IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A302/2021

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

SIGNATURE 04/07/2022 DATE

In the matter between:

VUSI DLAMINI **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGEMENT

MOSOPA, J

1. The appellant was convicted in the Brakpan Regional Court of the following charges;

    1.1. Contravention of the provision of section 3(1)(a), read with sections 1, 3(1)(b) and 3(2) of the Criminal Matters Amendment Act 18 of 2015, relating to tampering with or damaging or destroying essential infrastructure;

    1.2. Theft of ferrous and non-ferrous metal forming part of essential infrastructure, read with the provisions of section 155(2) and 264 of the Criminal Procedure Act 51 of 1977, read with the provisions of section

51(2)(a) and Part II of Schedule 2 of Act 105 of 1997 (also relating to the first count).

2. The appellant pleaded not guilty to the charges and throughout the trial, he was legally represented.

3. Following conviction, the appellant was sentenced to fifteen (15) years imprisonment on each count, but the sentences were ordered to run concurrently, in terms of section 280 of the Criminal Procedure Act 51 of 1977, thus the appellant would serve an effective term of fifteen (15) years imprisonment.

4. Leave to appeal against sentence was granted by this court on petition on 30 August 2021. Some portions of the record are missing, but by agreement between the parties, it was agreed that the record is sufficient to dispose of the matter with regard to sentence. It is on that basis that this court decided to proceed and hear the appeal matter.

BACKGROUND

5. The convictions against the appellant has their genesis in an incident that occurred on 13 September 2017 at Apex Train Station, when the appellant was found burning cables which were cut off from the railway infrastructure controlling the railway signals, by security at Metro Rail, who saw the smoke rising from the bushes.

6. Mr Ncube, the security officer who arrested the appellant, testified that he patrolled the area in the morning and there was nothing wrong with the place. It is only at 13h30 when he noticed the smoke coming from the bushes about 100 meters from the train platform, that he went to investigate and found the appellant there. The appellant had a black bag, containing a knife, his identity document and gloves and the appellant was alone at that stage.

7. Mr Mkwanyana, the Metro Rail peace officer, was called to the scene following the arrest of the appellant. However, prior to that, he received an alert at around 13h00 from his control room that the tracks were out and malfunctioning. The damage or removed cables were five (5) in total, differing in sizes.

SENTENCE

8. The appellate courts' powers were clearly set out by the Constitutional Court is ***S v Bogaards 2013 (1) SACR 1 (CC)***, at para 41, when it said;

"[41] Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."

9. The appellant is convicted of charges which resorts squarely within the purview of section 51(2)(a) of Act 105 of 1997, which prescribes a minimum sentence of fifteen (15) years, in the event of conviction of a first offender.

10. The Criminal Amendment Act 18 of 2015 prescribes a minimum sentence of thirty (30) years imprisonment in the event of conviction of section 3(1)(a), under which the appellant was convicted.

11. The trial court imposed a sentence of fifteen (15) years imprisonment in respect of each count, but ordered that the sentences run concurrently and the effective imprisonment to be served by the appellant was fifteen (15) years.

12. When sentencing the appellant, the trial court adequately took into account the personal circumstances of the appellant; the fact that he is 32 years old and has a 4-year-old dependent and he is a first offender. The trial court also considered the seriousness of the offences and the interests of society.

13. The trial court found that no substantial and compelling circumstances exist in respect of the applicant and imposed a fifteen (15) year sentence as opposed to thirty (30) year prescribed sentence.

14. The only issue to be determined in this appeal matter is whether the trial court erred in finding that no substantial and compelling circumstances exist.

15. It was contended by Mr Alberts, on behalf of the appellant, that although it has to be accepted that disruptions could have been severe, the value of the cable stolen is relatively minor. As a consequence, the sentence imposed is not proportional to the offence.

