



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, MAKHANDA)**

In the matter between:  
138/2022

Case No: CA&R:

**MAYIBONGWE CETWAYO**

Appellant

and

**THE STATE**

Respondent

---

**APPEAL JUDGMENT**

---

**BANDS AJ:**

[1] In accordance with the provisions of section 112(2) of the Criminal Procedure Act 51 of 1977, the appellant, when appearing in the Regional Court, East London, pleaded guilty to a charge of unlawfully and intentionally tampering with, damaging, and destroying essential infrastructure in circumstances where he

knew; alternatively, ought reasonably to have known, that the property in question was essential infrastructure.

[2] This constitutes an offence in terms of section 3(1)(a); read with sections 1; 3(2); and 6 of the Criminal Matters Amendment Act 18 of 2015 (*“Criminal Matters Amendment Act”*). The appellant, having been convicted on the basis of his plea was sentenced to a period of 15 years. It is this sentence that he appeals against.

[3] It is perhaps apposite at this juncture to emphasise that one of the purposes of the Criminal Matters Amendment Act, as reflected in the preamble thereto, was to amend the Criminal Law Amendment Act 105 of 1997 (*“Criminal Law Amendment Act”*), to regulate the imposition of discretionary minimum sentences for essential infrastructure-related offences. To this end, Part II of Schedule 2 was amended by the addition of various offences, inclusive of the following:

*“Theft of ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, 2015 –*

*(a) if it caused –*

*(ii) interference with or disruption of any basic service, as defined in section 1 of the aforementioned Act, to the public; or*

*(iii) damage to such essential infrastructure.”*

[4] Essential infrastructure is defined in section 1 of the Criminal Matters Amendment Act as *“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...”*

[5] In turn, a basic service is defined as “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...”

[6] It was accordingly not in dispute that a minimum sentence of 15 years imprisonment, prescribed by s 51(2) of the Criminal Law Amendment Act 105 of 1997, read with Part II of Schedule 2, applied. In circumstances such as the present, a court is required to impose the prescribed minimum sentence unless it is satisfied that there are substantial and compelling circumstances which militate against its imposition. Whilst such circumstances may be comprised of any of the factors which the courts traditionally take into account as mitigation and may be the cumulative effect of any number of such factors, if the imposition of the prescribed minimum sentence would be disproportionate to the crime and bring about an injustice, this on its own constitutes a substantial and compelling circumstance justifying the imposition of a lesser sentence.<sup>1</sup>

[7] The Constitutional Court in *S v Dodo*<sup>2</sup> held, with reference to the aspect of proportionality, that what had to be considered in determining whether the length of a sentence was proportionate to the offence, was the offence in its broader context. This, Ackermann J described at paragraph [37] as consisting of “all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could

---

<sup>1</sup> *S v Malgas* [2001] 3 All SA 220 (A); *S v Vilikazi* 2009 (1) SACR 552 (SCA) at paras [14] and [15]; and *Madikane v S* 2011 (2) SACR 11 (ECG).

<sup>2</sup> 2001 (3) SA 382 (CC)

*have a bearing on the seriousness of the offence and the culpability of the offender.*" Ackermann J went on further to state at paragraph [38] that even when the legislature has prescribed the sentence ordinarily to be imposed in respect of an offence, the value of human dignity lies at the heart of the requirement that sentences must be proportionate to the offence.

[8] The appellant's counsel submitted that the trial court erred in its finding that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence than that prescribed and that the sentence was disproportionate. In essence, appellant sought an order that the sentence of 15 years' imprisonment imposed by the trial court be set aside and replaced with a term of direct imprisonment for a period of 5 to 8 years; alternatively, that half of the sentence be suspended. The state aligned itself with the appellant, contending that the prescribed minimum sentence is disproportionate to such an extent that such disproportionality constitutes a substantial and compelling circumstance warranting an interference with the sentence imposed by the trial court. Counsel for the state, in argument, postulated an appropriate sentence of between 8 to 10 years, with a portion thereof being suspended.

[9] Having said that, it is trite that the determination of the matter falls within the purview of the court's power, which is in no manner circumscribed by the state's concession in respect of sentence.

