IN THE HIGH COURT OF AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

[*Reportable*]

CASE NO: CC62/2020

In the matter between:

SADIQ WILLIAMS First Applicant (Accused 7)

MOEGAMAT ALIE SMART Second Applicant (Accused 8)

SHALINE NAIDOO Third Applicant (Accused 14)

and

THE DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE Respondent

Date of hearing: 20 April 2021 and further submissions received from counsel on 4 August 2021

Date of Judgment: 16 September 2021 (delivered via email to the parties' legal representatives)

JUDGMENT

Henney J:

Introduction:

[1] The applicants are part of a group of 12 accused persons who had been indicted in the criminal division of this court, under case number CC62/2020.

[2] In the indictment, the first applicant is listed as accused 7, the second applicant as accused 8, and the third applicant as accused 14. They had been indicted, together with the other accused persons, on a total of 101 charges, which may be divided into two groups: 3 charges of the contravention of the provisions of section 9 of the Prevention of Organised Crime Act 121 of 1998 ("POCA"); while the other 98 offences relate to the 'pattern of criminal gang activity' referred to in the POCA charges. According to the indictment, each of the applicants had also been charged with offences included in the 'pattern of criminal gang activity', as set out therein.

[3] In this application the applicants seek an order, by way of notice of motion, that their respective trials be separated from the other accused persons mentioned in the indictment, in terms of the provisions of section 157 (2) of the Criminal Procedure Act 51 of 1977 ("the CPA").

Summary of the charges relating to all the applicants

[4] All the applicants have been charged with counts 1, 2 and 3, which are contraventions of section 9 (1) (a), 9 (2) (a) and 9 (2) (b), characterised as gang related charges under POCA. With regard to these charges, the respondent alleges that the applicants, and the other accused not involved in this application, between 22 March 2008 and 17 September 2019, and at Lentegeur, Philippi, Kleinvlei, Nyanga and Mitchells Plain, had:

1) actively participated in or had been members of the criminal gang; wrongfully, unlawfully, and intentionally aided and abetted criminal activity for the benefit of, and at the direction of, or in association with, the "Junior Cisco Yakkies" ("the JCY") criminal gang, by committing the offences as set out in counts 4 to 101 in the indictment;

2) wrongfully and unlawfully performed acts aimed at causing, bringing about, promoting or contributing towards a pattern of gang activity, by committing the offences as set out in counts 4 to 101 in the indictment;

3) wrongfully and unlawfully incited, instigated, commanded, aided, advised, encouraged or procured other person/s to commit, bring about, perform or participate in the pattern criminal gang activities, which includes the pattern as set out in counts 4 to 101 of the indictment.

Individual charges relating to first and second applicants only

[5] In counts 63 – 65, the first applicant is charged with attempted murder, possession of an unlicensed firearm, and the unlawful possession of ammunition, which the respondent alleges occurred on 28 August 2018, and at or near Lentegeur in Mitchells Plain, wherein it is alleged that he wrongfully and unlawfully attempted to kill a person by shooting at him or her with a firearm and that, whilst doing so, he was in the unlawful possession of a firearm and ammunition.

[6] In respect of counts 76 – 78, the first and second applicants are charged with murder, possession of an unlicensed firearm and the unlawful possession of ammunition, which the respondent alleges occurred on 20 September 2018, in Mitchells Plain, in circumstances where they acted in furtherance of a common purpose or conspiracy, by killing one Tasriq Attwood by shooting him with a firearm and that, in doing so, they were also in the unlawful possession of a firearm and ammunition.

[7] The second applicant, aside from the POCA related charges, has only one set of charges against him where he is jointly charged with the first applicant, and the first applicant has only one other set of charges against him. The other sets of charges in the amended indictment do not relate to the first and second applicants at all.

Individual charges in respect of the third applicant only

[8] The third applicant (accused 14) appeared in the Mitchells Plain regional court on 31 May 2018, where he was charged with offences relating to three criminal case dockets, namely: CAS 159/10/2016, CAS 209/02/2017 and CAS 1333/02/2017. The third applicant entered a plea of not guilty to all the counts, and the trial commenced before the regional court in Mitchells Plain, under case number RCA 09/2018. As of July 2020 this matter has not yet been concluded.

[9] On 24 August 2020 the third applicant was charged on the fourth criminal docket, namely CAS 131/11/2020. At some stage, for reasons not relevant to this application, an order was made in case RCA 0946/2018 that the trial was to

commence de novo. Thus these four criminal dockets, CAS 159/10/2016, CAS 131/11/2016, CAS 209/02/2017 and CAS 1333/02/2017 have been included in this indictment, under case number CC62/2002, on which the third applicant, together with the other applicants, is currently arraigned in the criminal trial before this court.

[10] Counts 10 – 13 relate to the third applicant, wherein he is charged with murder, attempted murder, possession of an unlicensed firearm and the unlawful possession of ammunition, which the respondent alleges occurred on 4 October 2016 and at Mitchells Plain. The State alleges that he murdered one Erwin Human by shooting him with a firearm, during which event he also unlawfully possessed a firearm and ammunition.

[11] In the indictment the third applicant is also charged on counts 14 – 18, for the murder of Wazeem Abrahams on 2 November 2016, during which event the State alleges that he was in possession of an unlicensed firearm and unlawfully in possession of ammunition. He is also charged on counts 23 – 27, wherein the State alleges that he attempted to murder Manuel Hamilton by shooting him with the firearm, during which event he was also in the unlawful possession of a firearm and unlawfully in possession of ammunition.

Summary of charges set out in counts 4 to 101 on which the pattern of criminal gang activity is based

[12] In the indictment, the State alleges that the applicants and the remainder of the accused are part of a ‘criminal gang’. A ‘criminal gang’, in terms of section 1 (1) (iv) of POCA, includes ‘any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity’. In the indictment the State alleges that a ‘pattern of criminal gang activity’ exists, as set out in counts 4 – 73, and that the offences as set out in counts 4 – 101 are offences as contemplated in schedule 1 of POCA.

[13] Under section 1 (1) (xi) of POCA, a ‘pattern of criminal gang activity’ includes ‘the commission of two or more criminal offences referred to in Schedule 1: [p]rovided that at least one of those offences occurred after the date of commencement of

Chapter 4[1] and the last of those offences occurred within three years after a prior offence and the offences were committed:- (a) on separate occasions; or (b) on the same occasion, by two or more persons who are members of, or belong to, the same criminal gang'. (Own footnote included.)

[14] In the indictment the State alleges that the applicants and the other accused belong to a criminal gang, that has as one of its activities the commission of one or more criminal offences, including the commission of crimes of violence, which includes murders and attempted murders, the illegal possession and use of firearms, drug possession and drug trafficking, particularly but not limited to 16 Ivy Street and 123 Turksvy Street, and various parks and open fields.

[15] As part of this criminal gang activity the State also alleges that they made themselves guilty of the robbery of vehicles, and that the applicants and the accused are members of the JCY, a criminal gang, who individually or collectively engaged in a 'pattern of criminal gang activity' as set out in the indictment.

[16] It is not in dispute that the offences as set out in counts 4 – 101 are listed in Schedule 1 of POCA. These offences, on a reading of the indictment, emanate from 29 criminal gang activities either committed by a single accused, or several of them, as part of a pattern of criminal gang activity. The reason for the multiple charges, it seems, would be that a singular or particular criminal gang activity, like the murder or attempted murder for example, committed either by a singular member of the gang or a group of persons belonging to the gang, would result in the commission of several other offences, like the possession of firearms and ammunition. It is for example alleged that accused 12 would have, in respect of the first criminal gang activity as listed in the indictment, committed the crime of attempted murder on 22 March 2008 by attempting to kill some person by shooting at that person, and simultaneously would have committed the crime of unlawful possession of a firearm and ammunition.

