

SOUTH AFRICA / JUDGMENT

S v Ndou and Others (SS36/2019) [2022] ZAGPJHC 580 (15 August 2022) [2022] ZAGPJHC 580

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

SS36/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

CASE

NUMBER: SS36/2019

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

15

August 2022

In

the matter between:

THE
STATE
and
ALBERT
AVHURENGWI SOLLY NDOU
First Accused
MULALO
KENNETH MUNYAI
Second Accused
TSHILILO
FREEMAN CHAUKE
Third Accused
COLLEN
LESIBA
MULEYA
Fourth Accused
MASHUDU
STEVEN CHIRUNDU
Fifth Accused
SIMON
SAKALA
Sixth Accused
BRIAN
MULEYA
Seventh Accused
LUCKY
SHONGWE
Eighth Accused

JUDGMENT

WILSON AJ:

1 Each of the accused persons was indicted before me on charges relating to the theft of batteries from cellular telephone network

towers in the Gauteng, North West and Limpopo provinces. Each of the accused persons was charged with offences committed during the thefts to which they were alleged to be linked.

2 In addition, each of the accused persons was charged with an offence under the Prevention of Organised Crime Act 121 of 1998 (“POCA”). The substance of that charge is that the theft of batteries from the various towers constituted a “pattern of racketeering activity” carried out as part of a “criminal enterprise” within the meaning given to those terms in POCA.

3 Accused number 1, Mr. Ndou, was, in addition, charged with the management of the enterprise the State alleges. The management of

such an enterprise – viz. conduct that goes beyond mere association with an enterprise engaged in a pattern of racketeering

activity – constitutes a separate offence under POCA.

4 On the first day of trial, I separated the proceedings against accused number 2, Mr. Munyai, and accused number 5, Mr. Chirundu,

from the proceedings against the remaining accused persons. The State alleged that they had absconded, but it was nonetheless content to proceed without them.

5 On 27 June 2022, the third accused, Mr. Chauke, absented himself from court without my permission, and did not appear again for the remainder of the trial. On the State's application, I provisionally cancelled Mr. Chauke's bail, and issued a warrant

for his arrest. I then refused an application to postpone the trial to allow the State to trace Mr. Chauke, because the State could not demonstrate that the prejudice to the remaining accused that would likely be caused by the resulting delay was outweighed by any prejudice to the State that may be caused by proceeding with the trial forthwith.

6 Any such prejudice was ameliorated by an order in terms of section 159 (3) of the Criminal Procedure Act 51 of 1977 ("the CPA"), which I made immediately upon refusing the State's postponement application. The effect of that order is that Mr. Chauke's trial is separated from those of the remaining accused persons, but may continue before me once his attendance has been secured, from the stage it had reached when he absented itself.

7 The nett effect of all this is that I was required to return verdicts only in respect of five of the accused persons: accused number 1, Mr. Ndou; accused number 4, Mr. Collen Muleya; accused number 6, Mr. Sakala; accused number 7, Mr. Brian Muleya; and accused number 8, Mr. Shongwe.

The principal issues to be decided

8 The indictment alleges 43 counts. It was conceded at the end of the State's case that no evidence had been led in respect of

counts 41 to 43. On the strength of that concession, I immediately acquitted each of the accused on those counts.

9 I then acquitted Mr. Collen Muleya, Mr. Sakala and Mr. Shongwe on the basis that the State had led no evidence on which a reasonable

court acting carefully could convict them in relation to any of the other counts alleged against them on the indictment. My reasons for acquitting Mr. Muleya, Mr. Sakala and Mr. Shongwe were given orally shortly after the State closed its case, but I shall record and supplement them in the course of this judgment. Only Mr. Ndou and Mr. Brian Muleya were ultimately put on their defence.

10 The evidence led at trial coalesced around thefts of batteries from eight towers, and the attempted theft of batteries from a ninth.

There was no dispute between the parties that the thefts and the attempt took place. Nor was the manner in which the thefts and the attempt were carried out placed in any serious dispute. Unauthorised persons gained access to each of the towers using keys and identification cards that they had acquired during their work as contractors for the cell phone companies the towers serve. Where they had neither keys nor cards, the State's case is that they lied about being authorised contractors, and used angle grinders and other tools to force open the gates, containers and safes that secured the batteries in each tower. The batteries were loaded onto bakkies, and taken away to be sold. In most cases, the batteries were recovered before they could be taken away, or before they could be sold.

