IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.: CCT 308/20

In the matter between:

LIQHAYIYA TUTA Applicant

and

THE STATE Respondent

APPLICANT'S WRITTEN SUBMISSIONS
IN TERMS OF DIRECTIONS DATED 15 SEPTEMBER 2021

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I INTRODUCTION

1. This is an application for leave to appeal against the conviction and sentence of the applicant by the High Court (Bam J) on 9 September 2019.[1] The High Court convicted the Applicant on one count of murder and one count of attempted murder, and sentenced him to life imprisonment and 15 years' imprisonment on these two counts respectively.

2. These submissions are delivered in terms of the directions issued on 15 September 2021, and replace the written submissions delivered in terms of the Court's initial directions dated 10 February 2021.

3. The Applicant seeks leave to appeal against both conviction and sentence. In respect of conviction, the Applicant advances two principal grounds of appeal:

    3.1. First, it is submitted that specific irregularities in the trial prevented the Applicant of knowing the full ambit of the case against him and accordingly infringed his right to a fair trial in terms of section 35(3) of the Constitution; and

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[1] The High Court judgment is reported on SAFLII as *S v Tuta* [2019] ZAGPPHC 1059 and appears in Record Vol 2 pp 110-123 ('HC judgment').

3.2. Secondly, it is submitted that the trial court failed to apply the correct legal test to determine whether the Applicant's defence that he acted in putative private or self-defence was reasonably possibly true.

4. In respect of sentence, it is submitted that the sentencing court erred in its legal approach to the minimum sentencing legislation. The trial court treated one of the jurisdictional facts triggering a minimum sentence – that the deceased was a law enforcement agent – as an aggravating factor outweighing the acknowledged mitigating factors in the case. This is legally impermissible, effectively double-counting the jurisdictional fact and sterilising the constitutional 'safety valve' of substantial and compelling circumstances justifying departure from the prescribed minimum.

5. In the sections that follow, we briefly outline the factual background to the case; explain why the matter falls within the jurisdiction of this Court and that it is in the interests of justice to grant leave to appeal; address the grounds of appeal against conviction; and, in the alternative, explain why the sentence was constitutionally problematic.

II FACTUAL BACKGROUND

6. The central facts are not in dispute. Such factual disputes that arise are narrow and linked to the legal test applied by the trial court in rejecting the defence of putative private defence.

7. The Applicant's conviction arises from a tragic incident that occurred at or around 23h00 on 2 March 2018 in Sunnyside, Pretoria, that resulted in the death of Const Sithole and the serious injury of Const Magalefa.

8. On the night in question, the Applicant and a friend, Twanano Nkuna, were walking in Sunnyside, Pretoria. They were followed by an unmarked red Polo motor vehicle and ultimately chased by its occupants who were armed with firearms. The Applicant was caught, tripped, and pinned down. He resisted and stabbed both men. One died and the second was seriously injured. They were policemen, on duty and on patrol in plain clothes as part of 'Operation Fiela' to look for 'suspicious' activity. The surviving policeman testified that he believed that the Applicant had been carrying a suspected stolen laptop. No laptop was found and no one was charged in relation to a laptop. The applicant was charged and convicted of one count of murder and one count of attempted murder. His defence was effectively that he was unaware that the two men were policemen and

acted in fear for his life. The State disputed this version. We return to aspects of the events and the approach of the trial court to the conduct of the trial and key legal questions in relation to the grounds of appeal addressed below.

9. The High Court refused leave to appeal in a short judgment without substantive reasons.[2]

10. The Supreme Court of Appeal in turn also refused leave to appeal and the President of the SCA dismissed an application for reconsideration.[3] This application for leave to appeal accordingly lies against the original High Court judgment convicting and sentencing the Applicant.

III LEAVE TO APPEAL

11. It is submitted that this matter raises legal issues relating to the right to a fair trial, the correct legal test for the defence of putative private defence and the nature of the legal power of a court applying minimum sentencing legislation.

12. All of these issues have constitutional implications, particularly the first and last issues. In addition, all three issues raise arguable points

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2 Record Vol 2 p 124.

3 Record Vol 2 p 125.

of law of general public importance which ought to be considered by the Court.[4]

Leave to appeal against conviction

13. It is well-established that an appeal against conviction on the basis that the right to a fair trial has been infringed engages this Court's jurisdiction. This Court has confirmed that its constitutional jurisdiction applies to allegations of judicial bias,[5] undue delay,[6] and where the trial court relied on evidence for the first time in the judgment on conviction.[7] It is, of course, not sufficient simply to allege an irregularity. The irregularity relied upon must be "*sufficiently serious to undermine an accused's fair trial rights*."[8] It is also not ordinarily within this Court's jurisdiction to consider what amounts simply to an appeal on the facts in criminal matters,[9] but if this Court has jurisdiction and grants leave to appeal on important legal issues, it will decide the factual issues that underpin such questions. Even under this Court's constitutional jurisdiction before the 17th

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4 Section 167(3)(b)(ii) of the Constitution.

5 *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) para 21

6 *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at paras 21 and 28. Reiterated in *Van Heerden v National Director of Public Prosecutions* [2017] ZASCA 105; 2017 (2) SACR 696 (SCA) para 47

7 *Van der Walt v S* [2020] ZACC 19 020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC).

8 *Van der Walt v S* (n 7) para 15.

9 *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36; 2001 (1) SA 912. *Boesak* was decided before the 17th amendment expanded this Court's jurisdiction beyond constitutional matters.

amendment to the Constitution, this Court had confirmed that "*the application of a legal rule by the SCA may constitute a constitutional matter … if the application of a rule is inconsistent with some right or principle of the Constitution*."

14. Following the 17th amendment, this court will also enjoy jurisdiction if the application of a legal rule is of general public importance.[10]

15. It is submitted that the issues raised under the two grounds of appeal against conviction meet that threshold.

    15.1. The first ground of appeal concerns the interventions by the trial judge, in particular his curtailment of cross-examination of the Applicant by the prosecutor, with the effect that the State's case was not put to the Applicant on all issues.

    15.2. The second ground of appeal concerns the court's approach to the legal test for the defence of putative private defence. This is a constitutional issue to the extent that it engages the right to a fair trial, but is also undoubtedly a legal question of general public importance at the heart of our system of criminal justice.

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[10] *Ramabele v S; Msimango v S* [2020] ZACC 22; 2020 (11) BCLR 1312 (CC) ; 2020 (2) SACR 604 (CC) para 30.

Leave to appeal against sentence

16. Leave to appeal against sentence is not, without more, a constitutional issue and nor does it automatically raise an issue of general public importance under this Court's residual jurisdiction. More is required.

