REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A116/2021

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE 11 March 2022

SIGNATURE [redacted]

In the matter between:

MAMBANE LAURANCE	First Appellant
FUNDAMA GIDEON	Second Appellant
MNISI WITNESS	Third Appellant

AND

THE STATE	Respondent

This judgment is handed down electronically by circulation to the parties' legal representatives by email and uploading on case line. The date and time for hand- down is deemed to be 11 March 2022.

JUDGMENT

NDLOKOVANE, AJ (MUNZHELELE J concurring)

Introduction

[1] This case turns in essence around copper theft which is prevalent in the Gauteng Province and apparently also in other parts of South Africa.

[2] The appellants were convicted in the Regional division of Gauteng held at Brakpan on 26 March 2019 on two counts, namely the tampering, destroying or damaging of essential infrastructure('count 1') and of theft of ferrous and non-ferrous metal ('count' 2), committed on 4th January 2018 in the Brakpan area where they damaged and stole: 150mm by 3 core XLPE cable, supplying electricity to substation Vulcania 33 and substation Vulcanian south, the property of Ekurhuleni Municipality with an estimated value of R60 000,00.

[3] On 23 March 2019, the learned magistrate sentenced them to effective period of 15 years imprisonment, with reference to the minimum sentence regime contained in section 51(2) of Act 105 of 1997. They now appeal against their conviction and sentences with special leave from this division.

The Appellants' grounds for appeal

[4] One of the grounds for appeal in respect of the conviction is that the learned magistrate erred in rejecting the evidence of the appellants and found instead that the state had proved its case beyond a reasonable doubt. Their evidence being that, they

were hired to dig the trench and were not aware that their actions were unlawful. I hasten to mention that during the hearing of this application, counsel on behalf of the appellants conceded that this ground of appeal is no longer an issue that the appellant raises and this court need not consider it. Another ground for consideration raised on behalf of the appellants was that the court *a quo* misdirected itself by convicting them on both counts 1 and 2 ,as same constitutes duplication of charges.

[5] Regarding the sentence, the appellants contends that the sentence by the court a *quo* is shockingly inappropriate, in that it is out of proportion to the totality of the accepted facts; and that the trial court should have taken the personal circumstances of the appellants cumulatively in order to find exceptional circumstances to deviate from the minimum sentence.

Material Evidence

A brief summary of the evidence of witnesses from both the state and defence can be summarised as follows:

[6] It is common cause that the state led the evidence of four(4) security officers in the employ of CPI, namely, Mr Mvumelwano Penny, Mr Jimmy Moloto,Mr Sipho Khehla Mabaso and Mr Michael Ngomane. Their evidence corroborates each other in most material aspects, except where it relates to which one of them arrested which appellant.

[7] On the day in question, they reported for duty and amongst their duties, they patrolled one of the hot spots in the area of Ekurhuleni for theft of cables.

[8] Mr Ngomane, the supervisor, was the driver of the motor vehicle they were in and as he approached the area, he saw five (5) people in a trench. He then accelerated the speed of the motor vehicle, at some stage he stopped and his colleagues alighted the vehicle and chased after the 5 men. Some of the men had the cables handing around their shoulders whilst running.

[9] Mr. Nvumelano, chased after the second appellant who had a cable in his possession and he dropped it on the ground while running. It is when he apprehended him and took him back to the trench. Mr. Moloto also chased and assisted in the apprehending of the second appellant.

[10] Mr Mabaso chased after the first appellant, who dropped the cable and he then apprehended him and then brought him back to the trench.

[11] The evidence on record depicts the cable having been stripped and was rolled, inside the trench, where there were tools. The pictures of the appellants, together with the cables, tools as well as the trench were taken by the security officers. The appellants were taken to the police station, the cables and tools were booked into SAP 1315/2018.

[12] This evidence was corroborated by Mr Heinlein Bernard Buitendag, who is the Clerk at Brakpan Police Station. He confirmed having booked the following items, lasher, spade, two picks, one hacksaw, three pieces of 9 meter, 158 mm free cord copper cables.

