THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 130/11

In the matter between:

SELWYN WINSTON DE VRIES	**First Appellant**
VIRGIL LENNITHE DE VRIES	**Second Appellant**
JULIAN MICHAEL VAN HEERDEN	**Third Appellant**
LLEWELLYN SMITH	**Fourth Appellant**
ACHMAT MATHER	**Fifth Appellant**
and	
THE STATE	**Respondent**

Neutral citation: *De Vries v The State* (130/11) [2011] ZASCA 162 (28 September 2011)

Coram: Navsa, Mhlantla and Leach JJA

Heard: 29 August 2011

Delivered: 28 September 2011

Summary: Criminal law and procedure ─ cigarettes stolen in series of hijackings sold to appellant for distribution ─ appellant guilty of theft of cigarettes as well as of money laundering under POCA ─ those offenses also predicate offences justifying racketeering conviction under s 2(1)(e) of POCA ─ State entitled to prosecute all such offences in a single prosecution ─ such not an improper splitting of charges nor leading to a duplication of convictions

O R D E R

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

The appeal is dismissed.

J U D G M E N T

LEACH JA (NAVSA AND MHLANTLA JJA concurring)

[1] The five appellants were among eleven accused tried in Western Cape High Court, Cape Town on a plethora of charges, including several under the Prevention Of Organised Crime Act 121 if 1998 ('POCA'). The trial commenced in August 2005 and ran in fits and starts for some three years. It resulted in all five appellants being convicted on some or other of the charges. The fifth appellant, who was accused no 11, was convicted of three charges under POCA and two of theft and sentenced to an effective 5 years' imprisonment. With leave of the trial court, the fifth appellant appeals to this court against his convictions, both in respect the facts found proved as well as in respect of two special entries recorded by the trial court. The remaining appellants were granted leave solely in respect of the first special entry. But, although they were represented at some stage and were responsible for having prepared the record,[1] they prosecuted their appeals no further and did not appear at the hearing. Presumably they intend to abide this court's decision on the first special entry. In any event, in the light of their failure to appear I intend to proceed on the basis that the fifth appellant alone is before us on appeal, and shall thus refer to him henceforth as 'the appellant'.

[2] During 2003 the British American Tobacco Company of South Africa (BATSA) was the victim of a series of armed robberies carried out by an armed gang which hijacked BATSA trucks at gunpoint and stole their cargoes of cigarettes. On each occasion the truck was stopped by members of the gang masquerading as

1 This were informed from the bar.

policemen (they wore police uniforms and used a vehicle with a flashing blue police light) who called on the driver to stop. When he complied, they held him up at gunpoint while cases of cigarettes were transferred to a waiting truck and then removed to Gauteng for sale. The first two of these robberies occurred in the Western Cape; the initial incident on 24 June 2003 outside Worcester and the second on 12 August 2003 near Darling. The value of the cigarettes stolen was considerable; R690 285 on the first occasion and R719 351 on the second. Both robberies were the brainchildren of Selwyn de Vries, who played an active part in their organisation and execution, and who was aided and abetted by his younger brother, Virgil de Vries. They were, respectively, the first and second accused in the trial in the high court.

[3] It is often said that there is no honour among thieves, and that proved to be the case in regard to a third robbery that occurred on 2 October 2003 at Kinkekbos near Port Elizabeth in the Eastern Cape. It had been carefully planned by Selwyn de Vries and other members of his gang who had travelled to the Eastern Cape to spy out the land and had selected a place suitable to carry out a similar hijacking. However when it was suspected that Selwyn de Vries had stolen a considerable sum of money from the aunt of Julian van Heerden,[2] one of his gang members, members of the gang fell out with one another and Van Heerden and others went off to carry out the third robbery without the De Vries brothers. They did so using the same modus operandi as before. Disguising themselves as policemen, they flagged down a BATSA truck near Kinkelbos and held up the driver at gunpoint. The truck's cargo was transferred to another truck being driven by Vernon James Aspeling, who had also driven the getaway truck during the first two robberies and who later played a substantial role in the trial of the appellant and his co-accused. Van Heerden and the other robbers then drove off towards Gauteng leaving Aspeling following behind in the truck carrying the spoils. However the De Vries brothers had smelled a rat. They hastened to the Eastern Cape, arriving on the scene shortly after the incident. Aspeling had not gone far when they drew up alongside his truck and threatened to shoot him if he did not stop. He did, and the De Vries brothers and a companion assumed control of the truck and took it on a different route to Gauteng. Van Heerden and his crew learned what had happened and, once both groups of robbers had returned to Gauteng, a confrontation between them took place which resulted in a gun-battle during which Virgil de Vries sustained a severe gunshot wound. It also

2 He was the third accused and was initially cited as the third appellant in this appeal.

attracted the attention of the police and, ultimately, led to the arrest of the De Vries brothers and a number of the other miscreants.

[4] As a sequel to these events, the appellant and eleven others were arraigned for trial in the high court on various charges. It was not suggested that the appellant had personally participated in any of the robberies but the state alleged that he had purchased the stolen cigarettes and had received them for the purpose of resale, well knowing that they had been stolen. He was therefore charged with an alleged contravention of s 2(1)(f) of POCA (count 1 of the indictment); an alleged contravention of s 2(1)(e) of POCA (count 2); a number of counts of robbery with aggravating circumstances; and three counts of 'money laundering' in contravention of s 4 of POCA.

[5] The matter was set down for trial on 1 August 2005. When the matter was called that day, the prosecutor informed the court that she could not proceed as she was still awaiting both the necessary written authority from the National Director of Public Prosecutions ('NDPP') required under s 2(4) of POCA and a centralisation certificate under s 111 of the Criminal Procedure Act 51 of 1977. This led to the matter being postponed for two weeks to enable the state to get these formalities in order.