17. In *Bogaards*, this Court granted leave to appeal against sentence on the basis that the failure to give notice to the accused that the SCA was considering an increase of sentence potentially infringed his fair trial right under section 35(3) of the Constitution, raising a constitutional issue.[11]

18. This Court explained in *Bogards* that

> "*absent any other constitutional issue, the question of sentence will generally not be a constitutional matter. It follows that this Court will not ordinarily entertain an appeal on sentence merely because there was an irregularity; there must also be a failure of justice. Furthermore, this Court does not ordinarily hear appeals against sentences based on a trial court's alleged incorrect evaluation of facts. For instance, this Court will not, in the ordinary course, hear matters in relation to sentence merely because the sentence was disproportionate in the circumstances. Something more is required*."[12]

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11 *Bogaards v S* [2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC).

12 *Bogaards* (n 11) para 42. See also this Court's recent decision in *Van der Walt v S* (n 7), reaffirming and applying *Bogaards*.

19. In the present matter, it is submitted that the "*something more*" required to engage this Court's jurisdiction takes the form of the approach of the sentencing court to the minimum sentencing legislation, which approach is inconsistent with the Constitution.

20. In particular, the sentencing court's treatment of one of the jurisdictional facts triggering the application of a minimum sentence provision (here, that the deceased was a law enforcement agent) as an aggravating factor that outweighed mitigating factors and precluded a finding of "*substantial and compelling circumstances*" has serious constitutional implications. If left undisturbed, the approach of the sentencing court effectively negates the constitutional 'safety valve' of substantial and compelling circumstances that renders the minimum sentencing regime constitutionally compliant. In effect, the court's approach would make it impossible ever to find substantial and compelling circumstances in one of the prescribed offences.

21. In its directions dated 15 September 2021, this Court requested the parties to make submissions on the following question:

> *"In an appeal against the imposition of a prescribed minimum sentence, is the sentencing court's finding that no substantial and compelling circumstances existed to depart from the prescribed minimum sentence a matter of sentencing*

> *discretion in regard to which an appeal court's power to interfere is limited in the same way as it is when ordinary sentence is under appeal, or is it a value judgment in regard to which the appellate court may substitute its own assessment for that of the sentencing court?"*[13]

22. The question raised by the court regarding the nature of the sentencing court's power and its appealability raises a constitutional issue and also an issue of general public importance. It is a far-reaching question applicable to all similar cases and a decision on the issue will provide important guidance both to sentencing courts and appeal courts, as well as to litigants.

IV APPEAL AGAINST CONVICTION

23. The Applicant seeks leave to appeal against the conviction on two grounds:

    23.1. First, that the general conduct of the proceedings deprived the Applicant of a fair trial; and

    23.2. Secondly, that the Applicant ought to have been found not guilty on the basis that he acted in putative private defence.

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[13] Directions dated 15 September 2021 para 4.

First Ground of Appeal against Conviction: Fair Trial

24. It is submitted that the Applicant's right to a fair trial was violated by irregularities in the conduct of the trial that go to the heart of its fairness.

25. The Applicant does not persist with the complaint of judicial bias. We submit that the irregularities that have been identified demonstrate that the trial court failed to follow a fair procedure and to apply the correct legal test when it arrived at the conviction decision.

26. In the application for leave to appeal, the Applicant identified a broad range of interventions by the trial judge and aspects of the conduct of the trial. While their cumulative effect is relevant, at this stage the Applicant focuses on two specific irregularities.

27. In assessing the materiality of the irregularities, it is submitted that the serious nature of the charges must be borne in mind.

28. The irregularities take the form of interventions by the trial judge and conduct of the prosecutor that ultimately violated the principle articulated by this Court in *Molimi*, where it was held that "[t]he right

of the accused at all important stages to know the ambit of the case [she or he] has to meet goes to the heart of a fair trial".[14]

29. The Applicant was charged with murder and attempted murder. His defence, clearly stated at the outset, was putative private defence: in essence that he did not know that his armed assailants were policemen and that he believed his life was in danger and that he was lawfully entitled to defend himself. The onus was on the State to prove the Applicant's *mens rea,* including the subjective knowledge of the unlawfulness of his actions. In order to defend himself, the Applicant needed to know the State's case on this crucial point and on what evidence the state relied.

30. The manner in which the trial was conducted violated the *Molimi* principle in two material respects that directly contributed to the conviction. The first concerned an intervention by the judge; the second concerned the conduct of the prosecutor. The conviction was wrong in law and was influenced by these irregularities. Common to both incidents is that the Applicant did not ultimately adequately know the State's case on his state of mind or what evidence would determine this issue.

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[14] *S v Molimi* [2008] ZACC 2; 2008 (3) SA 608 (CC) ; 2008 (2) SACR 76 (CC) 2008 (5) BCLR 451 (CC) para 54.

31. The first irregularity that we address arose towards the end of the cross-examination of the Applicant by the prosecutor. At this point, the prosecutor had put to the Applicant that the two policemen had identified themselves as police (denied by the Applicant), but had not cross-examined the Applicant on intention. There followed this exchange between prosecutor (Ms Roos), trial judge and the Applicant:

> "*MS ROOS: Constable Magalefa said that the first time he saw you he followed you on foot and he was wearing his reflector bullet proof vest.*
>
> *ACCUSED: As I testified that the first time we saw this red Polo it was at the T Junction at Riley Street and the people that I saw, none of them was wearing a bullet proof vest.*
>
> *COURT: Ms Roos, is there any sense in confronting the accused with the state's evidence at this point in time, you know what his version is.*
>
> *MS ROOS: Yes, M'Lord, as long as there… [intervenes]*
>
> *COURT: Now move on please.*
>
> *MS ROOS: … is not an inference drawn from the fact that the state did not put it, M'Lord, then I can leave that, M'Lord.*
>
> *COURT: Yes.*"[15] (Underlining ours)

32. It is clear that the Applicant's testimony was that he did not know that the "*people that [he] saw*" were police since "*none of them was*

[15] Record Vol 1 p 88 lines 6-19

wearing a bullet proof vest." Because of the intervention, the Applicant was not informed whether the State's case was that he knew that the assailants were policemen (*dolus directus*), or that he foresaw that they could be policemen and acted regardless (*dolus eventualis*), or that he may not have known but should have foreseen that they were policemen (negligence).

33. Nor had the prosecutor taken a clear position on this during opening addresses. The summary of facts in terms of section 114(3)(A) of the Criminal Procedure Act 51 of 1977 ("CPA") simply described the encounter and recorded that "*the accused said that he was not aware that they were police officers*".[16] Despite charging him with murder, which requires *dolus*, and despite acknowledging the Applicant's sole defence being putative private defence, the State did not cross-examine the Applicant on his state of mind.

