**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case no: 717/2019

In the matter between:

**MMEREKI WELCOME MATHEKGA** **FIRST APPELLANT**

**JOHANNES THULANI MNGOMEZULU** **SECOND APPELLANT**

and

**THE STATE** **RESPONDENT**

**Neutral citation:** *Mathekga And Another v S* (Case no 717/2019) [2020] ZASCA 77 (30 June 2020)

**Coram:** CACHALIA, MOCUMIE, MAKGOKA, MOKGOHLOA AND DLODLO JJA

**Heard**: This appeal was disposed of without an oral hearing in terms of s19 (a) of the Superior Courts Act 10 of 2013

**Delivered**: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be delivered at 09h45 on 30 June 2020.

**Summary:** Criminal law and procedure – murder – intent to kill – dolus directus – whether present – onus to prove the protection of s 49(2) of the Criminal Procedure Act 51 of 1977 (the CPA) – whether appellants' objectively and/or subjectively believed their actions to be justified by s

49(2) of the CPA – Sentence – whether appellants ought to have known that the deceased was a police officer, for sentencing to be brought within the purview of s 51(1) of the Criminal Law Amendment Act 105 of 1997 – whether 15 years' imprisonment appropriate.

## ORDER

**On appeal from:** Gauteng Division of the High Court, Johannesburg (Smith AJ, sitting as court of first instance):

1 The appeal on the conviction on murder in respect of both appellants is dismissed.

2 The appeal on sentence in respect of each appellant succeeds to the extent indicated hereunder.

3 The order of the high court is set aside and substituted with the following:

'In respect of murder, each accused is sentenced to thirteen (13) years' imprisonment.'

## JUDGMENT

**Mocumie JA (Cachalia, Mokgohloa and Dlodlo concurring):**

[1] This appeal concerns two police officers, the appellants, who, armed with an R5 assault rifle and Z88 9 mm pistol, respectively, opened fire on two other police officers clad in civilian clothing. The two officers clad in civilian clothing had been pursuing a suspect on foot for having shot their colleague. One of the civilian clad police officers, Constable Tshomela, was fatally wounded and the other, Constable Khumalo, was seriously injured. A bystander was also injured from a gunshot. Three minibus taxis and two motor vehicles, which were parked at a taxi rank where the incident

occurred, were badly damaged by bullets. Twenty-nine spent cartridges were found on the scene in the aftermath of the shooting.

[2] The first and second appellants, Constables Mmereki Welcome Mathekga and Johannes Thulani Mngomezulu respectively, appeared in the Gauteng Division of the High Court, Johannesburg (the trial court). They were convicted of murder, two counts of attempted murder and malicious damage to property. They were each sentenced to 15 years' imprisonment on the murder charge and on the attempted murder of one of the bystanders to five years. In respect of the attempted murder charge relating to Constable Sidwell Khumalo, the first appellant was sentenced to seven years' imprisonment. All the sentences, were ordered to run concurrently with the sentence imposed on count one. In effect both appellants were sentenced to 15 years' imprisonment. The appeal is with the leave of the trial court.

[3] It is common cause that on 14 January 2013, at around 13h45, the appellants, who were based at Jeppe police station at the time, as well as other police officers in the area of Hillbrow, Johannesburg, received a back-up-call from Constable Daniel Ndima, reporting that he had been shot while on duty. The suspect had apparently fled the scene and was being pursued on foot by two of his colleagues, Constable Khumalo and Constable Tshomela. In response to the back-up-call, the appellants drove to Claim Street next to a taxi rank, in the city centre. As they approached the taxi rank, they saw two men holding firearms in their hands walking at a rapid pace. These two men disappeared behind a line of taxis. The appellants started shooting in their direction. The bullets went through the windows of the minibus taxis and the motor vehicles parked alongside the pavement.

[4] From the moment the shooting commencement until it had stopped, everyone, including the two police officers and taxi commuters, had attempted to hide to avoid being shot. Some fled into the taxis and others out of them. One of the street vendors hid underneath a mini bus taxi. The first appellant used an R5 assault rifle and the second appellant a Z88 9mm pistol.[1] By the time the shooting had stopped, Constable Tshomela had been fatally wounded. He had sustained gun wounds to the head, the neck, the chest and the back, whilst Constable Khumalo sustained wounds to his leg and both hands. The first appellant found Constable Khumalo inside a nearby shop into which he had fled for cover. It was only then that he had realised that Constable Khumalo was a police officer after he had identified himself.

[5] With ample justification, the trial court found that: (a) the two appellants did not attempt to arrest the suspect; (b) they had no reasonable suspicion to think that Constable Khumalo and the deceased had committed any offence relating to the shooting of Constable Ndima; (c) it could not have been clear to Constable Khumalo and the deceased that there was an attempt to arrest them or has been made to arrest them; (d) there was no attempt to resist or to flee by the two; (e) there was no threat of serious violence to the 'arrestor or any other person' and (f) that they had not been trying to overcome any resistance from the two (Constable Khumalo and the deceased). It also found that, objectively viewed, the two appellants were not protected by s 49(2) of the Criminal Procedure Act 51 of 1977 (the CPA) and therefore, their acts were unlawful.

[1] An expert, Cees Clover, Equity International at the Marikana Commission of Inquiry (February 2013 to October 2014) stated that a shot fired from an R5 assault rifle at close range at centre body mass, abdomen or legs produces horrific injuries – death is virtually inevitable.

[6] Lastly, on whether the appellants subjectively believed that they were justified to act as they did and have the protection afforded by s 49(2), the trial court found that both appellants were experienced police officers. They had been trained extensively as established by their testimony. It was reiterated that they knew exactly what the requirements of s 49(2) were as they, from time to time during their testimony, used the words and phraseology of s 49(2), such as 'imminent danger' and 'we thought that we were going to be attacked'. On the strength of *S v De Blom*,[2] the trial court held that a person who works in a particular sphere of activity, ought to know what the law relating to that activity is, that they could not have subjectively believed at all or knew that their actions were covered by s 49(2). It is these factual findings that the appellants are attacking on the basis that another court may find differently.

[7] Three issues arise for determination:

(i) Whether the appellants objectively and/or subjectively believed that their actions were justified by s 49 of the CPA as amended.

