

SOUTH AFRICA / JUDGMENT

Dludlu and Another v S (CA43/20) [2024] ZANWHC 74 (12 March 2024)

[2024] ZANWHC 74

COURT

North West High Court, Mafikeng

BEFORE

Reddy AJ, Roux AJ

CASE / FILE NUMBER

CA43/20

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

Case No.: CA43/20

Regional Magistrates Case No.:RC4/116/2017

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In the matter between:-

HENDRICK JOHANNES DLUDLU FIRST

APPELLANT

JERRY KGOPANE

SECOND

APPELLANT

and

THE STATE

RESPONDENT

Coram: Reddy AJ & Roux AJ

Date of hearing: 27 November 2023

Date of judgment: 12 March 2024

ORDER

- (i) The appeal against sentence in respect of both appellants is upheld.
- (ii) The globular sentences of twelve (12) years imprisonment on counts 1 and 2 in respect of both appellants is set aside.
- (iii) On count 1, each of the appellants is sentenced to ten (10) years imprisonment.
- (iv) On count 2, each of the appellants is sentenced to five (5) years imprisonment.
- (v) In terms of section 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that the sentence imposed on count 2 shall run concurrently with the sentence imposed on count 1.
- (vi) In terms of section 103(1) of the Firearms Control Act 60 of 2000 the appellants shall remain unfit to possess a firearm.
- (vii) In terms of section 282 of the Criminal Procedure Act 51 of 1977, the sentence is antedated to 17 July 2019.

JUDGMENT

REDDY AJ

Introduction

- [1] The appellants were charged in the Regional Court at Klerksdorp with two
- (2) criminal offences. Aggrieved by the conviction and sentence imposed by the Regional Magistrate, the appellants applied for leave to appeal against both conviction and sentence. The court a quo granted leave to appeal only on sentence. The appeal is therefore before this Court only on sentence.

The offences

- [2] On count 1, the appellants are alleged to have contravened section 3(1)(a) read with section 1 of the Criminal Matters Amendment Act 18 of 2015 and further read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 (“the CLAA”). It was alleged that the appellants had unlawfully and intentionally tampered with, damaged, or destroyed essential infrastructure by cutting and removing electrical copper cable from a railway line between Klerksdorp and Stilfontein.

- [3] On count 2, the appellants were charged with theft of copper cable to the value of R167 634.00, which copper cable was part of the railway line and therefore essential infrastructure as defined in section 1 of the Criminal Matters Amendment Act 18 of 2015. The State placed no reliance on section 51(2) read with Part II of Schedule 2 of the CLAA to trigger the applicable minimum sentence on count 2. Instead, the State inexplicably formulated count 2 to be read with Schedule 5 of the CPA, which deals with bail.

Background facts

- [4] A summary of the relevant evidence adduced at trial sets a factual backdrop to the conviction and accentuates salient facts that formed the bedrock of the sentence that was imposed on the appellants.
- [5] A company, The Combined Private Investigations (“the CPI”) was contracted to Eskom and Transnet with its primary mandate to protect the infrastructure of the two parastatals. Allied to this, would be the investigation of theft. It is headed by the Area Manager for Violent Crimes, Mr Marius Mostert (“Mostert”). The Klerksdorp jurisdiction was singled out as a hotspot area due to the frequency of incidents relating to damage of and tampering with infrastructure. Due to this status, it was brought under the microscopic eye of the CPI.
- [6] On 7 December 2016, at about 20h00, Mostert was patrolling the area behind the Matlosana Mall, Klerksdorp when he noticed that 9 (nine) lengths of copper cable between poles marked as 150/17 to 151/09 on the railway line, had been stolen. Immediately backup CPI members were summoned which included Mr. William Matlotlo Sebitwane (“Sebitwane”). The crime scene was secured. A scouring of the crime scene led to the discovery of footprints. These footprints were tracked, which led in the direction of the PC Pelser Airfield. Before arriving at the PC Pelser Airfield approximately two (2) to three (3) kilometres from the point where the copper cable was cut, a bush was observed. Beneath this little bush, piles of hidden copper wire were recovered. The recovered copper wire was identified as Catenary, which is a seven-stand wire which is unique to Transnet, and therefore easily identifiable as the property of Transnet.
- [7] Mostert’s investigative intuition immediately triggered into overdrive, and he arranged for CPI security personnel to perform standby duties for the copper wire to be kept under continual observation. This plan was put into place. Mostert positioned himself in the hanger of the airport, wherefrom the entire operation was being orchestrated.
- [8] At dusk there was a change of CPI members. Sebitwane with other members of the CPI, alighted from their motor vehicles near the Klerksdorp dumping site and stealthily proceeded on foot in the direction of where the copper wire had been concealed. Using night vision apparatus to keep observation of the area where the copper wire was, Sebitwane noticed the silhouettes of 4 (four) persons picking up the copper wire.