[13] Mr. Thobane Eric Ramovha a senior operation officer for medium voltage,in the employ of the Ekurhuleni Electrical Department testified that he identified the cable as that of the municipality on 10 January 2018 and that the cable supplies power between two substations which is Volcania 33 substation and Volcancia South. Due to the cable theft, the residential area, industrial area and the hospital for mentally handicapped were affected by the power cut. The value of the cable was said to be thirteen thousand five hundred rand (R13 500,00) and the repairing costs thereof amounts to sixty thousans rand (R 60 000,00).

[14] After the state closed its case, the appellants also testified. Their evidence is that on the day in question they met for the first time at the robots at a certain BP garage to look for odd jobs. While there, a bakkie arrived and appellant 1 ran to it with three other people including the second and third appellants. Whilst inside the bakkie, the occupants

of the bakkie said that they need only three people, and the fourth person they were with, alighted.

[15] They were driven to the place where they were told to dig as those people who requested them to dig wanted to take out the old pipes and put new ones. The driver of the motor vehicle left and they remained with two other gentlemen who pointed to them where to dig. They started digging and later went out of the trench to smoke, then realized that the two gentlemen they were with had also left.

[16] The first appellant was the first to go out for a smoke and then followed by the second and third appellants. While the three of them were outside the trench, a bakkie came at a high speed and stopped near them. They were informed that they were being arrested for theft of cables and photos of them were taken as well as the tools and cables. The appellants denied being in possession of the cable and that they stripped off the outside cover. They contend that they did not know that it was illegal to dig the area and were hired by unknown men in the bakkie and were going to be paid one hundred and fifty rand (R150,00) and also deny running away when they saw the bakkie.

[17] The issue in this appeal is the question of whether the court a *quo* in convicting them on counts 1 and 2 indeed committed duplication of charges?

The Applicable Law

[18] In *S v Francis*[1], it was reiterated that the powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection, the trial court's conclusion, including its acceptance of a witness evidence, is presumed to be correct.

[1] 1991 (1) *SACR 198 (A) at p204*

[19] The evidence of the state witnesses as earlier alluded corroborates each other in most material aspects.I see no reason to tamper with the court a *quo*'s finding in accepting their evidence as true.

[20] I cannot say the same with the evidence of the appellants. Accepting their evidence that the appellants ran away upon being approached. If they were not aware what they were doing was wrong, one wonders why they were running with the cable on some of their shoulders. The appellants' version that they were hired to dig up and did not know their act of digging was unlawful cannot be probable and was correctly rejected as false by the court a *quo*. A proper evaluation brings one to safely conclude that the only reasonable inference one can draw was that for the appellants to steal the cable they had to tamper with and damage the cable being the essential infrastructure. Consequently, they were correctly convicted.

[21] A new offence is created in section 3(i)(b) of the Criminal Amendment Act 18 of 2015 read with the provisions of section 51(2) 105 of 1997 which reads as follows:

> *"3.1 Any person who unlawfully and intentionally –*
>
> *(a) tampers with, damages or destroys essential infrastructure; or*
>
> *(b) colludes with or assists another person in the commission, performance or carrying out of an activity referred to in paragraph (a),*
>
> *and who knows or ought reasonably to have known or suspected that it is essential infrastructure, is guilty of an offence and liable on conviction to a period of imprisonment not exceeding 30 years or, in the case of a corporate body as contemplated in* ***section 332(2)*** *of the* ***Criminal Procedure Act, 1977,*** *a fine not exceeding R100 million.*
>
> *(2) For the purposes of subsection (1), a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both –*
>
> *(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and*

(b) the general knowledge, skill, training and experience that he or she in fact has."

Evaluation

[22] As pointed out in the heads of argument on behalf of the respondent, it was the undisputed evidence of Ekurhuleni Electrical Department's employee, Mr. Ramovha, that the service provided by damaged cables is an essential service in the infrastructure of the community, in that the cable supplies power between two substations which is Volcania 33 substation and Volcancia South. Due to the cable theft, the residential area, industrial area and the hospital for mentally handicapped were affected by the power cut.