(ii) Whether the appellants were aware that the deceased was a police officer in order for the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) to apply on sentencing, and

(iii) Whether an effective sentence of fifteen years' imprisonment imposed on the appellants was appropriate in the circumstances**.**

[8] Section 49(2) (Use of force in effecting arrest) of the CPA provides:

'If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, *when it is clear that an attempt to arrest him or her is being*

[2] *S v De Blom* 1975 (3) SA 513 (A).

*made*, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, *use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing*, but, in addition to the requirement that *the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if –*

*(a) the suspect poses a threat of serious violence to the arrestor or any other person; or*
*(b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.*' [3] (Emphasis added.)

[9] Dealing with the issue of the use of force in effecting arrest, referring to the case of this Court, in *Govender v Minister of Safety and Security*,[4] the Constitutional Court in *Ex parte: Minister of Safety and Security: In re S v Walters* [5] citing the judgment of the United States Supreme Court in *Tennessee v Garner*[6] – in the context of the history of police violence and brutality from which South Africa emerged – stated '[o]ur Constitution demands respect for the life, dignity and physical integrity of every individual. Ordinarily this respect outweighs the disadvantage to the administration of justice in allowing a criminal to escape'. Section 49 was thereafter amended by aligning the words of the proviso, ie the criteria as to when deadly force may be used in order to effect arrest of a suspect, with the criteria tabulated in *Walters*.[7] These guidelines were also adopted by the

[3] Section 49 was substituted by s 7 of the Judicial Matters Second Amendment Act 122 of 1998 and by s 1 of the Criminal Procedure Amendment Act 9 of 2012.
[4] *Govender v Minister of Safety and Security* 2001(2) SACR 197 (SCA).
[5] *Ex Parte: Minister of Safety and Security and Others: In re S v Walters* 2002 (2) SACR 105 (CC) with reference to *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).
[6] *Tennessee v Garner*, 471 US 1 (1985).
[7] The nine guiding principles are: (a) The purpose of arrest is to bring before the court for trial persons suspected of having committed offences. (b) Arrest is not the only means of achieving this purpose, nor

South African Police Service under s 13(3)(*b*) of the South African Police Service Act 68 of 1995.

[10] The Constitutional Court stated in *Walters* para 47:

'The observation in *Olmstead v United States* referred to by Langa J in the passage quoted above from his judgment in *Makwanyane* also needs to be repeated and underscored:

"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." We have a history of violence – personal, political and institutional. Our country is still disfigured by violence, not only in the dramatic form of murder, rape and robbery but more mundanely in our homes and on our roads. This is inconsistent with the ideals proclaimed by the Constitution. The state is called upon to set an example of measured, rational, reasonable and proportionate responses to antisocial conduct and should never be seen to condone, let alone to promote, excessive violence against transgressors. Its role in our violent society is rather to demonstrate that we are serious about the human rights the Constitution guarantees for everyone, even suspected criminals. An enactment that authorises police officers in the performance of their public duties to use force where it may not be necessary or reasonably proportionate is therefore both socially undesirable and constitutionally impermissible.'[8]

---

always the best. (c) Arrest may never be used to punish a suspect. (d) Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest. (e) Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used. (f) In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence the suspect is suspected of having committed, the force being proportional in all these circumstances. (g) Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only. (h) Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrestor or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later. (i) These limitations in no way detract from the rights of an arrestor attempting to carry out an arrest to kill a suspect in self-defense or in defence of any other person. (see also Burring and Reddi, 'Section 49, lethal force and lessons from the De Menezes shooting in the United Kingdom' 2013 (46) De Jure 928 at 943 citing the work of Bruce 'Killing and the Constitution – Arrest and the use of lethal force' (2003) *SAJHR* 430 at 442).

[8] Footnote 5 above.

[11] The trial court was satisfied that the State had succeeded in proving the case against the appellants beyond a reasonable doubt. With regard to the murder count, the trial court found that the appellants had the direct intention to kill the deceased.[9] The appellants maintained that they did not have such intention. They asserted that their conduct was only negligent because they had acted unreasonably. Thus at worst, on count one, they were guilty of culpable homicide not murder.

[12] The appellants' reliance on s 49(2) must be considered against the following facts. Firstly, in their defence, the appellants stated that they had responded to a backup call from Constable Ndima that he had been shot. They immediately proceeded in a police marked motor vehicle to a street in the city centre near a taxi rank. There they saw two men briskly walking with firearms in their hands amongst commuters and street hawkers on the side of the pavement. They believed that the men were the suspects who had shot Constable Ndima. They identified themselves as police officers and ordered them to stop and drop their weapons. But they ignored them and continued walking. The first appellant fired a warning shot prompting the two men to take cover behind the minibus taxis.

[13] Second, they alleged that the intention to fire the warning shot was to alert the two men to their presence and that they should come out of their cover and surrender themselves so that they could be arrested. They did not fire intentionally at any person. As the trial Judge correctly found, if there was any such warning given by either of the appellants, the probabilities

[9] Commonly referred to as intent in the form of *dolus directus.* Dolus directus, also called actual intention, is present, when a person directs his or her will to bringing about the prohibited act or consequence and deliberately accomplishes what he or she actually intended and desired to accomplish. See Snyman *Criminal Law* 6 ed (2015). See also *S v Pistorius* [2015] ZASCA 204; 2016 (2) SA 317 (SCA).

show that the two would have noticed them as they were in full police uniform. Or at the very least Constable Khumalo or the deceased would have reacted, because they were expecting other police officers to arrive after the back-up call was made. The trial Judge also found, which I agree with, that: (a) there was no evidence to support the version of the appellants; (b) their evidence created doubt that a warning was given; (c) on the evidence supported by independent witnesses – the civilians at the taxi rank – who were close to them when they started to shoot, the appellants had not issued any warning to their colleagues before they opened fire on them. Furthermore, the appellants were unable to explain why they fired twenty-nine bullets directly at the two men when they had posed no threat. Their suggestion that the two men were seen carrying firearms was of no consequence because the evidence established that neither of them had had their firearms in their hands at the crucial moment when they were shot at. Their firearms were in their holsters.

