



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

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

Case number: 78/2017

In the matter between:

THE STATE

and

MALOME ALFRED MATSITELA

1st Accused

STEVEN LANGA

2nd Accused

AMOS NGUBENI

3rd Accused

ANDRIES MKHUMBUZA

4th Accused

HEARD ON: 13 SEPTEMBER 2018

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 14 SEPTEMBER 2018

[1] Messrs Matsitela, Langa, Ngubeni and Mkhumbuza, it is now time to sentence you. In order to achieve a balanced sentence I shall consider firstly you as persons and your personal circumstances, secondly the nature and severity of the crimes and thirdly, the interests of the community. The objects of punishment, to wit

retribution, prevention, deterrence and reformation will also be kept in mind.

- [2] I set out your personal details in my judgment convicting you and I shall not repeat that. Mr Van der Merwe mentioned further personal aspects when he addressed me in mitigation. These can be summarised as follows.
- [3] Mr Matsitela, your scrap metal business closed down after your arrest. I accept that you and your family have lost a source of income and that some of your income streams might be from legal activities. Your wife is unemployed and your father-in-law is now supporting your family. Your landlord is on the verge of selling what is left of your business for arrear rental. You passed matric and obtained a diploma in business management. You were arrested on 23 October 2015 and you spent time, about 26 months, in custody awaiting trial. However, you were sentenced on 7 December 2017 for similar matters and since then you are a sentenced prisoner. You have been sentenced to an effective period of 12 years' imprisonment. Your convictions in 2017 relate to offences committed at the end of 2014 and the beginning of 2015. Those convictions are not previous convictions as the present offences were committed prior to those offences. However you have previous convictions which I shall return to later.
- [4] Mr Langa, before your arrest you were a taxi driver, earning approximately R4000.00 per month. Your highest academic qualification is Standard 5. Your wife is unemployed and you were the sole breadwinner. I have not been informed who is caring for

your family now. You have not spent any time in custody awaiting trial as you were arrested in another case and sentenced in that matter on 27 June 2017. You received an effective sentence of 20 years' imprisonment. Similar offences were committed than *in casu*, although you were also convicted and sentenced in respect of gang-related activities. Your previous convictions will be dealt with later.

- [5] Mr Ngubeni, you passed standard 4 and worked as a window fitter, earning about R4 500.00 before your arrest. You own a proper (brick) house. Your wife is a security officer who supports your children of school-going age. You were arrested on 2 February 2017 and spent one and a half years in custody awaiting trial. You are a first offender.
- [6] Mr Mkhumbuza, you were a tavern owner and also sold clothes on the side-line. Your income was approximately R5 000.00 per month. You are engaged in a traditional marriage and used to send monthly between R1 500.00 and R2 000.00 to your family in Mozambique. You dropped out of school in grade 2. You were arrested on 3 August 2017 and spent a year in custody awaiting trial. You are not a first offender. I shall deal with your previous conviction later. Your Toyota Tazz motor vehicle has been seized, although no forfeiture order has been made yet.
- [7] Theft is a serious crime in itself, even if committed in isolated circumstances by individual persons. However, when the crime is committed by gangs or syndicates or two or more people in a planned and organised manner, the seriousness of the crime

reaches a different level, not even to speak of the stealing of items forming part of a country's essential infrastructure relevant to the delivery of basic services to the community. POCA contains prescribed sentences for transgression of the provisions of that Act and count 7 attracts a prescribed minimum sentence in accordance with the provisions of s 51(2) of Act 105 of 1997 read with Part II of Schedule 2. You can count yourselves fortunate insofar as the Criminal Matters Amendment Act, 18 of 2015 ("the 2015 Act"), only came into operation on 1 June 2016. As mentioned earlier, theft of ferrous or non-ferrous metal forming part of essential infrastructure and offences under s 3 of the 2015 Act now attract prescribed minimum sentences. Therefore sentences in respect of counts 9 and 10 must be considered in view of the prescribed minimum sentences legislation. Counts 3, 4, 5, 6 and 8 would have attracted prescribed minimum sentences if committed after 1 June 2016. The legislature made it clear in the preamble of the 2015 Act that legislation was warranted as a result of "the unacceptably high incidence of crime relating to essential infrastructure",...SINCE "essential infrastructure-related offences are becoming increasingly more organised" and "offences which of themselves are relatively minor but causing considerable damage to essential infrastructure."

- [8] Our legislature has in mind with the 2015 Act, read with Act 105 of 1997 that courts should impose the prescribed minimum sentences, unless there are really convincing reasons to depart from that, referred to in s 51(3) of Act 105 of 1997 as substantial and compelling circumstances. Although, dealing with a totally different offence, the warning in *S v Matyityi* 2011 (1) SACR 40 (SCA) at para [23] must be heeded. I quote:

“Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them.”