34. As illustrated by the decisions of the High Court[17] and the SCA[18] in *Pistorius*, in a case of putative self-defence this set of facts relating to the state of mind of the accused is determinative. It is not a fringe issue. It has major implications for conviction and sentence. The

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[16] Record Vol 4 p 235 para 4 of statement of facts.

[17] *S v Pistorius* [2014] ZAGPPHC 793.

[18] *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204; [2016] 1 All SA 346 (SCA); 2016 (2) SA 317 (SCA); 2016 (1) SACR 431 (SCA) ('*Pistorius (SCA)*').

determination of intention or negligence or no fault would mean conviction of murder, of culpable homicide, or acquittal. The determination of fault would also affect sentencing, as even the difference between *dolus directus* and *dolus eventualis* would be relevant to sentencing.

35. We address putative private defence directly under the second ground below, but here submit that the failure to put the State's case to the Applicant on his state of mind and the court's curtailment of cross-examination on this issue (while informing the state that the court would draw no adverse inferences against it) infringed the Applicant's right to a fair trial, specifically his right to know the case of the state on *dolus*.

36. The second irregularity concerned the reliance by the trial court in convicting the accused on rejection of evidence of the Applicant that was not put in dispute by the prosecution (or by the court itself) during the trial.

37. In *Van der Walt,* this Court upheld an appeal against conviction on the basis that the trial court relied on exhibits belately in the judgment, so that the accused did not know during his case that the exhibits would be relied upon against him. As Madlanga J explained for the unanimous court:

> "*Undeniably, a timeous ruling on the admissibility of evidence is crucial. It sheds light on what evidence a court may take into consideration and may even give an indication as to how much weight may be accorded to it. This enables an accused to make an informed decision on whether to close her or his case without adducing evidence or, where she or he does testify or adduce evidence, to adduce further evidence to controvert specific aspects of evidentiary material. Without a timeous ruling on all evidence that bears relevance to the verdict, an accused may be caught unawares at a stage when she or he can no longer do anything.*"[19]

38. It is submitted that the same principle applies to evidence of an accused that is received without dispute by the prosecution and court. If an accused testifies on facts directly related to his defence, and the evidence is not challenged, he is entitled to conduct his defence on that basis. There is a need for the prosecution to challenge the evidence, if disputed, and put the State's case on the point.

39. The relevant evidence concerned all that the Applicant did <u>after</u> the incident itself. The Applicant's evidence was that he sought help at two bars nearby, where he told the security guards what had happened; then returned home, where he told his friends and phoned his sister to tell her; and finally that he went to Sunnyside police station the following day to report the incident, accompanied by his sister.

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[19] *Van der Walt v S* (n 7) para 25.

40. The trial court rejected the Applicant's evidence on these events in the judgment on conviction:

> "*The unreasonable and strange conduct of the accused, that, on his version, after having been attacked, and injured, he reported the matter to three sets of security guards, his friends and sister, without success or effect, and not calling the police, well knowing that two men were seriously injured, and he himself having sustained an open wound during an incident where he was attacked. His explanation that it did not crossed his mind, was clearly not true, and to say the least, unbelievable. What exactly he wanted from the security guards he never explained. He obviously had a motive not to report to the police soon after the incident because, and this is inferential reasoning, he knew that he had attacked and stabbed the policemen. Although there is no onus on the accused, it has to be remarked that his version that he reported to three sets of security guards, and his sister, as well as his friends, and at the police station the next morning, where he received a cold shoulder, was not substantiated at all. The latter part of the version must be considered against the objective facts that the police, who were surely aware that two police officers were seriously injured the previous night in their jurisdictional area, were not prepared to open a docket concerning similar facts that very morning. This is totally improbable. The version of the accused as to what he did after the incident, instead of calling on the police, just did not make sense, keeping in mind that he is an educated man. The accused's conduct in not reporting to the police that night is damning to his version.*"[20]

[20] HC judgment para 21(ii).

41. The cross-examination of the Applicant on these events was comprehensive, covering the events chronologically.[21] Crucially, the prosecutor did not dispute the Applicant's testimony or put it to him that it was contrived. In particular, regarding his testimony that he attempted to open a docket at the police station the day after the incident, the prosecutor and the Applicant had the following exchange:

> "*MS ROOS: Sir, the next time when you went to the police at what time did you go to the police station?*
>
> *ACCUSED: Around between twelve and one.*
>
> *MS ROOS: The afternoon?*
>
> *ACCUSED: That is indeed so.*
>
> *MS ROOS: Why did you not immediately the next morning go to the police station?*
>
> *ACCUSED: I waited for my sister because I was… [indistinct] to off earlier on the premises by myself.*"[22]

42. It is clear from this exchange that the prosecutor did not challenge the Applicant's evidence that he and his sister had gone to the police station to report the incident and been told that no docket could be opened. At most, the cross-examination implies criticism of the Applicant for not going to the police sooner. But the important fact is

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21 Record Vol 1 p 84 line 19 to page 86 line 24.

22 Record Vol 1 p 86 lines 15-23.

that it is common cause that he went to the police on his own volition to report the matter. Indeed, the evidence of Const Magalefa was that he could never have identified the Applicant after the incident[23] and that he understood that he was arrested at Indwe, the student residence where he lived.[24] This evidence corroborated the Applicant's testimony that he had reported the incident first to the police station, identifying himself and providing his address.

43. Despite all this, the trial court found that the Applicant's unchallenged evidence that we went to report to the police was "*totally improbable*".[25] It is clear that the rejection of the Applicant's testimony on this point (and the Applicant's overall evidence on events after the incident) played a significant role in his conviction.

44. It is accordingly submitted that the Applicant's right to a fair trial in section 35(3) of the Constitution – and specifically to know the ambit of the case against him to be able to conduct his defence accordingly, implicating section 35(3)(a) and (i) – was violated. On this ground, the conviction falls to be set aside.

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23 Record Vol 1 p 20 lines 9-16.

24 Record Vol 1 p 43 lines 1-3.

25 HC judgment para 21(ii).

Second Ground of Appeal against Conviction: Putative Private Defence

45. The second ground of appeal is putative private defence. The Applicant concedes that there is no basis to contend that he was acting in self-defence per se, given the identity of the two persons involved in the incident as members of the SAPS. It is submitted that it is reasonably possibly true that the accused subjectively believed that he was acting in self-defence.

46. Murder is the unlawful and intentional killing of a human being. Where the killing meets the other elements but is not intentional, only negligent, the offence of culpable homicide is committed.

47. While the defence of private defence excludes the element of *lawfulness*, putative private defence excludes fault in the form of intention. As the Appellate Division explained in *De Oliveira*:

> "*The test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way (S v Ntuli 1975 (1) SA 429 (A) at 436E). In putative private defence it is not lawfulness that is in issue but culpability ('skuld'). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude dolus in which case liability for the person's death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide.*"[26]

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[26] *S v De Oliveira* 1993 (2) SACR 59 (A) 63i-64b.