[14] It is trite that a court of appeal is bound by the factual findings of the trial court except where these findings are wrong or not borne out by the record. This is especially when the findings are dependent on the credibility of the witnesses who testified.[10] The trial court cannot be faulted for having found that the force the appellants used was not reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the purported suspects from fleeing. That excessive force was used is evident from the fact that Constable Khumalo too was shot on the leg and

[10] See *Liesching and others v S* [2018] ZACC 25; 2019 (1) SACR 178 (CC) para 94–where the Constitutional Court held that '[t]his Court held in *Makate* that appeal courts are generally reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial' (Footnotes omitted.). See also *Modiga v The State* [2015] ZASCA 94; [2015] 4 All SA 13 (SCA) para 23.

both hands with an R5 assault rifle even as he tried to flee from the scene, visibly, without a firearm in his hands. The deceased was shot directly multiple times, which shots hit him in the head, neck, chest and back, fired by both the appellants with an R5 assault rifle and a Z88 9mm pistol which, as testified to by experts, are both lethal weapons.[11] This on its own, supported by the expert medical evidence and ballistic reports, led the trial court to conclude that, in respect of the murder, when the appellants shot the deceased, the deceased was clearly visible to both of them and thus they intended to kill him.

[15] Taking all the evidence into account, it is clear that the two appellants, who were trained police officers, armed with lethal weapons, made no attempt to arrest the two police officers they thought were suspects. This is evidenced by the testimony of all witnesses, corroborated to a certain degree by the evidence of the appellants that they opened fire on the two immediately upon their arrival on the scene, without any interruption or pause.[12] The first appellant did not even wait for the second appellant to properly park the police vehicle they were travelling in. He emerged from the vehicle with an R5 assault rifle and started to shoot continually, joined on beat and without fail by the second appellant, with a Z88 9mm pistol. They came out of the police vehicle guns blazing with the clear intent to kill the persons that had taken refuge behind the minibus taxis. Regardless of who was behind the minibus taxis, ie regardless of the identity of those persons – with little or no regard to the danger they were putting the civilians in and their behavior was not indicative of people who feared

[11] Captain Sereo, supported by the evidence of the first appellant described the R5 assault rifle as a high caliber firearm.

[12] The witnesses said this happened immediately upon the arrival of the two appellants. The two said, they shouted first and simultaneously started to shoot when they received no response.

retaliation from criminals. Their conduct subsequent to getting the report about the shooting of Constable Ndima was beyond doubt unreasonable. Had they made the basic yet critical enquiry before they proceeded to the scene, they would have established that they were in pursuit of one suspect, not two, as described by Constable Ndima, who had seen the suspect when he was shot. Constable Ndima would have also told them, as he had told other colleagues who came to enquire from him, that two of his colleagues were on foot pursuing the suspect. This would have alerted them to the fact that there were two plain clothed police officers in pursuit of the suspect.

[16] In sum, there was no justification for the appellants to have used deadly force because: (a) the apparent suspects did not pose any threat to the appellants or to any other person; (b) they were not suspected, on reasonable grounds, of having committed a crime involving the infliction or threatened infliction of serious bodily harm; and (c) It has not been shown by the appellants, on whom the *onus* rested, that although the identity of the suspect that had shot Constable Ndima was unknown, it could not have been established through a basic enquiry , before resorting to the use of deadly force.

[17] On a conspectus of all the evidence, I have no doubt that objectively and subjectively the appellants acted outside the scope of s 49(2) of the CPA. I therefore find that there is no merit in the contention that they were justified in their conduct. There is consequently, no basis to interfere with the findings of the trial court in this regard. The appeal on the convictions of murder and attempted murder cannot succeed. It remains to deal with the appellants' submission that, at worst, they should have been convicted of culpable homicide.

[18] There is no merit in this submission. Once the trial court concluded, correctly so, that they had fired directly at their colleagues with intent to kill and that their actions fell outside the ambit of s 49 of the CPA, there was no room for a finding that they were merely negligent.

[19] I turn next to the question of sentence. It is trite that a court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, assess the appropriateness of the sentence as if it were the trial court and then alter the sentence arrived at by that court, simply because it disagrees with it.[13] To do so would be to usurp the sentencing discretion of the trial court. But where material misdirection has been demonstrated, an appellate court is not only entitled, but is also duty-bound, to consider the question of sentence afresh to avoid an injustice.[14]

[20] The appellants were charged with murder read with the provisions of s 51(1) of the CLAA. For s 51(1) of the CLAA to be applicable, the State must prove that the offence for which the appellants have been convicted, falls within Part I of Schedule 2. Section 51, titled 'Minimum sentences for certain serious offences', provides that:

'(1) Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall, if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall–

(a) if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person in the case of–

[13] See *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41.
[14] See *S v Phillips* [2016] ZASCA 187;2017(1) SACR 373 (SCA) para 5.

(i) a first offender, to imprisonment for a period not less than 15 years;'

. . .

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection.

(3)*(a)* If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.'

[21] This Court in *S v De Beer*[15] stated:

'It is a truism that the Criminal Law Amendment Act 105 of 1997 introduced far-reaching changes to our sentencing regime. As a reaction to the escalating levels of serious crime, the Legislature introduced mandatory sentences for certain specified offences. There is some measure of uncertainty, regarding the correct approach as to the proper application of minimum sentences prescribed by the CLAA. Some courts have held that the minimum prescribed sentence must be applied as a matter of course as soon as an accused is convicted of an offence falling within the various categories of the CLAA, unless the circumstances of the appellant are shown to be exceptional. This approach is wrong.

The correct approach was adumbrated as follows in *S v Vilakazi* 2009 (1) SACR 552 (SCA) at 566A-D:

"The court was required to apply its mind to the question of whether the sentence was proportional to the offence...."

The court proceeded at 559e-562d to hold that:

"It was accordingly incumbent upon a court to assess whether the prescribed sentence was indeed proportionate to a particular offence. If any circumstances were present that would constitute weighty justification for the imposition of a lesser sentence. Thus, a prescribed sentence could not be assumed a priori to be either proportionate to the

[15] *S v De Beer* [2017] ZASCA 183; 2018 (1) SACR 229 (SCA).

offence, or, indeed, constitutionally permissible. Proportionality was to be determined on the circumstances of a particular case."

[22] It is clear in the judgment of the trial court that it convicted and sentenced the appellants on the basis of s 51(1) read with Part I of Schedule 2 where the victim was a law enforcement officer performing his or her functions. The provision requires that the law enforcement officer must be performing his or her functions as such. Such actions will alert the offender to the fact that the person is a law enforcement officer.[16] Where the offender was not aware that the person was a law enforcement officer, the offender cannot reasonably be expected to know that the victim was a law enforcement officer, the provisions of s 51(1) do not apply. On the facts, this murder was one in circumstances other than those referred to Part 1. It automatically, fell within the ambit of s 51(2) read with Part II of Schedule 2, in terms whereof the prescribed minimum sentence is 15 years' imprisonment.