[6] When the matter resumed on 15 August 2005 it appeared, that following representations received, the NDPP had decided not to authorise the prosecution of the 11th accused cited in the charge, Denzil Boyles. The charges against him were withdrawn and led to the appellant, who had until then been the 12th accused in the indictment, becoming accused no 11 and the charge sheet being amended accordingly. Following this, both the centralisation certificate and the requisite written authority under s 2(4) of POCA, which by then had come to hand, were handed in without objection from the defence. Thereafter the charges were duly put and the trial eventually got under way.

[7] The trial turned into a marathon, hallmarked by unnecessarily lengthy and tiresome cross-examination. It was also interrupted by a number of interlocutory applications. Eventually, after some three years, it culminated in most of the accused being convicted on various counts and sentenced to varying terms of imprisonment. The appellant was convicted on two counts of theft arising from the two robberies in the Western Cape, the court concluding although he had not participated in the robberies himself, he had indeed purchased the stolen cigarettes a time when he

must have been aware that they were stolen goods. The court also concluded that the appellant's actions in doing so for the purpose of resale amounted to 'money laundering' as envisaged in s 4 of POCA, and convicted him on two charges under that section. Finally the court concluded that through his actions the appellant had associated with the enterprise of the De Vries gang and had participated in its affairs through a 'pattern of racketeering activity' in contravention of s 2(1)(e) of POCA, and convicted the appellant on count 2 of the indictment as well. The appellant was sentenced to an effective total of five years' imprisonment with a further three years' imprisonment being conditionally suspended. It is not necessary to deal with the individual sentences for purposes of this judgment as there is no appeal in that regard.

[8] Immediately after sentence had been imposed, the appellant applied for leave to appeal. He also applied for no less than14 special entries to be entered onto the record of which the court a quo found all but two to be vexatious (I shall return to them in due course). In regard to the application for leave to appeal, counsel for the appellant indicated that a formal document containing the grounds of appeal was in the process of being prepared and undertook to hand it in in due course. As the 27 grounds of appeal upon which the application for leave was based all related solely to the conviction which had occurred several months earlier, it is inexplicable that a written document containing the grounds of appeal had not been prepared. Be that as it may, the learned judge in granting leave to appeal stated that he had decided 'not to attempt to sift the numerous grounds of appeal, many of which are interwoven with others, but rather to allow the (appellant), through his notice of appeal, to stipulate the grounds upon which he proposes to rely'. Unfortunately neither the promised grounds of appeal nor a notice of appeal were ever forthcoming, which complicated matters both for this court as well as for his counsel who proceeded to raise issues in respect of which leave to appeal had been neither sought nor granted.

[9] The first issue to be decided is whether the court a quo erred in concluding that the cigarettes stolen in the initial two robberies in the Western Cape were indeed ultimately sold and delivered to the appellant as, if his denial of having purchased them cigarettes is reasonably possibly true, his convictions cannot stand. The principal state witness implicating the appellant was Aspeling. The holder of a heavy-duty driver's licence who had in the past operated his own transport business, Aspeling had also run a bottle store and a nightclub through which he had come to

know the De Vries brothers.

[10] According to Aspeling, about a month before the first robbery he was approached by an acquaintance known as Zallie who introduced him to Julian van Heerden (accused no 3 in the trial). At their request, he arranged the hire of a truck which he agreed to drive in order to transport wrecked motor cars from Klerksdorp. This proved to be a ruse on the part of Zallie and Van Heerden as they told him to drive them to Cape Town rather than to Klerksdorp. On the way, they met the De Vries brothers and, on arriving in the Western Cape, Aspeling eventually learned that the reason the truck was required was to transport cigarettes which were to be stolen from BATSA. He seems to have had no difficulty in falling in with the plan and drove the truck not only to the scene where the robbery was carried out, but thereafter back to Cape Town and, eventually, via a circuitous route back to Gauteng.

[11] On reaching Gauteng, Aspeling drove directly to Selwyn de Vries' home in Ennerdale where 163 cases containing cigarettes were initially offloaded but were later repacked into the truck. Aspeling testified that he then drove the truck to Lenasia, following Virgil de Vries and Van Heerden who were travelling in another motor vehicle. They led him to a nursery in Lenasia where the cases of cigarettes were offloaded onto pallets. While there, he saw Virgil de Vries together with the appellant who was dressed in Muslim attire. At some stage Virgil de Vries addressed the appellant as 'Bra Achie' and told him he needed the parcel. The appellant immediately produced a bundle of bank notes totalling exactly R10 000 and gave it to Virgil de Vries. It was the exact amount needed to pay the balance due in respect of the hire of the truck and Virgil de Vries, in turn, handed it to Aspeling to enable him to make the payment. Several days later at a meeting held at Selwyn de Vries' home, Aspeling was paid R53 000 as his share of the proceeds of the robbery.

[12] Several weeks later, at the request of Selwyn de Vries, Aspeling again hired a similar truck and agreed to participate in the second robbery. He described the events surrounding the robbery in detail and how he had again driven back to Gauteng in the truck bearing the stolen cigarettes which, once more, ended up being finally offloaded at the appellant's nursery in Lenasia. Aspeling stated that the appellant was there at the time and gave instructions to his workers to assist in the unloading.

[13] For completeness, I should mention that Aspeling also testified about the

planning of the third robbery in the Eastern Cape, the execution of that robbery and the subsequent hijacking of the hijacked cargo of cigarettes. He also described how after the latter event he had been taken by the De Vries brothers to a house in Comaro where the cigarettes were left in a garage, and that he had heard Virgil de Vries making telephonic arrangements with the appellant for the cigarettes to be collected. He later ascertained that the cigarettes had vanished from the garage and, together with Van Heerden and others, went to confront the appellant at his place of business and demanded to be paid. The appellant telephoned Virgil de Vries and an arrangement was made for Aspeling, Van Heerden and the others to go to the home of Selwyn de Vries. They were on their way there when the confrontation and gun battle mentioned earlier took place.