[9] From this vantage point, Sebitwane noticed colleagues that formed part of the CPI dayshift observation team, who had been tasked with keeping watch over the copper wire bundle, pursuing these four persons. Knowing that these persons were fleeing in his direction, Sebitwane stood on guard awaiting their arrival. When these persons were close enough Sebitwane and Mr Andries Moeketsi (“Moeketsi”) decided to give chase. As this duo closed in on the first appellant, he threatened to shoot them. Faced with the quandary of allowing the first appellant to make good his escape or fall back, Sebitwane and Moeketsi grabbed the first appellant, forced him down and restrained him. This resulted in the first appellant sustaining an injury to his

leg. The first appellant was arrested approximately 50 (fifty) metres from where the copper cable was concealed. The second appellant was arrested by another CPI member, Mr Rethabile Andrew Matobo (“Matobo”), who was part of Sebitwane’s group.

[10] Mostert emerging from the hanger pursued one of the four persons who was running in the direction of the tarred road. This person was apprehended by another security member of the CPI. Mostert conceded that he was not involved in the apprehension of the appellants.

[11] In possession of the first appellant, a cellular phone and an identity card were found. Around his waist was tied elastic black tube rack that is used for joining branderings, and saws that are used to cut cables. The tube rack was the same as that which was used on the scene. After identifying himself, the first appellant as well as the recovered items were handed over to Mostert.

[12] In possession of the second appellant, two (2) cellular phones were found. These cellular phones were also handed over to Mostert. A complete photo album was presented corroborating the evidence of the various state witnesses. The appellants were handed over to the South African Police Services Specialized Unit and received by Warrant Officer Voges.

The convictions and sentences

[13] The appellants were convicted as follows:

“On count number 1, both accused are found guilty of contravening of section 3(1)(a) read with section 1 of the Criminal Matters Amendment Act 18 of 2005 and section 51(2) of the Criminal Law Amendment Act 105 of 1997. On count number 2, both accused are found guilty of theft, as charged.”

[14] Despite the verdict by the Regional Magistrate on count 2, that the appellants were guilty of theft, with no reference to section 51(2) of the CLAA, the Regional Magistrate expressed himself as follows in the judgment on sentence:

“The crimes the accused have been convicted of are referred to in Part 2 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. Section 51(2) thereof prescribes 15 years’ imprisonment as the minimum sentence that should be imposed, unless substantial and compelling circumstances justifying the imposition of a lesser sentence.”

(emphasis added)

[15] The Regional Magistrate clearly misdirected himself in respect of count 2, as no minimum sentence was applicable, when he said in his judgment on sentence:

“So there is no remorse on their part that can count in their favour. Nevertheless I am of the view that the mitigating circumstances that it referred to earlier, are sufficient to constitute substantial and compelling circumstances justifying the imposition of a lesser sentence than 15 years’ imprisonment.”

And accordingly the accused are sentenced as follows:

- Both counts are taken together for the purpose of sentence.
- Both accused are sentenced to 12 years’ imprisonment.
- In terms of section 103(1) of the Firearms Control Act 60 of 2000 both accused are declared unfit to possess a firearm.”

The approach to sentence on appeal

[16] In *S v De Jager* 1965 (2) SA 616 (A) at 629, Holmes JA stated as follows regarding the discretion of a court of appeal to interfere with the sentence imposed by a lower court:

“It would not appear to be sufficiently recognized that a Court of appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which hosts the discretion, and a Court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated

by an irregularity or misdirection or is so severe that no reasonable court could have imposed it...”

[17] In *S v Malgas* 2001 (2) SA 1222 Marais JA re-affirmed the trite principle in *De Jager* when he said:

“[12] ... A court exercising appellant jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellant court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is large...”

[18] The approach adopted in an appeal against sentence, in the authorities as aforesaid, has been endorsed by the Constitutional Court in *S v Bogaards* 2013 (1) SACR 1 (CC), as follows:

“[14] Ordinarily, sentence is within the discretion of the trial court. An appellate court’s power to interfere with sentence imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated;...”

- [19] The Regional Magistrate misdirected himself on sentence when labouring under the impression that the provisions of the CLAA were applicable to the theft conviction as well, mindful of the impermissible globular sentence approached. This is the kind of material misdirection elucidated in *Malgas and Bogaards* which vitiates the exercise of the sentencing discretion and entitles this Court to consider the question of sentence afresh, as if it were the court of first instance. This Court is therefore at large to consider sentence afresh.
- [20] In passing, it would be remiss of this Court not to highlight that the approach by the Regional Magistrate in taking both counts as one for the purposes of sentence and imposing a globular custodial sentence of twelve (12) years imprisonment, ran counter to the principles enunciated in *S v Rantlai* 2018
- (1) SACR 1 (SCA) at paragraph [9].
- [21] The practice of imposing globular sentences is regarded as undesirable by our courts, and it has been stated repeatedly that this practice must be reserved for exceptional circumstances. However, the mere practice of imposing globular sentences is not a misdirection per se warranting interference. It is desirable that each separate offence should be punished separately. See: *S v Kruger* 2012 (1) SACR 369 (SCA); *Director of Prosecutions, Transvaal v Philllips* 2013 (1) SACR 107 (SCA) paragraph 27.

