IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

CASE NO. 541/2019

REPORTABLE

In the matter between:

JABULANI JOHN NDLOVU	**1ST APPELLANT**
FORGET NDLOVU	**2ND APPELLANT**
SIBUSISO SANI NDLOVU	**3RD APPELLANT**

and

THE STATE	**RESPONDENT**

FULL COURT APPEAL JUDGMENT

D Van Zyl DJP:

Introduction.

[1] This appeal raises two issues: (1) whether the trial court, acting in terms of section 35(5) of the Constitution, correctly allowed physical evidence found as a

result of the unlawful search of a premises to become part of the evidential material placed before it by the state; and (2) whether or not the cumulative effect of the sentences imposed by the trial court rendered the sentences shockingly disproportionate.

[2] The appellants were charged in the Grahamstown High Court with various charges arising from ten incidents of rhino poaching that occurred over a period of three years at various farms and nature reserves in the districts of Albany, Jansenville, Graaff Reinet and Cradock in the Eastern Cape. Each of these ten incidents gave rise to five counts. The trial proceeded before Pickering J, who convicted the appellants on almost all the charges. They were sentenced to lengthy periods of imprisonment, resulting in an effective sentence of 25 years. The appellants unsuccessfully applied for leave to appeal against their convictions and the sentences imposed. They were granted leave on petition on the two aforementioned limited and narrowly defined grounds.[1]

[3] The first issue arises from a search that was conducted by the police in the presence of the appellants during the night of 17 June 2016, at chalet number 8, at the Makana Resort and Caravan Park in the town of Makhanda (formerly Grahamstown). The search resulted in the seizure of a number of articles, and in

[1] "3.1 On conviction: whether the trial court correctly admitted the evidence obtained as a result of the unlawful search of the premises.

3.2 On sentence: whether the cumulative effect of the premises of the sentence of 25 years' was shockingly inappropriate."

the arrest of the appellants. The following items were found in the chalet:

(a) A freshly removed rhino horn;

(b) A tranquiliser dart gun;

(c) Five tranquiliser darts;

(d) Etorphine (M99) tranquiliser;

(e) A yellow bow saw;

(f) Rounds of .22 blank ammunition;

(g) Two knives;

(h) Side cutter pliers;

(i) A cordless drill; and

(j) Six cellular phone handsets with sim cards and one loose sim card.

[4] The relevance and the importance of these items in the determination of the issues raised in the trial in relation to the guilt or otherwise of the appellants, is beyond question. The state proved, by way of forensic evidence, that the tranquiliser darts, recovered from some of the scenes of rhino poaching, were fired from the tranquiliser gun found in the chalet. The relevance of the yellow bow saw is borne out by the evidence that a flake of yellow paint was collected by a forensic field officer at the scene of a rhino poaching incident in Cradock. It

was forensically determined that the flake of paint was physically and chemically indistinguishable from the yellow paint on the saw handle, and that the flake of paint could have originated from the saw. Importantly, it was found that the flake of paint fitted a paint chip on the saw handle.

[5] Further, the poaching of the white rhinoceros known as Campbell in the Albany District, on the farm Bucklands, coincided with the search of, and the finding of the articles in the chalet. The animal was darted with a tranquiliser gun and its horn removed. The injuries caused by the removal of the rhino's horn were so severe that they caused its death. It was admitted by the appellants at the trial that the horn of this animal was removed with a saw, and that the DNA material of the animal was found on the yellow bow saw that was found in the possession of the accused in the chalet.

[6] The items found in the chalet were further consistent with the *modus operandi* adopted in all the incidents of rhino poaching with which the appellants were charged. The undisputed evidence was that in all the incidents none of the animals were shot with a firearm. They were all darted with a tranquiliser. Apart from the tranquiliser gun, a number of unused tranquiliser darts and several vials of tranquilising fluid were found in the chalet. The accepted evidence was that only veterinarians with the required permit may purchase tranquilising fluid.

[7] The accepted evidence was further that the purpose of the knives found in the chalet was to clean the grooves of the harvested horns in order to stop the bleeding following their removal from the animals. The information obtained from the cellphones and the sim cards found in the chalet in turn showed that some of the cellphone numbers were used in the areas, and at times coinciding with the incidents of rhino poaching. The appellants admitted at the trial that each one of them had used these cellphones and sim cards.

[8] At the commencement of the trial the appellants challenged the admissibility of the evidence pertaining to the seizure of the aforesaid items found in the chalet. The objection was that the search of the chalet was unlawful and in breach of the appellants' constitutional rights. The trial court proceeded to conduct an admissibility hearing (a trial within-a-trial) at which the police officials who were instrumental in the search of the chalet and the discovery of the items, testified. The appellants in turn elected not to testify or to call any witnesses.

The evidence.

[9] The state presented the evidence of three witnesses in the admissibility hearing: Captain Viljoen who was the Commander of the Stock Theft and Endangered Species Unit, and the provincial coordinator for the investigation of rhino poaching in the Eastern Cape; Brigadier McLaren, who was the Provincial Head of Detectives in the Eastern Cape at the time; and Warrant Officer Vos, who was

a member of Viljoen's Unit. In summary, their evidence was that Viljoen's Unit was investigating a number of incidents of rhino poaching in the Eastern Cape. Viljoen testified that the *modus operandi* of these incidents were similar to that of incidents in other Provinces: Most of the incidents occurred during full moon; the tracks of two persons were found at the various scenes; a dart gun was used loaded with a specific dart called a Pneu dart; and the horns of the animals were removed in a specific manner with a saw.

[10] What preceded the search of the chalet in Makhanda was that Viljoen had information that a so-called Ndlovu gang was involved in the poaching of rhinos, and the first appellant, who was resident in Port Elizabeth, was a suspect. As a result, the first appellant's house was kept under surveillance. On the morning of 16 June 2016 Viljoen was notified that two unknown men who were driving in a white Audi motor vehicle had fetched the first appellant from his home. It was the period of the full moon, and Viljoen then activated, what he called, Operation Full Moon. He travelled to Makhanda to assist Vos with patrol duties. The reason for proceeding to Makhanda was that there had been on earlier incident of rhino poaching in that area. As it was the *modus operandi* of the poachers to target a specific area twice before moving elsewhere, he suspected that the suspects may be on their way to the Makhanda area.