[14] The appellant denied all the allegations involving him in these events and suggested they were figments of Aspeling's imagination, probably designed to cover up the true identity of the actual purchaser of the stolen cigarettes. Appellant's counsel on appeal sought to criticise Aspeling's reliability, suggesting that as he had not identified the appellant at an identification parade his identification of him in court was no more than a so-called 'dock identification' and thus inherently unreliable. Of course the presence of an accused in the dock may sometimes cause a witness to wrongly assume that he or she is the responsible person. But this is not such a case. Aspeling testified about three occasions when he went to the appellant's premises and saw the appellant. It is not the appellant's case that Aspeling could be mistaken. He contends that Aspeling's testimony regarding the delivery of the cigarettes at *his* nursery in Lenasia after the first two robberies and the approach Aspeling and Van Heerden made to *him* to demand payment for the cigarettes stolen in the third robbery, is deliberately false. In these circumstances there is no room for a possible mistaken identification. Either Aspeling lied or he told the truth.

[15] The court a quo believed Aspeling. It subjected his testimony and credibility as a witness to exhaustive scrutiny. In doing so, it emphasized that Aspeling had testified in great detail in regard to the various roles that individual participants had played in the material events. So great was his assurance in doing so that one of the counsel who appeared for certain of the accused complemented him on the faultless delivery of his evidence in chief. Importantly he was in no way shaken by lengthy and harrowing cross examination and, as appears from the following extract of six paragraphs from the judgment which are worthy of repetition, impressed the trial judge as a witness:

'[73] This Court had an extended opportunity to observe the witness. He was, as was put to him on several occasions by counsel, clearly a man of considerable intelligence. He was, furthermore, articulate with a confident and assertive personality. He appeared to bear no particular malice or resentment against the accused despite oblique references to incidents which he regarded as threatening to his or his wife's safety and that of his son by his first marriage. This lack of malice was borne out by the fact that he had no hesitation in testifying that certain of the accused were not involved in certain of the robberies. So for example (he) testified that accused 6, 7 and 10 were not involved in the first robbery and that, in relation to the third robbery, accused 10 did no more than pick up accused 1 at the Kroonvaal toll plaza.

[74] For the most part Aspeling appeared to enjoy the battle of wits involved in his cross-examination. This was manifest in his tendency to sometimes become somewhat argumentative under cross-examination, to ask the cross-examiner questions and to argue his own position or to seek to demolish the position being advanced by counsel on behalf of one or other of the accused. Notwithstanding these criticisms Aspeling's evidence as a whole and in cross-examination was most impressive. Counsel for accused 11, Mr Spangenberg, placed great reliance on what he argued was Aspeling's failure to answer a critical question in cross-examination. This incident must be seen in context, however. In the first place it occurred towards the end of Aspeling's marathon stint in the witness box and towards the end of his lengthy cross-examination. The cross-examination in question was at times aggressive if not ill-tempered with neither the cross-examiner nor Aspeling prepared to give an inch. Aspeling referred to it as a "tug of war". Its tone was evidenced by State counsel's objections to aspects of the cross-examination as being "bullying" and "sarcastic".

[75] Towards the end of his eleventh day in the witness box Aspeling declined to answer further questions concerning the issue of Zallie misleading him as to the true purpose of the trip to Cape Town. He did so on the basis that the answer would become "too lengthy". He continued to answer all other questions until Court adjourned for the day shortly thereafter. The following morning at the re-commencement of his cross-examination, Aspeling immediately declared himself willing to answer any further questions on the topic. He explained that he and the cross-examiner had "started on a rocky road" the previous day. Asked by the cross-examiner why he had refused to answer the previous day he explained, "but to me, it seemed as if we were at a type of war or something". In my view the explanation furnished by the witness for his refusal to answer the question the following day after more mature reflection of his position largely negated any criticism that this incident adversely affected his credibility or indicated an inability to answer was entirely credible. Further, his preparedness to answer the question the following day after more mature reflections of his position largely negated any criticism that this incident adversely affected his credibility or indicated an inability to answer the question.

[76] Notwithstanding the extremely favourable impression which Aspeling made as a witness, his evidence was not without fault. I have already alluded to the improbability of aspects of his evidence relating to how he was drawn into the first robbery. A similar criticism can perhaps be levelled at his evidence regarding his initial false explanation to his accomplices as to what had happened to him whilst driving away from the scene of the Kinkelbos robbery with the cargo of cigarettes. Aspeling's explanation of his behaviour in this regard is that he did not want to disclose accused 1 and 2's role in the post-Kinkelbos hijacking because he wished to avoid the spectre of his accomplices charging off to Johannesburg to engage in a violent confrontation with accused 1 and 2. This explanation cannot be rejected out of hand since, given his intelligence and the fact that he'd already made the suggestion to accused 1 and 2, it seems clear that Aspeling had already then seen the possibilities of negotiating with accused 1 and 2 for a share of the proceeds of the robbery.

[77] Aspeling impressed as someone who had decided to make a clean breast of things and was quite prepared to admit to the criminal actions in which he had been involved. He revealed himself as someone who kept cool in a situation of crisis or pressure and as someone who would invariably talk his way out of a tight corner rather than resort to violence or threats of violence. As far as accomplice witnesses are concerned, I have never previously encountered a witness who testified over so wide a terrain and in such great detail but with so little damage being done to his evidence. The above observations were made and impressions formed, on a *prima facie* basis, after hearing Aspeling testify in February 2006. Given the elapse of more than two years before argument was eventually heard I re-read his transcribed evidence in full after hearing argument which transcription was available to counsel throughout. If anything, this re-reading strengthened my first impressions of his evidence arrived at more than two years before.

[78] In summary then, Aspeling's evidence, although not flawless, contained no material contradictions or inconsistencies. What improbabilities there may be in his evidence are not of such a degree as to render his veracity suspect . . ..'

