

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A229/2012

In the appeal between:-

SAMUEL MNYUKU

Appellant 1
(Accused 5 in the Court *a quo*)

TIKI NDLOVU

Appellant 2
(Accused 7 in the Court *a quo*)

SAMSON SEBOTSA

Appellant 3
(Accused 8 in the Court *a quo*)

SEZO (SERGIO) MANHLATHI

Appellant 4
(Accused 9 in the Court *a quo*)

PETRUS N NKUNA

Appellant 5
(Accused 10 in the Court *a quo*)

ANTON T MAYEMI

Appellant 6
(Accused 11 in the Court *a quo*)

and

THE STATE

Respondent

CORAM:

C J MUSI, J *et* MOLOI, J

HEARD ON:

25 FEBRUARY 2013

DELIVERED ON:

14 MARCH 2013

JUDGMENT

K.J. MOLOI, J

- [1] The appellants were convicted of theft of copper cable and sentenced each to 10 (ten) years imprisonment by the regional magistrate, Kroonstad. They come before us on appeal against the sentences only, leave having been granted by this court on petition. Appellant 1 was convicted of copper cable valued at R43 300,00 and appellants 2 to 6 of copper cable valued at R53 000,00.
- [2] The ground of appeal against the sentences of 10 (ten) years imprisonment in respect of all the accused is that the sentences were shockingly heavy and inappropriate. The State conceded that the sentences imposed were heavy, but not shockingly inappropriate. The State based its argument on the aggravating factors, such as the high amounts lost by the complainant (ESKOM); the fact that all the appellants were in employment at the time of the commission of the offences and were as such earning a living; the results of theft of copper cable inconvenienced the communities as the electricity cannot be reliably supplied; such thefts negatively affected the South African economy thus calling for deterrent sentences; the high incidence of theft of copper cable in Kroonstad accounts for 20% of the entire country and that it is very difficult to apprehend the perpetrators of such thefts. Furthermore, the commission of such offences may be fatal and is often planned as one needed special equipment to carry them out and is often committed by organised groups.

[3] On behalf of the appellants it was submitted that the trial court, in considering the sentences, failed to take into account the personal circumstances of each of the appellants.

- The first appellant was a 57 year old man and was a first offender; he was married and had minor children; he had been in custody for three months before he was released on bail on 19 August 2009.
- The second appellant was married and had one minor child. He was employed as a tiler earning R600,00 per week and was also a first offender. He was in custody for a period of two years and three months before he was sentenced.
- The third appellant was married and had two minor children. He was employed as a bricklayer earning R800,00 fortnightly. He was also a first offender. He was in custody for a period of two years and two months before he was sentenced.
- The fourth appellant was 37 years of age; married and had two minor children. He was employed as a bricklayer and earned R1 500,00 fortnightly. He was also a first offender. He had been in custody for two years and two months when he was sentenced.
- The fifth appellant was 45 years of age; married and had six children. He was employed as grass cutter and earned between R1 000,00 and R2 000,00 per month. He was in custody for two years and two months when he was sentenced. He had two previous convictions for theft and was sentenced to twelve months

imprisonment on 12 November 2004 and to twenty four months imprisonment on 13 April 2007, respectively.

- The sixth appellant was 35 years of age and is a Mozambique citizen who had lived in South Africa for the past ten years. He had a minor child in South Africa with a South African woman. He was employed and earned R3 400,00 per month. He was also a first offender. He was in custody for a period of two years and two months when he was sentenced.

[4] When dealing with the sentencing process and referring to the seriousness of the offence, the trial court stated that the offences were committed by an organised gang. On behalf of the appellants it was contended that no evidence supported that view. It was pointed out that all the appellants were acquitted on count one that related to the Prevention of Organised Crime Act (POCA) Act No 121 of 1998. The conviction of appellants 2 to 6 on count 9 suggested, however, a joint operation by a group of people.

