's terms it is a pretty penny and would have been worth far more 12 years ago.

[161] We know from the evidence of Jaco Botha that he and his fellow workers at the Kendal Road FPE were paid well by Mr du Toit and it is reasonable to infer that there would have been other production expenses incurred in relation to that turnover. Nevertheless, I can only conclude that accused no 4 too was overtaken by greed for the easy money which abalone presented. The consequences of his conduct have had a significant effect both on the environment and on the communities who lawfully survive off the sea. Mr du Toit's moral blameworthiness is very high and he too deserves a heavy sentence.

Accused no 5

[162] Koos Liebenberg is 46 yrs old, single and is self-employed as a chef, earning between R1500 and R2000/day. Like accused no 2 he has maintained a stern silence throughout these proceedings but presented the evidence of his mother in mitigation of sentence. Ms

Liebenberg told the court that her family suffers from a congenital illness which, in the case of her son, has manifested itself in colon cancer. Mr Liebenberg has already had abdominal surgery for his condition and his long-term prognosis is cause for concern. Mr Liebenberg resides with his mother in Stellenbosch and contributes towards her upkeep. He is not possessed of any substantial assets and is not in a position to pay a fine.

[163] Mr Liebenberg has only been convicted on one count of contravening Reg 39(1)(a), in relation to the 1969 units of frozen abalone found at Brackenfell on 6 October 2006 but his stash of frozen abalone weighed in excess of 2 tons. It seems that he was in cahoots with the Rapitrade supply line and in particular accused nos 2 and 4, but little else is known of Mr Liebenberg's involvement in this matter and, in the circumstances, when compared to his co-accused, his moral blameworthiness is not high notwithstranding the large amount of abalone stored at Brackenfell.

CONSIDERATION OF AN APPROPRIATE SENTENCE GENERALLY

[164] Having dealt with the three legs of the Zinn triad, I move on to consider what, in general terms, an appropriate form of sentence in this

matter will be. From what I have already discussed, it is apparent that none of the accused is able position to offer to pay a fine in any meaningful amount, nor did any of their counsel suggest that they were in a position to do so.

[165] Counsel for the defence each submitted that all of the objectives of sentencing could be achieved in this case by imposing non-custodial sentences on their respective clients. In the result, counsel all urged the court to consider the imposition of sentences of correctional supervision in terms of s276(1)(h) of the CPA. As Terblanche op cit at 317 points out, correctional supervision is indeed a suitable and appreciable form of punishment which does not remove the offender from the community where he lives and works. It is intended to limit the freedom of the offender through the imposition of, inter alia, house detention and community based service. In terms of s276A such a sentence must be for a fixed period not exceeding 3 years.

[166] At the same time counsel for the defence all readily conceded that the offences involved here are of a serious nature. In normal circumstances, one would be cautious about imposing correctional

supervision for offences of such severity, particularly because of the limited duration thereof – as I have said for a maximum of 3 years.

[167] The Supreme Court of Appeal has repeatedly cautioned that in serious cases the personal circumstances of the offender will often recede into the background as the gravity of the offence and the interest of the public in relation to a suitably severe punishment come to the foreground. Retribution and deterrence (both aimed at the accused personally and towards the members of society in general) are certainly still very relevant considerations in our law.

[168] In S v Swart 2004(2) SACR 370 (SCA) at 378c, Nugent JA referred to cases such as S v Nkambule 1993 (1) SACR 136 (A), S v Mhlakaza and another 1997 (1) SACR 136 (A) and S v Di Blasi 1996 (1) SACR 1 (A), and went on to remark as follows:

> *"[12] What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each*

according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively small role."

[169] And in S v Vilakazi 2009 (1) SACR 552 (SCA) at 574 d the same Judge had the following to say:

> *"[58]… In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be… But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment.…"*

[170] In her address on sentence Ms van der Merwe referred the court to a number of earlier superior court decisions relating to sentences imposed in abalone poaching matters. I mention them only to give some idea of the parameters aginst which the gravity of the present offences must be judged. In S v Prinsloo en n ander 2002 (2) SACR 457 (C) at 462g – 463d, Thring J (with the concurrence of Potgieter AJ), in an appeal involving the possession of 50 abalone remarked that contraventions of the MLRA could no longer be regarded as trifling affairs. The court referred to a number of earlier decisions in this Division calling for heavier sentences in circumstances where "*our natural resources are being depleted daily."*

[171] In the unreported case of Kenneth Marthinus v Die Staat (Case no A570/2001, 12 April 2002), Van Reenen J (with HJ Erasmus AJ concurring) upheld a sentence imposed by the Magistrate in Hermanus of 6 months direct imprisonment for the possession and transportation of 160 abalone in the Gansbaai area.