[11] On his arrival in Makhanda, Vos informed Viljoen that a motor vehicle matching the description of the one in which the first appellant was fetched in Port Elizabeth was seen at the Makana Resort and Caravan Park on the outskirts of the town. Viljoen went to the resort and established from the gate register that

an Audi motor vehicle with a Cape Town registration number had entered the resort, and that the three occupants were booked into chalet number 8. The guard at the gate further informed Viljoen that the vehicle and its occupants had left the resort earlier. Viljoen then drove out onto one of the main roads in the area. His suspicion was that two of the persons who had been in the vehicle may have been dropped off for purposes of poaching, as that would have been consistent with the *modus operandi* of the poachers in previous incidents. He did not see the vehicle.

[12] The next day, 17 June, while travelling with Vos, Viljoen saw the Audi motor vehicle parked inside the resort. They continued, during the day, to keep a lookout for the vehicle. Later in the day he saw the vehicle parked near a taxi rank. It only had one occupant. He made a note of the vehicle's registration number, and upon making enquiries, established that it belonged to a car hire company. After the vehicle had left the taxi rank, Viljoen contacted the police covert surveillance team for assistance. He gave the team leader a description of the vehicle together with a brief to keep a lookout for the vehicle, and to report its movements to him.

[13] Surveillance vehicles were placed in and around the town of Makhanda. During the early evening, Viljoen received a report from the surveillance team leader that the Audi had been seen driving at a high speed in the direction of Fort Brown, and that it had executed a U-turn in the same area where a recent rhino poaching incident had occurred. Apart from the erratic manner in which the vehicle was driven, further suspicion was raised by the fact that the area was

uninhabited. Viljoen suspected that the driver of the vehicle had gone there to fetch the other two persons, whom he had dropped off the previous night. His suspicion was strengthened by the fact that whilst the vehicle had left the resort the previous night with three occupants, only one person returned. Moreover, when Viljoen saw the vehicle again earlier in the day, it was occupied by only the driver.

[14] Viljoen requested the assistance from standby detectives in Makhanda and awaited the arrival of McLaren who was to join them from East London. Fearing that the motor vehicle may proceed to Port Elizabeth on its return from Fort Brown, Viljoen decided to keep surveillance of the national road that bypasses Makhanda. Viljoen was next informed that the vehicle was seen at a fast food outlet in Makhanda and that it now, once more, had three occupants. He drove to the town. He passed the Audi vehicle which entered the resort. Viljoen then contacted Vos and instructed him to proceed to the resort in order to check on the vehicle. Vos reported to Viljoen that he had seen persons at the vehicle who were in the process of offloading something from its boot. Viljoen suspected that they were offloading their luggage and were likely to leave anything incriminating out of sight in the boot. He accordingly instructed Vos to conduct a search of the vehicle, expecting Vos to do so with the consent of the occupants.

[15] Viljoen then proceeded with McLaren to the resort, the latter having joined him by that stage. On their arrival at the chalet McLaren exited the vehicle. According to McLaren, while he was approaching the chalet, the door of the chalet opened unexpectedly. Vos, whom he found present in the vicinity of the chalet, was the

first to enter. He followed Vos into the chalet. Vos in his evidence explained that after he had reported to Viljoen what he had seen at the chalet, he, on the instructions of Viljoen, returned to the scene to search the vehicle and the persons involved. The vehicle was still outside the chalet, its boot was closed and there was no-one outside. He then decided to enter the chalet. As he was proceeding towards it, the door suddenly opened and the third appellant emerged from the chalet. He was able to see through the open door. He observed two other men on the inside, and there was a backpack on the floor with an object protruding from a black refuse bag. He decided to enter the chalet as he feared that if there were any exhibits in the chalet, they may be destroyed. Although Vos testified that it seemed to him that the occupants had committed an offence, or that they were going to commit an offence, he conceded in cross-examination that he did not have sufficient evidence at the time that he entered the chalet, to form a reasonable suspicion that a crime was committed.

[16] Viljoen followed Vos and McLaren into the chalet. McLaren testified that they almost simultaneously arrived at the chalet when the top part of the chalet door suddenly and unexpectedly opened. Matters then developed very quickly. The evidence was that what followed was in reaction to the unexpected opening of the chalet door, and was motivated by a fear that evidence might be destroyed should they not react immediately, and by a concern for their own safety.

[17] Both Viljoen and McLaren testified that before proceeding to the resort, they had already formed a reasonable suspicion, based on the information available to

them, that the occupants of the Audi motor vehicle were involved in the poaching of rhinos, and that items associated with this unlawful conduct would be found in the vehicle. Viljoen's evidence was that his sole intention was to search the vehicle, as he believed that they would find evidence of poaching in it. He testified that while he had sufficient information to obtain a search warrant, he believed that the delay in obtaining one would have defeated the object of the search of the vehicle.

[18] The trial court dealt extensively with the criticism levelled at the evidence of the police officials in its judgment in the admissibility hearing. In doing so, the learned judge did not ignore the deficiencies in the evidence of the police witnesses. He considered what was contended to have been inconsistent in Viljoen's evidence, and found that that sole contradiction relied upon was not sufficient to cast doubt on the truthfulness and the reliability of his evidence as a whole. The learned judge was alive to deficiencies in McLaren's recall of events, and traversed contradictions and improbabilities in the evidence of Vos.

[19] The trial court found both Viljoen and McLaren to be honest witnesses who made a good impression. It rejected any suggestion that their evidence may have been manipulated. The court, in considering the uncontested evidence as a whole, gave due consideration to the overall probabilities, and concluded that Vos proceeded to the Makana resort on the instructions of Viljoen, which instructions did not include the entering of the chalet, but rather to search the motor vehicle

for evidence of rhino poaching. The court found that the decision made by Vos to enter the chalet was of his own doing, and was a decision taken on the spur of the moment. The court concluded that the state witnesses had not made a prior decision to deliberately enter the chalet in violation of the constitutional rights of the appellants, and ruled that the evidence of the search and seizure which followed after the police officers had entered the chalet, was admissible.

