

SOUTH AFRICA / JUDGMENT

Tem mies and Another v S (Appeal) (A35/2025) [2025] ZAWCHC 184 (29 April 2025) [2025] ZAWCHC 184

COURT

Western Cape High Court, Cape Town

BEFORE

Allie, Moosa

CASE / FILE NUMBER

A35/2025

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

CASE NO.: A35/2025

REPORTABLE

In the matter between:

CAYTON TEMMIES

FIRST APPELLANT

MALIXOLE YOSE

SECOND APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: Tem mies and Another v S (case no A35/2025) [2025] ZAWCHC (29 April 2025)

Coram: ALLIE J et MOOSA AJ

Heard:

25 April 2025

Delivered:

30 April 2025 (delivered via email to the respective Counsel)

Summary: Criminal law – appeal - test for trial court misdirection – sentence announced by trial court different to sentence recorded on charge sheet – determining official sentence – ‘open justice’ principle applied – appeal court sentencing afresh – applicable principles – theft of essential infrastructure – electricity - minimum sentence

ORDER

On appeal from the regional court at Stellenbosch, the following is ordered:

- (a) Condonation is granted for the late filing of the respondent’s heads of argument.
- (b) The appeal against the court a quo’s sentence of the First Appellant on count 1 and count 2 is upheld. The court a quo’s

order on sentencing for both counts is set aside and is substituted with the following in its stead:

‘(i) On count 1, accused no. 1 is sentenced to 10 years direct imprisonment;

(ii) On count 2, accused no. 1 is sentenced to 15 years direct imprisonment;

(iii) The sentences for count 1 and count 2 shall run concurrently.’

- (c) The appeal against the court a quo’s sentence of the Second Appellant on count 1 and count 2 is upheld. The court a quo’s

order on sentencing for both counts is set aside and is substituted with the following in its stead:

‘(i) On count 1, accused no. 2 is sentenced to 8 years direct imprisonment;

(ii) On count 2, accused no. 2 is sentenced to 15 years direct imprisonment;

- (d) The appeal against the court a quo’s declaration that the First Appellant and Second Appellant respectively are unfit to possess a firearm is dismissed.

Moosa AJ (Allie J concurring)

INTRODUCTION

1. This is a criminal appeal stemming from proceedings in the regional court at Stellenbosch. Appellants pleaded not guilty and were, after a trial, convicted on 13 July 2023 and sentenced on 19 September 2023 for two charges emanating from the Criminal Matters Amendment Act 18 of 2015 (the CMAA).
2. After unsuccessfully petitioning the trial magistrate for leave to appeal, the Appellants successfully petitioned the high court for leave to appeal. They were granted leave, but only for their sentences. This judgment relates to that appeal.

3. When the hearing commenced, respondent's Counsel, Ms Monis, moved for an order condoning the extremely late filing of her heads of argument. That application was unopposed and was granted only to avoid further prejudice to the Appellants in the pursuit of their appeal.
4. At the hearing, this Court expressed its displeasure at the fact that the respondent filed its heads of argument only a few court days before the hearing, bearing in mind the rule of court regulating the filing of heads in a criminal appeal. This conduct is seriously prejudicial to the Appellants and their right to prepare timeously for this appeal, and it is disrespectful to this Court and its rules which are designed to promote fairness in the administration of justice. The failure by the Office of the Director of Public Prosecutions to appoint a substitute legal practitioner to draft and file heads of argument while Ms Monis was unable to do so for personal reasons is conduct that this Court views in a most serious light. It cannot be countenanced.
5. It is also necessary to record that, prior to the hearing, a written communication was sent to the Appellants' Counsel drawing his attention to the fact that he ought to be prepared to address this Court on the issue of a possible increase in the sentence imposed on the Second Appellant by the trial court on count 2.

SALIENT BACKGROUND FACTS

6. In count 1, the appellants were charged with the offence of tampering, damaging, or destroying essential infrastructure[1] that provides a basic service[2] to the public. It was alleged, and later proved at trial, that on 19 February 2022 at the Stone Hill Farm in Devon Valley, they, acting in concert, cut and removed 600 metres of seven strand overhead copper conductor cables valued at about R41 886 which was owned by Eskom (the property).
7. In terms of s 3(1)(a) of the CMAA, an accused is liable, upon conviction of this offence, to be sentenced 'to a period of imprisonment not exceeding 30 years'. Both appellants were convicted on count 1 and sentenced to 15 years each.
8. On appeal, respondent's Counsel argued for the first time that a minimum sentence applies to count 1. Appellants' Counsel objected, and for good reason. On being asked by this Court whether, in the court a quo, Appellants' attention was drawn to the possible application of a minimum sentence on count 1, Ms Monis was constrained to concede that this was not done.
9. In fact, the trial record shows that, on 24 November 2022, the magistrate informed the appellants that count 1 carries a maximum sentence of 30 years.[3] No minimum sentence was mentioned at all. As a result, the appeal was argued on the basis that a minimum sentence only applies to count 2. This appears to be the correct legal position, regardless of the charge sheets' contents.