11 All the accused persons admitted to being present near at least some of the towers when the thefts took place, or in vehicles carrying stolen batteries when they were apprehended. Where they made those admissions, they sought to advance innocent explanations for

their presence. Mr. Ndou denied having been anywhere near the scenes of two of the thefts, and sought to advance alibi defences in respect of those incidents.

12 Accordingly – with the exception of the charges under POCA, which raise problems of their own – what might at first blush appear to be a factually complex case really boils down to two issues: whether the accused persons were present when the thefts were carried out, and whether, if they were present, they participated in the thefts, or in the other unlawful conduct alleged to have been committed in the course of them.

13 I now turn to address each of the incidents the State alleged.

The Clubview Incident

14 Just after 7pm on 28 January 2017, Pieter van Eck, who describes himself as a “Recovery Agent” at Capital Air Reaction Services, was called to an incident at a MTN cell phone mast in Von Wielligh Avenue in Clubview, near Centurion. He was accompanied by his colleague, Jappie Venter. There, he found Mr. Ndou, Mr. Shongwe and a third person, who is likely to have been Mr. Chirundu. One of the three men was standing at the gate. The other two were inside the site removing batteries from it. Six batteries had been loaded on to a Mazda bakkie, which was parked on the street outside the tower.

15 Mr. van Eck asked the men what they were doing. They (Mr. van Eck could not say which of the accused spoke to him) explained that

they were contractors sent to the site to work on it.

16 The undisputed evidence of Mr. van Eck, and several other State witnesses, was that there is a specific protocol for controlling access to MTN's cell phone towers. Part of that protocol is that each visit to a tower – for example for the purposes of maintaining or repairing the equipment in it – must be authorised by a control centre. Once a visit is authorised, those

who will enter the site are issued with a reference number. The reference number indicates that they are authorised to be present at a tower and to interfere with its installations for the period and for the purposes to which the reference number corresponds.

17 None of the men at Clubview could provide a reference number. The relevant control centre told Mr. van Eck that there was no such

reference number. It was not suggested in cross-examination of Mr. van Eck that there was such a reference number.

18 Mr. van Eck and Mr. Venter detained all three men pending the arrival of the police. While the police were on their way, the man

likely to have been Mr. Chirundu asked if he could go to his vehicle, which was parked on the street outside the tower, to get some tools. He was allowed to do so, but instead of collecting tools from the vehicle, he ran away.

19 Mr. Ndou and Mr. Shongwe were arrested on suspicion of theft and taken to Wierderbrug Police Station.

20 Three years later, while the investigation of the Clubview incident was apparently still continuing alongside the investigation of other cases of theft and damage at cell phone towers, Mr. Shongwe gave a statement to the police. That statement was handed in as Exhibit "R" before me. In it, Mr. Shongwe claimed that he was nothing more than an innocent bystander. He had accompanied Mr. Ndou and Mr. Chirundu to the tower on 28 January 2017 but had no idea of what was happening inside. He remained in the bakkie while they removed batteries from the tower. He later got out of the bakkie to wait around on the street. He assumed that Mr. Ndou and Mr. Chirundu were carrying out some sort of work on the tower. He was not involved in that work, and he never entered the tower.

21 When Mr. Mavata, who appeared for Mr. Shongwe before me, put Mr. Shongwe's version in cross-examining Mr. van Eck, he added

the detail that Mr. Shongwe had only joined Mr. Ndou and Mr. Chirundu to have a drink with them later that evening. They had told Mr. Shongwe that they had to go to the tower to do some work before going on for a drink.

22 Mr. van Eck was obviously unable to comment on this version. Other than the statement Mr. Shongwe gave to the police, I received

no evidence from the State that would tend either to exclude or to confirm Mr. Shongwe's version.

23 Mr. Ndou's version was not put to Mr. van Eck, or to any of the State's other witnesses. That version was that Mr. Brian

Muleya contracted him to go to the tower with Mr. Chirundu and Mr. Shongwe, and to allow them to load some material on to the bakkie. He says that he was paid R350 to do so, that he did not ask what was being loaded, and did not care. He said that he had no inkling of any intention to steal from the tower until Mr. van Eck and Mr. Visser detained him.

The Lochner Road Incident

24 At around 8am on 18 August 2017, two men entered the MTN cell phone tower at Lochner Road, Mnandi, near Centurion. They were observed by Andries and Dennis Lategan, who operated a business next to the tower. It is not possible to access the tower without crossing the Lategans' property, through a gate which they control. The two men were given access to the Lategans' property and entered the tower from there.

25 A short while later, Andries Lategan's gardener alerted him to the fact that the two men were removing batteries from the tower. Andries, together with his son, Dennis, challenged the men to produce evidence of their identity, presumably to establish whether they had a right to enter the tower. The men did not identify themselves, but they continued to load batteries on to the bakkie in which they had arrived.