48. If the putative private defence is also reasonable, it excludes fault in the form of negligence and therefore also precludes a conviction on culpable homicide.[27] In this matter, it is submitted that the belief of the Applicant was both genuine (excluding intention) and reasonable (excluding negligence).

49. Putative private defence is satisfied where the accused genuinely believes that that a defence excluding unlawfulness exists or that he or she is acting within the bounds of a legitimate defence, despite the fact that the accused exceeds the bounds of that defence.

50. The test for putative private defence to the charge of murder is subjective. It is concerned with what the accused *actually believed*, not what a reasonable person would have believed. It turns on the state of mind of the accused.

51. Putative private defence may be present where the attack was in fact lawful, but the accused thought it was unlawful,[28] or where the accused mistakenly believed that his life was in danger,[29] or that he

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27 On the relationship between intention and negligence, see *S v Ngubane* 1985 (3) SA 677 (A) at 686.

28 *S v Ntloko* 1912 EDL 402; *S v Schultz* 1942 OPD 56 at 60; *S v Ndara* 1955 (4) SA 182 (A) 184-5; *S v Botes* 1966 (3) SA 606 (O) 611; *S v Marshall* 1967 (1) SA 171 (O).

29 *S v Attwood* 1946 AD 331 at 340; *S v Hele* 1947 (1) SA 272 (E) 276; *S v Ngomane* 1979 (3) SA 859 (A).

was using reasonable means to avert the attack.[30] In such cases, the accused may nevertheless escape liability on the ground that he lacked the intention to act unlawfully.

52. The question of the accused's intention is one of fact to be determined by inference, which inference must be consistent with all the proved facts.[31]

53. The conclusion which is reached by the trial court, though it may find some evidence false or unreliable, must account for all the evidence.[32] It may not ignore evidence, and if it does so (whether by refusing to admit evidence or admitting and ignoring it), the "*judicial process becomes flawed*" and the appeal court may overturn the finding.[33] The appeal court is in as good a position as the trial court to draw inferences from proven facts, and may do so on appeal.[34]

54. The central question is whether the Applicant genuinely believed that the two people who confronted him were criminals attempting to rob

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30 *S v Tsutso* 1962 (2) SA 666 (SR); *S v Wassenaar* 1966 (2) PH H351 (T); *Ngomane* (n 29).

31 *Pistorius (SCA)* paras 34, 38.

32 *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449j-450c; *S v Mdlongwa* 2010 (2) SACR 419 (SCA) para 11.

33 *Pistorius (SCA)* para 36.

34 *Pistorius (SCA)* para 46.

or kidnap him or, as the State was required to prove, that he knew that they were members of the SAPS attempting to arrest him.

55. In the present matter, the full conspectus of facts from which the inference is to be drawn regarding the Applicant's subjective state of mind include facts *before* the relevant incident, the *incident itself*, and *subsequent* to the incident.

55.1. Regarding the facts <u>before</u> the incident, the following proven facts are material:

55.1.1. The Applicant had been robbed at gunpoint approximately a year previously.[35]

55.1.2. The area where the incident happened is crime-ridden and dangerous, and specifically (in the words of Const Magalefa) there are frequent hijackings often involving the use of firearms.[36]

55.1.3. These are facts that were known to the Applicant at the time. They provide the context for assessing his subjective state of mind.

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35 Put to only State witness (Const Magafela) in cross-examination and not disputed at Record Vol 1 p 47 line 19 to p 48 line 2. See also Pre-Sentencing Report of Criminologist Vol 3 p 196, confirming this robbery and two earlier violent traumas experienced by the Applicant as a child.

36 Testimony of Const Magalefa: Record Vol 1 p 3 lines 20-23; Vol 1 p 29 lines 18-20.

55.2. Concerning the incident itself, the following proven facts were material to the inference to the drawn:

55.2.1. The incident happened very close to where the Applicant lived, a UNISA student residence called 'Indwe'.[37]

55.2.2. The vehicle bore no SAPS markings but was an unmarked red Polo Sedan.[38]

55.2.3. The two SAPS members were wearing civilian clothing. They were also not carrying handcuffs, which they had left in the car.[39]

55.2.4. Const Magalefa was not wearing his bullet proof vest bearing the SAPS insignia when the altercation took place in which the Applicant was tripped, pinned down, restrained and ultimately struggled and stabbed the two SAPS members.

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37 Testimony of Const Magalefa: Record Vol 1 p 43 lines 13-15.

38 Testimony of Const Magalefa: Record Vol 1 p 3 lines 2-14; p 42 lines 15-17.

39 Testimony of Const Magalefa: Record Vol 1 p 45 lines 20-21.

55.2.5. Const Sithole alighted from the vehicle and tripped the Applicant, then pinned him to the ground. The Applicant asked "*What have I done to you?*" or words to that effect.[40]

55.3. It is submitted that the facts above relating to the incident itself are inconsistent with the inference drawn by the trial court. The trial court failed to have regard to the full conspectus of facts when drawing inferences regarding the state of mind of the Applicant.

55.4. Regarding events <u>after the incident</u>, the following proven facts are highly material to the inference regarding the Applicant's state of mind:

55.4.1. The Applicant immediately approached nearby venues for help, including approaching the security personnel at two nightclubs, and then returned to his residence, where he told his residence security, his friends and his sister what had happened to him. He told all of these people, consistently, that he had stabbed two men who had tried to rob him.[41]

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40 Testimony of Const Magalefa: Record Vol 1 p 38 line 23 to p 39 line 1.

41 Testimony of the Applicant: Record Vol 1 p 70 line 19 to p 72 line 19.

55.4.2. Const Magalefa confirmed that he could not have identified the Applicant after the incident. He "*did not know him from a bar of soap*".[42] The Applicant was arrested at Indwe (his student residence), apparently because he had presented himself to the police the day after the incident and provided his address.

55.4.3. The Applicant presented himself to the SAPS the morning after the incident to report it. He attempted to open a case at the Sunnyside police station, in the process identifying himself as the person involved in an incident that involved the stabbing of two men in a red polo, and providing his address.[43] The SAPS refused to open a case because he could not identify his assailants (the men who turned out to be Magalefa and Sithole) or provide the vehicle's registration number.

55.4.4. The Applicant co-operated fully following his arrest, including handing over the clothes that he had been wearing

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42 Record Vol 1 p 20 lines 9-16.

43 Testimony of the Applicant: Record Vol 1 p 73 lines 5-7.

the previous night, making a full statement to the police and conducting a pointing out.[44]

55.4.5. The Applicant was granted bail, including requiring him to report to the police twice a week, which he did without fail until his trial.[45]

55.4.6. At trial, the Applicant made extensive formal admissions in terms of section 220 of the CPA, including admitting that he had stabbed Constables Sithole and Magalefa and that this was the cause of death and injury, respectively.[46]

56. It is submitted that the facts before, during and after the incident set out below do not support the inference that the Applicant knew that his assailants were undercover police. To the contrary, the proven facts above contradict such an inference.