[20] At the end of the trial the judge, quite properly reconsidered his earlier admissibility findings in light of the further evidence which had been placed before him in the main trial, particularly that of Viljoen. A ruling on the admissibility of evidence in a trial within a trial is interlocutory and may be reconsidered or revised at any stage[2]. In this matter the trial court did reconsider the evidence, and again extensively dealt with the criticism directed at Viljoen's evidence, including the suggestion his version was a fabrication which ought to be rejected as false. The court found that sufficient corroboration existed for Viljoen's evidence so as to justify rejecting the contention that his evidence should be rejected because he was an untruthful witness, or because he had colluded with other witnesses to give a false account of events.

[21] A few aspects have emerged from the uncontested evidence of the police witnesses in the context of the enquiry in relation to the admission of the evidence. Firstly, on the accepted evidence the police had very little information regarding the involvement of any of the three appellants in the poaching of rhino

[2] S v M 2003 (1) SA 341 (SCA) at para [30].

before the events that played itself out in Makhanda. The information was limited to the first appellant, as a suspect, and the monitoring of his movements, as well as reliable knowledge regarding the *modus operandi* followed by poachers in other incidents of poaching. This led Viljoen to suspect that the Audi vehicle might be heading for the Makhanda area. Secondly, the focus of the investigation was the motor vehicle, and the fact that it had three occupants. This too was reasonably based on knowledge of a particular method used whereby two persons were required to actively remove the horn, and a third person to transport the active poachers and their loot to and from the remote localities were rhinos were known to be. In these circumstances, the focus of the investigation and the gathering of information over the two day period was to track the movements of the motor vehicle.

[22] Thirdly, the fact that rhinos are kept on farms covering vast areas in remote parts in this province made the detection of the commission of this type of crime, for reasons which are obvious, very difficult. Lastly, the locating of the incriminating items in the presence of the appellants who were staying in the same chalet, effectively meant that they were caught, in the words of their counsel, *in flagrante delicto*. The articles found in their possession provided compelling and conclusive evidence of their involvement in the poaching of the rhino, Campbell. The articles further provided derivative evidence that resulted in the conviction of the appellants on charges relating to other previous incidents of poaching in the province.

The findings of the trial court.

[23] On the evidence placed before it, the trial court made two findings. Firstly, it concluded that the entering and the search of the chalet, without a search warrant, was unlawful and in violation of the constitutional rights of the appellants. The entering of a premises, the search for, and the seizure of property connected with an offence constitutes an infringement of the rights of the individual to privacy. In terms of section 36 of the Constitution this right is subject to reasonable and justifiable limitation. Sections 20 to 22 of the Criminal Procedure Act[3] (CPA), constitutes such a limitation. The articles found in the chalet were concerned in or were on reasonable grounds believed to have been concerned in the commission or suspected commission of an offence, and afforded evidence of the commission or suspected commission of an offence as envisaged in section 20 of the CPA, and could, in the premises have been lawfully seized. The lawful seizure of such articles is dealt with in sections 21 and 22. By virtue of the provisions of section 21, a judicial officer may issue a search warrant if there are reasonable grounds for believing that an article referred to in section 20 is in the possession of, or under the control of, or on the person of, or on any premises within his area of jurisdiction. Section 22 makes the search and seizure without a warrant lawful if the person concerned consents to the search for and seizure of the article, or where the police official, on reasonable grounds, believes that a warrant would have been issued to him if he had applied for one under section 21, and that the delay in obtaining such warrant would defeat the object of the search.

[3] 51 of 1977.

[24] The finding of the trial court was that the actions of the police were not authorised by the provisions of the CPA. It is common cause that the entering and the search of the chalet was without consent or a search warrant. The court found that the first police official to have entered the chalet on his own evidence had not entertained the suspicion as envisaged in section 22. The trial court evidently proceeded from the premise that the search commenced when Vos entered the chalet. Section 22, on a plain reading thereof, requires the official who performs the action authorised thereby, to form the required suspicion. The trial court, correctly in my view, found that the fact that the police officials who subsequently entered the chalet may have entertained the required suspicion, could not serve to undo the unlawfulness of the actions of the official who first entered the chalet.

[25] The learned judge then proceeded in terms of section 35(5) of the Constitution to consider the admission into evidence of the fact of the finding of the items in the chalet in the light of the unconstitutional manner in which that evidence was obtained. It found that the admission of the evidence would not adversely affect the fairness of the trial, and would not be detrimental to the administration of justice. It is this finding of the trial court that is the subject matter of the first ground of appeal. In this court, it was contended on behalf of the appellants that the trial court wrongly admitted the evidence. This contention is essentially based on the following submissions:

(a) that the evidence of the state witnesses was of a poor quality and contradictory, and that the trial court failed to properly consider this in its finding that the police officials acted in good faith;

(b) that insufficient weight was given to fact that the search conducted constituted a violation of the constitutional rights of the appellants;

(c) that the ruling of the trial court did not afford the appellants adequate protection of their rights; and

(d) that the court, in considering the impact which the admission of the evidence would have on the administration of justice, on the one hand overemphasised the nature of the evidence as a relevant factor, and on the other, erred in failing to find that the search amounted to a conscious violation of the constitutional rights of the appellants.

Section 35(5) of the constitution.

[26] The admissibility of evidence that has been obtained in a manner that violates rights guaranteed by the Bill of Rights is dealt with in section 35(5) of the Constitution. It provides as follows:

> "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

[27] What is evident from the structure of section 35(5) is that it envisages a two-step process. First, the evidence sought to be excluded must have been obtained in a manner that infringed upon a right guaranteed by the Bill of Rights. If it is found that the impugned evidence was so obtained, the second step is to determine whether the admission of the evidence will render the trial unfair, or bring the administration of justice into disrepute. The section does not provide for the automatic exclusion of evidence that was obtained in violation of a protected right.[4] For all intents and purposes the evidence is *prima facie* admissible. It must be excluded if the court determines, in the exercise of its discretion, that its admission will have one of the consequences identified in the section.

[28] What section 35(5) seeks to achieve is to strike a balance between competing interests. On the one hand there is the need to preserve the authority of the Constitution and the entrenched rights of accused persons, and on the other, the public interest in maintaining the repute of the administration of justice.[5] The section requires the court to determine the immediate impact of the admission of

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[4] "A notable feature of the Constitution's specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence." S v Tandwa 2008 (1) SACR 613 (SCA) at para [116]. See also S v Singh 2016 (2) SACR 443 (SCA) at para [16].