26 By this time, the Lategans had grown suspicious. Dennis Lategan took pictures of both men, the vehicle, and the batteries being loaded onto the vehicle. The Lategans then returned to their premises and contacted the security company responsible for the tower. The security company told Dennis Lategan not to allow the men to leave, and that someone would be sent to investigate.

27 The Lategans did not return to the tower until representatives of the security company arrived. By that time, however, the men had

left the tower. They had also abandoned the vehicle and the batteries loaded on to it.

28 It turned out that the vehicle left at the site belonged to Mr. Brian Muleya. On 25 May 2018, Mr. Muleya gave a statement to the

police that was entered as Exhibit "P" before me. In that statement, Mr. Muleya states that he went to the tower with Mr. Ndou, because Mr. Ndou wanted to use his vehicle to "exchange" the batteries in the tower for new ones. He denied any knowledge of an intent to steal the batteries that were there. He says he believed Mr. Ndou to be authorised to remove the batteries.

29 The photographs Dennis Lategan took were included in an unsworn statement given by a Mr. Hendrik van Staden. That statement was entered as Exhibit "M" before me. Mr. van Staden did not place his statement under oath before me. Mr. Lategan however

confirmed that he took two photographs of the men at the tower included in the statement, and one of the photographs of the vehicle.

30 There is no dispute that Mr. Brian Muleya and his vehicle were present at the tower on that day. Nor is there any dispute that Mr.

Muleya was loading batteries on to the vehicle with another man. There is a dispute as to the identity of the other man. Neither of the Lategans were able to say who the other man was. They could not identify him in court.

31 The photograph is fairly clear. It appears, on its face, to be a photograph of Mr. Ndou. Mr. Ndou denies that it could have been

him. He says that at the time the photograph was taken he was in Venda. But, probably because none of the witnesses identified Mr. Ndou as the person in the picture, that version was not put in cross-examination.

The Mutale Incident

32 It was common ground that, on 9 September 2017, Mr. Ndou was arrested together with Mr. Chirundu near a Vodacom tower at Mutale in

Limpopo Province. There is no serious dispute that the gates to the tower had been broken open and the batteries inside the tower had been removed. The State alleges that Mr. Ndou was caught in the act of stealing batteries from the tower.

33 The State entered photographs of the motor vehicle found at the tower, together with tools – including a bolt cutter, two crowbars and five screwdrivers - that were found in the vehicle. These photographs were marked as Exhibit “O”. Although

the photographs do not depict the batteries allegedly in the process of being stolen, the security guard who first arrived at the scene, Mr. Mafumisa Tshitereke, said that he saw around 12 batteries in the vehicle when he first arrived. This evidence was not seriously challenged in cross-examination, and I accept it.

34 Mr. Ndou’s version is that he was at the tower, and that he was arrested. Mr. Ndou however insists that he had no knowledge of any theft from, or damage to, the tower. He says that Mr. Chirundu picked him up from his home in Venda. The two men agreed to go and buy tickets for an upcoming music festival to be held in Thohoyandou. Mr. Ndou says that he had drunk heavily the night before and was asleep in the car when he realised that it had stopped at a cell phone tower. Mr. Chirundu told Mr. Ndou that he wanted to dig up some plants for use in producing a traditional remedy. Mr. Ndou fell asleep again and was later woken up by the police who arrested both men.

The Krugersdorp Incident

35 On 11 October 2017, Tsebe Ramahlare, an investigator for Protea Coin Security, arrived at the NG Kerk MTN cell phone tower in Krugersdorp. He found that the entrance to the container housing the installations at the tower had been broken open, and 16 batteries had been taken from the tower.

36 The security guard on duty, Mr. Abel Leshwe, informed Mr. Ramahlare that the batteries must have been taken by three men who turned up in a bakkie claiming to be technicians who had arrived to service the tower. Mr. Ramahlare took a picture of the register kept

by Mr. Leshwe. On that register, the registration number [...] appears, among a number of other entries.

37 It is common ground that the registration number corresponds with a white Isuzu bakkie that Mr. Ndou rented from the Rental Boss

car hire company on 6 October 2017. The car was rented out for 19 days and then returned. Mr. Ndou states, however, that the vehicle

was only rented by him on behalf of another person, referred to as Mr. Mokoena, and that it was Mr. Mokoena who had custody of the vehicle throughout. He had nothing to do with the use of the vehicle.

38 The State said that it would call Mr. Leshwe to confirm that the vehicle was used to steal the batteries, but Mr. Leshwe was not

ultimately called to give evidence before me.

