

SOUTH AFRICA / JUDGMENT

# S v Ndebele and Another (SS16/10) [2011] ZAGPJHC 42 (14 March 2011)

**[2011] ZAGPJHC 42****COURT**

South Gauteng High Court, Johannesburg

**BEFORE**

Lamont

**CASE / FILE NUMBER**

SS16/10

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SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO:SS16/10

DATE:2011/03/14

In the matter between

THE STATE and NDEBELE AND ANOTHER. Accused

**S E N T E N C E**

LAMONT J: The two accused have been convicted of the offences listed in the charge sheet, as previously stated, in the course of convicting them. I refused a postponement to the accused, to enable them to obtain the services of a probation office or social welfare worker to provide an expert report, for the reasons which are contained in the judgment on the postponement application

Accused 1 is 36 years old, he is single. He is the father of a six year old child, and lives with the child and his girlfriend. He is self-employed in a CC which he owns. It conducts a business distributing stationery. It is a relatively unsuccessful enterprise in that the accused is unable to draw a salary from it. The accused is in good health, and has a previous conviction. He was found guilty on 6 September 2004, of six counts of contravening Section/Regulation 27(3) of Act/Ordinance 41 of 1987, in that he had interfered with electrical apparatus on or about 6 February 2004. The charges were taken together for purposes of sentence, and he was sentenced to R4 000 or 18 months' imprisonment, which was totally suspended. He also has a conviction for assault, committed on 31 October 2006, he was sentenced to R150 fine.

Accused 2 is 30 years old; he is single with two children by different women. One child is two years, one is aged four years. The two year old child, and accused 2's girlfriend live with accused 2. The four year old child lives with his mother. At the time of the commission of the offences, accused 2 was employed at South Deep Mine, earning a salary of some R14 000 per month. His health is good. Those are the personal circumstances which are put forward in respect of the two accused.

I am enjoined in considering sentence, to consider society, the personal circumstances of the accused, as well as the nature of the offence. Insofar as the considerations of society are concerned, there are a number of sub factors, including prevention, deterrence, retribution, rehabilitation. Insofar as the nature of the offence is concerned, consideration must be given to the enormity of the offence, the duration over which it was committed, and the actions of the accused in relation to it.

Insofar as the needs of society are concerned, evidence was led by the state, establishing that the theft of electricity is a prevalent, widespread crime. A number of vending machines, similar to the ones used to perpetrate the current offences, have been stolen (approximately 58) of which only 18 have been recovered. The machines in question are capable of generating some R450 000 per month, each. The calculation of the gross value of this is some R278 million.

In consequence of the skill of the actual thieves, or their associates, it has been necessary for Eskom to change the programmes and manner in which electricity is sold by these vending machines, in an attempt to limit the losses which are suffered by Eskom. The impact upon society, due to the high cost of electricity, in consequence of this kind of activity is notorious. So much for the direct effect of this type of conduct.

The accused have been convicted of committing a series of offences over a lengthy period of time, in a substantial amount. The amount of money is some R10 million. The time is to be counted in months. This was a sophisticated operation directed towards the sale and production of the vouchers in question. This is apparent from the fact of the large number of machines; it is no coincidence that five were found in relation to the activities of the accused.

Accused 1 and 2 are the senior persons involved in a huge racket, as defined, and have been convicted, and must be sentenced in accordance with their conduct and wrongfulness over the period. The amounts stolen are approximately during the period of February to May, R7 million in Westonaria and R1.3 million in Sasolburg. The activities of the accused have a direct economic effect on the whole economy.

The interests of the community dictate that persons who perform acts of this magnitude and over such a long period of time, be punished appropriately. The natural indignation and repugnance of the court, for their crimes, must appear fully in the sentence which is imposed upon them. Not only must the accused be punished appropriately, but the punishment must represent an appropriate deterrent effect for others.

The retributive impact of the punishment upon the accused must weigh its proper place in the balancing of all the elements of the offence. If a sentence which is too light is imposed upon the accused, members of the public and accused persons lose their respect for the judicial process. They also become more likely to commit offences. Persons who weigh up the commission of an offence must not see the offence to be economically worthwhile, in comparison with the punishment which they are likely to receive.

