IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISON, PIETERMARITZBURG

Not Reportable

Case No: SH187/2018

Appeal No: AR252/2019

In the matter between:

NOMZALO NDLELA	**1ST APPELLANT**
NONKULULEKO GOOODNESS MCHUNU	**2ND APPELLANT**
KHANYISILE MVELASE	**3RD APPELLANT**
BUSISIWE BIYELA	**4TH APPELLANT**
SIBONGILE MAHLABA	**5TH APPELLANT**
NONKULULEKO VANESSA HLATSHWAYO	**6TH APPELLANT**
ZINHLE MKHIZE	**7TH APPELLANT**
SILINDILE MKHIZE	**8TH APPELLANT**
SIBONGILE SITHOLE	**9TH APPELLANT**
MAKHOSAZANE PENELOPE MABIZELA	**10TH APPELLANT**
NTOMBIFUTHI SINETHEMBA KHUMALO	**11TH APPELLANT**
LUNGILE HLONGWANE	**12TH APPELLANT**

and

THE STATE	**RESPONDENT**

Heard: Dealt with ito s 19*(a)* of the Superior Courts Act 10 of 2013 without a hearing.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 16 July 2020.

JUDGMENT

GORVEN J (K PILLAY J CONCURRING)

[1] This is an appeal against the convictions and sentences imposed on the appellants. They were convicted in the Estcourt Regional Court on a charge of public violence. They were each sentenced to three years' imprisonment, wholly suspended on certain conditions, the second condition being that they serve a period of twenty-four months' correctional supervision in terms of s 276(1)*(h)* of the Criminal Procedure Act 51 of 1977 (the Act).

[2] The charge read as follows:

'That the accused are guilty of the crime of Public Violence

In that on or about 30th day of August 2018 and at or near R103 Road, Colenso area in the Regional Division of KwaZulu-Natal, the accused and diverse other persons numbering about 70 and more or thereabouts, did unlawfully assemble with common intent to forcibly disturb the public peace or security or to invade the rights of other persons and the said accused acting in concert did then unlawfully and intentionally cause the road to be blocked by causing a truck to halt in the middle of the road, thus jamming and/or obstructing traffic on the road.'

To this charge, the accused, all represented by the same attorney, pleaded guilty. In support of this plea, identical statements in terms of s112(2) of

the Act were tendered by each of them (the statements). The learned magistrate thereupon convicted all the appellants as charged. The conviction was based entirely on the guilty plea and the statements. No evidence was led.

[3] It is as well to consider some authoritative definitions of public violence. The first is:

'Public violence consists in the unlawful and intentional commission, together with a number of people, of an act or acts which assume serious dimensions and which are intended forcibly to disturb public peace and tranquillity or to invade the rights of others.'[1]

In this matter, the appellants had all been convicted of both public violence and culpable homicide. Two sets of protests had taken place by workers on consecutive days where trash was strewn over streets down which the protestors marched. On the second day, after a few of the protestors had been arrested, the rest sat down to listen to the leaders. A band of white men armed with pick handles and sjamboks then set upon the protestors as well as black non-participants, leaving nine people prone and one dead. They were sentenced to five years' imprisonment on each of the counts of public violence and culpable homicide, of which two years was ordered to run concurrently. The appellants did not appeal their conviction on the charge of public violence but did appeal the sentences as well as the convictions on the charge of culpable homicide. The court upheld the convictions and sentences.

[4] This was paraphrased by the Supreme Court of Appeal as:

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[1] Jonathan Burchell *Principles of Criminal Law* 3 ed (2005) at 867. Cited with approval in *S v Whitehead* 2008 (1) SACR 431 (SCA); [2008] 2 All SA 257 para 38. See also CR Snyman *Criminal Law* 6 ed at 321.

