

SOUTH AFRICA / JUDGMENT

Gwadiso and Another v S (A425/2017) [2018] ZAWCHC 33 (16 March 2018)

[2018] ZAWCHC 33

COURT

Western Cape High Court, Cape Town

BEFORE

C M Fortuin, J I Cloete

CASE / FILE NUMBER

A425/2017

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Republic

of South Africa

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: A425/2017

In

the matter between:

WISEMAN

GWADISO

First

Appellant

SINIVELE

LUDONGE

Second

Appellant

and

THE

STATE

Respondent

Court:

Justice C M Fortuin et

Justice J Cloete

Heard:

Friday 16 March 2018

Delivered:

Friday 16 March 2018

JUDGMENT

CLOETE J:

- [1] The appellants were convicted in the district court at Caledon on 13 September 2016 on one count of theft committed on 14 January 2016 in the Villiersdorp area where they stole 650 metres of copper cabling, the property of Telkom, with a value of R35 000. The matter was transferred to the regional court at Caledon for sentencing in terms of s 116(1)(b) of the Criminal Procedure Act 51 of 1977. On 28 February 2017 they were each sentenced to 12 years imprisonment of which 4 years were conditionally suspended. They appeal only against their sentences with special leave from this Division.
- [2] The police had been alerted by a Telkom employee that one of its alarms had been activated on a farm where the cabling was installed. The vehicle in which the appellants were travelling was traced and after a high speed car chase they were effectively caught red-handed with the cables and certain equipment in that vehicle (both were arrested on the scene as they tried to flee after the vehicle collided with a fence).
- [3] The Criminal Matters Amendment Act 18 of 2015 (“the 2015 Act”) 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”) so as to regulate the imposition of discretionary minimum sentences for essential infrastructure-related offences.
- [4] An ‘essential infrastructure’ is defined in s 1 of the 2015 Act as meaning:
‘any installation, structure, facility or system, whether publicly or privately owned, the loss or damage of, or the tampering with, which may interfere with the provision or distribution of a basic service to the public...’
- [5] A ‘basic service’ is in turn defined as meaning:
‘a service, provided by the public or private sector, relating to energy, transport, water, sanitation and communication, the interference with which may prejudice the livelihood, well-being, daily operations or economic activity of the public...’
- [6] One of the consequential amendments to the 1997 Act was to introduce, in Part II of Schedule 2, the following:
‘Theft of ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters
Amendment Act, 2015 –
(a) if it caused –
(i) interference with or disruption of any basic service, as defined in section 1 of the
aforementioned Act, to the public; or

(ii) damage to such essential infrastructure...’

[7] A further consequential amendment to the 1997 Act was the introduction of Part V, which refers to:

‘Any offence referred to in section 36 or 37 of the General Law Amendment Act, 1955 (Act No 62 of 1955), involving ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, 2015.

Theft, involving ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, 2015, which is not covered in Part II of this Schedule.’

[8] Section 36 of the General Law Amendment Act deals with the failure to give a satisfactory account of possession of goods, and s 37 with the absence of reasonable cause for believing that goods have been properly acquired, and have no relevance to the present matter.

[9] In giving consideration to a suitable sentence, the magistrate was mindful of the new provisions in the 1997 Act, but only to the extent that they are indicative of the seriousness with which the legislature regards the type of offence in question. In terms of s 51(2) thereof, conviction of a first offender for any offence in Part II of Schedule 2 attracts a minimum sentence of 15 years imprisonment, and in Part V, a minimum sentence of 3 years imprisonment, subject of course to the provisions of s 51(3).

[10] One of the grounds of appeal is that the magistrate erred in accepting that the offence would otherwise have fallen under Part II of Schedule 2, whereas in fact it would otherwise have fallen under Part V.

[11] However as pointed out on behalf of the respondent, it was the undisputed evidence of Telkom’s employee, Mr Fennie, that the service provided by Telkom is an essential service in the infrastructure of the community. It was also the undisputed evidence of Warrant Officer Van Dyk that upon visiting the scene he found at least four telephone poles where the cables had been cut and removed. Moreover, the appellants were found in possession of equipment suitable to cut the cabling.

[12] It is therefore clear that, given the theft and damage to essential infrastructure in the provision of a basic service, the appellants’ convictions would have attracted the prescribed minimum sentence contained in Part II and not Part V of Schedule 2 of the 1997 Act. There is thus no merit in this ground of appeal.

[13] The appellants submit that the magistrate also erred in failing to attach “sufficient” weight to all relevant sentencing factors, in particular not differentiating between their personal circumstances and not taking into account the period of 14 months that they were incarcerated awaiting trial. A related complaint is that she failed to consider whether the second appellant is a suitable candidate for correctional supervision.

- [14] While it is so that the magistrate did not mention the appellants' pre-trial incarceration period in her judgment, this does not necessarily mean that it was overlooked: see *S v Pillay* 1977 (4) SA 531 (A) at 535B. The sentences that she imposed indicate that she did not in fact overlook it. Moreover, in her judgment refusing leave to appeal she specifically stated that she had taken this into account.
- [15] The magistrate set out the appellants' personal circumstances which are unremarkable, as well as the fact that the first appellant has three previous convictions for dishonesty (two of housebreaking and one of housebreaking with intent to steal and theft) whereas the second appellant has no such previous convictions.
- [16] She correctly considered the fact that the legislature has deemed theft, coupled with destruction of essential infrastructure providing basic services to the public at large, to be sufficiently serious to warrant a prescribed minimum sentence of 15 years direct imprisonment in the case of a first offender. The prevalence of this type of offence, and its consequences not only to the service providers but also to the public at large, cannot be sufficiently underscored. It is also noted that the 2015 Act came into force just five months after the commission of the offence (on 1 June 2016).
- [17] The magistrate took into account that the offence was in all likelihood motivated by greed, given that both appellants were employed and earning an income. As submitted on behalf of the respondent, the evidence also established that this was a carefully planned and executed crime in an isolated area, and were it not for the security measures which Telkom itself had put in place at its own expense, there is a real likelihood that the appellants would not have been traced and apprehended.
- [18] While it is trite that a court must adopt an individualised approach to sentencing, the only truly relevant factor in the present matter is the difference between the previous convictions of the two appellants. However, merely because the first appellant received the same sentence as the second appellant, it does not necessarily follow that therefore the second appellant's sentence is too harsh or disproportionate to the offence. It must also be borne in mind that the first appellant has no previous convictions for an offence of this specific nature.
- [19] I agree with the respondent's submission that, in serious crimes such as the present, deterrence should play a significant role when weighed against the other traditional factors. Moreover, to impose a sentence of correctional supervision in this case would be sending out a completely wrong message to others who are minded to commit these crimes.

[20] In my view, not only were the sentences imposed proportionate to the offence, but they are also not grossly disproportionate to what the individual appellants deserve: see *S v Dodo* [2001] ZACC 16; 2001 (1) SACR 594 (CC) at paras [26] and [31] to [41]. They are therefore not shocking, startling or disturbingly inappropriate. There was also no material misdirection by the magistrate.

[21] In the result I propose the following order:

‘The appeals of the first and second appellants against their respective sentences are dismissed.’

J I CLOETE

FORTUIN J:

I agree and it is so ordered.

C M FORTUIN

For the Appellants: Mr H Carstens

Instructed by: Legal Aid

For the Respondent: Adv Susan Galloway

Instructed by: State Attorneys

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