[172] In S v Packereysammmy 2004(2) SACR 169 (SCA), the Supreme Court of Appeal, in an appeal which arose out of a conviction in the Caledon Magistrates' Court for possession of 6140 units of abalone,

found that a sentence of 18 months imprisonment was not excessive. And, in S v Van Dyk 2005(1) SA 35 (SCA) that court confirmed a sentence of 18 months imprisonment in terms of s276(1)(i) for possession of 378 abalone. All of those cases are more than 10 years old and relate to relatively small quantities of abalone in comparison to the present matter. Also, they do not take account of the significant increase in abalone poaching in the last 10 – 15 years, nor were the provisions of POCA applicable to those cases.

[173] The State further drew the court's attention to the matter of S v Roberts and others 2013 (1) SACR 369 (ECP). That matter was a POCA based abalone prosecution similar in nature to the present matter. It involved a criminal enterprise commercially exploiting abalone in the Port Elizabeth area and concerned a large tonnage of abalone. The court *a quo,* Chetty J, granted 3 of the 5 accused leave to appeal their sentences to the Full Bench of the Eastern Cape Division. That court (Beshe J with Lowe J and Brooks AJ concurring) upheld the sentences of Chetty J. The citation above is to the judgment of Chetty J in regard to the convictions, while his judgment on sentence and that of the Full Bench are unreported but copies thereof were handed up by the State.

[174] In his judgment on sentence handed down on 1 March 2013, Chetty J relied extensively on a research paper placed before him which emanated from the Dept of Ichthyology and Fisheries Science at Rhodes University and which dealt with *"the catastrophic results the relentless poaching of abalone in the Eastern Cape has had on the marine ecosystem."* Counsel for the State and defence were in agreement that this court too could have regard to that report in relation to sentence in this matter and I have done so. Suffice it to say that the evidence regarding environmental degradation which this court has heard is borne out in that paper. So too is the evidence regarding the massive upsurge in abalone poaching over the last 20 years or so.

[175] In seeking to draw some comparisons between the present matter and the Roberts case I note the following in respect of the latter.

175.1 The 10 charges related to possession of abalone for purposes of commercial exploitation over the period October 2005 to January 2009;

175.2 The charges involved 25914 units and a further 8130 kg (8.13 tons) of abalone, all of which appears to have been dried; and

175.3 The abalone was harvested in the Port Elizabeth area, dried there and transported by road through the Free State and Mpumalanga to Mozambique, from where it was exported to the Far East.

[176] The sentences imposed by Chetty J ranged from 18 months, 2 years and 8 years to 18 years direct imprisonment, while 2 of the accused received fully suspended prison sentences. The first accused, Peter Michael Roberts, who received a sentence of 18 years imprisonment was convicted of contravening both s2(1)(e) and (f) of POCA and had a previous conviction for possessing abalone for commercial purposes, as did the accused who was sentenced to 8 years imprisonment.

[177] Assuming similarly that the dried abalone in that matter represents 30% of the weight of shucked/frozen abalone, the tonnage of 8,13 dried product in that matter represents approxiamately 27 tons of frozen abalone. To that must be added the 25914 dried units which would have weighed around 777kg. Applying the 30% formula to that figure one finds that there were 2590kg or 2,5 tons of frozen abalone giving a grand total of around 30 tons of frozen abalone, or about 100 tons of live

abalone. In the result, the total mass of the abalone handled in the Roberts case over a period of 40 months pales into relative insignificance when compared with the more than 400 tons processed in this case in half that time.

[178] Clearly, this case is more serious than the Roberts matter. It involves a far bigger operation, handling larger volumes of abalone over a shorter period of time. It goes without saying that the monetary value of the abalone involved is higher too. Nevertheless, I believe that the judgment of Chetty J, (confirmed as it was on appeal by Beshe J) provides a useful basis for considering the appropriate sentences in this matter. In considering such sentences, I have regard also to the fact that POCA matters involving racketeering have, in the main, attracted heavy sentences from our courts. See, for example, in this regard S v Eyssen 2009 (1) SACR 406 (SCA), S v Dos Santos 2010 (2) SA 382 (SCA), S v Ndebele [2011] ZAGPJHC 42 (14 March 2011), Jwara v S [2015] ZASCA 33 (25 March 2015). The Legislature has determined that the FPE charges too merit fairly stiff sentences.

