IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 06/2016

In the matter between:

AMERICO DANIEL NJANGO & ANOTHER Applicants

and

THE STATE Respondent

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 27 FEBRUARY 2018

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[1] This is an application for leave to appeal. The applicant, who was accused 1 at the trial in which five accused were involved, was aggrieved by his conviction and sentence - hence he wishes to take me on appeal.

[2] The applicant and others were tried in the Kroonstad Circuit Court. Their trial commenced on 25th January 2016 and ended on 26 February 2016. Three of his four co-accused are not before me in these proceedings. Therefore, I shall not say much about them.

[3] The applicant was indicted for ten offences. Although the indictment consisted of sixteen charges, those relevant to him were charges 3, 4, 5, 7, 8, 12, 13, 15, 16 and 17. Those charges were part of a series of offences spanning from 4th January 2014 to 4th June 2014. The crime scenes were at various places in the Free State Province as well as in Mpumalanga Province.

[4] The verdict was pronounced on 18th February 2016. The applicant was acquitted in respect of one of the ten charges, to wit count 12 , but convicted of the 9 remaining charges.

"[133] Now the verdict as regards ACCUSED 1: in respect of counts 3, 4, 5, 7, 8, 13, 15, 16 and 17 GUILTY AS CHARGED. In respect of count 12 NOT GUILTY."

[5] Following his conviction the applicant was sentenced on 22nd February 2016.

In respect of count 3 three (3) years imprisonment.
In respect of count 4 five (5) years imprisonment.
In respect of count 5 five (5) years imprisonment.
In respect of count 7 three (3) years of imprisonment.
In respect of count 8 three (3) years imprisonment.

In respect of count 13 four (4) years imprisonment.
In respect of count 15 three (3) years imprisonment
In respect of count 16 seventeen (17) years imprisonment.

I directed that all the sentences must run concurrently in such a way that accused 1 serves an effective sentence of twenty (20) years imprisonment.

[6] Aggrieved by his conviction and sentence the applicant on18th September 2017, filed his application for leave to appeal against both. This application for leave to appeal was filed nineteen months after the finalization of the trial. Needless to say that it was awfully belated. As a result of that it became necessary for him to apply for condonation for his lateness in filling the application for leave to appeal. That he did. This application for leave to appeal was duly accompanied by a substantive application for condonation. The condonation application was unopposed. Therefore, I condoned the lateness.

[7] Section 17 of the Superior Court Act 10 of 2013 governs the legal position relative to the leave to appeal procedure. In **Hunter v Financial Services Board and Others** (2017) JOL 39476 (GP) HF Jacobs AJ remarked that the section imposes substantive law provisions applicable to applications for leave to appeal. First, it stipulates that leave to appeal may only be given if the judge is of the opinion that certain jurisdictional facts exist. The discretion of the judge sitting as a court of first instance is, therefore, curbed. Second, the jurisdictional facts which are in the opinion of the judge required to be present are that the appeal would have

reasonable prospects of success, or that some other compelling reason exists why the case should be heard on appeal. For instance, conflicting provincial decisions on a particular point of law under consideration, would constitute a compelling reason for granting leave to appeal.

[8] The learned judge went on. He said that an appeal would have prospects of success if it is arguable in the narrow sense of the word. The section requires that the argument advanced by an applicant in support of an application for leave to appeal must have substance. The notion that the point of law is arguable on appeal entails some degree of merit in the argument. The argument, however, need not be strongly convincing at the stage when leave to appeal is sought but it must nonetheless, have a measure of plausibility. Thirdly, the decision sought on appeal may not fall within the ambit of section 16(2)(a) of the Act and should, therefore, not be of such a nature that decision sought will have no practical effects or result. Finally, section 17(6) (a) provides that if leave is granted under section 17(2)(a) or (b) to appeal against the decision of a court of first instance consisting of a single judge, the judge must direct that the appeal be heard by a full court of that division unless the judge considers that a decision to be appealed involves a question of law of importance in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion or that the administration of justice requires consideration by the Supreme Court of Appeal of the decision, in which case the judge granting leave must direct that the appeal be heard by the Supreme Court

of Appeal. Whether a court of first instance grants or refuses leave to appeal it is required to give reasons for its order.

[9] As regards conviction my judgment was attacked on the following grounds:

"It is respectfully submitted that the Honourable judge erred in finding that the state had proved his (sic) case beyond reasonable doubt more particularly in view of the following facts:

1.1 there was no evidence linking the appellant to the commission of the offence;

1.2 the state in proving its case against the appellant relied solely on circumstantial evidence in all the charges;

1.3 the state relied on the evidence of a single witness and which evidence and its reliability is subject to serious doubt;

1.4 there was nothing found in possession of the appellant linking him to any of the offences at the time of his arrest."