[16] I do not think that this assessment of Aspeling as a witness can be materially faulted and it serves as a riposte to many of the criticisms levied against him on appeal. Moreover, the learned judge was acutely aware of the danger of relying upon the evidence of a single witness, particularly one who was an accomplice, and therefore concluded that it would not be safe to rely on Aspeling's identification of the various accused without some additional safeguard speaking for its reliability. In the appellant's case he found such a safeguard in his untruthful evidence in regard to the security arrangements at his business premises in Lenasia.

[17] A photograph of the entrance of the appellant's nursery in Lenasia was produced which showed a high double storied building, referred to as the 'guardhouse', immediately adjacent to a large sliding gate. Aspeling testified that this building and gate were there when the stolen cigarettes were taken there after the robberies and had in fact been in existence long before then. This the appellant denied. He alleged that the foundations of the guardhouse had only been laid in July 2003; that on 5 August 2003, his birthday, the wall was still only a few bricks high; and that the guardhouse had only been finally completed in February 2004. In purported proof of this, the appellant handed in an invoice relating to a payment made for the construction of the guardhouse in September 2003 and called the alleged builder, John Mangongwa, as a witness to testify that he had only built the guardhouse during the second half of 2003. The appellant therefore alleged that Aspeling was untruthful and that he had in fact never been to the appellant's premises.

[18] In order to meet this, the state successfully applied to re-open its case to prove certain aerial photographs, allegedly taken on 2 August 2003, as well as the opinion of a photogrammetric surveyor who testified that examination of such photographs showed that the guard-house had been completed when they were taken. The court a quo accepted this evidence and concluded that the evidence of both the appellant and Mangongwa in regard to when the guardhouse was constructed was a fabrication. It was this finding that was attacked on appeal.

[19] I did not understand the appellant to dispute the photogrammetric analysis of the photographs or that the guardhouse had indeed been built by the time they were taken. What was disputed, however, was whether the photographs were taken on 2 August 2003 as the state alleged, the appellant arguing that the state had failed to prove that to have been the case.

[20] The state sought to prove the date of the photograph through the evidence of Meshack Thathane, an employee of AOC Geomatics, a company that had been employed by the local authority to map the area. The records of that company reflect that the photographs were taken on 2 August 2003 and that Thathane was the camera operator who did so. He described the process used to take aerial photographs and how the ~~a~~ film is then removed from the camera and conveyed to the company's offices in a film canister. On each occasion a logbook with flight details, including details of the film used, is completed. The logbook relating to 2

August 2003 was completed in his hand, save for certain entries made by the laboratory technician including the film number, V13928. Thathane confirmed that he had been the person who took the photographs on that day, and his evidence in that regard was not really challenged. All that was put to him was that he relied on the logbook to establish the date, to which he replied in the affirmative.

[21] The aerial photographs in question were processed from negatives on a film bearing the number V13928. But as that number had been written into the logbook by the technician and not by Thatane, and as the technician was not called, the appellant argued that the entry was hearsay and that the state had therefore not established that the photographs had indeed been taken when Thathane said they were.

[22] Thathane not only described the customary process which was followed in which the technician wrote the full number onto the log during the course of the processing procedure, but went on to describe how he was involved in the checking process after the films had been processed. This involved making copies of the photographs and laying them out to see that all was in order for the purposes of mapping; all of which was generally done within a few days. In these circumstances, as it would have been readily apparent to all concerned in the mapping process if photographs were printed that were not of the area photographed for mapping a few days earlier, the inference is irresistible that the prints which were processed and used in that process were those he had taken shortly before – and that the company's records were therefore accurate. Moreover, it was never directly put to Thathane that the photographs were in fact not taken on the day that he said. Had he been specifically challenged in that regard, he might well have been able to provide a satisfactory explanation. It was also the undisputed evidence of Mr Slough, who had been involved in concluding contracts for AOC Geomatics, that the company's contract to carry out the mapping of the area in question was carried out in 2003. Bearing all of this in mind, I am of the view that the state satisfactorily proved that the photographs were taken on 2 August 2003. That being the case, the court a quo correctly rejected the appellant's evidence that the guard house had not yet been fully built when Aspeling said he had gone to the appellant's premises.

[23] Counsel for the appellant argued that even if this court were to conclude that to have been the case, it was merely established that the appellant had been untruthful in that regard but did not render Aspeling's evidence any more reliable. On

the contrary, it is trite that regard may be had to untruthful evidence or mendacity on the part of an accused as a factor reducing the risk of relying upon an accomplice's evidence[3] and I am not persuaded that the court a quo erred in its approach.

[24] In truth the entire issue in regard to whether the appellant lied about the guard-house is something of a red herring. His untruthfulness in that regard was not the sole factor relied upon by the trial court as a safeguard in accepting Aspeling's evidence. This is apparent from the judgment of the court below in which it is stated that Aspeling's evidence regarding the purchase of the cigarettes was accepted not simply as the appellant had given false evidence 'but also in the light of Aspeling's evidence as a whole and the probabilities'.

[25] Importantly, Aspeling's version was corroborated by a number of independent objective facts. Thus, for example, the passenger list of the InterCape bus service corroborated his allegation that one of the accused in the trial had travelled from Cape Town to Port Elizabeth on 1 October 2003 as he testified; South African Police Services insignia and several sets of police uniforms were found in a room on Virgil de Vries' property when he was arrested; an invoice from the transport company from which Aspeling had hired the truck in August 2003 reflected a payment made by him as he had testified; a security officer at the Cape Town Waterfront confirmed that he had clamped a red Jetta motor vehicle, an incident which Aspeling testified had occurred when he had breakfasted there with Selwyn de Vries and others shortly before the second robbery. All of this tends to corroborate the truth of Aspeling's detailed version.