[17] In respect of the second criminal gang activity as listed in the indictment, that was committed on 21 March 2016 at Lentegeur, Mitchells Plain, it is alleged that accused 1, 4, 10 and 12 would have committed the crime of murder in the furtherance of a criminal gang activity, attempted murder and would simultaneously have

[1] Chapter 4 deals with criminal gan
g activity as an organised crime.

unlawfully possessed a firearm and ammunition. In this regard, the State alleges that they have committed counts 5, 6, 7, 8 and 9, which forms part of a series of criminal gang activities in which the applicants and the other accused were involved. It is for these reasons that all the charges had been joined in one indictment.

The first and second applicants' submissions in the separation application

[18] The first applicant in particular submits that it is not necessary for him to be charged with the other 12 accused, for the respondent to secure a conviction under section 9 (2) (a) and (b), because the first applicant is charged with two sets of predicate counts which relate to two separate incidents. The respondent only needs to prove those predicate counts to prove that the first applicant is guilty of the contravention of section 9 (2) (a) and (b). This threshold, he submits, will not be overcome by charging him jointly with the 12 accused, nor will these predicate offences impact on the other 12 accused's cases as far as these charges are concerned.

[19] Regarding the second applicant, it was submitted that the respondent will not be able to prove that the second applicant is guilty of contravening section 9 (2) (a) and (b), because he is only charged with one predicate set of counts which relate to one incident only and not separate incidents. It was further submitted that even if he were to be charged with the 12 other accused, his one set of predicate counts will not push him over the threshold of what needs to be proved to secure a conviction against him under section 9 (2) (a) and (b).

[20] They further submit that although the applicants and the other accused could be joined on the POCA charges, the respondent has failed to show that it cannot prove its case against applicants if the trials were separated from the other 12 accused. The respondent has merely submitted that separation will prejudice its case, but has advanced no reasons to substantiate why that would be. The applicants therefore submit that there are accordingly no reasons why their trial should be joined with the other accused simply on the basis of the POCA charges.

[21] In terms of the provisions of section 155 of the CPA, participants, accessories and receivers can be jointly charged and, in this particular case, the applicants and the

other accused are not charged with being participants, accessories or receivers in the same offence. There are therefore no reasons why they should be jointly charged in terms of the provisions of section 155.

[22] In terms of the provisions of section 156 of the CPA, persons who committed a wrongful act at the same time and place can also be jointly charged. In terms of the indictment, the offences with which the first and second applicants are being charged were allegedly committed on 28 August 2018 and 20 September 2018, and at or near Lentegeur and Mitchells Plain, respectively, and it seems that none of the other charges that the other accused face, according to the indictment, were committed at the same time and place.

[23] They further submit that whilst all 14 accused face the umbrella POCA charges, as set out in counts 1 – 3 of the amended indictment, in order to be convicted of the POCA charges, the applicants as well as the other accused must be convicted of one of the predicate offences, as set out in counts 4 – 101, to be convicted on count 1, and at least the predicate offences to be convicted on counts 1 and 3. They submit that it is not necessary for them to appear with the co-accused in order for them to be successfully prosecuted on counts 1 – 3, and that it is not necessary to prosecute a co-accused on counts 1 – 3 for the applicants to be in the same trial.

The third applicant's submissions in the separation application

[24] In respect of the third applicant it is submitted that, besides the 3 POCA charges, where he is charged with all the other accused, he is the only one charged on the 18 charges in the indictment which relate to him. He similarly submits that there are no reasons, in terms of the provisions of section 156 of the CPA, why he should be jointly charged with the other accused. Also, it seems that the provisions of sections 155 and 156 would not be applicable to the joinder of the third applicant with the other accused. Firstly, he is, on every count with which he is being charged, the only participant. He is also not being charged with being a participant, accessory or receiver in the same offence as any co-accused, as required in terms of the provisions of section 155. Secondly, the offences the third applicant is being charged with were allegedly committed on 4 October 2016, 2 November 2016, 4 February 2017 and 24

February 2017, and at or near Mitchells Plain. It seems that none of the charges faced by the other accused were, according to the respondent, committed at the same times and in the same places. The third applicant therefore submits that there is no reason why he should be jointly charged with the other accused.

[25] The third applicant further submits that by holding a mass trial of 14 accused at the same time where the charges are not related to each other, is highly irregular and accordingly it is appropriate and competent to separate the trial of the applicant's from the other accused.

[26] The applicants' overriding grounds for separation are the following:

a) there is no reason for the applicants and the accused to be charged jointly in this matter;

b) that charging the applicants jointly with all the other accused would render their trials unfair;

c) that a separation of their trials would not hinder the respondent from prosecuting its case against the other key accused and the applicants;

d) that they would be prejudiced if their trials were not separated from the other 12 accused, while the respondent and the other 12 accused will suffer no prejudice if the applicants' trials were to be separated.

<u>The respondent's case in the separation application</u>

[27] The respondent submits that the applicants are attempting to ignore the POCA charges and the gang-related contents of the other charges. It submits further that it was made clear in the indictment and summary of facts that the applicants are members of a criminal gang, and that the offences committed by each individual accused are connected with (or related to) the activities of the gang. Requesting this court to separate the trials from the other accused, undermines the aims and purpose of POCA, because it does not suit the applicants to have the full context of the offences that they have committed placed before the court. In considering this application, the respondent submits that it is important for the court to consider the

aims and objects of POCA, as the offences in this case are gang-related offences. In this regard, the respondent refers to the preamble of the POCA, which sets out the aims and purpose of the Act.

[28] Regarding the question of a separation of trials in terms of the provisions of section 157 (2) of the CPA, there is no case law dealing specifically with the separation of trials in POCA gang related matters, whilst there are cases that consider the separation of trials in racketeering cases, which deals with contraventions of section 2 (racketeering) of POCA.

[29] The respondent submits that the pronouncements made in the cases dealing with a pattern of racketeering, as set out in *S v Naidoo*[2], would also be applicable to criminal gangs and their activities. Gang members also play different parts in the pattern of criminal gang activity, the offences that makes up the 'pattern of criminal gang activity' and in the criminal gang itself.

[30] Regarding the applicants' grounds for the separation of trials, the respondent submits that the reliance on the provisions of sections 155, 156 and 157 of the CPA is misplaced, because it completely ignores that the applicants have also been charged with POCA gang-related offences, and that the offences referred to form part of the 'pattern of a criminal gang activity'.

[31] The respondent further submits that once the statutory requirements have been fulfilled, the mere number of offences that an accused is charged with in the 'pattern of criminal gang activity' should not play a significant role in an application for the separation of trials. The second applicant (accused 8) places some emphasis on the fact that he is only charged with one set of offences, but he is also charged with accused 7, who is also a gang member, on the same charges. The respondent submits that the second applicant's association with the criminal gang is of such significance that it was necessary for him to flee with his family from his usual place of residence.

[32] The investigating officer set out a brief history of the JCY criminal gang for the relevant period, and the nature of the involvement of the applicants in the criminal gang activities. This includes the fact that the use of the same firearm by multiple

[2] 2009 (2) SACR 674 (GSJ).

accused in multiple incidents is a particularly significant indication that forms part of the 'pattern of criminal gang activity'. This, the respondent submits, is a further factor in favour of prosecuting the applicants together with the other accused in a single trial.

[33] The respondent submits further that the purpose of having the accused persons joined together in one trial, is to avoid prejudice to both the accused and the prosecution, and that a multiplicity of trials should be avoided. It further submits that the law allows for a situation where all accused persons could be tried together, even though all of them were involved in committing different offences in the furtherance of a criminal gang activity. The respondent also submits that they rely on the ongoing, continuing and repeated participation of each of the accused in a pattern of criminal gang activity. The overriding goal would be essentially the same, which is to prove that they committed the offences in terms of POCA.