[10] Given the applicability of the Criminal Law Amendment Act, the proper enquiry on appeal is whether the facts which were considered by the trial court

were substantial and compelling or not. In this regard, Bosielo AJ, writing for the Supreme Court of Appeal in *S v PB*,<sup>3</sup> formulated the approach as follows:

*"[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not."*

[11] The aforesaid approach was also propounded upon by Rogers J (Gamble J concurring, Matthee AJ dissenting) in *S v GK*<sup>4</sup> in the following terms: *"[t]he decision whether or not substantial and compelling circumstances are present involves the exercise of a value judgment; but a Court on appeal is entitled to substitute its own judgment on this issue if it is of the view that the lower court erred in its conclusion."*

[12] It accordingly remains to be considered whether the trial court was correct in finding that there were no substantial and compelling circumstances which justified a departure from the prescribed minimum sentence.

---

<sup>3</sup> 2013 (2) SACR 533 (SCA) at para 20.

<sup>4</sup> 2013 (2) SACR 505 (WCC).

See also: *Tafeni v S* 2016 (2) SACR 720 (WCC).

[13] The appellant pleaded guilty to removing water meters, which were the property of the Buffalo City Metropolitan Municipality, from their boxes to the value of R90,000.00, resulting in damage to waterpipes to the value of approximately R30,000.00 and the loss of water. There was no evidence as to the volume of the water loss and what impact, if any, the appellant's conduct had on the interference with the provision or distribution of water to members of the public. The water meters were recovered and returned to municipality. Whilst having pleaded guilty to the charge, the appellant was caught during the commission of the offence. Accordingly, notwithstanding that he shows a certain degree of remorse, which factor was taken into account by the trial court, such factor is at best a little more than neutral, given the circumstances of the matter.

[14] At the time of the commission of the offence and at the date of trial, the appellant was 23 years of age and still resided with his mother. He had no fixed employment, engaging in "*odd jobs*" to earn a living; was unmarried; and had no dependants. Whilst not a first-time offender, having been convicted of two prior offences, the appellant had not previously committed an offence of this nature. Despite the trial court having noted that it was at pains that the appellant was still of a tender age, this factor does not appear to have weighed heavily in the court's decision-making process.

[15] I am of the view that the trial court misconstrued the essence of youthfulness as a mitigating factor.<sup>5</sup> Moreover, the trial court failed to consider

---

<sup>5</sup> *Bistoni v State* (CA&R 37/2022), unreported judgment of the Eastern Cape Division, Makhanda.

that the appellant is of a sufficiently young age to make rehabilitation a real prospect, even after serving a lengthy period of direct imprisonment.

[16] Taking into account all of the features specific to the present matter, and more particularly, the circumstances of the commission of the offence; the events thereafter; and the personal circumstances of the appellant, I am of the view that the trial court was incorrect in finding that substantial and compelling circumstances did not exist to depart from the minimum sentence. As noted, the offence committed is sufficiently serious to attract a prescribed minimum sentence of 15 years imprisonment in the case of a first offender. Whilst the seriousness of the offence must be reflected in the sentence imposed by the court, this cannot be viewed in isolation from the factors alluded to above, including the personal circumstances of the appellant and the value attached to human dignity, which lies at the heart of the requirement that sentences must be proportionate to the offence as set out in *S v Dodo*. I am of the view that the trial court, in considering the sentence to be imposed, attached too much weight to the fact that the legislature has prescribed a minimum sentence to the offence, and in doing so, lost sight of the other important factors herein.

[17] In the present matter, the imposition of the minimum sentence was manifestly disproportionate. I consider that a sentence of 10 years' imprisonment, 3 years of which are suspended for 5 years, would be more appropriate in the circumstances.

[18] In the premises, the following order is issued:

1. The appeal against sentence is upheld.
2. The sentence of 15 years' imprisonment imposed by the trial court on 21 October 2021 is set aside and replaced by that set out in paragraphs 3 and 4, below.
3. The appellant is sentenced to 10 years' imprisonment, 3 years of which are suspended for 5 years on condition that the accused is not convicted of an offence provided for in the Criminal Matters Amendment Act during the period of suspension for which a sentence of imprisonment without the option of a fine is imposed.
4. The substituted sentence is antedated, in terms of section 282 of the Criminal Procedure Act 51 of 1977, to 21 October 2021.

---

**I BANDS**  
**ACTING JUDGE OF THE HIGH COURT**

I agree.

---

**V P NONCEMBU**



**JUDGE OF THE HIGH COURT**

**Appearances:**

For the appellant: Ms McCallum

Instructed by: Legal Aid South Africa, Makhanda

For the respondent: Mr Govender

Instructed by: National Director of Public Prosecutions, Makhanda

Heard: 8 February 2023

Delivered: 25 May 2023