IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A320/22

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

18/08/2023 [redacted]
DATE SIGNATURE

In the matter between:

TAMELA TITO **1st Applicant**

GALITO NGWENYAMA **2nd Applicant**

And

THE STATE **Respondent**

JUDGMENT

Delivered: This judgement 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 18 August 2023.

INTRODUCTION

[1] Following their conviction and sentence to 15 (fifteen) years of imprisonment, apropos count 1, for contravening section 3(1) and (2) of the Criminal Matters Amendment Act 18 of 2015, read with the provision of section 51(2) of Schedule 2 of the Criminal Law Amendment Act 51 of 1997, the Appellants, Mr. Tito Tamela and Mr. Galito Ngwenyama, sought leave to appeal against their conviction and sentence. The trial court refused the application.

[2] Dissatisfied with the refusal of leave to appeal, the Appellants petitioned the Gauteng Division of the High Court, Pretoria, as contemplated in section 309C of the Criminal Procedure Act 51 of 1977; and were granted leave to appeal against both the conviction and sentence. Since they are not appealing against count 2, to which they had already pleaded guilty, the only focal point for this court is count 1.

[3] The state alleged that on 15 January 2021 at Daveyton in the Regional Division of Gauteng, the Appellants unlawfully and intentionally tampered with, damaged or destroyed the essential infrastructure whilst they knew or ought to have reasonably known or suspected, as defined in subsection 2, that it was an essential infrastructure; to wit, it interferes with power transmission or electricity supplied to the community as a basic service.[1]

FACTUAL BACKGROUND

[4] In *casu*, the first state witness, Mr. Velaphi Vincent Skosana, testified that he was in his second year of employment as a security officer for Bidvest. He was stationed at Daveyton with his crew. On the day in question, he was working the nightshift. Just before 12 midnight, they noticed that some digging had started and observed the movement of people. They called for backup. At or about 01h00 they pounced on the diggers.

[5] He testified that the diggers used a pick and shovel to expose the cable which was buried deep underground. The second Appellant was inside the trench and the first Appellant was standing outside the trench they were digging, he testified. His testimony is that he chased after and arrested the first Appellant. Under cross examination he stated that the cable was already exposed when they arrested the Appellants. It was also his testimony that the second Appellant was arrested inside the trench by Mr. Ndenze.

[1] page 2 of the record

[6] The second state witness, Mr. Luvuyo Ndenze, testified that he was also employed as a security officer at Bidvest. On that fateful day, he stated that he, in the company of his superior, received a call for backup from Mr. Skhosana. Without any waste of time, they drove to Gumbi. He testified that he arrested the second Appellant, who was busy digging inside the trench.[2]

[7] The Appellants were arrested at 01h00 am by Bidvest Security officers on 15 January 2021 at Daveyton. Counsel for the Appellants conceded that the second Appellant was arrested inside the trench by Mr. Luvuyo Ndenze.

AD CONVICTION

[8] Not wanting to squander the court's time, Counsel for Appellants conceded upfront that on the facts the state witnesses' evidence was beyond reproach and their version was sound. To quote him he said: "I didn't delve into the facts of the matter for the simple reason that upon my reading, my Lords, of the record, I couldn't advance any meaningful argument in so far as the credibility or otherwise of the state witnesses."

[9] Indeed, there is no ring of truth to the Appellants' version that they were arrested at 9h30 pm enroute home from work, whilst in possession of digging instruments, namely: a spade and pick. Their version that they were made to roll on the ground, hence, they were covered in mud proved to be

[2] Page 43 of the record

unsustainable because it was not put to the witnesses who arrested them. As if that was not enough, Appellants' Counsel put to the state witnesses that they would deny having been arrested by them. Yet, in their evidence in chief the Appellants contradicted their Counsel by insisting that they were arrested by the selfsame witnesses. To illustrate the point, we refer to the record:

[10] Counsel put to the state witnesses the following:

"Ms. Clarence: In fact, they say that when they were walking, they met five security officers and they say that Skosana, the first state witness as well as yourself you were not amongst those security officers that arrested them."[3]

[11] During evidence in chief, the first Appellant stated:

"Accused 1: Your worship the people who arrested us were two.

Ms. Clarence: So, you do not know if the security guards that came to testify if they are the ones that indeed they arrested you. Is that what are you saying?

Accused 1: These two are the ones.

Ms. Clarence: Are they the ones that arrested you?