[5] S v Zuko 2009 (4) All SA 89 (E) at para [12].

the evidence on the fairness of the trial, and on the long term, the repute of the criminal justice system.

[29] In *S v Tandwa*[6] the Supreme Court of Appeal described the balancing of the competing interests as follows:

> "The court's discretion must be exercised 'by weighing the competing concerns of society on the one hand to ensure that the guilty are brought to book against the protection of entrenched human rights accorded to […] accused persons'.

[30] In *Key v Attorney-General, Cape Provincial Division and Another*[7] the Constitutional Court explained it as follows:

> "In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale."

The fairness of the trial.

[6] Supra at para [117].

[7] 1996 (2) SACR 113 (CC) at para [13].

[31] The first leg of the enquiry, namely what constitutes a fair trial, is an issue that must be determined by the trial judge on a case by case basis, that is, upon the facts and in the circumstances of each particular case.

> "What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in Ferreira v Levin, fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted."[8]

[32] Trial fairness is inextricably linked to the second leg of the enquiry. As stated in *Tandwa*:[9]

> "Where admitting the evidence renders the trial unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair."

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[8] Key v Attorney-General, Cape Provincial Division and Another supra at para [13]. See also Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) at para [153]; and S v Gumede 2017 (1) SACR 253 (SCA) at para [22].

[9] Supra at para [11].

The reason for the exclusion of the evidence that renders the trial unfair, is because an unfair trial is detrimental to the administration of justice. This is consistent with the words **"or otherwise"** in section 35(5), which is indicative that the first leg of the enquiry is in reality a specific manifestation of the second leg, namely the repute of the administration of justice.[10]

[33] In *S v Dzukuda; S v Tshilo*[11] the Constitutional Court, quoting from *S v Zuma*,[12] defined the right to a fair trial as follows:

> "As was said by this Court in *Zuma's* case, an accused's right to a fair trial under section 35(3) of the Constitution is a comprehensive right and "embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force." Elements of this comprehensive right are specified in paragraphs (a) to (o) of subsection (3). The words "which include the right" preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete sub-rights, some of which have been specified in the sub-section and others not. The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence on section 35(3) develops."

and

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[10] S v Naidoo 1998 (1) SACR 479 (N) at 527 g.

[11] 2000 (11) BCLR 1252 (CC) at para [9].

[12] 1995 (2) SA 642 (CC) at para [16].

"It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. In what follows, no more is intended to be said about this particular right than is necessary to decide the case at hand. At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done."[13]

[34] The focus of the enquiry under the first leg of section 35(5) is ultimately the impact which the admission of the evidence would have on the substantive fairness of the trial. It is evident that it is a determination that requires the exercise of a discretion on the basis of the facts of the case, and that there is not exhaustive list of factors that must or can be taken into account.[14] Factors and considerations relevant to this enquiry will include the nature of the right that was infringed, the extent of the infringement, and the nature of the impugned evidence and its connection to the rights infringement.[15] Evidence that was obtained in violation of the accused's trial rights would be more prejudicial to the accused than a violation of other rights in the Bill of Rights. Rights, such as the right not to be compelled to make any confession or admission that could be used in evidence against the accused,[16] or the right to legal representation,[17] and

[13] At para [11].

[14] S v M 2002 (2) SACR 411 (SCA) at para [30] and S v Tandwa supra at para [117].

[15] S v Pillay 2004 (2) SACR 419 (SCA); S v Tandwa supra and S v Gumede supra.

[16] Section 35(3)(j).

[17] Section 35(3)(f).

the right to silence,[18] are all aimed at protecting the right to a fair trial. Admission of evidence obtained in violation of these rights and other rights that form part of the right to a fair trial has the potential to cause serious prejudice to the accused in his defence.[19]

[35] In considering the nature of the impugned evidence, the mere fact that the evidence incriminates the accused in the commission of the crime he is charged with, does not mean that there is unfairness in the actual trial. It must be accepted that the admission of evidence **"may operate unfortunately for the accused but not unfairly."**[20] Further, the general approach is that real evidence which exists irrespective of the violation of a protected right, possesses an objective reliability and its probative value is unaffected by the manner in which it was obtained. In *S v M*[21] the Supreme Court of Appeal dealt with the reliable nature of this evidence as follows:

> "Real evidence which is procured by illegal or improper means is generally more readily admitted than evidence so obtained which depends upon the say-so of a witness (see, for example, *R v Jacoy* (1988) 38 CRR 290 at 298) the reason being that is usually possesses an objective reliability. It does not 'conscript the accused against himself' in the manner of a confessional statement (*R v Holford* [2001] 1 NZLR 385 (CA) at 390)."

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[18] Section 35(3)(h).

[19] S v Magwaza 2016 (1) SACR 53 (SCA) at paras [16] to [18].

[20] R v Wray (1971) 11 DLR (3d) 673, referred to by Chaskalson et al Constitutional Law of South Africa 2nd ed at page 26 – 19. See also S v Pillay supra at para [7].

[21] Supra at para [31].

[36] In contrast, it is generally accepted that when the infringement results in the conscription of evidence, that is, the accused is compelled to incriminate himself at the behest of the state, the admission of such evidence will affect the fairness of the trial.[22] The reason is twofold: Not only is the reliability of compelled evidence questionable, but also, to compel an accused person to incriminate himself is a flagrant and deliberate violation of a number of his or her trial rights and other protected rights, such as the right to be free from all forms of violence.[23] To admit conscriptive evidence would further operate to undermine the integrity of, and the confidence in the criminal justice system as envisaged in the second leg of the enquiry.

[37] Accordingly, where the infringement results in the discovery of evidence which existed independently, and would have been discovered independently of the rights violation, the fairness of the trial will rarely be affected.[24] By way of example, in *Gumede*[25] a firearm was found in an unlawful search that violated the accused's right to privacy. The court found that the admission of the discovery of the firearm into evidence will not result in an unfair trial.