57. Regarding the facts <u>after</u> the incident, as set out under the First Ground of Appeal above, the trial court rejected the Applicant's version that he had told security guards in the vicinity and at his residence, his friends and his sister, about the incident and that he had attempted to report it to the police the next day. However, <u>none</u>

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44 HC judgment para 4(ii).

45 Testimony of the Applicant: Record Vol 1 p 89 line 4 to p 90 line 2.

46 HC judgment para 4(i).

of these facts were disputed by the State in cross-examination of the Applicant. The Prosecutor asked the Applicant about these events and the Applicant effectively repeated his evidence-in-chief, which was never challenged by the Prosecutor, who simply moved on.[47] No other evidence was adduced by the State that is inconsistent with the Applicant's version regarding events after the incident.

58. In the circumstances, the trial court had no basis to reject or disregard this evidence. Had the State disputed the evidence and put it to the Applicant that he was lying, he would have had the opportunity to call further witnesses and adduce further evidence to corroborate his version. For instance, he could have called his sister to testify. As the State appeared to accept his evidence in this regard, there was no reason for him to call witnesses on these issues.

59. In the circumstances, the trial court committed an error of law by disregarding or rejecting the evidence of the Applicant regarding events after the incident. The Applicant's uncontested evidence in this regard was material, and is inconsistent with the inference that he knew that his assailants were police.

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47 Record Vol 1 p 84 line 19 to page 86 line 24.

60. The trial court finding essentially rested entirely on the testimony of Const Magalefa, and specifically on his testimony that the Applicant was carrying a laptop and that he and Const Sithole expressly identified themselves as police when they confronted the Applicant. Both allegations were entirely uncorroborated and contested by the defence.

60.1. No laptop was ever located and both defence witnesses denied that the Applicant was carrying a laptop.[48] The Applicant owns a laptop, which at all times was in his student accommodation room.[49] The trial court erred in finding that the State had no duty to put evidence to identify where a laptop may have been stolen that evening or where the alleged laptop went after the incident.

60.2. The Applicant[50] and the second defence witness[51] both testified that the two Constables were not wearing police bullet proof vests and did not identify themselves as police, both initially when the vehicle approached them and then later when

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48 Testimony of Applicant: Record Vol 1 p 75 lines 9-10; testimony of Nkuna Record Vol 1 p 93 lines 13-18.

49 Record Vol 1 p 75 lines 3-5.

50 Record Vol 1 p 75 lines 9-11 and p 60 line 12 to p 65 line 10.

51 Testimony of Nkuna: Record Vol 1 p 95 lines 7-16.

the Applicant was tripped and pinned down. The trial court rejected the evidence of two witnesses on this issue, preferring the version of Const Magalefa for the sole reason that this was the police version. In effect, the approach of the trial court is that it is not reasonably possibly true that two constables would fail to follow required protocol of shouting "police, stop"; and that it is not reasonably possibly true that a police witness might be dishonest or unreliable.

61. It is submitted that it is reasonably possibly true that the Applicant subjectively did not believe that Constables Magalefa and Sithole were SAPS members operating in plain clothes. In the language of *Pistorius*, the Applicant's belief was "*rational but mistaken thought*".[52] The State failed to prove that it was not reasonably possibly true that the Applicant genuinely believed himself to be in danger.

62. The High Court judgment reflects a presumptive preference for the evidence of a member of the SAPS as against that of an accused. The High Court's attitude is reflected in several aspects of the judgment, including:

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[52] *Pistorius (SCA)* para 53, citing *De Oliveira.* Rationality is not required, but supports the drawing of an inference that the belief was genuine.

62.1. The concern that the High Court legitimately expressed at the high rates of violent attacks on members of the SAPS;

62.2. The finding that it was "*absolutely implausible*" that the two policemen would have addressed the Applicant and Nkuna in a "*strange language and insulted them*" – this despite the fact that Const Magalefa's preferred language was Setswana[53] and the Applicant is Xhosa-speaking,[54] and despite testimony of both witnesses to this effect, which was consistent and detailed, including an intervention by the interpreter explaining that the word identified by the Applicant may have been in Sotho, Tswana or Sepedi;[55]

62.3. The finding that it was improbable that

> "*the two experienced policemen on patrol duty on a specific mission and purpose, would, without rhyme or reason, attack an innocent pedestrian, after having addressed and insulted him twice in a strange language, and not with the standard and regulatory warning 'Police – stop'*."[56]

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53 Record Vol 1 p 1 line 23.

54 Record Vol 1 p 55 line 9.

55 Record Vol 1 p 78 lines 12-24.

56 HC judgment para 21(i).

62.4. The finding that it was improbable that the Sunnyside police station were not prepared to open a docket when the Applicant attempted to report the incident the following morning.[57]

63. In effect, the High Court treated it as presumptively improbable that the police might not follow standard police protocol. The High Court in the process misrepresented the Applicant's version as being that the

> "*two policemen, patrolling the crime ridden streets of Sunnyside, without rhyme or reason, pursued two innocent pedestrians, and violently, without having identified themselves as policemen, attacked the accused, justifying his retaliation to stab the two policemen with his knife in self-defence.*"[58]

64. In fact the Applicant never denied that the two policemen were operating undercover or that they were, subjectively, suspicious of the Applicant and his friend and attempting to arrest them. His version was that he never knew that the two men were policemen at the time, that there was nothing to identify them as police and that they did not identify themselves as police by the time he resisted.

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57 HC judgment para 21(ii).

58 HC judgment para 14.

65. As a matter of logic, there are three possibilities regarding this central dispute of fact:

65.1. First, it is logically possible that the two policemen indeed shouted “police, stop!” and that the Applicant heard them;

65.2. Secondly, it is possible that that they did not, and that Const Magalefa was mistaken or inaccurate in this regard;

65.3. Thirdly, it is possible that the policemen did use the word “*police*” at some stage during the pursuit but that the Applicant either did not hear or was too scared to realise it (in other words, that both witnesses believe themselves to be telling the truth).

66. All of these versions are logically plausible. However, the High Court’s approach to presumptively accept the testimony of a single police witness foreclosed consideration of the other possibilities. While the High Court *claimed* at the outset that it would be considering all the evidence ‘*holistically’*,[59] it did not do so. It rather started with the evidence of Const Magalefa and, having concluded that it was satisfactory, proceeded to reject or disregard all the other evidence (much of which was common cause). In doing so, the High Court failed to apply the correct legal test to determine whether the defence of putative private defence was reasonably possibly true.

