

SOUTH AFRICA / JUDGMENT

Msomi v S (39/2018) [2019] ZAECHGHC 80; 2020 (1) SACR 197 (ECG) (3 September 2019) [2019] ZAECHGHC 80

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.E. Smith, S. Rugunanan

CASE / FILE NUMBER

39/2018

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: 39/2018

Magistrate's Court No: CCC1/04/13

In the matter between

SIPHO MSOMI Appellant

vs

THE STATE Respondent

JUDGMENT

SMITH J:

- [1] The appellant was charged in the Specialised Commercial Court, Port Elizabeth, with 2 counts of fraud, 3 counts relating to contraventions of the Electronic Communications and Transactions Act, No. 25 of 2002 (the Electronic Communications Act, and 2 counts relating to contraventions of the Prevention of Organised Crimes Act, No. 121 of 1998 (the Prevention of Organised Crime Act).
- [2] Counts 1, 2 and 3 relate to allegations that he, acting as a member of a syndicate, conspired with the other syndicate members to commit fraud involving the Standard Bank account of the Nelson Mandela Metropolitan Municipality (the NMMM).

- [3] The State alleged that the syndicate had obtained computer software (namely eBlaster) which enabled them to access keystrokes, including usernames and passwords, required to gain access to the municipality's bank account and to effect unauthorized payments from the said account. These amounts were then paid into beneficiary accounts which they had sourced in order to gain access to the funds. On 14 February 2009 the syndicate had transferred payments in the sum of R19 722 000 into the accounts of 61 of the aforementioned beneficiaries.
- [4] The syndicate also obtained the bank account numbers of the abovementioned beneficiaries by stealing bank cards and PIN codes to enable them to make the unauthorised payments from the NMMM's bank account.
- [5] Once these deposits had been made, they requested refunds from the beneficiaries either in cash or by transfers into nominated accounts. They also approached various individuals to open bank accounts or to allow the syndicate use of their existing accounts on various pretexts.
- [6] The appellant was consequently charged with:
- (a) an alleged contravention of section 86(4) of the Electronics Communications Act, which relate to the unlawful use of a device designed to overcome security measures in place for the protection of data to capture keystrokes relating to computer usernames and passwords (Count 1);
 - (b) fraud, it being alleged that he, falsely and with the intent to defraud, gave out and pretended to Standard Bank that the payments into the accounts of the various beneficiaries had been authorized by the NMMM and that those beneficiaries were entitled to the payments (Count 2); and
 - (c) a contravention of section 4 of the Prevention of Organised Crimes Act, it being alleged that he, together with the other syndicate members, knowing that the amounts transferred into the beneficiary accounts were the proceeds of unlawful activities, unlawfully entered into agreements or arrangements with the said beneficiaries which had the effect of disguising the nature, source and location of the funds, and enabling the appellant and other members of the syndicate access to those funds, by making withdrawal or purchases at various merchants or requesting transfers from those accounts to various other accounts (Count 3).
- [7] Counts 4 to 7 relate to the unauthorised transfer of funds from the Absa Bank account of the Koukamma Municipality (the municipality) during December 2009 to February 2010, by virtue of the same modus operandi.

