



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: A90/2023

In the matter between:

LINDANI ROBERT SIWAHLA

First Appellant

THABISO MOKHELE

Second Appellant

and

THE STATE

Respondent

CORAM: REINDERS, ADJP *et* JORDAAN, AJ

JUDGMENT BY: REINDERS, ADJP

HEARD ON: 2 OCTOBER 2023

DELIVERED ON: 23 OCTOBER 2023

This judgment was delivered in open court and subsequently distributed to the parties by electronic mail communication.

- [1] The two appellants were arraigned in the Regional Court on a main charge of tampering, damaging or destroying essential infrastructure in contravention of

the Criminal Matters Amendment Act¹ and in the alternative thereto a charge of theft of copper cable belonging to the Dihlabeng Municipality in Bethlehem. Both appellants were acquitted on the main count, however they were convicted on the alternative count of the theft of 265m of copper cable. Both appellants were sentenced to six years' imprisonment in terms of Sec 276(1)(B) of the Criminal Procedure Act². The magistrate made no order in terms of sec 103 of the Firearms Control Act.³

- [2] Both appellants applied for leave to appeal against their convictions and sentences imposed but such leave was refused. On 17 April 2023 the High Court on petition granted leave to both appellants to appeal against their respective convictions and sentences.

- [3] The evidence tendered by the State revealed that police officers, acting on information, proceeded to Loch Athlone Dam where they observed the appellants digging and removing copper cable. The cable so found were four m long. The copper cable belonged to the municipality. Further evidence indicated a 265m long furrow from which 261m of copper cable was missing.

- [4] The learned magistrate considered the evidence by the State to be reliable and found the state witnesses to be credible. The appellants who testified were viewed by the magistrate not to be good witnesses and he found that their evidence stood to be rejected as not reasonably possibly true. It is trite that the power of a court of appeal to interfere with credibility findings of a trial court is limited.⁴

¹ 18 of 2015

² 51 of 1977.

³ 60 of 2000.

⁴ See: **S v Francis** 1991 (1) SACR 108(A).

- [5] Having listened to the arguments, I was satisfied that the magistrate did not err in this respect and there is no basis upon which we can or should interfere with the court's credibility findings.
- [6] The finding by the learned magistrate that the only conclusion to be drawn on the evidence before him was that the appellants had stolen the remainder of the cable as well is, however, on a different footing. Only 4 meter of cable was found and the evidence revealed that digging had taken place over an extended period. There is no evidence on when exactly the remainder of the cable, thus 261m, were removed. In my view it is not the only conclusion that can be drawn from the evidence that the appellants had stolen the cable. It was the duty of the State to prove or adduce evidence in this respect and it failed to do so. Mr Pretorius on behalf of the State responsibly did not attempt to convince us otherwise. In my view therefore the conviction had to be amended to theft of 4 meter of cable only.
- [7] The appellants were sentenced for the theft of 265m of cable instead of 4m. The sentences therefor have to be set aside and reconsidered. There is no doubt, as stated by the magistrate, that the offence is serious and prevailing in the jurisdiction of this court. It goes without saying that the monetary value of 4m of cable is considerably less than that of 265m. Having considered the appellants' personal circumstances and in particular that fact that both appellants had spent one year in custody awaiting trial, we considered an appropriate sentence to be a suspended sentence.
- [8] After hearing the appeal and in view of our intention to set aside and replace the custodial sentence of six years with a suspended sentence, we therefore granted the following order:

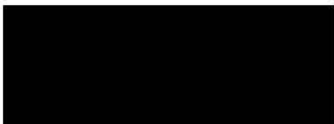
ORDER:

1. The appeal against conviction succeeds to the extent that the Appellants should only have been convicted of theft of four (4) and not two hundred and sixty-five (265) m of cable.
2. The conviction is amended and replaced by the following order:

“Accused One and Accused Two are found guilty of theft of four (4) m of cable.”
3. The appeal against sentence is upheld and the sentence imposed by the court a quo is set aside and replaced by the following order:

“Accused One and Accused Two are each sentenced to twenty-four (24) months’ imprisonment wholly suspended for a period of five (5) years on condition that the Accused is not convicted of theft committed during the period of suspension.”
4. The sentences in paragraph 3 above are deemed to have been imposed on the 26th of April 2022.
5. The consequential orders in terms of Sec 103(1) of the Firearms Control Act 60 of 2000 are confirmed.

I concur.



C REINDERS, ADJP



M JORDAAN, AJ

On behalf of the Appellants:

Instructed by:

Mr P van der Merwe

Legal Aid South Africa

BLOEMFONTEIN

On behalf of the Respondent:

Instructed by:

Adv D Pretorius

Director of Public Prosecutions

BLOEMFONTEIN