

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

Case no: A119/12

In a matter between:

FANA BEN MSIMANGA

APPELLANT

And

THE STATE

RESPONDENT

CORAM: C.J. MUSI, J et DA ROCHA-BOLTNEY, AJ

JUDGMENT BY: C.J. MUSI, J

HEARD ON: 04 FEBRUARY 2013

DELIVERED ON: 04 FEBRUARY 2013

- [1] The appellant was convicted of theft of copper conducting cable, by the regional magistrate Viljoenskroon, and sentenced to nine (9) year's imprisonment. An application for leave to appeal against the conviction and sentence was dismissed. The appellant petitioned the Judge President. Leave to appeal against the conviction was refused. He was however granted leave to appeal against the sentence.

- [2] The factual matrix of this matter is briefly as follows. On 27 March 2010 security guards who were engaged to patrol Eskom's conducting cable lines at Vierfontein, in the district of Viljoenskroon, noticed a pick-up dropping off five persons near an area called the jersey line. (This is apparently the name given to that particular stretch of conducting cable line by Eskom). Those persons moved towards the conducting cable. The security guards saw a spark or flash as they called it. The spark was caused by a bolt cutter cutting the conducting cable.
- [3] They moved towards the place where they saw the flash. They saw men rolling conducting cable. When they approached the men, they ran away. They followed the men and the appellant and another person were caught and arrested.
- [4] Despite the damning evidence against him, the appellant elected not to testify. The regional magistrate duly convicted him.
- [5] The State called Mr Johannes Meyer, an investigating officer employed by Eskom, to testify before sentence was passed. According to him the copper cable cannot be reused. It has to be sold as scrap. He estimated its value between R34 000-00 and R35 000-00. He testified that the total monetary loss to replace and repair the conducting cable was R277 000-00.

- [6] He further testified that the loss that Eskom suffers as a result of theft and repair of conducting cables in that particular area is approximately R30 million per annum. The loss occasioned by theft of cable in that region amounts to R2½ million to R3 million annually. As a result of the damage to the cable in this matter electricity supply to the mines in the region was disrupted. According to him it takes between 24 and 72 hours to restore electricity supply but they have alternative electricity supply in the event of theft.
- [7] The appellant was thirty-two (32) years old, unmarried but cohabitated. He and his partner have an eleven (11) year old child. He passed standard 8(eight) and was employed as a taxi driver. He earned R350-00 per week. He was arrested on 27 March 2010 and sentenced on 31 August 2010. He was in custody for that period. He had a previous conviction for theft. During September 2003 he was sentenced to R2000-00 or four months imprisonment of which half was suspended for five (5) years on certain conditions.
- [8] The regional magistrate found that the offence was serious and that Eskom suffered huge losses because of this particular theft and generally because of theft of copper conducting cable.
- [9] Mr Reyneke, on behalf of the appellant, argued that the sentence is shockingly inappropriate. He did not argue that the magistrate misdirected himself or that he committed an irregularity which warrants this Court's interference.

- [10] Mrs Liebenberg, on behalf of the respondent on the other hand, argued that the sentence is appropriate in the light of all the aggravating factors that are present in this matter. She highlighted the loss that Eskom suffered; the fact that the appellant was employed; the ramifications of this particular crime; the fact that the crime is prevalent and that it is difficult to apprehend offenders. She also alluded to the fact that the appellant has a relevant previous conviction. She however conceded that the sentence is heavy, but argued that it is not shockingly inappropriate.
- [11] It is trite that a court of appeal will not interfere lightly with the sentence of the trial court because sentencing is pre-eminently in the discretion of the trial court. A court of appeal will only interfere if the trial court misdirected itself or where it has committed an irregularity or where the sentence is shockingly inappropriate. A court of appeal may also interfere where the discretion vested in the trial court is exercised improperly or unreasonably. See **S v Pieters 1987 (3) SA 717 (A) at 728 b-c.**
- [12] We have in this division regrettably seen an increase in the number of theft of copper cable appeals being argued before us. Likewise many automatic review matters where stiff sentences for this kind of offence have been imposed, have landed on my desk.

