

SOUTH AFRICA / JUDGMENT

S v Nel (59/88) [1989] ZASCA 87; [1989] 4 All SA 900 (AD) (17 August 1989)

[1989] ZASCA 87

COURT

Supreme Court of Appeal

BEFORE

E M Grosskopf, Steyn, Kumleben

CASE / FILE NUMBER

59/88

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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

A P J NEL APPELLANTvsTHE STATE

RESPONDENTCORAM : E M GROSSKOPF, STEYN et KUMLEBEN JJA

HEARD : 23 MAY 1989

DELIVERED : 17 AUGUST 1989

JUDGMENT

KUMLEBEN JA/...1. KUMLEBEN JA:

The appellant was charged in the regional court with, inter alia, sabotage in terms of sec 54(3) (e) of the Internal Security Act, No 74 of 1982, alternatively, with malicious injury to property. Initially he pleaded not guilty to both charges. At the close of the State case, he altered his plea on the alternative charge to one of guilty. This was not accepted by the State. The trial proceeded, at the conclusion of which he was found guilty on the main charge and sentenced to 10 years' imprisonment. His appeal to the Orange Free State Provincial Division of the Supreme Court was partially successful. The conviction was confirmed but the sentence altered to one of five years' imprisonment. The judgment is reported (S v Nel 1987 (4) S A 276 (OPD)) and the page

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citations in this judgment refer to that reported decision. Leave was granted by that court for a further appeal against both the conviction and reduced sentence.

The facts giving rise to these charges are fully set out in the judgments of the trial court and the court a quo. Only certain of them, which were undisputed or plainly proved, need be initially recounted.

The appellant started work at the Western Holdings Gold Mine ("the mine") in

1981. In April 1983, when he was a shift boss at no 7 shaft, it was inspected by officials not connected with the mine. Their selection of his working place at the mine was a random one. After their inspection they submitted an unfavourable report to Mr Edkins, the production

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manager of no 6 and no 7 shafts. He severely

reprimanded the appellant, amongst others. (His workrecord hitherto had been exemplary.)

During the period June to November 1983 three underground electrical sub-

stations were blown up and sabotage was suspected. This led to the appellant being transferred to no 6

shaft. After about two weeks he was allowed at his request to return to no 7 shaft but was warned that any further trouble there could result in his dismissal. There was a further mishap. A fire broke out in the appellant's section of the shaft. This led to Mr Edkins discharging him on grounds of incompetence. The appellant felt that this action was unfair and was deeply aggrieved by it.

For the next four weeks he unsuccessfully applied for work at various gold mines in the area. He

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4. eventually found employment as a shift boss on the Free State Geduld Gold Mine. After he had been working there for about a fortnight, the personnel officer informed the appellant that he was in trouble for having engaged him since the reason for the appellant's dismissal from his previous employment had come to the notice of this official's superiors. The appellant was told that on this account he might well lose his job. This was on Friday 18 May 1984. That day, whilst working underground, he stole 14 packets of explosives (about 2 kilograms in weight) and took them home with him. On the following Monday the appellant was in fact discharged. That same evening he took the stolen explosives and went to no 7 shaft of the mine. The shaft clerk's office (also referred to as the planning office), which was the one easily accessible to him, was one of twelve offices in the administration

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5. block of that shaft. He placed all the packets of explosives in that office and detonated them. This caused extensive damage to the entire block of offices and its contents, which included records, schedules, a computer and furniture; in short, all the appurtenances of administrative offices. The ensuing disruption, from the time of the explosion until the end of August when normal mining operations on that mine were resumed, resulted in a loss of

production estimated at R870 016,00 (a 3.4 percentage loss over that period) and the cost of replacement of that portion of the office block and equipment was about R156 000,00. The intent accompanying the damage caused by the appellant will be discussed in due course. At this stage all that need be said is that it was an act of retribution for what was seen by him to be unfair treatment at the hands of Mr Edkins and was directed at him and the mine in general.

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6. Thus it was that the appellant was charged, as I have said, with sabotage in terms of sec 54(3) (e) of the Act. The first three subsections of sec 54, respectively create the statutory offences of "terrorism", "subversion" and "sabotage". I cite those provisions of sec 54(3) that are for present purposes relevant and, in reference to a recent decision of this court to which I shall advert, the two preceding subsections are also set out in abbreviated form:

"(1) Any person who with intent to -

- (a) overthrow or endanger the State "authority in the Republic;

(in sub-paragraphs (b) to (d) further prescribed intentions are set out)

in the Republic or elsewhere -

- (i) commits an act of violence or threatens or attempts to do so;

(in paragraphs (ii) to (iv) further proscribed acts are stated)

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shall be guilty of the offence of terrorism and liable on conviction to the penalties provided for by law for the offence of treason.