The Strubensvalley Incident

39 On 17 October 2017, Mr. Andre Herbst was called to an MTN cell phone tower at the Town Square shopping centre in Strubensvalley. There he discovered that the container housing the tower installations had been broken open, and 16 batteries had been stolen.

40 The security guard on duty informed Mr. Herbst that the batteries must have been taken by men driving an Isuzu bakkie with registration number [...] – the vehicle that Mr. Ndou accepts he signed for from Boss Rental around a week before.

41 Again, however, the security guard capable of confirming that this was the vehicle used to steal the batteries was not called to give evidence.

The Potchefstroom Incidents

42 On 18 February 2018, 32 batteries were stolen from cell phone towers at ML Fick School and Mooibank in Potchefstroom.

43 On the same day, Mr. Chauke was arrested in possession of 20 of those batteries. With him in the car was Mr Collen Muleya. Mr. Chauke apparently told the arresting officer that he had been asked by a man called “Solly” to pick the batteries up from Potchefstroom earlier that day.

44 Mr. Collen Muleya said that he was just a passenger in the vehicle, and had no idea what was being carried. Mr. Chauke had picked him up from his home earlier and was driving him to buy cigarettes. The arresting officer, Sgt Tshiovhe, was unable to explain in his evidence precisely why Mr. Collen Muleya was arrested, or to give any evidence that might have excluded Mr. Collen Muleya's

explanation for his presence in the vehicle. His evidence was, at its highest, that Mr. Collen Muleya was arrested "for further investigation".

45 On the same day, Mr. Ndou was arrested in possession of the remaining 12 batteries stolen from Potchefstroom. The unchallenged evidence of the arresting officer, Warrant Officer Masethla, was that Mr. Ndou claimed that the batteries were his, and that he had them

because he was contracted to do something with them. He did not say what he was to do, and by whom he had been contracted.

46 Mr. Ndou was arrested in the company of Mr. Chirundu, who initially tried to run away from the police officers. The version Mr. Ndou later gave in his evidence is that he had been driven in the vehicle to Potchefstroom by Mr. Chirundu. Mr. Chirundu had requested

the use of the vehicle in return for a payment to Mr. Ndou. At Potchefstroom, Mr. Chirundu had taken the vehicle and left Mr. Ndou

on his own for some time, before returning with the vehicle, which was by this time fully loaded. Mr. Ndou says that he was not

interested in what had been loaded on to the vehicle, because he was keen to get back home, having been left on his own in Potchefstroom

for so long.

The Faerie Glen Incident

47 On 8 April 2018, Mr. Ndou was arrested at the Olympus Vodacom Tower, Faerie Glen. Thomas Mabunda, a Bidvest Protea Coin security

officer, says that he saw Mr. Ndou trying to cut into a security cage housing batteries at the tower. Mr. Mabunda says that Mr. Ndou tried to avoid being apprehended by promising to "pay" Mr. Mabunda. Mr. Mabunda refused the apparent bribe, and called his colleague, Ben Chabalala, to assist him in arresting Mr. Ndou. Mr. Ndou then scaled a wall around the installation and attempted to escape. He was apprehended shortly after by Mr. Chabalala and security officers from an adjacent business, known as "Blos Café".

48 Mr. Ndou accepts that he was present at the tower, but says that he never entered it. He says that he was waiting for his girlfriend to finish a shift at a nearby café (this could have been Blos Café. Mr. Ndou did not say). Mr. Ndou says that he was arrested outside the tower while waiting in his motor vehicle. He denies attempting to access the tower or steal anything from it.

The Midrand Incident

49 On 1 November 2017, Sergeant Given Musekwa arrested Mr. Chauke in possession of ten batteries – which Sgt. Musekwa described

as “batteries of the tower” – which were loaded on to the back of Mr. Chauke’s vehicle, a Nissan NP200 bakkie. Mr. Sakala was a passenger in the vehicle and was also arrested.

50 In cross-examination, Mr. Dzimba, who appeared for Mr. Sakala, put to Sgt. Musekwa that his client was not in possession of the batteries and that Mr. Sakala was there to do no more than assist Mr. Chauke in his work by translating from Chichewa into a language Mr. Chauke could understand. Precisely what the need for such services was, and how they were rendered, was never explored.

51 Ultimately, however, Sgt. Musekwa was unable to gainsay Mr. Sakala’s explanation for his presence. Nor was the State able to lead any evidence that suggested that Mr. Sakala had participated in anything unlawful.