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[22] See the minority judgment of Scott JA in S v Pillay and Others supra at para [7] and [9] Scott AJ dissented on the facts of that case. The passages in Pillay were referred to with approval in S v Tandwa supra at para [119]. See further S v Magwaza supra at para [14].

[23] S v Tandwa supra at para [127].

[24] S v Pillay supra at para [9].

[25] S v Gumede supra.

"The firearm was obtained by means of the search which, because of its illegality, violated the appellant's right to privacy. But the fact that the evidence of a firearm was obtained in that manner did not, in my view, affect the fairness of the trial. This is so because the firearm is real evidence that the police probably would have found if they had entered the premises lawfully in terms of a search warrant and without breaching the appellant's right to privacy. The existence of the firearm would have been revealed independently of the infringement of the appellant's right to privacy. Consequently, the fact that the evidence of a firearm was unfairly obtained did not necessarily result in unfairness in the actual trial." (at para [32]). (See also S v M 2002 (2) SACT 111 (SCA) at para [31]; Mthemba v S (2008) 3 ALL SA 159 (SCA) at para [33] and S v Lachman 2010 (2) SACR 52 (SCA)).[26]

[38] In this matter the trial court found that the admission into evidence of the discovery of the incriminating items in the chalet did not render the trial unfair. On the facts of the case, trial fairness is not an issue and this finding of the trial court is correct. The evidence in this case was not conscriptive. The appellants were not in any way compelled to participate in the discovery of the articles in the chalet. Further, the breach of the appellant's right to privacy does not operate to undermine the reliability of the evidence. The articles were relevant real evidence that existed independently of any of the actions of the police officials, and would have been revealed independently of the appellant's right to privacy. I am accordingly satisfied that the admission of the evidence did not render the trial unfair, and will proceed to consider the effect of its admission on the reputation of the administration of justice.

[26] At para [32].

Detriment to the administration of justice.

[39] Having comprehensively dealt with the evidence and the case law, the trial court came to the reasoned conclusion that the admission of the evidence was not detrimental to the administration of justice, but rather, that it would be its exclusion that would impact negatively thereon. In arriving at this conclusion, the court took into account the following factors: (a) that the police officials concerned acted in good faith; (b) that their conduct was not part of a settled or deliberate policy to act in violation of the rights of the appellants; (c) the circumstances in which the decision to enter the chalet was made; (d) that Viljoen had reasonable grounds to believe that the motor vehicle contained evidence relating to rhino poaching; and (e) the nature of the offences with which the appellants were charged, and the public outrage at the continued slaughter of rhinos for their horns.

[40] The determination whether the admission of the evidence will be detrimental to the administration of justice requires a value judgment.[27] The focus of the enquiry is the public interest:

> 'Public policy, in this context, is concerned not only to ensure that the guilty are held accountable; it is also concerned with the propriety of the conduct of investigating and prosecutorial agencies in securing evidence against criminal suspects. It involves considering the nature of the violation and the impact that the evidence obtained as a result thereof will have, not only on a particular case, but also on the integrity of the administration of justice in the long term.

[27] S v Pillay paras [92] and [95]; S v Magwaza supra at para [15]; and S v Gumede supra at para [25].

Public policy therefore sets itself firmly against admitting evidence obtained in deliberate or flagrant violation of the Constitution. If on the other hand the conduct of the police is reasonable and justifiable, the evidence is less likely to be excluded – even if obtained through an infringement of the Constitution.'[28]

It is a determination that requires the exercise of a discretion and is made having regard to the totality of the circumstances, including, but not limited, to the facts of each case.[29] In *Singh* it was stated that the enquiry is purely a legal question, and that the question of the incidence and the quantum of proof does not arise.[30]

[41] Considerations which enter into the balance in the making of this determination would include the right that was infringed, the seriousness or severity of the infringement, the nature of the evidence, and the impact of its inclusion or exclusion on the integrity of the criminal justice system and the confidence of the public therein. The list is not exhaustive. The enquiry is by its very nature broad and imprecise. In *Singh*[31] the court stated that a conspectus of the various cases shows that

'... the factors that may be taken into account to determine whether the reception of the evidence is detrimental to the administration of justice are the bona fides of the investigation, the nature and seriousness of the violation of the accused's rights,

[28] Cachalia JA in *S v Mthembu* 2008 (2) SACR 407 (SCA) at para [26]. See also *S v Tandwa* paras [116] and [118]; *S v Singh* para [16]; *S v Magwaza* 2016 (1) SACR 53 (SCA) at para [15]; and *Gumede* para [25].

[29] *S v Pillay* para [96]and S v Magwaza supra at para [15].

[30] Supra at para [16].

[31] Supra.

considerations of urgency and the public safety, the availability of alternative, lawful means of obtaining the evidence in question, the deterrent function of the courts in excluding improperly obtained evidence which would inevitably have been discovered even if improper means had not been employed. All those factors are merely guidelines and the list is not exhaustive. In the end every case depends on its own facts.'[32]

[42] The seriousness of the rights violation as a relevant factor has two aspects to it. It requires an assessment of the seriousness of the impact on the protected interest of the accused, and the seriousness of the conduct that resulted in the violation. On the facts of this case the search of the chalet was a serious violation of the privacy of the three appellants. It was rented accommodation where they could reasonably have expected their privacy to be respected. This must be weighed against considerations relevant to the seriousness of the conduct. The seriousness of conduct that resulted in the rights violation**.** Its seriousness may vary. On the one end of the spectrum the admission of evidence which was obtained through a deliberate or reckless disregard for the rights of the accused will inevitably have a negative impact on public confidence in the rule of law, and risk bringing the administration of justice into disrepute. At the other end, evidence obtained through a technical or minor violation of the protected right may minimally undermine public confidence in the rule of law.

[43] The trial court found that the police officials acted in good faith and did not set out to deliberately violate the appellants' rights. In making this finding the trial judge made several important credibility findings and findings of fact. As stated earlier,

[32] At para [18]. See also *S v Mark and Another* 2001 (1) SACR 572 (C) at 578 d – e; *S v Zuko* para [22].

the trial judge accepted the truthfulness of Viljoen's and McLaren's testimony, and found them to be honest witnesses. While he acknowledged that McLaren's ability to recall events may have been compromised by illness, he found Viljoen to be an excellent witness whose evidence was consistent with the probabilities and provided a coherent account of the events of the two days and the surveillance of the motor vehicle occupied by the appellants. The learned judge further found that Viljoen's instructions to Vos was to search the motor vehicle, and that he was not instructed to enter the chalet. On the evidence as a whole, he concluded that there was no prior decision by the police officials to deliberately enter the premises in violation of the appellants' rights, and that their actions were not part of a settled or deliberate policy to violate the rights of suspects. Rather, Viljoen's and McLaren's actions were motivated by having been taken by surprise by the precipitate conduct of Vos.