- (2) Any person who with intent to achieve any of the objects specified in paragraphs (a) to (d), inclusive, of subsection (1) -

- (a) causes or promotes general dislocation or disorder at any place in the Republic, or attempts to do so;

- (b) cripples, prejudices or interrupts at any place in the Republic any industry or undertaking, or industries or undertakings generally, or the production, supply or distribution of commodities or foodstuffs, or attempts to do so;

(paragraphs (c) to (k) specify further objectives)

shall be guilty of the offence of subversion and liable on conviction -

- (i) to imprisonment for a period not exceeding twenty years; or

(ii)

(3) Any person who with intent to -

(a)

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(b)

(c)

(d)

(e) cripple, prejudice or interrupt at any place in the Republic any industry or undertaking or industries or undertakings generally or the production, supply or distribution of commodities or foodstuffs; or

(f) .

in the Republic or elsewhere - (i) commits any act;

(iii)

(iv)

shall be guilty of the offence of sabotage and liable on conviction to imprisonment for a period not exceeding twenty years."

In the case of Minister of Law and Order and Others v Pavlicevic 1989(3) S.A. 679 AD this court was

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concerned with the nature of the offence (subversion) created by sec 54(2) of the Act. The respondent's husband had been arrested and detained in terms of sec 29(1) of the Act. It provides that an officer of the South African Police of or above a prescribed rank, may arrest and detain a person if he has reason to believe, inter alia, that he has committed an offence referred to in sec 54(2). The appeal turned on the question whether the officer concerned had reason to believe - as he purported to have - that the erstwhile detainee (he was released from detention by order of the court a quo) had done an act included in sec 54(2) with the intent to achieve the objects specified in two of the paragraphs of sec 54(1). The offences created by sec 54(2), as explained in the judgment (per Corbett CJ) at 689 B - C,

10/... 10. "consist essentially of two elements: (i) conduct falling within one or other of the categories listed in paras (a) to (k) inclusive - 'the conduct element' - and (ii) an accompanying intent to achieve any of the objects specified in paras (a) to (d) inclusive of sec 54(1) - 'the mental element'. The coincidence of both elements is obviously essential for the commission of the crime of subversion."

The appellant in that case contended that the "intent element" in sec 54(2) included the common law concept of *dolus eventualis* and that therefore to sustain a conviction on a charge of subversion in terms of sec 54(2) it need only be proved that an accused subjectively foresaw the possibility of his act attaining one of the objects listed in paragraphs (a) to (d) of sec 54(1) and that he was reckless of such eventuality. (Cf. *S v Sigwahla* 1967 (4) S.A. 566 (AD) 570 B - C.) This argument was rejected - see page 689 E to 690 A - on the grounds that:

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"One is here not dealing with the concept of *mens rea*, which is a necessary ingredient of common law crimes and of most statutory offences, but with an expressly prescribed element in a statutory offence. And the wording of the section, in my view, clearly excludes the idea of some sort of *dolus eventualis*. It decrees that the offence is only committed if the person concerned did one of the listed acts 'with intent to achieve' any of a number of specified objects (or, as the Afrikaans text, the signed one, puts it, 'met die opset om enige van die doelstellinge te bereik').

Whatever the position may be where a person commits such an act with intent to achieve both a proscribed object and one which is not, I am satisfied that the section does not cover the case where the person commits the act, not with the intention of achieving a proscribed object, but merely with the knowledge that his conduct may have that result. To hold otherwise would amount to flying in the face of the express language of the section. In this connection it must be borne in mind that sec 54(2) creates a very serious offence, punishable with a maximum sentence of twenty years imprisonment (in certain circumstances twenty-five years imprisonment); that consequently even if the language is ambiguous (which I do not think it is) the less onerous interpretation should be adopted (see *Rex v Milne and Erleigh* (7) 1951 (1) SA 791 (A), at 823 A - F); and that this approach would lead to a rejection of the argument of appellant's counsel.