52 The batteries in Mr. Chauke’s possession were later booked into the evidence store at Midrand Police Station. Mark Brink, a Network Specialist employed by Telkom, attended the police station on 1 November 2017, and identified what he called “a whole stack” of batteries in the evidence store as having been stolen from a Telkom installation. The State’s evidence did not explicitly confirm that these batteries were the batteries that had been logged in by Sgt. Musekwa, but I am prepared to accept that they were, because nothing of consequence will ultimately turn on it.

53 I have now summarised the evidence relating to each of the incidents to which the State attempted to link some or all of the accused persons. I have set out the material facts proved. I have also dealt with the facts admitted by or on behalf of the accused persons, and exculpatory explanations advanced where these have been offered.

54 I now turn to consider what the evidence establishes in relation those of the accused persons whose culpability I am required to assess.

Collen Muleya

55 It was accepted that the only evidence against Collen Muleya was that he was apprehended when riding with Mr. Chauke in a vehicle

carrying stolen batteries. Mr. Ngodwana, who appeared for the State, also accepted that the evidence sustained none of the counts on the indictment originally pressed against Mr. Collen Muleya.

56 In resisting Mr. Collen Muleya's application for discharge at the end of the State's case, Mr. Ngodwana instead argued that the State's evidence was capable of sustaining a conviction on the charge of being in possession of stolen goods knowing them to be stolen. That is obviously a competent verdict on the charge of theft of batteries from the ML Fick Primary School tower that was originally pressed.

57 The problem with this argument is that the State's evidence did not establish that Mr. Collen Muleya was ever in possession of the stolen batteries. Mr. Collen Muleya was a passenger in the car driven by Mr. Chauke. It was accepted that the vehicle was

Mr. Chauke's vehicle, not Mr. Muleya's. Accordingly, there was no direct evidence at all that Mr. Muleya was ever in

possession of the stolen batteries.

58 Moreover, the State led no evidence that could exclude the version that Mr. Muleya put in cross-examination – viz. that he

was Mr. Chauke's innocent passenger, and that the only reason for his arrest was his presence in the vehicle. The arresting officer in fact corroborated that version by confirming that Mr. Muleya was arrested "for further investigation". That investigation appears to have advanced no further in the four years between Mr. Muleya's arrest and the trial before me.

59 Accordingly, the State led no evidence on which a reasonable court acting carefully could have convicted Mr. Muleya.

60 For those reasons, I acquitted Mr. Muleya and discharged him at the close of the State's case.

Simon Sakala

61 The State's case against Mr. Sakala is no better. He, too, faced no evidence on which a reasonable court could convict him

on any of the counts on the indictment. Mr. Ngodwana accepted this, but pursued the same argument he had pursued in respect of Mr. Collen Muleya – that Mr. Sakala was in possession of stolen goods knowing them to be stolen. That argument must suffer the same fate as it did in Mr. Muleya's case. There was no evidence led to suggest that the batteries were in Mr. Sakala's possession, that he had any knowledge that they were stolen, or that his explanation for being in the vehicle carrying the batteries was anything but true.

62 In addition, Mr. Dzimba put Mr. Sakala's version even though the arresting officer had not actually identified Mr. Sakala as being present at the scene of his arrest. Mr. Sakala had nothing to gain in admitting that he was arrested while accompanying someone in possession of stolen batteries. He could just as easily have remained silent and applied for discharge on the basis that none of the State's witnesses had identified him. He chose not to do that. That choice strongly suggests that his explanation – involving as it did a potentially incriminating admission – was truthful.

63 For those reasons, I acquitted Mr. Sakala and discharged him at the close of the State's case.

Lucky Shongwe

64 The case against Mr. Shongwe was even thinner. He was present at the Clubview incident, but the State led no evidence that inculpated him any further in that incident, or in any of the other counts on the indictment. There was no evidence led to suggest that he had any role at all in stealing batteries from the Von Wielligh Avenue tower, or from any other tower. The State was given a year's

notice that such evidence would be required. Mr. Shongwe elected to make an exculpatory statement to the police in January 2021. The State has had ample time since then to procure the evidence necessary to exclude the explanation for Mr. Shongwe's presence at the tower that his statement advanced. That evidence, if it exists, was not produced before me.

65 For those reasons, I acquitted Mr. Shongwe and discharged him at the close of the State's case.

Brian Muleya

66 The State conceded that the evidence against Mr. Brian Muleya was almost exclusively limited to his participation in the removal of batteries from the Lochner Road tower.

