



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No : 746/2007

SHAMIEL EYSEN

Appellant

and

THE STATE

Respondent

Neutral citation: *Eyssen v S* (746/2007) [2008] ZASCA 97 (17 September 2008).

Coram: STREICHER, MTHIYANE, CLOETE, HEHER JJA and
KGOMO AJA

Heard: 21 AUGUST 2008

Delivered: 17 SEPTEMBER 2008

Corrected:

Summary: **Prevention of Organised Crime Act 121 of 1998:** interpretation
of ss 2(1)(e) and (f) (racketeering activities).

ORDER

On appeal from: High Court, Cape Town (Veldhuizen J sitting as court of first instance)

The appeal succeeds. The convictions on counts 1 and 2 and the sentences imposed on those counts are set aside. The sentences on counts 4, 29 and 46 are ordered to run concurrently with the sentence imposed on count 5. The effective period of imprisonment is therefore 15 years.

JUDGMENT

CLOETE JA (STREICHER, MTHIYANE, HEHER JJA and KGOMO AJA concurring):

[1] The appellant was the first of 18 accused charged in the Cape High Court with 75 counts alleging statutory contraventions as well as common law crimes. It was the State case that the appellant was the leader of a gang called the Fancy Boys which operated out of premises in Salt River and which during the years 2001 to 2003 committed a number of offences involving primarily housebreaking and robbery in the Cape Peninsula.

[2] The appellant was convicted by the court a quo (Veldhuizen J and assessors) of the following offences:

- (a) two relating to racketeering activities, namely, contraventions of ss 2(1) (e) and (f) of the Prevention of Organised Crime Act¹ ('the Act') (counts 1 and 2), for which he was sentenced to 20 years' imprisonment on both taken together;
- (b) one relating to criminal gang activities in contravention of s 9 of the Act (count 4), for which he was sentenced to three years' imprisonment;
- (c) two of housebreaking with intent to rob and robbery with aggravating circumstances (counts 5 and 46) and one of robbery with aggravating circumstances (count 29), for each of which he was sentenced to 15 years' imprisonment.

All of the other sentences were ordered to run concurrently with the sentence imposed for the racketeering activities so the effective period of imprisonment was 20 years.

¹ 121 of 1998.

[3] Leave to appeal against the convictions on all counts was refused by the trial judge but granted by this court in respect of the two counts relating to racketeering activities only. I shall first examine the provisions of the sections which the appellant was found to have contravened, and then consider the evidence.

[4] The relevant part of s 2(1) reads as follows (I shall put in inverted commas words or phrases which are defined in s 1):

'2(1) Any person who —

...

(e) whilst managing or employed by or associated with any "enterprise", conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a "pattern of racketeering activity";

(f) manages the operation or activities of an "enterprise" and who "knows" or "ought reasonably to have known" that any person whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a "pattern of racketeering activity";

...

within the Republic or elsewhere, shall be guilty of an offence.'

[5] The essence of the offence in subsec (e) is that the accused must conduct (or participate in the conduct) of an enterprise's affairs. Actual participation is required (although it may be direct or indirect). In that respect the subsection differs from subsec (f), the essence of which is that the accused must know (or ought reasonably to have known) that another person did so. Knowledge, not participation, is required. On the other hand, subsec (e) is wider than subsec (f) in that subsec (e) covers a person who was managing, or employed by, or associated with the enterprise, whereas subsec (f) is limited to a person who manages the operations or activities of an enterprise. 'Manage' is not defined and therefore bears its ordinary meaning, which in this context is: '1 be in charge of; run. 2 supervise (staff). 3 be the manager of (a sports team or a performer).'²

² The Concise Oxford English Dictionary (10th ed) sv 'manage'.