[3] Extract from the record page 49 paragraph 10

Accused 1: Yes

Ms. Clarence: Are you sure about that?

Accused 1: Yes, I am."[4]

[12] The comedy of errors did not end there; the Appellants did not put it to the first two state witnesses that they assaulted them during the arrest. However, in their evidence in chief they submitted that they had been assaulted. It is, therefore, not surprising that Counsel for the Appellants conceded that they were arrested in the manner described by the state witness. In short, they were caught *in flagrante delicto*.

[13] Counsel for the appellants narrowed down the appeal on conviction to the interpretation of the Criminal Matters Amendment Act no 18 of 2015. Perhaps it is appropriate to refer to the section in question:

"Offence relating to essential infrastructure:

3. (1) Any person who unlawfully and intentionally—

(a) tampers with, damages or destroys essential infrastructure; or

[4] Record page 109 paragraph 10

(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."

[14] Counsel for the Appellants submitted that the state failed to prove the requirements of knowledge as contemplated in Section 3(2) (a) and (b) of the Act. Buttressing his point, he referred us to the passage of the court *a quo*'s judgment at page 186 para 11 in which the court said the following:

"The court is satisfied that after analysis of the evidence relating to assault and the place where they were arrested, that the version of the accused cannot stand. After having said all this and take into account the definition which relates to tampering essential infrastructure and basic services, the court is satisfied that on the evidence tendered by the state, count one has been proved beyond a reasonable doubt."

[15] He submitted that this passage captures the essence of their criticism. Having conceded that the state proved beyond reasonable doubt that the Appellants tampered with the essential infrastructure, Appellants' counsel questioned whether the state had proven beyond reasonable doubt that the Appellants knew that which they were digging was an essential infrastructure.

[16] Upon being questioned by the court about his submission that the Appellants embarked on digging the trench at 1:h00 am without knowing what they were looking for, he offered no resistance and conceded that he would not be able to answer the court's question. To quote the Appellants' counsel: "the Appellants case actually falls on the court's questions. The only irresistible answer is that they must have known."

[17] The entire case, subsequently, crumbled. It stands to reason that all the elements of the offence were proven beyond reasonable doubt. It is trite that in criminal cases the onus rests on the State to prove its case against the accused

beyond reasonable doubt. In *S v Van Der Meyden*[5] the court said:

> *"The onus of proof in a criminal case is discharged by the state if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 at 373 and 383)."*[6]

[18] In the matter of *S v Trainor*[7] the court said the following:

> *"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable the quality of that evidence must of necessity the evaluated, as must corroborative evidence, if any. Evidence must of course be evaluated against the onus on any particular issue or in respect of the case in its entirety..."*[8]

[19] Summarizing the approach of an appeal court to findings of fact by trial court, Smalberger JA in *S v Francis*[9] stated:

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[5] 1999(1) SACR 447
[6] Supra at page 448 para f-g
[7] 2003 (1) SACR 35 (SCA)
[8] Supra para 9
[9] 1991 (1) SACR 198 (A)

"The power of a court of appeal to interfere with the finding 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's evidence, is presumed to be correct."[10]

[20] The court *a quo* concluded that the Appellants' version was improbable and stood to be rejected. The court found that there was sufficient corroboration on the part of the evidence of the state relating to all the essential elements of the offence. Having looked at the evidence in its totality, we are of the view that the trial court's decision cannot be faulted. Accordingly, this court does not find any misdirection on the part of the court *a quo, a fortiori* the appeal against conviction must fail.

AD SENTENCE

[21] The Appellants are convicted of an offence which falls within part 2, schedule 2 of the Criminal Law Amendment Act 105 of 1997 which provides for a minimum sentence of 15 (fifteen) years imprisonment. In order to deviate from the minimum sentence, the court must find substantial and compelling circumstances present which will justify the imposition of a lesser sentence than the one prescribed.

