THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 84/14

In the matter between:

KHANGALE MARSHALL NNDANDULENI **FIRST APPELLANT**

MANYAGA PAUL RATSHILUMELA **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Nndanduleni v The State* (84/2014) [2016] ZASCA 51 (1 April 2016)

Coram: Leach, Zondi JJA and Plasket AJA

Heard: 17 February 2016

Delivered: 1 April 2016

Summary: Criminal Procedure – court a quo granted leave to appeal against conviction on some charges and refused leave on others – appellant applying for leave to appeal against conviction on those charges in respect of which leave was refused – appellants found guilty on the basis of common purpose – sentence – cumulative effect.

ORDER

On appeal from: Limpopo Local Division of the High Court, Thohoyandou, (Hetisani J sitting as court of first instance):

1. Leave to appeal is granted to the appellants in regard to the convictions in respect of which leave was refused in the court below.

1.1 The first appellant's appeal against conviction on count 1 and count 3 succeeds and his convictions on those counts and the sentences imposed pursuant thereto are set aside;

1.2 The first appellant's appeal against conviction on count 2 (attempted murder), counts 4 and 5 (robbery with aggravating circumstances) is dismissed.

1.3 The first appellant's appeal against sentence on count 2 (9 years' imprisonment) and count 4 (12 years' imprisonment) is dismissed;

1.4 The appeal against sentence on count 5 succeeds and the sentence imposed on that count is set aside and replaced with the sentence of 15 years' imprisonment.

1.5 It is ordered that the sentence on count 2 and 7 years of the12 years' imprisonment on count 4 are to run concurrently with the sentence of 15 years' imprisonment on count 5.

2.1 The second appellant's appeal against conviction on count 3 and count 5 succeeds and his convictions on those counts and the sentences imposed pursuant thereto are set aside.

2.2 The second appellant's appeal against conviction on count 1 (murder), count 2 (attempted murder) and count 4 (robbery with aggravating circumstances) is dismissed.

2.3 The second appellant's appeal against the sentences on counts 1, 2 and 4 succeeds and those sentences are set aside and replaced with the following:

2.3.1 Count 1: 20 years' imprisonment;

2.3.2 Count 2: 10 years' imprisonment;

2.3.3 Count 4: 15 years' imprisonment.

2.4 It is ordered that the sentences on count 2 and 10 years of the 15 years' imprisonment on count 4 are to run concurrently with the sentence imposed on count 1.

3. Under s 282 of the Criminal Procedure Act 51 of 1977, the above sentences are antedated to 17 March 2009, being the date sentence was imposed in the court a quo.

JUDGMENT

Zondi JA (Leach JA and Plasket AJA concurring):

[1] The two appellants were indicted in the Limpopo Local Division of the High Court, Thohoyandou (Hetisani J) on five counts, namely one count of murder (count 1), two counts of attempted murder (counts 2 and 3) and two counts of robbery with aggravating circumstances as defined by s 1 of the Criminal Procedure Act 51 of 1977 (counts 4 and 5) arising from the incidents which occurred on 22 and 23 February 2007 at Tshapasha-Uncle Taki's Eating House and Murengisa-Zwothe Eating House respectively. In relation to counts 1 to 4 it was alleged by the State that in committing the offences concerned, the appellants acted in furtherance of a common purpose.

[2] The first appellant pleaded not guilty to all of the charges and raised an alibi defence. He alleged that after his arrest he was assaulted by the police at Mutale police station resulting in him making a confession before a magistrate. In that event a trial-within-a-trial was held to determine the admissibility of his confession. Various police officers who were involved in his arrest, detention and interrogation and the magistrate who took down his confession testified. At the conclusion of the trial-within-a-trial the confession was ruled admissible whereafter the main trial proceeded. He was convicted of all of the charges and was sentenced as follows: 11 years' imprisonment on count 1; 9 years' imprisonment on count 2; 8 years' imprisonment on count 3; 12 years' imprisonment on count 4; and 22 years' imprisonment on count 5. Sentences on counts 1 - 4 were ordered to run concurrently with the result that effectively the first appellant would be required to serve 34 years' imprisonment.

