


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE No: A427/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	15/10/2019
SIGNATURE	DATE

In the matter between;

BONGINKOSI VINCENT MKHWANAZI

Appellant

and

THE STATE

Respondent

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JUDGMENT

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MKHAWANE, AJ:

Introduction

[1] The appellant, together with his co-accused, was convicted of tampering with or damaging or destroying essential infrastructure to wit; Transnet electrical transformer causing damage to the value of R6m, in contravention of the provisions of section 3(1) read with sub section 1(13) 3(2) of the Criminal Matters Amendment Act 18 of 2015 and further read with section 51(2) and Part 2 of Schedule 2 of the Criminal Law Amendment Act 105 of 1977 as amended.

[2] He was also convicted of theft of nonferrous metal, copper and aluminium washers from electrical transformer in contravention of section 15(2) and 264 of the Criminal Procedure Act 51 of 1977.

[3] They were sentenced to 15 years imprisonment on each count and the sentences were ordered to run concurrently. Therefore the effective sentence is 15 years' imprisonment.

[4] Leave to appeal in respect of sentence was refused by the court a quo. He petitioned the High Court which granted him leave to appeal.

[5] The appellant did not plead guilty to both charges contrary to what was alleged in his heads of argument.

[6] The 15 years' imprisonment imposed by the court a quo is in accordance with the minimum sentence prescribed by the Criminal Law Amendment Act 105 of 1997.

[7] In terms of the Act, a Court may only deviate from the prescribed minimum sentence should it find that substantial and compelling circumstances exist that justify a deviation.

[8] In *S v Malgas* 2001 (2) SA 1222 SCA at paragraph 25 summarised the guidelines in respect of a deviation of the minimum sentence prescribed by the Act as follows:

- A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).*
- B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.*
- C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.*
- D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.*
- E. The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.*

- F. *All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.*
- G. *The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.*
- H. *In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.*
- I. *If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.*
- J. *In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.*

[9] In *S v Vilakazi* 2009 (1) SACR 552 (SCA) at paragraph 15 the court said the following in regard to the approach to be followed when deciding whether or not to impose a minimum sentence in terms of Act 105 of 1997:

*"It is clear from the terms in which, the test was framed in Malgas and enclosed in Dodo that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence."*

[10] The court went on to state the following in paragraph 20.

*"Whether a sentence is proportionate cannot be determined in the abstract, but only upon a consideration of all material circumstances of the particular case, though leaving in mind that the legislature has ordained and the other structures referred to in Malgas. It was also pointed out in Malgas that a prescribed sentence need not be shockingly unjust before it is departed from 'for one does not calibrate injustice in a court of law.' It is enough for the sentence to be departed from that it would be unjust to impose it."*

[11] In imposing the sentence the court a quo took into account all the relevant factors regarding sentencing to determine if the prescribed minimum sentence is indeed the appropriate sentence for the offences the appellant was convicted of.

[12] The court took into account the appellant's personal circumstances as placed on record by his legal representative, the nature and seriousness as of the offence and its prevalence as well as the interest of the community.

[13] The magistrate also took into account the extensive damage caused to the infrastructure (the transformer) caused by the appellant and his co-accused, the replacement cost of which was R6m.


[14] In my view the court a quo considered all the relevant factors in respect of the sentence, namely the circumstances of the commission of the offences, personal circumstances of the appellant, the mitigating and aggravating circumstances, which it balance against each other.

[15] The court a quo could not find substantial and compelling circumstances that exist to deviate from imposing the minimum sentence. I also cannot find substantial



**H E Mkhawane**  
ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

I agree,



**Neukircher J**  
JUDGE OF THE HIGH COURT  
GAUTENG L DIVISION, PRETORIA

Date of hearing:

4 September 2019

Judgment delivered:

Counsel for the appellant:

Mr Kgagara

Instructed by:

Legal Aid South Africa

Counsel for the respondent:

Mr Coetzer

Instructed by:

National Director of Public  
Prosecutions, Johannesburg