



**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

Appeal No. : A102/2016

In the matter between:

LEBAMANG JACOB PALEDI
MALEFETSANE WILLIAM MOHETHI
SIMON SEEISA MOSHOESHOE

1st Appellant
2nd Appellant
3rd Appellant

and

THE STATE

CORAM: MOLEMELA, JP *et* MOLOI, ADJP *et* MUSI, J

JUDGMENT: C.J. MUSI, J

HEARD ON: 6 JUNE 2016

DELIVERED ON: 28 July 2016

- [1] This is an appeal against the sentences imposed by a single judge of this division.

- [2] The appellants were accused 2 to 4 in the court *a quo*. I shall hereinafter refer to the appellants as the accused. Accused 1 failed to appear in the court *a quo* and a warrant for his arrest was issued. He could not be traced and the court *a quo* ordered that his trial be separated from that of accused 2 to 4.
- [3] The facts are briefly as follows: On 17 April 2013 at approximately 19:00 the four accused went to a tuck shop at Selosesha, Thaba Nchu where Mr Salten Hassen, the deceased, was selling goods. He suspected that they wanted to rob him. He called Messrs Daste and Teradu to assist him. They were at another tuck shop and drove to the tuck shop where the deceased was working. When they got there accused 1 shot at them whilst they were still in the car. He approached them and accused 2 to 4 ran into the tuck shop where they robbed the deceased. Accused 1 robbed Messrs Daste and Teradu of their cellular phones whereafter he ran into the shop and shot the deceased. All the accused ran away together after the shooting. The three accused were convicted on all the charges based on the doctrine of common purpose. There is no appeal against their conviction.
- [4] The accused were convicted of two counts of attempted murder, two counts of robbery with aggravating circumstances and one count of murder. Accused 4 was a minor when the crimes were committed. The accused were sentenced as follows:

- “a) Accused number 2 is sentenced to effective 15 years for count 5 murder, 10 years for count 1 and 2 attempted murder and 10 years for counts 3 and for robbery.
- b) Accused 3 is sentenced to effective 15 years for murder count 5, 10 years for count 1 and 2 attempted murder, 10 years for counts 3 and 4 robbery.
- c) Accused 4 is sentenced to 10 years for count 5 murder 5 of which will be suspended, 5 years for count 1 and 2 attempted murder, 5 years for count 3 and 4 robbery.
- d) All the sentences imposed upon the accused are to run concurrently.
- e) In terms of section 282 of the Criminal Procedure Act 51 of 1977 the sentences imposed upon the accused are antedated to the date upon which they were originally sentenced which is 24 April 2013.” Quoted without emendation.

[5] I assume that the learned judge took counts 1 and 2 as well as counts 3 and 4 together for sentencing purposes.

[6] Mr Reyneke, on behalf of the accused, submitted that the order in paragraph (e) above is incompetent.

[7] Section 282 of the Criminal Procedure Act 51 of 1977 reads as follows:

“Whenever any sentence of imprisonment, imposed on any person on conviction for an offence, is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on such person in respect of

such offence in place of the sentence of imprisonment imposed on conviction, or any other offence which is substituted for that offence on appeal or review, the sentence which was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction, be antedated by the court to a specified date, which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed, and thereupon the sentence which was later imposed shall be deemed to have been imposed on the date so specified.”

[8] It is clear that section 282 may not be utilised by a trial court. It may only be used when a sentence is substituted on appeal or review. The court *a quo* was not dealing with an appeal or a review. I agree that the order purportedly made in terms of section 282 ought to be set aside. The court *a quo* erred. We are at liberty to reconsider the sentence in light of the negative implications of setting aside paragraph (e) of the court *a quo*’s sentence.

[9] Mr Reyneke submitted that we should reduce all the periods with 3 years. The effect of his suggestion would be that accused 2 and 3’s sentences would be as follows:

Counts 1 and 2	7 years’ imprisonment
Counts 3 and 4	7 years’ imprisonment
Count 5	12 years’ imprisonment
In respect of accused 4 it would be	
Counts 1 and 2	2 years’ imprisonment
Counts 3 and 4	2 years’ imprisonment
Count 5	7 years’ imprisonment

of which half is suspended for 5 years.