[3] The second appellant also pleaded not guilty to all of the charges and raised an

alibi defence. He was convicted and sentenced as follows: 37 years' imprisonment on count 1; 14 years' imprisonment on count 2; 15 years' imprisonment on count 3; 20 years' imprisonment on count 4; and 17 years' imprisonment on count 5. Sentences on counts 1 - 4 were ordered to run concurrently with the effect that the effective sentence was 54 years' imprisonment.

[4] Thereafter the appellants applied to the court a quo for leave to appeal against conviction and sentences. The court a quo granted them leave to appeal against conviction on some of the charges and refused them leave on others. It, however, granted each appellant leave to appeal against all the sentences imposed. In view of the fact that the incidents giving rise to the charges concerned were intertwined and evidence interrelated, in order to facilitate the proper hearing of the appeal and in the exercise of its powers under s 17(1)(*b*) of the Superior Courts Act 10 of 2013, this court invited the appellants at the hearing of the appeal to apply for leave to appeal against conviction on those charges in respect of which leave was refused. They accepted the invitation. The State did not object thereto. It opposed the application for leave only on the basis that it had no reasonable prospect of success. The matter was then argued on the basis that an application for leave to appeal had been made and the court permitted argument on grounds of appeal on which leave was refused.[1]

[5] One further aspect requires mention. For reasons not stated in the record the second appellant was not charged with count 5 (robbery with aggravating circumstances) yet he was convicted and sentenced on that charge. This was a serious misdirection on the part of the court a quo. The second appellant's conviction and the sentence imposed pursuant thereto are irregular and must be set aside.

[6] It is common cause that on 22 February 2007 at about 20h30 two persons robbed Abel Takalani, an employee of Uncle Taki's Eating Place (the tavern) at gunpoint of R1000 in cash and a Motorolla cellular phone. Takalani identified the two appellants as the persons who robbed him. According to Takalani's evidence, on the day in question, the two appellants came to the tavern and bought a beer from him, which they drank at the veranda. The tavern was illuminated by an electric light and it was thus possible for

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1*Harlech-Jones Treasure Architects CC and Others v University of Fort Hare* 2002 (5) SA 32 (E) para 56; *S v Sefatsa & others* [1987] ZASCA 150; 1988 (1) SA 868 (A) at 877A-E.

him to identify them. He observed them for not less than 16 minutes while they were sitting at the veranda. Thereafter the second appellant walked in again and bought some more beer. He produced a R10 note for that purpose. As Takalani was busy preparing change for him, the second appellant pulled out a firearm and pointed it at him, demanding money from him. Takalani gave him all the cash he had in the till. At the same time, the first appellant who was also armed with a firearm joined the second appellant. The first appellant pointed a firearm at the two customers in the tavern and walked them to the storeroom. Takalani was similarly pushed into the storeroom. There the second appellant demanded more money from him. Takalani thereupon opened the safe and gave him all the money that was there. The two appellants locked Takalani and the two customers inside the storeroom and fled the scene.

[7] It is further common cause that in the early hours of 23 February 2007, three occurrences took place at Murengisa-Zwothe Eating Place in Mutale. Two armed suspects arrived there, one of whom fired a shot at the vehicle in which Oscar Tshikhomo and his two friends were sitting. The keys of the car were demanded from him before he was shot. According to Tshikhomo the same suspect who shot him proceeded to the bar lounge and fired shots. According to Reckson Tshivhase, who observed the occurrences at the bottle store while sitting under a Marula tree, the person who fired shots at the bar lounge was the second appellant. Tshivhase testified that Rudzani Mphephu (the deceased) and one Lutendo were playing cards at the veranda of the bar lounge when the two appellants arrived. The second appellant asked the deceased to come to him. When the deceased refused, the second appellant threatened to kill him. The second appellant fired shots at the wall. The deceased remonstrated with him and, addressing him by his nickname, Seven, said: ‘Seven, do not kill other people’. The second appellant however fired two shots at the deceased and killed him. After the shooting the second appellant approached Tshivhase and told him to leave. According to Tshivhase the first appellant, who was also armed with a firearm, was inside the bar lounge when the shooting incident at the veranda took place. Tshivhase’s evidence regarding the occurrences at the veranda of the bar lounge is corroborated by that of Lutendo. Lutendo had been sitting with the deceased when the second appellant terrorised them. He knew the second appellant as Seven and had known him for two months before the shooting incident.