[10] Mr Monareng, counsel for the applicant, submitted that the evidence tendered by the prosecution constituted no proof beyond a reasonable doubt to justify the conviction of the applicant. Based on this proposition counsel submitted that a reasonable possibility existed that another court will come to a different conclusion as regards the guilt or otherwise of the applicant. Accordingly counsel submitted that the applicant had a reasonable prospect of success on appeal. It was his argument that the circumstantial evidence tendered by the prosecution against the applicant was inadequate to justify his conviction. Therefore, counsel urged me to grant leave to appeal.

[11] Mr Steyn, counsel for the respondent, sharply differed. He submitted that the respondent had proved its case against the applicant beyond a reasonable doubt; that the applicant was correctly convicted in respect of all the nine charges; that there existed no reasonable prospects of success on appeal and that the application was unmeritorious. Accordingly counsel implored me to refuse the applicant leave to appeal.

[12] The case against the applicant was overwhelmingly strong, in my view. I deem it necessary to highlight the following aspects of the prosecution case against him:

- The state witnesses, Sithole Mthombeni and Gerhardt van Deventer, corroborated each other in all material respects and their versions were, without any doubt, free from contradictions and improbabilities.
- The relevant cellphones of the applicant and his four co-accused "exi 1" to "exi 5" were found on the persons of the applicant and his four co-accused. The cellular number of the applicant linked to "exi 1" was 072 050 0127.
- The applicant was the owner of a motor vehicle, a Sentra sedan involved in the commission of the crime referred to in count 16. He was also the lawful owner of a firearm found in his possession in that motor vehicle.
- The witness, Mr Joubert, identified the copper cables recovered shortly after the theft as that which belonged to Transnet Limited. The said copper cables were stolen at Bosrand railway station and loaded on the Nissan NP200, a bakkie which was accompanied by the applicant sedan right up to the moment of its recovery (count 16).

- The applicant and his four co-accused were arrested on 4th June 2014 near Sasolburg after been pursued for approximately 70km by the operatives of Combined Private Investigations from the last scene of the theft of copper cables which was committed on or about 3rd June 2014 at Bosrand and Geneva in the district of Kroonstad.
- The applicant and accused 5 tried to flee and to resist arrest at the time they were confronted near Sasolburg.

[13] I continue with the respondent's case against the applicant.

- The applicant indicated, through his legal representative that he did not know accused 2, 3, 4 and 5. Notwithstanding his disassociation, their phonebooks told a different story.
- The phonebook of accused 2 had the cellular numbers of the applicant, accused 1,accused 3, accused 4 and accused 5.
- The phonebook of accused 4 had the cellular numbers of the applicant, accused 1, accused 2 and accused 5.
- The phonebook of accused 5 had the cellular numbers of the applicant, accused1, accused 3 and accused 4.

[14] All in all 16 crimes of theft were committed over a time span stretching from 20 January 2014 up to 4th June 2014 - approximately 6 months

- The applicant and his co-accused had repeated contacts with each other over the period. During that period their

cellphones were very active on the various crime scenes far from their homes.

- The applicant contacted scrapyard metal dealers shortly before, during and after each incident of theft.
- The cellular numbers of the scrapyard dealers were stored in his phonebook "exi 1"

[15] I still continue with the respondent's case against the applicant. This is now the last mile of the arduous road for the applicant.

- It was put to the state witnesses that the applicant was at one stage in Bloemfontein far from the crime scenes at Geneva and Bosrand near Kroonstad. However, an analysis relative to his cellphone contained no shred of objective evidence that he was ever in the vicinity of Bloemfontein at the time of the incident described in count 16.
- It was similarly put to the prosecution witnesses that his four co-accused were travelling somewhere between Welkom and Odendaalsrus at the time the incident described in count 16 was committed. However, again there was no shred objective evidence to support their alibi(s).
- It was also put to the prosecution witnesses that the applicant and his co-accused approached Kroonstad from the Welkom road and not the Hennenman road.They tried to distance themselves from Hennenman road. Yet again there was no cellular data to corroborate their version that

they came from the direction of Welkom. On the contrary, there was overwhelming pieces of objective evidence and direct evidence which linked them to the Hennenman road.

[16 Notwithstanding the aforesaid highly incriminating evidence against the applicant and his co-accused, they opted not to testify or to call any witnesses to testify on their behalf.Therefore the prosecution case stood unchallenged.The applicant had no version before the court to be considered. Of course, it was their fundamental right to remain silent. From his silence, in the face of the formidable case presented against him which cried out for an explanation, I drew an adverse inference. He must have appreciated that risk. Because he did, he must accept the consequences flowing from his decision to remain silent. An innocent person has a natural inclination to speak out against false accusation alleged against him. **S v Brown & Another** 1996(2) SACR (HC) et 60f-61d and the authorities there cited.

[17] In the light of the totality of the facts and the surrounding circumstances, the only reasonably possible inference that could be drawn by any objective court, from all the facts proven and unchallenged, was that the applicant was beyond reasonable doubt guilty of all the charges in respect of which he was accused and ultimately convicted.

[18] As regards sentence, it was submitted on behalf of the applicant that the effective term of 20 years imprisonment was strikingly inappropriate in that:

2.1 It is out of proportion to the totality of the accepted facts proven in mitigation.

2.2 It over emphasises the need to remove the Appellant from the society Rather than correcting his behaviour.

2.3 It disregarded the social standing of the Appellant in the community and the need to rehabilitate him back to the community.