[23] The trial court, found, erroneously so, that the murder fell within the ambit of s 51(1). It went further and found that compelling and substantial circumstances contemplated in s 51(3)(*a*) existed which justified a deviation from the prescribed minimum sentence of life imprisonment, but the lesser sentence of 15 years' imprisonment. On that basis alone, it misdirected itself materially. This obliges this Court to reconsider sentence afresh.[17]

[24] Having said that, it is proper to refer to the approach this Court has adopted in the application of s 51 as gleaned from a plethora of judgments of

[16] SS Terblanche, A guide to Sentencing in South Africa,3 ed (2016) at 61.
[17] *S v Malgas* 2001(1) SACR 469 (SCA) para 33

this Court.[18] But nonetheless requires repetition to serve as a basis for the decision to be reached in this judgment on sentence. Authors in this area of the law state that when dealing with the minimum sentence legislation two important factors must be borne in mind. Firstly, the CLAA creates a minimum sentence with a lower limit, 'leaving the court with the discretion to impose more'.[19]

The seriousness and aggravating nature of the offence can lead to the imposition of a higher sentence than the prescribed minimum sentence; because the 15 years is a minimum that a court may impose and not the maximum as ordained in the proviso to s (2) that 'the maximum sentence that a regional court or high court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection.'[20] In *Khoza,*[21] the trial court imposed 21 years' imprisonment for robbery with aggravating circumstances where the prescribed minimum sentence was 15 years. The trial court found that in view of the seriousness and aggravating nature of the offences, a sentence of 15 years would be too lenient and accordingly imposed a higher sentence. This Court confirmed the sentences imposed by the trial court and dismissed the appeal. Secondly, the most important factor to bear in mind is that, substantial and compelling circumstances do not exist in a vacuum.[22] The minimum sentence is the bench mark, the starting point. This means, the sentencing court must consider the prescribed minimum sentence as the

---

[18] See *S v Khoza and Others* 2010 (2) SACR 207 (SCA); *S v Mathebula and Another* 2012 (1) SACR 374 (SCA).
[19] *Khoza,* ibid, para 48.
[20] *Hiemstra's Criminal Procedure* at 28-21 (Service Issue 12) with reference to *S v Khoza and others* 2010 (2) SACR 207 (SCA) para 88-89.
[21] Ibid.
[22] *In vacuo,* in Latin.

bench mark – ie the usual sentence it should impose for that offence, where there exist no reasons for it to impose another sentence.

[25] Coming back to the appellants, the unfortunate part is that despite the loss of a human life and many years of reflection and introspection, the appellants still took no responsibility for what they had done. They said they were sorry for having killed their colleague. Not another human being which is remarkably different from genuine remorse. There is nothing on record indicating that the two offered their condolences or even reached out to the families of the deceased and Constable Khumalo in any way. Such action would have given room for restorative justice to be considered by the trial court and this Court. In fact, it is revealed in the Victim Impact Statement compiled in 2016, three years after the incident, that Constable Khumalo was still emotionally wounded. According to that report, he still remembers how the deceased looked when he fell down after being gunned down by his own colleagues. His own physical injuries were not healed. A bullet that was lodged in his arm still had to be removed. He stated that, 'he had told both suspects to tell the truth and they failed to do so. . . '.

[26] Furthermore, in the Victim Impact Statement, the deceased's elder sister stated that the deceased was the sole bread winner of a family of seven siblings with an unemployed elderly mother and no father, and thus his death has had a huge financial impact on their lives. She confirmed that the appellants did not approach her family to apologise for what they had done. They did not contact them in any way. On the question of remorse, the trial court correctly observed that 'you both expressed your remorse that you are sorry that you killed a colleague but maintained that your killing of the deceased was excusable and therefore not unlawful'.

[27] In its reconsideration of sentence, this Court is not bound by the conclusion of the trial court on its findings on what qualifies as compelling and substantial circumstances. However, in my view, the following do qualify as compelling and substantial circumstances. Both appellants are first offenders. They are relatively young and were gainfully employed in the police service with no track record of ill-discipline or misconduct before this fateful day. They spent ten months incarcerated prior to being released on bail. They have families and young children of school going ages who depend on them. The circumstances under which the murder was committed are unusual as depicted in the trial court judgment; although committed with direct intention as this Court found earlier in this judgment. However, particularly because of the unusual circumstances of the case; a measure of mercy, must be filtered into the sentence considered appropriate. All these cumulatively, would justify a deviation from the prescribed sentence of 15 years.

[28] Having said that, however, to arrive at a balanced sentence which reflects the *triad* enunciated in *S v Zinn*:[23] 'the crime, the offender and the interests of society', the interests of the victim(s) as part of the broader society should also come into play and be accounted for. In *R v Karg*,[24] five decades ago this Court stated:

'It is not wrong that the natural indignation of interested persons and the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the

[23] *S v Zinn* 1969(1) SA 239 (A).
[24] *R v Karg* 1961 (1) SA 231 (A) at 236A-C.

administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.'

This Court recognised this approach in *Matyityi* where it stated:[25]

'An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim centered. Internationally the concerns of victims have been recognised and sought to be addressed through a number of declarations the most important of which is the UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power. The Declaration is based on the philosophy that adequate recognition should be given to victims and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the state it is an injury or wrong done to another person. The Service Charter for Victims of Crime in South Africa seeks to accommodate victims more effectively in the criminal justice system.'

[29] In my view, a sentence of 13 years' imprisonment will be proportionate to 'the crime, the criminal and the legitimate needs of society'.[26] It will remind the members of the police service as the Constitutional Court stated in *Walters* that 'the state is called upon to set an example of measured, rational, reasonable and proportionate responses to antisocial conduct and should never be seen to condone, let alone to promote, excessive violence against transgressors.' A non-custodial sentence in the form of a wholly suspended sentence or correctional supervision in terms of s 276(1)*(i)* of the CPA as proposed by the appellants would be inappropriate in the circumstances. One of the aggravating circumstances which stood out, was the fact that they did not show any remorse for having

[25] *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) para 16.
[26] *S v Malgas* 2001 (1) SACR 469 (SCA).

killed another human being. That lack of appreciation of having killed another human being, leaves a lasting and unsettling impression that they cannot rehabilitate easily, if given a non-custodial sentence. However, on the above reasons in the preceding paras the appeal on sentence ought to succeed.