[6] The word 'enterprise' is defined in s 1 as follows:

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

It is difficult to envisage a wider definition. A single person is covered. So it seems is every other type of connection between persons known to the law or existing in fact; those which the Legislature has not included specifically would be incorporated by the introductory word 'includes'. Taking a group of individuals associated in fact, which is the relevant part of the definition for the purposes of this appeal, it seems to me that the association would at least have to be conscious; that there would have to be a common factor or purpose identifiable in the association; that the association would have to be ongoing; and that the members would have to function as a continuing unit. There is no requirement that the enterprise be legal, or that it be illegal. It is the pattern of racketeering activity, through which the accused must participate in the affairs of the enterprise, that brings in the illegal element; and the concepts of 'enterprise' and 'pattern of racketeering activity' are discrete. Proof of the pattern may establish proof of the enterprise, but this will not inevitably be the case.³

[7] It is a requirement of the subsections in question that the accused (in subsec (e)) or the other person (in subsec (f)) must participate in the enterprise's affairs. It will therefore be important to identify what those affairs are. It will also be important for the State to establish that any particular criminal act relied upon, constituted participation in such affairs. (Para 14 below illustrates the point.) The participation may be direct, or indirect.

[8] It is a further requirement that the participation must be through a 'pattern of racketeering activity'. That concept is defined as follows:

' "pattern of racketeering activity" means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years

³ *United States v Turkette*, 452 US 576 (1981) at 583.

(excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1.'

The word 'planned' cannot be read *eiusdem generis* with 'ongoing, continuous or repeated' and accordingly qualifies all three. The relevant meaning of 'pattern' is given in the Oxford English Dictionary⁴ as 'an order or form discernible in things, actions, ideas, situations, etc. Frequently with *of as pattern of behaviour = behaviour pattern*' In my view neither unrelated instances of proscribed behaviour nor an accidental coincidence between them constitute a 'pattern' and the word 'planned' makes this clear.

[9] The participation must be by way of ongoing, continuous or repeated participation or involvement. The use of 'involvement' as well as the word 'participation' widens the ambit of the definition. So does the use of the words 'ongoing, continuous or repeated'. Although similar in meaning, there are nuances of difference. 'Ongoing' conveys the idea of 'not as yet completed'. 'Continuous' (as opposed to 'continual')⁵ means uninterrupted in time or sequence. 'Repeated' means recurring.

[10] Some limitation is introduced into the definition by the requirement that the participation or involvement must be in any Schedule 1 offence. The limitation is, however, not substantial. Schedule 1 lists a considerable number of offences, both statutory and common law, and includes (as item 33): 'Any offence the punishment wherefor may be a period of imprisonment exceeding one year without the option of a fine.'

[11] For the purposes of this appeal it is not necessary to interpret the latter part of the definition of 'pattern of racketeering activity' commencing with the

⁴ 2nd ed sv 'pattern', meaning 8(c).

⁵ Which means 'constantly or frequently occurring': Concise OED (revised 10th ed) sv 'continual'.

words 'and includes' and I accordingly refrain from doing so. It is also not necessary to deal with the provisions of ss 1(2) and (3), which deal respectively with when a person has knowledge of a fact, and when a person ought reasonably to have known (or suspected) a fact, for the purposes of the Act.

[12] I now turn to the facts. The cornerstone of the State case was the evidence of Mr Mishal Donough. He was an accomplice who was warned in terms of s 204 of the Criminal Procedure Act.⁶ The trial court appreciated the dangers of accepting his evidence and concluded that it could not safely be relied upon unless corroborated, which, the court correctly appreciated, meant corroborated by evidence implicating an accused. Corroboration is of course not the only safeguard which can properly be used to reduce the danger of convicting an innocent person, but the trial court was amply justified in its approach as the representative of the State on appeal correctly conceded. Donough was a particularly dangerous witness. He subjectively appreciated this; he said:

'If I wanted to I could have put any of these accused at any scene'

He had, on his own version, been involved in more than 30 robberies in addition to the 15 to which he testified over a period of about two years. He had entered into a plea bargain agreement with the State, the relevant paragraph of which reads:

'The parties further agree that a just and fair sentence for the accused will be the following:

1. That the accused be sentenced to a fine of R15 000 (fifteen thousand rand) or 36 (thirty six) months' imprisonment, of which R7 500 (seven thousand five hundred rand) or 18 (eighteen) months is suspended for a period of 5 (five) years on condition that he is not convicted of theft, attempted theft or contravening s 36 or s 37 of the General Law Amendment Act 62 of 1955 which offence is committed within the period of suspension.
2. The parties agree that the accused will assist the South African Police Services to bring known perpetrators known to him to book, more specifically, Shamiel Eyssen.