10. In count 2, the appellants were charged with theft of the property, being ferrous or non-ferrous metals forming part of essential infrastructure as defined in the CMAA. As stated above, they were convicted on this count too.
11. By virtue of Part II in Schedule 2 to the Criminal Law Amendment Act 105 of 1997 (the CLAA), minimum sentences are prescribed for persons convicted of theft of ferrous or non-ferrous metals forming part of essential infrastructure. The prescribed minimum sentence varies, depending on whether an accused is a first, second, third or subsequent offender of any such offence.
12. It is common cause that both appellants were first offenders as regards their conviction of theft of ferrous or non-ferrous metals forming part of essential infrastructure. As such, a prescribed minimum sentence of 'not less than 15 years' applies ex lege, unless a court finds substantial and compelling circumstances exist in relation to a particular accused.
13. Argument on sentencing occurred in the court a quo on 18 September 2023. The transcribed record reveals that at this crucial stage of the proceedings, neither the State prosecutor nor the appellants' Attorney reminded the trial court that a different sentencing regime operated by law in respect of counts 1 and 2. This may have contributed to some of the seemingly bona fide errors made by the trial magistrate at the time of sentencing.
14. The appeal record read as a whole reveal that a regrettable series of errors occurred on 19 September 2023 when the case resumed for sentencing. The impact of the errors on the sentences is discussed later in this judgment.
15. At the time of sentencing the First Appellant on count 2, the trial magistrate informed him that she had found substantial and compelling circumstances meriting a deviation from the mandated minimum sentence of 15 years. However, for reasons unexplained in the record, she then handed down a sentence of 15 years direct imprisonment.
16. This relevant part of the record (at page 246 lines 8-12) reads as follows:

'I have approach your case with an element of mercy Mr Temmies and in the result I have ... [indistinct] ... in regards to count one your sentenced to 15 years imprisonment with regards to count two you are sentenced to 15 years imprisonment.' (my emphasis)
17. Notwithstanding this utterance to the First Appellant, ex facie the front page of the J15 form, the trial magistrate recorded 'Twelve
- (12) years' as his sentence for count 2. This is less than the minimum sentence prescribed by law and less than the sentence which the trial court informed the First Appellant is the actual sentence imposed on him for count 2.

18. While the sentence recorded on the J15 for count 2 is consistent with the trial magistrate's finding of substantial and compelling circumstances relating to the First Appellant, it gives rise to a legal problem, namely, what is the official sentence in relation to count 2 for all purposes in law, including for this appeal: is it 12 years or 15 years imprisonment? Appellants' Counsel, Mr Calitz, urged this Court to find that the former is the legally binding sentence.
19. Mr Calitz argued further that the gravity of the problem increases manifold when regard is had to the magistrate's failure to order that the sentences on both counts for the First and Second Appellants respectively run concurrently under s 280(2) of the Criminal Procedure Act 51 of 1977 (the CPA).
20. On this basis, Mr Calitz contended that the trial magistrate misdirected herself in a material way which, so he argued, justifies this Court intervening on appeal.

ISSUES

FOR ADJUDICATION

21. Three crisp issues arise for determination. The first is a novel question of law, namely, when an inconsistency arises between the sentence announced by a trial court to an accused and that recorded on the J15 form contemporaneous with the sentence uttered in court, then which sentence takes precedence for purposes arising under the CPA – is it the sentence communicated to an accused in court, or the sentence recorded by the judicial officer on the J15 form?
22. The second issue arising for adjudication is whether the trial magistrate misdirected herself and did so to such a degree that it impels this Court to set aside the sentences imposed on the appellants, or either of them.
23. If this latter issue is decided in the affirmative and the sentences are set aside in whole or in part, then the third issue arising for determination is: what would an appropriate sentence be in the circumstances of this case in substitution of the sentence(s) set aside by this Court?
24. I now turn to deal in turn with each of these issues.

THE FIRST ISSUE: A NOVEL QUESTION OF LAW EXAMINED

25. Mr Calitz was unable to cite any authority for his proposition that the 12-year sentence recorded on the J15 form has the force of law for purposes of the CPA over the sentence announced in open court to the First Appellant.
26. My research has also not yielded any case law directly on point. However, I consider that *S v Mbewu* (case no. 214517)

[2009] ZAECHC 8 (29 January 2009) as providing some useful guidance. I shall revert thereto later.

27. Section 35 of our Constitution, 1996 entrenches the right of every accused to a fair trial. This includes the rights to a fair trial in public and to fairness in sentencing. See, for eg, the right in s 35(3)(n) to the least severe punishment imposed by law, if certain constitutionally imposed requirements are met.
 28. It would be a violation of an accused's right to a fair trial in public if a trial court were permitted to announce one sentence in court and then be permitted to, in effect, alter that sentence by recording a completely different sentence on a J15 form without any obligation to inform an affected accused of the sentence so recorded and sought to be imposed on him/her.
 29. I find that, as a matter of principle, it would be egregiously unfair if the latter sentence recorded on a J15 form has the force of law and prevails over the sentence announced in a courtroom to an accused (and the public, if any).
 30. If a sentence recorded on a J15 form automatically, and without more, prevails over that communicated to an accused and members of the public in court at the relevant time, then this would put at risk the accused's and the public's confidence in the judiciary and our criminal justice system. This is because such a legal position would create fertile opportunity for potential abuse of judicial power through the imposition of sentences out of the public eye and in secret.
 31. In *S v Jaipal* [2005] ZACC 1; 2005 (4) SA 581 (CC) para 29, the apex court held as follows:

'The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'
 32. I find that the passing of a sentence in secret (as distinct from passing sentence in camera) is incongruent with the 'open justice' principle applicable in the context of s 35(3) of the Constitution. Such a practice may have a pre-constitutional vintage and may hark back to a by-gone era when the rights of accused were routinely trampled upon, resulting in a real need to entrench a universal fair trial rights regime for all accused persons within s 35 of the Bill of Rights located in Chapter 2 of our final Constitution.
 33. The principle of 'open justice' in judicial proceedings serves the public interest and, in criminal proceedings, protects accused by ensuring that justice is administered openly and transparently (not in secret). See *Savoi and others v NDPP and another* 2024
- (1) SACR 343 (CC) para 1; *E. Sat (Pty) Ltd and others v Lucken NO and others* 2024
 - (2) SACR 377 (KZD) para 96.