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59 HC judgment para 13.

67. This matter is distinguishable from *Pistorius* on a number of salient grounds, including:

    67.1. Whereas in *Pistorius* the potential threat was a person behind a bathroom door, in this matter the threat (from the Applicant's perspective) was two men who pursued and physically assaulted the Applicant;

    67.2. In this matter, the two "assailants" were armed with firearms, whereas in *Pistorius* the accused had no basis to believe that the person he considered an intruder in the bathroom was armed;

    67.3. The Applicant in the present matter employed a knife, being the only means at his disposal and – though potentially lethal – proportionate to the firearms borne by the two men he understood to be assaulting him, whereas in *Pistorius* the accused used a powerful firearm on a potentially unarmed would-be intruder;

    67.4. The Applicant had no alternative means of resisting the two armed men save for resorting to using the knife.

68. The trial court failed to consider the full conspectus of proven facts in drawing its inference that the Applicant did not genuinely believe himself to be assailed by criminals, and therefore committed an error that this Court on appeal is enjoined to reverse.

V APPEAL AGAINST SENTENCE

69. In the event that the appeal against conviction fails, the Applicant appeals against the sentence of life imprisonment on count 1 (murder) and 15 years on count 21 (attempted murder) imposed on him.

70. The High Court held that count 1 triggered the mandatory minimum sentence of life imprisonment for the murder of a law enforcement official.

71. Section 51(1) of the Criminal Law Amendment Act 105 of 1997 read with Schedule 2, Part I, provides that, for murder of "*a law enforcement officer performing his or her functions as such, whether on duty or not*", a regional court or high court shall impose a sentence of imprisonment for life. This is the highest or strictest category of minimum sentences in the regime.

72. The High Court accepted that mitigating factors included the Applicant's youth (21 years and 3 months at the time of the offence), that he is a first offender and that the crimes were not premeditated.[60] However, the High Court held that these mitigating circumstances were outweighed by the "*overwhelming*" aggravating

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60 HC judgment on sentencing para 12.

circumstances.[61] The High Court further found that the Applicant showed no remorse because he maintained his innocence.

73. The High Court accordingly found that there were no substantial and compelling circumstances to justify a departure from the minimum sentence of life imprisonment on count 1.[62]

74. The High Court's reasoning justifying the 15 year sentence for count 2 (attempted murder) is thin,[63] but the Court seemingly relied on the same analysis of mitigating and aggravating circumstances.

The nature of the minimum sentencing discretion and appealability

75. As noted above, this Court specifically raised the nature of the sentencing court's discretion under the minimum sentencing legislation, and its appealability, in the directions dated 15 September 2021.

76. In summary response to the Court's question: It is respectfully submitted that the imposition of a sentence under mandatory minimum sentencing legislation is not a 'true discretion' insulated from interference on appeal. This is so because of the application of a legislative mandatory minimum sentence threatens the

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61 HC judgment on sentencing para 13.

62 HC judgment on sentencing para 15

63 HC judgment on sentencing para 17.

constitutional right to a fair trial and, although the regime itself has been held to pass constitutional muster, its application in specific cases threatens constitutional rights. Where the sentencing court misapplies the legislative provision in a way that infringes constitutional rights, a court on appeal is enjoined to intervene. We develop this submission in the context of the jurisprudence on the constitutional implications of the regime.

77. The mandatory minimum sentence regime attracted constitutional concern as it implicates, in particular, the right to a fair trial in section 35.[64]

78. This Court held in *S v Dodo* that the provisions of sections 51, 52 and 53 do not breach the right to a fair trial, in particular the right to a fair trial before an ordinary court under s 35(3)(c) of the Constitution.[65] This Court declined to confirm a High Court order of invalidity in respect of the new sentencing regime, and in the process endorsed[66] the "*operational construction*" developed by the SCA in *S v Malgas* to apply the "*substantial and compelling circumstances*" proviso in section 51(3)(a), which authorises courts to depart from the

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64 In *S v Dzukuda & others; S v Tshilo* 2000 (2) SACR 443 (CC), this Court declined to confirm an order of invalidity made by the High Court in respect of the since-repealed section 52 of the regime. Section 52 required regional courts that convicted of crimes covered by section 51 to commit the accused to the High Court for sentencing.

65 *S v Dodo* 2001 (1) SACR 594 (CC).

66 *S v Dodo* (n 65) para 11.

prescribed minima. The SCA's ten-principle guideline in *S v Malgas* was as follows:

> *"A Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).*
> *B Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.*
> *C Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.*
> *D The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.*
> *E The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.*
> *F All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.*
> *G The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as*

cumulatively justify a departure from the standardised response that the legislature has ordained.
H In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.
I If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
J In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided."

79. In *S v Dodo*, this Court effectively concluded that the *Malgas* approach to 'substantial and compelling circumstances' saved the minimum sentencing provisions from unconstitutionality:

> *[40] On the construction that Malgas places on the concept "substantial and compelling circumstances" in section 51(3)(a), which is undoubtedly correct, section 51(1) does not require the High Court to impose a sentence of life imprisonment in circumstances where it would be inconsistent with the offender's right guaranteed by section 12(1)(e) of the Constitution. The whole approach enunciated in Malgas, and in particular the determinative test articulated in paragraph I of the summary,5[9] namely:*
>
> > *'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by*

> *imposing that sentence, it is entitled to impose a lesser sentence',*
>
> *makes plain that the power of the court to impose a lesser sentence than that prescribed can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross. Thus the sentencing court is not obliged to impose a sentence which would limit the offender's section 12(1)(e) right. Accordingly section 51(1) does not compel the court to act inconsistently with the Constitution.*"[67]

80. Key to the constitutionally compliant exercise of the sentencing power under section 51, therefore, is the correct approach to whether substantial and compelling circumstances are present. If such circumstances, being present, are ignored by the sentencing court, the effect will be a disproportionate sentence that offends against section 12(1)(e) of the Constitution.

81. In *Centre for Child Law v Minister of Justice and Constitutional Development* & others (National Institute for Crime Prevention and the Re-integration of Offenders, as Amicus Curiae) 2009 (2) SACR 477 (CC),[68] this Court did uphold a later constitutional challenge to sections 51(1), (2), (5)(b) and (6) of Act 105 of 1997, on the basis that that it the application of these provisions to persons who were under

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67 *S v Dodo* (n 65) para 11.

68 *Centre for Child Law v Minister of Justice and Constitutional Development (National Institute for Crime Prevention and the Re-integration of Offenders, as Amicus Curiae)* 2009 (2) SACR 477 (CC).

the age of 18 at the time of an offence was inconsistent with the Constitution. We return to the issue of age in the context of the Applicant below.

