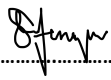




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO.: A245/2021

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



14.06.22

SIGNATURE

DATE

In the matter between:

**THEKO BUTHELEZI
ISEAILI BOTLAKI
THABO MTUNGWA
KATLEGO BUTHELEZI**

**First Appellant
Second Appellant
Third Appellant
Fourth Appellant**

and

THE STATE

APPEAL JUDGEMENT

Mfenyana AJ

Introduction

[1] The appellants were convicted by the Regional Court, Oberholzer, Gauteng, of attempting to tamper, damage or destroy essential infrastructure in contravention of section 3 (1) of the Criminal Matters Amendment Act 18 of 2015.

[2] They were each sentenced to an effective term of 10 years imprisonment on 11 June 2021.

[3] They appealed to the court *a quo* against both their conviction and sentence. The court *a quo* dismissed the application in respect of the conviction, granting the appellants leave to appeal only against the sentence. They now appeal against the sentence with leave of that court.

[4] The issue that arises in this appeal is whether the court *a quo* misdirected itself in various respects, particularly the following:

- (a) In not considering alternative forms of punishment including a suspended sentence;
- (b) In imposing a sentence that was shocking and disproportionate to the facts of the matter;
- (c) By imposing the same sentence in respect of all the appellants regardless of their differing personal circumstances and previous convictions;
- (d) By over-emphasising the seriousness of the offence and the interests of society;
- (e) In not considering the prospects of rehabilitation;

- (f) By taking into account evidence which was not tendered in court and;
- (g) In not finding substantial and compelling circumstances to deviate from the prescribed minimum sentence.

Factual background

[5] On or about 8 September 2018, near Carletonville, the appellants were apprehended by private security officers after digging underground Telkom cables in an attempt to destroy and tamper with essential infrastructure. They were apprehended when they jumped out of a hole they had dug in pursuance of the commission of the act as aforesaid. Having observed that a fresh hole had been dug, presumably in preparation for tampering and/ or stealing Telkom cables, members of the CPI security company kept watch in the vicinity, close to the freshly dug hole. When the appellants jumped out of the hole following a disturbance by the security officers, they were apprehended while trying to flee. They were later handed over to the police and subsequently arrested.

Legal framework

[6] Section 3(1) of the Criminal Matters Amendment Act states:

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

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

[7] As far as an attempt is concerned, section 3(1) makes no mention of it, or what sentence should be imposed in those circumstances. In this regard, the honourable Magistrate set out in detail comparative cases where an offence had not been completed. The court stated that the question was whether in digging a hole above a Telkom cable, the appellants had completed the offence and in essence contravened section 3(1). He found that the state had succeeded in proving an attempt by the appellants to contravene section 3(1).

[8] Theft of ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, if it is alleged that the offence caused or had the potential to cause the disruption of any basic service is listed in Schedule 5. It is clear that the legislature envisaged an instance where the offence went as far as posing a potential interference. The attempt by the appellants in my view falls into this category.

Sentence

[9] In sentencing the appellants, the court *a quo* took into account the interests of society, and referred to numerous newspaper reports. The newspaper reports painted a grim picture and how prevalent 'cable theft' has been in the country in recent years, stating that the public is 'sick and tired' of power failures and lack of electricity due to 'cable theft'. The court *a quo* stated as follows in respect of the newspaper articles:

“That is only to give the interest of society in this kind of offence. Actually we can say it is the order of the day, there are several cases daily on the court rolls.”¹

[10] The appellants’ contention in this regard is that the court *a quo* introduced new evidence which had not been tendered into evidence. The articles referred to by the learned magistrate were statements of fact depicting the prevalence of the offence. I shall deal with this ground of appeal later on in this judgement in respect of interests of society.

[11] With regard to the personal circumstances of the appellants, the court *a quo* stated that it would not overlook them. Dealing first with the personal circumstance of the first appellant, the court considered that the first appellant had previous convictions of robbery, fraud, malicious injury to property, assault with intent to do grievous bodily harm, common assault and possession of a firearm without a licence; his age, marital status, that he has two minor children and stayed with his wife and children, was healthy and was doing casual jobs and was “under the influence” at the time of his arrest. Further the court considered that the first appellant was injured during his arrest.

[12] The court *a quo* further considered the personal circumstances of the second third and fourth appellants; that they were all healthy and were doing casual or odd jobs. Save for the second appellant, they also had minor children. All the appellants save for the second appellant had previous convictions.

¹ Record, page 216 at paras 21 - 24

[13] Save for identifying that there was a need to consider ‘look at’ mercy restorative justice, the purposes of sentence and the need to reform the appellants and put them on a path away from crime, there is no further indication from the record that the court *a quo* considered these and to what extent and manner. The court added however that the sentence must be punitive as a way of retaliation, given the seriousness of the crime committed by the appellants. The court proceeded to sentence each of the appellants to an effective ten years imprisonment, stating that it would not distinguish the sentences for the appellants as their personal circumstances were all similar save in respect of the second appellant who had no previous convictions. Finally, the court *a quo* took into account that the appellants were only convicted of an attempt and that the court would “lean back” as a consequence.