The appropriateness of this court dealing with the application on motion

The applicants' submissions

[34] After having heard argument, and while preparing judgment, I caused a notice to be sent to the parties to file supplementary heads of argument, wherein I made the following remarks:

"It seems that an application for a separation of trials may be applied for under the following circumstances:

1) Before any evidence had been lead in respect of the charge;

2) At any time during the trial upon the application of the prosecutor or the accused.

The parties are requested to make further submissions whether the words "at any time during the trial" in the section means at any time during the trial before the court dealing with the criminal trial in terms of the CPA. This essentially seems to be an interlocutory application to be dealt with in the course of a criminal trial, if one should have regard to the provisions of the act".

[35] Miss Webb, for the first and second applicants, submitted that during the pre-trial proceedings this court made an order that this application be dealt with by means

of motion proceedings separately from the criminal proceedings. She further submitted that the CPA is silent regarding the procedure to be followed when such an application is instituted. She further submitted, relying on *S v Ramgobin*[3] and *Naidoo*[4], that the procedure regarding applications of this nature is not regulated by the provisions of the CPA, nor is there case law that requires it to be brought in a particular way.

[36] She further stated that the Uniform Rules of Court, under rule 10 (5), provide that the court may order that an application for the separation of trials may be heard in respect of the parties. Also that a separation application would by its nature be interlocutory to the criminal procedure and is not irrevocable. She further submits interlocutory applications by their nature would be an unnecessary burden to the trial court, and to place this application before the trial court, will no doubt be lengthy considering the number of accused, the charges they face and the number of witnesses in the trial. It could have adverse effects on the evidence led at the trial, because the investigating officer, for example, has made various allegations against the applicants in his affidavit in this separation application, and if the court were to consider his testimony before the trial this could adversely affect the way in which the court deals with the matter.

[37] Mr. Mckernan, appearing for the third applicant, submits that although on a simple reading or interpretation of section 157 (2) it would seem that, since a trial only commences after the charges have been put to the accused who then pleads, section 157 (2) only finds application after that point, that the CPA does not preclude or prohibit such an application from being heard prior to the commencement of the trial. He also aligns himself with the argument of Miss Webb, regarding the fact that the respondent during this application presented evidence which would be detrimental to the applicants, if such evidence were to be presented in such an application before the trial court.

[38] He furthermore submits that if the relief sought by the applicant is not dispositive of the matter, the judgment given would in a ‘civil sense’ be open to appeal, which would unduly delay the criminal trial. For this reason, he submits it should

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[3] 1986 (1) SA 68 (N).
[4] Fn 2 above.

characterise the criminal interlocutory application. According to him if the applicant were to be acquitted he would have no interest in seeking recourse regarding the refused application.

The Respondent's submissions

[39] The respondent submits that the meaning of 'at any time during the trial' is not clear. It submits that when a trial commences or begins is one of those concepts that may have different meanings depending on the circumstances and context. There is no definition in the CPA that explains the phrase 'at any time during the trial'. The respondent also submits that it did not find any definition in any other legislation.

[40] According to the respondent the problem in this case has arisen because section 157 of the CPA came into operation before the Constitution, and these provisions do not properly deal with the consequences of the Constitution coming into operation. According to the respondent, prior to the Constitution coming into operation, the possibility of a separation of trials usually arose during a trial. Such matter will usually not be in dispute and could be dealt with relatively informally in submissions from the bar.

[41] According to the respondent, as far as High Court matters are concerned, the accused is transferred to the High Court for trial and, in practice, the matter is placed on the pre-trial roll, but the case is transferred for trial. The respondent therefore submits that in these circumstances 'during the trial' could come to have an extended meaning which would cover applications such as the application concerned in this case. The respondent submits that the use of motion court proceedings to bring applications before plea in criminal proceedings, and even during a criminal trial, has increased considerably since the Constitution came into operation. Such applications usually involve a constitutional challenge, sometimes combined with an aspect of criminal procedure from the CPA.

[42] The respondent submits that there has been some criticism of the practice of using a procedure usually used in civil cases, when the CPA provides a procedure for dealing with the issue in question. According to the respondent, the problem that has arisen in a number of criminal cases has been caused not by the use of motion

proceedings, but rather by the abuse of the procedure. Issues that could have been dealt with jointly in one application are dealt with in a fragmented manner, and when a particular application is refused, it is inevitably followed by at least one, and usually more, appeals, which results in long delays to the start of trials.

[43] According to the respondent, it appears that the applicants were entitled to bring the application by means of motion proceedings because there is a lack of any other way to bring such application at a pre-trial stage. The use of civil procedure, however, does not change the nature of the application, because it's an interlocutory application in a criminal matter.

The legislation relevant to these proceedings

[44] Section 157 of the CPA states:

'**Joinder of accused and separation of trials**

(1) An accused may be joined with any other accused in the same criminal proceedings at any time before any evidence has been led in respect of the charge in question.

(2) Where two or more persons are charged jointly, whether with the same offence or with the different offences, the court may at any time during the trial, upon the application of the prosecutor or of any of the accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any of such accused.'

[45] The relevant sections of POCA provide as follows:

'**9. Gang related offences.**-(1) Any person who actively participates in or is a member of a criminal gang and who--

(a) wilfully aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang;

(b) threatens to commit, bring about or perform any act of violence or any criminal activity by a criminal gang or with the assistance of a criminal gang; or

(c) threatens any specific person or persons in general, with retaliation in any manner or by any means whatsoever, in response to any act or alleged act of violence,

shall be guilty of an offence.

(2) Any person who--

(a) performs any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity;

(b) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about, perform or participate in a pattern of criminal gang activity; or

(c) intentionally causes, encourages, recruits, incites, instigates, commands, aids or advises another person to join a criminal gang,

shall be guilty of an offence.'

'**11. Interpretation of member of criminal gang.**-In considering whether a person is a member of a criminal gang for purposes of this Chapter the court may have regard to the following factors, namely that such person--

(a) admits to criminal gang membership;

(b) is identified as a member of a criminal gang by a parent or guardian;

(c) resides in or frequents a particular criminal gang's area and adopts their style of dress, their use of hand signs, language or their tattoos, and associates with known members of a criminal gang;

(d) has been arrested more than once in the company of identified members of a criminal gang for offences which are consistent with usual criminal gang activities;

(e) is identified as a member of a criminal gang by physical evidence such as photographs or other documentation.'

Evaluation

The appropriateness of a separation application in these proceedings

[46] Section 157 falls within the parameters of Chapter 22 of the CPA, which deals with the conduct of the proceedings in a criminal trial. It refers to aspects which only the trial court can deal with. I do not agree with both the counsel for the applicants as well as the respondent, that our courts have not pronounced upon the question of

what is meant by the concept 'at any time during the trial'. In *S v Hendricks*[5], the meaning of the word 'trial' was discussed at length with reference to certain cases by the Appellate Division. where Marais JA said the following:

'In both juristic and statutory usage, the word trial has come to be used as an appropriate description for criminal proceedings in which a verdict is required to be given, and, if the verdict be guilty, a sentence imposed, irrespective of whether or not any triable issue has been raised by the accused's plea. In colloquial usage it may have a narrower meaning and be confined to a proceeding in which a triable issue of fact has been raised by an accused's plea. *R v Keeves* 1926 AD 410 at 413; *R v Tucker* 1953 (3) SA 150 (A) at 159G-H. None the less, it has always been recognised that there are distinct phases of a trial. I leave aside the preliminary extracurial aspects of a trial and confine myself to what happens in court when the proceedings commence.' (Own underlining.)

The meaning of the phrase 'during the trial' was also discussed in *R v Tucker* 1953 (3) 150 (A) at 159B, to which the court in Hendricks referred, and where the following was said:

'The question whether the validity of an indictment arises "on the trial" of an accused who pleads guilty appears to have been answered in the affirmative by the CHIEF JUSTICE in the case of *R v Laubscher*, 1926 AD 276 . . .'