[26] In addition, it seems to me to be highly improbable that Aspeling would implicate his other co-accused in events in which there can be no doubt that they did participate, but for some unknown reason falsely implicate the appellant. It was suggested that he did so probably in order to protect the identity of the person to whom the cigarettes were in fact sold but it is improbable that he would have endangered the acceptability of his entire evidence by implicating a wholly innocent person whom he did not know and who might well be in a position to categorically refute his allegations. Importantly, there is nothing externally visible at the appellant's Lenasia nursery to indicate that he is a purveyor of cigarettes, and the fact that he does operate a cigarette wholesaling business from those premises was something which Aspeling was unlikely to have known unless he delivered the

3 See *S v Hlapezula* 1965 (4) SA 439 (A) at 440F-G.

cigarettes there as he said he did. It is also not without significance that he described the appellant as being dressed in traditional Muslim attire, which the appellant admitted he often did, and that the appellant is indeed known by the name 'Bra Achie', the name Aspeling said Virgil de Vries used when addressing him.

[27] In the light of all these circumstances, even without taking the appellant's mendacity in regard to the guardhouse into account, I am satisfied that the trial court correctly accepted Aspeling's identification of the appellant as the person to whom the cigarettes stolen from the first two robberies in the Western Cape were delivered. In the light of the quantity of cigarettes and the circumstances surrounding their delivery, the appellant must have known that they had been stolen and, as theft is a continuing crime, it was accepted that if this court found that Aspeling's version of the delivery was acceptable, the appeal in respect of the theft charges should fail.

[28] That brings me to what may be loosely called the 'technical defences' raised by the appellant. At this stage it is necessary to revert to the application for leave to appeal when the so-called 'special entries' were entered on the record for decision by this court. Posed in the form of questions, they read as follows:

(a) 'Did the State prosecute the accused without being in possession of a valid written authority by the National Director of Public Prosecutions in terms of s 2(4) of the Prevention of Organised Crime, Act 121 of 1998, the authority in question being too wide and therefore invalid. Secondly, was the centralisation directive of the National Director of Public Prosecutions in terms of s 111 of Act 51 of 1977 invalid by reason of being wide, vague and inherently contradictory.'

(b) 'Was accused 11's right to cross-examine within the trial/s-within-the-trial unfairly limited or disallowed at any point?'

[29] Unfortunately, neither of these are valid special entries. As this court has recently been at pains to point out, the purpose of a special entry is to record an irregularity affecting a trial that does not appear from the record; and an attack upon a ruling made by a trial court during a course of proceedings does not qualify – see *Staggie v The State* (38/10) [2011] ZASCA 88 para 16 and *Masoanganye v The State* (252/11) [2011] ZASCA 119 para 10. In regard to the first special entry, the alleged irregularities therein set out arise from exhibits A and B handed in without objection at the commencement of the trial and which form part of the record. Moreover, the argument that the two exhibits were invalid due to them having been couched in wide and vague terms was ventilated in an interlocutory application heard during the course of the trial, and rejected in a ruling which all forms part of

the record. The second special entry set out in (b) above, relating to a ruling in respect of cross-examination, also relates to a matter of record. Clearly neither of the special entries should have been made.

[30] As the appellant abandoned all reliance upon the second special entry and did not refer thereto in argument, nothing more need be said about it. However, the first special entry was made as both the appellants' legal representatives and the learned judge in the court a quo were all under the mistaken impression that it was appropriate to raise these issues by way of a special entry. In these circumstances it would be unjust to penalise the appellant by refusing to hear argument on what is raised in the first special plea, and the solution appears to me to be to regard it as a ground of appeal and to determine the issues it raises in that way.

[31] I therefore turn to the issue of the s 2(4) POCA authorisation raised in the first special plea. The section provides that '(a) person shall only be charged with committing an offence contemplated in subsection (1) if a prosecution is authorised by the National Director.' As already mentioned, the authority in question was handed in without objection before the accused were asked to plead. As appellant's counsel (who appeared for the appellant at the trial) freely conceded, at that stage all concerned accepted it to be in proper form and related to the POCA charges levied against the accused in the indictment. However shortly before the end of the trial, a judgment in the Pietermaritzburg high court in the matter of *Moodley and others*[4] came to the ears of the appellant's legal representatives. The accused in that matter, who were to be tried on s 2(1) POCA offences, contended that they had been charged before the NDPP had given the necessary written authority required by s 2(4), and launched an application seeking an order declaring the charges under s 2(1) to be unlawful. The high court hearing the application *mero motu* raised the issue that the written authorisation was too broad and 'lacked the necessary specificity' as details of the dates and places at which the offences were allegedly committed had not been set out and, on that basis, upheld the application. The s 2(4) authorisation in the present case was in terms virtually identical to that in *Moodley*, and so in October 2007 the appellant and each of his co-accused launched interlocutory applications seeking orders that the POCA counts which they were facing should similarly 'be declared to have been invalidly instituted and be set aside'. In doing so, they relied squarely upon the high court's decision in *Moodley*

4 Subsequently reported as *Moodley and Others v National Director of Public Prosecutions and Others* 2008 (1) SACR 560 (N)

and an authorisation allegedly lacking in detail.

[32] For purposes of this application, a senior counsel was brought in to lead the junior counsel who had been representing the appellant at the trial. He filed extensive heads of argument which I shall mention later. On 18 February 2008, the trial judge delivered his ruling. He found that that even assuming the high court's judgment in the *Moodley* case to be correct, not only was it distinguishable on the facts but the authorisation in the present case could only be challenged by way of an application for a special entry to a higher court. Despite that, before dismissing the application, he went on to express an obiter opinion that it was not the purpose of the authorisation under s 2(4) to detail the nature and extent of the prosecution as the indictment serves that purpose.

