



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR183/24

In the matter between:

MDUDUZI BUTHELEZI

FIRST APPELLANT

MANDLA NGCOBO

SECOND APPELLANT

JOHN THOBELA

THIRD APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Regional Court for the Regional Division of KwaZulu-Natal, held at Durban (sitting as Court of first instance):

1. The appeal against sentence is upheld.
2. The sentence of ten years' imprisonment is replaced with a sentence of five years' imprisonment.

JUDGMENT

MIZRACHI AJ (SHAPIRO AJ concurring)

[1] The matter before the Court is an appeal by three out of five individuals convicted of theft of meat to the value of R80 000 on 31 May 2023 by the Court *a quo*.

[2] The appeal is in respect of the sentence imposed on the five individuals on 18 August 2023. The sentence imposed on the appellants for their part in the commission of the offence was ten years' imprisonment, while the other two participants received a lesser sentence of five years' imprisonment. This was combined with an Order that the appellants were declared unfit to hold a firearm.

[3] The Court *a quo* found that no determination in terms of s 103(1) of the Firearms Control Act 60 of 2000 was made and the appellants are consequently unfit to possess a firearm. This aspect is not, however, subject to the appeal before this Court.

[4] The three appellants' appeal is limited to the sentence of ten years' direct imprisonment with leave to appeal having been granted by the Court *a quo*.

[5] Considering the discretionary nature of sentences, this Court would have to determine whether there has been a material misdirection by the Court *a quo*. It is therefore necessary to traverse the background facts and circumstances of this case.

[6] This is particularly important considering the unique circumstances and context to the crime that was pivotal to the reasoning of the Court *a quo* in imposing a sentence of ten years' imprisonment.

[7] The offence occurred on 14 July 2021 in the midst of the unrest and looting which ravaged the province, both economically and with tragic loss of life. The appellants, together with two others, were stopped while travelling in the Chester area by Sergeant Kobisa of the South African Police Service ("SAPS").

[8] They were directed to Chester police station due to the volatility of the situation at the time. Upon arrival at Chester police station, the complainant, Mr Luthuli, identified the boxes in the vehicle as belonging to him, having been looted from his storage facility. The vehicle was stopped approximately two kilometers from the storage facility coming from the direction of the facility.

[9] The meat contained in the boxes carried in the vehicle was identified by a marking which the complainant confirmed was the marking on all of his products.

[10] The complainant indicated that when he attended his storage facility during the looting which was taking place, approximately 5 000 people had flooded the yard and were looting his property. The storage facility, together with trucks belonging to the complainant and vehicles belonging to employees which were parked at the premises and were not insured were destroyed and the complainant estimated the total loss suffered to be approximately R70 million.

[11] The complainant furthermore gave painful testimony of the impact which this event had on his life and his personal circumstances. He had unsuccessfully attempted to extinguish the fires which were started on 13 July 2021 and which engulfed his storage facility using only a hosepipe, as fire services were nowhere to be found in the chaos of the unrest and looting which was taking place around the province.

[12] He gave evidence that while insurance had paid for a portion of the loss he sustained as a result of this incident, it did not come close to compensating him for his actual loss, and he was required to substantially downgrade his life. He stated that he had to leave his flat, downgrade and go back home, and that his children could not continue with their schooling.

[13] The Court *a quo* refused leave to appeal the conviction by the appellants on 20 November 2023 and the petition for leave to appeal the conviction to the High Court was subsequently refused on 11 June 2024. The Court *a quo*, however, granted leave to the appellants to appeal the sentence imposed.

[14] The basis for the appeal on sentencing as set out in the appellants' heads of argument can be summarized as follows:

- (a) Necessary weight was not given to the personal circumstances of the appellants including the circumstances under which the theft took place;
- (b) The Court over-emphasised the aggravating circumstances at the expense of the mitigating factors;
- (c) The sentence of ten years for theft was too high considering the appellants were first offenders;
- (d) The Court was misdirected in respect of the degree of culpability of the appellants as the crime was impulsive and not premeditated;
- (e) The Court failed to take into account that the value of the meat had drastically reduced as by the time the meat was recovered, it was no longer fit for human consumption;
- (f) The Court misdirected itself by punishing the appellants more harshly than the other two persons convicted of the same offence, based on the age difference between them;
- (g) The Court was overly concerned with the interests of society at the expense of the personal circumstances of the appellants;
- (h) The evidence before the Court did not suggest that the appellants were a danger to society.