[23] It was also the undisputed evidence of Mr. Nvumelwano, Mr Moloto and Mr. Mabaso that upon visiting the scene they *inter alia* found the cable having been stripped and was rolled, inside the trench, where there were tools. Moreover, the appellants were found in possession of equipment suitable to cut the cabling. The appellants tried to run away fortunately they were caught and arrested. It was conceded during arguments by the counsel for the appellant that the respondent has proved the case beyond reasonable doubt and the conviction of the accused was in order.

[24] It is therefore clear that, given the theft and damage to essential infrastructure in the provision of a basic service, the appellants' convictions have attracted the prescribed minimum sentence contained in Part II and not Part V of Schedule 2 of the 1997 Act.

Duplication of charges

[25] It is necessary to consider the duplication of convictions as Ms. Moloi on behalf of the appellants raised the issue in her heads of argument and oral submissions with specific reference to theft ('count 2)' and tampering, damaging or destroying of essential infrastructure in terms of the provisions of section 3 of the The Criminal Matters Amendment Act 18 of 2015 (' Act 18 of 2015 ')("count1"). Ms. Moloi contends that the appellants should have been charged with one of the counts as an alternative

to the other and not as two separate counts. She further submitted that if one has to look at the intention of the legislature in respect of the two counts that the appellants had been charged and convicted of it cannot be said that the intention was meant for the perpetrators to be punished twice for the same offence.

[26] The respondent in contrast contends that there is no merit in the submission of duplication of charges by the appellant in that count 1 creates a statutory offence whilst count 2 is a common law offence The appellant knew or reasonably ought to have known when they dug up, that their conduct was unlawful.

[27] In considering conviction, the court a *quo* accepted that the appellant's main intent was to steal the electric cable. To steal the cable, they had to inevitably tamper with and damage the cable being the essential infrastructure.

[28] Theft is defined as the unlawful and intentional appropriation of *inter alia* moveable property which belongs to another in order to permanently deprive the person of such property.[2] Whereas, in terms of section 3 of Act 18 of 2015, an offence is committed if a person unlawfully and intentionally tampers, damages or destroys essential infrastructure. There is a clear distinction between the elements to be proven by the State to ensure a conviction in respect of these offences. There is no single test to consider duplication of convictions, but two indicators to be used are the test of a single intention, the evidence test and the elements required to prove the offence.[3]

[29] If the elements constituting the offences differ, there cannot be a duplication even though one single act is committed or transaction is concluded.

[30] In totality, from the record in the present case clearly demonstrates that the appellants were found in possession of the cables, some dropped them from the

---

[2] See: CR Snyman, *Criminal Law*, 5th ed at 483

[3] See: *S v McIntyre* **1997 (2) SACR 333** (T) at 336-7 and Du Toit *et al, Commentary on Criminal Procedure Act 14-6 and further*

shoulders as they were running away from the officers,by running with the cables, the intention was to deprive the owner hence the offence of theft.

[31] Further a proper consideration of the elements in section 3 , namely, by digging and cutting the cables, they were tampering with the municipality infrastructure meant to supply electricity to the two substations which is Volcania 33 and Volcancia South. They knew that having tampered and destroyed the infrustracture, clearly, the supply of electricity will became a huge problem not only to the residence but also to industries and shops because electricity is an essential commodity we cannot live without. This confirms the contravention of section 3 as charged. Consequently, it follows that there cannot be a duplication in this regard, even though one single act was committed, there is a clear distinction between the elements for the two offences as proven by the state. Therefore, the appellants were correctly convicted by the court *a quo.* Accordingly, I see no reason to temper with its decision.

Sentence

[32] The Criminal Matters Amendment Act 18 of 2015 ("the 2015 Act") came into effect on 1 June 2016. One of its stated purposes (as reflected in the preamble) was to amend the Criminal Law Amendment Act 105 of 1997 ("the 1997 Act") so as to regulate the imposition of discretionary minimum sentences for essential infrastructure related offenses.