'[T]he salient features of the offence are that a group of persons, acting in concert, must be shown to have committed an act or acts of sufficiently serious dimensions which invaded the rights of others and disturbed public peace.'[2]

[5] Relevant excerpts from the statements are:

- 'I and a group of approximately 70 persons unlawfully assembled with the common intent to forcibly disturb the public peace or security or to invade the right of other persons and that we acting in concert with each other then unlawfully and intentionally caused the road to be blocked by causing a truck to park across the middle of the road thus obstructing the traffic on that road.'
- 'When a large articulated truck arrived on the scene we caused this truck to stop and forced the driver to park the truck across the road, thus preventing any traffic from passing this intersection.'
- 'I admit that this action assumed serious dimensions and consequences as no traffic could pass on this road that acts as an alternative routed between Ladysmith, Colenso, Weenen and Estcourt towns.'
- 'I further admit that the closure of the road was unlawful and intended to forcibly disturb and disrupt the commuters on this road and as such the public peace and tranquillity and to invade the rights of other persons using the road.'
- 'Although a certain amount of force in the form of intimidation was involved in the closure of the road, no actual violence was perpetrated and no person or property injured or damaged.'
- 'The road was not closed for much longer than an hour before we were forced to disperse and the traffic allowed to continue as normal.'

[6] The submissions made on behalf of the appellants on the merits were threefold. That the appellants had the right to gather and protest peacefully and unarmed in order 'to show and voice their displeasure against government for its failure to provide basic services'. And 'can there be an offence of public violence where, as a matter of fact, there was no violence of any type or kind'? Finally, that it should be determined if

[2] *S v Le Roux and Others* 2010 (2) SACR 11 (SCA) para 5.

there is any relationship 'between non-violent disruptive protest and the criminal offence of public violence.'

[7] It is trite that, when the State accepts the facts set out by accused persons in a statement in terms of s 112(2), a court is bound by those facts in deciding whether a conviction should follow. It has been held that this 'must be seen as a *sui generis* act by the prosecutor by which he [or she] limits the ambit of the *lis* between the State and the accused in accordance with the accused's plea.'[3] The statements and they alone, thus form the factual basis for the decision. No other facts can be taken into account.

[8] The difficulty with the thrust of the above submissions is that they bear no relation to the facts admitted by the appellants. The heads of argument set out what are termed common cause facts or facts which are not disputed. In the first place, these include facts not found within the statements. One example of many is that in the weeks preceding the protest, the community of Colenso had communicated grievances concerning lack of service delivery to the office and Member of the Executive Council of Co-operative and Traditional Affairs. Reference to facts not included for the purposes of assessing whether the conviction is sound is not permissible. Secondly, some of the narrated facts are incorrect. One example is the averment that the protest was a spur of the moment affair. This is contradicted by the statements which say:

'[i]t was decided at a meeting that we will step up our protest to draw wider publicity for our complaints. As part of the increased outcry for attention, it was decided that we would march without proper authority to the turnoff . . . and stage a blockage of the R103 provincial road.'

[3] *S v Ngubane* 1985 (3) SA 677 (A) at 683E-F.

No submissions based on facts which do not appear in the statements can be taken into account.

[9] The appellants submit that the acts did not assume serious dimensions. They call in aid the cases of *R v Nxumalo*[4] and *S v Mlotshwa and Others*.[5] In both these matters, convictions on charges of public violence were set aside. In the former, the fracas had only lasted two minutes and in the latter 'a mere six to seven seconds'. These acts were held not to have been 'of sufficiently serious dimensions.'[6] However, in the present matter the actions of the appellants prevented persons from using a public road, which is the alternative to a toll road, for just over an hour. The appellants submitted that people are regularly stuck in traffic jams for that period. This, of course, is not due to intentional actions on the part of a crowd of people. In my view, the actions of the appellants cannot be equated with those in the two matters under review and assumed serious dimensions.

[10] Relying on *S v Mei*,[7] the appellants submitted that some form of violence is required. Since none was admitted, the conviction cannot stand. But the first definition referred to above requires the acts of serious dimensions to be 'intended forcibly to disturb public peace and tranquillity or to invade the rights of others'. And the other definition referred to above made no mention of violence:

'[T]he salient features of the offence are that a group of persons, acting in concert, must be shown to have committed an act or acts of sufficiently serious dimensions which invaded the rights of others and disturbed public peace.'[8]

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[4] *R v Nxumalo* 1960 (2) SA 442 (T).
[5] *S v Mlotshwa and Others* 1989 (4) SA 787 (W) at 795I.
[6] *Mlotshwa* ibid.
[7] *S v Mei* 1982 (1) SA 299 (O) at 303A.
[8] *S v Le Roux and Others* 2010 (2) SACR 11 (SCA) para 5.

No mention is made here of violence per se. The use of force or, as an alternative, the invasion of the rights of others meets the criteria if the commission of the act assumes serious dimensions. Be that as it may, the appellants admitted to having forced the driver to block the road with his vehicle. This, in my view, is sufficient.