[15] The respondent in its heads of argument set out the following:

- (a) The sentence imposed upon the appellants appears to be exemplary, motivated by the scale and impact the July unrest had on the country;
- (b) The Court *a quo*, in differentiating the sentencing between the appellants and the other two persons convicted appears to have only considered the age difference between them as the sole deciding factor in imposing a harsher sentence on the appellants despite them all having similar personal circumstances, and all being first offenders;
- (c) While the Court *a quo* warned itself against sacrificing the accused on the altar of deterrence, it did not individualise the sentences nor temper them with mercy;

- (d) The appellants showed no remorse, their conduct was clearly well orchestrated and their part in the activities on the day had severe repercussions on the complainant, his staff and his customers.

[16] The law in respect of an appeal Court's powers to interfere with sentencing is well-established, and interference can only occur if the appeal Court is of the view that the sentence imposed was unreasonable, unjust, is vitiated by irregularities or if the Court *a quo* has misdirected itself materially.

[17] Similarly well-established are the considerations in respect of sentencing, commonly referred to the *Zinn* triad, namely, the crime, the offender and the interests of society.¹ The application of these factors was expanded upon in *S v Banda and Others*² where the Court held that a balance between these three factors must be applied when considering an appropriate sentence, and the Court should ensure that no one factor is overly or underly emphasised to the exclusion of the others.

[18] The Court in *S v Sobandla*³ held that:

'As to the magistrate's view of the need for a strongly deterrent sentence, the peculiar circumstances of the present case do not, in my assessment, suggest the risk of a repeated robbery or housebreaking by the appellant. Essentially what the trial court had in mind was, in the interests of the community, a sentence which would deter others who might, given the prevalence referred to, contemplate similar serious criminal conduct. Having regard to all the facts of the present matter, however, it seems to me that appellant's counsel (who appeared at the court's request, and for whose assistance we are grateful) was right in contending, in effect, that appellant was sacrificed on the altar of deterrence, thus resulting in his receiving an unduly severe sentence.'

[19] The respondent's representative accepted at the hearing that the Court *a quo* had misdirected itself in imposing a sentence of ten years' imprisonment on the appellants. He submitted that the appeal should be upheld and that the sentence in respect of the appellants should be reduced to five years' imprisonment to bring parity of sentencing with the two other persons convicted.

¹ *S v Zinn* 1969 (2) SA 537 (A) at 540G.

² *S v Banda and Others* 1991 (2) SA 352 (BG).

³ *S v Sobandla* 1992 (2) SACR 613 (A) at 617F-G.

[20] The representative for the appellants initially stated that one year's imprisonment would be appropriate as the sentence, though he was not beholden to this term.

[21] I agree with the position of the respondent and of the Court *a quo* that the appellants showed no remorse for their actions, and that this is a factor to be considered insofar as the prospect of rehabilitation of the appellants. I furthermore agree with the Court *a quo* that the imposition of anything other than a sentence of imprisonment would be inappropriate given the seriousness of the crime and the surrounding circumstances in which the offence was committed.

[22] I, however, disagree with the Court *a quo* in respect of the severity of the sentence imposed on the appellants.

[23] When considering the judgment of the Court *a quo* on sentencing, it is apparent that it considered a sentence of ten years' imprisonment to be an appropriate sentence. It also considered a sentence of five years' imprisonment to be appropriate in respect of the other two persons convicted.

[24] The peculiar circumstance in the present case, being the commission of the offence in the fervor of the July 2021 unrest, when considered alongside the fact that the appellants were all first-time offenders at a late stage in their lives leads me to conclude that the deterrence factor was weighted too heavily by the Court *a quo*.

[25] This is not to suggest that deterrence should not have been an important consideration in arriving at an appropriate sentence. I consider this, however, to have been correctly applied in both the refusal of the Court *a quo* to impose a fine, suspended sentence or a sentence under s 276(1)(i) or (h) of the Criminal Procedure Act 51 of 1977 and by the imposition of the sentence of imprisonment of five years on the other two persons convicted.

[26] The imposition of a sentence of 10 years' imprisonment for this offence induces a sense of shock and accordingly constitutes a material misdirection by the

Court *a quo*. I further view the imposition of the sentence of 10 years' imprisonment as being exceptional.

[27] A sentence of five years' imprisonment adequately balances the factors considered in the *Zinn* triad in the circumstances of this case.

[28] In light of the misdirection by the Court *a quo*, this Court is empowered to intervene and to alter the sentence which was imposed on the appellants.

Order

[29] I accordingly make the following order:

1. The appeal in respect of sentence is upheld.
2. The sentence of ten years' imprisonment is replaced with a sentence of five years' imprisonment.

MIZRACHI AJ

I agree.

SHAPIRO AJ

Appearances

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Ref: 10/2/5/1/3 – 161/24

Date of hearing:

4 July 2025

Date of judgment:

04 November 2025

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 11h00 on 04 November 2025.