[33] It was presumably as a result of this ruling that the appellant sought his first special entry, intending to rely on the high court decision in *Moodley* to attack the certificate. Unhappily for the appellant, his argument was overtaken by events as the high court's decision was set aside by this court on appeal to it by the state, the judgment being reported as *NDPP v Moodley* 2009 (2) SA 588 (SCA). When the state applied for leave to appeal, counsel for the accused abandoned the judgment insofar as it declared the s 2(4) authorization by the NDPP to be invalid and of no force and effect. The issue was therefore not dealt with in detail by this court, but Scott JA observed that the abandonment was clearly correct and the order of the high court 'is clearly not to be regarded as a precedent'.[5]

[34] In my opinion Scott JA's view is clearly correct. As correctly observed by the court a quo, the indictment contains the details of the charges upon which an offender is to be prosecuted and I can see no good reason for those details to be repeated in the s 2(4) authorisation. All that is necessary is for the NDPP to authorise that the accused be charged with whatever offence under s 2(1) is alleged in the indictment. As here the authorisation reflected the names of the appellant and his various co-accused, and the NDPP authorised that they be prosecuted 'in respect of a contravention of ss 2(1)(e), 2(1)(f) and 2(g) of the Prevention of Organised Crime Act 121 of 1998', all concerned understood that it related to the proceedings in the court a quo. Accordingly, that is really the end of the matter.

[35] It was also argued that even if the s 2(4) authorization was in proper form, it had been produced too late as the appellant had already been charged with

5 At para 10.

committing offences set out in the indictment at the time the indictment containing the s 2(1) charges was served upon him some months before, when the matter was postponed in the magistrates' court for hearing in the high court. The appellant contended that the s 2(4) authorization should have been obtained by that stage and that it was too late to obtain and produce it immediately before the trial commenced in the high court. This argument had been raised by the appellant's leading counsel's heads of argument in the interlocutory application in relation to the s 2(4) authorisation but was not a ground of appeal. In any event, in the light of the facts of the present case, it is devoid of merit.

[36] In *Moodley* this court held it to be unnecessary to decide at what precise stage a person is 'charged' as envisaged by s 2(4), but observed that until the accused has pleaded, the state would be at liberty to withdraw the charge and recharge the accused once the authorisation is available, an exercise that would serve no purpose.[6] I wholly agree with that sentiment and, indeed, it is a powerful reason to conclude that the legislature only intended a person to be 'charged' when the indictment is put and he or she is asked to plead. But it is unnecessary to reach a final conclusion in that regard as in *Moodley*, a case in which the charge had not yet been put to the accused, this court went on to hold that once the written authorisation was granted the prosecution was lawful.[7] Applied to the present circumstances, as the authorisation was granted and handed in before the accused were asked to plead, the proceedings from then on (the trial itself) were lawful.

[37] Despite this, appellant's counsel submitted further that a valid s 2(4) authorisation was an essential element of an offence under s 2(1) of POCA; that it was thus essential for the state to prove that the NDPP had properly applied his mind to the issue; and that it could not do so merely by handing in the certificate as that would offend the best evidence rule. Accordingly, as the NDPP had not been called, he argued that the state had failed to prove a contravention of s 2(1).

[38] This was also not an issue raised in the grounds of appeal but an argument set out in senior counsel's heads of argument filed at the stage of the interlocutory application and repeated, apparently without thought, in the heads of argument filed in this appeal. Strictly speaking the issue is thus not properly before this court. But there is clearly no merit in the argument. An offence under s 2(1) is committed by the

6 At 594 para 12.

7 At 594 para 13.

actions of the offender, not those of the prosecuting authority. The s 2(4) authorisation is simply a procedural requirement that has to be fulfilled. It was fulfilled in time as set out above, and that was accepted to be the case by all the accused, including the appellant. The fact that the NDPP did not testify is therefore no reason to upset the appellant's conviction on count 2.

[39] I turn to the second part of the first special entry, namely, the contention that the centralisation certificate under s 111 of the Criminal Procedure Act was too widely framed. The principal argument in this regard was that only the 11 accused who stood trial after the decision not to proceed against Boyles had been taken were named in the certificate, although reference was also made to 'accused 12' in certain places. The centralization certificate was obviously a sloppy piece of work. Changes were made to its wording in consequence of the decision to withdraw against Boyles, and seemingly at that stage certain errors crept in. But those are clearly no more than obvious typographical errors and, as counsel for the appellant conceded, all concerned appreciated that the certificate related to the charges that were put to the various individual accused. As the appellant clearly understood the certificate, and accepted it was in proper form, it hardly lies in his mouth to now complain that it was too widely framed, and there is no room for an argument that he was embarrassed by its vagueness.

[40] However, the appellant further argued that there was no proof that the deputy NDPP who had signed the authorization had been duly and properly authorized to do so. This argument, too, was one carried over into the appellant's argument from the heads of argument filed by senior counsel in the interlocutory application but not raised as a ground for appeal. It is also not an argument that can be determined by the facts on record. The issue was therefore neither properly raised nor ripe for decision by this court. If the appellant wished to contest the validity of the certificate, he should have done so when it was first produced. At that stage he accepted it was in order and for purposes for this appeal that is really the end of the matter.

[41] The appellant also argued that the manner in which he was charged resulted in an impermissible so-called 'splitting of charges' or 'duplication of convictions', leading to him being punished more than once for the same actions. This argument was based on it being alleged in count 2 of the charge sheet that he had contravened s 2(1)(e) of POCA by having wrongfully and unlawfully participated in the affairs of an enterprise (the De Vries gang) through a pattern of racketeering

activity. Details of the pattern of racketeering activity relied on were set out in annexure 8 to the indictment. This is a list of the alleged offences in the indictment, excluding those under s 2(1). In the case of the appellant, those offences were the charges of theft and charges of money laundering levied against him – including the two counts of money laundering and two counts of theft on which he was ultimately convicted. Essentially the appellant's argument is that it would amount to an improper splitting charges or duplication of convictions for the offences of which he has been convicted to be taken into account in deciding whether he was guilty of a scheme of racketeering activity in count 2, and then to sentence him for each conviction.

[42] In considering this argument it is necessary to turn to the provisions of POCA itself. Section 2(1)(e) thereof makes it an offence if any person:

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

In s 1 'enterprise' is defined including '. . . any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity' while 'pattern of racketeering activity' is defined as meaning:

'. . . the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1.'