- [8] The State alleged that during the aforesaid period, the appellant acting as a member of a syndicate, unlawfully installed a computer programme on the Koukamma Municipality computers, namely Winspy, which enabled them to record and access keystrokes, including usernames and passwords, which in turn enabled them to make unauthorized transfers from the municipality's Absa Bank account into various specified beneficiary bank accounts.
- [9] They also unlawfully obtained information required by Vodacom for a sim-swap which they then used to induce Vodacom to process the sim-swap. In the result the syndicate gained access to a Random Access Verification number which was sent to the duly authorised municipal employee to release payments from the municipality's account. With access to the said verification code the syndicate effected payments in the sum of R1,4 million into the bank accounts of 16 different beneficiaries. The appellant and other members of the syndicate all shared in the proceeds of these offences.
- [10] Against the background of this factual matrix the appellant was charged with:
- (a) an alleged contravention of section 86(4) of the Electronic Communications Act, in that the appellant, together with other members of the syndicate, made use of Winspy to capture keystrokes in order to overcome security measures designed to protect data or access thereto, namely computer usernames and passwords, without the authority of the municipality (Count 4);
 - (b) an alleged contravention of section 86 (1) of the Electronic Communications Act, namely the unlawful interception of the Random Verification Number required to effect electronic transfers from the Koukamma municipality's bank account (Count 5);
 - (c) fraud, it being alleged that the appellant, together with other members of the syndicate, gave out and pretended to Absa Bank that: the payments into the mentioned beneficiary accounts were made by duly authorized municipal functionaries; that the payments had been authorized in the normal course of the municipality's business; and that the mentioned beneficiaries were entitled to the payments (Count 6); and
 - (d) an alleged contravention of section 4 of the Prevention of Organised Crimes Act, in that the appellant and the other members of the syndicate, being aware of the fact that the aforesaid funds were proceeds of criminal activities, entered into agreements or arrangements with the aforesaid beneficiaries which had the effect of concealing or disguising the nature, source or ownership of the said funds, and to enable the appellant and other syndicate members to remove or diminish the funds by making cash withdrawals or requesting transfers from those accounts to various other bank accounts (Count 7).
- [11] The appellant pleaded guilty to all the charges and his legal representative prepared and submitted a written statement in terms of section 112 of the Criminal Procedure Act, 51 of 1977. Although the appellant admitted all the elements of the various charges, his section 112 statement was unfortunately little more than a regurgitation of the allegations contained in the indictment.

[12] He was nevertheless duly convicted on all charges and sentenced as follows:

(a) Counts 1, 2 and 3 were taken as one for the purposes of sentencing and, having found no substantial and compelling circumstances in respect of count 2, he was sentenced to undergo 15 years' imprisonment;

(b) Count 4, 5, 6 and 7 were also taken as one for the purposes of sentencing and he was sentenced to 15 years' imprisonment.

[13] The sentences were ordered to run concurrently with each other and also with another sentence of 8 years' imprisonment which the appellant was serving in respect of a different matter.

[14] The appellant appeals against his sentence with the leave of the court a quo.

[15] It is common cause that the sentences imposed by the magistrate in respect of counts 1, 4 and 5 are incompetent, since none of those offences fall within the ambit of the minimum sentences legislation, but are regulated by the provisions of the Electronic Communications Act.

[16] That Act prescribes the following sentences:

(a) in respect of counts 1 and 4, which relates to a contravention of section 86 (2) of the Act, the penalty clause, namely section 89(2) provides for a fine or imprisonment not exceeding 5 years; and

(b) in respect of count 5, which relates to a contravention of section 86(1) of the Act, the penalty clause provides for a fine not exceeding 12 months.

[17] To his credit the magistrate realised this error, albeit only after the event, and in his judgment on leave to appeal said the following:

"Upon being presented with the notice of application for leave to appeal, at 9h00 the day before yesterday, I immediately upon revisiting

sentence, realized that the sentencing with regard to counts 1, 4 and 5 were irregular as it exceeded the maximum prescribed sentences for those offences."

[18] Ms. De Klerk, who appeared on behalf of the State, has conceded (both in her heads of argument and in argument before this court), that those sentences are indeed irregular and fall to be set aside.

[19] It is also common cause that, in respect of counts 2 and 6, a prescribed minimum sentence of 15 years' imprisonment was applicable. The magistrate was accordingly under a duty to consider whether there were any substantial and compelling circumstances which justified lighter sentence.