[8] The third occurrence happened inside the bar lounge. Mr Phusuphusu Kwinda, the bar attendant testified that when he heard gunfire, he hurried to lock the main entrance security door. As he did so, the second appellant unexpectedly emerged and pointed a firearm at him. Kwinda ran back into the building and locked himself and his wife in one of the rooms while the appellants helped themselves to cash and liquor. When he later checked the till, he discovered that R1000 in cash was missing.

[9] The appellants were arrested on the strength of the information furnished by a police informer some two weeks after the offences had been committed. The first appellant was arrested by a team of detectives including Inspector Netshaulu, the investigating officer, Inspector Nemukula and Netshiavha on 12 March 2007 at Paradise Lounge in Thohoyandou. According to Netshaulu the first appellant was warned at the time of his arrest of the allegation against him and informed of his rights in terms of s 35 of the Constitution. After his arrest he travelled in a police vehicle with Nemukula and Netshiavha to Mutale police station where he was handed over to Captain Tshivhulungi for interrogation. During the interview, the first appellant indicated to Tshivhulungi that he was involved in the commission of the offences concerned and that he wished to make a confession. Netshaulu arranged for the first appellant to be taken for a confession to the magistrate, Mr Rambuda. Inspector Netshitongwe who was unconnected with the investigation of the case, took him to Mr Rambuda on 13 March 2007 at about 07h00. After introducing the first appellant to Mr Rambuda, Netshitongwe left him with Mr Rambuda and waited for him outside Mr Rambuda's office. Ms Siala interpreted for the first appellant from Venda to English and vice versa when a statement was taken from him. In that statement the first appellant implicated the second appellant. He alleged that a plan to rob Uncle Taki's Eating Place on 22 February 2007 and Murengisa-Zwothe Eating Place on 23 February 2007 was the idea of the second appellant and a certain Ndivhuwo. During the robbery at Uncle Taki's Eating House, he stood guard outside the premises while the second appellant robbed the place of cash. Some few minutes later the second appellant emerged from the building with money. Ndivhuwo joined them at the gate and they fled the scene.

[10] According to the first appellant's statement, after the commission of the first robbery, at the suggestion of Ndivhuwo, he and the second appellant went to rob Murengisa-Zwothe Eating Place. At the latter place the second appellant pulled out a

firearm and fired a shot on the wall. The second appellant had a verbal altercation with one of the customers sitting at the veranda. He shot him execution style. Thereafter the three of them got inside the bar lounge and helped themselves to liquor and cash. The second appellant gave the first appellant R300 in cash for his participation. As set out at the outset, the confession was ruled admissible.

[11] Counsel for the appellants submitted that the court a quo erred in ruling that the first appellant's confession was admissible in circumstances where it was clear from paragraph 5 of the standard form of the confession that the first appellant had wanted to consult with an attorney before making a statement. That request, the argument continued, was not honoured. He contended that the magistrate should have afforded the first appellant an opportunity to consult with his legal representative before taking down his confession and such failure, he argued, violated the first appellant's constitutional right and in consequence rendered his confession inadmissible. In support of this proposition he relied on *S v Soci* 1998 (2) SACR 275 (E); *S v Marx & another* 1996 (2) SACR 140 (W); *Director of Public Prosecutions, Transvaal v Viljoen* [2004] ZASCA 145; 2005 (1) SACR 505; *R v Wong Kam-Ming* [1979] 1 All ER 939; *S v De Vries* 1989 (1) SA 228 (A); *R v Dunga* 1934 AD 223 at 226.