82. As this Court anticipated in *S v Dodo*, the guidelines from *S v Malgas* have been applied and refined in later cases. It is submitted that the finding of the absence of substantial and compelling circumstances is appealable, given the implications of this constitutional 'safety valve' for the constitutionality of the minimum sentencing regime.

Substantial and compelling circumstances are present

83. It is respectfully submitted that the sentencing court erred in relying on the identity of the victim as a law enforcement agent and the circumstances of the death as aggravating circumstances. These facts are the jurisdictional requirements of the minimum sentencing provision and are already taken into account by section 51 in triggering the mandatory minimum. To then rely on the fact that the victim was a policeman in aggravation a second time is tautologous and constitutes an error of law.

84. It is submitted that – once the court had found that murder of a law enforcement agent was committed – there were *no* aggravating circumstances established. Accordingly, the question was whether

the mitigating circumstances accepted by the court constitute substantial and compelling circumstances so as to justify departure from the mandatory minimum sentence. It is submitted that they do.

85. We briefly address the key mitigating factors of youth, first offence and lack of premeditation, as well as addressing the sentencing court's finding on lack of remorse and its failure to treat the two counts cumulatively.

Youth

86. That an accused is relatively young has always been accepted as a mitigating factor in sentencing. In *S v N*, the SCA reaffirmed that youth is an important mitigating factor and acknowledged that youth is often associated with "impulsiveness", which should be understood in sentencing.[69] This Court specifically confronted the application of mandatory minimum sentences and youth in *Centre for Child Law v Minister of Justice*, where it struck down the application of the legislation to children (people below the age of 18 at the time of the offence).[70] The Applicant was 21 years and 3 months old at the time

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69 *S v N* 2008 (2) SACR 135 (SCA) paras 37-38.

70 *Centre for Child Law v Minister of Justice* (n 68).

of the incident. Though not a child, he had barely attained majority. He was a student in the second year of the LLB.

87. Although the High Court in sentencing accepted that the Applicant's young age was a mitigating factor, it also stated:

> "*There seems to be a tendency that young people are more and more involved in cases where the victims were mercilessly killed. It is a common phenomenon that men of the accused's age commit serious crimes with total disregard of the sanctity of human lives*."[71]

88. In effect, the High Court appears to have treated the perceived "tendency" of young people to commit violent crimes as an aggravating factor. It is not. It is one of the most weighty and significant mitigating factors relevant to sentencing in any case.

<u>First offence</u>

89. Secondly, and relatedly, the Applicant was convicted of first offences. This ought to have weighed heavily in mitigation.

90. We address below the related point that the two counts arose from a single incident and that the cumulative effect of the sentences was required to take this into account.

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71 High Court judgment on sentence para 8.

Lack of premeditation

91. In addition, there was plainly no premeditation or planning on the part of the Applicant. While it is disputed that the Applicant was holding a suspected stolen laptop,[72] Constables Sithole and Magalefa also cannot be faulted for being out on the street in plain clothes and unmarked vehicle on the lookout for 'suspicious' activity, as this was their order under Operation Fiela.

92. The incident arose as a result of the policing operation that directed policemen to operate in plain clothes and confront "suspicious" persons. This Court recently confronted the risks to private persons (and indeed to the police) occasioned by warrantless searches of homes under the South African Police Service Act, striking down the offending provision.[73] Similarly, in the context of policing the COVID-19 pandemic, the High Court in *Khosa* confronted the lack of guidance provided to police and the South African National Defence Force and intervened to order that such guidance be put in place.[74]

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72 The only evidence of a laptop was Const Magalefa's testimony. No laptop was recovered and neither the Applicant nor Nkuna was ever charged with theft or possession of stolen property.

73 *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* [2021] ZACC 37.

74 *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* [2020] ZAGPPHC 147; 2020 (7) BCLR 816 (GP); [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461 (GP).

93. Although the present matter is not a constitutional challenge to the legal framework or operational plans under which the relevant policing operation took place, the same constitutional concerns are relevant to the context in which the incident took place. Policing operations directed at roving the streets for ‘suspicious’ activity put police and predominantly poor, black residents of urban areas at risk.

Remorse

94. Regarding remorse, it is correct that the Applicant has asserted his innocence and not expressed remorse in the sense of accepting that his conduct was wrong in law. It is not correct, however, that he has failed to express remorse for the death of Const Sithole and the injury to Const Magalefa. At all stages after the incident, the Applicant admitted his role in their death and injury, respectively, including when attempting to report the incident to the police and in his subsequent statement, pointing out, formal admissions at trial and testimony. In this respect, the Applicant has indeed expressed remorse at all times since the incident.

Cumulative nature of counts

95. Finally, the High Court erred in effectively treating the two counts (murder and attempted murder) as entirely separate for the purpose

of sentencing. As the court in *S v Schrich* held, where counts arise in substance from a single incident, the cumulative effect of sentences on separate counts should be taken into account and assessed against that single incident.[75] Where the cumulative effect of sentences arising from one incident is too harsh and disproportionate, an appeal court is enjoined to intervene.[76]

96. It is submitted that the sentencing court ought to have ordered sentences on the two counts to run concurrently.

VI CONCLUSION

97. It is accordingly submitted that it is in the interests of justice to grant leave to appeal.

98. On the merits, the appeal falls to be upheld and the conviction set aside.

99. In the further alternative, the sentence should be set aside and replaced with a reduced sentence on each count, to run concurrently.

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75 *S v Schrich* 2004 (1) SACR 360 (C). The case concerned six counts of attempted murder under the minimum sentencing regime (before it was amended to remove attempts). The counts of attempted murder arose out of one incident, involving vigilante action during which the appellant and cohorts fired upon an intended victim, injuring six of his guests, but missing him.

76 *S v Maseola* 2010 (2) SACR 311 (SCA) para 20.

Tembeka Ngcukaitobi SC

Jason Brickhill

Applicant's Counsel

Chambers, Johannesburg, 15 November 2021

APPLICANT'S TABLE OF AUTHORITIES

Constitution and legislation

Constitution of the Republic of South Africa, 1996

Criminal Procedure Act 51 of 1977

Criminal Law Amendment Act 105 of 1997

Case law

Bogaards v S [2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC)

Centre for Child Law v Minister of Justice and Constitutional Development (National Institute for Crime Prevention and the Re-integration of Offenders, as Amicus Curiae) 2009 (2) SACR 477 (CC)

Director of Public Prosecutions, Gauteng v Pistorius [2015] ZASCA 204; [2016] 1 All SA 346 (SCA); 2016 (2) SA 317 (SCA); 2016 (1) SACR 431 (SCA)

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S v Wassenaar 1966 (2) PH H351 (T);

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case number: CCT 308/2020

SCA 26/2020

NGP : CC15/2019

In the matter between:

LIQHAYIYA TUTA **APPLICANT**

and

THE STATE **RESPONDENT**

FILING NOTICE

KINDLY TAKE NOTICE THAT the Respondent hereby files the following documents:

Heads of Argument as required per the Instruction dated 28 January 2022.