[43] POCA was largely modelled upon so-called 'RICO' statute of the United States of America,[8] from which the definitions of 'pattern of racketeering activity' and 'enterprise' were directly taken. Given the generic similarity of the two statutes, it is somewhat surprising that neither party referred us to any American jurisprudence relating to the issue, the representative for the state merely stating that her office had insisted that the charge sheet be drawn in the way it was: by referring to the theft and money laundering charges as being the 'pattern of racketeering activity' relied on to prove the POCA charge, count 2. However, the jurisprudence of the United States is of considerable assistance in understanding why indictments are

8 Racketeer Influenced and Corrupt Organisations statute enacted as Title IX of the Organised Crime Control Act of 1970, codified as 18 U.S.C. §§ 1961-1968.

usually formulated in this way.

[44] The Fifth Amendment of the Constitution of the United States provides that no person shall be 'subject for the same offence to be put twice in jeopardy of life and limb'. This has given rise to the so-called defence of 'double jeopardy', a multi-facetted defence which, first, protects a citizen against a second prosecution for the same events after an acquittal on the first charge (in effect what is known in this country as *autrefois acquit*); secondly, bars a convicted offender being prosecuted once again for the same offence (similar to the defence of *autrefois convict*) and, thirdly, protects against multiple punishments being imposed for the same offence (as does the defence of 'splitting of charges' in our law). After the introduction of RICO and other similar statutes[9] intended to combat organised crime, which introduced racketeering offences similar to those created by s 2 of POCA, many accused offenders in the United States raised pleas of double jeopardy in circumstances similar to the present. In doing so they argued that the RICO charge (sometimes referred to as an 'umbrella' charge[10]) together with the underlying so-called 'predicate offences' relied on to prove the racketeering activities, led them to face either being convicted again for earlier offences in respect of which they had already been tried, or to being sentenced twice for the same unlawful action. The arguments in respect of those pleas were essentially the same as that upon which the present appellant relies, namely, that having been convicted in respect of the predicate offences it is impermissible to either convict or sentence him for the umbrella offence of racketeering in count 2.

[45] These arguments received short shrift in the United States. In a series of decisions the courts of that country held the umbrella offences to be separate and discrete from the underlying predicate offences – and capable of being punished separately.[11] The reasoning for doing so was set out as follows in *United States v Crosby* 20 F. 3d 480 para 8:

'The Supreme Court's decision in *Garrett* conclusively established that Congress intended

9 Eg the CCE statute referred to below.

10 See eg Harvard Law Review [vol 122:276 2008] at 480.

11 Compare eg United States v Peacock, 654 F.2d 339, 349 (5th Cir. 1981); Garrett v United States, 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985); United States v Pungitore, 910 F.2d 1084, 1108 n. 24 (3rd Cir. 1990); United States v Beale, 921 F.2d 1412, 1437 (11th Cir. 1991); United States v Gonzalez 921 F.2d 1530, 1538 (11th Cir. 1991); United States v Cyprian, 23 F.3d 1189, 1198 (7th Cir.1994); United States v O'Connor, 953 F.2d 338, 344 (7th Cir.1994); United States v Crosby, 20 F.3r 480, 484 (D.C. Cir. 1994); United States v Morgano, 39 F.3d 1358, 1368 (7th Cir. 1994); United States v Baker, 63 F.3d 1478, 1494 (9th Cir. 1995); Susan S Brenner *RICO, CCE, And Other Complex Crimes: The Transformation of American Criminal Law?* William And Mary Bill of Rights Journal [Vol. 2.2] (1993) 239.

CCE[12] to be a separate offense from its predicate acts based on the language and history of the CCE statute. . . . . We find the statutory language and legislative history of RICO dictate a similar conclusion. . . . First, RICO itself defines "pattern of racketeering activity" to include "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (*excluding any period of imprisonment*) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (emphasis added). The highlighted statutory language at least suggests that Congress expressly contemplated that a RICO defendant might be incarcerated for one or more of the predicate offenses before being prosecuted for the RICO violation. Further, Congress's "Statement of Findings and Purpose" reinforces this intent, indicating that RICO was enacted to supplement rather than replace the existing predicate crimes and penalties. *See* Organized Crime Control Act of 1970, Pub.L. No. 91–452, 84 Stat. 922, 923, *reprinted in* 1970 U.S.C.C.A.N. 1073. ("It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."). Accordingly, we hold, as have other circuits, that Congress intended that a RICO violation be a discrete offense that can be prosecuted separately from its underlying predicate offenses . . .' (certain authorities omitted).

[46] In my view the same reasoning applies with equal cogency to POCA. The definition of pattern of racketeering activity, which the state is obliged to prove in order to secure a conviction under s 2(1)(e) of POCA, includes offences for which the offender may already have been convicted and sentenced ─ the legislature's necessary intent in this regard is to be inferred from the phrase 'excluding any period of imprisonment' in the calculation of the 10 year period referred to in the definition of 'pattern of racketeering activity'. In addition, the preamble to POCA also proclaims as its intent the introduction of '. . . measures to combat organized crime, money laundering and criminal gang activities' as '. . . the South African common law and statutory law failed to deal effectively with organized crime, money laundering and criminal gang activities, and also failed to keep pace with international measures aimed at dealing effectively with organized crime, money laundering and criminal gang activities . . .'.

[47] Due to the similarities between RICA and POCA, and bearing in mind certain of the decisions in the United States, this court in *S v Dos Santos and another* 2010

12 Continuing Criminal Enterprise statute 21 U.S.C. § 849 (1988) which makes it an offence to engage in a 'continuing criminal enterprise' by way of a continuing series of drug offences.