34. The imposition of legally binding sentences on accused persons through acts by judicial officers occurring out of the public eye in a non-transparent process is a slippery slope en route to the administration of criminal justice in ways antithetical to s 35(3) of the Constitution. This cannot be tolerated.
35. The recording of a sentence on the J15 form must align in every material respect with the sentence announced by a judicial officer in court. If there is a material inconsistency between them, as in *casu*, then an irregularity exists which warrants setting aside the sentence in every respect. In practice, this can occur on appeal, or on automatic review in cases where judicial error cannot be rectified under s 298 of the CPA (as happened in *S v Mbewu supra*).^[4]
36. *S v Mbewu* is an unreported review judgment in which the sentence appearing *ex facie* the J15 is 'a fine of R500 or ... imprisonment for 30 years' and that in the trial record is 'a fine of R500 or ... remain in jail for at least 30 days'. (my emphasis) The review court corrected this error at the request of the presiding magistrate who accepted that he was *functus officio* by the time that the *bona fide* error came to his attention. At para 5, the court usefully explained that a J15 form is no more than an annexure to the record of the trial proceeding.
37. In *S v Mbewu supra*, Nhlangulela J (Petse ADJP concurring) held (at para 5):

'Whereas the record is a device, as in tapes, discs or paper, in which everything that happens during the trial is captured, the charge sheet is a document that is drawn by the prosecutor before the trial and presented to the court to show the nature of the charge which has been preferred against the accused. The recordal of the imposed sentence on the charge sheet can only take place at the end of the trial when the verdict and sentence would have already been recorded in the tapes, disc or on paper.'
38. All this gives rise to the obvious question: what purpose is served by a trial court recording on a J15 form an already announced verdict and sentence, and then appends his/her signature to that form?
39. The answer to this question lies in an understanding of the role which a signed J15 form plays in the administrative processes involved in our criminal justice system after an accused is convicted and sentenced in a criminal court.
40. For present purposes, it is unnecessary to provide an exhaustive explanation. It suffices to say that a signed J15 form containing details of an accused's conviction and sentence is used for several administrative purposes (such as, enabling a determination to be made whether a sentence imposed is reviewable under s 302 of the CPA). See *S v King* (56/2023) [2024] ZAWCHC 122 (7 May 2024) para 1.

41. An appreciation of the role played by a signed J15 form in the administration of justice makes it clear that the recordal of a sentence thereon is an administrative step by a judicial officer aimed, inter alia, at facilitating the convicted and sentenced person to be processed in the next phase of our criminal justice system.
42. Accordingly, a signed J15 form serves as documentary evidence that an accused has been convicted on a particular charge and sentenced thereon in a particular way. However, that document does not serve as conclusive evidence for all purposes under the CPA of the sentence imposed on an accused. Where an inconsistency exists between the sentence recorded on a signed J15 form and the sentence read out in court to an accused, then, in my view, the latter sentence must, for all purposes under the CPA, prevail until it is set aside on appeal or review, or by way of a correction under s 298 of the CPA, if correction is possible in the circumstances of a particular case.
43. The view expressed here accords with our Bill of Rights demanding fairness in the administration of justice and the promotion of 'open justice' in the open and democratic society established by our supreme Constitution. The fact that a lesser sentence than the minimum sentence prescribed by law was recorded on the J15 form on count 2 which benefits the First Appellant is of no moment.
44. For the reasons outlined above, I find that written recordal on the J15 form of a 12-year sentence for count 2 has no binding legal force or effect. In these circumstances, I conclude that the 15-year sentence announced in court to the First Appellant is the actual, official sentence for purposes of the CPA, including for this appeal. That sentence cannot be ignored nor wished away.
45. Mr Calitz urged this Court to set aside the 15-year sentence imposed if his submission related to the 12-year sentence recorded on the J15 form is rejected. I now turn my attention to that issue.

THE SECOND ISSUE: SHOULD THE SENTENCES BE SET ASIDE?

46. Having adjudicated the first issue formulated above, it is now ripe to determine whether valid grounds exist for this Court to interfere with the sentences imposed by the trial court in relation to counts 1 and/or 2.
47. At the onset, the applicable legal principles emerging from case law will be outlined. Thereafter, those principles will be applied to the facts in casu.
48. An appellate court must be slow to interfere with a trial court's discretion on sentence. It is a truism that the imposition of punishment is pre-eminently a question for a trial court. See *S v Rabie* 1975 (4) SA 855 (A) at 857D.
49. In *S v Malgas* 2001 (1) SACR 496 (SCA) para 12, this salutary legal principle was expressed as follows:

‘A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial court.’

50. An appellate court can only interfere with a trial court’s sentence if it failed to act judicially and properly within legal limits. See *S v Rabie* supra at 857E.
51. The prerogative of a trial court on sentencing is jealously guarded. Therefore, an appellate court can interfere with a sentence in the following circumscribed instances relevant to the present appeal against a sentence (not a conviction):
- (a) if the sentence is vitiated by an irregularity during the trial or sentencing process that results in a failure of justice. See *S v Bogaards* 2013 (1) SACR 1 (CC) para 41; or
 - (b) if a trial court misdirects itself in relation to the sentence imposed and does so in such a nature, degree, and seriousness that the trial court cannot be said to have exercised its sentencing discretion at all, or exercised its discretion improperly or unreasonably, thereby vitiating the sentence imposed. See *S v Hewitt* 2017 (1) SACR 309 (SCA) para 8; or
 - (c) if the sentence imposed by a trial court ‘is one to which no reasonable court could have come, in other words, one where there is a striking disparity between the sentence imposed and that which this Court considers appropriate’ (*S v Petkar* 1988 SA 571 (A) at 574C).
52. As regards the ground in (b), in *S v Pillay* 1977 (4) SA 531 (A) at 535E-F, the former Appellate Division (now Supreme Court of Appeal) held a ‘misdirection’

‘... means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably’.