2.4 It over emphasised the seriousness of the offence and disregarded the personal circumstances of the Appellant.

2.5 It disregarded the negative impact a long term of imprisonment can on the Appellant and his family.

2.6 It fails to allow for corrective rehabilitation.

[19] Mr Monareng submitted, on the basis of the alleged misdirections, that the effective term of 20 years imprisonment was exceedingly retributive. Therefore, he urged me to grant the applicant leave to appeal against the sentence I imposed on him

[20] Section 51 of Act No. 105/1997 prescribes a minimum sentence of 15 years imprisonment in respect of count 16. In the light of the surrounding facts and the peculiar circumstances of the applicant concerning count 16, I found that there existed no substantial and compelling circumstances to deviate from the prescribed minimum sentence. I then loaded the prescribed minimum sentence and imposed a sentence of 17 years imprisonment on the applicant. Mr Steyn submitted that the applicant was rightly and correctly sentenced.

[21] The section finds no application to the rest of the charges in respect of which the applicant was convicted. Accordingly, I punished the applicant in accordance with the sentencing discretion entrusted to me in accordance with unwritten common law principles. As regards count 3, 4, 5, 7, 8,13, 15 and 17, the sentences imposed on him ranged from 3 to 5 years imprisonment. Mr Steyn supported those sentences. He submitted that the objectives of sentence assessment were thoroughly and correctly considered and applied. I am satisfied that I exercised my sentencing discretion properly and judicially. See **S v Holder** 1979 (2) SA 70 (A) at 74H.

[22] The sentencing of an offender is the prerogative of a trial court. A court with appellate jurisdiction shall only interfere on well-known and acceptable but narrow grounds. The power of a court exercising appellate jurisdiction in respect of sentence is very limited **S v Pieters** 1987 (3) SA 717 (A) at 727. I am not persuaded that the full bench of this division sitting as a court of first instance would have come to a different conclusion. Neither any of the individuals sentences imposed nor the effective sentence is shockingly inappropriate and harsh considering the legio of aggravating circumstances proven against the applicant.

[23] The aggravating factors may be tabulated as follows;

- The applicant committed several offences of a serious nature;
- The offences of which the applicant has been convicted are prevalent in the jurisdiction of this court;

- He still protested his innocence after his conviction, which attitude showed that he was remorseless, a factor which strongly militated against the contention that he was a rehabilitable offender;
- He committed the offences out of greet and not need;
- The high value of copper cables stolen was a strongly aggravating factor;
- The applicant had planned and coordinated the offences very well over a period of about six months.
- He was not a lone ranger but he committed the offences as a member of a gang of railway track thieves;
- He played a leading role in the commission of the offences of which he has been convicted. For instance, he supplied a motor vehicle to transport his co-accused to and from various crime scenes. He also provided protection for them because he was the carrier of a firearm.
- The widespread impact of these crimes on the economy of the country was a strongly aggravating factor. As Mr Steyn said, it was an economic sabotage in its worst form.

[24] The gravity of the offences,the deterrence objective of sentencing and the interests of the general public were overriding considerations in the case against the applicant. I am persuaded that there exists no reasonable prospect that a full bench hearing this matter on appeal will interfere with the sentences I imposed on the applicant. Given all the peculiar circumstances of this particular case, I am satisfied that the applicant's application for

leave to appeal against the sentences is unmeritorious. I would, therefore, refuse leave.

[25] The applicant was not alone before me in these proceedings. One of his co- accused was riding on his back . He was Thaba Chicco Madlasa, accused 2.

[26] I have already considered his position. The respondent's case against him was also overwhelming, as regards the merits. The defence in respect of each count on which he was convicted, was bedevilled by numerous features of material demerits.

[27] As regards sentence, I am not persuaded there is any substance in his grounds of appeal. His argument that the full bench will, on appeal, come to a different conclusion was in my view not plausible. I would, therefore, deny him leave to appeal against any individual or effective sentence I imposed on him.

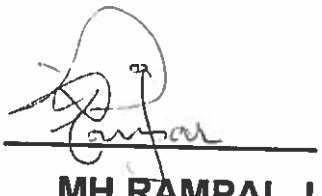
[28] Consequently I have come to the final conclusion that Mr Thaba Chicco Madlasa's application also has no reasonable prospect of success at all on appeal. In view of this, I am also inclined to deny him leave to appeal against the conviction and sentence.

[29] Accordingly I make the following order;

29.1 The application for leave to appeal fails in toto.

29.2 The conviction and sentence stand.

29.3 The same order applies to the second applicant, Thaba Chicco Madlasa.



MH RAMPAI, J

On behalf of the applicants:	Adv MM Monareng
Instructed by:	Rasegoete Attorneys
	Vanderbiljpark
On behalf of the respondent:	Adv C Steyn
Instructed by:	Director of Public Prosecutions
	Bloemfontein