[12] I disagree. In the standard form which served as Exhibit A in the court a quo, Mr Rambuda recorded that the first appellant was brought before him by Inspector Netshitongwe on 13 March 2007. Ms Siala interpreted for the first appellant from Venda to English and vice versa. The first appellant was inter alia asked the following questions:

'3. Are you aware that you have the right to be represented by a legal representative of your own choice or one paid at state expense at the time of making a statement?

Answer **Yes**

4. Do you know that you are entitled to consult with an attorney before deciding to make a statement?

Answer **Yes**

5. Do you now wish to make a statement on your own free will or would you like to be afforded an opportunity to go and engage or consult a legal representative before making a statement?

Answer **Yes**

6. Do you want to make a statement despite the fact that anything you say might be used against you at a subsequent trial?

Answer **Yes.**'

[13] In my view, the court a quo's ruling that the confession was admissible, was correct. The contents of paragraph 5 should not be read in isolation. They should be read together with the contents of paragraphs 3, 4 and 6 of the standard form and in light of Mr Rambuda's evidence. Mr Rambuda denied that the first appellant indicated to him that he wanted to first consult with his legal representative before making a statement. On a proper reading of the relevant paragraphs in the standard form it is clear that the first appellant was made aware that he was entitled to consult with an attorney before deciding to make a statement. He elected to do so on his own without the assistance of a legal representative. Thus understood, there is no basis for the contention that the admission into evidence of the first appellant's confession violated his constitutional right.

[14] At the conclusion of the main trial the appellants were found guilty on the basis that, in committing the offences concerned, they had acted in common purpose. The question that arises is whether this finding was correct. C R Snyman *Criminal Law* 6 ed (2014) at 257 points out that:

'The essence of the [common purpose] doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, then the conduct of each of them in the execution of that purpose is imputed to the others.'

It can be inferred from Kwinda's evidence that the appellants' common purpose was to commit robbery at Murengisa-Zwothe Eating Place. In this regard Kwinda, a bar attendant testified as follows:

'Yes I heard them talking while inside going from one place to the other saying that their purpose to be there was not to kill and therefore they should just take liquor and go away.'

[15] The question is whether the first appellant should be held liable for the killing by the second appellant of Rudzani. In my view, he should not. The court a quo erred in finding the first appellant guilty of murder. The shooting and killing by the second appellant of Rudzani, who was sitting and playing cards at the veranda and with whom the second appellant had a verbal altercation, is not conduct which may be imputed to the first appellant. In my view, it differs from what he and the second appellant had envisaged in their common purpose. A finding cannot be inferred from the evidence and especially from the first appellant's confession that the first appellant associated himself

in the murder of Rudzani,[2] or that he knew that the second appellant would kill someone, or foresaw the possibility that someone might be killed and reconciled himself to that possibility. Moreover, according to Tshivhase's evidence the first appellant was inside the bar lounge when the second appellant shot Rudzani at the veranda. In the circumstances the first appellant's appeal against conviction on count 1 should succeed.

[16] As far as the second appellant is concerned, he was correctly convicted of murder. The evidence of various witnesses placed him at the scene. He shot the deceased execution style. He had a direct intention to kill him.

[17] As regards the conviction of the appellants on count 2 (attempted murder of Tshikomo), the first appellant in his confession exculpated himself. He appeared to suggest in his confession that a third suspect, Ndivhuwo, may have been responsible for the shooting of Tshikomo because according to him when he (the first appellant) and the second appellant proceeded to the bar lounge, Ndivhuwo remained behind at Tshikomo's vehicle. This version is inconsistent with Tshikomo's evidence, which was that a suspect armed with a firearm confronted him and demanded the car keys from him before shooting him at point-blank range. Tshikomo further testified that the very same person moved 'towards the Bottle Store's gate. It was there . . . where he started shooting at the other person.' According to Tshivhase, the person who fired the shots at the veranda, was the second appellant – not an unknown person.