[22] The issue of sentence falls exclusively within the discretion of the trial

[10] Supra page 198 para j

court. There is a plethora of cases to the effect. In the matter of *S v Rabie*[11] the court said:

> *"1. In any appeal against sentence, whether imposed by a Magistrate or a Judge, 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'.*
>
> *2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."*[12]

[23] In *S v Anderson*[13] the court stated the following:

> *"Over the years our courts of appeal have attempted to set out various principles by which they seek to be guided when they are asked to alter a sentence imposed by the trial court. These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentences induces*

[11] 1975 (4) SA 855 (AD)
[12] Supra page 857 para-D-E
[13] 1964 (3) AD 494

a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interest of justice require it."[14]

[24] The triad highlighted in *S v Zinn*[15] is still good law. The court said:

"What has to be considered is the triad consisting of the crime, the offender and the interest of society[16]*."*

APPELLANTS' PERSONAL CIRCUMSTANCES

[25] The following personal circumstances of the Appellants were placed before the trial court:

25.1 The first Appellant was a 35-year-old first time offender.

25.2 He is not married and does not have any children. He did not attend any form of schooling. He is a Mozambican citizen. He did not go to school in Mozambique.

25.4 He was employed as a contract worker earning between R1000 (one thousand rands) and R2000 (two thousand rands) per week, since 2001.

[14] 1964 (3) SA 494 (A) 495 D-E
[15] 1969 2 537 (AD)
[16] Supra Page 540 para G

25.5 The second Appellant is 36-year-old first time offender.

25.6 He is a father of three children aged: 21, 18 and 14. All these children are in South Africa. He is not married.

25.7 He also does not have any form of formal schooling. He is a Mozambican citizen.

25.8 He was gainfully employed as a contract worker earning between R1000 (one thousand rands) and R2000 (two thousand rands) per week. He has been working with the first Appellant since 2001.

SERIOUSNESS OF THE OFFENCE

[26] The destruction of the essential infrastructure is a serious problem in South Africa. Not only does it affect the supply of electricity to households, but it also affects the economy of the country, which leads to job losses, unemployment, and pits locals against foreign nationals.

[27] These cables are very expensive to replace. They easily run into millions of rands. In *casu*, the entire cable costs R6 000 000.00 (six million rands) to replace and R5 750.00 (five thousand seven hundred and fifty rands) to

repair.[17] That is not counting the amount spent on security costs to deter people, such as the Appellants, from interfering with the essential infrastructure.

[28] The cable in question was used to supply Buffalo substation in Mayfield from Daveyton and from Daveyton substation to Buffalo substation. In brief it supplied electricity to Buffalo substation which feeds the community around Daveyton and Mayfield including businesses, Industrial Telkom Towers and water pump substations.[18]

INTEREST OF THE COMMUNITY

[29] The dangers posed by open trenches are innumerable. Children can fall into these trenches and get electrocuted by the exposed wires. Vandalism results in failure of service delivery which in turn causes civil unrest. This necessitated the enactment of Criminal Matters Amendment Act, whose preamble is worth mentioning in *toto*:

"PREAMBLE

WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996, guarantees certain rights and enshrines the right to freedom and security

[17] Page 61 of the record
[18] Page 57 of the record

of the person;

AND WHEREAS the Constitution places a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights;

RECOGNISING the importance of essential infrastructure in providing basic services to the public;

HAVING REGARD to the unacceptably high incidence of crime relating to essential infrastructure in the Republic which poses a risk to, among others, public safety, electricity supply, communications and transportation;

AND RECOGNISING the harmful consequences to the livelihood, well-being, daily operations and economic activity of the public if basic services cannot be provided due to loss, damage or disruption caused by essential infrastructure-related offences;

AND SINCE essential infrastructure-related offences are becoming increasingly more organised and are often committed by armed and dangerous criminal groups;

AND SINCE essential infrastructure-related offences on occasion manifest themselves in offences which of themselves are relatively minor but cause considerable damage to essential infrastructure;

MINDFUL of the negative impact of these offences on South Africa's economy and society and on peace and stability in the country"

[30] The import of this preamble is self-explanatory, we, therefore, don't find any substantial and compelling circumstances for the court *a quo* to depart from imposing the minimum sentence. We are firmly of the view that the sentence should not be disturbed. In the result we make the following order:

ORDER:

[31] The Appellants' appeal on both conviction and sentence is dismissed.

M. P. MOTHA

JUDGE OF THE HIGH COURT, PRETORIA

I Concur

J. S. NYATHI

JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 2 August 2023

Date of judgement: 18 August 2023

APPEARANCES:

ADVOCATE FOR APPELLANTS: J. L. KGOKANE

INSTRUCTED BY: LEGAL-AID

ADVOCATE FOR RESPONDENTS: P.C.B LUYT

INSTRUCTED BY: NATIONAL PROSECTING AUTHORITY