Application of the relevant principles to the facts in casu

53. For the various reasons articulated below under this heading, I find that the trial court exercised its discretion on sentencing unreasonably and imposed sentences strikingly disproportionate to the crimes. This Court is not only entitled but obliged to intervene. Any failure to intervene would be tantamount to an abdication of this Court’s constitutional duty to avert the injustice which would ensue if the unjust sentences imposed were to be served by the appellants. Hence, I propose the orders formulated below in this judgment.
- (i) Ad the First and the Second Appellants jointly

54. Appellants' Counsel, Mr Calitz, pointed out that the magistrate's judgment is silent on s 280(2) of the CPA.[5] He argued that this silence indicates an omission by the trial magistrate to consider this question. He reasoned that this failure

is a serious misdirection which, he contends, led to a further misdirection, namely, the magistrate's failure to order that

the sentences imposed on the appellants respectively for counts 1 and 2 shall run concurrently.

55. Respondent's Counsel, Ms Monis, conceded that the trial court appears to have misdirected itself in the manner contended by Mr Calitz. However, she left this question of law for determination by this Court, although she stated that the respondent does not object to the sentences running concurrently.

56. It is correct, as argued by Mr Calitz, that the trial magistrate's judgment does not refer to s 280(2) of the CPA, nor does the printed transcript give any indication that the magistrate considered the question whether the sentences imposed on the appellants respectively ought to run concurrently.

57. I am mindful that no judgment can ever be entirely exhaustive. Merely because the trial court's judgment does not refer to s 280(2) of the CPA nor to the question of concurrent sentences does not in and of itself mean that the trial magistrate did not consider the question of whether the sentences ought to run concurrently. See *R v Dhlumayo and another* 1948

(2) SA 677 (A) at 702.

58. However, the fact that the sentences imposed on the appellants were not ordered to run concurrently is a serious misdirection which culminated in the imposition of imprisonment for durations that can, in respect of both appellants respectively, be aptly described as shocking, or 'disturbingly inappropriate' (*S v Narker and another* 1975

(1) SA 583 (AD) at 585C).

59. The trial magistrate's failure to order that the sentences run concurrently means that the First Appellant was sentenced to an effective 30-year imprisonment (ignoring the 12 years noted on the J15 form); the Second Appellant was sentenced to an effective 25 years in prison. All this is unjust – it gives rise to a real sense of shock because of the disproportionality with the crimes charged and the other factors relevant when a fair and just sentence is determined.

60. In this context, one must not lose sight of the fact that a sentence ought to have a deterrent effect on would-be criminals. However, if a sentence imposed is, as shown by the appellants to be the case here, so shockingly disproportionate to the offences charged when balanced against the factors relevant to the determination of an appropriate sentence, then the sentence imposed will likely lose its potential for having an effective deterrent outlook.

61. Logic and common-sense dictate that this must be so because the shock caused by the sentences imposed would be so overwhelming that a would-be criminal is likely not to view the sentences with seriousness but rather see the sentences for what they truly are – unjust and unfair.
62. This consideration fortifies my view that the magistrate’s misdirection in failing to issue an order under s 280(2) of the CPA is of such a sufficient degree of seriousness as to warrant this Court’s interference with the sentences imposed on both appellants. However, there are additional grounds which impel this Court to intervene by sentencing the appellants afresh, rather than to remit the case back to the trial court for re-sentencing. These individualised grounds will henceforth be dealt with, albeit separately in relation to each appellant.

(ii) Ad the First Appellant only: count 1

63. The trial magistrate committed a misdirection by the manner she approached the relevant facts for purposes of assessing an appropriate sentence for the First Appellant on count 1.
64. A consideration that played a key role in determining the 15-year sentence emerges from the following extract on sentence (at page 246 lines 3-7):

‘With regards to accused number one you are not a first offender to this Court you have been given numerous opportunities by the court in order to rehabilitate yourself but it seems that have fallen on deaf ears.’ (my emphasis)

65. The reference to ‘numerous opportunities’ given to the First Appellant is wrong. This is not borne out by his SAP 69. It reveals that the First Appellant only had two convictions for theft: one in 2008 and another in 2016.
66. The trial magistrate misdirected herself when she failed to consider that one of these convictions occurred more than 16 years before the offence charged in the current indictment. The magistrate also erred when she said that ‘in 2006’ the First Appellant was convicted of a ‘similar offence of theft’.[6]
67. This alleged third conviction does not appear on the First Appellant’s SAP 69 in Exhibit E and is a serious error that contributed to the magistrate finding considerable aggravation and an absence of the potential for rehabilitation.
68. Under these circumstances, the trial magistrate misdirected herself by wrongly determining that the First Appellant had committed ‘numerous’ crimes and was given ‘numerous opportunities’ to rehabilitate himself but failed to do so.
69. The trial magistrate’s assessment of this as an aggravating factor for sentencing purposes is a misdirection that contributed to the imposition of a disturbingly inappropriate sentence for count 1 which, in my view, no reasonable court would have imposed if a proper, judicious evaluation were made of the triad of factors to be considered when determining a fair and just sentence.

70. On this basis, I propose that the sentence imposed on the First Appellant for count 1 be set aside and that he be re-sentenced afresh by this Court.

(iii) Ad the First Appellant only: count 2

71. In the context of this case, the finding by the trial magistrate that substantial and compelling circumstances exist for the First Appellant meriting a deviation from the prescribed minimum sentence is a material misdirection that cannot remain intact. The legal and factual basis for my view appears below when I deal with the re-sentencing of the First Appellant on count 2.

72. The trial magistrate found there to be substantial and compelling circumstances meriting a deviation from the minimum mandated sentence for count 2. Based on this finding, the First Appellant was entitled to, but did not receive, a sentence less than the 15-year prescribed minimum.