The court went further, at 159G-H, to state:

'It is true that the plea in *Laubscher's* case was one of not guilty, but it is clear that the learned CHIEF JUSTICE approved the statement of LORD COLERIDGE in relation to a plea of guilty. I am not losing sight of the fact that as a general rule it is correct to say that a trial involves the decision of some question at issue and that a plea of guilty makes it unnecessary for a superior court to try any issue of fact. But in my opinion the word "trial" in sec. 372, as in sec. 370, is used to denote the proceedings after arraignment, whether upon a plea of guilty or not guilty. It follows that the question whether an indictment discloses an offence is one which arises "on the trial" of an accused, even if he pleads guilty.' (Own underlining.)

[5] 1995 (2) SACR 177 (A) at 186E-H.

In Kerr v Rex (1907) 21 EDC 324 at 332, Kotze JP held:

> "*In its usual and ordinary acceptation the arraignment of an accused person means putting him on his trial. Such is the recognised meaning of the word. It is so defined in the Termes de la Ley, and Lord Hale, in his Pleas of the Crown (part 2, ch. 28), says that arraignment consists of three parts, viz., calling upon the prisoner at the bar by name in order to ascertain his identity, reading the indictment to him, and calling upon him to plead or answer thereto. This is still its meaning at the present day (Archbold's Criminal Pleading, 22nd ed. p. 165); so that when once a prisoner has pleaded the arraignment is complete*".

In *R v Keeves*[6], Innes CJ held that the word 'trial' in the juristic sense includes the determination as well as investigation of an issue. The learned Chief Justice further stated that it was not meant to denote merely the stage of the proceedings which ends with the evidence, within the meaning of the CPA in operation at that time.

With regards to the stage when an application for the separation of trials, within the meaning of section 157 (2), should be dealt with, the following was said in Ramgobin[7] at 73I-J:

'. . . Furthermore, s 157 (2) seems to envisage a situation where the *trial* has commenced; at least to the extent that the accused have pleaded. Not only does the section refer to any stage "during the trial" (and not to any stage during the proceedings) but it enacts that the Court may abstain from giving judgment in respect of any of the accused: a duty which it has only after the accused has pleaded.' (own underlining)

[47] I am therefore of the view that, as clearly stated in Ramgobin, such an application should be brought when the trial has commenced before a judge or magistrate after an accused has pleaded. The subsection even goes as far as to state that the court may abstain from giving judgment in respect of any of the accused.

[48] It would mean that a court would be entitled, in terms of the provisions of section 157 (2) of the CPA, to abstain from giving judgment in respect of any accused after such an accused has pleaded and a separation application has been granted.

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[6] 1926 A.D. 410.
[7] Fn 3 above.

This is a clear indication that such an application can only be made after the accused had entered a plea to the charge. It seems to be an exception from the provisions of section 106 (4)[8] which entitles an accused to demand that he or she be convicted or acquitted.

This is also the view of the learned authors of Du Toit et al – *Commentary on the Criminal Procedure Act*[9], where they expressed the view that where a separation of trials has been granted in respect of an accused who has pleaded, such accused is not entitled to demand a verdict in terms of the provisions of section 106 (4).

[49] This is a clear indication, in my view, apart from the express wording 'at any stage during the trial', that the meaning attached thereto should be that the trial court in a criminal case must deal with such an application, and not a civil court in motion proceedings. The procedure that was therefore adopted to deal with this matter, in terms of rule 6 of the Uniform Rules of Court, was clearly wrong, because it is not civil proceedings. It is an application that must be dealt with in a criminal trial in terms of the provisions as laid down in the CPA. The submission of the respondent, as Director of Public Prosecutions in this province, that there is no procedure prescribed in the CPA, is astonishing to say the least. It has been a practice in all criminal courts for many decades that such applications are brought during the course of the criminal trial. It is strange that the office of the Director of Public Prosecutions would not know about that. In all of the cases that have been reported such applications were brought within the context of a criminal trial[10]. It is part of the criminal proceedings and throughout the years the criminal courts have dealt with such applications in terms of the provisions of the CPA.

[50] In the lower courts (Regional and Magistrate's Court), it is practice for the criminal courts to deal with all the interlocutory issues. The practice where interlocutory issues are dealt with in separate motion court proceedings, is settled in civil cases (for example, rule 35 proceedings, applications to strike out, special pleas

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[8] Section 106(4) of the CPA states:-
'An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.'

[9] RS 61, 2018 Ch15 p43.

[10] R v Heyne (infra); R v Adams (infra); S v Ramgobin (fn 3 above); S v Shuma (infra); S v Somciza (infra).

etc) for which the Uniform Rules of Court make provision. There is no such practice in criminal cases, because the CPA clearly deals with the manner in which a criminal court should deal with interlocutory applications (for example, an application for a separation of trials in terms of section 157, special pleas in terms of section 106, objections to a charge in terms of section 85, requests for further particulars in terms section 87, etc).

[51] The further argument raised by the respondent, which seems to justify the practise of having interlocutory applications being made through the motion court, is that section 157 (2) of the CPA was enacted prior to the Constitution coming into operation, and the drafters of the section did not envisage criminal trials being held in a constitutional era. This is not consistent with the authorities laid down in various cases, especially those emanating from the Supreme Court of Appeal and the Constitutional Court, that the various procedures laid down in the CPA under the overall protection of an accused's right to a fair trial in terms of the Constitution[11], makes provision for such applications to be heard during the criminal trial. Every accused person in a criminal trial is afforded the necessary fair trial rights protection under the constitution. This would include the proceedings during which an application for a separation of trials is sought during a criminal trial. There would therefore be no need for an accused person, in seeking to protect his or her rights, to bring a separate application in motion court to deal with an application for a separation of trials, where all criminal trials are adjudicated under the overall fair trial provisions in terms of section 35 (3) of the Constitution.

[52] In criminal cases, it has always been the practice that when a judicial officer is confronted with an interlocutory application, it will deal with it expeditiously, make a ruling and then proceed with the criminal trial. Criminal court interlocutory applications being dealt with in a civil court is a practice which is foreign to criminal procedure. Where an accused person is not satisfied with the outcome of an interlocutory application, such an issue would be dealt with usually on appeal. Similarly, where an accused person is not satisfied with the decision of a judge in the High Court in an interlocutory matter, such issue, after the completion of the criminal trial, can be dealt with in an appeal.

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[11] See cases referred to in paras 55, 56, 57 (infra).

[53] It is therefore my considered view that this court, at this stage, not being the court before which the trial had commenced, would not be the appropriate forum to decide whether an application for separation should be granted to the applicants. In my view, such an application should be dealt with by the court before which the trial has commenced. Our courts have through the years expressed our displeasure with this type of procedure followed in criminal matters, and have been averse to dealing with such applications in this manner, because it would lead to piecemeal adjudication of disputes and would cause undue delays, and our courts have ruled that such applications are best left to the trail court dealing with the criminal matter. It has also been used by unscrupulous accused to unduly delay the proceedings, because it would usually be followed by an appeal to the Supreme Court of Appeal, and thereafter to the Constitutional Court.

[54] This issue of criminal matters being dealt with in the civil court has been dealt with in other divisions, as well as the Constitutional Court and the Supreme Court of Appeal. In the Constitutional Court, it was said in *S v Bequinot* 1997 (1) SACR 369 (CC):

'A Court *a quo*, which has to deal daily with the hard realities of the criminal justice system, is better placed than this Court to evaluate not only the effect of the reversal of the *onus* under s 37 on the essential fairness of a criminal trial, but also of the likely consequences of striking that provision or the reverse *onus* it contains from the statute book. The considered views of experienced trial and appeal Court Judges on such matters are valuable when this Court has to perform the difficult balancing exercise demanded of it by s 33 (1) of the Constitution.'