- [13] Theft of copper cable is very rife at the goldfields probably because of all the mines situated in that area. Mining is not a small cog in our economic machine. It is an integral part of our economy. It therefore means that if mining operations are stopped because of theft of copper cable, a vital organ of our economy is stopped.
- [14] Theft of copper cable leading to mines has a direct and negative effect on our economy. Theft of copper cable conducting electricity to homes also has a negative effect on the economy and the lives of those who pay for and expect an uninterrupted supply of electricity. The economic loss that it visits on Eskom is also astronomical as Mr Meyer's evidence indicated. I therefore share the regional magistrate's view that this is a very serious crime.
- [15] In this particular case the appellant was gainfully employed. The commission of the crime was therefore motivated by greed and not need. It is also true, as Mrs Liebenberg argued, that people who steal copper cable normally do so at night and it is not easy to apprehend them.
- [16] This offence was planned because these people went to the scene with all the necessary tools to commit the crime without being electrocuted. A bolt cutter, a nylon robe a hacksaw and branderings to which the hacksaw was tied when the copper cable was cut, were found at the scene.

- [17] According to Mr Meyer the cable that was cut conducts 88 000 volts of electricity. Cutting such a cable is by itself a very dangerous and life threatening thing to do.
- [18] In my view the most effective way of showing offenders and would be offenders that the game is not worth the candle is generally by imposing direct imprisonment even for first offenders.
- [19] Mrs Liebenberg attached two judgments of this Court to her heads of argument in which sentences of six (6) years' imprisonment respectively imposed on first offenders were confirmed on appeal.
- [20] In **Ernest Mogale v The State** case number 123/99 judgment delivered on 13 December 1999 by my retired brother Beckley J, the appellant was convicted of stealing copper cable worth R28 000-00. He was sentenced to six (6) years imprisonment. His appeal against the sentence was dismissed.
- [21] In the matter of **Matthews Godla v The State** case number A98/2009 judgment delivered on 3 March 2011, the appellant was also convicted of theft of copper cable. The value is not stated in the judgment, but is described as a large quantity of copper cable. Ms Liebenberg favoured us with the record of this appeal. The witness testified that the value might be plus minus R25 000-00. In the **Matthews Godla** matter it was not Eskom cables that was stolen, but indeed cable that was laid

by the complainant in order to supply electricity to a machine that he was using on his farm. The appellant in this matter was sentenced to six (6) years imprisonment in the regional court, Koffiefontein. His appeal against the sentence was also dismissed.

[22] I am acutely aware that it is not always wise to compare sentences imposed in different cases because the circumstances under which these offences have been committed and the personal circumstances of the accused or appellants are different. On the other hand the disparity between sentences imposed for similar offences should not be too great. There are no factors present in this matter that warrant such a pronounced deviation from the sentences that are generally imposed in this division for this kind of offence.

[23] Although the appellant has a previous conviction for theft, he was not in conflict with the law for a period of seven (7) years. He was also in custody for a period of five (5) months awaiting trial. He does not seem to have been the leader of the group.

[24] Having regard to his personal circumstances the seriousness of the offence, the interest of society and the sentences imposed in the past for similar offences the sentence of a nine (9) years imprisonment evokes a sense of disquiet in me. It is in my view shockingly inappropriate. I am of the view that a sentence of seven (7) years imprisonment would be

more appropriate, because the appellant, unlike the two appellants in the cases mentioned in paragraphs 20 and 21 above, is not a first offender. Secondly, the value of the cables stolen in this matter is higher than the value of the copper cable stolen in those matters.

[25] In this matter there is also evidence relating to the total loss in terms of replacement and repair value of the copper cable whereas in those cases there was no evidence to that effect.

[26] I accordingly, make the following order:

- (a) The appeal is upheld.
- (b) The conviction is confirmed.
- (c) The sentence is set aside and replaced by the following sentence: Seven (7) years imprisonment.
- (d) The sentence is antedated to 31 August 2010.

C.J. MUSI, J

I concur

DA ROCHA-BOLTNEY, AJ

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