73. The pronouncement by the trial magistrate of the 15-year sentence is an irregularity to a significant degree because 'a different sentence [to that mandated by law] must be imposed if the court is satisfied that substantial and compelling circumstances

exist which "justify" ... it' (S v Malgas *supra* para 14).

74. For the reasons already discussed above in relation to the first issue, the fact that the trial magistrate recorded a 12-year sentence on the front page of the J15 form for count 2 does not cure the irregularity, nor does it cure her misdirection. Indeed, I find that it compounds the severity thereof. This is because there is a material inconsistency between the 12-year sentence recorded on the front of the J15 form and the 15-year sentence announced to the First Appellant while he was in the dock at the time of being sentenced.

75. The two sentences apparent from different parts of the record in relation to count 2 are entirely incompatible with one another. This fact on its own vitiates the sentence for count 2. Both the sentence and the sentencing process is tainted with irregularity leading to a failure of justice. As a result, I propose to set aside the sentence and re-sentence the First Appellant afresh on count 2.

76. It is common cause that the discrepancy between the sentence announced in open court on count 2 and that recorded on the J15 form was brought to the trial magistrate's attention during the First Appellant's failed bid for leave to appeal served before her on 29 November 2023. Despite this, the magistrate decided not to correct the situation, nor refer the matter for review. This failure on the magistrate's part is inexplicable and is a further misdirection which justifies intervention in the manner which I propose in the preceding paragraph.

77. It is not open to this Court to resolve the problem by interpreting the transcribed judgment with a view to determine which sentence the trial magistrate truly intended to impose (*viz*, the 15 years announced in court, or the 12 years written on the J15). This is not a question of construction – it is one of misdirection.

(iv) Ad the Second Appellant only: count 1

78. After considering the sentence imposed on the Second Appellant in relation to count 1 and the factors which the trial court took into account in the determination thereof, I find that there is merit in Mr Calitz's argument that the trial magistrate misdirected herself by underplaying the Second Appellant's personal circumstances.
79. I am satisfied that this misdirection contributed significantly to the imposition of a 15-year imprisonment sentence which does not bear the hallmarks of a healthy blend between the well-rehearsed triad of factors listed in *S v Zinn* 1969 (2) SA 537 (A). Therefore, the sentence imposed for count 1 in relation to the Second Appellant ought to be set aside. I propose that it be so ordered.

(v) Ad the Second Appellant only: count 2

80. When sentencing the Second Appellant, the trial magistrate informed him that she could not find substantial and compelling circumstances. However, for reasons unexplained in the record, she imposed ten years direct imprisonment (as opposed to at least the mandatory 15-year minimum sentence).
81. The relevant part of the record (at page 246 lines 16-21) on sentence reads:
'Unlike Mr Temmies ... [indistinct] ... I could not find any substantial or compelling circumstances to deviate from the prescribed minimum sentence in your case with regards to count one I make the following order you are sentenced to 15 years imprisonment with regards to count 2 you are sentenced to 10 years imprisonment.' (my emphasis)
82. It was for this reason that the written communication referred to in paragraph 5 above was sent to the Second Appellant's Counsel prior to the appeal hearing.
83. The deviation from the minimum sentence of 15 years is irregular. That sentence flies in the face of the magistrate's express finding that she did not find substantial and compelling circumstances which merited deviating from the minimum 15-year sentence prescribed by law. In these circumstances, I would propose that an order setting aside the 10-year sentence be granted.
84. The trial magistrate's deviation from the prescribed minimum sentence does not pass muster of the settled test enunciated in *S v Malgas* supra para 25 (and approved in *S v Dodo* [2001] ZACC 16; 2001
- (1) SACR 594 (CC)), which test was aptly described by Navsa JA as being 'enduring and uncomplicated'.^[7]
85. In her heads of argument, Ms C Monis submitted that the imposition of the 10-year sentence is an exercise of the trial magistrate's 'inherent jurisdiction' and ought not to be interfered with on appeal. At the hearing, Ms Monis did not persist with her argument, correctly so. Her submission on this score is untenable as a matter of law and is rejected.

86. Regional courts are part of the magistracy. All magistrates' courts are creations of statute. Therefore, all magistrates are imbued with only those powers granted unto them by an empowering statute passed by a competent legislative body. Unlike judges, magistrates lack any inherent powers at common law. See *CC (Nee O) v DGC* 2024 (3) SA 109 (WCC) para 17.
87. Accordingly, the trial court was bound by law to impose the mandatory minimum 15-year sentence on the Second Appellant, unless it found substantial and compelling circumstances within the meaning of that expression. It did not. Therefore, its failure to impose the 15-year minimum sentence on the Second Appellant on count 2 is a material misdirection obliging this Court to intervene by setting aside the 10-year sentence. I propose an order to this effect.

THE THIRD ISSUE: SETENCING THE APPELLANTS AFRESH

88. At the hearing, Mr Calitz and Ms Monis were in agreement that if this Court finds a misdirection of the kind which vitiates the sentences imposed on the appellants or either of them for counts 1 and/or 2, then if this Court sets aside the relevant sentences, then it ought to re-sentence the appellants afresh without remitting the matter back to the trial court. As a result, they argued the appeal on this basis.
89. Consequent on my proposed setting aside of the sentences imposed on the appellants for counts 1 and 2 respectively, and in the light of the common cause position referred to in the preceding paragraph, it is incumbent on this Court to consider the question of a just and appropriate sentence afresh. To this end, some first principles are recited upfront.