67 Mr. Muleya admits participating in the removal of batteries from the Lochner Road tower. However, he denies any knowledge that what he was doing amounted theft. He says that he was there to assist Mr. Ndou by lending the use of his vehicle, and by driving that

vehicle. He also says that he believed that Mr. Ndou was a contractor who was authorised to remove the batteries. This was the gist of the statement Mr. Muleya gave to the police on 25 May 2018.

68 Mr. Masuku applied for Mr. Muleya's discharge at the close of the State's case. He advanced the contention that there was nothing in the State's case to gainsay Mr. Muleya's version, which the State had known about for four years.

69 While this argument had its attractions, I refused the application for discharge. It seemed to me that the fact that Mr. Muleya abandoned his vehicle at the Lochner Road tower was itself incriminating, and that it sat uneasily with his version that he did

not know that either he or Mr. Ndou were doing anything wrong. On that basis I was satisfied that there was evidence on which a

reasonable court acting carefully may have convicted Mr. Muleya.

70 Mr. Muleya elected not to lead any evidence in his own defence. The question now is whether Mr. Muleya's failure to explain why he abandoned his vehicle at the Lochner Road tower renders his self-exculpatory statement not reasonably possibly true.

71 It seems to me that the mere fact that Mr. Muleya abandoned his vehicle does not in itself demonstrate that he knew, at the time

that he removed the batteries from the tower, that he was stealing them. The evidence is capable of sustaining the inference that Mr. Muleya only realised that he was involved in stealing the batteries when Mr. Ndou told him to leave the tower, and, presumably, to abandon his vehicle. The fact that Mr. Muleya left his vehicle behind demonstrates that he must have known that something was wrong at the point he abandoned it. But it does not in itself demonstrate that he went to the tower and removed the batteries with the intent to steal them, or to assist Mr. Ndou to do so.

72 However, the statement of Constable Lebeko (handed in by consent as Exhibit “S” before me) confirms that the tower was forcibly opened, that an alarm sensor had been disconnected and that a battery void was broken. Mr. Muleya could not seriously have

thought that his presence at the tower was innocent in those circumstances. In addition, Mr. Muleya’s vehicle had been used

in the Clubview incident, although he was apparently not present.

73 Mr. Muleya’s failure to explain these incriminating facts justifies an inference against him. I do not think that his statement to the police can be accepted at face value. I reject it as not reasonably possibly true. It cannot be accepted that he was present at the tower to do anything other than help Mr. Ndou steal batteries from it.

Albert Ndou

74 The evidence ranges wider against Mr. Ndou than it does against any of the other accused persons. He was arrested at the scene of the Clubview Incident, the Mutale Incident and the Faerie Glen Incident. He was caught in possession of batteries stolen from either the ML Fick or Mooibank towers, or both. His vehicle was present at the ML Fick and Mooibank towers on the day that the batteries were stolen from them. A vehicle he rented is alleged to have been used to steal batteries from the NG Kerk and Town Square towers. He was pictured taking batteries from the Lochner Road tower, where Mr. Brian Muleya says Mr. Ndou had taken him, apparently to

“exchange” the batteries there.

75 Mr. Ndou was an unimpressive witness. He was belligerent and argumentative in the witness box. The explanations he advanced for being connected to no less than seven incidents of theft or attempted theft of batteries from cell phone towers were inconsistent, seldom put to any of the State witnesses, and transparently untrue. Where alibis were offered, they were improvised, lacking in detail, and uncorroborated. I reject Mr. Ndou’s evidence in its entirety. It was wholly improbable.

76 I am satisfied beyond reasonable doubt that Mr. Ndou stole batteries from the Clubview, Mutale, Lochner Road, ML Fick and Mooibank towers.

77 While it appears that he was not ultimately successful in making off with the batteries in each of these towers, the offence of theft was committed once the batteries were removed from their cabinets. At that point, the batteries were appropriated with the

intent to permanently deprive their owners or lawful possessors of them.

78 I am also satisfied beyond reasonable doubt that Mr. Ndou attempted to steal batteries from the Faerie Glen tower, and was caught in the act by Mr. Mabunda. Although Mr. Mabunda was a single witness to the attempt, his evidence was clear and satisfactory in

every material respect. It was also barely challenged. There was some play made in argument about whether it was Mr. Chirundu or Mr. Ndou who was inside the tower attempting to break in, but I accept Mr. Mabunda's evidence that it was Mr. Ndou.