[30] This judgment must be brought to the attention of those responsible for training the members of the police service so that they begin to train members of the police service appropriately – to reinforce the orders under the Police Service Act 68 of 1995 on the use of force in arresting a suspect(s).

[31] In the result, the following order is made:

1 The appeal on the conviction on murder in respect of both appellants is dismissed.
2 The appeal on sentence in respect of each appellant succeeds to the extent indicated hereunder.
3 The order of the high court is set aside and substituted with the following:
'In respect of murder, each accused is sentenced to thirteen (13) years' imprisonment'

_____

B C MOCUMIE

JUDGE OF APPEAL

**Makgoka JA (dissenting)**

[32] I have read the main judgment of my colleague, Mocumie JA. I agree with the conclusion that the appeal against the conviction should fail. However, I disagree with the sentence proposed in the main judgment. The court a quo erroneously imposed a sentence of 15 years' imprisonment because of a misdirection as to the applicability of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act) which aspect I shall consider shortly. The main judgment reduces the appellants' imprisonment terms from 15 to 13 years on the murder count. After much anxious reflection, and given the very unfortunate and unusual circumstances of the case, I conclude that long term imprisonment is not appropriate. Instead, correctional supervision, as recommended by the probation officers in respect of both appellants, should be given serious consideration. Below I set out the reasons for my conclusion.

[33] The facts which led to the conviction of the appellants are fully set out by my colleague, and need no regurgitation here. Briefly, a police officer was shot in downtown Johannesburg on 14 January 2013. The appellants responded to a call to search for the suspect who had shot their colleague. Upon arrival at the vicinity of where the shooting took place, they observed two men in civilian clothes holding firearms, walking briskly. Unbeknown to the appellants, those were also police officers, who too, were on the trail of the suspect. The appellants mistook them for the suspects, and fired several shots in their direction. Constable Tshomela was fatally wounded and his colleague, Constable Nxumalo, and a civilian, were injured. Vehicles in the vicinity were damaged. Only thereafter, it dawned on the appellants that the deceased and Constable Nxumalo were

their colleagues. On the evidence before it, the trial court correctly concluded that the appellants had no intention of arresting the suspect, but to kill him in revenge.

[34] As explained already, the court a quo's sentence is based on a misdirection, which is. The appellants were charged, among others, with murder subject to s 51(1) of the Act, which, read with Part I of Schedule 2 of the Act, requires the imposition of a minimum sentence of life imprisonment because the deceased was a law enforcement officer performing his functions as such. The court a quo considered the applicable sentence to be life imprisonment. However, it imposed a lesser sentence of 15 years' imprisonment, based on its finding, in terms of s 51(3)*(a)* of the Act, that there existed substantial and compelling circumstances. That sentence was ordered to run concurrently with all other sentences.

[35] It is common cause in the present case that the appellants did not know that the deceased was a police officer. They mistook him for a criminal. The court a quo misdirected itself in this regard. It said:

'[T]he Legislature has not distinguished, as it had done with murder falling under Part 2 of Schedule 2 of the Act, between the fact if the murder of a law officer is committed in a situation where the perpetrator knew that the person he is killing is a police officer or the situation where a perpetrator did not know or ought to have known that it is a police officer that he or she is killing.' (Emphasis added.)

[36] What exactly the court a quo intended to convey by this is unclear. Part II of Schedule 2 of the Act makes no reference to what the learned Judge says it does. The part lists lesser crimes than those mentioned in Part

I of the Schedule, eg murder simpliciter, robbery, drug trafficking, firearms smuggling, finance and exchange control crimes, terrorism and mercenary activities. There is no mention at all of killing of a police officer in Part II. That crime is mentioned only in Part I of Schedule 2 of the Act.

[37] However, somewhere in the judgment on sentence, the court a quo suggests that irrespective of the fact that the appellants did not know the deceased was a police officer, they nevertheless faced life imprisonment in terms of s 51(1). This is clearly wrong, and a material misdirection. The mischief s 51(1) read with part I(*b*)(i) of Schedule 2 aims to curb is the intentional and wanton killing of law enforcement officers, in order to impede them in their duties. It is not applicable where the perpetrator has no such knowledge, or could reasonably not be expected to have such knowledge. This is very clear by the use of the words 'a law enforcement officer performing his or her functions as such', in relation to the murder victim.

[38] It is therefore clear that the court a quo misconceived the import s 51(1) read with Part I*(b)*(i) of Schedule 2. That led it astray in considering sentence, starting on a wrong footing. The correct starting point ought to have been that, because the appellants did not know that the deceased was a police officer, Part II of Schedule 2 was applicable. The prescribed minimum sentence is 15 years' imprisonment, in respect of first offenders (which the appellants are) unless the court finds substantial and compelling circumstances in terms of s 51(3)*(a)* are present to justify a lesser sentence (which the court a quo found). It follows that had the court a quo not misdirected itself as to the applicability of s 51(2), it ought to

have imposed a sentence of less than 15 years' imprisonment.

[39] So viewed, the court a quo's misdirection was undoubtedly material. It had a direct and crucial bearing on the sentence it imposed. It is the type envisaged in *S v Pillay* 1977 (4) SA 531 (A) at 535E-F as being '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'.

[40] This court is therefore at large to consider sentence afresh. The lodestar in considering an appropriate sentence remains the enduring triad – the crime, the offender and the interests of society, as enunciated in *S v Zinn* 1969 (2) SA 537 (A); [1969] 3 All SA 57 (A) at 540G. Closely allied to these factors, is the impact of the crime on its victims. All these have to be considered bearing in mind the main purposes of punishment, which were reiterated in *S v Rabie* 1975 (4) SA 855 (A); [1975] 4 All SA 723 (A) 862A-B as being deterrence, prevention, reformation and retribution.

[41] The appellants' personal circumstances, as gleaned from the probation officers' reports, compiled in respect of both, are briefly the following. The first appellant was 32 years old at the time of sentencing. He had a difficult childhood. As a result of poverty, he and his brother grew up in a place of safety as his unemployed mother could not take care of them. His father died when he was a child. However, he seems to have risen above the adversity, and his difficult childhood does not seem to have had any role in the commission of the offence. He was not married, but was a father of two young children, with different mothers. He joined SAPS as a reservist in 2007, and permanently in 2009. As a result of the

incident, he no longer performed duties which required him to constantly carry a firearm. The second appellant was 37 years old at the time of sentencing. He too, grew up without a father figure. He had three minor children with different mothers, one of whom is his wife, who is employed. He completed matric in 2005 and joined SAPS the same year. He was promoted to the rank of sergeant in 2015, after the incident.

