IN THE HIGH OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

Date: ~~30~~ **November 2022** Signature:

Case No: **A344/2021**

In the matter between:

B CHIMUTANGA Appellant

and

THE STATE Respondent

JUDGMENT

NEUKIRCHER J:

1] The Appellant was arraigned in the Regional Court at Vereeniging on one count of theft read with section 155(2) and section 264 of the Criminal Procedure Act. 108 of 1997 (CPA), as amended, read further

with section 1 of the Criminal Matters Amendment Act, 18 of 2015, read further with part 2 or part 4 of schedule 2 of the Criminal Law Amendment Act, 105 of 1997 for theft of ferrous and or non-ferrous metal forming part of the essential infrastructure.

2] On 14 August 2020 he plead guilty in terms of section 112(2) of the Criminal Procedure Act, 108 of 1997 CPA and was subsequently convicted. He was represented throughout the trial.

3] On 16 October 2020 he was sentenced to 13 (thirteen) years imprisonment of which 3 (three) years were suspended for 5 (five) years.

4] Leave to appeal was sought and granted against sentence only.

AD SENTENCE

5] In **S v De Jager**[1], Holmes JA stated the following principle as regards the discretion of a court of appeal to interfere with the sentence imposed by a lower court:

"It would not appear to be sufficiently recognised that a Court of appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which has the discretion, and a Court of appeal cannot interfere unless the

[1] 1965 (2) SA 616 (A) at 629

discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited."

6] And in **S v Pieters**[2] it was held that the general approach of a court of appeal, when considering an appeal against sentence, should be:

"Met betrekking tot appelle teen vonnis in die algemeen is daar herhaaldelik in talle uitsprake van hierdie Hof beklemtoon dat vonnisoplegging berus by die diskresie van die Verhoorregter. Juis omdat dit so is, kan en sal hierdie Hof nie ingryp en die vonnis van 'n Verhoorregter verander nie, tensy dit blyk da thy die diskresie wat aan hom toevertrou is nie op 'n behoorlike of redelike wyse uitgeofen het nie. Om dit andersom te stel: daar is ruimte vir hierdie Hof om 'n Verhoorregter se vonnis te verander alleenlik as dit blyk dat hy sy diskresie op 'n onbehoorlike of onredelike wyse uitgeoefen het. Dit is die grondbeginsel wat alle appelle teen vonnis beheers."

---

[2] 1987 (3) SA 717 (A)
Also in S v Rabie 1975 (4) SA 855 (A): *"In every appeal against sentence ..., the Court hearing the appeal – (a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial Court and (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'."*

7] It is common cause that the minimum sentence in respect of the charge was 15 years[3]. A pre-sentencing report was filed in which the appellant's personal circumstances were detailed and the recommendation made that the correctional supervision should be imposed as:

"...it aims to provide a means of rehabilitation within the community, thus preserving the important links which the offender may have with his family or community structure. The probation officer is of the opinion that this is a suitable sentence as it will allow the accused to be able to provide for his family while participating in rehabilitation programmes that will encourage him to take steps towards correcting his criminal behaviour."

8] In rejecting this recommendation, the court took into account several factors which include the prevalence of the crime and the theft of fuel from Transnet's pipelines, the damage that is caused to essential infrastructure, the cost of repairing the damaged fuel pipes, the cost of employing enough security guards to guard against these crimes and the fact that these losses and costs have to be recovered from South Africa's overburdened tax payers. The Court also took into account that the appellant's role was to transport the stolen fuel from the scene to its destination and when he was contacted to ask to provide transport, he knew full well that a crime was going to be committed.

---

[3] Section 51(2)(a) of Act 105 of 1997

9] The Magistrate also took into account the fact that the truck used to transport the fuel belonged to the appellant, that he was 44 years old and married with 2 young children and the sole breadwinner; that since his arrest his family have suffered financially[4], that his truck had been impounded and that he had previously been (by all counts) a model citizen and that he plead guilty at the outset and so obviated the necessity and the costs of a trial.

10] The Court found that to impose a sentence of correctional supervision would send the wrong message to others intent on committing such a crime, but found sufficient mitigating circumstances to deviate from the minimum sentence of 15 years.

THE "NEW EVIDENCE"

11] Appellant argues however that the fact that appellant's truck had been impounded by the police was "*either disregarded or the Honourable Regional Magistrate failed to consider it properly or at all as a relevant factor in sentencing.*"[5] He argues that the Magistrate also failed to consider that the truck may well be forfeited to the State and this issue was not investigated prior to sentencing.

---

[4] The rental and childrens' school fees fell into arrears
[5] Appellant's heads at paragraph 7 page 4

12] In his heads of argument, appellant's attorney then proceeds to provide this court with information regarding the forfeiture of the truck and the value of that truck and submits that these are "*of paramount importance and factors which play a direct role in determination of an appropriate sentence when the imposition of a sentence is considered.*"[6] He has attached to his heads firstly, the preservation order granted on 19 December 2020 and secondly the forfeiture order which was postponed by Kumalo J on 17 January 2022.

13] In argument, the attempt to place new evidence before the court was abandoned, however, it is necessary to point out that whilst it is certainly possible to place further evidence before a court of appeal, in my view the manner in which appellant attempted to do so is to be discouraged – information is only elevated to the level of evidence when stated under oath. This is why affidavits are placed before court and witnesses at trial are administered an oath or affirmation. Submissions in *vacuo* in Heads of Argument are of no use, and attaching documents to those Heads to support a new submission that does not appear from a transcript, are equally meaningless.

14] It is important to note that the Magistrate did take into account the fact that the appellant's truck had been impounded – this he did when

[6] Appellant's heads of argument at paragraph 10

weighing up the personal circumstances of the appellant[7]. He also took into account the fact that the stolen fuel had been recovered[8].

15] The appellant argues that the Magistrate failed to take into account the possibility that he would not re-offend and that this is a material factor when considering sentence. However, what this argument loses sight of is the following:

15.1 firstly, the Magistrate had the benefit of a pre-sentencing report which ultimately recommended correction supervision. The Magistrate took into account all the factors mentioned therein;

15.2 secondly, one must not lose sight of the fact that this is an appeal on sentence only – the question to be asked is whether the sentence induces a sense of shock or whether there was a material irregularity or misdirection;[9]

15.3 thirdly, the theft of infrastructure is a prevalent and serious crime in this country so much so that the Legislature has determined that conviction on this charge carries a minimum sentence of 15 years for a first offender; and

15.4 fourthly, were one to impose a sentence of correctional supervision in respect of a serious crime of this nature, the message that would be sent to the public at large is that the crime is not a

---

[7] Record page 90 line 14-15
[8] Record page 98 line 11-12
[9] S v de Jager supra

serious one – which would be in diametric opposition to the message the Legislature is sending.

16] In my view the Magistrate took all relevant factors into account. He already determined that it was appropriate to deviate from the minimum prescribed sentence of 15 years and in so doing I am of the view that he did so judiciously taking all relevant factors into account and affording them the appropriate weight.

17] There is therefore no basis upon which this court can interfere with the sentence imposed and I am thus of the view that the appeal cannot succeed.

ORDER

18] The order that is made is:

The appeal is dismissed.

B NEUKIRCHER
JUDGE OF THE HIGH COURT

I agree

C SARDIWALLA
JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 11 November 2022.

Appearances:

For the Appellant	: Mr JP Fourie
Instructed by	: Fourie Attorneys
For the Respondent	: Advocate PW Coetzee
Instructed by	: The NDPP
Date of hearing	: 8 November 2022