Sentence considered afresh on appeal

- [22] Afore a consideration of sentence afresh, given the material misdirection by the Regional Magistrate in the exercise of his sentencing discretion, it must be underscored that the various grounds of appeal expounded upon by the appellant have been rendered moot. It is therefore unnecessary to consider those grounds of appeal.
- [23] The guidance provided in *Malgas* in respect of a courts sentencing discretion on appeal, where a mandatory sentence finds application, and which has mustered constitutional approval in *S v Dodo* 2001 (3) 382 (CC), is instructive:

“[12] The mental process in which courts engage when considering the questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by the legislature or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be just and appropriate sentence... Where material misdirection by the trial court vitiates its exercise of that discretion, an appellant court is of course entitled

to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is large.”

- [24] In *S v Matytyi* 2011

- (1) SACR 40 (SCA) at paragraph 23, Ponnan JA, in respect of serious crimes, such as the present, stated as follows:

“[23] Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is “no longer business as usual”. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for flimsiest of reasons-reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and the like other arms of state owe fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol boundaries of their own power by showing due deference to the legitimate domains of the power of the other arms of the state. Here 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. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as “relative youthfulness” or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.” (own emphasis)

- [25] Notwithstanding the arduous duty that a sentencing court is seized with, the exercising of a sentencing discretion is aimed at the attainment of a balance. The balance is achieved with reference to the traditional factors enunciated in *S v Zinn* 1969

- (2) SA 537 (A) at 540G-H) and confirmed in *Malgas*, being the offender, the crime and the interests of society. In *S v RO and Another* 2000

- (2) SACR 248 (SCA) at paragraph [30] Heher JA stated the following in this regard:

“Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence, invariably there are overlaps that render the process unscientific, even a proper exercise of a judicial function allows reasonable people to arrive at different conclusions.”

The personal circumstances of the appellants

- [26] The first appellant was born on 02 June 1973. He was 46 years at the time of sentencing. He is married and the father of three (3) children. The first born attained the age of twenty-one (21) years at the date of sentencing and was unemployed. The two
- (2) minor children aged twelve (12) and eight (8) years respectively are in the care of his wife who is unemployed. The highest level of education he attained was Grade 6. Although he is builder by profession he was employed as a miner prior to his arrest. He has three (3) previous convictions. On 22 April 1994, he was convicted of theft and sentenced to four (4) months imprisonment which was wholly suspended on certain conditions. On 4 January

1996 the appellant paid an admission of guilt of R300.00 for contravening section 1(a) of the Liquor Act, 27 of 1989 - selling alcohol without a licence. On 11 February 2003, he was convicted of theft and sentenced to three (3) years imprisonment. He was a trial awaiting detainee from the date of his arrest on 7 December 2016 to the date of sentencing on 17 July 2019.

- [27] The second appellant was born on 1 January 1974. He was 45 years old at the date of sentencing. He is a first offender. He is the father of three (3) children, the eldest of which was nineteen (19) years of age at the time of sentencing. The second born was fourteen (14) years old and the youngest about four (4) years old. His highest level of schooling is Grade 3. Due to his level of schooling, he worked with the first appellant as a team in securing employment. He also had been an awaiting trial detainee from 7 December 2016 to 17 July 2019.

The crimes

- [28] The Criminal Matters Amendment Act 18 of 2015 came into effect on 1 June 2016. One of its stated purposes (as reflected in the preamble) was to amend the Criminal Law Amendment Act 105 of 1997 ("the 1997 Act") to regulate the imposition of discretionary minimum sentences for essential infrastructure related offences. The record is replete with the devastating impact of the damage to essential infrastructure and the theft thereof. There is no underscoring that the offences the appellants were convicted of, are particularly serious with grave implications.

The interests of society

- [29] Tampering with and destroying essential infrastructure impacts on the provision of basic services to the citizenry. In the circumstances of the present matter, the appellants tampered with, damaged, and destroyed essential infrastructure by cutting and removing electrical copper cable from the railway line between Klerksdorp and Stilfontein intentionally. The value of the removed copper cable was substantial, amounting to R167 634.00.

Substantial and compelling circumstances

- [30] It is indubitable that on conviction, the appellants faced the imposition of the minimum sentence of 15 years imprisonment in respect of the first count. Thus unless substantial and compelling circumstances exist warranting a departure from the prescribed minimum sentence, that is the sentence which should ordinarily be imposed.
- [31] Having due regard to all the factors, both mitigating and aggravating specific to the present matter, and more particularly, the circumstances of the commission of the offence; the events thereafter; and the personal circumstances of the appellant and the time spent in custody awaiting trial, I am of the view that substantial and compelling circumstances exist to depart from the minimum sentence. A custodial sentence is merited.

Order:

[32] In the premise, I make the following order:

A REDDY

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

NORTH WEST DIVISION MAHIKENG

I agree.

B ROUX

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Date of Hearing : 27

November 2024

Date of Judgment: 12

March 2024

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Prepared on 11 October 2026 · Esheria