[11] On behalf of the appellants, it was submitted that evidence *aliunde* the admissions was required before the learned magistrate was entitled to convict the appellants. This submission was based on the case of *R v Mazibuko*.[9] However, that matter was decided under the old Criminal Procedure Act and not under the Act. It is trite that those provisions, having been repealed, do not bind courts. The Act does not require evidence aliunde where a statement in terms of s 112(2) has been put up.

[12] All the elements of the offence were covered in the statements. When a truck is forced to park in such a way as to impede the flow of traffic on a public road which is used by a number of road users, it seems to me that this evinces a direct intention to 'invade the rights of others to use the road'. It places the conduct foursquare within the ambit of that element of the offence. The statements do not simply use generalities to repeat the elements of the offence. They also set out facts which support the admissions of law of the appellants.

[13] There is thus no basis on which to find that the learned magistrate misdirected himself on the facts. Nor can his conclusion that the appellants admitted all the elements of the offence be faulted. That being the case, an appeal court may not interfere with the convictions. The appeal against the convictions cannot succeed.

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[9] *R v Mazibuko* 1947 (4) SA 821 (N).

[14] As indicated, the appellants were all sentenced to a period of imprisonment of three years', wholly suspended on certain conditions and, in addition, a period of two years' correctional supervision in terms of s 276(1)*(h)* of the Criminal Procedure Act 51 of 1977 (the Act). The appellants complain that the sentence is so disproportionate as to warrant interference on appeal. In support of this complaint, the appellants make four broad submissions:

a) No actual or threatened violence was proved or alleged against any of them;

b) No discernible harm was committed against any person or property;

c) All but two of the appellants had already spent 60 days in custody awaiting trial;

d) Some of the conditions imposed bear no relation to the offence of which the appellants were convicted.

[15] Since the submission is to the effect that the sentences imposed were disproportionate to the crime the required exercise is to assess the entire conspectus of evidence and to apply this to the time-honoured approach to sentencing. This takes into account the nature of the offence, the circumstances specific to the offender, and the interests of society.[10] A sentencing court also considers what is sought to be achieved by any sentence. All of this is weighed against sentences in comparable matters, but in an awareness that no two matters are identical. It is therefore appropriate to consider sentences in previous matters dealing with public violence.

[10] *S v Zinn* 1969 (2) SA 537 (A) at 540G-H.

[16] In *S v Mbuyisa*,[11] the appellant, an 18-year-old scholar, had thrown a large stone on the roof of a school during a two-day period where 10 to 15 people had caused damage to the school. He had no previous convictions. The magistrate imposed a sentence of three years' imprisonment, half of which was suspended for a period of five years. On appeal, the court substituted a sentence of a fine of R500 and imprisonment for a period of one year which period of imprisonment was conditionally suspended for five years.

[17] In *S v Ningi and Another*,[12] the appellants were convicted of public violence as well as murder and attempted murder. Two hostel rugby teams comprising workers employed at a sawmill attacked each other, with fatal consequences. On appeal to a Provincial Division their convictions on the counts of murder and attempted murder, on which they had been sentenced to long periods of imprisonment, were set aside. They were sentenced to 18 months' imprisonment on the public violence count. Because of the sentences on the other two counts, the trial court had not considered correctional supervision as an option for sentencing on the public violence count. The Supreme Court of Appeal held that because the other convictions and sentences were to be set aside, the matter should be remitted for the trial court to consider correctional supervision as a sentencing option.

[18] In *S v Le Roux and Others*,[13] the appellants ran amok in a restaurant and assaulted patrons and damaged property. There had been prolonged and widespread. The court described some of the conduct as:

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[11] *S v Mbuyisa*, 1988 (1) SA 89 (N).
[12] *S v Ningi and Another* 2000 (2) SACR 511 (A).
[13] *S v Le Roux and Others* 2010 (2) SACR 11 (SCA).

'upending tables, breaking glasses and throwing chairs around. The group was then seen breaking up into smaller groups which continued assaulting any patron they encountered. This escalated into full scale chaos engulfing the whole restaurant, with accompanying screaming, shouting and confusion.'

Three of them received sentences of six years' imprisonment of which either two or three years was suspended. A previous accused person had pleaded guilty and turned state witness. In his case, four of the six years were suspended. The sentences of the appellants were all confirmed on appeal.