79 I am, however, not satisfied that the evidence makes out a case that Mr. Ndou stole batteries from the Town Square or NG Kerk towers. Although it was suggested that the vehicle Mr. Ndou rented was present at those towers at around the time the batteries were stolen, the State did not call the security guards on duty at the time the batteries were stolen to confirm that the vehicle rented by Mr. Ndou was in fact the vehicle that made off with the batteries. Nor did the State apply to have Mr. Ramahlare's or Mr. Herbst's hearsay evidence to this effect admitted. In the absence of such an application, I am bound to exclude that evidence. Without it, or the direct evidence of the security guards on duty, there is insufficient evidence to conclude that the vehicle rented by Mr. Ndou was involved in the thefts from those towers.

80 Direct evidence was led that the Mooibank tower, the ML Fick tower, the Lochner Road tower and the Mutale tower were broken into.

The evidence of breaking and entering at the Lochner Road tower came in the form of a sworn statement from Constable Dede Leboko, handed in by consent as Exhibit "S". The evidence was also that Mr. Ndou was in the process of cutting off the lock to one of the installations at the Faerie Glen tower when he was apprehended.

81 The circumstances of the case strongly suggests that keys used to access some of the towers had themselves been stolen. But no direct evidence was led of these thefts, and there is insufficient evidence on which to convict Mr. Ndou of any of them.

82 It was further alleged that Mr. Ndou attempted to bribe Mr. Mabunda during the Faerie Glen incident. It is true that Mr. Mabunda

alleged that Mr. Ndou offered to pay him if he did not apprehend Mr. Ndou at the tower. I accept Mr. Mabunda's evidence in this respect. I am accordingly bound to accept that the charge of attempted bribery made out on count 37 of the indictment has been proved.

83 Finally, the indictment alleges that, in breaking in to the towers, and removing the batteries, Mr. Ndou damaged or destroyed essential infrastructure, contrary to section 3 of the Criminal Matters Amendment Act 18 of 2015. I am satisfied that the towers constitute "essential infrastructure" as defined in section 1 of that Act, in that they are "installation[s], structure[s],

facility[ies] or system[s]” involved in the provision of basic telecommunications services to the general public, and that tampering with them may result in interference with those services. In this case, the evidence was that removing batteries from

the towers means that they cannot function in the event of a power outage. Depending on the type of tower, the removal of batteries may limit or eliminate many of the services the towers provide even if the power supply to the tower remains uninterrupted.

The POCA charges

84 Mr. Ndou’s activities, as I have outlined them, are alleged to constitute a “pattern of racketeering activity”.

This is defined in POCA as “the planned, ongoing, continuous or repeated participation or involvement in” at least two offences mentioned in Schedule 1 of POCA, which must be committed after 1999 and within ten years of each other.

85 Clearly, the conduct proved in respect of Mr. Ndou constitutes such a pattern. I have found that Mr. Ndou has committed multiple

acts of theft and breaking and entering. They were committed over a compressed period, between January 2017 and February 2018.

86 Section 2 (1) (e) of POCA makes it an offence to participate in a “pattern of racketeering activity” while “managing

or employed by or associated with any enterprise”. Section 2

(1) (f) makes it an offence to manage any enterprise with the actual or constructive knowledge that another in that enterprise is engaged in a pattern of racketeering activity. It is alleged that Mr. Ndou associated with and managed an enterprise the sole purpose of which was to identify cell phone towers, and steal batteries from them.

87 In the summary of substantial facts annexed to the indictment, the enterprise was said to involve at least all 8 of the accused, who worked in concert to steal batteries from the various towers. Had that been proved, I would have had no hesitation in convicting Mr. Ndou on either or both of the POCA offences alleged.

88 The problem, though, is that insufficient evidence has been led of the nature of the enterprise in which Mr. Ndou is alleged to have participated. An “enterprise” in terms of POCA can, of course, constitute a single person, but the State does not allege that the “enterprise” in this case was Mr. Ndou acting alone. The State alleges that Mr. Ndou acted as part as a syndicate the purpose of which was to break into and steal batteries from cell phone towers. The activities of that syndicate as an enterprise have not been proven as distinct from a series of offences in which Mr. Ndou was definitely involved.

89 I am not prepared to convict Mr. Ndou of the racketeering offences pressed against him in circumstances where the evidence leaves obscure the nature of the enterprise said to constitute the “racket”. Proof of an “enterprise” as distinct from a person who commits repeated offences is an essential element of the offences defined in sections 2 (1) (e) and (f) of POCA. The State has not proved this element.

90 It follows that Mr. Ndou must be acquitted on the racketeering offences alleged on the indictment. For the same reasons, Mr. Muleya cannot be convicted on the POCA charge either.