⁶ 51 of 1977.

3. The parties also agree that the accused will testify for the State in the upcoming trials against these perpetrators.'

Donough did not have the R7 500 and was obliged to borrow the money from his girlfriend. Had he breached the terms of his plea bargain agreement, he would probably not have been able to avoid jail. He said that if he were to go to jail, it was likely that he would be murdered there by members of the Fancy Boys gang and he conceded that this had played 'a big, big part' in his decision to enter into the plea bargain agreement. It could therefore be expected that Donough would go to almost any lengths to co-operate with the State, particularly in ensuring that the appellant be convicted.

[13] The State case on both racketeering charges was that the 'enterprise' was the Fancy Boys gang, and that the 'enterprise's affairs' comprised robbery, particularly at private homes. The acceptable evidence reveals very little about the gang and its members and suggests that there was no organisation, structure or hierarchy. It may have been no more than a loose association of individuals some of whom sporadically joined with others, who may or may not have been members of the gang, to commit crimes not for the benefit of the gang, but to enrich only themselves. If this is so then on the State's submissions as to the meaning of 'enterprise', which were based on decisions in the United States of America,⁷ the Fancy Boys gang was not an enterprise. It is not necessary, however, to decide the point as there are other fatal flaws in the State case. It will suffice to highlight just one in each of the counts on appeal.

[14] It was the State case on the count based on s 2(1)(e) that the pattern of racketeering activity, through which the appellant participated in the conduct of the affairs of the Fancy Boys gang, consisted in his commission of the common law offences with which he was charged. Direct participation was relied on. The problem for the State is, as submitted on behalf of the appellant, that the

⁷ Particularly *United States v Turkette*, above n 3 and *United States v Bledsoe* 674 F.2d 647 (1982) especially at 665. The latter requires 'a common or shared purpose which animates those associated with it', and that the enterprise functions as a continuing unit, as well as 'an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity' such as the command system of a Mafia family or the hierarchy, planning and division of profits within a prostitution ring.

appellant was acquitted on all but three of those charges and it was not shown that the three on which he was convicted, were part of the affairs of the gang. Donough said that the Fancy Boys were involved in armed robbery and 'mainly done house break-ins'. The three common law crimes of which the appellant was convicted fit this description. But the evidence of the victims and eyewitnesses who testified, established that a number of persons were involved in the commission of each. On one, only the appellant was convicted (count 5). The appellant and accused 12, who was a Fancy Boy, were convicted on another (count 29). On the third (count 46), the appellant and accused 4, who was not a Fancy Boy, were convicted. In all three cases neither the identity of the other participants, nor their membership of the Fancy Boys gang, was established. It was therefore in my view not proved that the robberies of which the appellant was convicted were part of the affairs of the Fancy Boys gang. It follows that the conviction of contravening s 2(1)(e) of the Act must be set aside.

[15] The representative for the State on appeal made several submissions as to why the appellant was correctly found by the trial court to have managed the operations or activities of the Fancy Boys gang and was therefore guilty of contravening s 2(1)(f) of the Act. The first submission was that the gang would get together at the appellant's house prior to each robbery, where the appellant would give instructions about the robbery as well as provide firearms and vehicles for use in the robbery. But it was not Donough's evidence that the appellant would give instructions about each robbery. His evidence in chief was: '[O]n a certain day, was a certain house targeted or a certain area like Camps Bay or Newlands, or how did it work? – Well, how it worked was, random areas and random houses. If we saw a front door open we went in.'