[44] The contention that the trial court erred in failing to find that the search of the chalet was a reckless and/or conscious violation of the rights of the appellants, was primarily founded on what has been described in argument as the contradictory and conflicting nature of the evidence of the police officials. The argument is founded on the existence of contradictions in the evidence of the police officials, which contradictions it was submitted point to the falsity of the evidence of those witnesses, from which the conclusion must be drawn that the police who conducted the search of the chalet acted with a reckless or deliberate disregard for the constitutional rights of the appellants.

[45] It is trite that a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility unless they are vitiated by irregularity, or unless an examination of that evidence reveals that those findings are patently wrong. However, whilst it must be acknowledged that the trial court had the advantage of seeing and hearing the witnesses, and is better placed to determine where the truth lies, the demeanour of a witness is ultimately no substitute for evaluating the content of the evidence taking into account the wider probabilities.[33]

[46] In my view the trial court cannot be faulted in its assessment of the evidence. It was very much alive to the deficiencies in the evidence and pertinently addressed the points of criticism levelled at these in argument. Notwithstanding those deficiencies, the court was satisfied as to the truthfulness of the evidence of Viljoen and McLaren, and that there was no pre-arranged plan to carry out an unlawful search of the chalet. The existence of contradictions or inconsistencies in the evidence of witnesses does not mean that the conclusion contended for must follow without more. As submitted by counsel for the State, if anything, what has been relied upon as contradictions rather tend to point away from a deliberate stratagem on the part of the police to give false evidence as was suggested on behalf of the appellants.

'Contradictions *per se* do not lead to the rejection of a witness' evidence. As Nicholas J,. as he

[33]R v Dhlumayo 1948 (2) SA 677 (A) at 705; S v Hadebe 1991 (2) SACR 641 (SCA) at 645 e-f; S v Francis 1997 (1) SACR 198 (A) at 204 d – e and S v Marx [2005] 4 All SA 267 (SCA) at para [283].

then was, observed in *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C, they may simply be indicative of error. And (at 576G-H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence.'[34]

[47] Contradicting statements made by different witnesses, on face value, mean nothing more than that at least one is erroneous, but one cannot, merely from the fact of the contradiction, say which one. An argument that is accordingly based only on a list of contradictions between witnesses leads nowhere so far as veracity is concerned. The assessment of what is presented as contradictions in the evidence of witnesses, and the value to be attached thereto, must be approached with circumspection and the application of a good deal of common sense. The importance of the contradictions are to be determined with reference to their nature rather than their number; their importance in the context of other evidence which is not in dispute or which cannot be disputed**;** and their relevance in the context of the issues which the trier of fact is tasked to decide.[35]

[48] The trial court's assessment of the evidence went further than simply focusing on the merits or demerits of the evidence of each individual witness. Rather, it approached the evidence holistically. It quite correctly also had regard to the

[34] *S v Mkohle* 1990 (1) SACR 95 (A) at 98 f-g.

[35] See generally *S v Mafaladiso* 2002 (1) SACR 583 (SCA) at 593f – 59 h and the cases referred to there.

evidence as a whole and the wider probabilities[36] arising therefrom, including the election of the appellants not to testify or to place any version before it with regard to the events which transpired over the two days when they were present in the area, which meant that the court's finding could only have been based on the evidence led by the prosecution. The finding that the search of the chalet in the manner in which it was conducted was unplanned and motivated by the unexpected opening of the door, accords with the wider probabilities as they arise from the uncontested evidence. The evidence points to the fact that the focus of the police investigation was the movements of the motor vehicle in which the appellants were travelling. The actions of the police officials in proceeding to the Makhanda resort in apparent haste and in a rather uncoordinated manner, is consistent with how events unfolded and information received regarding the movements of the appellants' motor vehicle. Viljoen believed that evidence of rhino poaching would be found in the vehicle. The trial court found his belief to have been reasonable. On the probabilities, the actions of the police officials in going to the resort was motivated by fear that they would lose track of the vehicle, before it could be searched. It accords with Viljoen's evidence that his sole intention was to search the vehicle and that he had not foreseen that they would have to enter the chalet in the manner in which it transpired.

[49] I am satisfied that on the accepted evidence the trial court correctly found that the police officials acted in good faith, and that the violation of the appellants'

[36] *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426d.

rights was not planned, or part of a deliberate stratagem by the police to act with reckless disregard of those rights in the investigation of the matter.

[50] The trial court also did not confine itself, in its finding that the admission of the evidence will not be detrimental to the administration of justice, to the state of mind of the police officials. It also considered two other aspects which in the circumstances may operate to reduce the seriousness of the violation. It correctly found that Viljoen had sufficient information at the time to constitute reasonable grounds to either obtain a warrant or to support a warrantless search. Viljoen and McLaren entered the chalet immediately, or at least shortly after Vos. If it was not for the fact that Vos reached the chalet before them, the search would have been lawful. The second factor is that the conduct of the police officials must be considered in the context of the realities of the particular matter. Police officials are on occasion required to make spur of the moment decisions which may impact on the constitutional rights of a person. In this matter the decision to enter the chalet was compelled by reason of the fact that the third appellant unexpectedly opened the chalet door. It was preceded by decisions and actions which were made in the field as part of a continuing and developing investigation into the commission of crimes that were not capable of easy detection.

[51] To this may be added that fear that evidence will be destroyed if the police officials concerned did not immediately react when the chalet door opened and

their presence was discovered, was not unreasonable in the circumstances. Having regard to the manner in which the crimes were committed, the finding of DNA evidence was a real possibility, as it has proved to have been in the present matter. By its very nature, it is the type of evidence that can be destroyed without any difficulty. The suggestion at the trial, and repeated in this argument in this court, namely that the police could have secured the area while a search warrant was obtained, does not account for the realities of the moment. It is in any event difficult to comprehend how securing the area around the chalet would have prevented the appellants from potentially tampering with evidence, or how Viljoen could have prevented the appellants from leaving the chalet and the resort without further infringing upon their rights.