[179] At the end of the day, however, each case must be considered on its own merits – there being no blueprint for sentencing in

matters such as these. And, within the case itself, each accused must be considered individually, with due regard being had for his particular involvement in the affairs of the enterprise, his moral blameworthiness and for the existence (or absence) of a criminal record.

[180] There is one general mitigatory factor which must apply to all the accused. This case has hung like a dark cloud over their heads for more than 11 years. It took 8 years before the trial could commence for the various reasons I referred to earlier, some of which are attributable to the pre-trial stances and challenges adopted by some of the accused. And once it commenced, the hearing of the matter has stretched over a period of more than three and a half years. During that time the accused have been in court over protracted periods of time and their earning capacities, such as they now are, have been compromised accordingly. All have complained of the depressing effect which the uncertainty attached to this litigation has had on them. I believe that their sentences fall to be ameliorated somewhat in the light thereof.

[181] As I have said, counsel for the defence all asked for non-custodial sentences to be imposed on the accused. The State asked that all of the accused, save for no 5, be sentenced to direct imprisonment. In

the light of that which I have set out above I agree that, other than in respect of accused no 5, direct imprisonment is the only suitable sentence for crimes of this gravity.

[182] In respect of Accused no 1, Ms van der Merwe, when asked by the court whether a sentence of imprisonment might be imposed in terms of s276(1)(i) of the CPA, fairly conceded that such a sentence would not be without merit in light of the fact that Mr Miller's involvement with the enterprise was tempered by his mens rea having been found to be in the form of dolus eventualis and that his activity only involved the supply of pilchards for a period of about 12 months. He is also a person with a strong sense of public spiritedness.

[183] Finally, counsel for the defence asked the court to bear in mind that there might be a duplication of criminal conduct in that those who ran illegal FPE's also had to possess the abalone to achieve these ends, and that the POCA charges are based on the very existence of predicate offences. I agree with the priciples underlying those submissions. In my view, the cumulative effect of the sentences imposed can be addressed by applying the provisions of s280 of the CPA and ordering sentences to run concurrently where appropriate.

RULING ON THE SECTION 204 WITNESSES

[184] The State relied heavily for the convictions in this case on witnesses warned in terms of s204 of the CPA. That section warrants immunity from prosecution for witnesses who answer potentially self incriminatory questions frankly and honestly. During argument the court indicated to the prosecution some reservations about the manner in which Adam Wildschutt and Salvin Africa, the State's key s204 witness, answered questions. They were not the best of witnesses in my view but at the end of the day the court is satisfied that all of the s204 witnesses are entitled to their indemnities. The court was informed from the bar that the witness David le Roux has since died and accordingly his discharge is no longer necessary.

[185] In the result it is hereby ordered, in terms of s204(2)(b) of the Criminal Procedure Act, that the following State witnesses are discharged from prosecution in relation to this matter-

- Salvin Africa
- Adam Wildschutt

- Lydia Wildschutt
- Jacobus Botha
- Percival Clack
- Harold Bauchop.

THE SENTENCES WHICH ARE IMPOSED ARE AS FOLLOWS

[186] **ACCUSED NO 1 , PHILLIP JAMES MILLER**

COUNT 2

(Contravening s2(1)(e) of the Prevention of Organised Crime Act, 121 of 1998 – participation in the affairs of an enterprise which conducts its affairs through a pattern of racketeering activity)

4 years imprisonment in terms of s276(1)(i) of the Criminal Procedure Act, 51 of 1977.

COUNTS 15, 16, 17, 19, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31 and 32

(Contravening Reg 39(1)(a) of the Regulations as promulgated under Government Notice R1111 and published in Government Gazette 19205 of 2 September 1998 – unlawful possession of abalone for commercial purposes)

6 months imprisonment in terms of s276(1)(i) of the Criminal Procedure Act on each count all of which is suspended for 5 years on condition that the accused is

not convicted of any contravention of the Prevention of Organised Crime Act, 121 of 1998, or any offence arising from the provisions of the Marine Living Resources Act, 18 of 1998, and committed during the period of suspension.