We should then order that the sentences run concurrently and ante date them to the date of sentence.

[10] Mr Mthethwa, on behalf of the respondent, initially submitted that the sentences without the impugned order would still be appropriate. He however conceded that the court *a quo* wanted to give recognition for the time that the accused were in custody awaiting the finalisation of the trial.

[11] The court *a quo* was aware of the fact that the convictions on counts 3 and 5 triggered the provisions of section 51 of Act 105 of 1997. The court *a quo* however found that there were substantially and compelling circumstances which warranted the imposition of lesser sentences. Although the court *a quo* did not enter those circumstances on the record of the proceedings there is no appeal against that finding.

[12] The court *a quo* was also aware that imprisonment of a minor is a last resort and not a first choice. Mr Reyneke did not make any submission against the imposition of direct imprisonment in respect of accused 4.

[13] It is clear from the court *a quo*'s judgment on sentence that it wanted to ameliorate the cumulative sentences by subtracting the period that the accused spent in prison awaiting the finalisation of the trial. Mr Reyneke's suggestion that each of the periods should be reduced by three years

does not do justice to the court *a quo*'s intention. The court *a quo* determined the appropriate sentence for each count and that should be respected. It is therefore only the cumulative effect of the sentence that should be adjusted. That can be achieved by reducing the anchor sentence only.

- [14] The effect of setting aside the impugned order would be that the effective sentence of each of the accused would be increased by 2 years and 10 months. This would be unfair as it would rob them of a benefit which the trial court wanted them to enjoy.
- [15] The state did not appeal against the sentence and order. It was satisfied that the court *a quo* considered all the relevant factors. In my view the court *a quo* considered all the relevant factors but used a wrong tool in its attempt to repair an injustice.
- [16] As stated above, Mr Reyneke submitted that we should sentence the accused to the same effective periods as the court *a quo* did, less the awaiting trial period. He however urged us to deduct 3 years from the sentence instead of 2 years and 10 months. I agree. It is practical to round the period off. The time spent waiting for the finalization of the trial should not be the subject of an exact mathematical calculation. The merits of each case and the circumstances of each accused must be assessed in determining the extent to which the sentence should be reduced. The State and society would also not be substantially prejudiced by the

reduction of the sentence with a further two months. See *S v Vilakazi* 2012 (6) SA 353 (SCA) at paragraph 60 and *S v Radebe* [2014] JOL 31565 (SCA) at paragraph 13.

[17] The suspended sentence in respect of accused 4 should also be clarified and corrected because the sentence of the court *a quo* does not contain conditions of suspension or a period of suspension.

[18] I therefore make the following order:

Accused 2 and 3 are sentenced as follows:

Counts 1 and 2 are taken together for sentencing purposes - 10 years' imprisonment.

Counts 3 and 4 are taken together for sentencing purposes - 10 years' imprisonment

Count 5 – 12 years' imprisonment.

The sentences on counts 1 to 4 should run concurrently with the sentence on count 5. The sentences are antedated to 26 February 2016.

Accused 4 is sentenced as follows:

Counts 1 and 2 are taken together for sentence purpose – 2 years' imprisonment.

Counts 3 and 4 are taken together for sentences purposes- 2 year's imprisonment.

Count 5 – 10 years' imprisonment of which 8 years is suspended for 5 years on condition that the accused is not

convicted of murder or robbery with aggravating circumstances committed during the period of suspension.

The sentences on counts 1 – 4 to run concurrently with the sentence on count 5.

The sentence is antedated to 26 February 2016.

C. J. MUSI, J

I agree.

M. B. MOLEMELA, JP

I agree.

K. J. MOLOI, J

On behalf of the appellants:

Mr. J. D. Reyneke
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. S. Mthethwa
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

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