Unreasonable delay

91 It is finally necessary to say something about the delays that have featured in this prosecution. The offences on the indictment

were committed between four and five years ago. The matter was listed for trial before me on 17 January 2022, but had been postponed on numerous occasions before that. The State was not in any event ready to proceed until shortly before 15 March 2022, and I am convinced that the commencement of the trial would have been further delayed had I not taken steps to case manage the matter during the first term of this year.

92 Counsel for most of the parties then became unavailable at the end of the first term, and the matter had to be postponed to the part-heard roll on 27 June 2022. It took some effort to arrange a four-week period, commencing on that date, and concluding on 29 July 2022, with a break during the week of 11 July, during which the trial could be completed.

93 However, on 27 June 2022, and despite having had the better part of 3 months to make arrangements to do so, the State failed to secure the attendance of Mr. Brian Muleya for the continuation of the trial. Mr. Muleya was detained at St. Albans Prison in Port Elizabeth pending trial on other charges he faces in the Eastern Cape. It took an additional week to have Mr. Muleya conveyed to Johannesburg from Port Elizabeth, meaning that the trial could not proceed until 5 July 2022.

94 It is not necessary for me to go in to any detail about the reasons for the delay. Suffice it to say that the delay was entirely

foreseeable, avoidable and wholly unreasonable.

95 However, the attitude taken by the State – that the responsibility for the delay lay with the Police and the Department for Correctional Services, and so could not be attributed to the State as a party before me – does require comment.

96 When the National Prosecuting Authority indicts an accused person, it does so on behalf of the State as a whole. Where the accused person is in the custody of the Police or the Department of Correctional Services, it is the State as a whole that is responsible

for ensuring that they are timeously produced before a court, and that the trial proceeds as speedily as possible. While it may be necessary to distinguish between different departments of State in order to identify the causes of a particular delay in the trial process, the responsibility for the delay lies with the State as a whole. Counsel for the State may not – and ought not to be encouraged to – fold their arms and blame the Police, the Department of Correctional Services or any other functionary or entity for a delayed prosecution. For obvious reasons, any procedural consequences arising from the delay will be visited on the State as whole, whether or not counsel or the National Prosecuting Authority is directly responsible for them.

97 In this case, it was argued that the State should not be mulcted in costs for the week-long delay caused by Mr. Muleya's absence, because the National Prosecuting Authority was not directly responsible for his failure to appear before me.

98 I reject that argument, but I am nonetheless disinclined to order the State to pay the wasted costs of the week of 27 June 2022.

This is because three out of the four counsel who appeared for the defence were funded by the State itself through Legal Aid SA, and counsel for the privately-funded accused person did not press for a costs order on his client's behalf. It has not been

demonstrated that any actual prejudice would be cured by a costs order in these circumstances. It was also argued that I am not, in any event, empowered to make a costs order in criminal proceedings. I have some doubts about that proposition. But, in the circumstances, they need not be explored.

Verdict

99 For all these reasons –

99.1 I formally record that -

99.1.1 accused no. 4, COLLEN LESIBA MULEYA was found NOT GUILTY and discharged under section 174 of the Criminal Procedure Act 51 of 1977 on 8 July 2022; and that

99.1.2 accused no. 6, SIMON SAKALA and accused no. 8, LUCKY SHONGWE were found NOT GUILTY and discharged under section 174 of the Criminal Procedure Act 51 of 1977 on 18 July 2022.

99.2 I find accused no. 7, BRIAN MULEYA, GUILTY of counts 10, 11 and 13 on the indictment.

99.3 In respect of all of the other counts on the indictment alleged against him, I find accused no. 7, BRIAN MULEYA, NOT GUILTY.

99.4 I find accused no. 1, ALBERT AVHURENGWI SOLLY NDOU, GUILTY of counts 3, 4, 10, 11, 13, 14, 15, 18, 26, 27, 29, 30, 31, 32, 33, 37 and 38 on the indictment.

99.5 In respect of all of the other counts on the indictment alleged against him, I find accused no. 1, ALBERT AVHURENGWI SOLLY NDOU, NOT GUILTY.

S D J WILSON

Acting Judge of the High Court

HEARD ON:

15, 16, 17, 18, 23 and 24 March 2022; 27, 29 and

30 June 2020; 4, 5, 6, 7, 8, 18, 21, 22, 26 and 29

July 2022.

DECIDED ON:

15 August 2022

For the State:

L Ngodwana

Instructed by National Prosecuting Authority

For the First Accused:

Mr. Simane

Instructed by Legal Aid SA

For the Third and Seventh

Mr. Masuku

Accused:

Instructed by Legal Aid SA

For the Fourth and Eighth

A Mavata

For the Sixth Accused:

QM Dzimba

Name of instructing attorney not supplied

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