In cross-examination he admitted that in respect of nine counts of housebreaking with intent to rob and robbery with aggravating circumstances⁸ the appellant had had nothing to do with the planning. In the event, the appellant was convicted of having committed three robberies which, I have

⁸ Counts 33, 34, 35, 37, 38, 39, 41, 44 and 53.

already found, were not shown to be part of the affairs of the Fancy Boys gang. Donough did indeed say that the appellant provided guns and vehicles for the Fancy Boys to commit robberies, but this evidence was not corroborated and it accordingly falls to be disregarded.

[16] It was submitted that according to Donough, the premises rented by the appellant at 45 Coleridge Road in Salt River, after he moved from his previous address, became the stronghold of the Fancy Boys gang. But again, that was not Donough's evidence. What he said in the passage relied on by the representative for the State was:

'Accused No. 1 then made arrangements with the other gang leader who I know as Madat American. He made arrangements to rent a house at 45 Coleridge Road, Salt River, for the purpose of selling drugs. This house then became the new stronghold, or as I know it, pos.

It was known [as] the pos? – Well, a drug house in gangster terms is called a pos.'

If this passage is properly analysed, Donough's evidence was that the house became the new stronghold for selling drugs, not the new stronghold for the Fancy Boys gang. And even if it be accepted that the appellant managed a drug dealing operation at the house at 45 Coleridge Road, it was not established that this was part of the operation or activities of the gang, as the representative of the State correctly conceded on appeal.

[17] It was further submitted that the appellant was unemployed, but still able to amass some wealth as he owned a house, was able to rent another house for between R3 500 and R4 500 per month and had at least R25 000 in cash which was found at his mother's house. But all of this could be in consequence of his activities as a drug dealer. Nor does the fact that according to Inspector Kotze the appellant was the person who assumed charge when the police executed search warrants at 45 Coleridge Road, take the matter further: the appellant was the lessee of the premises where the drug dealing operation was being conducted and (on the State case) he managed that operation. He could therefore be expected to have taken charge when the premises were searched

by the police for those reasons, not because he was managing the operation or affairs of the Fancy Boys gang.

[18] Inspector Kotze also testified that when some gang members were arrested, the appellant paid their bail and that when the appellant's co-accused were arrested, they refused to sign warning statements unless the appellant gave them permission to do so. But not all of the accused, and not all of those whose bail was paid, were members of the Fancy Boys gang; and the fact that some of them were, is not a sufficient basis to find that the appellant managed the operation or activities of the gang.

[19] The trial court, in finding that the appellant managed the operation of the gang, said that he gave instructions at the house at 45 Coleridge Road to members of the gang before the robberies which formed the subject matter of two of the counts on which he was convicted (5 and 46), were committed. So far as the one (count 5) is concerned, this was a factual misdirection. So far as the other (count 46) is concerned, assuming that the finding of the trial court is correct, the robbery in question was not shown to form part of the operation or activities of the gang and if the appellant did indeed give instructions to those involved in the robbery, this does not support a finding that in so doing he managed the operation or activities of the gang.

[20] There was no cross-appeal by the State on sentence, nor any suggestion that if the convictions and sentences imposed on the racketeering counts were set aside, this court should increase the effective sentence beyond 15 years.

[21] The appeal succeeds. The convictions on counts 1 and 2 and the sentences imposed on those counts are set aside. The sentences on counts 4,

29 and 46 are ordered to run concurrently with the sentence imposed on count 5. The effective period of imprisonment is therefore 15 years.

T D CLOETE
JUDGE OF APPEAL

Appearances:

For Appellant: G Smith

Instructed by
Lovius-Block Attorneys Bloemfontein

For Respondent: P van Wyk

Instructed by
The Director of Public Prosecutions Cape Town
The Director of Public Prosecutions Bloemfontein