[52] Another important consideration that enters into the making of the value judgment envisaged by section 35(5) and which must be weighed in the balance, is the public interest in the detection and the effective prosecution of crime. This consideration reflects society's "collective interest in ensuring that those who trangresss the law are brought to trial and dealt with according to the law".[37]Accordingly, in the exercise of its discretion, a court conducting an enquiry in terms of section 35(5) should consider not only the negative impact which the admission of evidence may have on the repute of the administration of justice, but also the impact of failing to admit the evidence.

[37] *R v Askov* [1990] 2 SCR 1199 at 1219 – 1220.

[53] In this context, there exists a number of factors which on the facts of this case require consideration. The first is the nature of the evidence and the reliability thereof. The admission of unreliable evidence serves neither the accused's interest in a fair trial, nor the public interest in the disclosure of the truth. Conversely, the exclusion of relevant and reliable evidence may render the trial unfair from the public's perspective, thereby bringing the administration of justice into disrepute. A corollary to the inquiry into the reliability of the evidence, is the importance of the evidence to the prosecution's case. Another factor is the seriousness of the charges faced by an accused person. The seriousness of the charges is assessed with reference to the impact which the commission thereof has on the community at large.

[54] On the facts of the matter the evidence found in the chalet is important to the successful prosecution of the appellants. It is highly reliable and relevant evidence essential to substantiate the charges. As stated earlier, the evidence consisted of real evidence which was found without the assistance of the appellants, and which evidence proved the direct involvement of the appellants in the incident of rhino poaching in the Makhanda area, as well as indirectly in incidents elsewhere in the province. It goes without saying that the crimes in connection with which the appellants were charged are indisputably serious and impact heavily on community interests.[38]

[38] An aspect which will be dealt with in more detail in the second part of this judgment.

[55] Having considered these factors individually and together, I am satisfied that the trial court correctly found that the evidence ought to be admitted, as its exclusion would cause harm to the administration of justice. The learned judge's assessment is not tainted by any error of law or of fact relevant to this conclusion. There is accordingly no reason to interfere with his weighing up of the various factors in the exercise of his discretion.

The cumulative effect of the sentences imposed.

[56] What remains is the question whether the cumulative effect of the sentences imposed by the trial court did not render the effective sentence of 25 years' imprisonment shockingly disproportionate.

[57] The appellants were convicted on a number of counts of the theft of rhino horns, and in the case of the first and third appellants, one count of attempted theft. In respect of the convictions for theft, the trial court sentenced the appellants to 15 years' imprisonment on each count. The remaining convictions were in respect of a number of statutory offences which were committed to facilitate the theft of the rhino horns.[39] In respect of those offences the court imposed sentences of

[39] The offences constituted contraventions of s 57(1) of the National Environmental Management; Biodiversity Act 10 of 2004; section 29(K) of the Cape Provincial Ordinance on Nature and Environmental Conservation, 19 of 1974; section 22A(1) of the Medicines and Related Substances Act 101 of 1965; and s 90 of the Firearms Control Act 60 of 2000, read with section 250 of the CPA.

imprisonment ranging from five to ten years imprisonment.

[58] When dealing with a number of counts, a court should have regard to the cumulative effect of the sentences[40]. In this matter the aggregate of the sentences, if they were to be served consecutively in respect of all the counts, would have been in excess of 400 years. The trial court was mindful of the cumulative effect of the sentences. With reference to the relevant case law, the trial court paid due regard to the fact that the cumulative effect of the sentences would be excessive, and then proceeded to consider, what was referred to in *S v Mpofu,*[41] as the totality principle. What this means is that the sentencing court must look at the totality of the criminal conduct and then determine what an appropriate sentence will be for all the offences:

> 'In effect, the accused normally receives a "discount" for bulk offending, particularly where the various counts are similar in nature, for the imposition of a separate and consecutive sentence for each individual charge would result in a very high aggregate penalty which would be disproportionate to the moral blameworthiness of the accused having regard to his line of conduct as a whole.'

[40] *R v Abdullah* 1956 (2) SA 295 (A) at 299H; *S v Young* 1977 (1) SA 602 (A) at 611D; and *S v Moswathupa* 2012 (1) SACR 259 (SCA) at para [8].

[41] 1985 (4) SA 322 (ZHC) at 324H-I.

The judgment in *Mpofu* was quoted with approval by the SCA in *S v Johaar.*[42]

[59] The approach adopted by the trial court, correctly so, was to look at the totality of the criminal behaviour of the accused and to ask itself what an appropriate effective sentence for all the offences would be. It concluded that an effective sentence of 25 years' imprisonment would be appropriate in the circumstances of the case, and proceeded to order some of the sentences to run concurrently in order to achieve that result. While recognising that the effective sentence was a severe one, the court concluded that it was not out of proportion to the nature of the offences, the interests of the community and the personal circumstances of the appellants.

[60] There exists no reason to interfere with this finding of the court. As a point of departure, it is trite law that the determination of a sentence in a criminal matter is pre-eminently a matter for the determination of the trial court:

> 'In the exercise of this function the trial court has a wide discretion in (a) deciding which factors should be allowed to influence the court in determining the measure of punishment, and (b) in determining the value to attach to each factor taken into account … A failure to take certain factors taken into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard …

[42] 2010 (1) SACR 23 (SCA) at para [14].

Furthermore, a mere misdirection is not by itself sufficient to entitle a Court of appeal to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably.'[43]

[61] In determining an appropriate sentence, a sentencing court must be mindful of the foundational sentencing principle, namely that the punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy. In addition, the court must also consider the main purposes of punishment, which are deterrent, preventative, reformative and retributive. In the exercise of its sentencing discretion the aim is to achieve a judicious balance between all relevant factors in order to ensure that one element is not overemphasised at the expense of, or to the exclusion of the others.