- [20] Unfortunately the magistrate's rather terse judgment on sentencing does not evince that he has given due consideration to all the relevant factors. It is understandable though that he was somewhat hamstrung by the fact that the appellant's section 112 statement did not explain in detail the circumstances which led him to commit the crimes, or any other facts which may have compelled an inference of diminished moral blameworthiness, or would have some mitigating effect in any other respect.
- [21] Nevertheless, the appellant's legal representative mentioned various important factors from the bar which either on their own or collectively had at the very least warranted serious consideration by the magistrate. Those factors appeared to have been accepted by the state, and during argument before this Court, Ms. De Klerk conceded that they were properly before the magistrate and should have been taken into account in the enquiry as to the presence or absence of substantial and compelling circumstances.
- [22] The magistrate's failure properly to consider all those factors amounted to a serious irregularity which entitles this court to interfere with the sentence. It is trite that an appeal court will only interfere with a sentence imposed by a trial court if there has been a misdirection, or the sentence is so disproportionately harsh that the only reasonable inference is that the trial court did not properly exercise its sentencing discretion. There can be little doubt that the former ground exists in this matter.
- [23] In *S v Mokela* 2012 (1) SACR 431 SCA, at paragraph 14, the Supreme Court of Appeal emphasised the duty of judicial officers to enquire properly and thoroughly into the existence or otherwise substantial and compelling circumstances. In this regard Bosielo JA said, at para. 14:
- "The duty extends to a point where a sentencing court may be obliged, in the interests of justice, to enquire into circumstances, whether aggravating or mitigating, which may influence the sentence which the court may impose."*
- [24] And in *Selli v The State* (220/15) [2015] ZASC 173 (26 November 2015), the Supreme Court of Appeal held that a failure by a presiding officer to be "diligent, conscientious and punctilious" in his or her search for substantial and compelling circumstances amount to a serious misdirection.
- [25] For these reasons I am of the view that this court is at large to consider the sentences afresh.
- [26] Mr. Howse, who appeared for the appellant, submitted that the mitigating factors which were placed before the court a quo from the bar, had not been disputed by the State and the magistrate was accordingly constrained to consider whether or not they, either individually or collectively, constituted substantial and compelling circumstances.
- [27] These factors are the following:

- (a) the appellant was a first offender, which meant that at the age of 42 he had led a crime free life and, there are accordingly good prospects for his rehabilitation;
- (b) the appellant has a Master's degree in computer science and is highly skilled in a scarce discipline. He can accordingly still make a meaningful contribution to society after his rehabilitation;
- (c) the appellant was not the initiator of the crimes, and had been enticed by the other members of the syndicate to become involved. He had been tempted into committing the offences in order to raise funds for his defence in another trial;
- (d) the actual prejudice in consequence of all the counts had been limited to R600 000 and the appellant himself benefitted only to the limited extent of some R50 000;
- (e) he had performed a secondary role in the planning and execution of the offences and his moral blameworthiness is completely less than that of the other members of the syndicate; and
- (f) the appellant had shown genuine remorse and had played open cards with the State and the police from the start. His detailed statement to the police assisted them in successfully pursuing, investigating, and prosecuting the case against the other members of the syndicate.

[28] While I agree with Mr. Howse's submissions regarding the mitigatory effect of most of the above-mentioned factors, I am unable to agree that the appellant

played a secondary role in the planning and execution of the offences, and that he is consequently somehow less morally blameworthy.

[29] It is common cause that the appellant played a central role in the execution of the crimes and, as a matter of fact, it would not have been possible for the syndicate to execute their plans if it were not for the appellant's exceptional expertise and skills. It is common cause that the transactions in respect of the Koukamma Municipality's Absa account was executed by the appellant while he was in prison and while having access only to his cellphone.

[30] Ms. De Klerk has also correctly submitted that the fact that the municipalities did not suffer greater financial losses were only due to the

intervention of their respective banks and not as a result of any belated pains of conscience on the part of the appellant and his co-perpetrators.