[42] The crimes which the appellants have been convicted of, are undoubtedly serious. A valuable member of society – a law enforcement officer – was killed on duty. Although the deceased was not married and had no children, his family, especially his elderly mother, has been devastated by the loss. Constable Nxumalo was badly injured and disfigured. There was no formal victim impact reports. However, affidavits deposed to by the deceased's sister, Ms Zandile Tshomela, and by Constable Khumalo, were handed up by consent.

[43] The following appear from the affidavit of Ms Tshomela. The deceased was 32 years old. He joined SAPS in 2008. He had seven siblings. Their father passed on in 2003, and their mother, who was 66 years old, was finding it difficult to come to terms with the deceased's death. The deceased was not married, and did not have any children. However, he supported the family and his death had a huge impact on them.

[44] The family was aggrieved with the appellants pleading not guilty, and 'not coming clean' about the shooting of the deceased. Further, the appellants never reached out to the family to apologise or contribute towards funeral costs. The family members were divided as to what type

of sentence should be imposed on the appellants. Their mother wished for a long prison sentence, while the siblings wished for 'some period of imprisonment'. She, Ms Tshomela, on the other hand, after being appraised of the different sentencing options by the prosecutor, felt that correctional supervision was the appropriate sentence.

[45] Constable Khumalo, the injured police officer, too, was very aggrieved about the appellants' failure to 'tell the truth' in court about the shooting. He had suffered trauma as a result of the incident, which resulted in him being reluctant to participate in crime prevention operations. He wished for a period of 15 years' imprisonment to be imposed on both appellants.

[46] With regard to the interests of society, it must be considered in the appellants' favour that they were useful, upright and productive members of society, whose overzealousness overcame them at a crucial moment in the execution of their duties. I do not think society's interests would be served by subjecting them to lengthy prison terms, with damaging and lasting consequences. While they need to be punished for their conduct, this should not be to the point of breaking them. Although there must be a certain proportionality between punishment and the crime, that does not imply that the punishment be equal in kind to the harm that the offender has caused, as explained in *S v Mafu* 1992 (2) SACR 494 (A). See also *S v Kruger* [2011] ZASCA 219; 2012 (1) SACR 369 (SCA) where this court cautioned against viewing punishment of a convicted person as revenge. It must also be borne in mind that long term imprisonment would leave the appellants' families without financial support.

[47] What is more, the appellants' moral blameworthiness should not be lost sight of. It bears emphasis that their conduct was not pursuant to any greed, personal gain or criminal motive. Furthermore, it should be borne in mind that the appellants have continued their employment with SAPS. The second appellant was even promoted despite the unfortunate incident. This, in my view, is a clear indication that their superiors had accepted their remorse, and continue to regard them as valuable members of the police service.

[48] It therefore escapes me what purpose would be served by long imprisonment terms. Certainly not rehabilitation. In *S v Khumalo and Others* 1984 (3) SA 327 (A); [1984] 2 All SA 232 (A) at 331F it was observed that rehabilitation is generally not served by prolonged imprisonment. The Constitutional Court in *S v Williams and Others* 1995 (2) SACR 251 (CC); 1995 (7) BCLR 861 (CC) para 65 noted an international gradual shift of emphasis away from the idea of sentencing being predominantly the arena where society wreaks its vengeance on wrongdoers. Sentences have been passed with rehabilitation in mind.

[49] As far as the aims of punishment are concerned, it seems that my colleague, like the trial court, overemphasises the deterrent element of sentence over others. In my view, sufficient weight is not accorded to three most important mitigating factors. First, that the appellants' conduct was not motivated by any personal gain or with a 'criminal mind'. Second, that the appellants are not a danger to society and there is no prospect that they will reoffend. As pointed out by this Court in *S v Ingram* 1995 (1) SACR 1 (A); [1995] 3 All SA 121 (A) at 9a-b, this fact is an important factor in mitigation as it means that individual deterrence does not play a major role

in the case. While general deterrence remains a relevant factor, an accused should not be sacrificed on the altar of deterrence. See *S v Sobandla* 1992 (2) SACR 613 (A) 617F-H. Third, the extra-ordinary and unfortunate circumstances of the case and the fact that the appellants have shown remorse for killing their colleague.

[50] With regard to remorse, our courts link the presence of remorse with the prospect of the rehabilitation of the offender. *S v Ntuli* 1978 (1) SA 523 (A) 528B– C; *S v Keyser* [2012] ZASCA 70; 2012 (2) SACR 437 (SCA) para 29. My colleague considers the fact that the appellants never reached out to the family of the deceased to assist with funeral expenses, nor visited Constable Nxumalo, as an indication of lack of remorse. It does not appear that these were ever raised as discrete issues during the sentencing proceedings, and that the appellants were afforded an opportunity to meaningfully deal with them. As such, one should not, without full facts, conclude that this conduct is indicative of lack of remorse.

[51] The main consideration, in my view, should be whether the appellants need to be removed from society. This is where correctional supervision comes in. In *S v R* 1993 (1) SA 476 (A); [1993] 1 All SA 326 (A) at 488G this Court pointed to the legislature's intention to distinguish between two types of offenders, namely those who had to be isolated from the community by incarceration and those who were deserving of punishment but not required to be removed from the community. Do the appellants need to be removed from the community? I do not think so.

[52] In *Williams* Langa J lauded '[t]he introduction of correctional supervision . . . as a milestone in the process of "humanising" the criminal

justice system'. He remarked further:

'. . . It brought along with it the possibility of several imaginative sentencing measures including, but not limited to, house arrest, monitoring, community service and placement in employment. This assisted in the shift of emphasis from retribution to rehabilitation. This development was recognised and hailed by Kriegler AJA in *S v R* as being the introduction of a new phase in our criminal justice system allowing for the imposition of finely-tuned sentences without resorting to imprisonment with all its known disadvantages for both the prisoner and the broader community.

The development of this process must not be seen as a weakness, as the justice system having 'gone soft'. What it entails is the application of appropriate and effective sentences. An enlightened society will punish offenders, but will do so without sacrificing decency and human dignity.'[27]

[53] Lest it be suggested that because of the seriousness of the murder count correctional supervision is *a priori*, inappropriate, I tabulate below, cases in which this court, and the various divisions of the high court, have considered it suitable for murder. In most of them the death of the victim resulted from abuse, a history of acrimony, assault over a number of years and so-called crimes of passion. I consider the underlying approach apposite.