[62] In this matter the court considered the personal circumstances of the appellants, and particularly the fact that all three of them were first offenders. This consideration, the court found, must be weighed against the serious nature of the offences, the interests of society and other factors relevant to the imposition of sentence. It concluded, with reference to cases such as *S v Swart*[44] and *S v*

[43] Olivier JA in *S v Kibido* 1998 (1) SACR 213 (SCA) at 216g-j. See also *S v Fazzie and Others* 1964 (4) SA (A) at 684A -B; *S v Pillay* 1977 (4) SA 531 (A) at 535 A-B.

[44] *S v Swart* 2004 (2) SACR 370 (SCA) at para [12].

Vilakazi[45], that this is a case where the personal circumstances of the appellants must recede into the background, and where the retributive and deterrent purposes of punishment, should come to fore.

'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.'[46]

[63] The trial court's weighing up of the relevant factors cannot be faulted. The evidence placed before it revealed the extent of the scourge of rhino poaching in the country. Between 2012 and the date of the trial, 6 913 rhinos were slaughtered for their horns, of which 91 were poached in the Eastern Cape. In *S v Lemthongthai*[47] and *S v Els*[48] the SCA recognised the threat which the poaching of rhinos poses to our biodiversity heritage and the protection of the animal as an endangered species. It held that the imposition of lenient sentences would send out the wrong message. It is appropriate to quote from both these judgments. In *Lemthongthai, Navsa* ADP stated that:

'Tsoka J correctly took into consideration that the rhino population since 2010 has been

[45] 2009 (1) SACR 552 (SCA) at para [58].

[46] At para [58].

[47] 2015 (1) SACR 353 (SCA).

[48] 2017 (2) SACR 622 (SCA).

in decline due to illegal rhino poaching. He referred to the decision in *S v Chu* [2012] ZAGPJHC 204 in which the South Gauteng High Court, sitting as a court of appeal, was emphatic in its concern about our diversity heritage and the protection of endangered species such as rhino. In para 20 Tsoka J said the following:

> "The sentiments expressed by Willis J above resonate not only with the people of the world but with the population of South Africa. If we do not take measures such as imposing appropriate sentences for people such as the appellant, these magnificent creatures would be decimated from earth. Our Flora and Fauna would be poorer for it. South Africa would no longer be the safe home of one of the "Big Five", as it is known all over the world**."'**[49]

[64] Similar sentiments were also expressed in *Els* where Saldulker JA said the following:

> '[17] I am not persuaded that a non-custodial sentence is called for. Threat to the wildlife in South Africa has dramatically increased in recent years, and so has the illegal trade in rhino horns. As a result, this species is under a serious threat of being slaughtered or otherwise exploited, for economic gain. Sentences which reflect our censure will go a long way to safeguard the rhino from being economically exploited. Regrettably, a non-custodial sentence would send out the wrong message.
>
> [18] Creating a safe haven for the fauna and flora of our land and our heritage should resonate

[49] At para [14].

universally.'[50]

[65] The trial court took into account as aggravating factors the fact that none of the appellants had shown any regret or remorse for their actions; that their actions were motivated by greed and financial gain; that the incidents of rhino poaching in respect of which the appellants were convicted, were committed over a period of three years, which gave them sufficient time to reflect on the lawlessness of their actions, and to desist from these; and that the second appellant was a qualified field guide who, despite a professed love for wild life, participated in the commission of the offences. This sentiment stands in stark contrast to the horrific injuries suffered by the animals as a result of their horns having been hacked off with a saw whilst still alive. The trial court dealt as follows with the nature of the injuries suffered by the rhino Campbell as it appeared from the evidence:

"…the rhino bull was lying in a large pool of blood and blood tainted foam. The blood emanated from the traumatized sinuses and airways which had been traumatically exposed when the horn was removed. The level of the incision and damage to tissues and blood vessels was sufficient to cause substantial blood loss which, along with the amount of pain that this trauma would have caused, led to the death of the animal. The photographs of the various dead and maimed rhino contained in Exhibit J bear silent testimony to the horrific injuries inflicted upon the various rhino in order to steal their horns. Two of the dead rhino cows were heavily pregnant.'

[50] At page 629.

[66] A further aggravating factor is the fact that the commission of the offences, which took place in remote areas, and are not capable of easy detection, was meticulously planned. For the reasons mentioned in *Lemthongthai* and *Els*, the trial court correctly found that the interests of the community must be accorded the necessary weight, and that it would not be served by sentences which are disproportionately light in comparison with the seriousness of the offences. I am accordingly satisfied that on the facts of this case the trial court was correct in concluding that a term of direct imprisonment was an appropriate sentence.

[67] It is undoubtedly so that 25 years is a long period of imprisonment. In the absence of any misdirection, the remaining question for decision is whether there exists a striking disparity between the aggregate sentence which the trial court considered to be reflective of the moral blameworthiness of the appellants, and the sentence which this court would have imposed. To put it differently, the question is whether the effective sentence imposed by the trial court appears to this court to be so startingly or disturbingly inappropriate, so as to warrant interference with the trial judge's discretion regarding sentence.[51] Ultimately, the purpose is to determine whether there was a proper and reasonable exercise of the discretion bestowed upon the sentencing court.[52]

[68] Having given the matter careful consideration, I am of the view that it cannot be

[51] See *S v Whitehead* 1970 (4) SA 424 (A) at 436D and *S v Sibiya* 1973 (2) SA 51 (A) at 57 B-C.

[52] *S v Kgosimore* 1999 (2) SACR 238 (SCA) at para [10].

said that the trial court exercised its discretion improperly or unreasonably. The personal circumstances of the appellants and the direct consequences of the sentences imposed cannot outweigh the seriousness of the offences and the impact of their commission on those interests which are sought to be protected by the law. A long term of imprisonment is in my view justified, and even if there may exist any disparity between a sentence that this court would have imposed, and the one imposed by the trial court, it cannot be said to be striking to the extent that it must be found that the court improperly or unreasonably exercised its discretion.

Order.

[69] For all these reasons the appeal is accordingly dismissed.

_____
D VAN ZYL
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

ROBERSON J:

I agree.

_____
J ROBERSON
JUDGE OF THE HIGH COURT

GRIFFITHS J:

I agree.

_____
R. E. GRIFFITHS
JUDGE OF THE HIGH COURT

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