[18] To the extent that there is a discrepancy between Tshikomo's evidence and that of the first appellant regarding the identity of the person who shot him, I accept Tshikomo's evidence and reject that of the first appellant. Tshikomo was a truthful witness. Unlike the first appellant who may have had a motive to minimise his role and that of the second appellant in the commission of the offences, Tshikomo did not have such motive. He testified about the events as they unfolded around him. Tshikomo's evidence that the person who shot him was the same person who fired shots at the veranda, is also consistent with the evidence of Tshivhase. Tshivhase identified the second appellant as the person who fired shots at the veranda. The conclusion is therefore ineluctable that the person who shot Tshikomo is the second appellant and he did so with an intention to kill him. The first appellant's suggestion that Ndivhuwo was responsible for the shooting,

2*S v Thebus & another* [2003] ZASCA 12; 2003 (2) SACR 319 (CC) at 341 para 34.

is rejected.

[19] Tshikomo was shot at point-blank range on the right hip and the bullet got lodged on the pelvic wall. It can be inferred from this fact that the second appellant had the requisite intent to kill him. He was therefore correctly convicted of attempted murder of Tshikomo.

[20] The question is whether the conduct of the second appellant can be imputed to the first appellant. In my view, there exist sufficient objective facts from which an inference for the motive for the shooting of Tshikomo can be drawn. The appellants needed a get-away vehicle to use after the robbery. Tshikomo's vehicle happened to be at the scene. When the robbery of the bar lounge was carried out it would seem, based on Tshikomo's evidence, the second appellant was already in possession of Tshikomo's car keys. This is so, because after the robbery of the bar lounge, both the appellants ran to Tshikomo's vehicle to drive away from the scene. When the vehicle would not start, they left it and fled the scene on foot. The only reasonable inference is that the first appellant must have foreseen, and in fact did foresee, that they may have to get a vehicle to enable them to get away from the scene, and it was likely that they may have to use force, including a weapon, in the process. Tshikomo's evidence does provide the motive for the shooting. He testified as follows: 'What happened is that he opened the door of the driver's seat where I was seated, ... Having opened the door as such . . . it was then indicated that he wanted the key and he then shot me . . . on my waist yes'. The shooting of Tshikomo by the second appellant was conduct which was foreseen as a possibility by the first appellant. In my view, the State established that the first appellant was guilty of attempted murder on the basis of the furtherance of a common purpose with the second appellant.

[21] With regard to the charge of attempted murder of Isaac Ndou (count 3), I am not satisfied that the evidence adduced was sufficient to sustain a conviction on that charge. Prior to the shooting of Tshikomo someone ─ probably the second appellant ─ fired a shot through the back window of Tshikomo's car while Ndou was lying on the back seat. It is not clear from the evidence whether the second appellant had aimed at Ndou or for that matter, whether he was aware of his presence in the vehicle when he fired a shot at the vehicle. The appellants were entitled to the benefit of doubt and they should have

been acquitted on count 3.

[22] As regards the conviction on count 4 (armed robbery at Murengisa-Zwothe) the first appellant was correctly convicted. Besides his own confession which formed the basis of his conviction, there is also the evidence of Tshivhase which placed him at the scene. In relation to the second appellant he is placed at the scene by Tshivase and Lutendo. Lutendo had seen him before. These two witnesses had sufficient opportunity to observe the second appellant. The place was illuminated with an electric light. The witnesses were found by the court a quo to have been truthful and reliable. Their identification evidence was reliable. The appellants' conviction on count 4 is accordingly confirmed.

[23] As far as the first appellant's conviction on count 5 is concerned, I have no doubt on my mind that he was properly convicted. His conviction was based not only on his own confession which was ruled admissible by the court a quo, but also on the identification evidence of Takalani, the bar attendant at Uncle Taki's Eating Place, from whom the appellants bought some beer. Though they were not his regular customers, he had sufficient time to observe them while they were sitting at the veranda. They sat there for approximately 16 minutes before the second appellant came in again to buy some more beer. The area was illuminated with an electric light. Takalani's identification evidence was therefore reliable and his reliability as a witness, was unquestionable. It is unfortunate that the second appellant was not charged on count 5 as the evidence clearly demonstrated that both appellants in committing robbery acted in furtherance of a common purpose. In relation to the first appellant, the conviction is accordingly confirmed but, as I have already mentioned, in regards to the second appellant's appeal on this count must succeed.