(a) The appellant in *S v Potgieter* 1994 (1) SACR 61 (A); [1994] 3 All SA 432 (A) was convicted of murder and was sentenced to seven years' imprisonment. It was assumed in her favour that over a period of six years, she was subjected to assaults, humiliation and psychological abuse by the deceased. She was 37 years of age, a first offender and the mother of four children. This court set aside the sentence of the trial court of seven years' imprisonment and remitted the case to the trial court to

[27] *S v Williams and Others* 1995 (2) SACR 251 (CC); 1995 (7) BCLR 861 (CC) paras 67 and 68 (footnotes omitted).

reconsider the sentence afresh after compliance with the provisions of s 276A(1)*(a)* of the Criminal Procedure Act 51 of 1977 as amended (CPA).

(b) In *S v Larsen* 1994 (2) SACR 149 (A); [1994] 4 All SA 380 (A) the appellant was sentenced to five years' imprisonment, half of which was suspended, for shooting and killing her husband. The appellant had been assaulted and abused by the deceased over many years and the marriage was under severe strain in the period leading up to the fatal incident. This court remitted the matter to the trial court for the consideration of the imposition of a sentence of correctional supervision in terms of s 276A(1)*(a)* of the CPA.

(c) In *Ingram* the appellant was convicted of murder and sentenced to eight years' imprisonment. The appellant was frequently abused by her husband, the deceased. They were both intoxicated at the time of the shooting. It was held that for a murder such as this, the imposition of appropriate conditions can render the sentence of correctional supervision suitably severe and the sentence of eight years in prison was set aside on appeal. The matter was remitted to the trial court to reconsider the sentence afresh after compliance with the provisions of s 276A(1)*(a)* of the CPA.

(d) In *S v Aspeling* 1998 (1) SACR 561 (C) the appellant had shot and killed his brother after a long history of acrimony between them. Having regard to the appellant's personal circumstances and other factors, it was held that it was not necessary for him to be removed from the community for any substantial time. It was held that correctional supervision in terms of s 276(1)*(i)* of the CPA was appropriate.

(e) In *S v Romer* [2011] ZASCA 46; 2011 (2) SACR 153 (SCA) the respondent had been convicted on one count of murder and two counts of

attempted murder under a state of diminished responsibility, though not acting as an automaton, at the time of the shootings. He was sentenced to 10 years' imprisonment wholly suspended for five years on the usual conditions. In addition, he was sentenced to three years' correctional supervision. In an appeal by the State against the sentence, it was contended that the sentence imposed on the respondent was disturbingly lenient, given the serious consequences of his conduct. This dismissed the appeal, and held, that the deterrence of the respondent, or others, was not an overriding consideration.

(f) This court found a sentence of 12 years' imprisonment for murder strikingly inappropriate in *Botha v S* [2017] ZASCA 148, given the facts of that case and the mitigating circumstances, which included prolonged abuse of the appellant by the deceased (her husband). This court held that the appellant was not a danger to society. The matter was accordingly remitted to the trial court for reconsideration of sentence in terms of s 276(1)*(h)* of the CPA.

(g) The appellant in *S v Mosikili* 2019 (1) SACR 705 (GP) had been convicted for killing his disrespectful and abusive son and was sentenced to 12 years' imprisonment, five years of which were suspended for a period of five years. The appellant was 58-years old, first offender and gainfully employed and supported his family, including the deceased's son. On appeal, the high court held that the relatively low risk that the appellant would re-offend, combined with his remorse, rendered a sentence of correctional supervision more likely to achieve the goal of rehabilitation than other potential sentencing options. The sentence was accordingly set aside and replaced with a sentence of 36 months' correctional supervision, which included house detention and the performance of free community service.

[54] In *S v Maritz* 1996 (1) SACR 405 (A) and *S v Maleka* 2001 (2) SACR 366 (SCA) this court decided against a sentence of correctional supervision. So did the high court in *S v Zulu* 2004 JDR 0434 (W). Like the present case, *Maritz* involved a police officer in executing his duties. The officer had tied a murder suspect to the front of an armed vehicle and ordered him to run in front of the vehicle. The deceased was pulled under the wheels of the vehicle and was killed. In the trial court the appellant was sentenced to eight years' imprisonment of which two were suspended. This court held that the case did not only stem from negligence but also from an abuse of power by the appellant and that correctional supervision was therefore not a befitting sentence. Despite that, this court interfered and substituted a sentence of four years' imprisonment of which two years were suspended.

[55] In *Maleka* the appellant, a teacher, shot and killed a school principal after the latter had severely assaulted him. He was sentenced to 10 years' imprisonment. On appeal it was held that although many mitigating circumstances were present, the seriousness of the offence made it necessary to send a clear message to the community at large that resort to violence, particularly with firearms, would not be tolerated. It was held that a sentence of correctional supervision would be inappropriate. However, the sentence of ten years' imprisonment was set aside and replaced with a sentence of ten years' imprisonment of which five years were suspended for three years.

[56] In *Zulu* the accused had been a victim of an armed robbery and the police station where he had reported the robbery seemed not to care. He

took the law into his hands, and killed the robbers. He was convicted of premeditated murder. His conduct of having handed himself over to the police was considered indicative of remorse. He was sentenced to 12 years' imprisonment of which four years was suspended for three years on suitable conditions.

[57] What the above cases demonstrate is this. In murder cases where the moral blameworthiness is reduced because of the unusual, unfortunate or extra-ordinary circumstances such as in the present case, the courts have consistently considered correctional supervision as a suitable sentencing option. Where they found it unsuitable, like in *Maritz, Maleka* and *Zulu*, long prison terms were avoided.

[58] In the present case, the main judgement reduces the appellants' prison terms from 15 to 13 years. In an appeal against sentence where it is contended that a sentence imposed by the trial court is either excessive or lenient, interference is justified where there exists a 'striking' or 'startling' or 'disturbing' disparity between the sentence of the trial court and that which the appellate court would have imposed, had it been the trial court. See for example *S v Sadler* 2000 (1) SACR 331 (SCA); [2000] 2 All SA 121 (A) para 8; *S v Cwele and Another* [2012] ZASCA 155; 2013 (1) SACR 478
(SCA); [2012] 4 All SA 497 (SCA) para 33.