[14] It is the appellants’ contention that the court *a quo* failed to consider alternative forms of punishment in sentencing them, and that no distinction was made between them despite the fact that they have differing personal circumstances. It is apparent from the record that the learned magistrate acknowledged this fact, which he attributed to the fact that there were no material differences between the personal circumstances of the four appellants. The appellants rely on *Mthethwa* in driving the point home, that ‘it is one thing to recite the personal circumstances of the accused, and another to fuse them in considering the sentence’. Therefore, so contend the appellants, the trial court merely paid lip service to this aspect. While I agree with the appellants in this regard, that the distinction is not apparent, I am of the view that the contention falls short of demonstrating a misdirection that could warrant interference by this Court.

[15] As far as the appellants' contention that the court *a quo* over-emphasised the seriousness of the offence and the interests of society goes, this criticism is not warranted. The fact of the matter is that there is no doubt that 'cable theft' has become more prevalent in recent years in the country. In my view, reference by the court *a quo* to specific instances of such prevalence does not amount to over-emphasizing the seriousness of the offence nor does it amount to the learned Magistrate testifying in those proceedings. It is common cause that the offence of tampering and destroying essential infrastructure has in recent years been escalated to Schedule 5 with other serious crimes including treason, murder, rape, robbery and other serious offences. In my view this is illustrative of the seriousness of the offence.

[16] Notwithstanding that the court *a quo* may have referred to newspaper articles, what is apparent from the record is that the court did this to demonstrate the interests of society.² It does not appear to me that merely by referring to specific instances of cable theft, the court *a quo* was introducing new evidence. Even if this were the case, it would not in my view, be considered to be so material that it amounts to a misdirection.

[17] I have not lost sight of the fact that the offence that the appellants were ultimately convicted of is an attempt to tamper, damage or destroy essential infrastructure. For this, the court *a quo* sentenced each of the appellants to 10 years.

[18] It must be borne in mind that imposition of sentence is a prerogative of the trial court. An appeal court will not interfere with a sentence imposed by a

² Record, page 216 supra at note 1

trial court, unless it is of such a nature that no reasonable court ought to have imposed it, and is thus grossly excessive, or there was an improper exercise of the discretion by the trial court, or the interests of justice require it. The consideration is not whether the court of appeal would have imposed a lighter sentence if the punishment were within its discretion, but that the sentence must reflect the blameworthiness of an offender and should be proportional to what an offender deserves. It should have regard to, and serve the interests of society.

[19] Placing reliance on *Malgas*³ the appellants further contend that the court *a quo* erred in not finding substantial and compelling circumstances to deviate from the prescribed minimum sentence. They argue that an attempt to commit a crime should attract a lesser sentence than when the crime is completed. What this argument misses is that for the court to find that whether or not substantial and compelling circumstances exist, these must be taken cumulatively. These circumstances play no role in the present matter as there is no deviation warranted, it being so that the court *a quo* was not dealing with a prescribed minimum sentence. In any case, if one were to consider that the prescribed sentence for a (complete offence) contravention of section 3(1) is a period of up to 30 years, there can be no basis for the appellants' contention that a period of 10 years is excessive in the circumstances. The preamble to the Act is instructive- To introduce stricter measures for offences related to essential infrastructure.

[20] As I have already stated, the prescribed minimum sentence is in any event not applicable in the circumstances of the present matter as the charge the

³ 2001 (1) SACR 469 (SCA)

appellants were convicted of carries no prescribed minimum sentence. I can therefore not find any misdirection on the court *a quo* in this regard.

[20] The same goes for the appellants' averment that the court *a quo* did not properly apply its mind and did not enquire into the proportionality between the offence and the period of imprisonment. The reliance on *Dodo*⁴ appears to be misplaced in my view. For the simple reason that there present appeal is not concerned with a prescribed minimum sentence of life imprisonment the appeal must fail on this ground too.

[21] The appellants further contend that the court *a quo* erred in not considering that the appellants were good candidates for rehabilitation. A relevant consideration in this regard is that the appellants, save for the second appellant were not first offenders. This argument also overlooks the fact that rehabilitation is an in-built component of the programs offered by the Department of Correctional Services. Essentially rehabilitation is in itself part of the sentencing regime designed to benefit offenders who are sentenced to a term of imprisonment.

[22] The determination whether or not a misdirection has occurred was clearly set out by Trollip JA in *S v Pillay*⁵, as follows:

“... the word ‘misdirection’ in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection

⁴ 2001 (1) SACR 594 (CC)

⁵ 1977 (4) SA 531 (A) at 553E-F

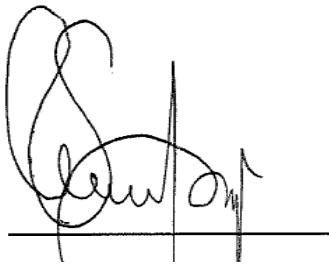
is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

[23] What the above suggests is that an appeal court will not lightly interfere with a sentence imposed by the sentencing court unless there is a serious misdirection which has not been shown to be the case in this matter.

[24] In our view, not only was there no material misdirection by the magistrate, the sentences imposed were proportionate to the offence, and also not grossly disproportionate to what the individual appellants deserve.

[24] In the result the following order is made:

The appeal is dismissed.

A handwritten signature in black ink, appearing to read 'S. M. MFENYANA', written over a horizontal line.

S. M MFENYANA AJ
ACTING JUDGE OF THE HIGH COURT
HIGH COURT, PRETORIA

I agree,



N KHUMALO J
JUDGE OF THE HIGH COURT
HIGH COURT, PRETORIA

For the Appellants : Mr M G Botha

For the First Respondent : Mr R N Sibanda

Heard on : 23 February 2022

Judgement handed down on: 14 June 2022