[9] Although constitutional rights such as the privacy and physical integrity of another human being are not applicable here such as, e.g. in the case of rape, the effect of the crimes may be equally devastating to human beings and also affect a large section of the community, unlike a rape or murder case where one usually finds one victim only. No doubt, members of the community have constitutional rights such as the freedom of movement (s 21) and the right to sufficient food and water (s 27) to name just two rights. Local governments must strive in terms of s 152 of the Constitution to comply with their objectives, *inter alia* to ensure the provision of services to the community in a sustainable manner and to promote a safe and healthy environment. They cannot comply if their electricity supply is cut off by criminals stealing copper from e.g. Eskom. I shall deal with this again when the third leg of the triad is discussed.

[10] I accept that we are not confronted with the worst kind of interfering with essential infrastructure *in casu*, but the minimum sentences legislation is not aimed at those cases only. I accept also that a court may consider proportionality when considering whether a prescribed minimum sentence should be imposed. As long ago as 2002 Ackermann J, speaking for a unanimous Constitutional Court bench, said the following in respect of the overall purpose of POCA:

“The rapid growth of organised crime, money laundering, criminal gang activities and racketeering threatens the rights of all in the Republic, presents a danger to public order, safety and stability, and threatens economic stability. This is also a serious international problem and has been identified as an international security threat.”

[11] The interests of the community must be given due weight as well. I touched upon it. I do not have any evidence of how many persons were affected as a result of Telkom’s decision not to repair the relevant telephone lines. I was told it was not cost-effective to do so. I am in the dark in this regard. It is possible that farmers and their employees are sitting ducks, staying in remote areas with no landline communication, which they and their predecessors have been enjoying for decades, whilst staying outside cellphone reception areas, e.g. in mountainous areas. It is also possible that those farms lie derelict and that the effect on the community is minimal.

[12] The water supply to the town of Senekal was interrupted in a time when many Free State towns, including Senekal, had their own infrastructure problems which were exacerbated by a serious drought. Thieves that cruelly and without considering the consequences of their deeds steal essential infrastructure must be severely punished as a measure of the community’s abhorrence.

[13] I accept that transportation of goods and passengers by train was not affected due to the stealing of the FCC cables *in casu*. Fact of the matter is that the tampering took place on the main railway line in the Free State that links Gauteng with the Eastern and the

Western Cape provinces. Witnesses provided uncontested evidence of potential devastating effects as a consequence of the stealing of copper cables and tampering with the railway infrastructure. I do not have to repeat that.

[14] Adv O Wessels testified in aggravation of sentence. She is the chairperson of the South African Revenue Protection Association (“SARPA”) for the Free State, Northern Cape and Lesotho. She explained the co-operation between all stakeholders, some of which I mentioned *supra*, in order to come up with strategies to fight the common enemy, *inter alia* the copper theft syndicates in this country. The magnitude of the problem is incomprehensible. She referred to the estimated negative impact on the economy in the amount of R5bn as published by the former Minister of Police in November 2013. The costs to replace stolen cables over the last four years are in excess of R273m for Eskom, R81m for Transnet and R480m for Telkom. A thief with a primary school education would not be able to appreciate these figures.

[15] Ms Wessels testified that over the last nine years CPI in Kroonstad has effected the arrest of over 900 suspects in respect of copper theft in the Free State province alone. Over 230 000 copper theft incidents were reported through South Africa over a four year period. She mentioned that, according to her investigation and intimate knowledge of the copper theft industry, 11 of the 18 copper theft syndicates operating in the country that she is aware of, sold their copper to accused 1. She also testified that she has documentary proof, stored on her computer and obtained for another case against the accused in the Eastern Cape, that

accused 1 made a profit of R21m in the four months before his arrest and that his cheque payments to known copper thieves during that time, excluding amounts less than R5000.00, amounted to R15m. Mr van der Merwe denied this, but did not investigate this version any further. Ms Wessels' testimony is accepted without reservation, but I am prepared to give accused 1 the benefit of not allowing such hearsay evidence which is unfortunately inadmissible. I have seen too often in my life that financial statements or financial analyses by so-called experts are flawed. I do not know who drafted the analysis, what experience this person has and what source documents were available to him/her. In any event, this information relates to a period more than a year after the crimes of January 2014, for which I convicted accused 1, were committed. That evidence may become relevant in the other matter. I accept that accused 1 is not your average working class citizen. We know that at the time of his arrest he was staying in a security complex, normally afforded by the rich only.