[24] To sum up, as regards the murder charge (count 1), the court a quo erred in convicting the first appellant on this count. He should have been acquitted. It follows therefore that the sentence imposed pursuant thereto should be set aside. The second appellant was correctly convicted. With regards to the conviction on the charge of attempted murder (count 2) the appellants were correctly convicted.

[25] As regards the conviction on the charge of attempted murder (count 3) the court a

quo erred in convicting the appellants. The evidence adduced was insufficient to sustain the conviction on that charge and the appellants should have been entitled to the benefit of the doubt and should have been acquitted. The sentences imposed on this count should be set aside. As far as the conviction on a charge of robbery with aggravating circumstances is concerned, (count 4), the appellants were properly convicted. As regards the first appellant the evidence adduced in the form of his confession and by the eyewitnesses sufficiently established the conviction. With regard to the second appellant the evidence of the eyewitnesses placed him at the scene and his alibi defence was correctly rejected as being not reasonably possibly true.

[26] In relation to the conviction on the charge of robbery with aggravating circumstances (count 5), the first appellant was convicted on the basis of his confession and the evidence of Takalani, the eyewitness. He was correctly convicted. As regards the second appellant, the court a quo erred in convicting him on the charge to which he was not asked to plead. This constituted a gross misdirection on the part of the court a quo. Therefore the sentence imposed by the court a quo on the second appellant on this count, should be set aside.

[27] I turn to consider the appellants' appeal against the sentences. In the light of the conclusion I have reached regarding the first appellant's conviction on counts 1 and 3 it follows that the sentences imposed by the court a quo on those counts should be set aside. It therefore follows that the sentences which fall to be considered in this appeal are the following: 9 years' imprisonment on count 2; 12 years' imprisonment on count 4; and 22 years' imprisonment on count 5. It is not clear from the record whether the appellants were sentenced on the basis that the provisions of the Criminal Law Amendment Act 105 of 1997 were applicable to the charges concerned. There is no reference in the indictment to the provisions of that Act, nor is there any indication in the record that the appellants were forewarned that its provisions would apply upon their conviction. In the result in considering the appeal against sentences, I would do so on the basis that the sentences imposed were not subject to the provisions of that Act, which means that the court a quo had a discretion to impose any sentence it considered appropriate. The sentences were attacked on the grounds that they were shockingly harsh and disproportionate to the offences which the appellants were charged with and convicted of.

[28] The imposition of sentence is a matter falling pre-eminently within the judicial discretion of the trial court. The test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate.[3] The question is not whether the sentence was right or wrong, but whether the trial court in imposing the sentence exercised its discretion properly and judicially. As was correctly pointed out by this court in *S v Pillay* 1977 (4) SA 531 (A) at 535E-F:

'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.'

[29] In sentencing the first appellant the court a quo took into account his personal circumstances, namely that he was 23 years old, single and had one previous conviction of assault with intent to do grievous bodily harm. It also took account of the fact that the offences, of which he was convicted, were very serious and therefore called for severe punishment. With regard to the sentences of 9 years' imprisonment and 12 years' imprisonment imposed on counts 2 and 4 respectively, I cannot find any misdirection on the part of the court a quo. Firearms were used in the commission of the offences concerned. The offences were well planned and specific establishments were targeted. But be that as it may, it is the sentence of 22 years' imprisonment that was imposed on count 5 which raises concern. It is not clear from the record why a sentence of 22 years' imprisonment was imposed for the robbery committed on 22 February 2007, yet a sentence of 12 years' imprisonment was imposed for the robbery that occurred on 23 February 2007 having regard to their substantial similarity. In my view, the court a quo misdirected itself in that regard. A sentence of 15 years' imprisonment on each count of robbery should have been imposed. But since there is no appeal by the State against the sentence of 12 years' imprisonment on count 4, there is no reason to interfere with it. In the circumstances, the sentence of 22 years' imprisonment on count 5 should be set aside and be replaced with one of 15 years' imprisonment. The cumulative effect of these

3*Coetzee v S* [2009] ZASCA 134; [2010] 2 All SA 1 (SCA) para 13.

sentences is 36 years' imprisonment, but as reprehensible as the offences may have been, such a sentence is far too severe. Consequently, I would order that the sentences on count 2 and seven years of the 12 years' imprisonment imposed on count 4 should run concurrently with the sentence on count 5. What this means is that effectively the first appellant will serve 20 years' imprisonment.