16. The court, in the matter of ***S v Vilakazi 2009 (1) SACR 552 (SCA)*** at paras 14-15, when dealing with the determinative test in respect of substantial and compelling circumstances, stated;

"[14] It is only by approaching sentencing under the Act in the manner that was laid down by this court in S v Malgas – which was said by the Constitutional

Court in S v Dodo to be 'undoubtedly correct'– that incongruous and disproportionate sentences are capable of being avoided. Indeed, that was the basis upon which the Constitutional Court in Dodo found the Act to be not unconstitutional. For by avoiding sentences that are disproportionate a court necessarily safeguards against the risk – and in my view it is a real risk – that sentences will be imposed in some case that are so disproportionate as to be unconstitutional. In that case the Constitutional Court said that the approach laid down in Malgas, and in particular its 'determinative test' for deciding whether a prescribed sentence may be departed from, 'makes plain that the power of a court to impose a lesser sentence ... can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross' [and thus constitutionally offensive]. That 'determinative test' for when the prescribed sentence may be departed from was expressed as follows in Malgas and it deserves to be emphasised: '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.'

[15] It is clear from the terms in which the test was framed in Malgas and endorsed 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. The Constitutional Court made it clear that what is meant by the 'offence' in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise) consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.' If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in Malgas, which said that the relevant provision in the Act 'vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which 'justify' it."

17. The theft of railway tracks cable is on the rise and the government has lost a lot of money relating to this kind of offence. The value of the cable stolen is, in my considered view, not the only relevant consideration. The offence committed posed a great risk to train users as the theft of cables affect the railway signals. Without

functioning signal operating, it is trite that it could result in trains colliding and a loss of life and limb suffered as a result.

18. Rail transport is a cheap means of transport which is relied on by the poor, indigent and lowest earning employees. Given that each train carries a large number of passengers, many casualties may result in the event of a train collision. The appellant was ignorant of the risk posed by his conduct, as his intention was only to sell the stolen cable to get money, which shows that his conduct was driven by greed.

19. We have seen the total collapse of train infrastructure as a result of this theft of railway cables in our country, which will take many years and lots of taxpayers' money to fully restore.

20. The court, in the matter of ***S v Matsitela and Others (78/2017) [2018] ZAFSHC 135 (13 September 2018)*** at para 79, when dealing with crimes relating to essential infrastructure, stated;

> *"[79] Although the value of the stolen goods may not have been proved with sufficient weight, the consequences of the theft in several cases and the potential consequences in other instances could not be challenged. No doubt, the promulgation of the 2015 Act is a logical consequence of the unacceptably high crime rate relating to infrastructure. Considerable damage may be caused to essential infrastructure by the commission of offences that are in themselves relatively minor. The legislature has recognised this as is apparent from the preamble to the 2015 Act."*

21. It was argued that the personal circumstances of the appellant constitute substantial and compelling circumstances. The court, in the matter of ***Vilakazi*** *(supra)*, at para 58, when dealing with the personal circumstances of the accused, found that in the event of serious offences, the personal circumstances of the accused recedes to the background. What must be considered is whether the accused could re-offend.

22. No correctional supervision reports and/or pre-sentence reports were before the trial court and as such, this aspect cannot be predicted. The only reasonable inference which can be drawn from the absence of these reports before the trial court, is that the appellant is not a candidate for rehabilitation.

23. The period of eight (8) months spent by the appellant awaiting finalisation of his trial matter cannot on its own constitute substantial and compelling circumstances. That aspect has to be considered along with other aspects, as the period in detention pre-sentencing is but one of the factors that should be taken into account. The most important aspect to consider is whether the sentence imposed is

proportionate to the crime (see ***S v Radebe and Another 2013 (2) SACR 165 (SCA)***).

24. The appellant did not show any remorse and instead shifted the blame onto Bongani Zulu, who he claimed stole the copper cables, despite the fact that Bongani Zulu was not found. It cannot be found to be true that he was influenced to a certain extent to commit the offence by Bongani Zulu. Nothing which seemed to belong to Zulu was seized when the appellant was arrested, only items belonging to appellant were seized.

25. It is therefore my considered view that the sentence imposed is indeed proportionate to the crime committed and there is no need to interfere with the sentence.

ORDER

26. As a result, the following order is made;

    1) The appeal against sentence is hereby dismissed.

MJ MOSOPA

JUDGE OF THE HIGH

COURT, PRETORIA

I agree,

CM SARDIWALLA

JUDGE OF THE HIGH

COURT, PRETORIA

APPEARANCES

For Appellants:	Mr HL Alberts
Instructed by:	Legal Aid SA
For Respondent:	Adv PW Coetzer
Instructed by:	The DPP
Date of hearing:	25 May 2022
Date of delivery:	Electronically transmitted