DATED AT PRETORIA ON THIS 2nd DAY OF FEBRUARY 2022.

dp/o Aroos.

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AND TO: THE REGISTRAR OF THE HIGH COURT: GAUTENG
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AND TO: MARWESHE INC
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REF : MW Marweshe/Cri-Tuta-L

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case number: CCT 308/2020

SCA 26/2020

NGP :CC15/2019

In the matter between:

LIQHAYIYA TUTA **APPLICANT**

and

THE STATE **RESPONDENT**

RESPONDENT'S ADDITIONAL HEADS OF ARGUMENT IRO THE DIRECTIVES ISSUED ON 28 JANUARY 2022

INTRODUCTION :

1. The parties were directed to file written submissions on 28 January 2022, with specific reference to two cases, to wit Homareda[1] and GK[2].

2. The question that now arises is whether the finding of a trail court that there were no substantial and compelling circumstances to deviate from the minimum sentence is a matter of sentencing discretion, or a value judgment. In various cases (referred in the respondent's main heads of argument) courts have found that section 51[3] allows the sentencing court a discretion. It should be noted that both these matters are matters where courts of appeal decided to interfere with the sentences imposed and were therefor not the courts of first instance.

3. **S v HOMAREDA**[4]

3.1 In this matter[5] Cloete J summarized the approach the court should follow when exercising the discretion as bestowed by section 51[6] upon a court when deciding on an appropriate sentence as follows:

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[1] 1999 (2) SACR 319 (W)
[2] 2013 (2) SACR 505 (WCC)
[3] Section 51(3) of Act 105 of 1997
[4] supra
[5] Page 325 paragraphs G – J and Page 326 paragraphs A - D
[6] Act 105 of 1997

"(1) The starting-point is that the prescribed minimum sentence must be imposed.

(2) It is only if a court is satisfied ***(discretion)*** *that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, that it may do so. (Own insert and emphasis.)*

(3) In deciding whether substantial and compelling circumstances exist, each case must be decided on its own facts. The Court is required to look at all factors - mitigating and aggravating - and consider them cumulatively. (Value judgment.)

(4) If the Court concludes in a particular case that the minimum prescribed sentence is so disproportionate to the sentence which would have been appropriate - bearing in mind that the Legislature perceives the necessity for sentences emphasising the deterrent component, but equally bearing in mind that this does not necessarily lead to an automatic increase of sentences previously imposed - it is entitled to impose a lesser sentence. If the Court is of the view that application of this test would result in the imposition of a sentence less than the prescribed minimum in most cases, it should set in train the process necessary for the Constitutional Court to adjudicate

upon the constitutionality of the legislation in question." (Apportionability test).

3.2 The court then in addition to what is set out above states:

"There is a further aspect which must be mentioned where a Court is sitting as a Court of appeal.

(5) The 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: cf Wijker v Wijker 1993 (4) SA 720 (A) at at 727E-728B." (This approach was confirmed in GK[7].)

3.3 Following this approach, in instances where section 51[8] is applicable during the sentencing procedure it will be the "*starting-point*" from where a court has to decide whether it will deviate or not, as it is entitled to do so in terms of section 53(1). [9] It is inferred from this approach that a court is exercising a value judgment when assessing whether

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[7] Par 5 c-d
[8] Point 3 *Supra*
[9] Point 3 *Supra*

substantial and compelling circumstances exist which can favour the accused. Together with the assessment it follows that the court has regard to the aggravating circumstances.

3.4 The court also found that a court of appeal has the power to interfere with a judgment given by a lower court and can substitute the judgement of the lower court with a judgment it deems more appropriate in the circumstances.

S v GK[10]

4. The approach followed in the GK matter is as follows:

"A determination that there are or are not substantial and compelling circumstances is not itself a matter of sentencing discretion.

The question whether such circumstances are present or absent involves a value judgment, but unless there are clear indications in the Act that this value judgment has been entrusted solely to the discretion of the trial court, an appellate court may form its own view as to whether such circumstances are or are not present. The fact that a judicial

[10] 2013 (2) SACR 505 WCC

power involves a value judgment does not in itself mean that it is a discretionary power in the sense that an appellate court's power to interfere is circumscribed (see Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd 1992 (4) SA 791 (A) at 800C – G)."[11]

5. It is the respondent's respectful conclusion that in Homareda the court was of opinion that the sentencing court's discretion lies in the decision whether there are substantial or compelling circumstances whilst the court in GK was of opinion that it is not in itself a sentencing discretion. To this extent there is uncertainty created in the approach to be followed, which provides this Honourable Court the opportunity to intervene and create legal certainty.

APPLICATION ON THE FACTS

6. Bam J, as he was then, was clearly aware that the "*starting-point*" was Act 105 of 1997[12], and considered various factors before coming to the

[11] 2013 (2) SACR 505 (WCC) -Page 507 paragraph G - I
[12] Record : Volume 2 : Page 175 paragraph 16 -

finding that there are no substantial and compelling circumstances present.

7. The court *a quo* during sentencing, considered the personal circumstances of the applicant, especially his age and the fact that he was a first offender.

8. The court *a quo* also remarked on the factor of remorse on the side of the applicant. The applicant did not show any remorse. The court *a quo* expressed clearly that the applicant's lack of remorse would not be held against him.[13]

9. The court *a quo* correctly considered the seriousness of the crimes committed. The crime (murder of a SAPS member) is viewed to be of such a serious nature that the Legislature specifically made provision for this sort of crime in section 51[14].

10. From this "*starting-point*", being life imprisonment, the court exercised its sentencing discretion to consider the presence of substantial and

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[13] Record : Volume 2 : Page 177

[14] Act 105 o 1997.

compelling circumstances. In doing so, the court *a quo* exercised a value judgment by considering the specific circumstances of the case and found that the personal circumstances of the applicant, which was raised as substantial and compelling circumstances, was outweighed by the aggravating circumstances surrounding the commission of the crimes.

CONCLUSSION

11. Should the court find that the court *a aquo* erred in its approach to the imposition of the minimum sentence, the court of appeal is in a position to make its own value judgement of the circumstances and whether substantial or compelling circumstances are present.

12. In doing so, it is the respondent's respectful submission that the standard that should be applied should an appellate court be of a different view be the test of gross disproportionality as per ***S v Dodo***[15]

[15] 2001 1 SACR 594 (CC).

SIGNED at PRETORIA on THIS the 2nd DAY of FEBRUARY 2022.

A ROOS

ADVOCATE FOR RESPONDENT

ASSISTED BY: M JANSEN VAN VUUREN

Alicia Roos (A)

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