[30] As regards the second appellant the only sentences which still merit consideration are those that were imposed on count 1 (37 years' imprisonment); count 2 (14 years' imprisonment); and count 4 (20 years' imprisonment).

[31] The second appellant was 32 years old, single with two dependants. He was self-employed. He had one unrelated previous conviction. Although the offences of which he was convicted are serious, I do not think the sentences imposed pursuant thereto were appropriate. Individually and cumulatively, the sentences are too severe. There does not appear that the court a quo considered that the offences were interrelated. This shows that the court a quo failed to exercise its discretion properly, which therefore justifies this court's interference with the sentence. I would reduce the sentences on count 1 to 20 years' imprisonment; on count 2 to 10 years' imprisonment and on count 4 to 15 years' imprisonment. To reduce their cumulative effect I would order that sentence on count 2 and 10 of the 15 years' imprisonment on count 4 should run concurrently, with the sentence on count 1. Accordingly, the second appellant will serve effectively 25 years' imprisonment.

[32] As mentioned above, this court allowed the appellants to apply for leave to appeal against the convictions in respect of which the court below had refused leave to appeal. The matter was then argued before us as if such leave had been granted, with counsel addressing the merits of all the convictions. In the light of this it is somewhat artificial to now refuse leave to appeal in respect of those convictions which lack merit. From a practical point of view it is best to grant leave to appeal in respect of those convictions.

[33] In the result I make the following order:

1. Leave to appeal is granted to the appellants in regard to the convictions in respect of which leave was refused in the court below.

1.1 The first appellant's appeal against conviction on count 1 and count 3 succeeds and his convictions on those counts and the sentences imposed pursuant thereto are set aside;

1.2 The first appellant's appeal against conviction on count 2 (attempted murder), counts 4 and 5 (robbery with aggravating circumstances) is dismissed.

1.3 The first appellant's appeal against sentence on count 2 (9 years' imprisonment) and count 4 (12 years' imprisonment) is dismissed;

1.4 The appeal against sentence on count 5 succeeds and the sentence imposed on that count is set aside and replaced with the sentence of 15 years' imprisonment.

1.5 It is ordered that the sentence on count 2 and 7 years of the12 years' imprisonment on count 4 are to run concurrently with the sentence of 15 years' imprisonment on count 5.

2.1 The second appellant's appeal against conviction on count 3 and count 5 succeeds and his convictions on those counts and the sentences imposed pursuant thereto are set aside.

2.2 The second appellant's appeal against conviction on count 1 (murder), count 2 (attempted murder) and count 4 (robbery with aggravating circumstances) is dismissed.

2.3 The second appellant's appeal against the sentences on counts 1, 2 and 4 succeeds and those sentences are set aside and replaced with the following:

2.3.1 Count 1: 20 years' imprisonment;

2.3.2 Count 2: 10 years' imprisonment;

2.3.3 Count 4: 15 years' imprisonment.

2.4 It is ordered that the sentences on count 2 and 10 years of the 15 years' imprisonment on count 4 are to run concurrently with the sentence imposed on count 1.

3. Under s 282 of the Criminal Procedure Act 51 of 1977, the above sentences are antedated to 17 March 2009, being the date sentence was imposed in the court a quo.

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D H Zondi
Judge of Appeal

Appearances

For the First and Second Appellant:	L M Manzini (Attorney) Instructed by: Thohoyandou Justice Centre, Thohoyandou Bloemfontein Justice Centre, Bloemfontein
For the Respondent:	A Madzhuta Instructed by: The Director of Public Prosecutions, Thohoyandou The Director of Public Prosecutions, Bloemfontein