Basic sentencing guidelines

90. *S v Zinn* supra remains the locus classicus for the guidelines to be applied at the sentencing phase of a criminal proceeding. The punishment imposed must fit the crime and the criminal, and it must be fair to the broader society.
91. The Zinn trifecta of traditional factors apply irrespective whether the sentencing relates to an offence for which there is a minimum mandated sentence, or not. See *S v Malgas* supra para 25 (approved in *S v Dodo* supra para 40).
92. Thus, when determining sentence, this Court is enjoined to focus on inter alia: (i) the crime: its nature, seriousness, and prevalence; (ii) the offender: his personal circumstances, and prospects of rehabilitation; and (iii) the interests of society. These considerations are to be carefully calibrated to ensure that none is over-emphasised, and none is under-emphasised. Each consideration must be given its due weight to arrive at a well-balanced, just sentence.
93. Dispensing justice through sentencing under the aegis of the CMAA, read with the CPA and CLAA, demands the promotion of the ideals of restorative justice (not retribution). Age-old principles of punishment have been jettisoned by our Constitution and its values favouring a more human-centric approach to sentencing infused with modern notions of justice and fairness.

94. As a result, when determining a fair and just sentence, this Court must moderate its evaluation with a healthy mix of, on the one hand, mercy and compassion, and, on the other, judicious consideration of the appellants' respective personal circumstances and potential for rehabilitation. This has appropriately been described as "an awesome responsibility" vested in courts of law (*S v Banda and others* 1991 (2) SA 352 (BG) at 353C).
95. It is trite that there is no magic or scientific formula for determining with surgical precision the length of imprisonment that would, in any case, pass the litmus test for a fair and just sentence. The circumstances related to every accused person must be considered separately to ensure that an appropriate individualised sentence is determined.
- (a) Consideration of the crime and broader societal interests
96. At the onset, I consider the crimes involved and fairness to the interests of society. In this context, the legislature's objectives under the CMAA are relevant. The sentences to be imposed should, as far as is reasonably possible, further the attainment of those aims and not undermine them – ie, to protect essential infrastructure for the benefit of communities and society at large.
97. Counts 1 and 2 of the indictment comprise serious offences. Both are contained in the CMAA. Ms Monis argued, correctly so in my view, that a sentencing court cannot overlook the fact that these statutory offences are, by design, legislative responses to a 'scourge' in our society, namely, the tampering with, damaging, destroying and theft of essential infrastructure which play a critical role in the proper functioning of our society for public benefit.
98. For this reason, so Ms Monis argued, criminal conduct of this nature is singled out for special attention in the CMAA. I agree. Although the periods envisaged by the statutory provisions differ, imprisonment is foreshadowed as an appropriate punishment. This shows the legislature's serious intent and society's attitude towards the crimes in question.
99. To achieve the legislative aim in the furtherance of societal interests, a relatively high minimum sentence is prescribed for theft of ferrous and non-ferrous metals forming part of essential infrastructure (count 2), and an even higher maximum prison sentence is imposed for tampering, damaging, or destroying essential infrastructure providing a basic service to the public (count 1).
100. When sentencing the appellants for these crimes, I am mindful of the serious effects flowing from their actions, and the public's need for courts to deter these crimes through, inter alia, the imposition of stiff prison sentences. Too light a sentence would undermine the public interest and the achievement of the legislature's aims to protect essential infrastructure for public benefit. However, a shockingly inappropriate sentence would likely, as discussed elsewhere above in this judgment, undermine the deterrent effect of a criminal's sentence.

101. The State proved that the appellants' actions in casu prejudiced not only Eskom, as owner of the stolen copper cables, but also the broader business and residential community in the Devon Valley of Stellenbosch.
102. The oral evidence of Mr Ruaan Engelbrecht, duly supported by Exhibit B, shows that it cost Eskom no less than R80 316,01 to repair the damage to essential infrastructure caused by the appellants' tampering and theft of copper cabling worth about R41 866. In addition, Mr Engelbrecht's evidence taken with his statement in Exhibit C shows that Eskom incurs a recurring financial expense to employ him and other private investigators as part of its on-going, much-needed operational plan to prevent, combat, and investigate widespread copper cabling theft perpetrated by criminals (such as, the appellants).
103. Logic and common-sense dictates that all this has a knock-on effect for the general public, namely, higher electricity prices and, as the facts of this case shows, Eskom's inability, from time to time, to deliver an essential service to members of the public, namely, the provision of electricity. All this is important as part of the adverse financial and societal impact considerations arising from the commission of crimes of the nature with which the appellants were convicted. This cannot be ignored at the time of sentencing.
104. When considering an appropriate sentence in cases involving either tampering, damaging, destroying, and/or theft of essential infrastructure, it is incumbent on courts to look beyond the traditional narrow interests of the directly affected complainant (such as, Eskom in casu).
105. It is necessary to take cognisance of the broader socio-economic impact of an accused's conduct, and of the fact that the victims of the crime may comprise a wider array of persons. A failure to do so may, in appropriate cases, qualify as a misdirection in sentencing. This approach to sentencing aligns with that advanced in the instructive dictum originating in *S v Matyityi* supra para 16:

'An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim-centred.' (my emphasis)

106. To this end, the following testimony by Mr Ruaan Engelbrecht about the impact of the appellants' actions on the other affected victims is significant:[8]

'Yes, all the properties from where the links were pulled on the line to switch the line off. All properties including a hotel, a winery, a private residence, all were without power until the line was fixed which was approximately two days later. The replacement value on just the cabling according to all the lists that is with Eskom is R47 000,00.'

107. Mr Denver Marlin Pedro also provides useful testimony about the impact of the power outage on the surrounding business and residential communities:[9]

‘The cable that was stolen forms part of Eskom’s essential infrastructure and it is used to distribute electricity from one place to another. This specific line supplied the farms as well as the Devon Valley Golf Estate which include the hotel and the restaurant at the farm side. ... The cables were cut ... on a Friday night. I went out the Saturday morning. I was called out. And the electricity was only restored to those areas on the Tuesday due to the fact that over weekends we only work on a skeleton staff ... Obviously people are going to be without electricity for the duration of the repairs because we could not feed from another point. ... The farmers and the farm workers especially, like I said, it basically created an opportunity for criminals as well due to the fact that it is dark after hours.’