[16] Messrs Matsitela, Langa, Ngubeni and Mkumbuza, none of you testified in mitigation and none of you showed any sign of remorse. Your personal circumstances have been recognised, but those must take a backseat in light of the other two elements of the triad. I shall try to sentence you in order to give effect to the purposes of sentence and specifically the chances of rehabilitation. Both legal representatives were *ad idem* that long term imprisonment was the only option available to the court.

[17] Mr Ngubeni and Mr Mkumbuza, your crimes have been committed over a period of nearly three years. Mr Ngubeni, you are a first

offender, but the same does not apply to you, Mr Mkumbuzi. You have been convicted of possession of presumably stolen property in August 2009. This is a crime involving dishonesty. You had to serve an effective sentence of 3 years' imprisonment. That offence occurred a long time ago and I shall treat you and your brother the same. Mr Matsitela and Mr Langa, your convictions in 2017 are indicative of dishonesty. Mr Matsitela, in your case and bearing in mind also the evidence led during the trial, it is proof of your propensity to steal items belonging to the essential infrastructure of our country. I also take into consideration, Mr Matsitela, that you offered a convenient dumping place and market for stolen copper and that the others would not be able to make money out of their theft, was it not for you and criminals like you. Mr Langa, you were convicted of failing to give satisfactory account of possession of goods in respect of two separate matters in Kenhardt during August 2014. Your sentence of 3 years' imprisonment was wholly suspended for 5 years which means that it may now become operative. I have been told that you received a sentence of 20 years' imprisonment on 27 June 2017 for copper theft and gang-related counts, but this is not contained in the SAP 69's handed in and admitted by you. Mr Van der Merwe clearly has personal knowledge hereof and I therefore accept that you have indeed been convicted and sentenced as he stated in his oral argument. He confirmed it again this afternoon. The same applies to accused 1 whose SAP 69's indicate 6 years instead of 12 years' imprisonment. Mr Langa, your propensity to commit crimes relating to essential infrastructure is also clear.

[18] Mr Van der Merwe did not argue that substantial and compelling circumstances exist. I could not find any. I reiterate that the only way that these crimes can be curbed is by imposing heavy penalties and as far as possible to adhere to the intention of the legislature. Local authorities are cash-stripped and can ill-afford to better protect their infrastructure. None of them can afford to guard their infrastructure all the time. The same applies to utilities such as Telkom, Eskom and Transnet. Entities such as Telkom, Eskom and Transnet probably pay millions of Rands to private investigators to do the work that SAPS have to do, and may I say, this case would probably not have reached the doors of the court without the laborious work and professional and highly skilled approach to crime intelligence and investigation undertaken by Mr Doubles van Deventer and the staff of CPI. The employ of private investigators is a clear indication of the magnitude of the problem. The next issue is whether the prescribed minimum sentences would be disproportionate with the seriousness of the offences. I do not think so for the reasons advanced *supra*.

[19] It is now time to inform you, Messrs Matsitela, Langa, Ngubeni and Mkhumbuza of the sentences that I decided to impose. I have considered the harshness of the sentences if the cumulative effect thereof is not appropriately dealt with. In that sense I shall show you some mercy in the hope that you are candidates for rehabilitation. It is clear that your career paths have gone in the wrong direction as indicated.

[20] You are sentenced as follows:

Count 1 – accused 1: 15 years' imprisonment;
Count 2 – accused 1, 2, 3 and 4: 7 years' imprisonment;
Counts 3, 4 and 5 – accused 1, 2, 3 and 4: 4 years' imprisonment on each count;
Counts 6 - accused 3 and 4: 4 years' imprisonment;
Count 7 – accused 3 and 4: 10 years' imprisonment;
Count 8 - accused 3 and 4: 6 years' imprisonment;
Count 9 – accused 3 and 4: 8 years' imprisonment;
Count 10 – accused 3 and 4: 15 years' imprisonment.

[21] The sentences shall run concurrently with each other in terms of s 280(2) of the Criminal Procedure Act, 51 of 1997 on the following basis: (a) accused 1's sentences shall run concurrently on the basis that accused 1 shall serve effective imprisonment of 18 years, 6 years of which shall run concurrently with the sentence which he is presently serving; (b) accused 2's sentences shall run concurrently on the basis that he shall serve effective imprisonment of 12 years, 6 years of which shall run concurrently with the sentence which he is presently serving; (c) accused 3 and 4's sentences shall run concurrently on the basis that they shall serve 20 years' effective imprisonment.

JP DAFFUE, ADJP

14 September 2018