(2) SACR 382 (SCA) concluded:[13]

'Prosecutions under POCA, as also the predicate offences, would usually involve considerable overlap in the evidence, especially where the enterprise exists as a consequence of persons associating and committing acts making up a pattern of racketeering activity. Such overlap does not in and of itself occasion an automatic invocation of an improper splitting of charges or duplication of convictions. As should be evident from a simple reading of the statute, a POCA conviction requires proof of a fact which a conviction in terms of the Diamonds Act does not. I can conceive of no reason in principle or logic why our approach should be any different to that adopted by our American counterparts . . . . '

[48] In order to secure a conviction under s 2(1)(e) of POCA, the state must do more than merely prove the underlying predicate offences. It must also demonstrate the accused's association with an enterprise and a participatory link between the accused and that enterprise's affairs by way of a pattern of racketeering activity.[14] In the light of this, an offence under s2(1) of POCA is clearly separate and discrete from its underlying predicate offences and, in my view the decision in *Dos Santos* in regard to this issue is undoubtedly correct.

[49] This also effectively disposes of the appellant's allegation that he could not be convicted on both of the s 2(1)(e) POCA offence (count 2) as well as the underlying predicate offences of theft and money laundering. As POCA recognizes that past convictions may be taken into account in establishing a pattern of racketeering, there is no reason in either law or logic why that pattern cannot be established by proving both the umbrella and predicate offences in the same trial, as was here the case. This, too, was the conclusion in *Dos Santos* where Ponnan JA said:[15]

'Our legislature has chosen to make commission of two or more crimes within a specified period of time, and within the course of a particular type of enterprise, independent criminal offences. Here the two statutory offences are distinctly different. Since POCA substantive offences are not the same as the predicate offences, the State is at liberty to prosecute them in separate trials or in the same trial. It follows as well that there could be no bar to consecutive sentences being imposed for the two different and distinct crimes, as the one requires proof of a fact, which the other does not. Although a court in the exercise of its general sentencing discretion may, with a view to ameliorating any undue harshness, order the sentences to run concurrently. Thus, by providing sufficient evidence of the five predicate acts, the State had succeeded in proving the existence of the "racketeering activity" as defined in POCA.'

13 At para 43.

14 See eg the judgment of Cloete JA in *S v Eyssen* 2009 (1) SACR 406 (SCA).

15 At para 45.

[50] Despite this authority, the appellant persisted in an argument that it had been impermissible for the state to have charged him with both count 2 and its predicate offences by contending that once the prosecuting authority had decided to charge him with an offence under s 2(1), it placed the trial procedurally into a category of prosecution entirely different from a 'normal prosecution' by reason of s 2(2) which reads:

'The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.'

[51] In the light of this section, the appellant contended that as s 2(2) makes serious inroads into an accused's normal procedural rights by rendering admissible evidence that would otherwise be inadmissible – including evidence of previous convictions – the trial in respect of offences other than those contemplated by s 2(1) would be unfair: and for that reason an accused cannot be charged in the same indictment with both an offence under s 2(1) as well as the underlying predicate offences.

[52] It was not suggested that any evidence otherwise inadmissible had in fact been introduced to the prejudice of the appellant or which in any way compromised his defence or rendered his trial unfair. To that extent the argument is purely academic and it is unnecessary to consider it in any detail. Suffice it to say that the trained judicial mind should be able to limit the effect of otherwise inadmissible evidence to the charges in respect of which it is admissible – any s 2(1) charges – and to exclude it from consideration in respect of charges in which it is not. Indeed this is what occurs daily done by courts, eg in hearing trials within trials.

[53] It may well be that the state for some reason decides not to prosecute the predicate offences in the same indictment as an umbrella charge, but that is a matter of prosecutorial discretion which need not detain us here. Of course the state should take care to ensure that the manner in which the indictment is drawn and the evidence presented does not result in an unfair trial, but the mere framing of a charge sheet to include both a POCA umbrella offence and its underlying predicates does not in itself occasion unfairness. Without the appellant having established that

he was in any way prejudiced, it cannot be said that the manner in which the state exercised its discretion in charging him was improper.

[54] In these circumstances I have concluded that there was no impermissible splitting of charges nor duplication of sentences by reason of the appellant having been charged on count 2 with an umbrella contravention of s 2(1)(e) of POCA as well as the underlying predicate offences of theft and money laundering in respect of which he was convicted.

[55] I should mention that as a ground of appeal the appellant relied on an alleged splitting of charges involving the theft and money laundering offences, contending that both flowed from his dealings with the cigarettes stolen during the first two robberies and that, once convicted of money laundering, he ought not also to be convicted of theft as well. This argument, quite correctly, was not pursued before this court. The statutory offence of money laundering is created by s 4 of POCA which provides:

'Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and ─

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person,

which has or is likely to have the effect ─

(i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

(ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere ─

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,

shall be guilty of an offence. '

[56] By receiving the cigarettes for himself well knowing they were stolen, the appellant made himself guilty of theft as it is a continuing crime. By proceeding to use the cigarettes as part of his stock in trade as a wholesaler as if they were goods lawfully acquired, and thereby disguising or concealing the source, movement and

ownership of the cigarettes and enabling and assisting the robbers to either avoid prosecution or to remove property acquired in the robberies, the appellant clearly made himself guilty of a contravention of s 4. Doing so involved different actions and a different criminal intent to that required for theft. In these circumstances there was no improper splitting of charges.

[57] It was not suggested that if Aspeling's identification of the appellant was accepted and the various technical defences I have dealt with did not succeed, the appellant was not guilty of the charges of which he was convicted. As I have found against the appellant on all these issues, in my judgment he was properly convicted and, as he does not seek to assail his sentence, the appeal must fail.

[58] The appeal is accordingly dismissed.

_____

L E Leach
Judge of Appeal

APPEARANCES

For Appellant	J P Spangenberg Instructed by High Court Unit, Cape Town Justice Centre Cape Town Bloemfontein Justice Centre, Bloemfontein
For Respondent	H C Booysen Instruction by The Director of Public Prosecutions Bloemfontein