108. Mr D.M. Pedro was not cross-examined. Hence, his afore-quoted evidence stands unchallenged. Although Mr R. Engelbrecht was cross-examined, his afore-quoted testimony was undisputed and remains intact.

109. The evidence established that the appellants (together with four others who ran away when they were confronted)[10] used bolt cutters to remove 600 metres of copper cabling from Eskom’s functional power line infrastructure that provides electricity to parts of the Devon Valley in Stellenbosch. They stole the cabling, weighing about 260 kgs, by placing it onto the back of a bakkie and then riding away with it. Their actions caused a severe power outage which affected the business and neighbouring residential community for a whole weekend.

110. The appellants’ conduct left a community in darkness. As testified by Mr Pedro, this placed farmers and farm workers at risk – they were vulnerable to attack by criminals. This impact on community members is an aggravating factor.

111. In *S v Matyityi* supra para 16, it was held:

‘In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the state – it is an injury or wrong done to another person. ... As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens,

particularly victims of sexual abuse, by reaffirming one of our founding democratic values namely human dignity. It enables us as well to vindicate our collective sense of humanity and humanness.’

112. As a matter of principle, all victims of crime matter. In this case, the dignity of all the affected victims of the appellants’ crimes (such as, farmers and farmworkers) are entitled to no less consideration for sentencing purposes. Mr Calitz was constrained to concede that the appellants’ crimes to some degree adversely impacted the Devon Valley business and residential community, although he argued that the full extent and nature of that impact is unknown.

113. While Mr Calitz's latter point is well made, there can be no doubt that the power failure resulting from the appellants' actions directly rendered to residents and visitors in the affected Devon Valley area being vulnerable to attack in the dark and some parts of the community were unable to enjoy a dignified living for an entire weekend by not having access to a supply of electricity.
 114. As a result, the affected victims of the appellants' crimes were unable, inter alia, to cook hot food; to boil water; to frost items in a freezer or to keep them cold in a fridge; or to operate necessary home appliances and/or tools. This is the pernicious effect of what the appellants did - this justifies their prosecutions.
 115. Moreover, it cannot be overlooked that access to electricity is pivotal for the fulfilment of the Constitution's promise of a better quality, dignified life for its beneficiaries. Eskom is the parastatal tasked with this important responsibility.
 116. Our courts infer the existence of a constitutional right to electricity by drawing on a cluster of rights entrenched in the Bill of Rights including, but not limited to, the right to human dignity in section 10 thereof. See F Dube & CG Moyo "The right to electricity in South Africa" 2021 (24) Potchefstroom Electronic Law Journal at page 9.
 117. This right in the hands of the affected Devon Valley residents and other persons in that community on the weekend in question was violated by the appellants' actions. This is a serious aggravating factor for sentencing purposes.
 118. Accordingly, I am satisfied that a sentence of direct imprisonment for both appellants is warranted on counts 1 and 2. In the circumstances, I propose that an order to this effect be granted.
 119. The question now arising is the following: for how long should each appellant be imprisoned? I now turn to deal with this issue.
- (b) Consideration of the First Appellant's personal circumstances
120. First Appellant's personal circumstances are: he is 39 years old, unmarried, with three children (ages 16, 6 and 4 years), all of whom reside in Grabouw. He is a self-employed mechanic and was so employed for about 11 years when the offences were committed. He earned an income of about R4 000 pm. His highest educational qualification is matric. He is a repeat offender, having one relevant previous conviction in 2016 for theft. In 2020, he was convicted twice for offences under the Drugs and Drug Trafficking Act 140 of 1992, although these drug related offences do not serve as aggravating factors in this case.
 121. I consider the First Appellant's age to be a mitigating factor. He is a mature adult at aged 39 years. As such, his age does not diminish his moral blameworthiness. However, as a middle-aged man, this age suggests to me that his prospects of rehabilitation during incarceration are good. This shows potential that, on release, he may not pose a danger to repeat his crime.

122. Another mitigating factor that ought to be factored into the equation when deciding on the length of his incarceration is that the First Appellant has two young children (ages 4 and 6 respectively), and a child-teen aged 16, all of whose best interests should not be overlooked. The period of imprisonment ought, as far as is reasonably possible, to allow these children to still enjoy some relationship with their father post his incarceration (and vice versa). In my view, a 10-year period of imprisonment under s 276(1)(b) of the CPA read with s 3(1)(a) of the CMAA would still enable this to occur.
123. A further mitigating factor is that the First Appellant was, at the time of his sentencing in the court a quo, an awaiting trial prisoner for about 18 months. See *S v M* 2007 (2) SACR 60 (W) para 113.
124. An aggravating factor is the First Appellant's lack of remorse for his actions.[11] He pleaded not guilty, as is his right. See *S v Dzukuda and others*; *S v Tshilo* 2000
- (4) SA 1078 (CC) para 40. However, he and his co-accused were caught red-handed and had no real defence. Despite this, they proceeded to waste the trial court's time and valuable judicial resources by causing a nine-day trial to be run at taxpayers' expense until its completion at sentencing.
125. Mr Calitz argued that another mitigating factor is that the stolen copper cables were recovered. This fact, so he argued, reduces the financial loss suffered by Eskom. I endorse the view expressed by Ms Monis who argued that the appellants ought not to benefit from the recovery of the stolen copper cables because there is no evidence that they can be re-used by Eskom, nor that they have any monetary value for Eskom.
126. Ms Monis argued further, with merit, that the appellants did not surrender the copper cables of their own volition. They were caught red-handed. In other words, the stolen copper cables were recovered through good investigative work by Mr Ruaan Engelbrecht and his team of investigators, rather than by reason of any good conduct on the part of the appellants, or either of them. Thus, so Ms Monis argued, this ought to be viewed as an aggravating factor.
127. Having regard to all the foregoing, I conclude that a 10-year period of imprisonment ought to be imposed on count 1 for the First Appellant. This duration is mixed with a healthy dosage of mercy and compassion, when due consideration is given to the maximum sentence allowed by law, as well as the degree of aggravating and mitigating considerations highlighted above.
- (c) Consideration of the Second Appellant's personal circumstances
128. The Second Appellant's personal circumstances are, in the main, substantially similar to that of the First Appellant, except he has no prior conviction. This latter fact accounts, albeit in part only, for the different period of imprisonment imposed on him in relation to count 1.