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12. Some support for my conclusion concerning *dolus eventualis* may, I think, be derived by way of analogy from a series of cases in which it has been held with reference to sec 29(1) of the Black Administration Act 38 of 1927, which penalises conduct 'with intent to promote any feelings of hostility between Bantu and Europeans' (Afrikaans: 'met die doel om vyandige gevoelens tussen Swartes en blanke te bevorder'), that for the State to succeed in a prosecution under this section it is not sufficient to show that an accused possessed a constructive intention (ie *dolus eventualis*); the State has to prove the actual intention of promoting such hostility (see *S v Singh and Another* 1975 (1) SA 330 (N), at p 335 C-F, and the cases there cited; see also *S v Mbilane and Another* 1978 (3) SA 131 (E), at p 134 C - 135 A)."

The offence of sabotage created by sec 54(3) likewise consists of the two stated elements, the "intent element" being as explicitly formulated and stated. The reasoning and conclusion in the quoted passage applies equally to this offence. This was conceded by Mr Nel, who appeared for the respondent. Thus, positively stated, in this case the State was required to prove that the appellant had the actual

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13. intention (dolus directus) specified in paragraph (e) of sec 54 (3) of the Act.

The question posed by Holmes JA in *S v Sabben* 1975(4) S.A. 303 (AD) at 304 B - C, an appeal against a conviction of murder, contrasts the two forms of intent:

"Did he actually intend to compass the death of the deceased (murder with dolus directus); or was it a case of foresight of the possibility of resultant death, and persistence regardless whether death ensued or not (murder with dolus eventualis)."

Certain authorities in the field of criminal law recognise an intermediate category of intention falling within the concept of actual intent. For instance, in *South African Criminal Law and Procedure* (2nd Ed.) Vol I at pages 136 and 137 the following appears:

14/... 14. "Actual Intention (Dolus Directus or Indirectus) This is intention in its ordinary grammatical sense. The accused meant to do the prohibited act or to bring about the criminal consequence. Actual intention will be present in two situations: first, where the accused's aim and object was to do the unlawful act or to cause the consequence, even though the chance of its resulting was small; and secondly, where, although not the accused's aim and object, he foresaw the unlawful act or consequence as certain, or as 'substantially certain', or 'virtually certain'."

(Cf. *Snyman Strafrecht* (4th Ed) 139.) For present purposes I assume in favour of the respondent that the "intent" referred to in sec 54(3) includes dolus indirectus.

It follows that it must be proved that the appellant actually intended one or more of the consequences listed in paragraph (e) of sec 54(3). This sub-paragraph, one notes, incorporates two distinct, and significantly different, objectives or intentions and

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15. thus two distinct forms of contravention. The offence may be committed (1) with intent to "cripple, prejudice or interrupt any industry"; or (2) with intent to "cripple, prejudice or interrupt ... the production, supply or distribution of commodities or foodstuffs". (For ease of reference I shall refer to (1) as "the industry directed intent" and (2) as "the commodity directed intent").

I turn to the charge on this count and its formulation. It is alleged:

"DAT die beskuldigde skuldig is aan Sabotasie binne die bestek van Artikel 54(3)(e) Wet 74/1982.

DEURDAT op 21 Mei 1984 en te Western Holdings Goudmyn, Welkom, in die distrik van Welkom en in die Streeksafdeling van die Oranje-Vrystaat, die beskuldigde wederregtelik en opsetlik die beplanningskantoor van die Western Holdings Goudmyn, Welkom met plofstof beskadig het, met die opset om die produksie van handelsware van die genoemde Western Holdings Goudmyn synde 'n nywerheid of onderneming te verlam en/of te benadeel en/of te onderbreek."

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16. It will be seen that the charge explicitly and accurately refers to, and follows the language of, the commodity directed intent, save that a reference to "supply or distribution" and "foodstuffs" has been omitted. The additional words - "being an industry or undertaking" - are, to my mind, descriptive and parenthetical. It was argued that by their introduction the author included, albeit in an obscure way, an * allegation of industry directed intent. This submission - an inherently unattractive one - cannot be accepted. The words cripple, prejudice or interrupt govern "the production of commodities" and nothing else: grammatically they cannot possibly refer to the phrase "being a mine". The charge therefore complied with the requirements of sec 84 of the Criminal Procedure Act no 51 of 1977, ("the Criminal Code") in that it set out with sufficient clarity the essentials of the charge.

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One is consequently not dealing with the situation where a defective charge sheet may or may not have been cured by evidence (see sec 88 of the Criminal Code).

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