[55] Similarly, in the Supreme Court of Appeal in *Moyo and Another v Minister of Justice and Constitutional Development and Others* 2018 (2) SACR 313 (SCA) it was said:

'In s 35 the Constitution guarantees a range of rights to arrested, detained and accused persons. Section 35 (3) guarantees to all accused persons the right to a fair trial. That is secured in practice by the provisions of the CPA. The appellants do not seek to impugn the provisions of the CPA in any way, yet they are seeking to assert their fair-trial rights before a civil court. That should give pause for thought. Why are issues germane only in the context of criminal proceedings being canvassed and determined in civil proceedings

and not in the constitutionally compliant forum, and in accordance with the constitutionally compliant statute, provided for the adjudication of criminal cases?'

[56] In Wilkinson and Another v National Director of Public Prosecutions and Others 2019 (2) SACR 278 (GP) the following was said at para 26:

'In my view, departures from the procedures laid down in the CPA and the removal of criminal proceedings to the civil courts should not be encouraged. The criminal trial has not yet commenced, and the criminal charges are yet to be adjudicated upon. Because the criminal charges are yet to be adjudicated upon, the applicants require this court to decide the constitutionality of the provisions of the various ordinances, without the benefit of the criminal-court findings on a number of issues which have a bearing on the question of whether or not the provisions should be declared unconstitutional.'

Where, however, in criminal proceedings there is no provision in the CPA to deal with an issue, for instance which might be subject to review by a High Court for example, like the setting aside of a search warrant or where an interlocutory decision by a magistrate during the course of the proceedings was clearly wrong and would lead to undue hardship, it should be open to an accused person to approach the High Court by way of notice of motion on review. Only in such exceptional circumstances, in my view, where an accused person would have no other suitable remedy, should such a person be allowed to bring an application during the course of criminal proceedings by means of motion proceedings.

[57] In this regard, I refer to what Langa CJ said in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others*[12]:

'[65] I nevertheless do agree with the prosecution that this court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of s 35 (5). Allowing such litigation will often place prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to their investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure the prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later. There can be no

[12] 2009 (1) SA 1 (CC).

absolute rule in this regard, however. The courts' doors should never be completely closed to litigants. If, for instance, a warrant is clearly unlawful, the victim should be able to have it set aside promptly. If the trial is only likely to commence far in the future, the victim should be able to engage in preliminary litigation to enforce his or her fundamental rights. But in the ordinary course of events, and where the purpose of the litigation appears merely to be the avoidance of the application of s 35 (5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then step in and consider together the pertinent interests of all concerned. If that approach is generally followed the State would be sufficiently constrained from acting unlawfully by the application of s 35 (5) and by the possibility of civil and criminal liability. The nature and degree of unlawfulness of the search warrant are important factors to be borne in mind for the purposes of a decision under s 35 (5). It is for this reason that the same court should consider the unlawfulness of the warrant and its impact.

[66] The suggestion that s 34 or s 38 of the Constitution might be infringed by courts that adopt the approach commended in the preceding paragraph is not justified. Section 34 of the Constitution requires a dispute that can be resolved by law to be determined by a court that is independent and impartial. The court that hears the criminal trial will be both independent and impartial. Section 38 of the Constitution confers the right on any person who alleges an infringement of or threat to a right in the Bill of Rights to approach a competent court and the court may "grant appropriate relief". It will be appropriate for a court not to entertain proceedings which are brought in terms of s 38 simply in order to avoid the application of s 35 (5) or to achieve a delay in criminal proceedings.' (Internal footnotes omitted.)

[58] Therefore, for the reason that this court is not the court seized with the criminal trial, and that only that court can deal with such an application, this application, for this reason alone, falls to be dismissed. This, in my view, should be the end of this matter and the application should therefore be dismissed. It seems, however, that even though this court would not be the right court to pronounce on the separation application, the parties have filed extensive heads and presented full argument before this court, and given the fact that there seems to have been an increase in the prosecutions of POCA gang related matters not only in this court, but also in the Regional courts of this division. A further reason to deal with this application is because the issue of a separation of trials had been dealt with in POCA matters in the context of racketeering and not in the context of criminal gang activity. This is the first case that deals with the issue of separation in gang related POCA matters. The

interests of justice demand that this court deal with the separation application, so as to avoid a duplication of proceedings of the same issue before the criminal court. I will therefore proceed to deal with this application.

The Separation Application

[59] During these proceedings it was not disputed the applicants and the other accused are part of a criminal gang. It was further not disputed that the offences that were committed in respect of counts 4 – 101 emanate from the activities the applicants allegedly, together with the other accused, undertook as a criminal gang, the JCY.

[60] These charges, the State alleges, are part of a pattern of gang activity, which was also not disputed in these proceedings. For the purposes of showing that it was all part of a series of criminal gang activities, all the accused and the applicants were joined in one indictment, even where the crimes they allegedly committed were either not committed by them jointly, or while they were at the same place, or at the same time. The applicants and the other accused were joined in the indictment on the basis of their involvement in, and being members of, the criminal gang. The applicants and the accused were charged with a series of activities committed by them and the different accused for different crimes over a period in pursuance of one overall plan, which is to further the aims of the criminal gang they belong to.

[61] The first question to consider is whether the joinder with the other accused was permissible in this particular case. Secondly, whether the POCA intended, as one of its purposes, to have prosecutions of members of the same criminal gang be dealt with in one criminal trial in this manner, even in cases where they were not participants or accessories after the fact to a crime, or to prosecute members of a criminal gang where they, or some of them, have not committed their wrongful acts at the same time or at the same place, as respectively permitted in terms of sections 155 and 156 of the CPA.

[62] The series of activities or acts committed, according to the indictment, constitute a pattern of criminal gang activity, which led to the commission of the

Schedule 1 offences as set out in POCA. In *Ramgobin*[13], at 78G–79G, it was held to be perfectly permissible where separate acts are alleged, each of which constitutes a separate offence, and where each would be the subject of a separate charge in circumstances where the accused are not participants in the same offence for the purposes of section 155, or were present at the same time and place for the purposes of section 156 of the CPA. It relied on the dictum in *R v Adams and Others*[14] where it was held, at 669F-G, that 'a joinder of persons on the basis of participation in "a course of conduct" not for the same periods, constitutes a departure from the usual or general rule'.

[63] A number of accused could nevertheless be joined in one indictment if they were fully informed of the particulars of the charges each of them face. Joinder would be permissible on the basis of the dictum in *R v Heyne and Others*[15], even though such joinder may not have been permitted in terms of the provisions of the equivalent provisions of sections 155 and 156 of the CPA[16]. In *Heyne*, the erstwhile Appellate Division was prepared to uphold a joinder of accused in circumstances different to those set out in sections 155 and 156 of the CPA.

[64] In *Ramgobin* the court went further, relying on *Heyne*, and held at 79G-H: 'The practice, therefore, of charging a series of acts committed by different accused at different times over a period in pursuance of one overall plan or design as one offence, notwithstanding that each such act could form the subject of a separate charge, is well-established in our law, and rests on Appellate Division authority.'

[65] In *Heyne* various accused, which included 3 companies and 15 natural persons, were charged with fraud committed over a period of two and a half years. The facts of that case were briefly that the accused consistently, over the period as stated, acted in concert by creating books and documents containing false entries. They also failed to make entries into various records in order to deceive the police and auditors. They were all joined together in the same criminal proceedings. Schreiner JA said the following at 626-627:

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[13] Fn 3 above.
[14] 1959 (1) SA 646 (SCC).
[15] 1956 (3) SA 604 (A).
[16] Sections 327 and 328 of the Criminal Procedure Act 56 of 1955.