[19] It remains to consider the triad referred to above in the present matter. First, the offence. It must be borne in mind that s 17 of the Constitution[14] accords to all persons the right to assemble and to protest peacefully. In this matter, the means used to protest overstepped the mark. The appellants intruded on the rights of others. They forced an innocent truck driver to stop and to impede other innocent road users. Access through that intersection to that road was prevented for just more than an hour. This was no longer conduct protected under the Constitution.

[20] The underlying motivation for their actions was explained in the statements. The appellants had 'attended a meeting to discuss the lack of service delivery and other related issues in [their] ward and more particularly the lack of response by the authorities to [their] complaints and peaceful demonstrations regarding these issues. . . It was decided at this meeting that [they would] step up [their] protests to draw wider publicity to [their] complaints.' This was not the first attempt they had made to have their grievances addressed. Complaints had been laid and peaceful protests

[14] Constitution of the Republic of South Africa, 1996.

held without eliciting any response from those who had assumed a responsibility to serve the community.

[21] It is entirely understandable that this would lead to frustration on their parts. Sections 152(1)*(a)* and *(b)* of the Constitution of the Republic of South Africa, 1996, provide that objects of local government are respectively 'to provide democratic and accountable government for local communities' and 'to ensure the provision of services to communities in a sustainable manner'. Because the State accepted the statements, the fact was established that the local government had failed to give effect to at least these two objects. It had not been accountable by responding to the complaints of the community. They believed that it had failed to provide services due to the community. This gave rise to the conviction that the only way to obtain a response was to 'stage a blockade' of the road. These were the actions of people desperate to prompt a response. It is a far cry from a destructive, violent mob running amok and wreaking havoc on persons and property. No physical harm was done to any person or property. Even though it was an offence, it was different in character to the majority of such matters.

[22] The appellants' situations must be considered next. They all pleaded guilty. They were all first offenders.[15] Many were unemployed. All but a few had been detained awaiting trial for about 60 days. Their detention was at a facility some 150 kilometres from their homes and family. All of them were women and the vast majority were mothers, some with very young children. They were deprived during that time of being able to care for their children, who lacked their nurture.

[15] One of the appellants had a conviction some 30 years before which was correctly not counted as a previous conviction.

[23] Finally, the interests of society must be brought into account. As was conceded by the prosecutor in his address on sentence, the exigencies of this particular matter did not call for either correctional supervision or direct imprisonment. He conceded that a wholly suspended sentence would be appropriate. The court was not bound by this concession but, given that the prosecutor is a representative of the State, the concession should have carried some weight in assessing the interests of society. Many of the appellants are unemployed so imprisonment with the option of a fine would in all probability amount in real terms to a sentence of direct imprisonment. This, to my mind, would not be appropriate. Indeed, it seems clear that the appellants pose no danger to society. This was recognised by the learned magistrate after conviction in releasing on warning all the appellants who were not on bail. Any concern for society can be addressed by a wholly suspended sentence. This would in my view sufficiently deter the appellants and others from committing a similar offence in the future.

[24] When taking the triad into account, it is clear that the sentences imposed by the trial court were significantly disproportionate to those called for. It placed far too great an emphasis on the result of the action of the appellants which caused the traffic to be impeded. Although their actions assumed serious proportions, when balanced with the other relevant considerations, it is my view that a wholly suspended sentence of imprisonment is appropriate. This must be made subject to not committing a similar offence during the period of imprisonment.

[25] In the premises:

1 The appeal against the convictions of the appellants is dismissed.

2 The appeal against the sentences imposed on each of the appellants is upheld and the following sentence is substituted for each of them:

‘The accused is sentenced to a period of imprisonment of one year. This sentence is wholly suspended for a period of three years on condition that the accused is not convicted of public violence for which the accused is sentenced to a period of imprisonment without the option of a fine committed within the period of suspension.’

GORVEN J

DATE OF HEARING:	Dealt with ito s 19*(a)* of the Superior Courts Act 10 of 2013 without a hearing.
DATE OF JUDGMENT:	This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 16 July 2020.
FOR THE APPELLANTS:	T Nkosi, of the SERI Law Clinic, Johannesburg Locally represented by Mzila Attorneys
FOR THE RESPONDENT:	IP Cooke of The Director of Public Prosecutions, KwaZulu-Natal.