[33] An *'essential infrastructure'* is defined in section 1 of the 2015 Act as follows:

'Any installation, structure, facility or system, whether publicly or privately owned, the loss or damage of, or the tampering with, which may interfere with the provision or distribution of a basic service to the public…'

[34] A *'basic service'* is in turn defined as follows:

'a service, provided by the public or private sector, relating to energy, transport, water, sanitation and communication, the interference with which may prejudice the livelihood, well-being, daily operations or economic activity of the public…'

[35] One of the consequential amendments to the 1997 Act was to introduce, in Part II of Schedule 2, the following:

> *'Theft of ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, 2015 –*
>
> *(a) if it caused –*
>
> *(i) interference with or disruption of any basic service, as defined in section 1 of the aforementioned Act, to the public; or*
>
> *(ii) damage to such essential infrastructure…'*

[36] A further consequential amendment to the 1997 Act was the introduction of Part V, which refers to:

> *'Any offence referred to in section 36 or 37 of the General Law Amendment Act, 1955 (Act No 62 of 1955), involving ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, 2015.*
>
> *Theft, involving ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, 2015, which is not covered in Part II of this Schedule.'*

[37] With regards to sentence, the appellant was convicted in terms of the provisions of section 51(2) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, in respect of counts 1 and 2.

[38] Section 51(2) of Act 105 of 1997, provides for minimum sentences of categories of offenders who have been convicted of offences reflected to in Para. 1, II, III and IV of schedule 2 by providing that:

"Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part II of Schedule 2 to imprisonment for 15 years for first offender……."

[39] An escape clause appears under section 51(3) of the Act and provides that:

> *"If any court referred to in subsections 1 or 2 is satisfied that substantial and compelling circumstances exist which justify the imposition of a less sentence than the sentence prescribed in these subsections, it shall enter those circumstances on record of the proceedings and must therefrom impose such lesser sentence".*

[40] In evaluating substantial and compelling circumstances Marais JA in *S v MALGAS*[4] held:

> *"But for the rest, I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets 'substantial' and 'compelling' cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative impact of those circumstances must be such as to justify a departure."*

[41] The learned Judge continued at 481i to 482a:

> *"B. Courts are required to approach the imposition of sentence conscious that the legislature had 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 courts.*

---

[4] 2001 (1) SACR 469 (SCA) at 477f

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."

[42] In mitigation, the appellants brought to the attention of the court a *quo* their personal circumstances. From the record, these can be summarised as follows: The first appellant is a Mozambican citizen, He was 38 years old; He is unmarried, He has three children, aged 24 years old, 18 years old and 16; The mother of his children is a South African citizen and they resides together; His children's mother does odd jobs as a domestic worker; The appellant was doing odd jobs fixing swimming pools; He earned four thousand rands (R 4 000,00) per month; The appellant has been in custody for fourteen (14) months.

[43] The second appellant: He was 35 years old; he attended school until Grade 7; He is unmarried; He has 2 children aged 9 years old and 6 years old; The children resides with their mother in Mozambique; His children's mother is unemployed; At the time of his arrest he was doing odd jobs as a general worker; He spent fourteen (14) months in custody awaiting trial.

[44] The third appellants' personal circumstances are as follows; He was 26 years old; He is unmarried; has no children, He attended school until Grade 9 and he dropped out of school in Grade 10; He was doing odd jobs as a build and painter; He is a first offender;

[45] It should however be borne in mind that in cases of serious crime the personal circumstances of the offender by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions of whether the accused is married or single, whether he has two children or three, whether or not he is employed, are in themselves largely immaterial to what that

period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas's case said should be avoided. Also see *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para 58.

[46] The record is depleted with the devastating consequences for the country and community as a result of the tampering and theft of these electrical cables which I alluded to earlier in my judgment and wish not to repeat herein.

[47] Having considered all the above, the trial court made a finding that there were indeed no substantial and compelling circumstances which justifies deviation from the minimum sentence of fifteen (15) years imprisonment for counts 1 and 2.

[48] Despite my diligent search, I have not been able to find any demonstrable or clear error on the part of the trial court in respect of the sentence to justify interference with its findings.

Order

[49] In the result, the following order is made:

[49.1] The appeal against both the conviction and sentence is dismissed.

NDLOKOVANE N
Acting Judge of the High Court
Gauteng Division, Pretoria

Heard: 10 February 2022

Electronically Delivered: 11 March 2022

Appearances:

Applicant Counsel: Adv. M.B Moloi

Instructed by: Legal Aid South Africa

Respondent's Counsel: Adv. K Germishuise

Instructed by: NPA