'Some crimes, such as crimes of omission, may be continuous in their nature. In the case of other crimes when there is a series of acts done in pursuance of one criminal design the law recognises the practical necessity of allowing the Crown, with due regard to what is fair to the accused, to charge the series as a criminal course of conduct, that is, as a single crime. (*Rex v Smit and Another*, 1946 AD 862.) In the present case the Crown has, in the name of necessity or convenience, gone much further. In advancing its claim that prolonged criminal behaviour is a sequence of shorter, separately punishable spells of criminality, the Crown has argued that the question is simply one of providing the accused person with sufficient particulars to enable him to know what the case is that he has to meet. Each accused in the present case was told that he was being charged with taking part, for such period as he was associated with the work of one or other bottle store, in a scheme of illegal liquor selling and he told, so far as it was known, the values of the liquor which it was alleged was illegally supplied during each of the months comprising that period.'

At 628 the court continues:

'The correct view, it seems to me, is that if the Crown relies upon a course of conduct, with such advantages from its point of view as there may be, the course of conduct must be regarded as one continuing crime, provable in various ways, including the proof of individual criminal acts making up the course of conduct.'

[66] It would seem that it is well-established in law that the joinder of accused persons in one indictment and trial is permissible in circumstances other than those laid down in sections 155 and 156 of the CPA. In *Heyne* it was held that such a joinder would be permissible in circumstances where it is practical, necessary and convenient. It was further held that a court is not necessarily obliged to grant a separation where there is a reasonable possibility of prejudice to an accused. A further factor is the inconvenience to the prosecution, especially in exceptionally long drawn out trials.

[67] In S v Maringa and another[17], the SCA also made reference to the decision of *Heyne* where the two appellants in that case who were tried together with 5 other accused on that trial sought to be separated from the other accused, where they faced a trial in a total of 399 charges, including fraud, forgery, uttering and corruption. The first appellant was charged with all the counts, barring those related to the corruption charges. The second appellant was charged with only 34 counts of fraud. The

[17] 2015 (2) SACR 629 (SCA)

appellants' objection to be jointly charged was based on the provisions of section 155 and 156 of the CPA as they did not all face the same charges.

[68] The offences were all committed about the same time and place and were in the furtherance of a common purpose designed to fraudulently sell property belonging to the Johannesburg Metropolitan Municipality and to transfer those properties to buyers, in order for the accused to collect the proceeds of those sales. It was necessary for them to successfully effect such transfers to get the co-operation of SARS and the Deeds officials in the furtherance of the common purpose. The officials were bribed and therefore corruption charges were part and parcel of the overall design of the scheme. The court held that there was a whole mosaic of evidence that was necessary to prove the scheme as well as the participation of the various accused in its different facets. This court found that the Magistrate's decision not to separate the trials had been properly exercised. It was the view of the court that the purpose of section 155 and 156 was to avoid a multiplicity of trials where there were a number of accused and where essentially, the same evidence on behalf of the prosecution was led on charges faced by all the accused.

[69] I can think of an example in another context where a number of persons, in order to defraud the social grant system, commit theft or fraud in the same manner without them being aware of each other, or having participated in each other's crime, or being an accessory after fact in each other's crime. Or having committed their offences separately from each other, and without being at the same place when they committed their individual offences, and without having done so at the same time.

[70] In such a particular case, based on convenience and practical considerations, it would not be improper to charge the accused together, even if none were aware of the existence of the other, and the individual crimes each one of them committed were at different places and times, especially if the same witnesses would testify in all of their cases.

[71] In coming back to this case, the common denominator between the applicants and the other accused is that they belong to a criminal gang, and that they have allegedly committed the offences, either individually or together with other accused, in the furtherance of a criminal gang activity, which constitutes a pattern of criminal gang activity. The provisions of section 9 (1) (a) of POCA, with which all the applicants and

the accused are charged, make it an offence to aid and abet criminal gang activity, which the State alleges was done in the instant case.

[72] All the applicants and the accused are also charged with contravening section 9 (2) (a) of POCA, the crime of causing or contributing to a pattern of criminal gang activity. Similarly, all of them are also charged with contravening section 9 (2) (b) of POCA, which criminalises the incitement to commit, perform or participate in a pattern of criminal gang activity. It is therefore essential for the accused to be charged jointly in one indictment, even though they may have committed separate offences at different times and in different places in respect of counts 4 – 101, these being the essential elements or building blocks to prove a pattern of criminal gang activity.

[73] It is clear that POCA, as one of its purposes, and aims to criminalise certain activities associated with gangs. In my view, it could clearly not have been the purpose of the legislation to deal with gang members who are involved in a criminal gang activity, and where it is shown that such activities constitute a pattern of criminal gang activity, on an individual basis, by prosecuting them not as members of the criminal gang collectively, but independently of each other. Once it has been shown that an offence was committed in furtherance of the activities of, or for the benefit of, a criminal gang, even by an individual member of the gang without having involved other members of the gang, I can see no difficulty in joining all the gang members together in one indictment where they all committed offences individually and apart from each other for the benefit of that gang.

[74] In my view, in order to achieve the aims and purposes of POCA, which is to eradicate criminal gang activity, it would be perfectly permissible to join a number of accused who are members of a specific gang, even though they have committed a number of crimes with some of the members of the gang or in their individual capacities. Where firstly, it has been proven that an accused person is a member of a criminal gang and has made common cause with the criminal activities of the criminal gang, such an accused clearly aligned him or herself with that gang and has an interest in the affairs of that gang. Secondly, where it has been shown that an accused person, either individually or as part of a group, participated to commit a specific crime with other members of the gang or he or she as a member of the gang individually committed a crime in the furtherance of the aims and activities of the gang.

[75] It can hardly be argued that when such an offence is committed by an individual member of the gang, that such gang member should not be tried with other members of that gang, who either collectively or individually committed offences in furtherance of the activities of, or for the benefit of, that gang. It would make practical sense to join an individual or group of persons who associates themselves with a particular gang, where they voluntarily joined a gang, commit criminal offences in furtherance of the activities of that gang, and make common cause with the criminal activities of that gang, in one indictment to stand trial with other members of that gang. It is clear that such a person, by doing all of this, established an active interest in the affairs and activities of such a gang, even though he or she was not present at or participated in a specific activity of the gang which resulted in a criminal offence committed in the name of that gang. The conduct and actions of other gang members will have an impact on such a person.

[76] It would be essential, for the State to prove a pattern of criminal gang activity, if all the activities of such a gang in furtherance of the gang's activities and for the benefit of that gang which results in criminal offences, are placed before a court, even if they were all involved in different criminal activities. What is important is the fact that ultimately the charge(s) against each of the applicants and the other accused constitutes a pattern of criminal gang activity. Therein lies the link that would justify a joinder as contemplated by the decision in *Heyne*.

[77] In the preamble to POCA, the legislature clearly states that the South African common law and statutory law failed to deal effectively with organised crime, money laundering and criminal gang activities. Furthermore, that our law failed to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities. It recognises the pervasive presence of criminal gangs in many communities, which is harmful to the well-being of those communities. It was therefore necessary to criminalise participation in the promotion of criminal gang activities, and it seems it was for this reason that the respondent, as stated in the affidavit[18] of Advocate Riley, a Deputy Director of Public Prosecution in the Western Cape, chose to prosecute all of the applicants as well as the accused in this manner. She states: 'Before the POCA legislation was in place, prosecutors had

[18] Para 21.

few legal methods to prosecute an entire criminal group. Prosecutors were forced to try gang related crimes individually, even though a large number of individuals may have been involved in the commission of a crime. It is necessary and desirable for all accused to be charged together in order to place [as] full [a] picture as possible of the activities of the JCY gang before the court hearing the matter. A POCA trial will [sic] give [a] broad overview of the criminal activities and accused involved as part of the gang's effort to control their turf. A joined trial will not be unfair to any of the accused and is also fair to the state and community affected by the activities of the gang. A separation of trials will hinder the respondent in presenting its case against all the accused. Some witnesses have to give evidence on more than one occasion.'