[187] **ACCUSED NO 2 , WILLIE JACOBUS VAN RENSBURG**

COUNT 2

(Contravening s2 (1) (e) of the Prevention of Organised Crime Act, 121 of 1998 - participation in the affairs of an enterprise which conducts its affairs through a pattern of racketeering activity)

8 years imprisonment

COUNTS 34, 35, 38, 39, 41, 42, 43, 48, 105, 107 and 115

(Contravening Regulation 39(1)(a) of the Regulations as promulgated under Government Notice R1111 and published in Government Gazette 19205 of 2 September 1998 – unlawful possession of abalone for commercial purposes)

8 months imprisonment on each count

COUNT 114

(Contravening s18(1) of the Marine Living Resources Act, 18 of 1998 – unlawfully operating an unlicensed fish procecessing establishment)

4 years imprisonment.

The total period of imprisonment therefore is 19 years and 4 months.

In terms of s280 of the Criminal Procedure Act, 51 of 1977, it is ordered that each of the sentences on counts 34, 35, 38, 39, 41, 42, 43, 48, 105, 107, 114 and 115 is to run concurrently with the sentence on count 2.

The effective sentence is therefore 8 years imprisonment.

[188] **ACCUSED NO 3, ADRIAAN GEVAN WILDSCHUTT**

COUNT 2

(Contravening s2(1)(e) of the Prevention of Organised Crime Act, 121 of 1998 – participation in the affairs of an enterprise which conducts its affairs through a pattern of racketeering activity)

15 years imprisonment

COUNTS 46, 47, 50, 51,100, 102, 104, 106, 108 and 109

(Contravening Regulation 39(1)(a) of the Regulations as promulgated under Government Notice R1111 and published in Government Gazette 19205 of 2 September 1998 – unlawful possession of abalone for commercial purposes)

8 months imprisonment on each count

COUNTS 99 and 101

(Contravening s18 (1) of the Marine Living Resources Act, 18 of 1998 – unlawfully operating an unlicensed fish

procecessing establishment, with the 2 counts being taken together for the purposes of sentence)

5 years imprisonment

COUNT 103

(Contravening s18 (1) of the Marine Living Resources Act, 18 of 1998 – unlawfully operating an unlicensed fish procecessing establishment)

5 years imprisonment

The total period of imprisonment therefore is 31 years and 8 months.

In terms of s280 of the Criminal Procedure Act, 51 of 1977, it is ordered that each of the sentences on counts 46, 47, 50, 51, 99, 100, 101, 102, 103, 104, 106, 108 and 109 is to run concurrently with the sentence on count 2.

The effective sentence is therefore 15 years imprisonment.

[189] **ACCUSED NO 4, TONY PETER DU TOIT**

COUNT 2

(Contravening s2(1)(e) of the Prevention of Organised Crime Act, 121 of 1998 – participation in the affairs of an enterprise which conducts its affairs through a pattern of racketeering activity)

15 years imprisonment

COUNTS 14, 15, 16, 17, 19, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 38, 39, 41, 42, 43, 48, 105, 107, 115 and 116

(Contravening Regulation 39(1)(a) of the Regulations as promulgated under Government Notice R1111 and published in Government Gazette 19205 of 2 September 1998 – unlawful possession of abalone for commercial purposes)

6 months imprisonment on each count

COUNT 114

(Contravening s18(1) of the Marine Living Resources Act, 18 of 1998 – unlawfully operating an unlicensed fish procecessing establishment)

5 years imprisonment

The total period of imprisonment therefore is 34 years.

In terms of s280 of the Criminal Procedure Act, 51 of 1977, it is ordered that each of the sentences on counts 14, 15, 16, 17, 19, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 39, 41, 42, 43, 48, 105, 107, 114, 115 and 116 is to run concurrently with the sentence on count 2.

The effective sentence is therefore 15 years imprisonment.

[190] **ACCUSED NO 5, JOHANNES EMIL LIEBENBERG**

COUNT 116

(Contravening Regulation 39(1)(a) of the Regulations as promulgated under Government Notice R1111 and published in Government Gazette 19205 of 2 September 1998 – unlawful possession of abalone for commercial purposes)

1 year imprisonment fully suspended for 5 years on condition that the accused is not convicted of any contravention arising from the provisions of the Marine Living Resources Act, 18 of 1998 and committed during the period of suspension.

GAMBLE, J