129. Second Appellant's Counsel emphasised the following personal circumstances: Second Appellant is 38 years old, unmarried, with three children (ages 1, 7, and 15 years). He is a seasonal farmworker in Grabouw who, when he worked, earned about R3 000 pm.
130. The Second Appellant is a first offender and a middle-aged man. As with the First Appellant, I similarly hold the view that the Second Appellant's age is a mitigating factor. His prospects of rehabilitation during incarceration appear to be good.
131. As with the First Appellant, another mitigating factor when fixing the period of incarceration is the best interests of the Second Appellant's children and the promotion of an opportunity to maintain and build a parent-child bond post-incarceration. To impose a prison sentence of such length that any prospect of nurturing such a bond in the future would be impossible, is in my view a sentence that is disproportionate to the crimes in the context of this case.
132. As with the First Appellant, another mitigating factor is that at the time of his sentencing, the Second Appellant had been an awaiting trial prisoner for about 18 months.
133. As with the First Appellant, an aggravating factor is the lack of remorse and the waste of valuable court time and judicial resources on a nine-day trial.
134. In the light of all these relevant considerations, I propose an 8-year period of imprisonment under s 276(1)(b) of the CPA read with s 3(1)(a) of the CMAA.

Count 2: prescribed minimum sentence - does substantial and compelling circumstances exist for deviation from the minimum sentence?

135. On the issue of imposing minimum sentences, the SCA emphasised the following in *S v Matyityi* supra para 23:

'Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them.'

136. Accordingly, I must yield to the sentencing regime in the CMAA by imposing on each appellant at least the minimum prison sentence of 15 years for count 2, unless I find substantial and compelling circumstances for one or both of them.
137. It goes without saying that when sentencing the appellants on count 2, I must bring an unbiased, impartial, independent mind to bear on this issue.

138. I am not bound by the trial magistrate's decision in which she found substantial and compelling circumstances in relation to the First Appellant, and not so in relation to the Second Appellant. Nor should I be influenced by either of those decisions. I must consider the issue at hand de novo through my own lens.
139. For purposes of the charge in count 2, both appellants are first offenders. As such, the statutorily specified sentence of at least 15 years for first offenders applies. It is now settled law that a minimum prescribed sentence must "not be departed from lightly and for flimsy reasons ..., and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded" from judicial consideration. See *S v Malgas* supra para 25.
140. In the trial court and on appeal, the appellant's Counsel relied on their personal circumstances sketched above as the basis for his contention that substantial and compelling circumstances exist for each and that a deviation from the mandatory, statutorily ordained sentence is merited. I disagree.
141. The personal circumstances of both appellants do not, in my view, qualify as weighty justification for imposing a period of imprisonment less than the minimum sentence prescribed by law. To do so would be unjust and incongruent with the legal principles that have developed over time in authoritative jurisprudence emanating from both the SCA and our apex court.
142. To this end, I rely on the oft-quoted dictum in *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 58:
- "In cases of serious crimes, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the question of whether the accused is married or single, whether he has two children or three, whether he is employed are in themselves largely immaterial to what that period should be and those seem to me to be what the kind of 'flimsy' grounds that Malgas said should be avoided."*
143. Therefore, I find that the imposition of the prescribed minimum sentence of 15 years in relation to count 2 would be a just sentence in relation to both appellants. I propose that it be so ordered.
144. Finally, the trial court's declaration, in accordance with s 103 of the Firearms Control Act 60 of 2000, that the appellants are both unfit to possess a firearm cannot be faulted. Probably for that reason, the appellants did not persist with their challenge against that decision at the hearing of this appeal.

ORDER OF COURT:

145. In the result, I would make the following orders:

FAREED MOOSA

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

ROSHENI ALLIE

JUDGE OF THE HIGH COURT

Appearances:

For appellants: M Calitz

Instructed by: Cape Town Justice Centre

For respondent: C Monis

Instructed by: Office of the Director of Public Prosecutions, Cape Town.

- [1] In this context, the term ‘essential infrastructure’ is defined in section 1 of the CMAA to mean ‘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’.
- [2] In this context, the term ‘basic service’ is defined in section 1 of the CMAA to mean ‘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’.
- [3] Record: page 30 lines 9 - 14.
- [4] Section 298 reads: ‘When by mistake a wrong sentence is passed, the court may, before or immediately after it is recorded, amend the sentence.’
- [5] For present purposes, the relevant portion of s 280 reads: ‘(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.
- (2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.’
- [5] For present purposes, the relevant portion of s 280 reads:
- ‘(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

- (2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.’
- [6] Record: page 244 (line 14).
- [7] DPP KZN v Ngcobo 2009
- (2) SACR 361 (SCA) para 12 (cited with approval in S v Matyityi 2011
- (1) SACR 40 (SCA) para 11).
- [8] Record: page 53 lines 5 - 11.
- [9] Record: page 72 lines 5 – 20.
- [10] Record: page 87 lines 13 - 18.
- [11] The concept of remorse and how to evaluate if an accused is remorseful has been explained as follows: ‘Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence.’ (S v Matyityi supra para 13)

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