[78] She states[19] further that the respondent will not otherwise be able to place the full extent of the activities of the JCY gang before the court. Criminal gang activities are one of the species of organised crime, like racketeering, that POCA seeks to eliminate. In this regard, I refer to the judgment of the Constitutional Court in *Savoi and Others v National Director of Public Prosecutions and Another*[20] where the court said, at paragraph 15: 'POCA seeks to ensure that the criminal justice system reaches as far and wide as possible in order to deal with the scourge of organised crime in as many of its manifestations as possible.'

[79] The efficacy, impact and reach of the legislation to combat the proliferation of criminal gangs and gang activity, will be rendered meaningless if prosecutions of the members of a criminal gang are to be separated and staggered, where their separate criminal conduct was committed in furtherance of the pattern of gang activity and for the benefit, existence and survival of the gang.

[80] It is important for the survival of a criminal gang to have the ability to spread its presence across a wide area, not only in the various towns but also in rural areas. The manner in which the JCY operates is set out by the investigating officer, Detective Sergeant Jamie Scholtz ("Scholtz"), in great detail in his affidavit. He states[21] that there is a strong presence of the JCY gang in the Mitchells Plain area, which has spread to the suburbs of Lentegeur, Rocklands, Eastridge, the Town Centre taxi rank

[19] Para 22.
[20] 2014 (1) SACR 545 (CC).
[21] Para 16.

area, Portlands and Westridge. According to him, the JCY gang also has a strong presence in Hout Bay, Worcester, Philippi, Strandfontein and Macassar.

[81] According to Scholtz, because of the JCY's widespread presence, in most instances they would commit crimes in the furtherance of their gang activity not in each other's presence, or with the participation of others, and not at the same place and at the same time. This happens when they're fighting with other gangs, where another gang is in a different area, in order to claim dominance and take over the area of a rival gang. One would colloquially referred to this as a "turf war"[22]. This would then result in the commission of Schedule 1 offences, such as those set out in counts 4 – 101, and that would form part of a pattern of gang activity.

[82] According to Scholtz, in this particular case the third applicant allegedly used what he described as a so-called "pool gun", to kill three members of the Americans gang, which is set out in counts 19 – 22. In counts 23 – 27, a person was killed and another seriously wounded, allegedly at the hands of the third applicant.

[83] That same gun the third applicant allegedly used, was also allegedly used by accused 4 to commit the murder which is the subject of counts 29 – 31. That was also a gang-related murder in the furtherance of criminal gang activity. According to Scholtz, firearms are a valuable commodity in gangs. It is used by gang members that act as bodyguards for the gang, and is used for the protection of the gang's drug outlets. Guns that belong to a specific gang are also issued to gang members to carry out specific tasks; these must be returned after a particular assignment or mission has been completed. He cites a further example of where a specific firearm that was linked through ballistic evidence, was used to commit the murder of two rival gang members, belonging to the Ghetto Kids, under counts 32 – 34.

[84] He furthermore describes the third applicant as an important figure in the JCY gang. In paragraphs 32 – 33 of his affidavit, he sets out how accused one became the leader of the JCY, after three previous leaders of the JCY were murdered, allegedly by a rival gang, the Fancy Boys, which resulted in a number of violent attacks on the Fancy Boys gang. These incidents, where revenge attacks were orchestrated on the Fancy Boys, are included in the indictment as charges against some of the accused.

[22] Paras 23, 24 and 25 of Scholtz' affidavit.

Scholtz describes accused 1, accused 2, accused 3, accused 4, accused 5, accused 6, accused 7 (the first applicant), accused 13, and accused 14 (the third applicant) as the hitmen of the JCY group in Mitchells Plain[23].

[85] According to him, the second applicant (accused 8), accused 11 and accused 12, are the drivers who drove the hitmen to the places where the hits or murders and attempted murders took place, in the revenge attacks launched on the Fancy Boys gang by the JCY. It seems that, based on the evidence of Scholtz, there is a practical necessity, and it would be convenient, for the accused and the applicants to be joined together in one indictment. The charges, as said earlier, emanate from 29 incidents of criminal gang activity and it would seem that even though the reasons for the joinder are not based on participation, or proximity in place and time when the offences were committed, it is essentially interwoven and closely associated with each other on the basis of the individual accused's singular intention to advance a pattern of criminal gang activity for the benefit of the JCY gang. The consistent link and golden thread that runs through all the individual charges committed by the different accused, where they acted either individually or as a group, is their gang membership and their allegiance to the JCY gang.

[86] The Constitutional Court ruling in *Savoi*[24], albeit in the context of racketeering, is of equal importance and application in cases of criminal gang activity, and at paragraphs 25 to 27 the court highlighted the manner in which organised crime and criminal syndicates operate:

'[25] The respondents add – correctly – that targeting specific offences for exclusion from the schedule will fail to reach the true nature of criminal activity engaged in by criminal syndicates, both as to its scale and those who are ultimately responsible for it. Criminal syndicates work in a complex weblike manner. They operate in different areas of economic activity, utilise different agents and organisations, and thereby commit various offences – some relatively minor at face value – over time, in complex combination. It is the diversity of criminal activity, situated in complex organisational structures, occurring over time, where the lines of authority are deliberately obscured, that renders legislation in the nature of POCA a necessity. The concept of a "pattern of racketeering activity" is thus tailored to meet the multifarious ways in which organised crime manifests itself.

[23] Para 38.
[24] Fn 19 above.

[26] To illustrate by reference to what, on the face of it, may be viewed as relatively minor individual offences: common assaults in the form of threats of violence or actual application of force may be the order of the day in the organised criminality of a criminal syndicate. A ready example is where an organisation that deals in drugs on a large scale protects its turf and gains new turf – to use the colloquialism – to sustain and increase its sales by requiring its henchmen to force competitors into submission by means of threats of violence and actual violence amounting to no more than common assault. Quite conceivably, these offences might fall under the catch-all item 33 of sch 1. This would fit the definition of "pattern of racketeering activity" perfectly. I give this example to show that it is idle to attack the definition by isolating individual offences, forming an opinion on how relatively minor they are individually and concluding that they are, therefore, unsuited to the notion of organised crime and "pattern of racketeering activity". That is shutting one's eyes to how organised crime works.

[27] In short, what may appear to be "ordinary" or "garden variety" commercial criminality may, in fact, be very much part of organised crime. And that is a question of fact." (Internal footnotes omitted.)

[87] Our courts have also, in the context of the crime of racketeering, which like criminal gang activity is a species of organised crime in terms of POCA, expressed its views with regards to the joinder of accused, where various accused were charged with various offences, of which some could not be linked to all of them in time or by an act of participation, and where it was submitted by the State that the situation was different because all of the accused were involved in the same transaction, that constituted the main count each of them faced, while they played different roles in achieving it. This was the situation the court had to deal with in *Naidoo*[25], where the appellant, the second of two remaining accused, was charged with theft and fraud and various statutory offences, as well as contravening sections of POCA (racketeering). In *Naidoo* it was further stated that, despite the fact that the nature of the part played by each accused would be different from that of another accused, the evidence to prove the conspiracy between them, or the individual counts on which accused 1 had been charged in the alternative, would remain the same.

[88] POCA clearly distinguishes between what constitutes a pattern of racketeering and what constitutes a pattern of criminal gang activity. The requirement of what

[25] Fn 2 above.

constitutes a pattern of racketeering seems to be more circumscribed than that of a pattern of criminal gang activity. A pattern of criminal gang activity does not require a planned, ongoing, continuous or repeated participation or involvement of a schedule 1 offence. It does not require what Cloete JA described in S v Eyssen[26] as

"(8) [N]either unrelated instances of prescribed behaviour nor an accidental coincidence between them constitute a pattern and the word planned makes it 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") means uninterrupted in time or sequence. 'Repeated' means recurring."