[59] It must be assumed that 13, instead of 15, years' imprisonment, is a sentence which my colleague would have imposed had she been the trial court. If that be the case, the appeal against sentence must fail because the disparity between the sentence imposed by the trial court and that which

she would have imposed, is not so substantial that it can be considered 'striking', or 'disturbing' as to justify interference.

[60] This is because when an appeal against sentence is upheld, that success ought to be meaningful and have practical effect. In my respectful view, the reduction of the appellants' imprisonment terms from 15 to 13 years is largely symbolic, and does not reflect the success of their appeal against sentence. It is pretextual and renders the success impotent.

[61] It must be borne in mind that the trial court moved, albeit on a misdirected basis, from life imprisonment to 15 years' imprisonment. That is a massive and meaningful reduction. On this basis, it is not unreasonable to infer that had the trial court moved from the correct basis of 15 years' imprisonment, together with its finding of substantial and compelling circumstances, it most likely would have imposed a sentence in the region of 8 and 10 years' imprisonment. Viewed in this light, the imposition of 13 years' imprisonment by this court can conceivably be regarded in real terms, as an increase, rather than a decrease, in their sentences.

[62] The fact is that the appellants' fair trial rights were infringed at the sentencing stage by being subjected to a wrong sentencing regime. It is the duty of this court to correct that. A symbolic reduction of the appellants' sentences from 15 to 13 years, in my respectful view, does not achieve the purpose of interference. It does not give due regard to the weighty mitigating factors so articulately set out by my colleague in para 27 of the main judgment. Instead, to my mind, the sentence perpetuates, rather than corrects, the injustice committed by the trial court.

[63] I turn now to consider what I deem to be an appropriate sentence. As stated already, both appellants are first offenders. In respect of each, the probation officers recommended a sentence of correctional supervision. However, in respect of the second appellant, a pre-sentencing report by another probation officer and a social worker, direct imprisonment was recommended, and correctional supervision was considered not suitable 'because of the seriousness of the offence'.

[64] However, in all the three reports, the appellants were reported to be responsible citizens, with no history of violence or substance abuse. They had stable homes and sufficient family support systems. They both verbalised remorse for their part in killing their colleague and injuring another, which had caused them much anxiety and regret. They were both found to be suitable candidates for a sentence of correctional supervision.

[65] The trial court summarily rejected correctional supervision as a sentencing option. It said:

'(T)he yardstick . . . that the sentence for murder under these circumstances is life imprisonment and the question is, if the substantial and compelling circumstances [are] of such a nature that the court will then only be permitted to impose a sentence of up to three years under correctional supervision in terms of section 267(1)(h) of the Criminal Procedure Act 51 of 1977. The court is humbly of the opinion that this period of three years also does not reflect the seriousness of the offence and the fact that a life has been lost and the absence of true remorse.'

[66] The above passage demonstrates that the court a quo started on the premise that because the appellants had been convicted of serious offences, that in and of itself, rendered correctional supervision inappropriate. As I have attempted to show, this is a wrong premise. As explained in *S v D*

1995 (1) SACR 259 (A) at 266*c-d*:

‘In its nature a sentence of correctional supervision is not denunciatory. It does not follow, however, that such a sentence is necessarily inappropriate because the case is one which excites the moral indignation of the community. The question to be answered is a wider one: whether the particular offender should, having regard to his personal circumstances, the nature of his crime and the interests of society, be removed from the community.’

[67] This court has on various occasions stressed that correctional supervision should not, without more, be seen as a light sentence, but as a suitably severe sentence for even a serious crime. See for example *S v Ingram* at 9e-f; *S v Flanagan* 1995 (1) SACR 13 (A); [1995] 4 All SA 86 (A); *S v Schutte* 1995 (1) SACR 344 (C) at 349E. In *Potgieter* at 88*d* it was pointed out that the conditions imposed could render the sentence a suitably severe one.

[68] In my view, the trial court failed to consider in any meaningful manner, correctional supervision as a sentencing option, as recommended by the probation officers. The learned Judge did not even engage with the reasoning in those reports and set out why she did not agree with the conclusions reached therein. All she mentioned was that correctional supervision was too lenient a sentence for the crimes of which the appellants had been convicted, and moved quickly to the conclusion that a custodial sentence was the only suitable sentence. At the risk of repetition, this is a wrong approach.

[69] In conclusion, I make the following observation. The psychological impact which the increasingly brazen killing of police officers by criminals, was not investigated as a possible factor in the conduct of the appellants.

One probation officer alluded to it, but did not elaborate further. The trial court made a passing comment about it during sentence. It is unfortunate that the appellants are not wealthy. Had they been, they would have been in a position to afford the services of professional psychologists or psychiatrists to investigate this aspect, compile reports and testify about it.

[70] Many of those who have benefitted from the sentence of correctional supervision were able to persuade the courts towards that sentence aided by these professionals. But the services of such professional are costly, and the appellants, being less privileged, clearly cannot afford them. In *S v Brown* [2014] ZASCA 217; [2015] 1 All SA 452 (SCA); 2015 (1) SACR 211 (SCA) para 121 this court cautioned against creating the impression that there are two streams of justice; one for the rich and one for the poor. One is left to wonder how such evidence would have impacted on sentence in this case.

[71] This is a regrettable and most unfortunate case, which makes sentencing even more difficult. The irony of it all is that the appellants are to serve long prison terms, alongside the very criminals whose activities they had dedicated their lives to fighting. In line with the cases I have referred as

guidelines, and having considered the nature of the crimes, the complimentary personal circumstances of the appellants, the interests of society and the aims of punishment, I am of the view that a sentence of correctional supervision for each of the appellants is a suitable one, as recommended in the probation officers' reports. Were I to impose a prison term, it would be for no more than 8 years' imprisonment, half of which to be suspended.

T M MAKGOKA

JUDGE OF APPEAL

Appearances

| | |
|---|---|
| For First Appellant: | M Mzamane |
| Instructed by: | Johannesburg Justice Centre |
| | Bloemfontein Justice Centre |
| For Second Appellant: | M Mkhatswa |
| Instructed by: | BDK Attorneys, Johannesburg |
| | Symington & De Kok Attorneys, Bloemfontein |
| For Respondent: | R Barnard |
| Instructed by: | Director of Public Prosecutions, Johannesburg |
| | Director of Public Prosecutions, Bloemfontein |