[5] Our attention was drawn to the decisions of this court in the cases of **Mncuambe and Three Others v The State** decided under Case No A118/2010. In that case the appellants were convicted for theft of copper cable worth R18 000,00. Appellants 1, 2 and 4 were sentenced to 5 (five) years imprisonment and the third appellant to 6 (six) years imprisonment. An additional period of imprisonment of 2 (two) years was imposed and suspended for 5 (five) years on certain conditions. The differentiation in sentences was

brought about by the fact that appellants 1, 2 and 4 were in custody for 18 (eighteen) months pending trial whereas appellant 3 spent only 4 (four) months in custody before he was released on bail. We were also referred to **Matthews Mothusi Godla v The State** heard under Case No A98/2009 wherein the sentence of 6 (six) years imprisonment for theft of copper wire was confirmed. The value of the copper wire involved in that case appears to have been R30 000,00. In **Ernest Mogale v The State** under Case No 123/99 the appellant was sentenced to 6 (six) years imprisonment for theft of copper wire valued at R28 000,00 and that sentence was confirmed on appeal.

- [6] It is trite that the court of appeal should not lightly interfere with the sentencing discretion of the trial court. Only in limited instances will a court of appeal be entitled to interfere with the sentence imposed by a trial court. Those circumstances may be an improper exercise of the sentencing discretion by a trial court: **S v Anderson** 1964 (3) SA 494 (A) or where the sentence appealed against induces a sense of shock: **S v De Jager and Another** 1965 (2) SA 616 (A) or where the trial court exercised its discretion improperly or unreasonably: **S v Kibido** 1998 (2) SACR 213 (SCA). In referring to the period of detention before trial and sentence the trial court in this matter placed part of the reasons for the delay to proceed with the trial and subsequent sentencing process at the door of the appellants in that they sought legal representation. Legal representation being a fundamental right of every accused

person in terms of the provisions of section 35(2)(b) of The Constitution of South Africa Act No 108 of 1996, cannot be held against the appellants. Failure to recognise the principle laid down in **S v Stephen and Another** 1994 (2) SACR 163 (W) at 168e – g that “Imprisonment whilst awaiting trial is the equivalent of a sentence twice that length” is a misdirection or even an improper and unreasonable exercise of a sentencing discretion by the trial court, entitling this court to interfere with the sentence imposed.

- [7] In this matter the first appellant alone was convicted and sentenced on count 8 involving copper cable valued at R43 200,00. He was in custody awaiting trial for a period of 3 (three) months only. He was the oldest of the appellants at 57 years of age. He was released after he had paid bail. All the other appellants were in custody awaiting trial for a period of two years and three months in respect of appellant number 2 and all the other appellants for a period of two years and two months. Appellants 2 and 6 were convicted on count 9 being theft of copper cable valued at R53 000,00. All the appellants were first offenders, except the fifth appellant who had a relevant previous conviction. Whilst it may in certain circumstances be important to individualise and thus differentiate sentences depending on the criminal, it may also be wise not to do so in circumstances where the accused who were charged together, but are convicted of separate counts or where they were kept in custody pending trial for separate periods of time. This is so because sentencing is not based on mathematical calculations. But in

certain cases, it may not be wise to differentiate between those having previous convictions and those not. The essence is that a person is sentenced on a charge of which her/she is convicted and not those on which he had already been punished.

[8] In the premises the following is ordered:

- 8.1 The convictions are confirmed;
- 8.2 The appeal against the sentences is upheld;
- 8.3 The sentences of (10) year imprisonment imposed upon all the appellants on 12 January 2012 is set aside and replaced by the following:
- 8.4 Each appellant is sentenced to 10 (ten) years imprisonment of which 4 (four) years imprisonment is suspended for a period of 5 (five) years on condition that the appellant is not convicted of theft committed during the period of suspension.
- 8.5 The sentence in 8.4 above is ante-dated to 12 January 2012.

K.J. MOLOI, J

I concur and it is so ordered.

C.J. MUSI, J

On behalf of appellants: Mr D. Reyneke
Instructed by:
Legal Aid Board
BLOEMFONTEIN

On behalf of respondent: Adv E. Liebenberg
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

/sp