[31] She also pointed out that the appellant was instrumental in the purchasing and installation of the computer software, the processing of the data in order to identify the relevant usernames and passwords, and the capturing and verifying of transfers from the municipalities' bank accounts. He also obtained the information required for the Vodacom sim-swop. He thus played a central role in the commission of the offences, and can accordingly not claim diminished moral responsibility.

[32] The appellant's conduct, after he had been apprehended by the police, is in my view an important consideration in his favour. Not only is it common cause that he admitted everything at the time, gave a detailed statement which greatly facilitated the investigations against the other syndicate members, pleaded guilty to all counts, but he also volunteered to testify against the other syndicate members. Ms. De Klerk has conceded that his testimony had been crucial in assisting the State to prove the case against them. She accordingly also conceded that this was an indication of genuine remorse on his part.

[33] In my view these factors, when considered in conjunction with the other mitigating factors, constitute substantial and compelling circumstances which compel us to consider lighter sentences.

[34] In considering sentence afresh, I am constrained to bear in mind that the offences with which the appellant had been convicted are very serious indeed. These types of cyber-crimes have far-reaching consequences for the economy and the public, and courts must impose sentences that reflect the serious nature of the crimes. It is so that there is unfortunately a misguided perception that these crimes are somewhat less morally reprehensible than fraud and theft committed in the "old fashioned" way. This perception is unfortunately further encouraged by films in which cyber-criminals are portrayed as debonair and devil-may-care rebels who fight a lone and just battle against an evil system. The reality is, however, far uglier. As is the case here, these types of crimes are more often than not motivated solely by greed, and not by any desire to do some societal good. The overwhelming demand for secure internet banking and shopping means that financial

institutions are becoming increasingly dependent on secure cyber transactions in order to conduct their business effectively. The

public sector, and for that matter private individuals and companies, are also equally reliant on access to secure internet banking.

The ability of cyber "hackers" to infiltrate these electronic systems for their own selfish purposes consequently has

far-reaching and deleterious consequences for the economy, both domestically and globally.

[35] There can be little doubt that the appellant is a highly skilled and talented individual, possessing skills which could have been used for the benefit of society. As I have mentioned earlier, he was able to breach the municipalities' safety measures from a prison cell, using only his cellphone. Why he has decided instead to use these skills for criminal purposes boggles the mind.

[36] Nevertheless, punishment should not be meted out in spasms of indignation, but must be spiced with mercy and, while reflecting the serious nature of the crimes, and the interests of society, must also make allowance for the reasonable possibility of an accused person being rehabilitated and once again becoming a valuable member of society.

[37] Having considered all the above mentioned factors, I am of the view that the sentences imposed by the trial court must be set aside and substituted with the following sentences:

- (a) Count 1: 3 (three) years' imprisonment
- (b) Count 2: 12 (twelve) years' imprisonment of which 2 (two) years are suspended for a period of 3 (three) years, on the condition that the appellant is not convicted of any offence involving an element of dishonesty, or a contravention of the provisions of the Electronic Communications and Transactions Act, No. 25 of 2002, or of section 4 of the Prevention of Organised Crime Act, No. 121 of 1998; committed during the period of suspension
- (c) Count 3: 3 (three) years' imprisonment.
- (d) Count 4: 3 (three) years' imprisonment.
- (e) Count 5: 9 (nine) months' imprisonment.
- (f) Count 6: 12 (twelve) years' imprisonment, of which 2 (two) years are suspended for a period of 3 (three) years, on the condition that the appellant is not convicted of an offence of which dishonesty is an element; or a contravention of the provisions of the Electronic Communications and Transactions Act, No. 25 of 2002, or of section 4 of the Prevention of Organised Crime Act, No. 121 of 1998; committed during the period of suspension.
- (g) Count 7: 3 (three) years' imprisonment.

These sentences shall run concurrently and are antedated to 29 January

2013. The sentences shall also run concurrently with the sentence of 8 years' imprisonment which the appellant was serving at the time of sentencing in this matter.

J.E. SMITH

JUDGE OF THE HIGH COURT

I agree.

S. RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

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