The fact that there may in future be a forfeiture order in respect of the proceeds of the offence is not relevant to this consideration. This is not to say that accused persons must be punished with a sledgehammer. The punishment for the accused must be individualised, and must match each of their actions appropriately. The fact that the crime which has been committed does not involve violence, and is what is colloquially known as a white collar crime, in my view is not a feature to be taken into account in the present offence as an ameliorating factor.

White collar crime which results in the increased cost to the public, of services which are made available to the public, such as electricity, do have as much an impact on the poor, and result in the poor suffering. Poor people who are entitled to the provision of electricity. They are required to pay more in consequence of the losses suffered by the manufacturers and suppliers of electricity.

The fact that the accused are remote from that impact does not in any way lessen the link between their conduct and the directness of the result.

The punishment of imprisonment, which I propose imposing upon the accused, is just that, a punishment. The persons in whose custody they will be will furnish them with the tools with which to carry on the business of living life in accordance with the law once they are released.

The nature of the offence is extremely serious. However, I am conscious of the fact that the accused should not be sacrificed on the altar of deterrence. What is required is a balancing of all the circumstances. In balancing the circumstances of the accused to the right of freedom, it is my view that that balance weighs more in favour of imprisonment than their right to liberty.

Society demands the removal of the accused from society, both as a punishment and to prevent them from committing further offences. In weighing these factors, as well as the requirement of society that others be deterred, it is my view that a lengthy period of imprisonment should be imposed upon the accused.

The duration over which the offences were committed demonstrates a fixed and settled intention on the part of the accused to perform illegal acts in the pursuit of profit. This similarly requires a lengthy period of imprisonment.

By reason of the previous convictions of accused 1, it is my view that accused 1's sentence should be more severe than that of accused 2. He has previously brushed with the law, and been involved in a series of offences, while not of an identical nature, of a nature involving tampering with electricity apparatus.

The legislation, of which the accused have been convicted in respect of count 1 and 2, is legislation designed to assist in the tracing and conviction of persons who are generally extremely difficult to trace and convict. It is usually, as it was put by the state, the foot soldiers who are captured and not the managers and promoters of the businesses. In the present matter managers of the business have been traced and convicted.

I do not lose sight of the fact that accused 1 alone is convicted of the second count. In my view while the offences should be charged separately, the punishment should be dealt with on the basis of one continuous act.

It is possible to divide the charge sheet into various groupings of counts. The first two counts deal with the conducting of an organised crime. Counts 3 to 7 deal with the theft of the cash dispensing units. Counts 8 to 6 521, 13 036 to 20 648, 28 262 to 28 311, 28 362 to 44 311 and 60 262 to 69 274 all relate to charges concerning the creation of the vouchers which represent credits. Counts numbers 6 522 to 13 035, 20 649 to 28 261, 28 312 to 28 361, 44 312 to 60 261 and 69 275 to 78 287 are all related to the theft of the electricity, in consequence of the use of the vouchers.

I was invited to isolate each count and impose a small sentence on all count, and then direct that each of these counts should run concurrently with the other counts. In my view, all of these counts should be taken together, and sentenced together. Similarly I was invited, in respect of each of the thefts of the cash dispensing units, to sentence individually. In my view there should be a globular sentence imposed in respect of all of those counts.

It remains to state that I also distinguish between accused 1 and accused 2, also on the basis of the conviction of accused 2, only in respect of count 1, for participation, whereas accused 1 has been convicted both of participation and management, count 2. I accordingly impose the following sentences on each of the accused.

Count 1, accused 1, 18 years' imprisonment. Count 1, accused 2, 15 years' imprisonment. Count 2, accused 1, 18 years'

imprisonment. Counts 3, 4, 5, 6 and 7, accused 1 and 2, 15 years' imprisonment. Counts 8 to 78 287, accused 1 and 2, 15 years' imprisonment. The periods of imprisonment imposed on accused 1 in respect of count 2 up to and including 78 287 are to be served concurrently with the sentence imposed on count 1. The sentences imposed on accused 2 in respect of count 3 up to and including 78 287 are to be served concurrently with the sentence imposed on count 1.

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