[89] POCA merely requires for a pattern of criminal gang activity to be shown that:

1) The commission of two or more criminal offences referred to in schedule 1;

2) Of which at least one of those occurred after the commencement of Chapter 4, and

3) The last of those offences occurred within 3 years after a prior offence;

4) The offences were committed
   a) On separate occasions; or

   b) On the same occasion by two or more persons who are members or who belong to the same criminal gang.

[90] This provision should be read together with section 9 of the Act where section 9 (1)(a) for example, makes it a criminal offence to participate or to be a member of a criminal gang; or where there is a wilful, aiding and abetting of criminal activity at the direction of or in association with any criminal gang. Section 9(2)(a) also makes it a criminal offence to bring about, promote or contribute to a pattern of criminal gang activity. It is also a criminal offence in terms of Section 9(2)(b) to incite, instigate,

[26] 2009(1) SACR 406 (SCA); [(2010)] 132 4 All SA 13

command, aide, encourage or procure any person to participate in the pattern of criminal gang activity.

[91] Whilst POCA clearly distinguishes between a pattern of racketeering and a pattern of criminal gang activity, with regards to the components and elements of each of the activities. The requirement it would seem for a pattern of racketeering are more onerous and circumscribed. It must be planned, ongoing and continuous conduct that would constitute a pattern of racketeering. What the two provisions, however have in common, is that there must be an association of some sort between the participants.

[92] In the case of racketeering, there must be an association with a particular enterprise and that a person's involvement may take place in a number of ways. It can be by virtue of the individual acts of association with the enterprise. In the case of criminal gang activity, the relation between the parties must be their association with a criminal gang. Similarly, as in the case of racketeering, their involvement may take place in a number of ways. It can also be by virtue of their individual acts of association with a criminal gang. POCA does not require that there be a planned, ongoing and continuous conduct to constitute a pattern of criminal gang activity as in the case of racketeering. What is required, is clearly set out in section 9(2) of POCA to constitute a pattern of criminal gang activity which can be in the form of individual acts of persons which are unrelated.

[93] Notwithstanding these differences, with regards to the different roles played by each accused, all of them contributed to a pattern of criminal gang activity. The fact that the applicants are charged under POCA as was stated in *Naidoo* albeit under section 2 (1) of POCA in my view, is of equal application in this case. The court held that even though the accused were all involved in different capacities in the illegal enterprise and various criminal activities were undertaken, all of those criminal activities has as their ultimate purpose the facilitation of the various crimes listed in schedule 1 of POCA.

[94] Similarly, in this particular case, the various accused allegedly committed various offences in the furtherance of a pattern of criminal gang activity, which resulted in them allegedly committing various offences listed in schedule one of POCA, for the benefit of the JCY criminal gang. I am therefore in agreement with the submission of

the respondent that the aims and objects of POCA apply to all the forms of organised crime which POCA seeks to criminalise.

[95] There was also a complaint by the accused in that matter that they would have to sit through a trial while evidence was being presented which would not relate to the charges they faced. The court held that the prejudice the accused referred to was exaggerated, in that the corruption and other charges in that matter were but part of the scheme that would be proved. The court further held that if separation was ordered, the State would suffer prejudice because there would then have to be three separate trials where the same witnesses would have to testify about the same facts. The court was further of the view that that was inimical to the interests of the State and that there should not be a multiplicity of trials relating to essentially the same facts and body of evidence.

[96] Regarding the question of prejudice, it was held in *S v Somciza*[27] that in dealing with the question of prejudice, in the exercise of its discretion in terms of section 157, the trial court has to weigh up the prejudice likely to be caused to the applicant by a refusal to separate, against the likely prejudice to the other accused or the State if the trials were separated. The court in *S v Shuma*[28], at 489I-J and 490A–B, was of the view that the interests of justice has a wide meaning, with Erasmus J opining:

'The interests of justice is a wide concept. In the framework of s 157 it encompasses the interests of the individual accused, as well as – or as against – the wider interests of society. It is in the interests of society as well as of justice that alleged perpetrators of the same crimes be tried jointly. The alternative, namely separate trial as a matter of course, will be cumbersome and lead to huge wastage of State resources. It will, too, inevitably bring about delay, which will be to the benefit of no-one – least of all the accused. Furthermore, as was pointed out by Greenberg JA in *R v Nzuza and Another* (*supra* at 380G), there is much to be said for the view that it is in the interests of justice that accused should be tried together to enable the court to have all the evidence before it, before deciding the disputed question as to who is the guilty person. These are cogent reasons for the holding of joint trials. It is therefore not surprising that – as far as I am aware – the practice of joint trials is universal in all legal systems. In South Africa, s 157 (1) of the Code specifically empowers the

[27] 1990 (1) SA 361 (A) at 367E-F.
[28] 1994 (2) SACR 486 (E).

prosecuting authority to join any number of accused in the same criminal proceedings. Such procedure is consonant with the interests of justice.'

In this particular case, having regard to the aims and objectives of POCA, the court, in exercising its discretion, is of the view that it is in the interests of society as well as justice that all members of a criminal gang be tried together, subject always to an accused's right to a fair trial.

[97] In *Naidoo* (para 12) the court fully appreciated the fact that the CPA (sections 155 and 156) does not permit a situation where an accused might suffer prejudice if he or she would have to spend weeks in court while evidence affecting his or her co-accused was dealt with, which had nothing to do whatsoever with the objecting accused and the charges faced by him or her, merely because, on other counts, he was charged with an offence of which his co-accused was not convicted. The court, however, stated that to rely on cases such as *Ramgobin*, *S v Chawe and Another* 1970 (2) SA 414 (NC), *S v Makganje* 1993 (2) SACR 621 (B), as well as S v Stellios Orphanou and Six Others, an unreported decision by Leveson J on 18 October 1985 (WLD), would not be useful because in none of these cases prosecutions in terms of POCA was undertaken. Further, that these cases are distinguishable from those which apply in the present proceedings. In each of these cases, the court held that the various co-accused were charged with various offences, some of which could not be linked to all of them in time or by act of participation.

[98] I agree with the sentiments expressed by the court in *Naidoo* regarding the applicability of the cases in POCA related prosecutions. The difference in this particular case is that the various offences of the accused and the applicants, which cannot be linked by means of participation or proximity in place and time, are the building blocks or foundation upon which a pattern of criminal gang activity has been constructed by the respondent in the indictment. Should one remove some of the building blocks by means of a separation, the pattern of criminal gang activity which POCA seeks to address will collapse. In my view, as said earlier, the prejudice the State and the public interests will suffer would far outweigh any prejudice any of the applicants or the accused will suffer. In my view, the prejudice suffered in one continuous trial stretching over a few months where all the accused and applicants are joined together, would be much less than if separate trials were to be held.

Right to a fair trial:

[99] It is difficult to determine at this stage whether the joinder of the applicants together with the other accused in one trial would infringe upon the applicants' right to a fair trial. The right to a fair trial is not static and can be influenced by a variety of factors and circumstances peculiar to the criminal trial. At this stage, it would be difficult to conclude whether the joinder of the applicants would render the trial unfair. Such a determination, in my view, would be best made by the trial court, after a consideration of all the facts, circumstances and even the evidence presented during the trial. Even if it would constitute an infringement, the question that would remain is whether it would render the trial unfair. That is also a determination for the trial court to make. The mere fact that an accused may be prejudiced, is not sufficient grounds to order a separation of trials, where it would be in the interests of justice in a case like this to have a joint trial. Especially in a case like this, where an accused would stand trial with members of the same gang he or she belongs to, and where they committed criminal acts in the furtherance of the interests of the gang, which forms part of a pattern of criminal gang activity to which they contributed.

[100] I conclude, for all of the reasons mentioned, that the joinder of the applicants in one trial with the other accused is not impermissible. Their application for a separation of trials therefore falls to be dismissed. In the result therefore, I make the following order:

1. That the application for separation of trials in respect of the applicants from the other accused persons as stated in the indictment is dismissed.

2. I make no order as to costs.

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R.C.A. Henney

Judge of the High Court